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THE PRISON LITIGATION REFORM ACT'S ENIGMATIC EXHAUSTION REQUIREMENT: WHAT IT MEANS AND WHAT CONGRESS, COURTS AND CORRECTIONAL OFFICIALS CAN LEARN FROM IT

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INTRODUCTION

David Williams was a prisoner confined in the Federal Correctional Institution in Otisville, New York. A diabetic, Williams developed an infection in his foot for which he repeatedly sought medical care. The prison doctor, however, considered Williams a malingerer. Even when Williams's infection had advanced to the point that he was hospitalized, the doctor failed to forward his medical records to the hospital or even send a note relaying that test results indicated Williams had an e. coli infection in his foot. Williams's foot and lower leg then became gangrenous, necessitating the amputation of his leg below the knee.

Maurice Mathie was a pretrial detainee in the Suffolk County Correctional Facility in New York. Roy Fries, a correctional officer at the facility, repeatedly made sexual overtures towards Mathie, over Mathie's objections. One day, Fries grabbed Mathie from behind, handcuffed him to some pipes, pulled down his pants, and anally raped him.

Both factual accounts depict real cases that culminated in lawsuits filed in federal district court.1 In each of the cases, the plaintiffs sought damages to compensate them for the injuries caused by correctional officials' actions or inaction. In the first case, Williams, the diabetic prisoner, was awarded $500,000 in compensatory damages.2 Mathie, the sexual-assault victim in the other case, was awarded a total of $450,000—$250,000 in compensatory damages and $200,000 in punitive damages.3

Since the enactment of the Prison Litigation Reform Act in 1996 (PLRA),4 prisoners, jail inmates, and certain juveniles confined in correctional or detention facilities have been subject to an exhaustion requirement.5 The PLRA requires these incarcerated individuals to

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2 Williams, 747 F. Supp. at 1014.
3 Mathie, 121 F.3d at 818. The district court awarded Mathie $250,000 in compensatory damages and a half a million dollars in punitive damages. Id. at 811. The court of appeals reduced the punitive damages award to $200,000. Id. at 817.
5 The PLRA's exhaustion requirement provides as follows: "No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), 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
exhaust their administrative remedies by pursuing their claims through the facility’s grievance process, before seeking redress in federal court.

But what if the prisoner is, like Williams and Mathie, only seeking damages for allegedly illegal conditions of confinement, and monetary relief cannot be obtained through the grievance process? Must the prisoner still pursue his or her claim through the grievance process?

The courts of appeals are deeply divided on this question. There is a three-way split between the courts. The Fifth, Ninth, and Tenth Circuits have concluded that the exhaustion requirement does not apply in this situation. The Third, Seventh, and Eleventh Circuits have, by contrast, held that the requirement does, at least generally, apply in this context. And the Second and Sixth Circuit Courts of Appeals have adopted an intermediate position, holding that the exhaustion requirement sometimes applies and sometimes does not, depending upon certain aspects of the grievance process. If the correctional officials consider a prisoner’s claim and attempt to resolve, in some way, the problems spawning it, then the prisoner seeking monetary relief exhausted." Id. sec. 803, § 7(a), 110 Stat. at 1321-71 (codified as amended at 42 U.S.C. § 1997e(a) (Supp. III 1998)).

6 E.g., Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000); Whitley v. Hunt, 158 F.3d 882, 886-87 (5th Cir. 1998); Lumsford v. Jumao-As, 155 F.3d 1178, 1179 (9th Cir. 1998); Garrett v. Hawk, 127 F.3d 1263, 1267 (10th Cir. 1997). The Fifth Circuit has now agreed with the recommendation of a Fifth Circuit panel to reconsider en banc a case in which the court begrudgingly followed the holding in Whitley. Wright v. Hollingsworth, 201 F.3d 663, 666 (5th Cir. 2000), reh'g en banc granted, 225 F.3d 777 (5th Cir. 2000).

These courts disagree, however, on the applicability of the exhaustion requirement to a claim seeking both monetary and injunctive relief. In Whitley, the Fifth Circuit concluded that a complaint seeking both kinds of relief is subject to the exhaustion requirement, Whitley, 158 F.3d at 887, a conclusion with which the Ninth Circuit concurs, Christensen v. Stewart, No. 97-15722, 2000 WL 329204, at *1 (9th Cir. Mar. 20, 2000) (table opinion, full text available on Westlaw)). By contrast, the Tenth Circuit has held that the exhaustion requirement applies only to the claim for injunctive relief. Miller v. Menghini, 213 F.3d 1244, 1246 (10th Cir. 2000); Florence v. Booker, No. 98-3153, 1998 WL 694521, at *1 (10th Cir. Oct. 6, 1998) (table opinion, full text available on Westlaw)).

7 E.g., Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), cert. granted, 121 S. Ct. 377 (2000); Nyhuis v. Reno, 204 F.3d 65, 70-71 (3d Cir. 2000); Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999), aff'd in part and vacated in part on other grounds, 216 F.3d 970 (11th Cir. 2000) (en banc); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 537 (7th Cir. 1999).

In dictum, the Seventh Circuit Court of Appeals observed that a prisoner would not have to exhaust certain medical claims for damages if he or she could not recover damages through the grievance process—namely, those claims in which the harm caused by allegedly deficient medical care had come to an end. Perez, 182 F.3d at 538. An example of such a case, according to the court, would be an inmate who claims that a prison doctor’s failure to promptly set his broken leg constituted cruel and unusual punishment, but whose leg had now healed. Id.
has to exhaust his or her administrative remedies, even if damages cannot be recovered through the grievance process.\textsuperscript{8}

This Article explores the applicability of the PLRA's exhaustion requirement to prisoners who are seeking monetary relief only for their injuries but who cannot obtain recompense through the grievance process.\textsuperscript{9} Part I of the Article begins with a general overview of the Prison Litigation Reform Act. Part II follows with a discussion of the pre-PLRA and post-PLRA rules of exhaustion for prisoners. Part III then analyzes the applicability of the exhaustion requirement when the grievance process does not offer prisoners the monetary relief they are seeking.

Part IV concludes with recommendations for correctional officials, the courts, and Congress derived from this analysis. These recommendations, further elaborated in Part IV, include the following:

\textit{Recommendations for Correctional Officials}

1. Correctional officials should revamp their grievance procedures or develop other administrative mechanisms to enable prisoners to recover monetary relief, when appropriate, without the need for litigation.

2. Correctional officials should refine their grievance processes by linking those processes to a structured mechanism for the identification and resolution of systemic problems at the institutional and departmental level that give rise to prisoners' grievances and lawsuits.

3. Correctional officials should evaluate the lawsuits filed by prisoners to determine whether improvements can be made in correctional operations in general and the operations of the grievance process and the Constituent Services Office, or similar entity, in particular.

\textit{Recommendations for Courts}

1. To facilitate the administrative problem solving that can, in the long term, reduce inmate litigation, courts should work with correctional officials to develop a process for providing copies of prison-

\textsuperscript{8} \textit{E.g.}, Odumosu v. Keller, No. 99-0215, 2000 WL 241644, at *2 (2d Cir. Feb. 1, 2000) (table opinion, full text available on Westlaw)) (noting that "practically any conceivable remedy" suffices, but the exhaustion requirement does not apply if the program coordinator returns the grievance seeking monetary relief without having reviewed it). In \textit{Wyatt v. Leonard}, the Sixth Circuit noted:

\begin{quote}
Although it makes 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 by providing some remedy, even though it will not pay damages.
\end{quote}

1999 \textit{FED App.}, 03856P, 193 F.3d 876, 878 (6th Cir. 1999).

\textsuperscript{9} This Article does not address the applicability of the exhaustion requirement to mixed claims for relief—those in which prisoners seek both monetary compensation and injunctive relief.
ers' complaints, including those dismissed *sua sponte*, to the correctional officials.

2. Courts should adopt and augment statutory construction rules, particularly the rules governing the interpretation of substantive statutes inserted into appropriation bills, to encourage deliberative decision making by Congress and to limit the need for courts to resolve questions regarding a statute's meaning that Congress, in the first instance, should have resolved.

**Recommendations for Congress**

1. Congress should revamp its procedures to promote deliberative decision making and to limit judicial involvement in, and resolution of, policy disputes that Congress should resolve.

2. Congress should authorize a broad-based task force to collect relevant facts about inmate litigation and litigation alternatives and to assess the effects of the Prison Litigation Reform Act. Congress should also direct the task force to develop recommendations regarding appropriate steps that Congress, other branches of the federal government, and state and local governments should take, including possible revisions to the PLRA, to limit the burdens of inmate litigation in ways that rectify problems in correctional operations and ensure that inmates' legal rights are protected and enforced.

I

**The Prison Litigation Reform Act—A General Overview**

The Prison Litigation Reform Act\(^{10}\) was attached as a rider to an omnibus appropriations bill, which was signed into law on April 26, 1996.\(^{11}\) According to its relatively sparse legislative history,\(^{12}\) the Act

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\(^{12}\) A House Report briefly discusses two House bills that were the precursors to the PLRA—the “Stopping Abusive Prisoner Lawsuits Act” and the “Stop Turning Out Prisoners
Beyond the House Report, the PLRA’s legislative history consists primarily of isolated comments of legislators found in the Congressional Record and the testimony of witnesses during hearings in the Senate and House of Representatives that focused, only in part, on the precursory legislation. For the limited remarks in the Congressional Record on the PLRA and its precursory legislation, see, for example, 142 CONG. REC. S2296-300 (1996) (statement of Sens. Kennedy and Simon), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 23; 141 CONG. REC. S19,113-14 (1995) (statement of Sen. Kyl), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 22; id. at S18,295-96 (statement of Sen. Abraham), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 21; id. at S18,1136-37 (statement of Sen. Hatch), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 20; id. at H14,105 (statement of Rep. LoBiondo), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 19; id. at H14,098 (statement of Rep. Mollohan), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 18; id. at S14,418-19 (statements of Sens. Hatch, Kyl, and Abraham), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 15; id. at S14,413-14 (statement of Sen. Dole), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 12; id. at S14,316-17 (statement of Sen. Abraham), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 10; id. at S7524-25 (statement of Sen. Dole), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 7; id. at S6699 (statement of Sen. Simon), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 6; id. at E317 (1995) (extension of remarks of Rep. Quinn), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 5.

During hearings in the Senate and House of Representatives, only fifteen witnesses presented limited testimony about the precursory legislation. Ten of these witnesses gave statements during the Senate hearing. Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 910, H.R. 667 Before the Senate Comm. on the Judiciary, 104th Cong. 9-16, 20-101, 107-08, 111-13, 141 (1995) [hereinafter PLRA Senate Hearing]; see id. at 10-11, 13-16, 20-25 (testimony and statement of John Schmidt, Associate Attorney General, United States Department of Justice, Washington, D.C.), reprinted in 2 BERNARD D. REAMS & WILLIAM H. MANZ, LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at Doc. No. 55 (1997) [hereinafter 2 REAMS & MANZ]; id. at 26-101 (panel consisting of William P. Barr, former Attorney General, United States Department of Justice, Washington, D.C.; Paul T. Cappuccio, Kirkland and Ellis, Washington, D.C.; John J. Dilulio, Jr., Professor of Politics and Public Affairs, Princeton University; Lynne Abraham, District Attorney, Philadelphia, Pa., on behalf of the National District Attorneys Association; Michael Gadola, Director, Office of Regulatory Reform, Michigan; Robert J. Watson, Commissioner of Correction, Delaware; and Steve J. Martin, former General Counsel, Texas Department of Corrections), reprinted in 2 REAMS & MANZ, supra, at Doc. No. 55; id. at 107-09, 111-13 (testimony and statement of panel member O. Lane McCotter, Executive Director, Utah Department of Corrections), reprinted in 2 REAMS & MANZ, supra, at Doc. No. 55; id. at 141 (statement of panel member James A. Collins, Executive Director, Texas Department of Criminal Justice), reprinted in 2 REAMS & MANZ, supra, at Doc. No. 55; see also id. at 169-217 app., reprinted in 2 REAMS & MANZ, supra, at Doc. No. 55 (documenting answers to questions of various senators regarding the PLRA’s precursory legislation and including supplemental submissions regarding H.R. 667).

had two ostensible purposes: to end perceived judicial micromanagement of correctional facilities and to curb the purported flood of frivolous prisoners' lawsuits inundating the courts. A summary of key PLRA provisions, other than its exhaustion requirement, is set forth below.

A. Restrictions on Prospective Relief

To achieve its first objective, the PLRA limits when courts can award "prospective relief," defined as relief "other than compensatory monetary damages," in cases contesting the legality of conditions of confinement in correctional facilities. The PLRA places additional limitations on the issuance of "prisoner release orders," which are commonly referred to as population caps. The purpose or effect of these court orders is to reduce the size of the inmate population in a correctional facility. The PLRA also restricts the length of time that a preliminary injunction can remain in effect in a conditions-of-confinement case. Unless the court makes certain findings prescribed by the statute, the preliminary injunction automatically expires ninety days after the date it was issued.

Very few of the witnesses' comments during the hearings concerned the exhaustion requirement. In addition, no Senate Judiciary Committee Report addresses the PLRA or the bills from which it evolved. Very few of the witnesses' comments during the hearings concerned the exhaustion requirement. In addition, no Senate Judiciary Committee Report addresses the PLRA or the bills from which it evolved.


15 Id. § 3636(a) (1) (A). Under these overlapping restrictions, the prospective relief must be "narrowly drawn," must "extend[ ] no further than necessary to correct the violation of the Federal right," and must be the "least intrusive means" of rectifying the violation. Id.

16 Id. § 3636(a) (3)(A). A court cannot issue a prisoner-release order unless a "less intrusive" order has failed to remedy the federal-right violation and the defendant was afforded a "reasonable amount of time to comply with the previous court orders." Id. In addition, before entering a prisoner-release order, the court must find, by clear and convincing evidence, that crowding is the "primary cause" of the illegal conditions of confinement and that no other remedy can alleviate those conditions. Id. § 3626(a) (3)(E). Finally, only a three-judge court, comprised of at least one court of appeals judge and one or more district judges, can issue a prisoner-release order. Id. § 3626(a) (3)(B).

17 Id. § 3626(g) (4).

18 Id. § 3626(a) (2). The preliminary injunction expires ninety days after its entry unless the court makes the following findings necessary to grant prospective relief: that the injunction is needed to remedy a violation of a federal right, is "narrowly drawn," extends
Another PLRA restriction on the remedial relief courts can award in conditions-of-confinement cases can be found in the section entitled, "Termination of Relief." Under the PLRA's immediate-termination provision, the prospective relief awarded in a conditions-of-confinement case must generally be terminated, on the motion of a defendant or intervenor, unless the relief was ordered with attendant findings by the court that the relief was needed to remedy a violation of a federal right, extended "no further than necessary to correct the violation," was "narrowly drawn," and was the "least intrusive means" of correcting the violation. If the court did not previously make those findings, the prospective relief must be terminated unless the court now makes written findings that the relief is needed to rectify a "current and ongoing violation of the Federal right, extends no further than necessary to correct [that] violation," is "narrowly drawn," and is the "least intrusive means" of remediating the violation.

The PLRA further provides for a stay of the prospective relief awarded in a conditions-of-confinement case if the court fails to rule on a termination motion within thirty days of filing. For "good cause," the court can, however, postpone the operation of the automatic stay for up to sixty additional days.

Finally, the PLRA places a number of restrictions on the appointment, compensation, and powers of special masters in conditions-of-confinement cases. Perhaps most significantly, special masters are forbidden from engaging in any ex parte communications with the parties. This prohibition could potentially hamper special masters' abil-

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19 Id. § 3626(b).
20 Id. § 3626(b)(2).
21 Id. § 3626(b)(3). Even if a court made these findings at the time the remedial order was entered, the order is subject to termination, upon motion, two years after the order's entry unless the court, once again, makes the prescribed findings. Id. § 3626(b)(1)(A)(i). If the order was entered before the date of the PLRA's enactment, the order can be terminated two years from that date unless the caveat to termination found in § 3626(b)(3) applies. Id. § 3626(b)(1)(A)(iii). If a court denies a termination motion, the motion can be refiled with the court one year after the date on which the order denying the termination motion was entered. Id. § 3626(b)(1)(A)(ii).
22 Id. § 3626(e)(2)(A)(i). The PLRA's stay provision states that "[a]ny motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay." Id. § 3626(e)(2). In Miller v. French, 120 S. Ct. 2246 (2000), the Supreme Court held that this stay provision does not unconstitutionally impinge on the separation of powers. Id. at 2260. The Court left open the question whether the provision abridges prisoners' due process right to be afforded a "meaningful opportunity" to be heard on the termination issue. Id.
23 18 U.S.C. § 3626(e)(3). A crowded docket will not, however, justify postponement of the date the stay goes into effect. Id.
24 Id. § 3626(f)(1)-(6).
25 Id. § 3626(f)(6)(B).
ity to negotiate agreements between the parties when problems arise while the court's remedial order is being implemented.

B. Curbing Frivolous Prisoners' Lawsuits

The PLRA contains a range of provisions to meet its other touted objective—to curb the filing of frivolous lawsuits by prisoners. First, prisoners who cannot afford to pay the full filing fee when bringing a civil action or appeal usually must still pay an initial partial filing fee. The inmate must then generally make incremental payments each month thereafter until the balance of the filing fee has been paid off.

Second, inmates who had civil suits or appeals dismissed on three or more occasions because they were frivolous, malicious, or failed to state a claim for which relief can be granted must, in most cases, pay the full filing fee up front when bringing a lawsuit or appeal in a civil case. Only if an inmate is unable to pay the full fee and is facing an "imminent" threat of "serious physical injury" can the inmate with three strikes bring a complaint or appeal in forma pauperis.

Third, the PLRA contains a physical-injury requirement. Prisoners cannot seek recompense for mental or emotional injuries sustained while they were in custody unless they also suffered a physical injury.

Fourth, courts must screen prisoners' civil complaints and dismiss any claims that are frivolous or malicious, fail to state a claim upon which relief can be granted, or seek damages from a defendant with immunity from damages liability. The PLRA authorizes a sua sponte

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26 28 U.S.C. § 1915(b)(1) (Supp. IV 1998). The prisoner must pay, as an initial partial filing fee, twenty percent of whichever is greater: (1) the average monthly deposits to the prisoner's trust-fund account, or (2) the average monthly balance in that account during the six months preceding the filing of the complaint or appeal. Id. However, if the prisoner lacks the assets or the means to pay the initial fee, he or she can still file the complaint or appeal. Id. § 1915(b)(4).

27 Id. § 1915(b)(2). Each month, the prisoner must make an installment payment on the filing fee equaling twenty percent of the income credited to his or her trust-fund account the month before. Id. However, prison officials cannot forward a payment to the court if the prisoner has ten dollars or less in the account. Id.

28 Id. § 1915(g).

29 Id.


31 Id.

32 The PLRA contains three overlapping provisions directing the dismissal of prisoners' claims for any one of these four reasons. 28 U.S.C. § 1915(e)(2) (applying to persons proceeding in forma pauperis in the district court or on appeal); id. § 1915A(b) (applying to prisoners' lawsuits filed against a governmental entity or officer); 42 U.S.C. § 1997e(c) (applying to cases contesting the legality of prison conditions under 42 U.S.C. § 1983 or some other "federal law").
dismissal on these grounds; dismissal need not, and indeed should not, await the filing of a motion to dismiss.33

Finally, a federal prisoner whom a court finds has brought a claim for malicious reasons or to harass the defendant can lose good-time credits, thereby extending the length of his or her incarceration.34 Courts can also revoke credits earned by a federal prisoner who “testifies falsely or otherwise knowingly presents false evidence . . . to the court.”35

C. Limitations on Attorney’s Fees

One section of the PLRA places significant restrictions on the attorney’s fees that the court can award to prevailing prisoners under 42 U.S.C. § 1988.36 These restrictions are unrelated to the PLRA’s purpose of reducing the number of frivolous prisoners’ lawsuits because attorney’s fees are only awarded in cases in which inmates prevailed, cases that, by definition, are nonfrivolous.37 Nor can it be said, at least absent some proof that these cases are prolonged by plaintiffs’ attorneys trying to augment their fees, that these fee limitations are directly linked to the goal of ending what Congress perceived as judicial micromanagement of correctional facilities.

The fee restrictions include, among others, a requirement that the fees be “proportionately related” to the relief awarded by the court.38 Elsewhere, the PLRA provides some concrete guidance concerning the meaning of this proportionality requirement in suits for monetary relief. If a prisoner receives an award of damages, a portion of the judgment, not to exceed twenty-five percent, must be paid towards the attorney’s fees awarded against the defendant.39 If the fee

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33 28 U.S.C. § 1915(e)(2) (permitting dismissal "at any time"); id. § 1915A(a)-(b) (directing dismissal "before docketing, if feasible"); 42 U.S.C. § 1997e(c) (allowing dismissal on the court’s own motion or the motion of a party).
35 Id. § 1932(3).
36 Id. § 1997e(d). Section 1988(b) authorizes courts to award attorney’s fees to the prevailing parties in suits brought under 42 U.S.C. § 1983 and certain other civil rights statutes. 42 U.S.C. § 1988(b).
37 But see Madrid v. Gomez, 190 F.3d 990, 995-96 (9th Cir. 1999). In that case, the Ninth Circuit Court of Appeals concluded that the PLRA’s restrictions on the hourly rates used to compute the attorney’s fees awarded prisoners under § 1988 do not abridge prisoners’ equal protection rights. Id. at 995-96. Applying a rational-basis test, the court of appeals cited the following two governmental interests purportedly served by the fee limitations: the interest in curbing the filing of frivolous prisoners’ lawsuits and the interest in minimizing the costs of such lawsuits to taxpayers. Id. at 996. While the court acknowledged that the prisoners’ claims in that case were nonfrivolous, and indeed meritorious, the court said that it cannot strike down a law just because “there is an imperfect fit between means and ends.” Id. at 996 n.8 (quoting Heller v. Doe, 509 U.S. 312, 321 (1993)).
39 Id. § 1997e(d)(2).
award does not exceed 150% of the judgment, the defendant must pay the balance of the fee award.\textsuperscript{40} So, for example, in a case in which a prisoner is awarded one-hundred dollars in compensatory damages, the defendants will have to pay, at most, about $149 in attorney's fees ($150 minus a minimal amount to be paid from the judgment itself).

The PLRA also places a cap on the hourly rate that can be used when calculating the fee award under § 1988.\textsuperscript{41} The Act directs that the hourly rate not exceed 150% of the hourly rate under the Criminal Justice Act.\textsuperscript{42} Under this cap, the maximum hourly rate at which prisoners' attorneys can be compensated is currently $112.50.\textsuperscript{43}

II

Exhaustion Before and After the Prison Litigation Reform Act

A. Pre-PLRA Exhaustion Provisions

In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA).\textsuperscript{44} Reports of widespread atrocities and violations of the constitutional rights of persons confined in prisons, jails, mental health facilities, and other institutions throughout the country provided the impetus for the enactment of this legislation.\textsuperscript{45} One

\begin{itemize}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} § 1997e(d)(3).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} The Criminal Justice Act provides that the Judicial Conference can authorize an hourly compensation rate of up to seventy-five dollars for attorneys appointed under the Act. 18 U.S.C. § 3006A(d)(1) (1994 & Supp. IV 1999). The Judicial Conference has approved this rate for both in-court and out-of-court work. \textsc{Admin. Office of the U.S. Courts, Reports of the Proceedings of the Judicial Conference of the United States} 19 (1995). But because of funding limitations, the seventy-five dollar rate has not been implemented in most judicial districts. \textit{Id.}
\item The judiciary appropriations bill for fiscal year 2000 appropriated funds to pay attorneys appointed under the Criminal Justice Act seventy dollars an hour for their work in court and fifty dollars for their out-of-court work. \textit{Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-34 to 1501A-35}. In some districts in which the seventy-five dollar rate has not been implemented because of budgetary constraints, courts are using the appropriated figure when computing attorney's fees under § 1988 in prisoners' cases. \textit{See, e.g., Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998)}. In these districts, the maximum hourly rate at which prisoners' attorneys can be compensated under § 1988 is $105 for in-court work (150% of the $70 appropriated figure) and $75 for out-of-court work (150% of the $50 appropriated figure).
\item \textsuperscript{45} \textit{S. Rep. No. 96-416, at 10-12, 18-19 (1979), reprinted in 1980 U.S.C.C.A.N. 787, 791-94, 799-80; see also S. Rep. No. 96-416, at 18-19, reprinted in 1980 U.S.C.C.A.N. at 800 (“The experience of the Department of Justice through its involvement in this litigation has shown that the basic constitutional and Federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis to warrant the attention of the Federal Government.”) (quoting Hon. Drew S. Days, III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).}
CRIPA provision authorized the U.S. Attorney General to file civil rights suits to abate "egregious or flagrant conditions" in prisons, jails, and other institutions that violated constitutional or other federal rights. A companion provision authorized the Attorney General to intervene in pending lawsuits brought to curb such conditions.

Another part of CRIPA, found in 42 U.S.C. § 1997e, dealt with a very different subject: the circumstances under which persons confined in correctional facilities must exhaust administrative remedies.

One of the many cases cited in the congressional reports and hearings to demonstrate the egregious conditions of confinement to which prisoners were frequently subjected was Battle v. Anderson. 376 F. Supp. 402 (E.D. Okla. 1974), aff'd in part and rev'd in part, 993 F.2d 1551 (10th Cir. 1993). The Oklahoma state prison system at issue in that case, which was designed to hold 2400 prisoners, housed 4600. Of the prisoners housed, 500 were in an overcrowded dormitory, and 2400 were crowded into 2500 rooms. The dormitory was overcrowded so that some prisoners had to sleep in garages and stairwells and were crammed in 36-square-foot cells that lacked ventilation and hot water and into which sewage leaked. Violence was rampant throughout the prison system, with one prison reporting nineteen killings over a three-year period. In addition, prisons were infested with rodents and insects and lacked even the most basic firefighting capabilities.

Another case, Gates v. Collier, 349 F. Supp. 881, 885 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974), documented horrific conditions at the Mississippi State Penitentiary at Parchman. Some inmates were confined naked in six-foot-by-six-foot cells, which lacked a light, toilet, sink, bed, or mattress. Milk of magnesia was administered to inmates to punish them for disciplinary infractions, and cattle prods were used to induce them to move or stand still. Broken windows were stuffed with rags rather than fixed to keep out the rain and cold. And there were other life-threatening problems in the prison, including open sewage through which diseases were spread and exposed wiring which posed a substantial fire hazard.

For these and other accounts of the kinds of unconstitutional conditions that prevailed in many prisons at the time CRIPA was enacted, see S. Rep. No. 96-416, at 12, reprinted in 1980 U.S.C.C.A.N. at 793-94; H.R. Rep. No. 96-80, at 11-12 (1979); Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House on the Judiciary, 96th Cong. 46-47 (1979) [hereinafter 1979 House CRIPA Hearings] (testimony of Peggy Weisenberg, Staff Attorney, National Prison Project, American Civil Liberties Union Foundation); Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House on the Judiciary, 95th Cong. 8-10, 292-93 (1977) [hereinafter 1977 House CRIPA Hearings] (testimony and statement of Hon. Drew S. Days, III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice); id. at 64, 70-71 (testimony and statement of Jay Lawrence Lichtman, Deputy Director, Defender Division, National Legal Aid and Defender Association); id. at 118 (statement of Alvin J. Bronstein, Executive Director, National Prison Project, American Civil Liberties Union); Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong. 30-31 (1977) [hereinafter 1977 Senate CRIPA Hearings] (statement of Hon. Drew S. Days, III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice); id. at 228-36 (testimony and statement of Dr. Bailus Walker, Jr., Environmental Health Consultant, U.S. Department of Justice).

46 42 U.S.C. § 1997a(a) (1994). Some of the other institutions whose conditions could, and still can, support the filing of a lawsuit by the Attorney General under CRIPA include mental hospitals, juvenile detention centers, juvenile training schools, and other facilities, outside of elementary and secondary schools, for the care, treatment, or supervision of juveniles. Id. § 1997(1). Additional institutions include those "providing skilled nursing, intermediate or long-term care, or custodial or residential care." Id.

47 Id. § 1997c(a).
before seeking redress in a civil rights lawsuit. This provision was reportedly inserted into CRIPA as a counterbalance to the other CRIPA provisions. Providing state and local officials with the opportunity, in some circumstances, to remedy constitutional violations and thereby avoid court intervention in correctional operations was apparently designed to assuage concerns about the Department of Justice interceding in those operations.

The exhaustion provision, as originally enacted, was quite limited in scope. First, the exhaustion provision only applied to state and local inmates who had filed a lawsuit under the federal civil rights statute, 42 U.S.C. § 1983. Federal prisoners were not subject to CRIPA’s exhaustion requirement.

Second, the exhaustion provision applied only to adults. Juveniles confined, for example, in juvenile detention facilities or juvenile training schools did not have to pursue administrative remedies before seeking redress in court for violations of their civil rights.

Third, the exhaustion provision only applied to adults convicted of a crime, not to pretrial detainees.

Fourth, not every prisoner bringing a § 1983 suit had to exhaust his or her administrative remedies. Only if the court found that exhaustion would be “appropriate and in the interests of justice” could the court require exhaustion.

Fifth, an inmate’s failure to pursue a claim through the grievance process before filing a lawsuit under § 1983 would not lead to the lawsuit’s dismissal. Instead, if the court determined that the case was one in which the inmate should be required to exhaust administrative remedies, the court would stay proceedings in the case for up to

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49 1977 House CRIPA Hearings, supra note 45, at 54 (statement of Rep. Drinan) (questioning witness about why “attorneys general feel so strongly, apparently, that a person should be required to exhaust his administrative remedies before the Attorney General can act”); id. at 77 (statement of Jay Lawrence Lichtman, Deputy Director, Defender Division, National Legal Aid and Defender Association) (asserting that conditioning the grant of authority to the Attorney General to vindicate confined persons’ constitutional rights on the adoption of an exhaustion requirement is “an unacceptable and unnecessary tradeoff”).
50 Id. at 77 (statement of Jay Lawrence Lichtman, Deputy Director, Defender Division, National Legal Aid and Defender Association).
54 See id.
55 Id.
56 Id.
57 Id.
ninety days. If, however, the matter was not resolved within that ninety-day period, the stay would be lifted, and the court would resume its processing of the prisoner's claim.

Finally, the correctional institution's grievance process had to meet certain requirements before a court could mandate exhaustion. The court could only require exhaustion of "such plain, speedy, and effective administrative remedies as are available." In addition, either the Attorney General had to have certified, or the court have found, that the grievance process was in "substantial compliance" with certain "minimum acceptable standards" issued by the Attorney General under the statute. The statute directed that the "minimum standards" provide for the following: (1) an advisory role for staff and inmates at the correctional facility in the grievance process's formulation, implementation, and operation; (2) time limits for the return of written decisions recounting the reasons for granting or denying a grievance at each level of the grievance process; (3) the expedited processing of emergency grievances; (4) safeguards to prevent retaliation against an inmate who has filed a grievance or against any other person who has participated in the grievance process; and (5) "independent review" of grievances by a person or persons from outside the institution.

In 1994, Congress amended CRIPA's exhaustion provision by extending to 180 days the period of time that a case could be stayed pending exhaustion of administrative remedies. The 1994 amendments also loosened the requirements that had to be met before a court could order a prisoner to exhaust his or her administrative remedies. Even if the prison grievance process did not meet the five minimum standards set forth in the statute, the court could require a prisoner to funnel a claim through that process if the court or the Attorney General had found that the administrative remedies were nonetheless "fair and effective."

58 Id.
59 Id.
60 Id. § 1997e(a)-(b) (amended 1994 and 1996).
62 Id. These codified standards can be found in 28 C.F.R. §§ 40.2 to 40.9 (1999).
B. The PLRA's Exhaustion Requirement

The Prison Litigation Reform Act modified CRIPA's exhaustion provision in four significant ways. First, the PLRA mandates the dismissal of conditions-of-confinement cases in which administrative remedies have not been exhausted.66 By contrast, before the PLRA's enactment, courts only stayed cases pending the exhaustion of administrative remedies.67

Second, all "prisoners" contesting the conditions of their confinement on constitutional or federal statutory grounds are subject to the PLRA's exhaustion requirement.68 Federal prisoners, as well as incarcerated juveniles, must now exhaust their administrative remedies.69

Third, the PLRA eliminated the cap on the exhaustion period.70 Under the pre-PLRA law, courts could defer adjudicating a prisoner's claim for, at most, 180 days while the prisoner attempted to obtain redress through the prison's grievance process.71 Now, there is no defined period of time in which correctional officials must process a grievance to avoid court adjudication of the claim.72

Finally, the PLRA deleted the statutory language outlining the following preconditions that had to be met before a court could require a prisoner to exhaust his or her administrative remedies: the requirement that the court find that the exhaustion of administrative remedies would be "appropriate and in the interests of justice"; the requirement that the administrative remedies be "plain, speedy, and effective"; and the requirement that the administrative remedies ei-

68 42 U.S.C. § 1997e(a) (Supp. III 1997). Title 42 U.S.C. § 1997e(h) defines a "prisoner" subject to the exhaustion requirement as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." Id. § 1997e(h).
69 Id. The Prison Litigation Reform Act extended the applicability of CRIPA's exhaustion requirement beyond prisoners bringing suit under 42 U.S.C. § 1983 to those contesting their conditions of confinement under "any other Federal law." Id. § 1997e(a). The lower courts have interpreted this amendment as bringing federal prisoners within the exhaustion requirement's scope. E.g., Lavista v. Beeler, 1999 FED App. 0371P, 195 F.3d 254, 256-57 (6th Cir. 1999); Alexander v. Hawk, 159 F.3d 1321, 1324-25 (11th Cir. 1998); Garrett v. Hawk, 127 F.3d 1263, 1265 (10th Cir. 1997); see also 141 Coxo. Rrc. H14105 (1995), reprinted in 1 REEMS & MANZ, supra note 11, at Doc. No. 19 (statement of Rep. LoBiondo) (asserting that cases brought by federal prisoners contesting the conditions of their confinement are subject to the exhaustion requirement).
70 § 1997e(a).
ther substantially comply with regulations implementing the five “minimum” statutory standards or be otherwise “fair and effective.” The only substantive requirement remaining on the face of the statute that administrative remedies must meet in order for the exhaustion requirement to apply is that the remedies be “available.”

III
THE APPLICABILITY OF THE PLRA’S EXHAUSTION REQUIREMENT TO CLAIMS FOR MONETARY RELIEF ONLY:
AN ANALYSIS OF CONGRESSIONAL INTENT

Whether or not the exhaustion requirement applies when prisoners are seeking monetary relief but cannot obtain such relief through the grievance process is ultimately a question of congressional intent. Did Congress intend that prisoners be required to pursue a claim through the grievance process when the relief the prisoner seeks cannot actually be obtained through that process? This Part discusses the extent to which the text, legislative history, and purposes of § 1997e, other PLRA provisions, and policy considerations help to illumine that intent.

A. The Language of the PLRA’s Exhaustion Provision

The text of § 1997e(a), on its face, arguably supports the position that the exhaustion requirement does not apply when a prisoner is seeking a type of relief that cannot be obtained through the grievance process. Section 1997e(a) only requires the exhaustion of administrative remedies that “are available.” How, one might ask, can a remedy—damages—be considered “available” if the grievance process does not provide for that kind of relief?

A response to that question might be that an administrative remedy is “available” because the inmate may obtain some alternative form of redress other than the monetary relief he or she initially sought. For example, an inmate seeking monetary relief might, as a...
sort of in-kind recompense, be transferred to a prison closer to his or her home or to a prison with a lower security level.

One could argue, though, that finding administrative remedies “are available” because of the theoretical possibility that correctional officials will find alternative ways to make amends for an inmate’s pecuniary loss distorts the plain meaning of the word “available.” “Accessible” and “obtainable” are synonyms for the word “available.” If a woman living in a rural area decided to undergo radiation treatment for her breast cancer but the hospital to which she has access does not provide such treatment, we would not say that radiation treatment is available at the hospital simply because there are a number of other cancer treatments of which she could avail herself there. Radiation treatment is simply not, in the plain sense of the word, available.

But this medical analogy only goes so far, ultimately confirming that parsing out the meaning of the word “available” does not fully answer the question of the meaning of § 1997e(a). For although the radiation treatment the cancer victim would prefer may not be available, other treatment modalities—chemotherapy and surgery—are. So the pivotal question is how narrow or broad is the definition of the item or service whose availability we are assessing. Is it, in the medical scenario, radiation treatment, medical treatments for breast cancer, or medical care in general? In other words, the question that needs to be asked and answered is “What is it that, under § 1997e(a), must be ‘available’?”

The answer to that question is “administrative remedies.” But the PLRA does not define what constitute the administrative remedies of which prisoners must avail themselves before filing lawsuits contesting the conditions of their confinement. Nor did CRIPA define that term.

One textual clue exists, however, as to the meaning of administrative remedies. Section 1997e(a) requires the exhaustion of “administrative remedies,” not of the administrative grievance procedure. By contrast, § 1997e(b) refers to the “administrative grievance procedure,” providing that a state’s failure to erect or follow such a procedure shall not be the basis for the Attorney General’s filing of, or intervention in, a lawsuit. The employment of this differential lan-

76 Merriam-Webster’s Collegiate Dictionary 122 (deluxe ed. 1998).
77 42 U.C.C. § 1997e(b). Section 1997e(b) specifically provides: “The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.” Id.
guage occurred twice—both in 1980 when CRIPA was originally enacted\textsuperscript{78} and in 1996 when the PLRA was enacted.\textsuperscript{79}

It is a classic rule of statutory construction that when the legislature uses certain language in one part of a statute and different language in another part of the statute, the difference in wording connotes a difference in meaning.\textsuperscript{80} It is presumed that the legislature employed differing language because substantive differences exist between the two terms found in the statute.

This canon of statutory construction suggests that the exhaustion of "administrative remedies" under § 1997e(a) is not the same thing as processing a claim through the "administrative grievance procedure." In other words, a correctional institution's establishment of a grievance mechanism does not necessarily mean, in a particular case, that an inmate has an administrative remedy for the alleged wrong of which he or she complains. The grievance process, like a trial, is not a remedy but a process through which a remedy is dispensed.

The potentially countervailing textual consideration is that the PLRA deleted certain predicates to exhaustion:\textsuperscript{81} the requirement that the court find exhaustion to be "appropriate and in the interests of justice" and the requirement that the administrative remedies be "plain, speedy, and effective." In addition, the PLRA excised the preconditions for deeming administrative remedies "plain, speedy, and effective": certification by the court or the Attorney General that the remedies substantially complied with the minimum standards promulgated by the Attorney General or were otherwise fair and effective.\textsuperscript{82}

The question is whether Congress, in redacting these requirements, intended that prisoners be required to process their claims through the correctional system's grievance process even when the grievance process is the antithesis of "plain, speedy, and effective"—when it is prolix, dilatory, and ineffective. For if that is the import of the 1996 amendments to 42 U.S.C. § 1997e(a), then one might argue, as a logical corollary, that Congress intended the exhaustion requirement to apply whether or not inmates could obtain, through the grievance process, relief that would compensate them for the alleged violation of their constitutional or other federal rights.

\textsuperscript{80} 2A Norman J. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000).
\textsuperscript{81} Supra notes 73-74 and accompanying text.
\textsuperscript{82} § 1997e(b) (amending 42 U.S.C. § 1997e(b)(1)-(2) (1994)).
B. Legislative History

Like its text, the legislative history of 42 U.S.C. § 1997e(a) points in two very different directions. Portions of that history support the proposition that an inmate need not pursue a claim through the grievance process if that process cannot provide the inmate the relief he or she is seeking. Other parts of that history suggest otherwise. In the end, the legislative history does little to clarify the legislative intent.

1. CRIPA’s Legislative History

The care with which Congress deliberated before enacting CRIPA in 1980 stands in stark contrast to its cryptic review of the much more complex PLRA before its enactment in 1996. The House Subcommittee on Courts, Civil Liberties, and the Administration of Justice held seven days of hearings on CRIPA in 1977 and 1979, at which twenty-three witnesses testified. The Senate Subcommittee on the Constitution also obtained extensive feedback about CRIPA from fifty-four different witnesses during eight days of hearings in 1977 and 1979.

Much of the discussion and debate regarding CRIPA centered on the provisions authorizing the Attorney General to initiate or intervene in lawsuits contesting “egregious” conditions of confinement that were the byproduct of a “pattern or practice” of depriving inmates of their constitutional rights. While most of the witnesses at the congressional hearings testified about the need for such federal intervention to curb unconstitutional conditions of confinement, the National Association of Attorneys General (NAAG) adamantly opposed what its witnesses depicted as federal encroachment on the affairs of the states.

The exhaustion provision was inserted into CRIPA in an attempt to counter this criticism. By redressing legitimate grievances that would come to prison officials’ attention because of the exhaustion

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83 1979 House CRIPA Hearings, supra note 45, at 5-104; 1977 House CRIPA Hearings, supra note 45, at 3-283.
86 E.g., 1977 House CRIPA Hearings, supra note 45, at 89-90 (statement of C. Raymond Marvin, Washington Counsel, NAAG); id. at 92 (Resolution Adopted Thursday, April 21, 1977, by the Executive Committee of the NAAG on H.R. 2439, Attorney General Intervention Involving Violation of Inmates’ Rights) (urging Congress to reject the proposed legislation “as an unprecedented intervention by an agency of the federal government into the administration of state affairs and the litigation of local concerns”).
87 See supra notes 49-50 and accompanying text.
provision, state officials could avoid the Attorney General's intervention in correctional operations.\textsuperscript{88}

If that were the sole purpose of the exhaustion provision—to minimize the Attorney General's initiation of "pattern or practice" lawsuits—then Congress apparently did not intend, at least in 1980, for the exhaustion provision to apply when inmates were seeking monetary relief but could not obtain such relief through the grievance process. The "pattern or practice" lawsuits that the Attorney General is authorized to bring under 42 U.S.C. § 1997a(a) are for equitable relief only, not damages. It follows that the exhaustion of claims for damages would not obviate the Attorney General's assertion of claims for equitable relief, because equitable relief can only be awarded by a court when damages are an inadequate remedy.\textsuperscript{89}

There are, however, statements in the legislative history suggesting that the purpose of the exhaustion provision, admittedly inserted in CRIPA to counterbalance the authorization of "pattern or practice" lawsuits by the Attorney General, was not confined to warding off such lawsuits. At least some exhaustion proponents envisioned that the exhaustion of administrative remedies would sometimes lead to the resolution of prisoners' individual claims with which the courts would otherwise be burdened.\textsuperscript{90} And the text of § 1997e(a) as it was enacted in 1980, which states that the exhaustion provision applies to lawsuits brought by individual prisoners, seems to confirm that the purpose of the exhaustion provision was broader than to thwart "pattern or practice" lawsuits;\textsuperscript{91} it would also serve to relieve the courts from the burdens of unnecessary or avoidable litigation in general.

\textsuperscript{88} See, e.g., 1977 House CRIPA Hearings, supra note 45, at 111 (testimony of John D. Ashcroft, Attorney General, Missouri) (testifying that while CRIPA will draw disputes into the courts, the provision for the exhaustion of administrative remedies may help prevent cases from being "generated unduly" by the Attorney General); id. at 493 (statement of William D. Leeke, Commissioner, South Carolina Department of Corrections) (arguing that administrative remedies should be exhausted before the Attorney General brings suit under this Act).


\textsuperscript{90} E.g., 1977 House CRIPA Hearings, supra note 45, at 229-30 (statement of Hon. Ruggero J. Aldisert, U.S. Court of Appeals for the Third Circuit) (asserting that using grievance procedures has the "greatest potential for relieving the pressures on the federal courts" and that the "exhaustion provision is absolutely essential to any meaningful effort to alleviate the crushing load on the federal courts").

\textsuperscript{91} See 42 U.S.C. § 1997e(a) (1988) (amended 1994). Section 1997e(a), as originally enacted, provided as follows:

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), 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 interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
CRIPA's legislative history, however, indicates that Congress did not intend that a prisoner be required to exhaust administrative remedies whenever a possibility existed, however remote, that the prison officials' consideration of the prisoner's claim might yield a settlement offer that would obviate the need for court adjudication of the claim. The House, Senate, and Conference Committee reports on CRIPA all underscored that "[i]t is the intent of Congress" that exhaustion not be mandated when a complaint raises issues that cannot, "in reasonable probability," be resolved by the grievance process.92 These comments strongly indicate that in 1980 Congress did not intend to require inmates seeking damages to pursue claims through the grievance process if they could not obtain monetary relief, at least absent a showing that there existed a reasonable probability that the claim could be administratively resolved despite the unavailability of this relief.

2. The PLRA's Legislative History

As mentioned earlier, the PLRA's legislative history is very sparse and most of the PLRA-related legislative materials that do exist bear on provisions other than the exhaustion requirement.93 With one exception, there is no indication that Congress even considered whether the exhaustion requirement would apply when an inmate seeks only damages and monetary relief cannot be obtained through the grievance process.

The remarks of Representative LoBiondo from New Jersey during what could only generously be described as the debates on the PLRA94 represent that one exception.95 During those remarks, Representative LoBiondo observed that the exhaustion requirement rectified

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

Id.


93 Supra note 12.

94 The PLRA was inserted as a rider to an omnibus appropriations bill for fiscal year 1996. Supra note 11. During sessions of the House and Senate, only a handful of representatives and senators commented, sometimes but briefly, on any of the PLRA's provisions or those of its precursors. See supra notes 11-12. For additional discussion of the circumstances surrounding the PLRA's enactment, see infra text accompanying notes 244-49.

95 141 CONG. REC. H14,105 (1995) (remarks of Rep. LoBiondo), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 19. At the time Representative LoBiondo made his remarks, he was ending the first year of his first term in Congress. LEADERSHIP DIRECTORIES, CONGRESSIONAL YELLOW BOOK 471 (2000).
what he described as the "real problem" stemming from the Supreme Court's decision in *McCarthy v. Madigan.* In that case, the Court held that CRIPA's exhaustion provision did not apply to federal inmates, but only to state prisoners bringing suit under 42 U.S.C. § 1983. In addition, the Court refused to judicially impose an exhaustion requirement in civil rights suits brought by federal prisoners, in part because damages could not be recovered under the Bureau of Prisons' grievance procedures.

In his comments on the PLRA's exhaustion requirement, Representative LoBiondo underscored that the exhaustion provision, in its revamped form, "will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to [an] administrative remedy process before proceeding to court." Representative LoBiondo's comments tell us that one legislator, out of a total of 535, clearly intended for the exhaustion requirement to apply when a prisoner was seeking damages but could not obtain damages through the grievance process. But did Congress as a whole share that intent? The answer provided by the PLRA's legislative history is, as discussed below, a mixed one.

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98 Id. at 150.
99 Id. at 154. In determining whether the common-law doctrine, under which administrative remedies generally must be exhausted, should be applied to federal prisoners, the Supreme Court in *McCarthy* balanced prisoners' interests with the interests of courts and correctional officials implicated by an exhaustion requirement. Id. at 152. The Court observed that applying the exhaustion requirement to federal prisoners would be burdensome to them for two reasons. Id. First, under the regulations of the Bureau of Prisons (BOP), prisoners had to meet very short deadlines when filing a grievance or subsequent administrative appeals, a "likely trap for the inexperienced and unwary inmate." Id. at 152-53. Second, prisoners could not recover monetary relief under BOP procedures. Id. at 152. Consequently, according to the Court, prisoners seeking only monetary relief had "everything to lose and nothing to gain" from a requirement that they first pursue their claim through the grievance process. Id.

The Supreme Court then found that these burdens were not counterbalanced by any institutional interests favoring an exhaustion requirement. Id. at 155. The Court noted that adjudication of the prisoner's claim in the case before it would not undermine prison officials' management and control of prisons because the prisoner's claim concerned the adequacy of the medical care he had received, a subject on which the Bureau of Prisons did not have any particular expertise. Id. The Court also concluded that an exhaustion requirement would not substantially further the interest in judicial economy because BOP's grievance process did not produce any "formal factfindings" that a court could "conclusively" rely upon when disposing of a prisoner's claim. Id. at 155-56.

101 Some evidence suggests that Congress did not share Representative LoBiondo's intent. Representative LoBiondo's intent was evident prior to the enactment of PLRA from the text of a bill that he had introduced several months earlier to override *McCarthy v. Madigan.* That bill provided:
a. **The Exhaustion Requirement's Purpose of Curbing Frivolous Lawsuits**

On the one hand, during discussions of the PLRA, the exhaustion requirement was described as a tool for curbing the filing of frivolous lawsuits by prisoners. During the hearings and limited debates on the PLRA and its precursors, purported examples of such frivolous lawsuits were recited. These examples included the lawsuit brought by an inmate who allegedly refused to leave his cell and then

No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner's incarceration until any administrative remedy procedures available are exhausted. This section applies to all actions regardless of the nominal party defendant. The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.


The highlighted sentence confirms that Representative LoBiondo did not want the inability to recover monetary relief through the grievance process to nullify the exhaustion requirement. But the fact that Congress did not include similar language in the PLRA's exhaustion requirement arguably suggests that Congress did not subscribe to, or at least contemplate, this interpretation of the exhaustion requirement—one that contravened the traditional rules governing exhaustion. *See infra* Part III.B.2(b) (discussing the traditional rules governing exhaustion).

102 E.g., 141 CONG. REC. H14,105 (statement of Rep. LoBiondo), *reprinted in 1 REAMS & MANZ, supra* note 11, at Doc. No. 19 (“An exhaustion requirement . . . would aid in deterring frivolous claims by raising the cost in time/money terms of pursuing a Bivens action.”) (quoting former Attorney General Dick Thornburgh); id. at S7525 (remarks of Sen. Dole), *reprinted in 1 REAMS & MANZ, supra* note 11, at Doc. No. 7 (stating that the exhaustion requirement and other PLRA provisions “would go a long way to curtail frivolous prisoner litigation”).

103 Based on his experiences as a judge, the Honorable Jon O. Newman, the Chief Judge of the Second Circuit Court of Appeals, was skeptical about the accuracy of the descriptions of the frivolous lawsuits cited as support for the enactment of the Prison Litigation Reform Act. *Hon. Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 BROOK. L. REV. 519, 521 (1996).* Judge Newman examined the court records in four of those cases and found that attorneys general lobbying for the PLRA's enactment had misrepresented their facts. *Id. at 520-22* (contending that the descriptions of the facts of prisoners' lawsuits contained on lists circulated by attorneys general to Congress and the media were “at best highly misleading and, sometimes, simply false”). According to Chief Judge Newman, the prisoners' claims raised legitimate concerns about prison conditions or operations. *Id. at 521.

104 E.g., 141 CONG. REC. S14,626 (remarks of Sen. Dole), *reprinted in 1 REAMS & MANZ, supra* note 11, at Doc. No. 16 (referring to lawsuits challenging the adequacy of storage space, a bad haircut, the failure to invite a prisoner to a pizza party, and the serving of chunky, rather than creamy, peanut butter); *id. at S7527-28* (Cost of Inmates' Frivolous Suits Is High, TUCSON CITIZEN, Feb. 2, 1995 inserted into the Congressional Record by Sen. Kyl), *reprinted in 1 REAMS & MANZ, supra* note 11, at Doc. No. 8 (citing lawsuits brought by Arizona prisoners, including the prisoner who wanted to be paid the minimum wage for his work and the prisoner who complained that prison officials had lost his tennis shoes); *PLRA House Hearings, supra* note 12, at 135 (statement of Daniel E. Lungren, Attorney General, California) (describing lawsuits filed by California prisoners, including one in which a prisoner complained that his cookies were crumbled and one in which the inmate sought an injunction and damages because he was not permitted to speak to anyone other than the person with whom he was seated on the bus).
sued because he hadn't been fed and another lawsuit in which an
inmate complained that correctional officials had mixed his clean and
dirty clothes together when searching his cell.  

i. Furthering the Purpose of Curbing Frivolous Lawsuits:
Theoretical Constructs

To the extent that the exhaustion requirement was designed, at
least in part, to siphon off legally frivolous claims from the courts, one
could argue that application of the exhaustion requirement to dam-
ages claims could further that purpose, even when damages are not
available through the grievance process. One way in which the ex-
hauation requirement might curb the filing of frivolous lawsuits is by
placing an obstacle between inmates and courts—an obstacle whose
complexities and attendant delays might dissuade some inmates from
ever pursuing their claims in court. The PLRA's removal of the 180-
day cap on the exhaustion period arguably provides some textual sup-
port for the proposition that Congress intended, through the exhaus-
tion requirement, to thwart prisoners' filing of frivolous lawsuits by
creating obstacles to litigation. And at least one member of Con-
gress conceded that he envisioned that the exhaustion requirement
would hinder the filing of frivolous lawsuits by prisoners in this way.

However, if the purpose of the exhaustion requirement was to
curb the filing of frivolous lawsuits by placing roadblocks in the path
of inmates trying to gain access to the courts, then we could expect
the exhaustion requirement to have a similarly obstructive effect on
the filing of nonfrivolous claims, including those that are meritorious.
Yet, none of those few members of Congress who discussed the
PLRA's exhaustion requirement admitted—and Senator Hatch, who
was a chief sponsor of the Prison Litigation Reform Act, specifically
denied—enacting the requirement in order to discourage inmates,
through the encumbrances of exhaustion, from bringing even merito-
rious claims to court.

The application of the exhaustion requirement to damages
claims might relieve the courts of the burdens of processing prisoners'
legally frivolous claims in another way: the filing of the prisoner's

105 PLRA Senate Hearing, supra note 12, at 112 (statement of O. Lane McCotter, Execu-
tive Director, Utah Department of Corrections).
106 See Prison Litigation Reform Act of 1995, sec. 803(d), § 7(a), 110 Stat. 1321-66,
MANZ, supra note 11, at Doc. No. 19; see also supra note 102 (citing evidence of Representa-
tive LoBiondo's intent that a exhaustion requirement would hinder frivolous prison
lawsuits).
108 Id. at S14,627 (remarks of Sen. Hatch), reprinted in 1 REAMS & MANZ, supra note 11,
at Doc. No. 16 ("I do not want to prevent inmates from raising legitimate claims.")). See
supra note 11 for a discussion of Senator Hatch's role in sponsoring the PLRA.
grievance could trigger a problem-solving response or an explanation from correctional officials that satisfies the inmate to the extent that he or she decides to refrain from filing a lawsuit. For example, in the cases cited earlier, correctional officials might delve into the reasons why the inmate who complained of not being fed had refused to leave his cell. If he had refused to leave his cell because of legitimate concerns for his safety, appropriate measures might be taken to protect him, such as a transfer to another section of the prison or a transfer to another prison. Similarly, if the inmate's claim that correctional officers mixed his clothes together during a cell search was processed through the grievance mechanism, it might culminate in the issuance of a directive to correctional officers clarifying the procedures they should follow during cell searches.

Section 1997e(a)'s touted purpose of curbing the filing of frivolous lawsuits could therefore be furthered by applying the exhaustion requirement to claims for damages, but only if certain requirements were met. If grievances seeking monetary relief were summarily denied because damages could not be awarded through the grievance process, then requiring prisoners to exhaust their claims through the grievance process would not further the legislation's purpose. But if the filing of the grievances were to trigger a concerted effort by correctional officials to identify and resolve problems raised in the grievances, including problems in communicating the rationale of correctional policies, procedures, and practices to inmates, then these problem-solving initiatives might reduce the filing of claims, both frivolous and nonfrivolous, in court. Simply explaining to prisoners in clear and understandable terms why, in some instances, corrective action is not possible might ward off other complaints.

In short, correctional officials could structure grievance systems in a way that siphons frivolous claims from the courts. Thus, to the extent that the legislative history reveals that one of the exhaustion requirement's main objectives was to reduce prisoners' filing of such claims, it is at least arguable that this history obliquely points to the desirability of applying the exhaustion requirement, in some circumstances, to claims for damages, even when monetary relief cannot be obtained through the grievance process.

ii. Preliminary Information on the Availability of Alternative Relief

The author conducted a survey to collect preliminary information on the extent to which correctional officials have structured their grievance processes to provide alternative relief to prisoners seeking monetary relief unavailable through the grievance process. In a telephone survey of the departments of corrections in forty-five states, re-
spondents were asked about their grievance procedures. The survey respondents were asked whether prisoners who file a grievance seeking monetary relief that cannot be obtained through the grievance process are offered alternative relief if they have a legitimate complaint about correctional operations or the conditions of their confinement. The survey respondents were also asked to provide examples of the alternative relief proffered to prisoners.

Table 1 lists the twenty-four departments of corrections which reported that they provide alternative relief to inmates to whom monetary relief cannot be awarded through the grievance process. The twenty-one departments listed in Table 2 reported that they do not provide such alternative relief. Most of the departments which reported that they provide alternative relief cited the replacement of an inmate’s property or the referral of a prisoner’s claim to another agency or entity as the alternative relief made available to an inmate.

<table>
<thead>
<tr>
<th>States offering what they consider alternative relief</th>
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<tbody>
<tr>
<td>Alabama</td>
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<tr>
<td>Arkansas</td>
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<tr>
<td>California</td>
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<tr>
<td>Colorado</td>
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<td>Delaware</td>
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<td>Florida</td>
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</table>

However, the departments of corrections in a small minority of these states reported adopting creative measures to provide remedial relief to a prisoner or to rectify the problem underlying the prisoner’s claim. In Colorado, staff determine if a “double-up” is possible. For example, if an inmate missed a meal, staff let him eat an extra meal the next week. Regardless of the relief requested by Georgia prison-

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109 The departments of corrections in the following states participated in this survey, which was completed, under the author’s supervision, in March, 2000 by Thaddeus Bringas, a law student at the University of Illinois College of Law: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The other five states either did not respond to requests to participate in the survey or refused to participate. Telephone Survey by Thaddeus Bringas with state corrections departments (Mar. 2000) [hereinafter Grievance Procedure Survey]. In three of the participating states, the departments of corrections identified someone from outside the department to be interviewed—an assistant attorney general in Delaware, a deputy attorney general in Idaho, and an administrative law judge in Utah.

110 These reports were not independently verified during this study.
ers, grievance officials determine whether staff have complied with the relevant policies and, if not, confirm that corrective actions are taken to ensure future compliance. Missouri officials may reassign the prisoner who filed the grievance to a new job or change the prisoner’s classification, and prisoners in Oklahoma may have their custody level changed or receive access to a requested service or program. Texas officials report that they take steps to correct problems in living conditions brought to their attention through grievances. In Virginia, the grievance committee examines the substance of the policy at issue in a grievance, the way in which it was interpreted and applied, and the procedures in place to implement the policy to determine whether the policy or procedures need to be changed. In addition, the committee works with the inmate to identify what might suffice as substitute relief. Finally, the filing of a grievance in Washington may result in corrective action being taken against a staff member, the referral of the prisoner to another doctor or mental health counselor for care and treatment, or the amendment of a policy or modification of the practices through which a given policy is implemented.\textsuperscript{111}

b. \textit{Traditional Exhaustion Rules}

The legislative history also contains a possible contrary sign—a sign that the exhaustion requirement should not apply when prisoners are seeking relief that cannot be obtained through the grievance process. During congressional hearings, the Department of Justice described the PLRA’s amendments to § 1997e(a) as having the effect of bringing the exhaustion requirement that applies to prisoners into conformance with other exhaustion requirements, a description with which no member of Congress took issue.\textsuperscript{112} If this is true, then, as

\begin{table}
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\begin{tabular}{|l|l|l|l|}
\hline
States that do not offer alternative relief & States that do not offer alternative relief & States that do not offer alternative relief & States that do not offer alternative relief \\
\hline
Arizona & Kentucky & Nevada & Pennsylvania \\
Hawaii & Maine & New Hampshire & South Carolina \\
Indiana & Michigan & New York & South Dakota \\
Iowa & Montana & North Dakota & Tennessee \\
Kansas & Nebraska & Oregon & Vermont \\
& & & Wyoming \\
\hline
\end{tabular}
\caption{Table 2}
\end{table}

\textsuperscript{111} Memorandum from Larry Uribe, Grievance Program Manager, Office of Correctional Operations, Washington Department of Corrections, to the author (Mar. 13, 2000) (on file with author).

\textsuperscript{112} \textit{PLRA Senate Hearing, supra} note 12, at 20-21 (statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice) (stating that the Act “strengthens the administrative exhaustion rule in this context—and brings it more into line with adminis-
discussed below, the rules that have traditionally applied to exhaustion requirements counsel against applying the PLRA’s exhaustion requirement to claims for relief that cannot be obtained through the grievance process.

In interpreting other exhaustion requirements, the Supreme Court has repeatedly held that the exhaustion of administrative remedies is not required when exhaustion would be “futile” or the administrative remedies are “inadequate.” The plaintiff who wishes to be exempted from an exhaustion requirement, however, has the burden of proving that pursuit of the remedies would be futile or that the remedies are inadequate. By contrast, under CRIPA, before its amendment by the PLRA, a court could not require a prisoner to exhaust administrative remedies unless the prison officials had succeeded in getting the grievance process certified or had otherwise demonstrated, to the court’s or the Attorney General’s satisfaction, that the grievance process was “fair and effective.”

In applying the longstanding “futility exception” to exhaustion requirements, courts generally have not required the exhaustion of administrative remedies when the relief a party was seeking could not be obtained through the administrative review process. For example, in Reiter v. Cooper, the bankruptcy trustee for a motor common carrier filed suit seeking to recover money from shippers who had paid less than the applicable tariff rates on certain shipments. The shippers, however, counterclaimed, contending that the carrier’s rates were unreasonable and hence in violation of the Interstate Commerce Act.

The trustee argued that the shippers must first bring this claim before the Interstate Commerce Commission, which had the authority to determine the reasonable tariff rate. The Supreme Court, however, noted that the Interstate Commerce Commission had no power to grant the reparations sought by the shippers. Consequently, the

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114 Honig, 484 U.S. at 327.
117 Id. at 262.
118 Id.
119 Id. at 268-69.
120 Id. at 269.
Supreme Court held that the shippers need not pursue the claim before the Interstate Commerce Commission as a precondition to filing the claim in court.121 Instead, the court could refer the matter to the Interstate Commerce Commission for a determination of rate reasonableness after the claim had been filed.122

The Supreme Court in Reiter acknowledged that even though the Interstate Commerce Commission had no power to grant reparations relief, the Interstate Commerce Act might have required the issue of rate reasonableness to be determined by the Commission before a claim could be filed in court.123 But the Court refused to find that Congress had intended for there to be such mandatory pre-suit administrative processing of a claim.124 The Court noted that the statute of limitations began to run at the time a shipment was delivered, not at the time the Interstate Commerce Commission rendered its decision.125 The Court was therefore reluctant to find that the Interstate Commerce Act required exhaustion when a claimant could not obtain monetary relief from the Interstate Commerce Commission and might be foreclosed from obtaining that relief from a court because the limitations period had expired while the Interstate Commerce Commission made the reasonable-rate determination.126

Other Supreme Court cases have also held that a claimant need not pursue relief in an alternative forum when the relief the claimant is seeking cannot be obtained in that forum. In Clayton v. International Union, UAW,127 an employee claimed that he had been discharged in violation of a collective bargaining agreement and that the union had breached its duty of fair representation in his dispute with his employer.128 The Supreme Court considered whether the employee was required to exhaust internal union appeals procedures before filing a lawsuit against the employer and union under section 301(a) of the Labor Management Relations Act.129

The plaintiff in Clayton sought both reinstatement to his job and monetary relief.130 The Supreme Court conceded that the exhaustion of the internal union procedures might culminate in an award of monetary relief to the plaintiff.131 In addition, exhaustion might thwart the filing of a lawsuit, either by clarifying for the claimant why

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121 Id. at 269-70.
122 Id. at 269.
123 Id. at 269-70.
124 Id. at 270.
125 Id.
126 Id.
128 Id. at 682.
129 Id. at 681-82.
130 Id. at 690.
131 Id.
his claim was without merit or by triggering a settlement offer that would forestall litigation. However, because exhaustion of the union procedures could not result in the plaintiff's reinstatement to his job, the Supreme Court refused to require exhaustion of the union remedies. The Court described the internal union procedures as "inadequate" and exhaustion as a "useless gesture" because the plaintiff would still need to file a lawsuit to obtain the "complete relief" he was pursuing under section 301.

Another arguably relevant Supreme Court case is Parisi v. Davidson. Technically, the principal question before the Court in Parisi did not involve the exhaustion doctrine. However, the case does provide insight into what the Supreme Court has considered a "remedy" in the past.

The question in Parisi was whether a serviceman claiming to be a conscientious objector could pursue a discharge from the Army in a habeas corpus action when he could raise his conscientious-objector status as a defense in a pending court-martial proceeding. The Supreme Court noted that while the serviceman could assert his conscientious-objector status as a defense to the criminal charge, he could not obtain the relief he was seeking, a discharge from the Army, from the military tribunal. Consequently, the Supreme Court said that it would not require the exhaustion of a "remedy" that did not, in fact, exist.

Another, though older, Supreme Court case also bears noting. In Case v. Beauregard, the Supreme Court dealt with another well-known exhaustion requirement—the requirement that legal remedies be exhausted before pursuing a claim for equitable relief. Traditionally, that rule required that before a court of equity could direct that a debtor's property be used to pay a debt, a creditor had to first obtain a judgment against the debtor in a court of law and be unsuccessful in executing the judgment. In Case, however, the Supreme Court held that legal remedies would sometimes be deemed exhausted even when the plaintiff did not adduce evidence of a fruitless

132 Id. at 689.
133 Id. at 696.
134 Id. at 685, 692-93.
136 See id. at 40.
137 Id. at 39-40.
138 Id. at 43.
139 Id. at 44. The Court stated that the serviceman "cannot "properly be required to exhaust a remedy which may not exist." Id. (quoting Noyd v. Bond, 395 U.S. 683, 698 n.1 (1969)).
140 101 U.S. 688 (1879).
141 Id. at 690.
142 See id.
execution on a judgment.\textsuperscript{143} When the debtor was insolvent and execution would be "meaningless," the remedy at law would be considered inadequate, thereby permitting immediate resort to the court in equity for relief.\textsuperscript{144}

To the limited extent that the PLRA's legislative history indicates that Congress designed the amendments to CRIPA's exhaustion provision to bring that provision into line with other exhaustion requirements,\textsuperscript{145} the backdrop of Supreme Court cases against which Congress enacted the PLRA suggests that the exhaustion requirement does not apply when a prisoner is seeking only monetary relief and the prisoner cannot obtain this relief through the grievance process. If this interpretation of the PLRA's legislative history is correct, then Congress, by deleting the reference to "plain, speedy, and effective remedies" and the certification requirements, did not mean to suggest that prisoners should be required to exhaust procedures that would be ineffective in remedying the harm caused by an alleged violation of the prisoners' constitutional or other federal rights. Nor did Congress intend to deviate from the prevailing rule that the exhaustion of administrative remedies is not required when those remedies are inadequate or when the relief sought by a claimant cannot be obtained through the administrative process. Instead, these modifications to § 1997e(a) were procedural in nature, shifting the burden of proof on the issue of the adequacy of the administrative remedies from the prison officials to the party on whom the burden has traditionally rested—the plaintiff.

C. The Purposes of Exhaustion Requirements

The purposes of exhaustion requirements can help clarify Congress's intent in enacting an exhaustion requirement. It is unlikely that Congress would have intended for the requirement to apply when the exhaustion of administrative remedies would not serve the usual purposes of exhaustion. According to the Supreme Court, exhaustion requirements have two principal purposes.\textsuperscript{146} The first purpose is to protect the administrative agency's authority by giving the agency the first opportunity to resolve a controversy before a court intervenes in the dispute.\textsuperscript{147} The second purpose is to promote judicial efficiency.\textsuperscript{148}

\textsuperscript{143} Id. at 691.
\textsuperscript{144} Id. at 690-91.
\textsuperscript{145} PLRA Senate Hearing, supra note 12, at 20-21 (statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice); see also supra note 112 and accompanying text (discussing this legislative history).
\textsuperscript{147} Id.
\textsuperscript{148} Id.
This latter objective can be accomplished in one of two ways. The first way is by resolving the dispute, thereby relieving the court from the burden of processing the plaintiff's claim. The second is by producing a factual record that can aid the court in processing a claim. Of course, whether or not an administrative review process will actually yield this latter benefit depends on the level of detail and the accuracy of the facts recounted in the written records of the administrative proceedings.

It is debatable whether application of the exhaustion requirement in § 1997e(a) to prisoners seeking damages that cannot be obtained through the grievance process would further the traditional purposes of exhaustion. On the one hand, a strong argument exists that exhaustion would not protect the correctional department's authority because in this context the department has no authority in need of protection—no authority to grant the relief sought by the prisoner. The contrary argument, of course, is that the agency, in some cases, might be able to offer the prisoner some substitute relief that would placate the inmate harmed by the correctional officials' allegedly unlawful actions. The need for judicial review of correctional officials' actions would then be obviated.

The problem with this argument is that it would support the application of exhaustion requirements in cases in which the Supreme Court has refused to require a plaintiff to exhaust administrative or judicial remedies. For example, as the Court acknowledged in Clayton, processing the plaintiff's claim through the union's appeals procedures might have yielded a settlement offer whose acceptance would have negated the need for court involvement in the dispute. Yet this possibility of substitute relief forestalling the need for litigation did not lead the Court to require the exhaustion of the claim through the union's procedures. Instead, the Court held that the plaintiff need not exhaust administrative procedures from which he could not obtain the particular relief, reinstatement to his job, that he was seeking.

A related argument is that the exhaustion of a prisoner's claim for damages through the grievance process will promote the other purpose of exhaustion, judicial efficiency, by negating the need for litigation, either because the prisoner accepts substitute relief or because the invalidity of the prisoner's claim becomes apparent to him

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149 Id.
150 Id. at 145-46.
151 See supra notes 109-11 and accompanying text (discussing the availability of alternative relief).
153 Id.
154 Id. at 696.
or her during the grievance process. However, by finding in Clayton that exhaustion would be a "useless gesture" when the plaintiff would still have to file a lawsuit to obtain the particular relief he desired, the Supreme Court implicitly rejected this construction of how exhaustion furthers the purpose of promoting judicial efficiency.

Some courts have, however, held that requiring an inmate seeking damages to pursue his or her claim through the grievance process promotes judicial efficiency by producing a factual record that facilitates the court's review of the prisoner's claim. In many states, though, no such factual record is produced. As shown in Table 3, more than half of the departments of corrections surveyed during this study reported that when officials deny a grievance because a prisoner is seeking relief that the grievance committee cannot award, grievance officials do not prepare a written report discussing whether the prisoner has any grounds for his grievance and the facts supporting that conclusion.

**Table 3**

<table>
<thead>
<tr>
<th>States in which the administrative grievance process does not produce a written report when a prisoner seeks unavailable monetary relief</th>
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<tbody>
<tr>
<td>Arkansas</td>
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<tr>
<td>Delaware</td>
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<tr>
<td>Florida</td>
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<tr>
<td>Hawaii</td>
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<td>Indiana</td>
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D. Other PLRA Provisions

The PLRA's exhaustion requirement was just one part of an Act designed to curb the filing of frivolous lawsuits by prisoners and end what was considered undue interference by the courts in the operation of correctional facilities. Because courts are generally supposed

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155 See supra Part III.B.2(a) (i).
156 Clayton, 451 U.S. at 693.
157 E.g., Nyhuis v. Reno, 204 F.3d 65, 76 (3d Cir. 2000); Alexander v. Hawk, 159 F.3d 1321, 1325 (11th Cir. 1998).
158 This study did not independently verify the statements of the other departments of corrections that they do prepare such a written report. For those states in which such written reports are prepared, a representative cross-section of those reports would need to be analyzed to determine whether they contain the level of detail that would meaningfully facilitate a court's review of a prisoner's claim. In addition, the procedural safeguards that attend the grievance process in each of those states would need to be examined to determine whether the safeguards are adequate to ensure that the factual findings of the grievance committee, if sufficiently detailed, are also generally accurate.
to interpret the different parts of a statute so as to complement rather than contradict each other, the question arises as to whether any of the other PLRA provisions provide clues as to the import and meaning of the exhaustion requirement.

Like the answers to so many of the other questions regarding the indicators of Congress's intent when enacting the exhaustion requirement, the answer to this question is inconclusive. On the one hand, some prisoners' advocates might argue that the almost unbounded interpretation of what constitutes a remedy when construing the PLRA's exhaustion requirement conflicts with the constrictive interpretation of remedial relief found in other sections of the PLRA. Under traditional principles governing remedies, the nature and scope of what is considered a "remedy" is tailored to the nature and scope of the injury that the relief is designed to redress. This central principle permeates other parts of the PLRA, such as the provisions limiting the scope of prospective relief in conditions-of-confinement cases. It might therefore seem discrepant if administrative actions not linked to the injury for which recompense is sought were considered "remedies" within the current meaning of the PLRA's exhaustion requirement.

However, because the PLRA's restrictions on prospective relief and the exhaustion requirement take very different tacks in limiting the intervention of courts in correctional operations—the former, by limiting the scope of court-ordered relief and the latter, by giving correctional officials first dibs in resolving an alleged problem in correctional operations—it might be a mistake to demand conceptual consistency between these discrete portions of the PLRA. In fact, the PLRA itself confirms that Congress did not consider administrative remedies on a plane with court-ordered remedies. The PLRA gives a court, at most, ninety days in which to rule on a motion to terminate prospective relief in a conditions-of-confinement case, even though such motions can raise exceedingly complex factual and legal questions. In addition, a preliminary injunction issued in a conditions-of-confinement case abates after ninety days. In other words, the court has only ninety days after issuing a preliminary injunction to decide whether to issue a permanent injunction. By contrast, the PLRA's exhaustion provision removed the previous 180-day deadline

159 2A Singer, supra note 80, § 46.05.
160 See Milliken v. Bradley, 433 U.S. 267, 281-82 (1977) (referring to the "well-settled principle that the nature and scope of the remedy are to be determined by the violation").
162 § 3626(e)(2)-(3); see supra text accompanying notes 22-23.
163 § 3626(a)(2); see supra text accompanying note 18.
for correctional officials to resolve a prisoner's grievance before court adjudication of the prisoner's claim.\textsuperscript{164}

The PLRA's screening provisions might also arguably bear on the meaning of its exhaustion requirement.\textsuperscript{165} As mentioned earlier,\textsuperscript{166} these provisions direct courts to dismiss prisoners' claims that are frivolous, malicious, fail to state a cognizable claim, or seek relief from a defendant protected by immunity, preferably before the complaint is even docketed. Additionally, 42 U.S.C. \S 1997e(c)(2) authorizes courts to dismiss a claim on any of these four grounds even if a prisoner has not exhausted his or her administrative remedies. Thus, if prisoners seeking monetary relief that they cannot obtain through the grievance process do file frivolous claims, their claims presumably will be quickly culled by the court.\textsuperscript{167}

Other provisions of the PLRA also create significant disincentives to the filing of frivolous claims. If prisoners file such claims, they still must pay the full filing fee,\textsuperscript{168} even if the court summarily dismisses their claims.\textsuperscript{169} The prisoners also accrue a "strike" upon the dismissal of a frivolous lawsuit. Once they have accrued three such strikes, the prisoners will generally be barred from bringing suit \textit{in forma pauperis}.\textsuperscript{170} The combined effect of the PLRA's screening mechanisms, filing-fee payment requirements, and three-strikes provision suggests that the argument that exempting some prisoners from the exhaustion requirement will dramatically undercut the PLRA's purpose of deterring prisoners from filing frivolous lawsuits is overstated. Prisoners generally have everything to lose and nothing to gain by filing a frivolous lawsuit for monetary relief.

E. Policy Considerations

One of the principal arguments for applying the exhaustion requirement across the board, whether or not the grievance process ac-


\textsuperscript{165} See 28 U.S.C. \S\S 1915(c)(2), 1915A(b) (Supp. IV 1998); 42 U.S.C. \S 1997e(c) (Supp. III 1997).

\textsuperscript{166} Supra text accompanying notes 32-33.

\textsuperscript{167} Before Congress enacted the PLRA, courts could dismiss \textit{sua sponte} the frivolous claims of prisoners who had petitioned the court to proceed \textit{in forma pauperis}. 28 U.S.C. \S 1915(d) (1994). However, the decision whether to dismiss a claim \textit{sua sponte} fell within the court's discretion. Denton v. Hernandez, 504 U.S. 25, 33 (1992).

\textsuperscript{168} 28 U.S.C. \S 1915(b)(1); see supra text accompanying notes 26-27.

\textsuperscript{169} E.g., Hains v. Washington, 131 F.3d 1248, 1250 (7th Cir. 1997) ("It would be absurd if the very weakest complaints—those summarily thrown out under \S 1915A—were cost-free from the prisoner's perspective, while more substantial claims must be paid for."); McGore v. Wrigglesworth, 1997 FED App. 0177P, 114 F.3d 601, 608 (6th Cir. 1997); Leonard v. Lacy, 88 F.3d 181, 184-86 (2d Cir. 1996).

\textsuperscript{170} 28 U.S.C. \S 1915(g); see supra text accompanying notes 28-29.
cords prisoners the relief they are seeking, is that otherwise prisoners will circumvent the exhaustion requirement by tacking on a claim for damages to their court complaint and, if need be, deleting any claim for injunctive relief. The way in which prison grievance procedures are currently structured suggests that, at least for the short term, this is a legitimate concern. The forty-five departments of corrections surveyed for this study reported that prisoners in their state either cannot obtain monetary relief through the grievance process or can obtain such relief only for very limited types of claims, generally for lost or damaged property and for miscalculated commissary charges, state pay, medical co-payments, other fees, and release payments. Only six states—Arkansas, Kansas, New York, South Carolina, South Dakota, and Wyoming—reported that prisoners can recover monetary compensation through the grievance process for medical claims beyond those seeking reimbursement for medical copayments. No state's department of corrections reported that inmates can recover monetary damages through the grievance process for correctional officials' excessive use of force or for unconstitutional conditions of confinement.

On the other hand, whether § 1997e(a)'s exhaustion requirement is defeasible at the stroke of an inmate's pen is up to correctional officials and legislators. If they want to ensure that correctional officials will have the first opportunity to resolve a prisoner's claim before a court enters into a dispute, then they need only modify the grievance procedures to allow for the awarding of monetary relief, when appropriate, to prisoners. Thus, the question really is: On whom did Congress place the responsibility of ensuring that the exhaustion requirement applies in as many cases as possible? Has Congress placed the responsibility on the courts, which would require the

171 As mentioned earlier, the courts that exempt prisoners seeking damages from the exhaustion requirement when monetary relief is unavailable are divided on whether the exhaustion requirement applies to prisoners filing mixed claims for both damages and injunctive relief. Supra note 6.

172 E.g., Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000) (stating that prisoners will "evade the exhaustion requirement" by seeking only damages); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 537 (7th Cir. 1999) ("Section 1997e would not be worth much if prisoners could evade it simply by asking for relief that the administrative process is unable to provide."); Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (asserting that not applying the exhaustion requirement because a prisoner is seeking damages would create an "enormous loophole" in that requirement).


174 Id.

175 Id.

176 Whiteley v. Hunt, 158 F.3d 882, 887 (5th Cir. 1998) ("[T]here 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." (footnote omitted)).
courts to deviate from the traditional rule that a remedy is inadequate and need not be exhausted when it cannot provide the plaintiff the relief he or she is seeking? Or has Congress placed the responsibility on correctional officials and legislators, who can modify grievance procedures and, when necessary, the law so that the exhaustion requirement applies to prisoners seeking only monetary relief.

F. Interpretive Principles—A Tie-Breaking Role?

One can selectively extrapolate arguments from the exhaustion provision's language, history, purposes, and underlying policy considerations to either support or refute the applicability of the exhaustion requirement to inmates seeking only monetary relief that cannot be obtained through the grievance process. Indeed, the closeness of the question confronting the courts leaves open the troubling possibility that a court will resolve the question based on how the court believes the question should have been resolved, had Congress addressed it, rather than on the court's construction of the indecipherable intent of Congress.

Canons of statutory construction can, however, provide courts with a more principled basis for breaking the interpretive tie when there are conflicting indicators of congressional intent. One canon particularly pertains here—the rule that courts should not construe statutes as abrogating the common law unless the legislature has clearly manifested its intent that the statute is to have this effect. This rule suggests that to the extent that there is doubt regarding the applicability of the PLRA's exhaustion requirement to prisoners seeking relief that cannot be obtained through the grievance process, courts should construe the requirement in keeping with longstanding rules governing the exhaustion of administrative remedies. In other words, courts should interpret the PLRA as simply having brought the exhaustion procedures applicable to prisoners into con-

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177 See United States v. Texas, 507 U.S. 529, 534 (1993) (noting the "principle that "[s]tatutes which invade the common law... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident" (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952))).

The force of this rule is particularly evident in the line of Supreme Court cases holding that certain government officials have absolute or qualified immunity from suit under 42 U.S.C. § 1983. E.g., Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 & n.18 (1981) (citing cases addressing "immunities of varying scope under the statute"). The plain language of § 1983 states that "every person" who violates another's federal rights when acting under the color of state law "shall be liable." 42 U.S.C. § 1983 (Supp. III 1997) (emphasis added). The Supreme Court has, however, repeatedly observed that § 1983 must be read in light of the immunities afforded by the common law at the time of § 1983's enactment. E.g., Fact Concerts, 453 U.S. at 258-59.

178 See supra Part III.B.2(b).
formance with the procedures applicable in other contexts. With this change in procedures, prison officials need no longer demonstrate the efficacy of the grievance procedures before a court can mandate exhaustion. Instead, the exhaustion of administrative remedies is mandatory unless the prisoner-plaintiff demonstrates that those remedies are inadequate or that exhaustion would be futile.

IV

RECOMMENDATIONS FOR CORRECTIONAL OFFICIALS, COURTS, AND CONGRESS

The Supreme Court or Congress will, in the end, resolve the question of whether prisoners seeking damages must process their claims through prison grievance procedures even when monetary relief cannot be obtained through those procedures.179 Whatever the ultimate decision on this issue, there are a number of lessons to be learned from the torturous process of attempting to divine Congress's intent when it enacted the PLRA's exhaustion requirement. Set forth below are recommendations for correctional officials, courts, and Congress that embody some of those lessons. These recommendations include, among others, suggested revisions in correctional grievance procedures, a modified approach for courts to follow when construing substantive legislation inserted into appropriation bills, and the appointment of a task force by Congress to assess the PLRA's impact and the validity of its factual underpinnings.

A. Recommendations for Correctional Officials

For years, many correctional officials have castigated the courts for intruding into what the officials understandably consider their terrain—the operation of correctional facilities.180 The PLRA's exhaustion requirement represents, in effect, a passing of the baton to correctional officials. Correctional officials now have the opportunity to play the role for which they have clamored—resolving problems in correctional operations and conditions of confinement that would otherwise wind up on a judge's desk. The question for the correctional officials is: Will they avail themselves of the opportunity they have sought for so long? Or will they just drop the baton?

179 At the time this Article went to press, the Supreme Court had granted certiorari in Booth v. Churner to resolve this question. 206 F.3d 289 (3d Cir. 2000), cert. granted, 121 S. Ct. 377 (2000).

As the Grievance Procedure Survey results indicate, the evidence as to whether the correctional officials can and will catch and hold onto the baton is, thus far, not encouraging. However, correctional officials can take steps to guard against the pendulum eventually swinging back towards greater court intervention in correctional operations. These steps will protect the fundamental interest in ensuring that correctional facilities are operating in conformance with constitutional and other legal requirements, remit the administration of correctional facilities to those persons trained to run correctional facilities, and limit the time and money parties spend litigating, and courts spend adjudicating, prisoners' claims. From a correctional perspective, the added benefit of taking the steps prescribed below is that they hold great promise for dramatically improving correctional operations over the long run.

1. Recommendation: Correctional officials should revamp their grievance procedures or develop other administrative mechanisms to enable prisoners to recover monetary relief, when appropriate, without the need for litigation.

In almost all of the states, prisoners seeking monetary compensation for most violations of their rights generally have no choice but to file a lawsuit, whether in state or federal court. So even if the Supreme Court were to conclude that the PLRA exhaustion requirement applies to prisoners even when they cannot obtain the monetary relief they are seeking through the prison grievance process, that decision would only defer the inevitable—the filing of lawsuits by many prisoners seeking damages. If correctional officials are therefore serious about avoiding the burdens of litigation and the scrutiny of correctional operations by the courts, then the officials must develop a means for prisoners to recover monetary redress without the need to file a lawsuit.

Correctional officials have traditionally been skittish about the idea of paying inmates money as redress unless ordered by a court to do so. They worry that if they pay money to one inmate whose grievance is legitimate, they will open a Pandora's box of unfounded claims for compensation. In the correctional officials' minds, it is better to keep the monetary-compensation door closed than to open it and be inundated by an avalanche of groundless claims for damages.

However, the experience of Corrections Corporation of America (CCA) suggests that correctional officials' fears are exaggerated. CCA is the largest private company providing correctional services to gov-

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181 See supra Part III.B.2(a) (ii).
182 Supra text accompanying notes 173-75.
183 Telephone Interview with Linda Cooper, Vice-President of Legal Affairs, Corrections Corporation of America (Apr. 28, 2000).
ernments at the local, state, and federal level. Since its inception, CCA has, when appropriate, paid inmates money when needed to re-

dress their legitimate grievances. According to their Vice-President of Legal Affairs, the company has done this for three reasons.

First, and most importantly, CCA pays inmates who have been harmed by the wrongful actions or inaction of CCA officials because it is simply the right thing to do. As CCA’s Vice-President for Legal Affairs explained in an interview: “If a prisoner establishes that due to our negligence, his tennis shoes were lost, we will spend $40 to buy him a new pair of tennis shoes. And we should because it was our fault.”

Second, correctional-management benefits accrue from “doing the right thing.” When prisoners perceive that they are being treated fairly by their “keepers” and that correctional officials attempt, in good faith, to make amends for their mistakes or misdeeds that cause injury to inmates, the prisoners will be less likely to harbor the resentment against those officials that can make prisoners more difficult and dangerous to manage.

Finally, providing recompense to inmates, when appropriate, for injuries sustained when CCA employees violated their limited rights has proven to be cost-effective for CCA. The Vice-President of Legal Affairs for CCA underscored that reimbursing the prisoner was not only the morally right thing to do, but the most prudent course of action from an economic standpoint. The vice-president contrasted CCA’s approach to the resolution of legitimate grievances in which inmates seek monetary relief with the response that has typified the public correctional sector. She noted that while CCA will pay the amount owed to the inmate, thereby avoiding the incursion of litigation expenses down the road, “an attorney who represents a Department of Corrections will spend $4,000 of the taxpayers’ money to avoid paying the prisoner $40.”

Of course, the economic benefits reaped by modifying a grievance process to make monetary compensation available in that process rather than through the more cumbersome and expensive litigation process would be short-lived if such a modification triggered

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184 Id.
185 Id.
186 Id.
187 Id.
188 BRANHAM, supra note 188, at 233.
189 Telephone Interview with Linda Cooper, supra note 183.
190 Id., supra note 188, at 233.
191 Id.
the filing of a sufficient number of spurious grievances to outweigh those benefits. But CCA has found that there are ways to preserve the economic benefits of reimbursing inmates to whom monetary compensation is rightfully due without inciting a wave of copycat grievances that would sap those economic benefits.

First, CCA does not pay damages to any prisoner who happens to claim that CCA owes him or her money. Instead, a prisoner has the burden of substantiating a claim for monetary redress before CCA will pay the prisoner any money.192

Second, CCA utilizes confidentiality agreements to curtail the risk that granting an inmate appropriate monetary relief will spur the filing of nonmeritorious claims for monetary compensation.193 One stratagem employed by CCA is to stretch payment of the sum owed to the prisoner over time.194 If the prisoner then breaches the confidentiality agreement by disclosing the fact of the payment to any other prisoners, the prisoner then forfeits his right to reimbursement.195

Prison officials can take still further steps to diminish the risk that awarding damages to one prisoner will have a domino-like effect throughout the prison. First, prison officials can work to enact legislation requiring a defined percentage of the monetary award to be used to pay the prisoner's outstanding financial obligations, such as for restitution, child support, and room and board at the correctional facility. This legislation could also require correctional officials to remit the remainder, or a large part of the remainder, of the compensation award into a special savings account for the prisoner. The money in the account could, at least generally,196 be reserved to ease the inmate's transition back into society upon his or her release from prison.

An additional step that correctional officials can take to avoid opening a Pandora's box of baseless grievances is to make the filing of a false grievance or the making of a false statement during the grievance process a disciplinary infraction. If correctional officials were to take this step, however, they would need to exercise care so as not to

192 Telephone Interview with Linda Cooper, supra note 183.
193 Id.
194 Id.
195 Id. CCA also encourages grievance officials to be "creative" in finding ways to compensate inmates. Id. At one CCA-operated facility, for example, an inmate entitled to $80 in compensatory relief received a $10 credit each month for eight months at the prison commissary. Id.
196 The vast majority of prisoners are eventually released from prison. Only a small percentage of convicted felons sentenced to prison receive life sentences. See Jodi M. Brown et al., Felony Sentences in State Courts, 1996, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), May 1999, at 3 (noting that only 1.2% of convicted state felons sentenced to prison in 1996 received life sentences). Even some of these prisoners will be released on parole or have their sentences commuted.
deter the filing of well-founded grievances.\textsuperscript{197} It would be imperative, for example, that a prisoner’s failure to prevail on a grievance not be considered tantamount to the filing of a false grievance. A prisoner might simply and, due to the difficulty of amassing evidence while incarcerated, understandably have been unable to prove the verity of his or her claim even though the claim asserted in the grievance was indeed true.

2. Recommendation: Correctional officials should refine their grievance processes by linking those processes to a structured mechanism for the identification and resolution of systemic problems at the institutional and departmental level that give rise to prisoners’ grievances and lawsuits.

The officials who process prisoners’ grievances typically address only the narrow questions raised by the individual grievance before them: Was this particular prisoner inappropriately denied a visit with his mother? Did prison officials wrongfully confiscate an item found in this particular prisoner’s cell? Was this particular prisoner, who was nearing completion of an eighteen-month educational program, properly transferred to another prison that did not offer such a program?

As they are currently constructed, prison grievance processes are much like the boy who plugged the hole in the levee with his thumb during a storm. Like the boy, the prison officials appear, on the surface, to have resolved the problem before them—in the case of the prison officials, by granting or denying the grievance. But in fact they have often done no such thing. The floodwater (the problem) is still mounting nearby, and the levee (the correctional system) will undoubtedly sprout new leaks (more grievances and lawsuits) until the problem is resolved. Of even greater concern, the unresolved problem will continue to impair the efficiency or effectiveness of correctional operations and potentially jeopardize institutional security.

An innovative problem-solving mechanism developed by the Missouri Department of Corrections highlights the distinction between resolving the issues raised by an individual grievance and solving the underlying problems. Dora Schriro, the Director of the Missouri Department of Corrections, created this mechanism, known as the Constituent Services Office, in 1994.\textsuperscript{198}

One purpose of the Constituent Services Office is to reduce the number of lawsuits filed by prisoners.\textsuperscript{199} But Director Schriro de-

\textsuperscript{197} Addressing the problems underlying such grievances could substantially improve the management of correctional facilities.

\textsuperscript{198} Mo. Dep’t of Corr., Constituent Services Office 1998 Annual Report 1 (1999).

\textsuperscript{199} Mo. Dep’t of Corr., Innovative Government Program Gets Results for Missouri Prison System 1, 6 (1998).
scribes this goal as the subsidiary purpose of the Office. According to her, the overarching purpose is to identify and address what she has described as the “root causes” of prisoners’ legitimate complaints, thereby improving the service the Department provides to what it considers its “customers”—prisoners, their families, legislators, the Governor’s Office, advocacy groups, and others.

The way in which the Constituent Services Office responded to one prisoner’s complaint illustrates its problem-solving focus. This particular prisoner contacted the Constituent Services Office after prison officials refused to let his mother into the prison for a visit even though she had traveled two hundred miles to see him. The prison officials cited the prison’s visiting rules in barring the mother’s entry into the prison; the mother’s dress, which was two inches above her knee, was too short, under those rules, to permit her to visit a prisoner. While wearing the same dress, the mother had, however, been permitted to visit her son when he was incarcerated in a different prison in the state.

Had the prisoner in this case filed a grievance regarding the refusal to let his mother visit him, his grievance, most likely, would have been summarily denied because the prison officials had acted in conformance with prison regulations. But the Constituent Services Office adopted a different tack when addressing the prisoner’s complaint, examining whether the Department of Corrections could take steps to prevent a recurrence of the problem the prisoner had brought to its attention.

Having received a number of other complaints from prisoners and their family members about visiting procedures, the Constituent Services Office assembled a task force to review visiting procedures within the Department. What the task force discovered was that those procedures varied widely from prison to prison and that there was no justification for those variations. The end result of this discovery was the formulation of uniform visiting procedures for all prisons throughout the state.

In an interview with the author, Director Schriro observed: “Litigation is a symptom of a problem. If you stop the litigation, you don’t stop the problem.” Branhm, supra note 188, at 234.
The Constituent Services Office, and the task force assembled under its auspices, unearthed another problem that had contributed to the prisoner's mother having been denied entry into the prison. Not only were the rules governing visitation conflicting, but many prisoners and their families were unaware of those rules. Only upon their arrival at the prison would family members learn that they could not visit their loved one because they were dressed inappropriately or that there were restrictions on the medical and infant supplies visitors could bring into the visiting room.

The task force responded to this problem by preparing a handbook for prisoners, their family members, and friends outlining the Department's visiting procedures. The handbook also contains the answers to questions frequently asked by prisoners' friends and family members, such as whether clothing and other items can be sent to a prisoner, whether money can be deposited in a prisoner's account, and how mail to a prisoner should be addressed. Each prisoner can identify up to two persons to whom the handbook will be sent at the Department of Corrections' expense.

In order for prison grievance procedures to realize their potential to avert litigation, correctional officials need to develop linkages between the grievance process and problem-solving mechanisms like the Constituent Services Office within the Missouri Department of Corrections. At this point, we do not know the most efficient and effective way to structure such linkages, partly because the Constituent Services Office is itself a novel correctional concept. By piloting and evaluating different ways to integrate a structured process for identifying and resolving systemic problems in correctional operations with the grievance-resolution process, correctional officials can identify the most effective ways of resolving not only grievances but the problems underlying those grievances.

Whatever form the linkages ultimately take, though, to be effective, they need to contain at least two basic components. The first is a statistics-gathering and evaluation component. Statistics about the grievances prisoners file can be a prime indicator of problems brewing within the correctional system. Changes in the types of grievances

and procedures were circulated to the superintendents (wardens) and inmate councils of each prison for comments and suggested revisions. Id.

208 Id. at 65.
209 Id.
211 Id. passim.
212 Telephone Interview with Lisa Jones, Constituent Services Officer, Missouri Department of Corrections (Apr. 27, 2000).
filed, such as increases in the grievances filed concerning medical care, excessive use of force, or access to religious programming, can identify focal areas for assessment and problem-solving initiatives. Similarly, increases in the number or types of grievances at particular prisons can flag facilities for priority intervention.

The collection by correctional departments of the kinds of statistics recounted above is not uncommon. However, what is not yet, but should be, the norm is for these statistics to be funneled to an entity whose core purpose is to identify and resolve the problems in correctional operations that often lie below the surface of prisoners' grievances and complaints.

The transmission of grievance statistics to a problem-solving entity would not alone suffice to avert, to the extent possible, the filing of lawsuits by prisoners who initially filed grievances in conformance with the PLRA's exhaustion requirement. The second necessary component of the linkages between the grievance process and this problem-solving entity is to funnel information to the Constituent Services Office or similar entity about individual grievances filed by prisoners so that an assessment can be made as to whether a grievance, even if technically nonmeritorious, reflects a deeper problem that the Department of Corrections needs to address. This grievance-review process would be undertaken not for the purpose of overruling the decisions of grievance officials in individual cases but in order to identify and resolve problems in correctional operations that may underlie those grievances.

Correctional officials could effectuate the grievance-review function in a variety of ways. One possibility would be to funnel all grievance reports to the Constituent Services Office. Another possibility would be to train grievance officials in the identification of grievances that should, on a selective basis, be forwarded to the Constituent Services Office for problem-solving review and assessment. A third possibility would be to assign a Constituent Services Officer to work within the grievance process. The participation of a Constituent Services Officer in the grievance process would foster a two-dimensional review of a prisoner's grievance: first, to determine if redress should be formally granted or denied, and second, to determine if there are problems the grievance has brought to light that warrant follow-up.

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213 In 1997, the author completed a study for the American Bar Association under a grant from the Bureau of Justice Assistance on ways to limit the burdens of pro se inmate litigation. See Branhm, supra note 188. During this project, the author received copies of grievance statistics collected by thirteen departments of corrections surveyed as part of the study. E.g., Office of the Inspector Gen., Fla. Dep't of Corr., Monthly Report (Nov. 1996).
3. Recommendation: Correctional officials should evaluate the lawsuits filed by prisoners to determine whether improvements can be made in correctional operations in general and the operations of the grievance process and the Constituent Services Office, or similar entity, in particular.

The lawsuits filed by prisoners are a rich source of information regarding the effectiveness of correctional officials' efforts to avert litigation through the administrative resolution of prisoners' grievances and the problems underlying those grievances. By examining these cases on an individual basis and determining why they ended up in court, correctional officials will be able to identify additional steps that they can and should take to augment and improve the operations of the grievance process and the Constituent Services Office or related entity. In addition, correctional officials can identify and resolve problems in correctional operations or conditions that were not resolved, but should have been resolved, during or as an outgrowth of the grievance process.

B. Recommendations for Courts

The findings of this study suggest the need for courts to take two steps, first, to reduce the flow of conditions-of-confinement cases into the courts, and second, to limit the number of instances when courts have to engage in a guessing game of statutory construction. The first step is administrative in nature, while the second relates to the canons of statutory construction.

I. Recommendation: To facilitate the administrative problem solving that can, in the long term, reduce inmate litigation, courts should work with correctional officials to develop a process for providing copies of prisoners' complaints, including those dismissed *sua sponte*, to the correctional officials.

The conditions-of-confinement cases filed by prisoners can be divided into four categories. The first group of cases consists of those in which the prisoners have raised legally meritorious claims and are entitled to remedial relief.214

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214 E.g., Hutto v. Finney, 437 U.S. 678, 681 n.3, 682 (1978) (upholding issuance of an injunction in case in which an average of four, but sometimes up to eleven, prisoners were confined in filthy, windowless cells in punitive isolation, and inmates were raped so frequently in the inmate barracks that some inmates would not sleep in their beds and instead clung during the night to the bars near the correctional officers' station); Blissett v. Coughlin, 66 F.3d 531, 537 (2d Cir. 1995) (affirming award of $150,000 in compensatory and punitive damages to prisoner who was kicked and beaten by correctional officers and then confined naked in a feces-smeared cell); Grimm v. Lane, 895 F. Supp. 907 (S.D. Ohio 1995) (awarding two inmates beaten by correctional officers a total of $460,800 in compensatory and punitive damages).
The second group of cases are those in which the prisoners have raised legally meritorious claims in the sense that their rights have been violated, but the prisoners are not entitled to remedial relief. An example of such a case would be one in which a prisoner's rights were abridged by prison officials, but the prison officials whom the prisoner has sued for damages are immune from damages liability.\footnote{E.g., Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999) (holding that although the disclosure of inmate's transsexuality abridged her constitutional right to privacy, the defendant was entitled to qualified immunity).} Another example is an inmate whose constitutional rights were violated but whose claim for compensatory damages is foreclosed by the PLRA's physical-injury requirement.\footnote{E.g., Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997) (holding that physical-injury requirement barred suit seeking compensatory damages for emotional distress sustained by prisoners exposed to asbestos); supra text accompanying notes 30-31.}

The third category of cases is comprised of those in which the prisoners' claims are not legally meritorious but have some substantive merit. An example of such a case would be one in which prison officials have violated their own regulations, but the violation has not abridged any constitutional rights.\footnote{E.g., Presler v. Mich. Dep't of Corr., No. 96-2148, 1997 WL 693057, at *1 (6th Cir. Oct. 21, 1997) (table opinion, full text available on Westlaw) (finding that a prisoner did not receive a hearing, as required by state law, within four days after being transferred to administrative segregation, but concluding that a state does not have "'a federal due process obligation to follow all of its procedures'" (quoting Levine v. Torvik, 986 F.2d 1506, 1515 (6th Cir. 1993))).} The cases falling within this category are not confined to those in which prison officials have overtly erred. This category of cases also includes those cases in which the officials have acted in conformance with their own rules, policies, and procedures, but those rules, policies, or procedures need to be revised. Also included in this category are cases in which the prison officials followed their rules and the rules are in no need of revision, but prisoners do not understand the rules or their rationale because of poor communications between prison officials and the prisoners. In short, the cases falling within this category, though legally nonmeritorious, raise claims stemming from problems that correctional officials should address and resolve.

The fourth and final category of conditions-of-confinement cases includes cases which are not only nonmeritorious from a legal standpoint, but substantively specious.\footnote{E.g., Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) (dismissing as frivolous a claim alleging that the United States and China had conspired to invade the prisoner's mind with a mind-reading and mental-torture device).} These cases are not the outgrowth of any problems that correctional officials should rectify. At least some of these cases, no doubt, are filed simply to harass the correctional officials whom the prisoners consider responsible for their detested captivity.
In all but the latter type of case, a Constituent Services Office or similar entity can perform a valuable problem-solving function. In addition, as mentioned earlier in this Article, correctional officials ought to evaluate the lawsuits filed by prisoners to determine whether there are steps that they can take to improve the grievance process or to augment the problem-solving capacity of the Constituent Services Office or related entity.

There are currently two impediments to such problem solving and evaluation. First, the PLRA authorizes courts to dismiss sua sponte a number of different prisoners' claims—those that are legally frivolous, those that are malicious, those that fail to state a claim for which relief can be granted, and those seeking monetary relief from a defendant with immunity from damages liability. As a result, many prisoners' complaints are dismissed before process has been served and never reach correctional officials' desks.

The other encumbrance to correctional officials' review of the lawsuits filed by prisoners is the peripheral role that correctional officials so often play in the litigation process, except during some settlement negotiations. The current prevailing mind-set is that the handling of prisoners' claims falls within the Attorney General's bailiwick once those claims are asserted in the form of a lawsuit not dismissed by the court sua sponte. The focus is on the elimination of the lawsuit through, for example, the filing of a motion to dismiss or a motion for summary judgment, rather than on the elimination of any problem that prompted the lawsuit.

This legalistic approach to prisoners' claims, while perhaps understandable, is short-sighted. In part because inmates are so very ignorant of the law, lawsuits raising the same or similar claims will continue to be filed until the problems underlying those claims are rectified.

The development of the kinds of linkages discussed earlier between the grievance process and the Constituent Services Office or similar entity would help to diminish the effects of the two impediments to correctional problem solving and evaluation discussed above. When inmates' claims are subject to the PLRA's exhaustion

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219 Supra Part IV.A.
221 The National Center for Education Statistics reported in 1994 that seven out of every ten inmates perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dep't of Educ., Literacy Behind Prison Walls; Profiles of the Prison Population from the National Adult Literacy Survey, at xviii, 17-19 (1994). As a result, the majority of inmates have tremendous difficulty "integrating or synthesizing information from complex or lengthy texts," essential skills for effective litigation. Id. at xviii.
222 See supra notes 198-213 and accompanying text.
requirement, the new problem-solving orientation of the grievance process fostered by these linkages should lead to the resolution of problems and the averting of lawsuits that would otherwise be filed if those problems were not resolved. So if these linkages are in place, correctional officials may often or generally have had the opportunity to resolve the problems underlying lawsuits of which they may be unaware or in which the Attorney General has assumed a predominant role. The extent to which they will have had this opportunity will depend on whether monetary relief is available through the grievance process and, even if it is not, whether the exhaustion requirement has been construed to apply to claims for such relief.

Even if the exhaustion requirement were deemed to apply to all prisoners' claims, there will, however, almost inevitably be some cases that fall through the cracks of the problem-solving system erected by the department of corrections and end up in court. The department therefore needs a backup system to identify and address any unresolved problems percolating below the surface of these cases. As mentioned earlier, this review process would have the added benefit of identifying ways in which correctional officials can improve the grievance process and the operations of the Constituent Services Office or related entity.

In order for this backup system to work, however, the prison officials charged with the responsibility of addressing and resolving the problems underlying prisoners' complaints need to be aware of these complaints. While the Attorney General can develop linkages with the Constituent Services Office or similar entity, this collaboration will do nothing to facilitate problem solving and evaluation in cases a court dismisses sua sponte, cases of which the Attorney General will generally be unaware.

Courts can properly fill in this gap by working with correctional officials to develop a process for funneling copies of prisoners' civil rights complaints to correctional officials. The development of such a feedback mechanism for correctional officials would not be inappropriate because the complaints filed in court are a matter of public record. Nor is such cooperation between courts and correctional officials in administrative matters without precedent or even unusual. Many departments of corrections have, for example, worked with courts to develop ways to reduce the time spent and costs incurred in serving process on current or former employees sued by prisoners. Courts and correctional officials have worked together to implement

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223 See supra Part IV.A.
224 BANHAM, supra note 188, at 222-26. In Utah, for example, one employee at each state prison accepts process for any employees at the prison sued by a prisoner. Id. at 222.
video-conferencing in prisoners' cases. Courts have also appointed task forces, comprised not only of court officials, but of correctional officials and others, to identify ways in which to streamline the processing of prisoners' claims.

Any residual concerns that some judges might harbor about perceived impropriety in this interbranch cooperation on administrative matters could be dispelled by including a prisoner's advocate in the discussions on the development of the feedback mechanism. During those discussions, details such as what complaints will be copied, who will make the copies, and who will pay the photocopying costs would need to be resolved.

2. Recommendation: Courts should adopt and augment statutory construction rules, particularly the rules governing the interpretation of substantive statutes inserted into appropriation bills, to encourage deliberative decision making by Congress and to limit the need for courts to resolve questions regarding a statute's meaning that Congress, in the first instance, should have resolved.

The congressional legislative process is, at least in theory, a two-part process. During one part of the process, Congress decides what policies and programs it should put in place, eliminate, or revise. These decisions, like all decisions of import, are best made after careful reflection and full consideration of the relevant facts, law, and policy considerations. And because significant differences of opinion often arise regarding the facts, law, and policy considerations bearing on a particular issue, gaining a full and accurate understanding of an issue requires consideration by Congress of differing perspectives.

For these and other reasons, Congress has, by its rules, entrusted various standing committees with the responsibility of reviewing proposed legislation falling within their jurisdiction, holding hearings on legislative proposals, and refining those proposals before their consideration by either the full Senate or House of Representatives. Members of the committees to whom these proposals are referred have developed expertise in the areas over which their committees exercise jurisdiction. Examples of some of the subject matters falling

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225 Id. at 208.
228 Id.
229 Id. at 9, 110-12.

The second part of the lawmaking process is the appropriations stage.\footnote{OLESZK, supra note 227, at 9, 110-12.} The question that is supposed to be addressed and decided during the appropriations process is: How much money will be appropriated to effectuate the policy and programmatic decisions already made by Congress. Under the rules of both the House of Representatives and the Senate,\footnote{Rules of the House of Representatives, Rule XXI, cl. 2(b), in CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES 783 (1999) ("A provision changing existing law may not be reported in a general appropriation bill."); Rule XXI, cl. 2(c), in JOHNSON, supra, at 783 ("An amendment to a general appropriation bill shall not be in order if changing existing law."); Standing Rules of the Senate, Rule 16.4, in SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE 14-15 (1995). The Senate Rule states:}

On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto.

\textit{Id.}

\footnote{\textit{See}, e.g., Sandra Beth Zellmer, \textit{Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis}, 21 HARV. ENVTL. L. REV. 457, 486-89 (1997) (listing examples of appropriations riders changing environmental policies, including a rider to the appropriations bill for the Department of Defense halting the listing of species as endangered under the Endangered Species Act and a rider exempting the Trans-Alaska oil pipeline from requirements in the National Environmental Policy Act).}

In recent years, Congress has increasingly breached this supposed dividing line between policymaking and fiscal allocations.\footnote{See, e.g., Sandra Beth Zellmer, \textit{Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis}, 21 HARV. ENVTL. L. REV. 457, 486-89 (1997) (listing examples of appropriations riders changing environmental policies, including a rider to the appropriations bill for the Department of Defense halting the listing of species as endangered under the Endangered Species Act and a rider exempting the Trans-Alaska oil pipeline from requirements in the National Environmental Policy Act).} Instead of waiting for a proposal, particularly a controversial proposal, to be vetted before standing committees in both the Senate and the House and during floor debates in each chamber of Congress, members of Congress simply insert it into an appropriations bill. This practice enhances the likelihood both that the proposal will be enacted and that it will be enacted without any significant revisions. By bypassing the standing committees, the proponent of the legislation can avoid the kind of in-depth scrutiny that might reveal problems in the proposed law, such as flawed premises or an imbalance among competing considerations. Additionally, the need, sometimes urgent, for funds to be disbursed through appropriations legislation thwarts careful review of
the fine-print of these often mammoth bills, making it less likely that Congress will sift out ill-advised substantive amendments.234

But is this circumvention by Congress of its own rules a proper concern of the courts? The answer, in a word, is yes.

The end result of this circumvention of processes designed to promote deliberative decision making is a greater likelihood that laws will contain gaps, ambiguities, and conflicting provisions unrecognized by Congress. These gaps, ambiguities, and conflicts will, in turn, provoke litigation that will place the responsibility of filling in these gaps and resolving these ambiguities and conflicts on the courts.

This burden-shifting has increased the courts' workload as courts have labored to discern the meaning and scope of poorly drafted statutes. But the repercussions of Congress's failure to follow its own rules go well beyond the distribution of work between the legislative and judicial branches of the government. For what is ultimately at stake here is not the distribution of workloads between the two branches, but the distribution of power.

As is true with all products of human endeavor, statutes, particularly statutes on complex subjects, will rarely, if ever, be drafted with perfection. It is virtually impossible to anticipate and provide an answer to every question that will be raised regarding a statute's meaning and scope. But to the extent that Congress follows procedures designed to promote deliberative decision making, statutes will be more clearly drafted and less likely to contain as many of the gaps and inconsistent provisions that provoke litigation. Conversely, to the extent that Congress permits these procedures to be skirted, power will shift to the courts as the courts resolve questions that Congress, under its procedures, should have resolved.

What the courts therefore need to do is to adopt a more clearly defined differential approach to the construction of substantive statutes that have been woven into appropriations bills. The Supreme Court has already said that the rule that courts should not readily find that Congress, by enacting one statute, has implicitly repealed another statute applies with special force to appropriations bills.235 Yet in determining whether a provision in an appropriations bill has effected a change in the substantive law, the Supreme Court has shown itself

234 See infra text accompanying notes 244-48 for a discussion of the federal budgetary crisis that spurred the enactment of the omnibus appropriations bill into which Congress inserted the PLRA.

willing to dig deeply below the surface of the provision in the appropriations bill in an attempt to ascertain its meaning.\textsuperscript{236}

The courts can, however, and indeed should, adopt a different approach when construing substantive statutes embedded in appropriations bills. If it is evident from the statute's "plain meaning" that the substantive provision changes the law, then the courts should, of course, give effect to that change. But if the statute's meaning is not evident, the court should not engage in a kind of Holy Grail search for what, in the appropriations context, is so often a mythical congressional intent. Instead, the courts should confine the statute's application to the situations to which it clearly applies and those only. If Congress wanted or wants the statute to have a broader scope, then Congress can enact a statute clarifying its intent.

Precedent supports this kind of approach to court adjudication—refusing to resolve an issue by parsing together bits and pieces of information from extraneous sources. In \textit{Miranda v. Arizona},\textsuperscript{237} the Supreme Court held that police officers must generally administer a set of four warnings to a suspect before subjecting that individual to custodial interrogation. The suspect must be apprised that he has the right to remain silent, that anything he says can and will be used against him in court, that he has a right to have an attorney with him while he is being questioned, and that if he cannot afford an attorney, one will be appointed to represent him before he is interrogated.\textsuperscript{238} The Court underscored in \textit{Miranda} that in order for statements obtained during custodial interrogation to be admissible in evidence, a prosecutor must generally adduce proof that the warnings were administered to a suspect and that the suspect validly waived his or her rights under \textit{Miranda} before the custodial interrogation commenced.\textsuperscript{239}

The Supreme Court, however, treated the consequences of failing to administer the fourth warning—the warning of a right, in certain circumstances, to appointed counsel—somewhat differently. If the suspect had an attorney or clearly had the funds to hire an attorney, the failure to administer this warning would not be fatal to the confession's admissibility.\textsuperscript{240} The Court forewarned police, though, that if there was "any doubt" regarding whether a suspect had the financial resources to pay for an attorney, the courts would not delve

\begin{itemize}
\item \textsuperscript{236} E.g., \textit{Tenn. Valley Auth.}, 437 U.S. at 189-93 (examining the legislative history of an appropriations measure to determine whether it exempted a dam from the requirements of the Endangered Species Act).
\item \textsuperscript{237} 384 U.S. 436 (1966).
\item \textsuperscript{238} Id. at 479.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id. at 473 n.43.
\end{itemize}
into the matter further.\textsuperscript{241} If the police had not given the suspect the fourth warning, the suspect's statements would be suppressed even if a further inquiry by the court would have revealed that the suspect, in fact, had the financial resources to procure an attorney at the time of the interrogation.

Similar to the approach followed when determining whether the fourth warning requirement of \textit{Miranda} has been met, courts can limit the scope of the inquiry they undertake when divining the meaning of substantive statutes incorporated into appropriations bills. The varying precedential effect the Supreme Court gives its own decisions also provides arguable support for applying different rules when construing riders inserted into appropriations bills. When an issue has been fully briefed and argued before the Supreme Court, the Court's ruling on that issue is a precedent to which the courts, including the Supreme Court, are bound, unless the Court later overrules its decision. But if the Supreme Court renders a decision without full briefing and argument, it considers itself less obligated to treat that decision as a binding precedent.\textsuperscript{242} And if a statement in a Court opinion is \textit{dictum}, not pertinent to the resolution of the issue before the Court, the statement has no precedential effect.\textsuperscript{243}

The distinction between the Supreme Court's calibrated approach to judicial construction of its own opinions and a calibrated approach to judicial construction of statutes is that courts are bound by the laws enacted by Congress, whether embodied in an appropriations bill or enacted as a freestanding bill. In this sense, it is not the prerogative of the courts to refuse to give effect to a statute whose meaning is clear or to give the statute limited effect simply because the procedures which led to its enactment were irregular or flawed.

But if a statute's meaning is not clear and the statute was enacted as part of an appropriations measure, thereby thwarting the kind of in-depth review through which the statute's meaning might have been clarified by Congress, a court has two choices. The court can embark on an analysis of the statute's legislative history, its purposes, its relationship to other statutory provisions, and other indicia of legislative intent in an attempt to determine what the statute means and its intended scope. The end result of this inquiry may be that the court is actually able to deduce what Congress's intent was when enacting the particular statutory provision. When interpreting vague or ambiguous statutes slipped into appropriations bills, though, the more likely result is that the court will end up guessing what Congress would have

\textsuperscript{241} Id.
\textsuperscript{242} See, \textit{e.g.}, Hohn v. United States, 524 U.S. 236, 251 (1998).
\textsuperscript{243} \textit{E.g.}, Maryland v. Wilson, 519 U.S. 408, 412-13 (1997); Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 592 n.5 (1993).
wanted to do had it taken the time to consider the issue before the court. In making this determination, the distinct likelihood exists that a court's prediction of what Congress would have done will be heavily influenced by the court's own opinions about what should have been done.

Alternatively, the court faced with questions regarding the meaning of a substantive provision inserted in an appropriations bill can, as courts do in the Miranda context, place limits on the depth of its judicial inquiry. By limiting the application of the appropriations rider to the situations to which it clearly applies, the court will, in effect, be remitting to Congress the legislative responsibility of resolving the policy questions that Congress skirted because of the provision's insertion into an appropriations bill. Not only would this form of judicial restraint be more in keeping with the division of labor and power between the judicial and legislative branches of the government, but it would promote deliberative congressional decision making by providing Congress with an incentive, when enacting laws, to follow the procedures it has devised to foster such deliberation.

C. Recommendations for Congress

This study has pointed to two problems that need to be addressed by Congress. The first relates to the way Congress currently functions, or rather, at times, malfunctions. The second relates to one particular product of nondeliberative lawmaking—the Prison Litigation Reform Act.

1. Recommendation: Congress should revamp its procedures to promote deliberative decision making and to limit judicial involvement in, and resolution of, policy disputes that Congress should resolve.

As mentioned earlier, the PLRA was attached as a rider to an omnibus appropriations bill.\textsuperscript{244} This bill was the byproduct of Congress's failure in 1995 to enact eight of the thirteen annual appropriations bills funding federal agencies.\textsuperscript{245} This failure was largely attributable to the inclusion of riders in those bills concerning such controversial issues as abortion, environmental regulation, and prisoner litigation.\textsuperscript{246}

Congress's failure to enact these appropriations bills led to a budgetary crisis and two government shutdowns, for a week in Novem-

\textsuperscript{244} Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No 104-134, 110 Stat. 1321; see also supra note 11 and accompanying text (discussing the legislative history of PLRA).

\textsuperscript{245} Zellner, supra note 233, at 507-09.

\textsuperscript{246} Id. at 508-09.
ber of 1995 and twenty-one days during December and January.\textsuperscript{247} Congress then used stopgap measures—"mini" continuing resolutions—to fund the government until the omnibus appropriations bill was finally enacted in April of 1996.\textsuperscript{248} Buried in the fine print of that bill was the PLRA.

Some members of Congress decried Congress's cryptic review of the provisions of the PLRA.\textsuperscript{249} But the way in which the PLRA was moved through, or in these critics' opinions, rammed through, Congress is not atypical.

This circumvention of existing procedures designed to promote deliberative decision making comes at great cost. First, the failure to thoroughly review legislative proposals leads to mistakes—to the making of policy choices based on a lack of relevant information or even misinformation.

Second, the incomplete, and sometimes cursory, review of legislative proposals leads to the enactment of poorly drafted laws—laws filled with gaps, inconsistencies, and ambiguities.\textsuperscript{250} This leads to a third problem to which this Article has already alluded: the need for judicial intervention to fill in these gaps, reconcile inconsistent statutory provisions, and decipher the meaning of ambiguous laws. This

\begin{itemize}
\item \textsuperscript{247} Id. at 508 n.289.
\item \textsuperscript{248} Id. at 509.
\item \textsuperscript{249} E.g., 142 CONG. REC. S2296 (1996) (statement of Sen. Kennedy), \textit{reprinted in} 1 REAMS & MANZ, supra note 11, at Doc. No. 23. Senator Kennedy stated:

\begin{quote}
Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.
\end{quote}

\textit{Id.; see also id. at S2297 (statement of Sen. Simon), \textit{reprinted in} 1 REAMS & MANZ, supra note 11, at Doc. No. 23} ("I am very encouraged that this legislation was considered as one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill."); 141 CONG. REC. H14,098 (1995) (statement of Rep. Mollohan), \textit{reprinted in} 1 REAMS & MANZ, supra note 11, at Doc. No. 18. Representative Mollohan stated:

\begin{quote}
The issues raised by these three legislative proposals are in the jurisdiction of the Committee on the Judiciary. These items include a major legislative rewrite of the Truth in Sentencing initiative grants, prison litigation reform and Legal Services Corporation. All these provisions amend current law and have impacts that are not clearly defined, despite the claims of the Committee on the Judiciary. The reasons they have ended up in this appropriations bill are unclear to me, because as far as I know, we still have a Committee on the Judiciary with an especially competent chairman and ranking member, and I see no reason why an appropriations bill should contain such extensive authorizing language.
\end{quote}

\textit{Id.}

\item \textsuperscript{250} For examples of just some of the many questions concerning the PLRA with which the courts have wrestled and on many of which they are divided, see \textit{infra} text accompanying notes 259-68.
\end{itemize}
intervention is costly in terms of the drain on judicial resources. It is also inefficient since it requires multiple courts to struggle to resolve issues—often inconsistently—that Congress, with a degree of forethought, could have anticipated and resolved.

A fourth, and related, problem that ensues from the effectual transfer to the courts of the responsibility of resolving questions that Congress, in the first instance, should have resolved is that it decreases legislative accountability. By leaving the resolution of sometimes controversial issues to the courts, members of Congress can avoid being held responsible for unpopular decisions. Additionally, by acquiescing to the insertion of substantive laws into appropriations bills, members of Congress can avoid having to take a specific stand on an issue for which they might later be held politically accountable.

Finally, the skirting of procedures designed to promote deliberative decision making is divisive. Following procedures through which differing viewpoints can be fully aired is more likely to foster the consensus-building through which legislative proposals are refined. By contrast, the perception that legislative proposals are being railroaded through Congress produces fractiousness and impedes the dialogue—both between members of Congress themselves and between members of Congress and key constituency groups—that can facilitate the making and implementation of sound policy choices. In addition, to the extent that members of Congress and others feel excluded from crafting and enacting legislative proposals, they may opt to process their own proposals through Congress in a way that generally insulates them from in-depth scrutiny and, in turn, promotes even greater divisions within Congress.

It is not within the purpose or scope of this Article to propose exactly how Congress should refine its procedures to promote deliberative decision making. Suggestions to improve the functioning of Congress should be canvassed, and the soundness of these and other ideas need to be examined in great depth. But clearly, as is evident from the circumstances surrounding the PLRA's enactment, a priority area upon which Congress should focus its attention is the process through which substantive laws are inserted into, and enacted as part of, appropriations bills.

2. Recommendation: Congress should authorize a broad-based task force to collect relevant facts about inmate litigation and litigation alternatives and to assess the effects of the Prison Litigation Reform Act. Congress should also direct the task force to develop recommendations regarding appropriate steps that Congress, other branches of the federal government, and state and local governments should take, including possible revisions to the PLRA, to limit the burdens of inmate litigation in ways that rectify problems in correctional
operations and ensure that inmates' legal rights are protected and enforced.

This recommendation is basically a recommendation that Congress do what it should have done back in 1996—collect the facts regarding inmate litigation before developing policy responses to that litigation. And because Congress has, through its enactment of the PLRA, already enacted a series of policy responses to inmate litigation, this recommendation also calls on Congress to initiate an assessment of the effects of the PLRA and of the need, if any, to revise or supplement the PLRA.

Some of the questions that should be addressed during this assessment process include the following:

1. To what extent, both before the PLRA was enacted and afterwards, have cases contesting conditions of confinement in correctional facilities led to the release of inmates from adult and juvenile correctional facilities? The PLRA's restrictions on the issuance of prisoner-release orders were enacted based on the assertions of witnesses, during congressional hearings, that lawsuits challenging the constitutionality of conditions in correctional facilities had led to the widespread release of dangerous inmates into the community.\(^\text{251}\) This study would assess the verity of these assertions and the impact the PLRA has had on the release of inmates in order to bring facilities into compliance with legal requirements.

2. How long has it taken to implement remedial orders granting prospective relief in cases involving the conditions of confinement in adult and juvenile correctional facilities, and what are the reasons for any delay in the implementation of those orders? The sections of the PLRA providing for the termination of prospective relief were grounded on the assumption that correctional facilities operate under court order for prolonged periods of time because of judicial aggrandizement—because judges are eager to exercise power over correctional operations and are unwilling to relinquish control of correctional facilities to state and local officials when appropriate to do so.\(^\text{252}\) This study would ascertain the extent to which, if at all, there are facts supporting this assumption.\(^\text{253}\) The study would also

\(^{251}\) See, e.g., PLRA House Hearings, supra note 12, at 260 (statement of Lynne Abraham, District Attorney, Philadelphia, Pennsylvania) (testifying that over one hundred people have been murdered in Philadelphia by inmates released because of a prison population cap).

\(^{252}\) See, e.g., 141 Cong. Rec. S14,419 (statement of Sen. Abraham), reprinted in 1 REAMS & MANZ, supra note 11, at Doc. No. 15 (expressing one senator's hope that the PLRA’s termination provisions would help end the administration of prisons by judges eager to intervene in the “minuia of prison operations”).

\(^{253}\) Two facts to be considered when assessing the causes for lengthy court oversight of correctional facilities are whether and when the defendants, in cases in which correctional
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determine the extent to which, if at all, delays in vacating court judg-
ments in conditions-of-confinement cases are attributable to other
causes.254

3. To what extent do there exist effective, alternative means,
other than litigation, of ensuring that conditions of confinement in
adult and juvenile correctional facilities are constitutional? Are there
additional alternatives that could be adopted, or refinements that
could be made in existing alternatives, to achieve this objective?

4. What are the trend data regarding the filing of conditions-of-
confinement cases by state and local inmates, both in terms of the
number of such lawsuits and the rate at which they have been filed?
To what extent did increases in the number of lawsuits filed before
the PLRA was enacted correspond with increases in the size of the
inmate population in jails and prisons? And to what extent do the
trend data for filings by federal prisoners differ from the trend data
for filings by state and local inmates and why?

As the PLRA and its precursors moved through Congress, a few
members of Congress and several witnesses testified before congres-
sional committees that there had been an “explosion” in the number
of conditions-of-confinement cases filed by prisoners.255 The study
would determine whether these statements accurately depicted the lit-
gation trends.256 More importantly, the answers to the questions set
forth above would unveil some of the basic facts about inmate litiga-

facilities are operating under a court order, have filed a motion to terminate the court's
supervision or a motion to vacate the court's judgment.

254 For a contrasting view regarding the source of the problem, at least in one particu-
lar case, see Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991). The court there noted:

The history of this case shows a consistent and persistent pattern of obfusca-
tion, hyper-technical objections, delay, and litigation by exhaustion on the
part of the defendants to avoid compliance with the letter and the spirit of
the district court's orders. The plaintiff class has struggled for eleven years
to achieve the simple objectives of equal protection under the law gener-
ally, and equality of opportunity specifically.

Id. at 715.

255 See, e.g., 141 CONG. REC. S7524 (statement of Sen. Dole), reprinted in 1 REAMS &
MANZ, supra note 11, at Doc. No. 7 (“Over the past two decades, we have witnessed an
alarming explosion in the number of lawsuits filed by State and Federal prisoners.”).

256 There is preliminary evidence suggesting that these statements of purported facts
were incomplete at best and erroneous at worst. For example, between 1980 and 1995, the
year before the PLRA's enactment, the number of civil rights suits filed by state and local
inmates increased 227%, climbing from 12,397 in 1980 to 40,569 in 1995. ADMIN. OFFICE
OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 145 tbl.C3 (1995);
ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFER-
ENCE OF THE UNITED STATES 232 tbl.21 (1980). During that same time period, however, the
number of state prisoners alone increased by 197%. Christopher J. Mumola & Allen J.
Beck, PRISONERS IN 1996, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washing-
ton, D.C.), June 1997, at 3 tbl.3; PRISONERS IN 1981, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of
tion needed by Congress to assess the soundness of policy measures enacted, or to be enacted, in response to inmate litigation.

5. To what extent has the dismissal of prisoners' claims for legal frivolousness changed since the PLRA's enactment? To what extent are prisoners claims, including legally frivolous claims, substantively frivolous? In other words, to what extent do they involve no issues or arguable problems that correctional officials should address? And to what extent do the claims brought by prisoners proceeding pro se differ from the pro se claims of nonprisoners in terms of the percent dismissed for frivolousness and failure to state a claim for which relief can be granted and the percent on which the plaintiffs ultimately prevail?

The PLRA was enacted, in part, to address what its proponents described as a burgeoning problem of prisoners' frivolous claims inundating courts. The answer to the first question set forth above will determine whether that claim was exaggerated and reveal the impact the PLRA has had on the rate at which prisoners file frivolous claims. The answer to the second question will help to clarify whether correctional officials need to adopt additional problem-solving mechanisms to avert the filing of lawsuits challenging correctional operations or conditions. And the answer to the third question will lend perspective to policymakers as they assess the extent to which the processing of prisoners' civil rights claims by courts should differ from the processing of nonprisoners' claims.

6. To what extent are inmates with meritorious legal claims able to obtain redress for the violation of their federal rights? What are the obstacles that impede inmates with meritorious claims from obtaining such redress, and what are the comparative costs and benefits of removing those obstacles?

The discussions of inmate litigation that preceded the PLRA's enactment were clearly one-sided, centering on the problems that were allegedly caused by that litigation and what could be done to alleviate those problems. A more balanced review of the subject would include, first, an analysis to determine the extent to which these problems—for example, of judicial micromanagement—do indeed exist. But a thorough analysis of the subject of inmate litigation would not be confined to an assessment of the burdens stemming from that

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257 See, e.g., 141 Cong. Rec. S18,136 (1995) (statement of Sen. Hatch), reprinted in 1 Reams & Manz, supra note 11, at Doc. No. 20 ("This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits."); PLRA House Hearings, supra note 12, at 208 (statement of Robert H. Macy, District Attorney, Oklahoma City, Oklahoma) ("Countless thousands of frivolous claims are filed in both State and Federal court by parties [prisoners] who are motivated by anger or greed and have nothing to lose."); PLRA Senate Hearing, supra note 12, at 3 (statement of Sen. Hatch) ("Frivolous prisoner lawsuits are reaching crisis proportions.").
litigation. A comprehensive analysis would also examine the extent to which the principal purpose of litigation—the remedying of the harm caused by illegal conduct—is achieved in prisoners' civil-rights litigation, the impediments to the realization of that purpose, and cost-effective steps that can be taken to ensure that in sifting out the "chaff" of inmates' claims, courts do not sift out the "wheat" as well.

7. What issues have the courts confronted regarding the PLRA's meaning, scope, and constitutionality? How have these issues been resolved, and on what issues are the courts divided?

It is ironic that the PLRA, an Act purportedly designed to curb the burdens of inmate litigation, has itself spawned so much litigation. Perhaps because of the haste with which the PLRA was enacted, courts have been confronted with numerous questions regarding the Act's meaning and scope. In addition, a number of constitutional challenges have been asserted against various PLRA provisions.253

Just a few examples of the many statutory questions with which the courts have wrestled, and frequently disagreed about, include: Who has the burden of proving whether an inmate has or has not exhausted administrative remedies?2 How does the exhaustion requirement apply to inmates who missed the deadline for filing a grievance?260 Under what circumstances, if any, can prisoners file conditions-of-confinement lawsuits when correctional officials have

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253 Constitutional challenges have been mounted against the PLRA's filing-fee requirements, see, e.g., Tucker v. Branker, 142 F.3d 1294 (D.C. Cir. 1998), its three-strikes provision, see, e.g., Rodriguez v. Cook, 169 F.3d 1176 (9th Cir. 1999), its screening provisions, see, e.g., Christiansen v. Clarke, 147 F.3d 655 (8th Cir. 1998), its physical-injury requirement, see, e.g., Davis v. District of Columbia, 158 F.3d 1342 (D.C. Cir. 1999), its termination provision, see, e.g., Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999), cert. denied, 120 S. Ct. 72 (1999), its automatic-stay provision, see, e.g., Miller v. French, 120 S. Ct. 2246 (2000); and its restrictions on attorney's fees, see, e.g., Madrid v. Gomez, 190 F.3d 990 (9th Cir. 1999).

259 Thus far, the courts have answered this question in three ways. The Sixth Circuit Court of Appeals has held that the prisoner-plaintiff has the burden of alleging and proving that he or she exhausted available administrative remedies. Brown v. Toombs, 1998 FED App. 0092P, 139 F.3d 1102, 1104 (6th Cir. 1998). The Courts of Appeals from the Fifth and Tenth Circuits have held that whether or not a prisoner has exhausted administrative remedies is determined on the pleadings without proof; in other words, the plaintiff need only adequately allege exhaustion. Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998); Basham v. Uphoff, No. 98-8013, 1998 WL 847689, at *4 (10th Cir. Dec. 8, 1998) (table opinion, full text available on Westlaw). Finally, the Second and Seventh Circuits have held that the defendants have the burden of pleading and proving a prisoner's failure to exhaust. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999); Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999).

260 Several courts have dismissed a claim for failure to exhaust even though the time for filing a grievance had expired. E.g., Lee v. O'Brien, No. 98-3868, 2000 WL 353141, at *1 (7th Cir. Mar. 22, 2000) (table opinion, full text available at Westlaw); Hartsfield v. Vidor, 1999 FED App. 0406P, 199 F.3d 305, 308-09 (6th Cir. 1999).
delayed the processing of their grievances. Once the money in a prisoner’s trust-fund account exceeds ten dollars, can the sum due from a prior month for the filing fee be withdrawn even if the withdrawal brings the amount in the account below ten dollars? How, if at all, do the filing-fee requirements apply to released prisoners? If a prisoner files a notice of appeal and an application to proceed \textit{in forma pauperis} and that application is denied, must the full filing fee be paid if the prisoner does not pursue the appeal? Can a prisoner be afforded an opportunity to amend his or her complaint before it is dismissed \textit{sua sponte} for failure to state a claim upon which relief can be granted? Does the physical-injury requirement bar lawsuits for compensatory damages in which prisoners allege a violation of their First Amendment or procedural due process rights? Does the physical-injury requirement apply to claims for punitive damages? And should the maximum hourly rate used when computing the attorney’s fees to be awarded prevailing prisoner-plaintiffs in conditions-of-confinement cases be based on the compensation rate authorized by the

\footnote{261} The Fifth Circuit Court of Appeals has held that administrative remedies are exhausted once the time limits prescribed by regulations for the prison’s response have expired. Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998).

\footnote{262} The Fifth and Sixth Circuits have answered this question in the affirmative. Johnson v. McNeil, 217 F.3d 298, 302 (5th Cir. 2000); McGore v. Wrigglesworth, 1997 FED App. 0177P, 114 F.3d 601, 606-07 (6th Cir. 1997).

\footnote{263} Some courts have held that when an indigent prisoner files an appeal shortly before being released from prison, the former prisoner must pay the initial partial filing fee. \textit{E.g.}, Gay v. Tex. Dep’t of Corr. State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997); \textit{In re Smith}, 114 F.3d 1247, 1251 (D.C. Cir. 1997); Robbins v. Switzer, 104 F.3d 895, 898 (7th Cir. 1997). Other courts have held that the PLRA’s prepayment requirements do not apply to released prisoners. \textit{E.g.}, McGore, 114 F.3d at 612-13; McGann v. Comm’r, Soc. Sec. Admin. 96 F.3d 28, 30 (2d Cir. 1999).

\footnote{264} The courts are divided on this question. Some courts have held that the prisoner must pay the full fee in these circumstances. \textit{E.g.}, Henderson v. Norris, 129 F.3d 481, 484 (8th Cir. 1997); Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997); Leonard v. Lacy, 88 F.3d 181, 186 (2d Cir. 1996). Other courts disagree. \textit{E.g.}, Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999).

\footnote{265} Most courts have held that a prisoner must generally be afforded the opportunity to amend unless the deficiency in the complaint cannot possibly be cured. \textit{E.g.}, Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000); Lopez v. Smith, 203 F.3d 1122, 1127-30 (9th Cir. 2000); Gomez v. USAF Fed. Sav. Bank, 171 F.3d 794, 795-96 (2d Cir. 1999); Perkins v. Kan. Dep’t of Corr., 165 F.3d 809, 806 (10th Cir. 1999); Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998); Bazrowski v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998). \textit{But see McGore}, 114 F.3d at 612 (concluding that a court must dismiss the complaint without affording the prisoner the opportunity to amend it).

\footnote{266} Some courts have held that the physical-injury requirement does not apply to such claims. \textit{E.g.}, Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998). \textit{But see Harris v. Garner}, 216 F.3d 970, 985 (11th Cir. 2000) ("The clear and broad statutory language does not permit us to except any type of claims, including constitutional claims.").

Judicial Conference under the Criminal Justice Act (CJA) or the lower rate at which Congress has been appropriating funds under the CJA.\textsuperscript{268}

By examining PLRA-related litigation, a task force can identify issues on which clarification is needed from Congress. An examination of the case law triggered by the PLRA can also yield a better understanding of the PLRA's implications and help to identify how it might be refined and improved.

8. What additional steps, if any, should Congress and other branches of the federal government take to reduce the costs of inmate litigation in ways that will rectify problems underlying that litigation and ensure that inmates' legal rights are protected? In addition, what, if any, additional steps can state and local governments take to reduce inmate litigation in ways that promote proactive problem solving and enforce the legal rights of prisoners?

The obvious point here is that the study of inmate litigation and the PLRA's effects should culminate in a set of recommendations upon which congressional hearings should then focus. Because a study would adduce many facts that should have been collected and considered before enacting a piece of legislation as far-ranging as the PLRA, it is possible that some of these recommendations would call for revisions in the PLRA itself.

\textbf{Conclusion}

If the PLRA's exhaustion requirement had no statutory predecessor, the task of deciding whether or not the requirement applies to prisoners seeking exclusively monetary relief that cannot be obtained through the grievance process would be a much easier one. The meaning of the "available" administrative "remedies" that a prisoner must exhaust would be construed against the backdrop of longstanding rules governing the exhaustion of administrative remedies. Under these rules, plaintiffs need not process a claim through an administrative tribunal if they cannot obtain the type of relief they are seeking from that tribunal. This interpretation of the exhaustion requirement, under which "administrative remedies" mean something different than "administrative grievance procedures," would also be in keeping with the different terminology found in subsections (a) and (b) of 42 U.S.C. § 1997e(a).

What muddles all of this is that § 1997e(a) modified an existing exhaustion provision, one that outlined certain requirements that prison grievance procedures had to meet before a court could require

a prisoner to pursue a claim through the grievance process. The question raised by those modifications is whether the deletion of the statutory predicates to exhaustion—including the requirement that the grievance process be found by the Department of Justice or a court to meet certain statutory requirements or to be otherwise "fair and effective"—means that a prisoner can be required to exhaust administrative remedies even when those remedies cannot repair or avert the harm of which the inmate complains. In other words, did this change in the statute's wording effectively abolish, in the prison context, the longstanding "futility exception" to exhaustion requirements?

If that question is answered in the affirmative, the repercussions of that modification in the law go far beyond the specific question addressed in this Article: whether a prisoner who is seeking exclusively monetary relief and cannot obtain such relief through the grievance process must process the claim for damages through the grievance process. For there are other instances when processing a claim through the grievance process would be futile or the remedies available to the prisoner palpably inadequate under the circumstances. For example, in some emergency situations, a prisoner might face an imminent threat of death or serious bodily harm that will come to fruition without immediate court intervention. If the deletion of the reference to "plain, speedy, and effective" remedies and the other changes in the exhaustion provision wrought by the PLRA are changes of substantive, rather than procedural, significance, then it is arguable that even the prisoner facing immediate peril that will cause irreparable harm is subject to the exhaustion requirement.269

The question whether prisoners seeking monetary relief only must pursue their claims through grievance procedures that do not afford such relief is one with which the courts will continue to grapple until the Supreme Court or Congress provides a definitive answer. However this question is ultimately resolved, the filing of prisoners' lawsuits for damages will continue unabated, although the filing date may be deferred because of the application of the exhaustion requirement. Until correctional officials revamp their grievance procedures to enable prisoners to recover monetary relief without having to file a lawsuit, the grievance process will, for many prisoners, simply be one more pit stop on the way to the courthouse door. And unless correc-

national officials also incorporate proactive problem-solving mechanisms into the grievance process, they will have to continue to process grievances and defend against lawsuits stemming from problems in correctional operations that they could have, but failed to, resolve.

The larger problem with the PLRA, though, is the lack of forethought with which it was enacted. This Article has addressed this problem by recommending that Congress examine the facts about inmate litigation and determine whether, based on those facts, the PLRA should be revised. More fundamentally, this Article calls on Congress to study and modify its procedures so that legislative proposals are, in the future, scrutinized with the care needed to ensure that statutes are clear, have minimal gaps, and embody sound and fact-based policy decisions.

Courts frustrated with trying to interpret the PLRA have lashed out at Congress for what the judges clearly consider Congress's shoddy work in drafting the statute. The Sixth Circuit Court of Appeals has noted: "When Congress penned the Prison Litigation Reform Act of 1995, . . . the watchdog must have been dead." Another court has castigated Congress for its "terrible blunders in legislative drafting." But the views of Judge Evans from the Seventh Circuit Court of Appeals perhaps best reflect what is becoming increasingly evident about the Prison Litigation Reform Act: "I always thought the PLRA was supposed to make the handling of prisoner litigation more efficient. If that’s its goal, and this sort of thing is its result, Congress should go back to the drawing board." Soon.

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270 McGore, 114 F.3d at 603 (citation omitted). In McGore, the court of appeals explained the genesis for this observation: "The statute contains typographical errors, creates conflicts with the Rules of Appellate Procedure, and is internally inconsistent. Moreover, the year in its name, 1995, does not correspond to the date of its enactment, 1996. We have even issued an unprecedented administrative order in an attempt to organize the chaos." Id. (citations omitted).


272 Hyche v. Christensen, 170 F.3d 769, 771 (7th Cir. 1999) (Evans, J., concurring). In Hyche, Judge Evans also observed: "I'd say that when an experienced district judge . . . is reversed three times in the same case on a little point like this, something is rotten in Denmark." Id.