COMMENT

CAN $1 BUY CONSTITUTIONALITY?: THE EFFECT OF NOMINAL AND PUNITIVE DAMAGES ON THE PRISON LITIGATION REFORM ACT'S PHYSICAL INJURY REQUIREMENT

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INTRODUCTION

The Supreme Court in Carey v. Piphus declared that the fundamental purpose of a civil rights award is to compensate individuals for injuries caused by the deprivation of their constitutional rights.1 While a court declaration that one's constitutional rights have been violated is valuable in and of itself, it is the existence of these remedies that is the crucial tool in protecting individuals from being injured permanently2 and that serves as a strong deterrent against future action.3 Because compensatory damages are such a powerful tool, plaintiffs are required to demonstrate that a defendant's actions not only deprived them of their constitutional rights, but also caused an "actual injury,"4 including impairment of reputation, personal humiliation, mental anguish, or physical injury.5

Prior to 1996, prisoners were capable of recovering compensatory damages for those constitutional deprivations at the hands of prison

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2 See id. at 254 ("Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests . . .").
3 See id. at 256-57 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.").
4 See id. at 255 (requiring plaintiffs to prove that the action both violated their constitutional rights and caused a compensable injury).
officials that caused actual injuries. Although a prisoner's civil rights were certainly diminished by the exigencies of incarceration, an individual, upon becoming a prisoner, was not "wholly stripped of constitutional protections." However, the passing of the Prison Litigation Reform Act ("PLRA") in 1996 changed this structure, significantly curtailing prisoners' abilities to bring lawsuits and to remedy violations of their constitutional rights.

The PLRA contains a number of provisions that each make it substantially more difficult for prisoners to utilize the judicial system. While several of these have been criticized for stripping prisoners' rights, the most controversial and most heavily litigated section has been the PLRA's ban on actions for mental or emotional injury in the absence of physical injury. Codified at 42 U.S.C. § 1997e(e), the provision has worked to bar such constitutional claims as violations of free exercise of religion, racial discrimination, and invasion of privacy, regardless of whether the prisoner suffered an actual injury. To counteract this drastic effect, many courts have held that § 1997e(e) precludes only compensatory damages, leaving open the possibility of awarding nominal or punitive damages.

This Comment argues that despite the potential for alternative relief in the form of nominal or punitive damages, § 1997e(e) is unconstitutional as violating the Fifth Amendment's Equal Protection Clause. First, due to the high standard for punitive damages and the requirement in some courts that the prisoner specifically plead nominal damages, prisoners are rarely awarded this alternative relief. Since an award of nominal damages under § 1997e(e) works in conjunction with the limitation on attorneys' fees, indigent prisoners

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7 See infra notes 33–36 and accompanying text.
9 See, e.g., Searles v. Van Bebber, 251 F.3d 869, 876–77 (10th Cir. 2001) (barring claim for compensatory damages for infringement of First Amendment right to free exercise of religion, because the complainant sought mental or emotional injury without a showing of physical injury); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (denying recovery of compensatory damages for alleged infringement of First Amendment rights where appellant could not show actual physical injury).
10 See, e.g., Todd v. Graves, 217 F. Supp. 2d 958, 961 (S.D. Iowa 2002) (barring claim for compensatory damages for emotional or mental injuries arising out of an alleged Fourteenth Amendment violation).
11 See, e.g., Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (precluding recovery on claim alleging violation of right to privacy where there was no proof of prior physical injury).
12 See infra Part I.D for an analysis of the availability of alternative damages.
have lost their best mechanism for being able to proceed with the assistance of counsel. Finally, in taking away compensatory damages for non-physical injuries, Congress has significantly changed the constitutional tort remedies structure as set forth by Carey and its progeny, thus creating an irreparable hole in civil rights law.

Part I of this Comment provides a background on prisoner civil rights and the Prison Litigation Reform Act, and examines the various circuits' interpretations of the mental/emotional damages provision and the availability of nominal and punitive damages. Part II discusses the tendency of lower courts to engage in constitutional avoidance as a method of circumventing constitutional scrutiny of § 1997e(e) while ensuring that a judicial forum remains open to adjudicate egregious constitutional violations. Part III discusses the constitutional deficiencies of § 1997e(e), arguing that the PLRA violates the Equal Protection Clause of the Fifth Amendment. Part IV argues that the availability of nominal and punitive damages does not cure the unconstitutionality of § 1997e(e). Finally, Part V maintains that § 1997e(e) must be struck down as unconstitutional, but that Congress's purpose in enacting the PLRA may be accomplished through its other provisions and through reliance on the competence of federal judges to screen prisoner lawsuits for dishonest motives.

I. BACKGROUND OF PRISONER CIVIL RIGHTS SUITS

A. The Law Prior to Enactment of the PLRA

Civil rights lawsuits are commonly brought under 42 U.S.C. § 1983, which provides legal and equitable remedies against any person who "under color of any statute, ordinance, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Section 1983 does not provide a source of substantive rights, but is instead a mechanism under which one can assert federal rights granted by the Constitution

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15 See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). While the Fifth Amendment does not expressly contain an equal protection clause, the Supreme Court has held that it forbids discrimination that is "so unjustifiable as to be violative of due process" and thus provides the same equal protection as the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (quoting Schneider v. Rusk, 377 U.S. 163, 168 (1964)).

or other federal laws. Indeed, § 1983 is the primary means by which people vindicate their civil rights.

Until the late 1960s, it was unclear whether prisoners retained any constitutional rights upon incarceration. Federal courts adopted a "hands off" policy with regard to prisoner civil rights lawsuits and consistently deferred to the authority of prison administrators. However, in Cooper v. Pate, the Supreme Court changed course and allowed a prisoner to bring a § 1983 action for infringement of his constitutional rights. In Wolff v. McDonnell, the Court held that although incarceration necessarily causes citizens to lose many rights and privileges, a prisoner is not wholly stripped of all constitutional protection:

There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. They retain right of access to the courts. Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.

Despite this willingness to become involved in cases of fundamental constitutional violations, the Court has made clear that in most cases prisoners do not retain the same level of protection as ordinary citizens. To balance the concern for protecting prisoners' fundamental rights with the need for deference to prison administration

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15 See Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) ("It is for violations of such constitutional and statutory rights that 42 U.S.C. § 1983 authorizes redress; that section is . . . a method for vindicating federal rights elsewhere conferred . . . .").

16 See, e.g., JOHN C. JEFFRIES ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 42 (2000) (finding that since Monroe v. Pape, 365 U.S. 167 (1961), in which the Court vindicated the use of § 1983 as a mechanism for enforcing one's constitutional rights, the number of suits brought under § 1983 jumped from 300 in the year of Monroe, to more than 43,000 suits in 1998).

17 See MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 1:02, at 7 (2d ed. 1993) ("[D]uring most of the history of this country, there was some question as to whether prisoners had any constitutional rights at all. . . . The so-called hands-off doctrine precluded judges from ever reaching the question of what rights survived incarceration.").

18 See Gilmore v. California, 220 F.3d 987, 991 (9th Cir. 2000) ("Although asked to intervene on behalf of prisoners, federal courts systematically declined under the so-called 'hands off doctrine,' a rule of judicial quiescence derived from federalism and separation of powers concerns."); see also James E. Robertson, Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis, 37 HARV. J. ON LEGIS. 105, 108-09 (2000) (describing the justifications advanced by the courts for the doctrine, including the "lack of expertise in penal administration; the potential for undermining the authority of correctional staff; the fear of triggering a flood of inmate lawsuits; and adherence to the principles of federalism").


and institutional security, courts apply a form of intermediate review to constitutional challenges by prisoners. A prison regulation that infringes on a prisoner's constitutional rights will be upheld if it is "reasonably related to legitimate penological interests."  

**B. Enactment of the Prison Litigation Reform Act**

The PLRA was enacted in response to complaints of an overwhelming number of frivolous lawsuits burdening the federal judiciary and wasting legal and financial resources. Indeed, statistics indicate a nearly ten-fold increase in prisoner civil rights lawsuits in just the four years after the Court began recognizing prisoners' rights—from 218 filings in 1966 to more than 2000 in 1970. In 1993, prisoner appeals constituted approximately 13,000 of the 32,000 civil appeals filed. This litigation "explosion" and the increasing involve-

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21 See O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."). However, the Supreme Court in Johnson v. California, 125 S. Ct. 1141 (2005), recently held that strict scrutiny continues to apply in prison cases involving racial classifications, while the lesser protection applies in all other prisoner constitutional torts suits. The Court noted that [t]he need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy.

The right not to be discriminated against based on one's race is . . . not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Id. at 1147, 1149.

22 O'Lone, 482 U.S. at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)). In O'Lone, the Court upheld a prison regulation that prevented Islamic inmates from attending weekly Friday religious services after finding that the policy was related to legitimate security and order concerns. Id. at 350-51.

23 See, e.g., Letter from Nat'l Ass'n of Attorneys Gen. to Senator Bob Dole (Sept. 19, 1995), 141 CONG. REC. S14, 417-18 (daily ed. Sept. 27, 1995) ("[T]he issue of frivolous inmate litigation has been a major priority of this Association . . . . [W]e estimate that inmate civil rights suits cost states at least $81.3 million per year. Experience . . . suggests that, while all of these cases are not frivolous, more than 95 percent of inmate civil rights suits are dismissed without the inmate receiving anything.").


26 While the raw number of prisoners filing suits was dramatically increasing, Professor Robertson claims that this "explosion" is really a half-truth: the absolute number of filings between 1980 and 1996 grew because of rapid growth in the prison population, while the rate of
ment of the judiciary in the operations of prisons led to the enactment of the PLRA as a means of addressing the growing number of what were perceived to be frivolous lawsuits.

In enacting the PLRA, Congress was overtly concerned with lawsuits involving conditions of imprisonment that were filed in response to "almost any perceived slight or inconvenience." Such suits included claims of insufficient locker space, a poor haircut given by a prison barber, being served chunky instead of creamy peanut butter, prison officials failing to invite a prisoner to a pizza party, being denied use of a Gameboy video game, and being issued Converse-brand shoes instead of Reebok or L.A. Gear. Indeed, the Senators repeatedly claimed that the PLRA would not prevent legitimate constitutional claims from being litigated and redressed.

Section 1997e(e) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional filings per 1000 inmates actually decreased seventeen percent. See Robertson, supra note 18, at 142; see also Kreimer, supra note 25, at 485 (noting that the overall rate of civil rights litigation per prisoner has remained approximately the same during the 1980s and 1990s).

See 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts.... I believe that the courts have gone too far in micro-managing our Nation's prisons."); 141 CONG. REC. S14, 317 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("[These reforms] will discourage judges from seeking to take control over our prison systems, and to micromanage them, right down to the brightness of their lights.").

According to Senator Orrin Hatch, 3.1% of cases have enough validity to reach trial, thus indicating that 97% of prisoner suits are without merit. 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch). But see Theodore Eisenberg & Steward Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 692 & n.207 (1987) (finding that pro se prisoners succeed in 15% of cases and counseled prisoners succeed in 53% of cases when success is defined not only as a trial victory, but also as settlement, stipulated dismissal, and voluntary dismissal by plaintiff).

141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("Today's system seems to encourage prisoners to file with impunity. After all, it's free. And a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell."). Although Congress claimed to be concerned about an overwhelming number of suits over prison conditions, District Court Judge William Wayne Justice noted that prisoner complaints generally fall into four main areas: guard brutality, lack of medical care, extreme overcrowding, and summary discipline. Judge Justice failed to mention cases challenging conditions of confinement as frequenting his docket. William Wayne Justice, The Origins of Ruiz v. Estelle, 43 STAN. L. REV. 1, 4-5 (1990).

141 CONG. REC. S14, 412-18 (daily ed. Sept. 27, 1995) (statements of Sen. Dole, Sen. Hatch, and Sen. Kyl). But see Jon O. Newman, Pro Se Litigation: Looking for Needles in Haystacks, 62 BROOK. L. REV. 519, 520-22 (1996) (arguing that these cases have been distorted by Attorney Generals and politicians and were not as frivolous as publicized; rather, they were based upon real legal arguments).

facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury. In addition to § 1997e(e), the PLRA includes a number of other provisions governing prisoners' ability to bring suit. Included among these requirements are: (1) requiring that a prisoner exhaust all administrative remedies before filing § 1983 actions or otherwise face dismissal of the lawsuit; (2) requiring plaintiffs to either pay the initial filing fee or make monthly installment payments from their personal accounts when bringing suits in forma pauperis ("IFP"); (3) prohibiting a prisoner from filing a suit IFP after having three previous suits or appeals dismissed as frivolous, malicious, or failing to state a claim, absent a showing of "imminent danger of serious physical injury", and (4) limiting the awarding of attorneys' fees for successful prisoner claims to 150% of the damages award.

The PLRA, which passed as a rider to an omnibus appropriations bill, has been criticized as being the result of a rushed enactment that was subject to little congressional debate. Senator Edward Kennedy complained that "[t]he 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." Section 1997e(e), in particular, received the least amount of congressional deliberation.

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32 42 U.S.C. § 1997e(e) (2000). The PLRA failed to define physical injury. However, courts have largely interpreted the provision to require that a physical injury be more than de minimis, although it need not be significant. See, e.g., Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003) (finding that deprivation of food, drink, and sleep does not satisfy the de minimis requirement of a physical injury); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (holding that a sore, bruised ear is not more than de minimis).


34 28 U.S.C. § 1915(b) (2000). This provision is significant because nearly all prisoners file in forma pauperis. See THOMAS, supra note 24, at 157 (reporting that 98% of all prisoner civil rights cases are filed IFP). As prisoners are perhaps the most impoverished group in the United States, paying a filing fee of $105 or $150 bars many prisoners from suing, regardless of the potential seriousness of the constitutional violation. See Boston, supra note 8, at 430, 433 ("Paying off such fees of those amounts over a period of time when they are getting paid pennies an hour, or nothing, for their labor, or... [have] no opportunity to work, is a daunting proposition... This provision is more than a nuisance or even a hardship. It is an absolute barrier... ").


38 See, e.g., Jason E. Pepe, Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act, 23 HAMLINE L. REV. 58, 62 (1999) ("The bill was not subject to committee mark-up. The judiciary committee did not furnish a committee report detailing the PLRA's effects... Notwithstanding the absence of deliberate debate, the PLRA became law.").


40 See Zehner v. Trigg, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) ("The legislative history contains virtually no discussion specifically concerning... § 1997e(e). ").
with the only specific mention of the provision in the congressional debates being a paraphrase from the actual statute's language. 41

C. Interpretation of § 1997e(e) Given by Federal Circuits

Section 1997e(e) has been one of the most litigated provisions of the PLRA with substantially conflicting interpretations and varying outcomes. Courts have encountered the most difficulty in determining the precise scope where the prisoner alleges deprivation of a constitutional right, particularly for violations of the First, Fourth, Eighth, and Fourteenth Amendments.

A court's construction of the PLRA often depends on which portion of § 1997e(e)'s language it chooses to emphasize. Courts that focus on the provision's "for mental or emotional injury" language hold that § 1997e(e) does not apply to constitutional torts as they are not claims for mental or emotional damages, but are claims for violations of "intangible and invaluable rights whose deprivation is an injury in and of itself."42 This construction was first articulated in Canell v. Lightner, in which the plaintiff brought a § 1983 action for violations of his First Amendment establishment and free exercise rights after a correctional officer actively sought to convert inmates to his Christian faith.43 The Ninth Circuit rejected the defendant's argument that the claim was alleging only mental or emotional injury without the requisite physical injury, holding instead that "deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred."44

Under this interpretation, courts find that the physical damages requirement cannot apply to all federal civil actions because otherwise, "for mental or emotional injury" would simply be superfluous language.45 Instead, courts look to whether the plaintiff is claiming that the defendant's actions caused injuries of "stress, fear, depres-

41 See 141 CONG. REC. S14, 414 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole) ("And it prohibits prisoners from suing the Government for mental and emotional injury, absent a prior showing of physical injury.").

42 Royal, 375 F.3d at 729 (Heaney, J., dissenting); see also Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) (finding that the deprivation of a First Amendment right to receive mail is a "cognizable injury" on its own and, thus, plaintiff's claim was dismissed because it was not "for" emotional or mental injury).

43 Canell v. Lightner, 143 F.3d 1210, 1211–12 (9th Cir. 1998).

44 Id. at 1213.

45 See Amaker v. Haponik, No. 98 Civ. 2663, 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999) ("The defendants' reading of the statute would require that a prisoner have sustained physical injury before bringing any federal civil suit. That reading would render superfluous the qualifying language 'for mental or emotional injury' and would be contrary to the well-established principle that all words in a statute should be read to have meaning.").
sion, and other psychological impacts,"\(^{46}\) or is claiming that the actions deprived him of his First Amendment or other constitutional rights. Only where a claim specifically alleges injuries of those psychological impacts will that portion of the claim be barred by § 1997e(e).\(^7\) These courts find that this interpretation is consistent with the express legislative intent of decreasing the number of frivolous lawsuits, while still protecting legitimate constitutional claims.\(^{48}\)

However, the majority of circuits have held that the physical injury requirement does apply to constitutional torts.\(^{49}\) These courts focus on the statute's "no Federal civil action" language, arguing that the word "no" indicates that Congress did not intend there to be any exceptions to the physical injury requirement.\(^{50}\) Since the language of

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\(^{46}\) Id. (concluding that the term "mental or emotional injury" must be defined according to its "well understood meaning" instead of automatically assuming that since the claim does not allege a physical injury, it must be asserting a mental or emotional injury).

\(^{47}\) The Seventh Circuit in *Robinson v. Page*, 170 F.3d 747 (1999), held that where a suit involves two separate claims with neither involving physical injury, and one claim is for damages for mental and emotional suffering and the other seeks damages for another type of injury, § 1997e(e) only bars the first claim. *Id.* at 749. Under this interpretation, if a suit alleged that the defendant's actions were (1) depriving a plaintiff of his First Amendment rights, and (2) causing psychological distress, only the claim of psychological distress would be dismissed.

\(^{48}\) See *Mason v. Schriro*, 45 F. Supp. 2d 709, 718–19 (W.D. Mo. 1999) ("Congress was concerned about frivolous lawsuits by inmates arising from their conditions of confinement. ... There is nothing in the legislative history to suggest that Congress intended to dramatically limit available judicial remedies for such historically actionable claims ... "). *Mason* was criticized and possibly overruled by *Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004).

\(^{49}\) See, e.g., *Royal*, 375 F.3d 720 (applying § 1997e(e) to a suit claiming violation of the First Amendment and the constitutional right of access to the courts); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (violation of Eighth Amendment); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (violation of First Amendment); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (violation of First Amendment); *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999) (violation of Eighth Amendment); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (violation of equal protection and the right to privacy); *Todd v. Graves*, 217 F. Supp. 2d 958 (S.D. Iowa 2002) (violation of Fourteenth Amendment as governs racial discrimination).

\(^{50}\) These courts view § 1997e(e) as having plain and unambiguous language, and therefore follow the rule of refusing to permit alteration from the strict wording of the statute. *See United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000) ("If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary. Therefore, if the intent of Congress can be clearly discerned from the statute's language, the judicial inquiry must end."); see, e.g., *Royal*, 375 F.3d at 723 ("[W]e conclud[e] [that] Congress did not intend section 1997e(e) to limit recovery only to a select group of federal actions brought by prisoners. ... In reaching this conclusion, we cannot escape the unmistakably clear language Congress used. ... To read this statute to exempt First Amendment claims would require us to interpret 'no Federal civil action' to mean 'no Federal civil action [except for First Amendment violations].' If Congress desires such a reading of section 1997e(e), Congress can certainly say so. We cannot."); *Thompson*, 284 F.3d at 417 (finding that since "the words '[f]ederal civil action' are not qualified," physical injury is required for claims of Due Process Clause and Eighth Amendment violations); *Searles*, 251 F.3d at 876 (holding that the plain language of § 1997e(e) "does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted"); *Cassidy v. Ind. Dep't of Corr.*, 199 F.3d 374, 376 (7th Cir. 2000) (finding the
§ 1997e(e) makes no distinction between various types of claims and "[is] not qualified, [it] include[s] federal civil actions brought to vindicate constitutional rights."51

This interpretation treats the constitutional deprivation not as an injury in and of itself but as the "underlying substantive violation."52 Relying on Carey, these courts find that a plaintiff cannot receive compensatory damages without proving an actual injury.53 However, they reason that since a compensable injury is categorically limited to physical or emotional injuries under general tort law,54 the plaintiff must be asserting a claim for mental or emotional injury when not alleging physical injury.55

D. Availability of Nominal Damages and Punitive Damages

Those courts that interpret the PLRA as encompassing constitutional torts nearly uniformly have held, in dicta at least, that § 1997e(e) applies exclusively to claims for compensatory damages while leaving open the possibility of nominal or punitive damages awards56 or the issuing of equitable relief.57 In Allah v. Al-Hafeez, the language of § 1997(e(e) to be plain and unambiguous and thus refusing to carve out exceptions not indicated by Congress).

51 Thompson, 284 F.3d at 417 (barring compensatory damages for an Eighth Amendment violation claim of deliberate indifference and improper confiscation of medication).
52 See Searles, 251 F.3d at 876 ("The underlying substantive violation... should not be divorced from the resulting injury, such as 'mental or emotional injury,' thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted....").
54 See RESTATEMENT (SECOND) OF TORTS § 905 (1979) ("Compensatory damages that may be awarded without proof of pecuniary loss include compensation (a) for bodily harm, and (b) for emotional distress.").
55 See Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("[Plaintiff] seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion.... [T]he only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.").
56 See, e.g., Royal v. Kautzky, 375 F.3d 720, 724 (8th Cir. 2004) (affirming the trial court's award of one dollar after finding that defendant violated plaintiff's First Amendment rights); Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003) ("[R]egardless of [o]f how we construe § 1997e(e)'s physical injury requirement, it will not affect [plaintiff]'s ability to seek nominal or punitive damages for violations of his constitutional rights."); Thompson, 284 F.3d at 418 (finding that § 1997e(e) does not limit the availability of nominal or punitive damages); Searles, 251 F.3d at 879 ("W[e] now hold that § 1997e(e) does not bar recovery of nominal damages for violations of prisoners' rights.").
57 See, e.g., Herman v. Holiday, 238 F.3d 660, 665 (5th Cir. 2001) ("The prohibitive feature of § 1997e(e), requiring physical injury before recovery, does not apply in the context of requests for declaratory or injunctive relief sought to end an allegedly unconstitutional condition of confinement."); Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir. 1999) ("Section 1997e(e) refers to claims for injuries 'suffered.' Use of the past tense indicates that the provision constitutes a limitation on a damages remedy only, and does not impair a prisoner's right to seek declaratory
Third Circuit held that claims seeking nominal and punitive damages were not "for" mental or emotional injury, but rather "to vindicate a constitutional right or to punish for violation of that right," and therefore were not barred. The court relied heavily on the Supreme Court's directive in both Carey and Memphis Community School District v. Stachura that nominal damages are available to vindicate constitutional violations in the absence of an actual injury. Since plaintiffs were barred by the PLRA from showing mental or emotional injury, the court deemed nominal damages to be an appropriate measure of relief. The Third Circuit further held that punitive damages may be awarded solely based on a constitutional violation as punishment for willful or malicious conduct and deterrence for future behavior, provided that the plaintiff makes the proper showing.

Among the courts leaving open the possibility of nominal damages, however, there is a division about whether the prisoner-plaintiff must actually plead the nominal damages, or whether nominal damages may be automatically considered in the constitutional tort context. While the District of Columbia Circuit in Davis v. District of Co-

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Footnotes:

58 Allah, 226 F.3d at 252.

59 Id. at 251 ("[T]he Supreme Court recognized in both Carey and Stachura that certain absolute constitutional rights may be vindicated by an award of nominal damages in the absence of any showing of injury warranting compensatory damages.").

60 Id. at 251-53.

61 Id. at 251 (finding that in order to be awarded punitive damages under § 1983, a plaintiff must show that "defendant's conduct [was] motivated by evil motive or intent, or [involved] reckless or callous indifference to the federally protected rights of others" (quoting Coleman v. Kaye, 87 F.3d 1491, 1497 (3d Cir. 1996))).


63 This same disagreement occurred in the non-prisoner context after the Supreme Court's declaration in Carey that individuals are entitled to nominal awards for constitutional violations. Some courts require plaintiffs to specifically request nominal damages in the pleadings phase, others permit plaintiffs to request nominal damages after the jury verdict, and still others hold that nominal damages must be awarded regardless of whether plaintiffs specifically sought them. Compare Westcott v. Crinklaw, 133 F.3d 658, 664 (8th Cir. 1998) (holding that the district court erred in instructing the jury on the availability of nominal damages where the plaintiff did not seek a nominal award and such relief would be wholly inadequate), with Campos-Orrego v. Rivera, 175 F.3d 89, 99 (1st Cir. 1999) (allowing the plaintiff to request nominal damages after
implied that a prisoner may be entitled to nominal damages in certain cases, it nonetheless dismissed the suit because the plaintiff never sought nominal damages in his pleadings and only raised the issue at oral argument. In contrast, the Third Circuit in *Mitchell v. Horn* held that the fact that the plaintiffs did not expressly seek nominal damages in their complaint was insignificant, as "it is not necessary to allege nominal damages." Finally, the Second Circuit takes a middle-ground approach by allowing its pro se prisoners to amend their complaints in order to specifically request nominal damages on remand.

Despite the willingness of most circuits to allow for punitive damages, this allowance is not universal. In particular, the *Davis* court expressly found that § 1997e(e) bars punitive damages:

Amicus argues that because punitive damages are awarded to punish the tortfeasor rather than to compensate the victim, they are not embraced by § 1997e(e). But § 1997e(e) draws no such distinction. It simply prevents suits "for" mental injury without prior physical injury. As the purposes of compensatory awards themselves are multifaceted (including, for example, deterrence), it can hardly be the case that, when a suit allegations only mental or emotional injury, the presence of additional purposes makes a suit not "for" the injuries alleged.

The *Davis* court further found that the purpose behind the PLRA would be thwarted if prisoners could evade § 1997e(e) by simply adding a claim for punitive damages and asserting that the defendant acted maliciously.
II. CONSTITUTIONAL AVOIDANCE AS A MECHANISM TO CIRCUMVENT BOTH § 1997E(E)'S POTENTIAL EFFECTS AND THE CONSTITUTIONALITY QUESTION

Strict construction of § 1997e(e) lends itself to harsh results that appear to sanction the commission of constitutional torts against prisoners. Not only may the strict construction leave a prisoner without the ability to invoke judicial power to protect his fundamental rights, but it also sends a powerful message to prison authorities that they may engage in constitutional wrongdoing without fear of judicial penalty. Regardless of the constitutional implications, lower courts often avoid determining the constitutionality of § 1997e(e) and, instead, counteract the potentially damaging consequences of the provision by finding alternative mechanisms for adjudicating cases involving constitutional torts. This judicial avoidance manifests itself in two ways: (1) by exempting constitutional torts from the reach of § 1997e(e), and (2) by finding that § 1997e(e) does not preclude a prisoner from having his rights adjudicated, but only bars an award of compensatory damages.

The minority of courts that have allowed constitutional torts to survive § 1997e(e) have done so not on the basis of the statute's unconstitutionality but rather by simply holding that allegations of constitutional violations are not claims "for" mental or emotional injury and are thus outside the purview of § 1997e(e). The Seventh Circuit

60 See infra Part III for an analysis of the constitutional implications of § 1997e(e).

70 The reason for such judicial avoidance of § 1997e(e)'s constitutionality likely stems from the difficulty in striking a statute down as violating equal protection. A statute will typically only be struck down as unconstitutional under a heightened standard of review (strict scrutiny or an intermediate level), which requires the action to impinge on a fundamental right or discriminate against a suspect or quasi-suspect class. See infra notes 95–98 and accompanying text. However, courts are rather reluctant to find that an action impinges on a fundamental right or to name a new suspect class, so heightened scrutiny is infrequently employed to find violations of equal protection. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) ("Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. ... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental."). Courts are even more reluctant to strike down a statute under a rational basis standard of review. See infra notes 126–27 and accompanying text; see, e.g., Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) (noting that "[o]nce strict scrutiny is ruled out, the equal protection challenge fails rather quickly").

71 See Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) ("Here, [plaintiff] alleges that prison officials violated his First Amendment rights by interfering with the receipt of his mail. A deprivation of First Amendment rights standing alone is a cognizable injury. ... A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.") (citations omitted); Barnes v. Ramos, No. 94 C 7541, 1996 U.S. Dist. LEXIS 15260, at *7–*8 (N.D. Ill. Oct. 11, 1996) ("[P]laintiff has not brought this suit to recover damages for mental or emotional injuries suffered as a consequence of defendants' actions. Rather, he alleges that his constitutional rights were violated because he was denied due process, because false charges were filed against him, and because he was sub-
in *Robinson v. Page*\(^{72}\) found that the only portion of an Eighth Amendment claim that would be barred from § 1997e(e) would be those portions of a complaint *explicitly* claiming mental and emotional injuries. Those "claim[s] involving another type of injury," including non-physical injuries, would not be barred by the PLRA as "[i]t would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits."\(^{79}\) Other courts have simply crafted a judicial exemption from § 1997e(e) for "significant constitutional claims."\(^{74}\) In *Warburton v. Underwood*, the Western District of New York found that "such claims nevertheless deserve to be heard, and thus the [c]ourt declines to dismiss the Establishment Clause claim under 42 U.S.C. § 1997e(e) despite the fact that the only injury plaintiff could experience as a result of a constitutional violation under the Establishment Clause would be mental or emotional."\(^{75}\)

Since many prisoner § 1983 suits can be labeled as a "significant constitutional claim" or be pled in such a way as to not explicitly address emotional or mental harm but rather involve "another type of injury," prisoners suing in these jurisdictions may escape the PLRA without needing to argue that it violates the Fifth Amendment's Equal Protection Clause. Despite the fact that these interpretations lead to positive results, "the interpretation cannot withstand scrutiny,"\(^{76}\) as few suits would ever fall within the purview of § 1997e(e):

> Under the minority view, prisoners' claims would never be within the statute. Insofar as prisoners' claims are within § 1983 and allege a constitutional violation, prisoners' claims will never be "for mental or emotional injury" but always "for the particular constitutional violation." Accordingly, such emasculation of § 1997e(e), which renders the entire statute superfluous, must be discarded as an implausible interpretation of the statute.\(^{77}\)

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\(^{72}\) 170 F.3d 747 (7th Cir. 1999).

\(^{73}\) Id. at 748; cf. Pepe, supra note 38, at 64 ("[Robinson and courts following Robinson] have not clarified what they mean by the somewhat cryptic reference—'claims involving another type of injury.' These other types of injury could include the constitutional deprivation itself, or some other unspecified injury.").

\(^{74}\) Warburton v. Underwood, 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998); see also Shaheed-Muhammad v. Dipaolo, 138 F. Supp. 2d 99, 101 (D. Mass. 2001) (holding that § 1997e(e) does not apply to violations of abstract rights because "the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not on physical well-being").

\(^{75}\) Warburton, 2 F. Supp. 2d at 315.

\(^{76}\) Pepe, supra note 38, at 64.

\(^{77}\) Id.
By twisting around the statutory language of the PLRA, these courts are able to take the easy route to reach the outcomes they deem fair—allowing constitutional torts to be adjudicated and enabling prisoners to seek judicial redress. In doing so, however, they are avoiding the constitutional implications of § 1997e(e) and the challenges in ruling on an equal protection argument.

Only a few courts have noted their constitutional concerns with applying § 1997e(e) to civil rights actions. However, instead of engaging in a Fifth Amendment equal protection analysis and determining whether the statute deserves to be struck down, those courts have decided cases on the basis of statutory construction. For example, the district court in *Mason v. Schriro* expressed its concern that an alternative construction could turn its back on serious constitutional violations:

> If the court were to interpret section 1997e(e) to apply in cases where prisoners alleged blatant racial or religious discrimination, there would be grave constitutional concerns because inmates would be severely restricted in the type of remedies they could seek for egregious equal protection violations. “[W]here constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it sets itself against the Constitution. Serious constitutional questions would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”

> ... If the court were to construe section 1997e(e) to preclude relief for Fourteenth Amendment equal protection claims because inmates could only show mental and emotional injury and could not show physical injury, serious constitutional concerns would be implicated. The court would, in effect, interpret section 1997e(e) as granting prison officials immunity from suit even where there is blatant and systematic racial or religious discrimination.

The court determined that rather than accepting “an interpretation that gives rise to serious constitutional problems[,] [it would] adopt a narrower interpretation of section 1997e(e) under which the statute does not apply to [constitutional torts].” While *Mason* is one of the only cases in which the constitutional implications of § 1997e(e) are

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78 See infra Part III for an analysis of the constitutional implications of § 1997e(e).

79 See *Oliver v. Scott*, 276 F.3d 736, 747 n.20 (5th Cir. 2002) (“Applying the PLRA would raise difficult constitutional questions not previously addressed in this circuit.”); *Dorn v. DeTella*, No. 96 C 3830, 1997 WL 85145, at *3 (N.D. Ill. Feb. 24, 1997) (“While [§ 1997e(e)’s] language unambiguously bars this suit, this case is before the court without the benefit of briefing; at this stage the court is unwilling to dismiss [plaintiff]’s complaint because this provision presents a substantial constitutional problem that the courts have not yet addressed.”).


81 *Mason*, 45 F. Supp. 2d at 719.
discussed in detail, in the end the court failed to strike the provision down on constitutional grounds. Instead, the court avoided the issue by giving the PLRA a narrow construction that exempted the plaintiff’s Fourteenth Amendment equal protection challenge from the purview of § 1997e(e).

Many of those courts which find that § 1997e(e) does apply to constitutional torts also engage in a form of constitutional avoidance. Although several courts have indeed ruled on the constitutionality of § 1997e(e) and found that the provision does not violate equal protection under the Fifth Amendment, many other courts have avoided detailed constitutional analysis by simply finding that § 1997e(e) does not preclude nominal and punitive damages. In *Calhoun v. DeTella*, for example, the Seventh Circuit held that only compensatory damages were barred by the statute and rejected the *amicus curiae* Illinois Attorney General’s argument that a plain reading of the statute barred the plaintiff’s suit in its entirety, including nominal and punitive damages. In so holding, the court stated that “[t]his contention if taken to its logical extreme would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process.” Although it is not clear if a constitutional challenge was even raised in *Calhoun*, the court never addressed it and, instead, predominantly spent its analysis determining whether the PLRA foreclosed all avenues for judicial relief. Those courts who have been faced with a constitutional challenge state simply that the availability of alternative remedies renders the issue moot.

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82 See, e.g., Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (holding that § 1997e(e) does not violate inmates’ due process rights of the Fifth Amendment because the Constitution does not guarantee a remedy for every constitutional violation); Harris v. Garner, 190 F.3d 1279, 1288–90 (11th Cir. 1999) (concluding that § 1997e(e) does not violate the Fifth Amendment because Congress only limited certain remedies and the provision is rationally related to a legitimate government purpose); Davis v. District of Columbia, 158 F.3d 1342, 1347–48 (D.C. Cir. 1998) (upholding § 1997e(e) on rational basis); Zehner v. Trigg, 133 F.3d 459, 462–64 (7th Cir. 1997) (holding that the Constitution does “not demand an individually effective remedy for every constitutional violation” and rejecting plaintiff’s argument that the provision should be struck down under strict scrutiny).

83 See, e.g., Oliver v. Keller, 289 F.3d 623, 629–30 (9th Cir. 2002) (determining the applicability of § 1997e(e) to the plaintiff’s claim for violation of Fourteenth Amendment rights through an analysis of the availability of nominal and punitive damages without addressing any constitutional challenge); Allah v. Al-Hafeez, 226 F.3d 247, 252–53 (3d Cir. 2000) (reversing the district court’s dismissal of claims for nominal and punitive damages after determining that only compensatory damages are barred by § 1997e(e), while failing to analyze the constitutionality of the provision).

84 *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003).

85 Id.

86 See Thompson v. Carter, 284 F.3d 411, 419 (2d Cir. 2002) (“Having found that compensatory damages for actual injury, nominal, and punitive damages remain available, we need not address [plaintiff’s] constitutional challenge.”); Allah v. Al-Hafeez, 226 F.3d 247, 252 n.5 (3d
In making these alternative remedies available, courts are able to follow the mandate of the PLRA while at the same time using the threat of a punitive damages award to avoid giving prison authorities carte blanche to violate the constitutional rights of prisoners. However, this potential for alternative relief fails to solve the constitutional problem, and § 1997e(e) continues to present significant constitutional deficiencies that must be addressed by the federal judiciary.\(^{87}\)

III. THE CONSTITUTIONAL IMPLICATIONS OF § 1997E(E)

While the PLRA was enacted to limit the number of frivolous lawsuits filed by prisoners challenging their conditions of confinement,\(^ {88}\) § 1997e(e) has gone far beyond this express purpose and has been applied to numerous constitutional torts that can hardly be deemed frivolous—infringement of the First Amendment right to free exercise of religion,\(^ {89}\) violation of the constitutional right to privacy,\(^ {90}\) infliction of psychological torture,\(^ {91}\) retaliation for exercising First Amendment rights,\(^ {92}\) and racial discrimination.\(^ {93}\) These constitutional injuries are rarely accompanied by physical injury, yet are still fundamental rights protected under the Constitution.\(^ {94}\) Instead of focusing on whether the underlying allegation pleads a genuine constitutional loss or whether it was filed with dishonest motives, § 1997e(e) concentrates on the type of injury the prisoner is alleging to have suffered, creating a hierarchy of injuries of which only certain ones are

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\(^ {87}\) See infra Part IV for an argument that the availability of alternative damages does not save § 1997e(e) from being unconstitutional.

\(^ {88}\) See supra notes 23–31 and accompanying text.

\(^ {89}\) See Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (applying § 1997e(e) to a claim involving freedom of religion); Allah, 226 F.3d at 252–53 (finding that § 1997e(e) bars a claim seeking compensatory damages for a violation of plaintiff’s right to free exercise of religion).

\(^ {90}\) See Davis v. District of Columbia, 158 F.3d 1342, 1345–48 (D.C. Cir. 1998) (applying § 1997e(e) to a claim involving disclosure of medical information).

\(^ {91}\) See Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999) (holding that § 1997e(e) bars a claim involving prison conditions).

\(^ {92}\) See Royal v. Kautzky, 375 F.3d 720, 722–26 (8th Cir. 2004) (finding that a claim alleging retaliation for filing of complaints and grievances regarding medical care was barred by § 1997e(e)); Mitchell v. Horn, 318 F.3d 523, 526–36 (3d Cir. 2003) (applying § 1997e(e) to bar a claim alleging retaliation for prisoner’s filing of complaints against an officer).

\(^ {93}\) See Todd v. Graves, 217 F. Supp. 2d 958, 959–62 (S.D. Iowa 2002) (holding that § 1997e(e) bars a claim alleging racial discrimination, after the prison denied the inmate’s requests to visit sick mother in the hospital and to attend her funeral).

\(^ {94}\) The Supreme Court has repeatedly declared that the Constitution protects the rights of prisoners. See supra notes 19–20 and accompanying text.
deserving of judicial attention. By denying prisoners their right to seek redress for wrongs committed against them, the PLRA implicates prisoners' equal protection rights under the Fifth Amendment.

Courts typically only strike down statutes violating one's equal protection when applying a heightened level of review. By allowing egregious constitutional violations to occur without sufficient judicial attention and remedy based solely on the status of a prisoner, § 1997e(e) deserves to be analyzed under some form of heightened review, either through strict scrutiny or an intermediate standard. A statute merits strict scrutiny where it either (1) burdens a fundamental right, or (2) discriminates against a suspect class. However, the Supreme Court in pre-PLRA cases applied an intermediate review, rather than strict scrutiny, to prison regulations that burdened prisoners' fundamental rights, finding that an action would be struck down as unconstitutional unless related to a legitimate penological interest. 

A. Section 1997e(e) Burdens Prisoners' Fundamental Right of Access to the Courts

A fundamental right of access to the courts has been recognized to ensure that prisoners may invoke judicial power to enforce or vindicate their constitutional rights. The right of access under the Fifth Amendment guarantees that prisoners are given "a reasonably ade-
quate opportunity to present claimed violations of fundamental rights . . . " The right has traditionally been applied to ensure that prisoners have access to legal assistance, or to prevent the prison administration from actively interfering with prisoners' legal attempts.

While § 1997e(e) may not technically bar prisoners from accessing the courthouse doors, it severely limits both the plaintiffs' ability to present their claims and the courts' authority to grant substantive relief. Instead of focusing on the ability to bring an action, Jason E. Pepe argues that

[T]he focus should be on the prisoner's ability to invoke the judicial power. For, what is the use of getting to the courthouse, only to have the judge conclude that there is no judicial remedy for the constitutional deprivation? It is the right to have the action adjudicated that is important, not the right to gain entry into the courthouse.

While some courts construe § 1997e(e) to preclude only certain substantive remedies, the effect of § 1997e(e) in combination with other PLRA provisions is to so severely restrict the type of remedies that can be sought for egregious constitutional violations that a judicial forum is denied.

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100 Bounds, 430 U.S. at 825, quoted in Lewis v. Casey, 518 U.S. 343, 351 (1996). In order to establish a right to access violation, the prisoner-plaintiff must demonstrate that the system's shortcomings caused an "actual injury" and have hindered efforts to pursue a non-frivolous legal claim. Lewis, 518 U.S. at 351; cf. Christopher v. Harbury, 536 U.S. 403, 414-15 (2002) (holding, in a non-prisoner context, that in order to prove a claim for deprivation of the constitutional right of access to courts, the plaintiff must allege both: (1) an underlying cause of action, whether anticipated or lost, and (2) official acts frustrating litigation).

101 See, e.g., Bounds, 430 U.S. at 832-33 (holding that states have an obligation to assist prisoners in preparing and filing legal papers by providing inmates with adequate law libraries or with assistance from lawyers).

102 See, e.g., Johnson v. Avery, 393 U.S. 483, 491 (1969) (holding that a prison rule specifically prohibiting prisoners from helping other inmates to prepare petitions and other legal matters violated the fundamental right to access).

103 See Mason v. Schriro, 45 F. Supp. 2d 709, 719 (W.D. Mo. 1999) ("[W]here constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it sets itself against the Constitution.") (citation omitted) (alteration in original).

104 Pepe, supra note 38, at 73 (emphasis added).

105 Those courts that construe § 1997e(e) as only denying prisoners a substantive remedy and not precluding the underlying claim rely on Christopher v. Harbury to reject the argument that the PLRA violates a prisoner's constitutional right of access to the court. See Christopher, 536 U.S. at 415 (holding that in order to state a constitutional denial-of-access claim, the plaintiff must allege both an underlying claim that was precluded and a lost remedy). Therefore, in order to accept that the PLRA violates the right-to-access, one must accept that § 1997e(e) precludes not only a substantive remedy, but also precludes one from seeing his or her claim adjudicated.

106 See infra Part IV.B for an analysis of the effect of § 1997e(e) in conjunction with the PLRA's attorneys' fees provision.
B. Section 1997e(e) Burdens Prisoners' First Amendment Rights

Robert Tsai argues the existence of a fundamental right of access under the First Amendment, under which theory the First Amendment reaches any regulation that has "the effect of burdening or discouraging one's ability to pursue constitutional claims, or which presents the danger of 'distorting' the process by which constitutional rights are adjudicated." Since the First Amendment safeguards government criticism and since constitutional litigation is a form of government dissent, the First Amendment naturally protects access to the courts and the ability to seek redress "effectively."

In Legal Services Corp. v. Velazquez, the Supreme Court struck down a statute that, as a condition to receiving federal funds for legal aid services, prohibited lawyers from challenging existing welfare law on constitutional grounds. While the indigent client was still able to engage in counseled litigation, the Court found that the statute precluded attorneys from presenting all well-grounded arguments, impaired the advocacy of constitutional claims, and thus violated the First Amendment. Section 1997e(e) likewise restricts an inmate's ability to present a constitutional claim: the provision allows a plaintiff to plead that a constitutional right has been violated, but prohibits him from arguing that he suffered an "actual injury" as a result of this violation (unless, of course, the injury was a physical one). The inmate, as a result of not being physically harmed, has much of his legal arguments and theories significantly limited, if not completely stripped away. Since § 1997e(e) has "a reasonably likely effect on the ability of [prisoners] to articulate constitutional claims," it therefore implicates the First Amendment, a fundamental right under Equal Protection Clause analysis.

C. Section 1997e(e) Discriminates Against Prisoners Because They Are Prisoners

While prisoners have always enjoyed a level of protection less than that of non-incarcerated citizens, § 1997e(e) makes prisoners second-class plaintiffs by requiring them to have suffered physical injury.

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107 Tsai, supra note 8, at 889–90 (arguing that the attorneys' fees provision of the PLRA is unconstitutional as violating the First Amendment).
108 Id. at 885.
110 Id. at 545. The Court also implied that the regulation violated the separation of powers doctrine as it invaded the function of the judiciary by foreclosing an entire area of the law from the courts. Id.
111 Tsai, supra note 8, at 888.
112 See supra notes 21–22 and accompanying text.
before litigating their constitutional suit. However, a discriminatory statute is generally only struck down if it is aimed at a suspect class \(^{115}\) (subject to strict scrutiny) or a quasi-suspect class (subject to an intermediate standard of review). Although all the United States Courts of Appeals have uniformly held that prisoners are not a suspect class, \(^{116}\) Pepe argues that prisoners should be deemed quasi-suspect.

While being a prisoner is arguably not an immutable characteristic, \(^{116}\) prisoners do retain many of the other factors of a suspect group: they are a discrete, identifiable minority who have traditionally suffered from unequal treatment, public misunderstanding, and political powerlessness. Until the 1960s, prisoners were thought to have lost all constitutional rights as courts kept a "hands off" approach, which allowed prisons to be run without any concern for prisoners' constitutional rights. \(^{117}\) While all incarcerated prisoners lose the ability to vote, many are permanently disenfranchised and have no clout in the political process. \(^{118}\) Moreover, "[t]here is evidence of a growing animus, or hostility towards prisoners," which is "derived from public misunderstanding that prisons have become country clubs, when in fact they are overcrowded institutions, full of violence, and short on basic services." \(^{119}\) In addition, the typical prisoner enters

\(^{115}\) In determining whether a group qualifies for suspect class designation, the courts consider the following factors: (1) whether the group exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; (2) whether they have suffered a history of discrimination; and (3) whether they are a minority or politically powerless. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (citing Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987)).

\(^{116}\) See, e.g., Johnson v. Daley, 339 F.3d 582, 585-86 (7th Cir. 2003) (noting that "[p]risoners are not a suspect class"); Taylor v. Delatoree, 281 F.3d 844, 849 (9th Cir. 2002) (same); Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3d Cir. 2001) (same); Carson v. Johnson, 112 F.3d 818, 821-22 (5th Cir. 1997) (same).

\(^{117}\) Pepe, supra note 38, at 76.

\(^{118}\) Most courts find that being a prisoner is not an immutable characteristic in that (1) their entry into the class is voluntary; (2) it is the result of committing a crime; and (3) they will eventually be released from confinement and no longer be prisoners. See Moss v. Clark, 886 F.2d 686, 690 (4th Cir. 1989) ("It would be ironic for the law to confer special solicitude upon a class whose members had violated it."). But see Pepe, supra note 38, at 77 (arguing that being a prisoner may be an immutable characteristic, as (1) many prisoners are never released from prison; (2) some prisoners have such a high recidivism rate that they spend the majority of their lives in prison with only brief intervals of freedom; and (3) the stigma associated with being an ex-convict never ceases).

\(^{119}\) Pepe, supra note 38, at 78 (citations omitted).
prison already significantly disadvantaged: he is more likely than other Americans to be indigent, uneducated, illiterate, mentally ill, have drug addictions, be a member of a minority group, and have previous convictions. As prisoners meet certain, but not all criteria for being a suspect class, Pepe maintains that prisoners should be deemed a quasi-suspect class, which warrants an intermediate level of review.

D. Section 1997e(e) Fails Under Heightened Review

Since § 1997e(e) burdens prisoners' fundamental rights and discriminates against a quasi-suspect class, it should be scrutinized under some form of heightened review. Under strict scrutiny analysis, § 1997e(e) easily fails: (1) the PLRA is not narrowly tailored to bar only those frivolous lawsuits relating to conditions of confinement, and (2) there are other reasonable means to achieve the PLRA's purpose. Likewise, § 1997e(e) cannot withstand the intermediate standard. While discouraging frivolous lawsuits in order to save judicial resources and time is a legitimate government interest, this intermediate level of review requires that the regulation specifically relate to valid penological interests. Legitimate penological interests generally refer to concerns of prison security, administration, and rehabilitation, but neither the legislative history of the PLRA nor any

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121 Pepe, supra note 38, at 79 (arguing that judicial scrutiny in the prisoner context should be the same as applied in cases of government discrimination against women, who are no longer politically powerless or discriminated by invidious motives, or aliens, who voluntarily enter into the class).

122 See Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 909–10 (1986) ("[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (alterations in original))); see also infra Part IV for other reasonable means to limit the number of frivolous lawsuits.

123 There are several versions of intermediate standards of review. In quasi-suspect classifications, the Court has held that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). However, where prison regulations burden prisoners' constitutional rights, the Court has crafted the intermediate standard of "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987).

124 See, e.g., O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987) (holding that a work detail policy preventing some prisoners from returning to the prison early to participate in religious programs was reasonably related to security and administration, as it could require the entire work detail to return early and would result in increased security risks); Turner, 482 U.S. at 91, 97–98 (upholding restriction on inmate-to-inmate correspondence as it was promulgated primarily to prevent mail from being used to communicate escape plans or to arrange violent acts, while striking down a restriction that limited prisoners' ability to marry each other because it was not rationally related to security or rehabilitation of prisoners); Jones v. N.C. Prisoners'
case interpreting it have ever rationalized § 1997e(e) as a means of regulating prison security or administration.\textsuperscript{125} Therefore, § 1997e(e) also fails under the intermediate review.

\textbf{E. Section 1997e(e) Should Fail Even Under Rational Basis}

Even where courts are unwilling to recognize that § 1997e(e) burdens a fundamental right or impinges on a quasi-suspect class, § 1997e(e) still presents constitutional deficiencies under rational basis review. However, given the toothless nature of rational basis review,\textsuperscript{126} striking down § 1997e(e) under that standard is rather difficult, particularly because no circuits have done so.\textsuperscript{127} Despite this, it is still hard to see how § 1997e(e) is rationally related to the legislative purpose behind the PLRA. Section 1997e(e) invites courts to find that prisoners have been unconstitutionally stripped of their fundamental rights but then proceed to deny a forum for relief. The distinction between which claims merit judicial attention and which do not is based solely on the nature of the injury and not on the severity or unconstitutionality of the wrong. The prisoner who was “fortu-

\begin{itemize}
\item Labor Union, Inc., 433 U.S. 119, 130–32 (1977) (holding that bans on inmate union meetings and union solicitation through bulk mail were reasonably related to objectives of prison administration and security).
\item Even if there is a potential relationship between § 1997e(e) and penological interests, any justification articulated by the government would be post hoc: There is a possible basis for concluding that § 1997e(e) may implicate these penological interests. Shuttling prisoners back-and-forth from the courthouse certainly impacts prison administration and security. . . . There is no support, however, for this rationalization in the legislative history of § 1997e(e). Insofar as the Court has in the past rejected post hoc rationalizations . . . so too should the Court reject any attempt to ground § 1997e(e) in concerns for prison administration or security.
\item Pepe, supra note 38, at 75–76.
\item See Gunther, supra note 97, at 8 (describing rational basis as being "minimal scrutiny in theory and virtually none in fact"). Under rational basis review, a statute will be upheld if it is rationally related to a legitimate government purpose, "even if [it] seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." Romer v. Evans, 517 U.S. 620, 632 (1996). This standard has been deemed "a paradigm of judicial restraint" as courts will uphold statutes if there is any "reasonably conceivable state of facts that could provide a rational basis." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 314 (1993) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").
\item See, e.g., Harris v. Garner, 190 F.3d 1279, 1290 (11th Cir. 1999) ("Under this lenient standard of review, section 1997e(e) easily passes muster."); Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C. Cir. 1998) (rejecting the equal protection argument under rational review); Zehner v. Trigg, 133 F.3d 459, 464 (7th Cir. 1997) ("Congress' stated purpose to limit frivolous lawsuits rationally supports its action in adopting § 1997e(e).") The same result has occurred with other provisions of the PLRA. See, e.g., Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 799 (11th Cir. 2003) (upholding the attorneys' fees provision under rational basis review); Johnson v. Daley, 339 F.3d 582, 598 (7th Cir. 2003) (same); Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 189–90 (3d Cir. 1999) (upholding the consent decree provision under rational basis); Plyler v. Moore, 100 F.3d 565, 373–74 (4th Cir. 1996) (same).
\end{itemize}
nate" enough to suffer withdrawal, panic attacks, chest pains, and difficulty breathing as a result of being denied medications is eligible for damages, whereas the prisoner who was excluded from religious services, prevented from following religious dietary laws, denied religious counseling that conformed with his beliefs, and then retaliated against for attempting to assert his First Amendment rights is ineligible for damages.

Congress asserts that the purpose behind § 1997e(e) is to save judicial resources by limiting frivolous and meritless lawsuits. However, finding that the nature of an injury demonstrates whether a claim is frivolous or meritorious is an irrational method for determining which cases are deserving of judicial attention. The only possible justification for the drawing of such an arbitrary line is the fear that mental and emotional damages are harder to judge and thus easier to fabricate. However, this argument was squarely rejected by the Court in Carey, which found "no particular difficulty in producing evidence that mental and emotional distress actually was caused." Instead, the Court found that juries, when given appropriate instructions, are competent to judge mental distress because such injuries are "evidenced by one's conduct and observed by others." With the only potential basis for a connection already struck down by the Court, there is simply nothing rational about using the nature of an injury as a mechanism to weed out frivolous lawsuits.

IV. THE AVAILABILITY OF NOMINAL OR PUNITIVE DAMAGES DOES NOT SAVE § 1997E(E) FROM UNCONSTITUTIONALITY

Courts applying § 1997e(e) to constitutional torts generally reason that because of the availability of alternative judicial remedies, prisoners are still given "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," and therefore are not denied equal protection under the laws. These courts further reason that since Congress created statutory remedies for constitutional violations by enacting § 1983, Congress

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108 See Ziemba v. Armstrong, No. 02CV2185, 2004 U.S. Dist. LEXIS 432, at *7 (D. Conn. Jan. 14, 2004) (finding a claim for damages from the denial of mental health medications that leads to physical consequences is not precluded by § 1997e(e)).

109 See Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (holding that a prisoner's claim stemming from emotional or mental injury as a result of a First Amendment violation is barred by § 1997e(e)).


111 Id. at 264 n.20.

112 Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) (quoting Lewis v. Casey, 518 U.S. 343, 350 (1996)).
may also limit those remedies in the prisoner context. However, the district court in Zehner v. Trigg acknowledged that "[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without in essence taking away the rights themselves." Section 1997e(e) goes beyond this point.

A. Prisoners Rarely Receive the Alternative Relief, Making Its Availability an Empty Promise

The availability of punitive or nominal damages for constitutional violations seems to be more of an exercise in dicta than in reality. While a punitive damages award would certainly serve its purpose of punishing prison administrators for violating a prisoner’s constitutional rights and deterring such future behavior, the reality is that few cases are actually awarded such damages. Indeed, a key feature of punitive damages is that they are never awarded as a matter of right, regardless of how egregious the defendant’s conduct. Instead, punitive damages may be awarded for outrageous conduct committed because of a defendant’s evil motive or reckless indifferent-

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135 See Zehner v. Trigg, 952 F. Supp. 1318, 1330 (S.D. Ind. 1997) (holding that Congress is not required to enact a damages remedy for emotional or mental injury because of its inherent power to limit available remedies); cf. Corr. Serv. Corp. v. Malesko, 554 U.S. 61 (2001) (holding that there is no constitutional right to a remedy against private entities where Congress has not provided one, where the plaintiff has alternative tort remedies and full access to remedial mechanisms, and where the suit would not deter individual officers from committing future unconstitutional acts).

136 Zehner, 952 F. Supp. at 1331. Despite this pronouncement, however, the district court still found § 1997e(e) to be constitutional, as other remedies remained available.

137 Many courts also leave open the possibility of equitable relief, but this too is rarely awarded because the claim is frequently moot by the time it arrives before the court. Since "an actual controversy must be extant at all stages of the case, not just at the time the complaint is filed," many times a prisoner has been transferred, the defendant-prison guard no longer works at the prison, or the prisoner has been released and thus no longer merits equitable relief. Thompson v. Carter, 284 F.3d 411, 415 (2d Cir. 2002) (quoting Beyah v. Coughlin, 789 F.2d 986, 988 (2d Cir. 1986)); see, e.g., Royal v. Kautzky, 375 F.3d 720, 724–25 (8th Cir. 2004) (denying injunction because defendant no longer worked at the prison); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (finding that equitable relief was moot as the prisoner had been transferred to another prison); Harris v. Garner, 190 F.3d 1279, 1283–84 (11th Cir. 1999) (holding that § 1997e(e) does not apply to prisoners who have been released).

138 See RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979) (“The purposes of awarding punitive damages...are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.”); see also Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 n.9 (1986) (discussing the purpose behind punitive damages in constitutional torts).


ence to the rights of others. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." In requiring the plaintiff to meet this high threshold of reckless indifference, and then allowing an award to be discretionary even if that high standard is met, most prisoners are denied punitive relief.

Royal v. Kautzky exemplifies this. The plaintiff, who was bound to a wheelchair from a spinal cord injury, filed a pro se complaint alleging that he was not receiving proper medical treatment. Shortly following the filing, the prison medical director confiscated the plaintiff's wheelchair and claimed that it was no longer needed. As a result, the plaintiff was forced to either use crutches while in severe pain or crawl on the floor. Although the wheelchair was finally returned after the prisoner submitted seventeen complaints, the plaintiff was soon thereafter placed in segregation for sixty days. Even though the district court found that the prison had unconstitutionally retaliated against the plaintiff, there was no accompanying physical injury and thus, compensatory damages were barred by § 1997e(e).

The court then decided against awarding punitive damages, finding that the defendant did not act with evil motive or reckless indifference but rather out of frustration with plaintiff's constant complaints. The court further noted that since the head of security had already retired, punitive damages would not deter future conduct. Recognizing that a lower court decision may only be reversed for abuse of discretion, the court of appeals affirmed the decision and the plaintiff was denied both punitive and compensatory damages,

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139 See Restatement (Second) of Torts § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").
141 Royal, 375 F.3d 720.
142 Id. at 726 (Heaney, J., dissenting).
143 Id. After plaintiff was seen crawling, the security director issued a memorandum stating that any inmate seen crawling on the ground would be subject to discipline. Id. at 726–27.
144 Id. at 727.
145 Id. at 722–23 (majority opinion).
146 Id. at 725.
147 Id.
148 Id. at 724 ("An appellate court should not lightly reverse a district court's decision to award—or not to award—punitive damages... Because a district court's decision to award punitive damages involves 'a discretionary moral judgment,' we empower a district court with enough discretion to make its proper judgment call without fear of inappropriate appellate intervention.").
Despite the finding that an egregious constitutional violation was committed against him.\(^{149}\)

While courts are more likely to award nominal damages, there still remains the issue of whether the plaintiff must plead nominal damages in order to avoid dismissal or summary judgment. While many courts have indeed found that it is unnecessary for a plaintiff to specifically request nominal damages, other jurisdictions have required the prisoner to include the request in the pleadings or at least in the appellate brief.\(^{150}\) In *Harris v. Garner*, for example, the court refused to consider nominal damages where the plaintiff had not sought them,\(^{151}\) and the suit was dismissed despite compelling allegations of Fourth, Eighth, and Fourteenth Amendment violations that occurred during a prison “shakedown.”\(^{152}\)

The dismissal of a potentially meritorious action, based on the plaintiff’s failure to plead nominal damages, is especially critical given the number of prisoners who proceed without the assistance of counsel.\(^{153}\) These plaintiffs presumably are unaware of the existence of nominal damages as a tool for vindicating constitutional rights and are ignorant of the necessity of pleading nominal damages to keep their claims alive. Realistically, most prisoners would not want to be awarded just $1.00, and so few would have any incentive to include a request for nominal damages without knowing of its greater significance. In those courts requiring the plaintiff to raise the issue, the fact that nominal damages may in fact be available is of no impact because the pro se litigant is already out of court, regardless of the potential merits of the lawsuit.

**B. An Award of Nominal Damages Does Not Support Attorneys’ Fees and May Preclude a Prisoner from Having Counsel**

In the typical civil rights lawsuit, the prevailing plaintiff is entitled to an award of reasonable attorneys’ fees.\(^{154}\) By contrast,

\(^{149}\) Id. The district court did, however, award plaintiff a $1.00 nominal damages award. *Id.*

\(^{150}\) See *supra* notes 62–66 and accompanying text.

\(^{151}\) 190 F.3d 1279, 1288 n.9 (11th Cir. 1999).

\(^{152}\) Id. at 1282 (alleging specifically that prison officials allowed members of the opposite sex to be present during strip searches and body cavity searches, physically harassed prisoners, made harassing comments to an inmate because of his sexual orientation, ordered one prisoner to tap dance naked, and ordered another prisoner to dry shave).

\(^{153}\) See JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 2 (1997) (stating that more than 90% of inmates petitioning district courts filed pro se and 88% did so on appeal); U.S. DEP’T OF JUSTICE, *supra* note 62 (reporting that 96% of prisoners proceed pro se).

\(^{154}\) See 42 U.S.C. § 1988(b) (2000) (“In any action or proceeding to enforce a provision of [the civil rights statutes] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs . . . .”). Section 1988 has been treated as asymmetric:
§ 1997e(d)(2) of the PLRA limits an award of attorneys’ fees to 150% of the monetary damages award.\textsuperscript{155} Since a plaintiff who recovers nominal damages is considered to be the prevailing party,\textsuperscript{156} a prisoner who receives a nominal award falls under the attorneys’ fees provision of § 1997e(d)(2).\textsuperscript{157} For example, a prisoner awarded $1.00 as a remedy for a non-physical constitutional violation finding would be awarded attorneys’ fees in the amount of $1.50.\textsuperscript{158} This insulting result simply feeds into the irrationality of § 1997e(e).

Since Congress chose to deviate from the default American Rule by enacting § 1988 in the first place,\textsuperscript{159} courts upholding § 1997e(d)(2) find that Congress similarly has the authority to limit the fees that a court may award in prisoner civil rights cases.\textsuperscript{160} However, in applying § 1997e(d)(2) to nominal damages awards, the courts have forced prisoners to lose their most powerful mechanism for obtaining counsel. While it is true that the fee cap provision does not make it impossible in all cases for a prisoner to obtain legal services,\textsuperscript{161} the provision does destroy a critical incentive for lawyers to

\textsuperscript{155} See 42 U.S.C. § 1997e(d)(2) (2000) ("Whenever a monetary judgment is awarded in an action... a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.").

\textsuperscript{156} See Farrar v. Hobby, 506 U.S. 103, 111–13 (1992) (holding that in order to qualify as the prevailing party, a plaintiff must obtain at least some relief and obtain an enforceable judgment against the defendant; finding that since a nominal damages award is a technical victory and still enables the plaintiff to enforce a judgment, a plaintiff awarded nominal damages is the prevailing party).

\textsuperscript{157} See Volk v. Gonzalez, 262 F.3d 528, 535 (5th Cir. 2001) (holding that the PLRA’s attorneys’ fees provision applies to awards of nominal damages); Boivin v. Black, 225 F.3d 36, 40 (1st Cir. 2000) ("Since an award of $1.00 is just as much a monetary judgment as an award of $1,000,000, the plain language of the statute makes the fee cap applicable to such an award.").

\textsuperscript{158} See, e.g., Royal v. Kautzky, 375 F.3d 720, 726 (8th Cir. 2004) (affirming the district court’s award of $1.50 in attorneys’ fees); Boivin, 225 F.3d at 38 (remanding to cap the attorneys’ fees at $1.50).

\textsuperscript{159} Under the American Rule, a prevailing party in tort litigation must bear 100% of his own attorneys’ fees. See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser."). However, "Congress has the power... to revise this schematic, and if it elects to do so, it may delineate both the circumstances under which attorneys’ fees are to be shifted and the extent of the courts’ discretion in that respect." Boivin, 225 F.3d at 39.

\textsuperscript{160} See Boivin, 225 F.3d at 39.

\textsuperscript{161} See id. at 43 ("[T]he PLRA fee cap does not make it impossible for a prisoner to secure the services of a lawyer... [W]e are reluctant to conclude that all attorneys accept or reject prisoners’ cases solely on the basis of financial considerations. Moreover, prisoners may hire attorneys with their own funds.").
take on prisoner constitutional tort cases, thereby creating an additional impediment on the prisoner who already has many cards stacked against him. The result is that an attorney may only take on cases where the prisoner has been physically injured, ignoring other constitutional cases that are just as meritorious and deserving of judicial attention. And even when a prisoner is able to secure counsel, the restriction on fees reduces any incentive a lawyer has to expend significant yet necessary resources and time, thereby affecting the quality of representation.}\footnote{See Tsai, supra note 8, at 894 (arguing that attorneys working for indigent clients with no prospect of attorneys' fees will have little incentive to litigate the case effectively).}

Two undesirable outcomes may occur where a prisoner is unable to obtain counsel. First, the prisoner may be forced to forgo litigation altogether.\footnote{However, the Seventh Circuit in Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003), discussed Congress's belief that litigation is recreation to prisoners, trips to the courthouse are like vacation, and prisoners are lured by the belief of a "pot o' gold" at the end of litigation. Id. at 592. If Congress's belief is indeed true, then few prisoners would be deterred from suing without counsel.} While this may seem to be exactly what Congress desired in enacting the PLRA, Congress's express intention was to limit the amount of\footnote{Cf. Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) (finding that a statute that bars constitutional issues from being presented to the courts severely impairs the judiciary function as "[i]nterpretation of the law and the Constitution is the primary mission of the judiciary").} frivolous lawsuits while leaving the courts open to prisoners with sincere allegations of constitutional violations.\footnote{See Boivin, 225 F.3d at 43 ("While pro se litigants are not exempt from procedural rules, courts are solicitous of the obstacles that they face. Consequently, courts hold pro se pleadings to less demanding standards than those drafted by lawyers.").} Violations of one's constitutional rights are seen in America as the most serious torts (as is made evident by the fact that Congress exempted civil rights cases from the American Rule in the first place), and are of particular interest to the federal judiciary.\footnote{See Newman, supra note 30, at 519 n.2 (describing instances where prisoners' rights have been recognized and upheld), cited in Boivin, 225 F.3d at 43 (demonstrating that simply because a prisoner brings a suit pro se does not automatically mean that the prisoner does not have a meaningful opportunity to succeed).} Such violations should not be considered less serious because the person whose constitutional right was stripped happens to be a prisoner.

Second, by reducing attorneys' fees to practically nothing, the courts will simply see an increase in the amount of pro se litigation. While pro se plaintiffs are held to less demanding pleading standards\footnote{See Newman, supra note 30, at 519.} and do occasionally achieve success,\footnote{See supra notes 23–31 and accompanying text.} the vast majority of pro se lawsuits fail.\footnote{See supra notes 23–31 and accompanying text.} The presence of counsel, on the other hand, dra-
matically improves success rates. Lawsuits brought pro se are not, and should not be, a preferred method of litigating constitutional violations, particularly as pro se litigation has the effect of substantially slowing the litigation process:

If without counsel, [prisoners] litigate untrained in procedure and suspicious of the judicial system. Prison administrators, the usual defendants in these actions, are often too busy keeping a lid on their underfinanced and volatile institutions to litigate responsively to court deadlines. They are represented by attorneys general who may defend through “papering” the plaintiff and the court with motions. The burden of sorting through the unprofessional pleadings of the plaintiff and the dilatory pleadings of the defendant falls upon the court, slowing the litigation process to a halt.

Given that the PLRA was enacted to free up the federal judiciary’s docket so that it could focus on non-prisoner lawsuits, it would seem that a provision that effectively encourages pro se litigation runs counter to that purpose.

C. Section 1997e(e)’s Prohibition on Compensatory Damages Runs Counter to the Damages Structure of Constitutional Torts

Although § 1983 constitutional torts are a “species of tort liability,” they are still governed according to common law tort damages principles. The Supreme Court first set forth this basic structure in Carey v. Piphus, holding that compensatory damages do not flow from every deprivation of constitutional rights. Rather, damages are to be awarded where the plaintiff succeeds in proving that the defendant both violated a constitutional right and caused an actual injury. In satisfying both elements, an award of compensatory dam-

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169 See Eisenberg & Schwab, supra note 28, at 692 (reporting that prisoners assisted by attorneys succeed in fifty-three percent of cases); Robertson, supra note 18, at 144 (noting that the presence of counsel dramatically improves the prisoner’s potential for success).

170 Herbert Eastman, Draining the Swamp: An Examination of Judicial and Congressional Policies to Limit Prisoner Litigation, 20 COLUM. HUM. RTS. L. REV. 64, 70-71 (1988) (citing Larsen v. Siewlaff, No. 76-3162, slip op. at 2 (E.D. Ill. Mar. 29, 1977) (denying the Illinois Attorney General’s motion to dismiss where the filing seemed to be based solely on a dilatory motive and finding that the effect of “assembly-line motions, while perhaps temporarily relieving the burden of government counsel, have done nothing more than temporarily shift the burden [to] the court which must rule on the motion”).


172 Under common law, damages only flow from injury or the invasion of a legally-protected interest. See RESTATEMENT (SECOND) OF TORTS § 902 (1979) (defining damages as “a sum of money awarded to a person injured by the tort of another”).


174 Id. at 264; see also Stachura, 477 U.S. at 307-08 (affirming Carey and emphasizing the importance of proving an actual injury for § 1983 damages); cf. Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 67 (2001) (rejecting plaintiff’s argument that the Court should recognize a federal
ages is mandatory, and the jury is required to award the amount appropriate "to compensate the plaintiff for his loss." On the other hand, where a defendant has deprived the plaintiff of an absolute constitutional right but has not caused an actual injury, the plaintiff's rights should be vindicated through an award of nominal damages. Punitive damages may likewise be awarded apart from showing actual injury as a mechanism to punish the defendant for his willful or malicious conduct and to deter others from similar behavior.

However, the actual injuries required to justify an award of compensatory damages are not limited to physical injuries and its associated out-of-pocket losses and other monetary harms. Rather, they include such injuries as "impairment of reputation..., personal humiliation, and mental anguish and suffering." Carey specifically held that distress—mental suffering or emotional anguish—is a genuine injury recognized by the law. The Court, while acknowledging that mental and emotional distress may be harder to prove than other types of injuries, found the difficulty of proof was not so substantial as to justify rules different from other types of injury. The concurrence in Stachura further held that deprivation of a First Amendment-protected activity could itself constitute compensable injury wholly apart from mental or emotional injury.

In enacting § 1997e(e), Congress significantly changed the landscape of the constitutional tort's remedies structure. Under the PLRA, compensatory damages are now available only for preferred types of actual injuries—property, physical, or physical plus emotional or mental injuries. Emotional or mental distress, which Carey explicitly declared to be injuries recognized by the law, is no longer deemed an actual injury when it occurs in the prisoner context. Deprivation of First Amendment rights, which may be considered an injury, is likewise deemed by the majority of courts a non-injury for

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remedy at law whenever there has been a constitutional deprivation and refusing to confer a private right of action for remedies against private entities acting under color of federal law).


176 Carey, 435 U.S. at 266 ("By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury . . . ").

177 See Stachura, 477 U.S. at 306 n.9 (providing that punitive damages are available upon a showing of the requisite intent).

178 Id. at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

179 Carey, 435 U.S. at 264 n.20.

180 Id. at 263–64 (noting that distress is typically proved by showing that the nature and circumstances of the wrong were such that it had an effect on the plaintiff).

181 Stachura, 477 U.S. at 315 (Marshall, J., concurring) ("Loss of such an opportunity [to engage in demonstration to express political views] constitutes loss of First Amendment rights 'in their most pristine and classic form.' There is no reason why such an injury should not be compensable in damages." (quoting Edwards v. South Carolina, 572 U.S. 229, 235 (1983))).
purposes of compensable damages. Whereas courts are required in the non-prisoner context to award compensatory damages when an actual injury is proved, the PLRA mandates the opposite: courts must now dismiss compensatory claims where the prisoner alleges certain actual injuries.

While the courts rationalize this result by finding that nominal or punitive damages remain available, they are still altering the principles as set forth in both common law tort doctrine and constitutional civil rights. The very purpose behind nominal damages is to vindicate one's constitutional rights where no harm has been inflicted. Section 1997e(e) ignores this structure, instead treating certain injuries flowing from constitutional violations as non-harm for purposes of nominal damages.

*Carey* and its progeny focus on the importance of ensuring the availability of an adequate and appropriate remedy proportional to the loss sustained. The PLRA, in allowing only limited remedies, drives a huge hole through this constitutional tort structure. Given that § 1997e(e) operates in and affects an area of law so fundamental to the United States, such an exception mandates that there be a significantcountervailing reason. However, the PLRA fails to present a sufficient counterargument. While limiting frivolous lawsuits in order to preserve resources for legitimate claims is indeed a valid concern, § 1997e(e) was enacted based on a number of half-truths of the actual need to curb prisoner litigation and does not ensure that such purpose will actually be accomplished. By considering only physical injury to be worthy of judicial attention, Congress ignores that a vast number of egregious violations of rights, deemed fundamental under the Bill of Rights, are not accompanied by physical injury. Section 1997e(e) does succeed in eliminating prisoner law-

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182 See, e.g., Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) ("The underlying substantive violation, like [a] First Amendment wrong, should not be divorced from the resulting injury, such as 'mental or emotional injury,' thus avoiding the clear mandate of § 1997e(e). The statute limits the remedies available, regardless of the rights asserted . . ."); Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) ("Allah relies on . . . the Stachura opinion as support for the proposition that a jury could measure the value of the infringement on his constitutional rights without basing it on any mental or emotional injury. . . . [E]ven assuming arguendo that presumed damages are available for a First Amendment free exercise claim, that claim would still be 'for mental or emotional injury suffered' under the facts as alleged in this case and would be barred by § 1997e(e) absent a showing of prior physical injury.") (internal citations omitted).

183 See *RESTATEMENT (SECOND) OF TORTS* § 907 cmt. a (1979) ("When a cause of action for a tort exists but no harm has been caused by the tort . . . judgment will be given for nominal damages.").

184 See supra note 26 for a discussion of how the prisoner litigation "explosion" was not quite as large as it initially appeared, due to a failure to correct for the increasing prison population.
suits, but also eliminates numerous cases that are neither frivolous nor wasteful of judicial resources. Indeed, § 1997e(e) forces the federal judiciary to turn a blind eye to the constitutional torts structure in many situations where an appropriate remedy is deserving.

V. THE PURPOSE BEHIND § 1997E(E) MAY BE ACCOMPLISHED THROUGH ALTERNATIVE METHODS

Federal courts must strike § 1997e(e) down as unconstitutional. This not only includes those courts currently applying the provision to constitutional torts, but also applies to those minority of courts who have allowed certain constitutional claims to survive § 1997e(e) through statutory construction rather than constitutional analysis. In ruling that § 1997e(e) is unconstitutional, courts are not depriving the legislature of a mechanism for reducing the number of frivolous prisoner lawsuits. Under the PLRA, judges are given a greater gatekeeper function in inmate cases than in non-prisoner suits, having more latitude to immediately dismiss on their own accord a complaint that seems frivolous, malicious, or does not state a claim upon which relief may be granted. While the legislative history of the PLRA indicates that Congress’s concern with “overzealous” judges who “have gone too far in micromanaging our Nation’s prisons” led them to enact the PLRA in order to take discretion away from federal judges, Congress may not overstep its bounds. Rather, Congress must place faith in the ability of federal judges to dismiss those lawsuits that truly are frivolous or malicious while keeping alive those that state a legitimate constitutional claim. Furthermore, since prisoners already face a higher standard for constitutional claims than non-prisoners face, judges must keep this in mind when determining whether the complaint states a claim upon which relief may be granted. With this higher burden, more prisoner lawsuits will be re-

185 The decrease in prisoner filings between 1995 and 1997 was thirty-three percent. This occurred notwithstanding a ten percent increase in the prisoner population. Margo Schlanger, Inmate Litigation, 116 HARV. L. REV. 1555, 1634 (2003) ("The most dramatic effect of the PLRA on individual inmate cases has been the decrease in district court filings coded... as inmate civil rights cases.... [T]he PLRA seems to have achieved its major goal of shrinking the number of civil rights filings by inmates.").

186 While the efforts to exempt constitutional torts from the purview of § 1997e(e) are laudable, those courts have avoided the constitutional issue by giving § 1997e(e) an implausible construction that renders the provision superfluous. See supra notes 71-80 and accompanying text. Statutory construction, therefore, is an improper mechanism for allowing prisoners to redress violations of their constitutional rights.


189 See supra notes 21-22 and accompanying text.
leased from court without having to resort to stripping prisoners of their rights.

Furthermore, judges have the ability to revoke an inmate’s good time credit as a sanction for filing a malicious claim, filing a claim solely to harass the defendant, testifying falsely, or presenting false evidence. Given that the majority of prisoners bringing suit are indigent and simply could not pay a fine, this non-monetary sanction is a powerful disincentive to any prisoner who wishes to file suit solely to spend time outside the prison walls or to gain retribution against his prison guards. Finally, the PLRA’s requirement that the prisoner first exhaust all administrative remedies may be an effective mechanism to ensure that the lawsuit is truly filed because of a legitimate complaint. This provision also works to settle issues the prisoner has with his conditions of confinement without necessitating the involvement of the courts.

CONCLUSION

While many courts declare that § 1997e(e) only precludes prisoners from seeking compensatory damages for violations of their rights, § 1997e(e) goes beyond precluding this particular remedy by stripping the ability to adjudicate many prisoners’ legitimate claims. This availability of nominal or punitive damages does not save § 1997e(e) from unconstitutionality. The PLRA, as construed by the majority of jurisdictions, restricts the availability of judicial remedies for violations of constitutional rights to the point where Congress is “in essence . . . taking away the rights themselves by rendering them utterly

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190 28 U.S.C. § 1932 (2000) (“In any civil action brought by an [inmate], the court may order the revocation of such earned good time credit . . . if . . . the court finds that (1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.”).

191 See Porter v. Nussle, 534 U.S. 516, 525 (2002) (discussing how internal review filters out frivolous claims and clarifies the contours of the controversy for those cases ultimately brought to court).

192 See id. (finding that by allowing corrections officials time and opportunity to address complaints internally, prison administration may be improved and the complaining inmate may be satisfied by the change, thus entirely obviating the need for judicial involvement). There is, however, a concern that this provision allows prisoners to be increasingly subjected to the power of prison administrators to retaliate against them for filing grievances. Cf. Gill v. Pidlypchak, 389 F.3d 379, 384 (2d Cir. 2004) (finding that the prisoner-plaintiff stated a First Amendment claim for being subjected to retaliation by prison officials after filing grievances); Trobaugh v. Hall, 176 F.2d 1087, 1089 (8th Cir. 1999) (directing award of compensatory damages for a prisoner being placed in segregation in retaliation for filing grievance). The administrative requirement, therefore, can only be enforced where prisoners have the ability to bring claims for unconstitutional retaliation free from the physical injury requirement of § 1997e(e); otherwise prisoners would face being retaliated against for following § 1997e(a), but be precluded from a judicial remedy by § 1997e(e).
hollow promises." In denying prisoners who have not been physically harmed an adequate remedy for their constitutional deprivations, Congress has created a huge gap in constitutional civil rights doctrine—the most fundamental area under American federal law. Freeing the federal judiciary docket to preserve critical resources for legitimate claims is a valid concern. However, this aim may be completed through alternative methods that do not raise such significant constitutional implications.

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