



University of Baltimore Law Review

Volume 45
Issue 1 Fall 2015

Article 6

2015

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Recommended Citation

Honick, Allen E. (2015) "It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Remedies for Constitutional Violations With the Need for Agency Autonomy," *University of Baltimore Law Review*: Vol. 45: Iss. 1, Article 6.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol45/iss1/6>

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IT'S "EXHAUSTING": RECONCILING A PRISONER'S RIGHT
TO MEANINGFUL REMEDIES FOR CONSTITUTIONAL
VIOLATIONS WITH THE NEED FOR AGENCY AUTONOMY

*Allen E. Honick**

"If we are to keep our democracy there must be one
commandment: Thou shalt not ration justice."¹

"The degree of civilization in a society can be judged by
entering its prisons."²

INTRODUCTION

The United States imprisons more people than any other nation.³ With more than 2.4 million prisoners, the American prison population outnumbers those of all European countries combined.⁴ Behind the new "iron curtain" exists a hidden world in which conditions are abhorrent, basic human rights are unprotected, and meaningful opportunities for redress are almost non-existent. As the national conversation centers on the effectiveness and sustainability of mass incarceration,⁵ this Comment highlights a less examined, but equally important, aspect of the incarceration problem—the lack of meaningful remedies for prisoners whose civil rights have been violated. The single biggest obstacle in the way of vindicating

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1. Chief Judge Learned Hand, 75th Anniversary Address to the Legal Aid Society of New York (Feb. 16, 1951).
 2. FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* (Constance Garnett trans., 1861).
 3. Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 12, 2014), <http://www.prisonpolicy.org/reports/pie.html>.
 4. *See World Prison Populations*, BBC, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/n1page1.stm> (last visited Nov. 13, 2015). China has a population nearly 10 times the size of the United States, yet incarcerates almost one million fewer citizens. *Id.*
 5. *E.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

constitutional rights is the Prison Litigation Reform Act (PLRA),⁶ and the judicially imposed restrictions engrafted since its enactment.⁷

This Comment will address the inadequacy and injustice of the PLRA, specifically the “proper exhaustion” rule as expressed in *Woodford v. Ngo*.⁸ “Proper exhaustion” means that “a prisoner must complete the administrative review process in accordance with applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court.”⁹ Failure to adhere to even the slightest procedural requirement is sufficient to warrant procedural default, i.e., a dismissal regardless of the merits of the underlying claim.¹⁰ The PLRA seeks to achieve laudable ends, but the means by which it does so leave much to be desired.

I do not present here a study of the reasons for an individual’s incarceration, but I focus, instead, on the difficulties an incarcerated individual faces in efforts to have a grievance decided on the merits.¹¹ Further, rather than critique the inequities and shortcomings in the criminal justice system as a whole, I examine the experience of life behind bars, and suggest how constitutional rights and protections can be guaranteed to those in prison.¹² For present purposes, I presume that those currently incarcerated are thus situated because they committed a crime for which they were duly tried and convicted, and are now serving a sentence imposed according to due process.

“Imprisonment” by definition means the loss of certain aspects of liberty,¹³ but it is not a blanket removal of all constitutional rights.¹⁴ Prisoners retain substantive rights under the First Amendment (freedom of speech, religion, and access to the courts),¹⁵ the Fifth and

6. 42 U.S.C. § 1997e (2012 & Supp. I 2013).

7. See *infra* Part II.C.

8. 548 U.S. 81, 93 (2006). Proper exhaustion and the consequence of procedural default differs from ordinary administrative exhaustion in that the latter only requires a claimant to present a complaint to an administrative agency prior to filing suit with dismissal of that claim having no bearing on future ability to file suit, whereas procedural default dictates that if a complaint is dismissed for failure to comply with procedural guidelines, a court can never consider that claim.

9. *Id.* at 88.

10. See *infra* Part III.C.

11. See *infra* Parts I–IV.

12. See *infra* Parts I–IV.

13. *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005). Prisoners do retain nominal liberty interests, such as the interest in avoiding solitary confinement, when that classification “imposes an atypical and significant hardship under any plausible baseline.” *Id.* at 223.

14. See *infra* Part I.A.

15. See *Cruz v. Beto*, 405 U.S. 319, 321–22 (1972) (per curiam); *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam).

Fourteenth Amendments (due process and equal protection),¹⁶ and the Eighth Amendment (protection against cruel and unusual punishment),¹⁷ to name a few. Nor is incarceration a relinquishment of citizenship.¹⁸ Thus, the privileges guaranteed to citizens, other than basic liberty interests, must also be ensured for prisoners.

This Comment begins, in Part I, by examining the history of redressing constitutional violations in prison. To properly understand the current state of affairs regarding prisoner civil rights actions, it is necessary to first explore the institutional framework for prisoner complaints, and the rationale behind its creation and implementation. Part I traces the history leading up to the PLRA, and the fundamental deficiency in the motivation and rationale offered for the PLRA's enactment.

Part II focuses on the specifics of the PLRA, what it requires of prisoner litigants, and how the PLRA fundamentally altered a prisoner's ability to bring a constitutional claim in federal court. Exhaustion of administrative remedies is examined as developed in the seven Supreme Court decisions since the PLRA's enactment.¹⁹ The judicial gloss of proper exhaustion and the consequence of procedural default articulated by the Supreme Court is the primary inquiry.²⁰ Procedural default, I argue, is the most significant barrier between a prisoner with a valid claim and the federal courts.²¹

Part III begins by examining Justice Stevens' dissent in *Woodford*, and its criticism of the majority's rationale for engrafting into the PLRA proper exhaustion as an absolute requirement. Proper exhaustion creates an inherent conflict of interests that undermines the PLRA's intent.²² Prisoners wishing to complain, *inter alia*, about their treatment by staff are required to submit their grievances to the same officials who, often times, are defendants in the underlying action.²³ These officials then have the incentive and the ability, based on the proper exhaustion doctrine, to procedurally default a claim, thereby reducing the likelihood of

16. See *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam); *Screws v. United States*, 325 U.S. 91, 93–112 (1945).

17. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Weems v. United States*, 217 U.S. 349 (1910).

18. See *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

19. See discussion *infra* Parts II.B–C.

20. See discussion *infra* Parts II.B–C.

21. See *infra* Part II.B.

22. See *infra* Part III.B.

23. See *infra* Parts III.B–C.

judicial intervention.²⁴ Repealing or revising the exhaustion provision would be the most direct and effective method to remedy procedural default, but given the extreme difficulty this Congress seemingly has in passing any meaningful legislation,²⁵ other solutions are explored.

In Part IV, two proposals are offered. The first involves a technical analysis of the proper exhaustion doctrinal underpinning, focusing on exceptions and loopholes built into the rule. The key to the harmonious existence of proper exhaustion and meaningful redress lies in exceptions to the rule. Justice Breyer's concurrence in *Woodford* is explored, and the administrative law interpretative framework discussed therein is, I argue, the appropriate guidepost for federal courts analyzing and applying proper exhaustion under the PLRA.²⁶ There is precedent for recognizing exceptions to proper exhaustion that should guide courts in their application of the PLRA's exhaustion provision.²⁷ This proposal is easily implementable and can take effect immediately.

The second proposal involves a long term and more comprehensive policy analysis, addressing the sources of the majority of prisoner civil rights actions, and holding prison officials accountable for violations in their institutions.²⁸ Given the inherently closed and secretive nature of prisons, a better system of checks and balances is necessary, taking into account the need for agency autonomy while still protecting constitutional rights. Ongoing independent oversight can provide a preemptive problem-solving function instead of the current reactive model employed by the federal judiciary. Although this proposal will take time, it provides a strong foundation for long term systemic changes in the American prison model.

PART I

The federal courts' involvement in conditions of confinement has come full-circle. From the Great Depression through the early 1960s,

24. See *infra* Part III.C.

25. See Rebecca Kaplan, *Unpopular Congress Was Also Very Unproductive in 2013*, CBSNEWS (Dec. 24, 2013, 11:19 AM), <http://www.cbsnews.com/news/unpopular-congress-was-also-very-unproductive-in-2013/>; Cristina Marcos, *A 'Do Nothing' Congress?*, THEHILL (July 13, 2014, 10:30 AM), <http://thehill.com/blogs/floor-action/212041-a-do-nothing-congress>.

26. See *infra* Part IV.A.

27. See *infra* note 252 and accompanying text.

28. See *infra* Part IV.B.

federal courts took a "hands-off" approach,²⁹ and did not interfere with conditions on the inside.³⁰ Between 1961 and 1980, courts began affirmatively changing the way they dealt with allegations of constitutional violations.³¹ During this time, courts conferred substantive and procedural rights on prisoners, and it seemed as though the gates of this "shadow world" had swung open.³² Congress also became involved in securing the judicially declared rights, enacting legislation aimed at providing prisoners with meaningful avenues of redress for violations of these newly recognized rights.³³ Three decades of progress in prisoner rights began to unwind in 1996 when Congress enacted the PLRA.³⁴ Nearly twenty years later, prisoners again find themselves without adequate remedies for violations of the most basic civil rights.³⁵ The PLRA and its accompanying jurisprudence have gradually eroded decades of progress in the prisoner rights arena.³⁶

A. "Hands Off" No More

42 U.S.C. § 1983 is the classic vehicle for vindicating federal constitutional rights, and provides in part:

Every person who, under color of any statute . . . 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, shall be liable to the party injured in an action at

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29. See, e.g., *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). *Ruffin* epitomized feelings of the federal bench toward prisoners and prison conditions, referring to prisoners as "slave[s] of the State." *Id.* "The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead." *Id.* This attitude resulted in a "hands off" approach by federal courts, leaving prison conditions and prison complaints to the individual state agencies without judicial oversight. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).
30. See MATT DELISI & PETER JOHN CONIS, *AMERICAN CORRECTIONS: THEORY, RESEARCH, POLICY & PRACTICE* 56 (2d ed. 2013).
31. *Wolfish*, 441 U.S. at 562 (stating that "in recent years . . . [federal] courts largely have discarded this 'hands off' attitude" to the problems inside prisons "and have waded into this complex arena").
32. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).
33. See *infra* Part I.B.
34. 42 U.S.C. § 1997e (2012 & Supp. I 2013).
35. See *infra* Part III.
36. See *infra* Part III.

law, suit in equity, or other proper proceeding for redress . . .
37

In 1961, the Supreme Court decided *Monroe v. Pape*,³⁸ a case in which an African-American man was arrested following a warrantless search of his home, detained for more than ten hours without access to counsel, and subsequently released without being charged.³⁹ The Court held that in passing Section 1983, Congress intended to provide “a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”⁴⁰ Section 1983 does not create a new cause of action, but provides a method for enforcing constitutional rights elsewhere established.⁴¹ Importantly, Section 1983 does not precondition the right to a constitutional claim in federal court on any procedural qualifications.⁴²

In 1964, the Supreme Court recognized a state prisoner’s unconditional right to bring a claim under Section 1983.⁴³ The rationale behind the lack of procedural barriers was that an aggrieved prisoner should not be required to seek relief from the state authorities against whom Section 1983 guarantees immediate judicial access.⁴⁴ This, of course, makes good sense, as in many if not most prisoner complaints these same prison officials are defendants in the ultimate action.⁴⁵ Prisoners began filing federal claims under Section 1983 to improve their conditions of confinement, and successfully

37. 42 U.S.C. § 1983 (2012); *see also* *Monroe v. Pape*, 365 U.S. 167, 171–85 (1961) (interpreting the original intent of Section 1983).

38. 365 U.S. at 167.

39. *Id.* at 169.

40. *Id.* at 172; *see also* *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Monell v. N.Y.C. Dep’t. of Soc. Servs.*, 436 U.S. 658, 700–01 (1978)) (holding that Section 1983 “provides a remedy ‘against all forms of official violation of federally protected rights’”).

41. *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (holding that Section 1983 is not itself a source of substantive rights, but rather “imposes liability for violations of rights protected by the Constitution”).

42. *Patsy v. Bd. of Regents*, 457 U.S. 496, 500–01 (1982). The *Patsy* court explicitly noted: “[T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983” *Id.*

43. *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam). Federal prisoners were given a similar right to pursue constitutional claims against the federal government, since Section 1983 pertains only to state action. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–91, 397–98 (1971).

44. DAVID FATHI, HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 11 (2009) (citing *Patsy*, 457 U.S. at 516).

45. *Id.* at 12.

secured numerous rights in a series of Supreme Court decisions between 1969 and 1976.⁴⁶ Meaningful access to the courts,⁴⁷ religious freedom,⁴⁸ procedural due process,⁴⁹ equal protection from invidious racial discrimination,⁵⁰ and adequate medical care⁵¹ were assured, reversing a century-old trend of federal courts remaining uninvolved in state prison conditions.⁵² In 1974, the Court declared: "There is no iron curtain drawn between the Constitution and the prisoners of this country."⁵³

Following *Cooper*, Section 1983 permitted prisoners to file federal claims for any allegation of constitutional violations, but in a speech to the National Association of Attorneys General (NAAG), Chief Justice Warren Burger suggested that states implement an institutional grievance model as a method for prisoners to raise complaints without having to go to court:

What we need is to supplement [judicial actions] with flexible, sensible working mechanisms adapted to the modern conditions of overcrowded and understaffed prisons . . . a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard *promptly, fairly and fully*.⁵⁴

B. State Grievance Systems – An Early Model

In 1980, Congress followed Chief Justice Burger's recommendation and endorsed, *inter alia*, the use of administrative prison grievance systems by passing the Civil Rights of

46. See cases cited *infra* notes 47–51.

47. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("[I]t is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.").

48. *Cruz v. Beto*, 405 U.S. 319, 322–23 (1972) (per curiam).

49. *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). A unanimous Court held that a prisoner's *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 520–21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

50. *Lee v. Washington*, 390 U.S. 333, 333–34 (1968) (per curiam).

51. *Estelle v. Gamble*, 429 U.S. 97 (1976).

52. See *supra* note 29 and accompanying text.

53. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

54. Chief Justice Warren E. Burger, Speech to the National Association of Attorneys General in Washington, D.C. (Feb. 8, 1970) (emphasis supplied).

Institutionalized Persons Act (CRIPA).⁵⁵ The purpose of the administrative grievance system format was to encourage settlement of prisoner disputes as an alternative to filing suit in federal court.⁵⁶ The CRIPA set forth minimum criteria for these systems, and required that each state's grievance model be certified by either the U.S. Attorney General or a federal court.⁵⁷ The CRIPA mandated that administrative remedies must be "plain, speedy, and effective."⁵⁸ Exhaustion was added to the CRIPA to counterbalance other provisions in the Act which made it significantly easier for prisoners to file suit against prison officials.⁵⁹ A prisoner only had to exhaust administrative remedies before filing a federal claim if a state system was certified by the U.S. Attorney General or a federal court.⁶⁰ The state grievance system scheme addressed early concerns regarding a potential flood of inmate litigation in light of the earlier Supreme Court holdings permitting private federal causes of action for alleged constitutional violations.⁶¹

The grievance system model was intended to provide prison administrators with an opportunity to address institutional complaints internally and avoid judicial intervention in the states' operation of their prisons.⁶² The CRIPA acknowledged a duality in the administrative remedy procedure—it was both an avenue for

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55. Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997a-j (2012)).
 56. See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 494–96 (2001).
 57. CRIPA § 7(a)(2). Certification requirements included an advisory role for employees and prisoners in the formulation, implementation, and operation of the system; maximum time limits for written replies to prisoner grievances; priority processing of emergency grievances; safeguards to avoid reprisals against any grievant; and independent review of the disposition of grievances by a person or entity not under the direct supervision or control of the institution. *Id.* § 7(b)(2).
 58. *Id.* § 7(b)(1).
 59. Branham, *supra* note 56, at 495; see also *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong. 53–54 (1977) [hereinafter *CRIPA Hearings*] (statement of Rep. Drinnan) (noting a concern among state attorneys general "that a person should be required to exhaust his administrative remedies before the Attorney General can act").
 60. Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1531 (2003).
 61. *Id.* at 1530–31.
 62. See Branham, *supra* note 56, at 495; see also *CRIPA Hearings*, *supra* note 59, at 77 (statement of Jay Lawrence Lichtman, Deputy Director, Defender Division, National Legal Aid and Defender Association).

prisoners to bring complaints, and an opportunity for prison administrators to recognize patterns of abuse, corruption, or other institutional shortcomings, and handle these claims internally without judicial involvement.⁶³ This model preserved state agency autonomy while still providing a meaningful method of redress for prisoners alleging constitutional violations.

One significant provision in the CRIPA required an independent review of the disposition of grievances "by a person or other entity not under the direct supervision or direct control of the institution."⁶⁴ Congress thus recognized the importance of an objective impartial review of the internal adjudication of prisoner claims. The CRIPA authorized the U.S. Attorney General to seek injunctive relief on behalf of prisoners deprived of their legal rights.⁶⁵ The CRIPA also provided an attorney's fee allowance: "[A] court may allow the prevailing party . . . a reasonable attorney's fee against the United States as part of the costs."⁶⁶ This incentivized private counsel involvement in prisoner actions, an important provision that the PLRA eventually repealed.⁶⁷

The CRIPA was primarily designed to address widespread constitutional violations in prisons.⁶⁸ While the language of the CRIPA regarding grievance system certification seemed strong and prisoner friendly, the federal government did little following the CRIPA's enactment to implement the certification requirements, and the certified system model never caught on.⁶⁹

Notably, in the few states that obtained CRIPA certification,⁷⁰ the grievance system model was successful in both resolving prisoner complaints and reducing the volume of Section 1983 actions in federal court.⁷¹ The administrative remedy model was put to the test,

63. *CRIPA Hearings*, *supra* note 59, at 53 (statement of Melvin T. Axilbund, Staff Director, A.B.A. Commission on Correctional Facilities).

64. CRIPA §7(b)(2)(E).

65. *Id.* § 5(a)(1).

66. *Id.* § 3(b).

67. *See* 42 U.S.C. § 1997e(d) (2012).

68. *See* Branham, *supra* note 56, at 493–94.

69. *Lewis v. Meyer*, 815 F.2d 43, 44–45 (7th Cir. 1987) (observing that "the Attorney General has not published a list of complying state rules[.]" making state compliance with the certification requirement difficult if not impossible).

70. E.g., Iowa, Missouri, Nebraska, Ohio, Tennessee, and Virginia.

71. *See, e.g., Donald P. Lay, Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 943–44 (1986). Between January 1 and November 30, 1984, Virginia referred 241 federal cases to the state's certified grievance procedure. *Id.* at 943. Seventy of these cases were resolved

albeit on a limited scale, and withstood the challenge, proving that “[a]n early and effective grievance procedure can without question minimize much of the burdensome inmate litigation under Section 1983 and still provide inmates with an expeditious and fair resolution of their often legitimate complaints.”⁷²

In 1980, there were roughly 500,000 prisoners in the United States.⁷³ Throughout the 1980s, the U.S. prison population experienced accelerated growth due to the “War on Drugs,”⁷⁴ mandatory minimum sentencing,⁷⁵ and recidivism (“three strikes”) statutes.⁷⁶ Interestingly, the rate at which prisoners filed civil rights suits between 1980 and 1996 actually decreased by 17 percent,⁷⁷ instead of ballooning as one might expect (or as the PLRA’s proponents claimed) given the tremendous expansion of the prison population.⁷⁸

C. *The Prison Litigation Reform Act*

In 1996, Congress passed the Prison Litigation Reform Act.⁷⁹ The attitude toward prison litigation had taken a decisive turn from the socially conscious mindset of the 1970s and 1980s. The PLRA was

by the grievance procedure, and 105 cases were reconsidered by the federal courts.
Id.

72. *Id.* at 951–52.

73. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 3 (2010), http://www.pewtrusts.org/~media/legacy/uploadedfile/s/pcs_assets/2010/CollateralCosts1.pdf.

74. “War on Drugs” refers to the federal drug prohibition policies beginning with President Richard Nixon’s passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236 (1970), and further developed by the Reagan, Bush I, and Clinton administrations. The phrase “War on Drugs” was first coined by President Reagan in a radio speech to the American public. *Reagan, in Radio Talk, Vows Drive Against Drugs*, N.Y. TIMES (Oct. 3, 1982), <http://www.nytimes.com/1982/10/03/us/no-headline-194726.html>.

75. *E.g.*, 21 U.S.C. § 841(b) (2000) (setting forth mandatory minimum sentencing for statutorily imposed limits on possession and distribution of controlled dangerous substances).

76. See Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331–34 (2005); see also Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563, 563 (2004).

77. See JOHN SCALIA, U.S. DEP’T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at iii (1997), <http://www.bjs.gov/content/pub/pdf/ppfc96.pdf>.

78. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1585 (2003). Schlanger notes that although the number of absolute filings increased during this period, the filing rate per prisoner “peaked in 1981.” *Id.*

79. 42 U.S.C. § 1997e (2012 & Supp. I 2014).

introduced as part of the 1994 "Contract with America,"⁸⁰ and packaged as a rider to an appropriations bill.⁸¹ Just like the War on Drugs, the PLRA capitalized on public sentiment regarding tort reform and other law and order goals.⁸² Senator Orrin Hatch, then Chair of the Senate Judiciary Committee introduced the PLRA in 1995:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little better to do are tying our courts in knots with an endless flow of frivolous litigation.

Our legislation will also help to restore a balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail. It is time to lock the revolving prison door and to put the key safely out of reach of overzealous Federal courts.⁸³

The PLRA's primary purpose was to reduce a perceived "epidemic" of frivolous prisoner lawsuits.⁸⁴ Its enactment was premised on the belief that prisoners "were unduly litigious, making federal cases out of the most trivial mishaps[.]" and these cases "were deluging both executive and judicial officials who were supposed to respond to them," resulting in "remarkably few successes" for prisoners.⁸⁵ The CRIPA, critics argued, was too permissive in opening the doors to the courtrooms, and had a burgeoning effect on federal dockets.⁸⁶ Proponents of the PLRA did not consider that the growing prisoner docket was more a result of rapidly rising prison populations than frivolous litigation.⁸⁷ In fact, contrary to the

80. See *Contract With America*, NAT'L CTR. FOR PUB. POL'Y RES. (1994), <http://www.nationalcenter.org/ContractwithAmerica.html>; H.R. 3, 104th Cong. (1995).

81. H.R. 2076, 104th Cong. Tit. VIII (1995).

82. See Roger Roots, *Of Prisoners and Plaintiff's Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210, 210–11 (2002); see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 389–91 (2002) (arguing that President Reagan's drug war efforts were purely political and exploited the prevailing view toward illicit drugs in America in the 1980s).

83. 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch).

84. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1776 (2003).

85. Schlanger, *supra* note 78, at 1567.

86. See *id.* at 1566–67.

87. *Id.* at 1586–87.

position asserted by the PLRA's proponents, a study conducted the year prior to the PLRA's enactment concluded that prisoners "are no more litigious than anyone else."⁸⁸

1. Misplaced Reasoning and the PLRA – Anecdotal Hype

Congress failed to recognize that "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State."⁸⁹ The "frivolity" cited by the PLRA's proponents was, in large part, only frivolous to them because they lacked an appropriate frame of reference.⁹⁰ This is not to dispute or minimize the concern of frivolous prisoner litigation. Rather, the soaring rhetoric proclaiming an "epidemic" of frivolous prisoner suits was based on anecdotal lobbying instead of empirical data.⁹¹

At first blush, the impetus for the PLRA seems logical and correct. Surely it is in everyone's best interest, including prisoners with meritorious claims, to have the federal docket freed up to the point that only worthy complaints are heard. In a 1995 letter to the editor published in the *New York Times*, four attorneys general argued in support of the PLRA: "Taxpayers have grown justifiably tired of footing the bill for the special privileges provided to prisoners"⁹² In support of the PLRA, the National Association of Attorneys General (NAAG) compiled a "top ten frivolous litigation list"⁹³ to illustrate the need for limiting prisoners' access to the courts.⁹⁴ The list purportedly provided an accurate snapshot of prisoner litigation, demonstrating the overall frivolity of these suits. The list including suits about a prisoner who "claimed he was not provided rubber shoes when he was ordered to mop the floor[;]" a prisoner who "claimed corrections officers were injecting the toothpaste in the commissary with pork by-products[;]" a prisoner who sued "because the prison's shower water was too cold and the building itself was too

88. *Prison Litigation Reform Act (PLRA): Myths and Facts*, SAVE COALITION, <http://www.savecoalition.org/myths.html> (last visited Nov. 13, 2015) (noting that in 1995, the rate of prisoner civil rights suits was 25 per 1000, while the rate of lawsuits filed by the entire U.S. population in both state and federal courts was 56 per 1000).

89. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

90. *Prison Litigation Reform Act (PLRA): Myths and Facts*, *supra* note 88.

91. Roosevelt, *supra* note 84, at 1777.

92. Dennis C. Vacco et al., Letter to the Editor, *Free the Courts From Frivolous Prisoner Suits*, N.Y. TIMES (March 3, 1995), <http://www.nytimes.com/1995/03/03/opinion/1-free-the-courts-from-frivolous-prisoner-suits-486495.html>.

93. See William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 667 (2004).

94. *Id.*

drafty[;]" and the most infamous case involving a prisoner who "sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen."⁹⁵ Congress bought into the hype and actually cited a similar list in debates on the House floor,⁹⁶ demonstrating the belief that the NAAG list was an accurate depiction of the majority of prisoner litigation.

Prisoner rights advocates responded by publishing their own list of ten "non-frivolous lawsuits,"⁹⁷ which described some of the most horrific and egregious examples of prison brutality and corruption. These suits included a case where "[d]ozens of women, some as young as 16, [were] forced to have sex with prison guards, maintenance workers, and a prison chaplain[;]" a case in which a "prisoner [gave] birth on the floor of the jail without medical assistance three hours after informing prison staff that she was in active labor[;]" and a case involving "single person cells hous[ing] four or five prisoners with mattresses on the floor soaked by overflowing toilets."⁹⁸ The debate became a "war of extremes,"⁹⁹ grounded on both sides in purely anecdotal evidence. When the PLRA was introduced in the Senate, bipartisan support existed for the legislation.¹⁰⁰ The PLRA passed in a process that "was characterized by haste and lack of any real debate."¹⁰¹

PART II

A. *The PLRA's Requirements*

The PLRA imposed many new requirements on prisoner litigants and drastically changed the Section 1983 and CRIPA models of

95. Derek Borchart, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 480 n.65 (2012); Jon O. Newman, *Pro Se Prisoner Litigation*, 62 BROOK. L. REV. 519, 520–21 (1996).

96. See 141 CONG. REC. 27,045 (1995) (listing the "Top Ten Frivolous Inmate Lawsuits Nationally").

97. *The Top Ten Non-Frivolous Lawsuits Filed by Prisoners*, ACLU NAT'L PRISON PROJECT, http://archive.acluor.org/archive/Leg_2005/pdf/Leg_2005_HB2140_top10.pdf (last visited Nov. 13, 2015).

98. *Id.*

99. Schlanger, *supra* note 78, at 1569.

100. See, e.g., 141 CONG. REC. 27042–44 (1995) (supporters of the PLRA included Senators Bob Dole, Orrin Hatch, and Harry Reid).

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

unabridged access to the federal courts for all.¹⁰² The PLRA became, in effect, a roadblock between prisoners and the courts.¹⁰³ The PLRA's requirements included exhaustion of administrative remedies as a precondition to filing suit,¹⁰⁴ limitations on prospective relief,¹⁰⁵ a three-strikes provision barring future filings if a prisoner has previously filed three suits that were deemed frivolous, malicious, or were dismissed for "fail[ure] to state a claim upon which relief could be granted,"¹⁰⁶ caps on attorney's fees,¹⁰⁷ exclusions of recovery for "mental or emotional injury . . . without a prior showing of physical injury or the commission of a sexual act[.]"¹⁰⁸ and mandating that even indigent prisoners pay filing fees.¹⁰⁹ Extensive scholarship exists discussing the intricacies of the PLRA's provisions, and, as such, this Comment will not address them all. This Comment instead focuses on the exhaustion requirement of the PLRA, the proper exhaustion rule, and the procedural default consequence added by the Supreme Court.¹¹⁰

Although many of the PLRA's provisions discourage prisoner claims, none are more profound than the exhaustion requirement. Exhaustion was never supposed to precondition a Section 1983 action.¹¹¹ Prior to the PLRA, exhaustion was only required where a state's grievance system was certified by the U.S. Attorney General or by a federal court.¹¹² Even in a CRIPA certified system, exhaustion "was in large part discretionary."¹¹³ Further, if the

102. *See generally* Schlanger, *supra* note 78, at 1627–33 (detailing the changes made to procedural law by the PLRA and the effects those changes had on inmate access to federal courts and remedies).

103. *Id.* at 1562 ("[T]he PLRA shut the courthouse doors to many inmates.").

104. 42 U.S.C. § 1997e(a) (2012).

105. 18 U.S.C. § 3626(a)(1)(A) (2012). Prospective relief refers to "all relief other than compensatory monetary damages," specifically referring to injunctive relief that was common in the form of consent decrees prior to the PLRA's enactment. *Id.* § 3626(g)(7).

106. 28 U.S.C. § 1915(g) (2012).

107. 42 U.S.C. § 1997e(d)(3).

108. 42 U.S.C. § 1997e(e).

109. 28 U.S.C. § 1915(b)(1).

110. *See supra* note 8 and accompanying text.

111. *See supra* note 42 and accompanying text. Exhaustion is an administrative law construct, and applied where Congress has established an administrative agency to handle grievances that occur under its purview. Prior to the PLRA, a Section 1983 suit was an independent federal cause of action with no relation to administrative proceedings.

112. *See supra* note 60 and accompanying text.

113. *Porter v. Nussle*, 534 U.S. 516, 523 (2002) (holding that under the CRIPA, exhaustion could only be required if the "court believed the requirement 'appropriate and in the

exhaustion requirement was imposed, the CRIPA required that the case be continued for up to ninety days in order for the prisoner to properly exhaust the available administrative remedies.¹¹⁴ Since the PLRA's enactment there have been seven Supreme Court opinions dealing with its provisions, four of the seven cases dealt specifically with the exhaustion requirement.¹¹⁵ Each of these cases further elucidated the exhaustion rule and ultimately added the procedural default consequence for failure to "properly" exhaust.¹¹⁶

B. Exhaustion Under the PLRA

The PLRA's exhaustion requirement provides: "No action shall be brought with respect to prison conditions under [Section 1983] or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."¹¹⁷ Exhaustion under the PLRA became mandatory, changing the CRIPA standard and creating a significant procedural hurdle to filing suit in federal court.¹¹⁸ The exhaustion provision's specific requirements remained unclear until a string of Supreme Court decisions clarified the provision, ending with the 2007 decision in *Jones v. Bock*.¹¹⁹ The PLRA also changed the CRIPA's mandate that state prison grievance systems be "plain, speedy, and effective" for exhaustion to even be considered as a

interests of justice." CRIPA's exhaustion provision is a "limited exhaustion requirement" that is "inapplicable to prisoner suits for damages when monetary relief was unavailable through the prison grievance system." *Id.* at 254 (citing *McCarthy v. Madigan*, 503 U.S. 140, 150–51 (1992)).

114. Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, § 7(a)(1), 94 Stat. 349 (1980).
115. *Jones v. Bock*, 549 U.S. 199, 216 (2007) (failure to exhaust administrative remedies in federal court is an affirmative defense); *Woodford v. Ngo*, 548 U.S. 81 (2006) (proper exhaustion is required, and failure to properly exhaust results in procedural default); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (even Section 1983 claims must be exhausted before filing suit); *Porter*, 534 U.S. at 516 (all conditions of confinement claims require exhaustion); *Booth v. Churner*, 532 U.S. 731, 741 (2001) (there is no futility exception to the exhaustion requirement).
116. *Jones*, 549 U.S. at 211–12; *Woodford*, 548 U.S. at 85; *Nelson*, 541 U.S. at 643; *Porter*, 534 U.S. at 519–20; *Booth*, 532 U.S. at 735.
117. 42 U.S.C. § 1997e(a) (2012).
118. See *Branham*, *supra* note 56, at 497–98 (outlining the procedural hurdles imposed by the PLRA).
119. 549 U.S. 199. The text of the exhaustion provision left open questions regarding its scope, application, and administration procedures, and between 1996 and 2007, the Supreme Court dealt with each of these questions. *Jones* signifies the last case interpreting the exhaustion requirement.

requirement.¹²⁰ States are now free to create grievance systems that are complex, making compliance difficult at best.

Conceptually, the exhaustion provision seems reasonable and well grounded. Prison administrators should be given the first opportunity to handle a prisoner's grievance, both for expediency and autonomy. Given the frequency with which prisoners file suit, and that these individuals are committed to the custody of the state in which they were sentenced, it is entirely reasonable for state prison agencies to have some autonomy in addressing complaints within their purview, and for administrative exhaustion to dissuade frivolous filings.¹²¹ This autonomy, however, should not preclude meritorious claims from reaching the federal courts. Prison grievance systems are not zero sum situations—there must be room for both administrative autonomy in prison management and a prisoner's ability to bring a constitutional claim in federal court under Section 1983. The Supreme Court's decisions following the PLRA's enactment illustrate the imbalance in favor of unchecked agency autonomy at the expense of constitutional rights.

C. *Supreme Court Interpretation of Exhaustion*

1. *Booth v. Churner*

In 2001, the Supreme Court granted certiorari in *Booth v. Churner* to resolve a circuit split regarding the PLRA's exhaustion provision.¹²² The Court specifically addressed whether a prisoner seeking compensatory damages in a Section 1983 action is subject to the exhaustion requirement when the internal grievance procedure could not provide the prisoner with the requested relief.¹²³ In other words, is there a futility exception to the exhaustion requirement? A unanimous Court held that there is no such exception to the PLRA.¹²⁴ In so concluding, the Court reasoned that since the PLRA removed the requirement that a grievance system be "effective," as originally

120. Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, § 7(b)(1), 94 Stat. 349 (1980).

121. *Jones*, 549 U.S. at 202–03.

122. *Booth v. Churner*, 532 U.S. 731, 735 (2001). The Third Circuit held that a grievance system's inability to provide a prisoner with the requested relief did not create an exception to the PLRA's exhaustion requirement, *Booth v. Churner*, 206 F.3d 289, 299–300 (3d Cir. 2000), while the Fifth, Ninth, and Tenth Circuits held that such an exception was appropriate. *See, e.g., Whitely v. Hunt*, 158 F.3d 882, 888 (5th Cir. 1998); *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1266–67 (10th Cir. 1997).

123. *Booth*, 532 U.S. at 735.

124. *Id.* at 740–41 (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

provided in the CRIPA, "Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures."¹²⁵ The Court thus removed traditional exhaustion exceptions found in other areas of administrative law.¹²⁶

2. Porter v. Nussle

In 2002, the Court again addressed the PLRA's exhaustion provision in *Porter v. Nussle*.¹²⁷ This case involved a prisoner (Nussle) who filed suit alleging that he was attacked and beaten by several prison guards.¹²⁸ Rather than first pursuing the administrative remedy procedure, Nussle filed a Section 1983 claim in federal court, charging a violation of his right to be free from cruel and unusual punishment.¹²⁹ The district court dismissed Nussle's claim for failure to exhaust, but the Court of Appeals for the Second Circuit reversed, holding that "exhaustion of administrative remedies is not required for [prisoner] claims of assault or excessive force brought under § 1983."¹³⁰ The Court of Appeals relied on the plain text of the PLRA which requires exhaustion "with respect to prison *conditions*," and concluded that prison conditions did not include "single or momentary matter[s], such as beatings."¹³¹ In another unanimous decision, the Supreme Court reversed: "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."¹³²

125. *Id.* This holding not only removed the traditional futility exception to administrative remedies, but also disregarded the need for state grievance systems to be fair and effective, thus giving states the freedom to construct unreasonable procedural rules without consequence.

126. Exceptions include pure questions of law in which agency actions may be challenged without exhausting administrative remedies, futility, and unavailability of remedies. JACOB A. STEIN, ET AL., ADMINISTRATIVE LAW 5-49 § 49.02 (Matthew Bender & Co., Inc. 2014).

127. 534 U.S. 516 (2002).

128. *Id.* at 520.

129. *Id.* at 521.

130. *Id.* (alteration in original). This holding hearkened back to the sentiment of the *Cooper* court—that a prisoner filing a Section 1983 action should not have to wrangle procedural barriers in an attempt to have their claim heard by a judge. See *supra* text accompanying notes 43–44.

131. *Porter*, 534 U.S. at 521–22 (alteration in original) (emphasis supplied) (citation omitted).

132. *Id.* at 532.

3. Woodford v. Ngo

Booth and *Porter* confirmed exhaustion as a universal requirement and as a prerequisite to a federal claim, thus setting the stage for the next major PLRA battle—what are the consequences a prisoner faces for failure to exhaust? In 2006, the Court decided *Woodford v. Ngo*,¹³³ the case that ultimately answered this question. Ngo, a California prisoner, filed a grievance beyond the fifteen-day period set forth in the California regulation,¹³⁴ and, as a result, his grievance was dismissed.¹³⁵ The dismissal was based purely on Ngo's failure to comply with the procedural filing period and was not a decision on the merits of his claim.¹³⁶ Ngo appealed the procedural dismissal, and the district court granted the State's motion to dismiss for failure to exhaust.¹³⁷ On appeal, the Ninth Circuit refused to read a procedural default requirement into the PLRA's exhaustion provision and reversed, holding that Ngo had indeed exhausted his administrative remedies because "no such remedies remained available to him."¹³⁸ The appellate court found support for its holding in the PLRA's exhaustion requirement, which prohibits a federal claim "until such administrative remedies *as are available* are exhausted."¹³⁹ The Ninth Circuit also held that a denial on state

133. 548 U.S. 81, 83–84 (2006).

134. *Id.* at 86–87. The California regulation in question only provided appeal rights to a claim that was not rejected on procedural grounds. CAL. CODE REGS. tit. 15, § 3084.5(c) (2004). Under this regulation, a prisoner had to navigate four levels of administrative grievances and appeals before exhausting all administrative remedies. *Id.*

135. *Woodford*, 548 U.S. at 87.

136. *Id.*

137. *Id.* The district court reasoned that since Ngo failed to reach the final stage in the administrative scheme, he had failed to exhaust all administrative remedies as required by the PLRA. *Ngo v. Woodford*, 403 F.3d 620, 625 (9th Cir. 2005), *rev'd*, 548 U.S. 81 (2006).

138. *Woodford*, 548 U.S. at 87. Since the regulatory deadline had passed, the Ninth Circuit concluded that no administrative remedy was available to Ngo. On the issue of procedural default, the appellate court concluded: "Procedural default is not an inextricable element of the PLRA's exhaustion requirement. If it were, prisoners' access to courts would be based on their ability to navigate procedural minefields, not on whether their claims had any merit." *Ngo*, 403 F.3d at 631.

139. 42 U.S.C. § 1997e(a) (2012 & Supp. I 2014) (emphasis supplied). This holding was consistent with the Sixth Circuit, *see Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), but conflicted with four other Courts of Appeals. *See Johnson v. Meadows*, 418 F.3d 1152, 1153 (11th Cir. 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1182 (10th Cir. 2004); *Spruill v. Gillis*, 372 F.3d 218, 222 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023–24 (7th Cir. 2002).

procedural grounds does not preclude subsequent judicial review of the underlying claim.¹⁴⁰

The Supreme Court granted certiorari and reversed.¹⁴¹ Writing for the majority, Justice Alito concluded: "[T]he PLRA exhaustion requirement requires proper exhaustion."¹⁴² Proper exhaustion demands that a non-exhausted claim can be procedurally dismissed without a ruling on the merits.¹⁴³ In so concluding, the majority noted that "[e]xhaustion is an important doctrine in both administrative and habeas law," and thus borrowed from both bodies of law in its interpretation.¹⁴⁴ Administrative law predicates "judicial relief" on the exhaustion of the "prescribed administrative remedy[.]"¹⁴⁵ Administrative law demands proper exhaustion; that is, "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issue on the merits)."¹⁴⁶ Habeas law also requires a prisoner to exhaust state remedies before filing a petition in federal court.¹⁴⁷ A prisoner satisfies habeas exhaustion, however, once state remedies "are no longer available, regardless of the reason for their unavailability."¹⁴⁸

The Court also interpreted the "general scheme" of the PLRA, as attempting to both reduce the quantity and improve the quality of prisoner suits, and to remove federal court oversight and interference with prison administration.¹⁴⁹ The Court held that a proper exhaustion requirement "serves all of these goals."¹⁵⁰ "The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to *consider* the grievance."¹⁵¹ The Court ignored the other side of this coin—a fair opportunity for the grievance to be *heard*. Further, the Court extended the proper

140. *Ngo*, 403 F.3d at 631.

141. *Woodford*, 548 U.S. at 82, 87. The decision was 5–1–3, with Chief Justice Roberts and Justices Alito, Scalia, Kennedy, Thomas, in the majority, Justice Breyer concurring, and Justices Stevens, Souter, and Ginsburg dissenting.

142. *Id.* at 93.

143. *Id.* at 81.

144. *Id.* at 88.

145. *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)).

146. *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002). Interestingly, the Court implies that proper exhaustion means that the agency addresses the issue on the merits, and not by summarily dismissing claims on solely procedural grounds. *Id.*

147. *Woodford*, 548 U.S. at 92.

148. *Id.* at 92–93.

149. *Id.* at 93–94.

150. *Id.* at 94.

151. *Id.* at 95 (emphasis supplied).

exhaustion rule beyond time deadlines to all state procedural rules, and defined the requirement as follows: “[A] prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court.”¹⁵² This additional requirement significantly enhanced the exhaustion provision of the PLRA, mandating that a court dismiss a claim, not only if it was untimely under state regulations, but also if it failed to comply with even the most minute procedural directive.¹⁵³ *Woodford* is the most significant decision since the PLRA’s enactment because of the addition of proper exhaustion and the consequence of procedural default.¹⁵⁴

Woodford was not the right case to determine the consequence for failure to exhaust. The plaintiff failed to comply with the regulatory guidelines not because of some exigency, but because of neglect.¹⁵⁵ It was this neglect upon which the majority premised its strongest reasoning, holding that if they accepted Ngo’s argument, “a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time[,]” thus thwarting the administrative process entirely.¹⁵⁶ This rationale makes good sense. A more appropriate case to challenge the exhaustion requirement would have been a defaulted claim due to an inability to file within the regulatory time period,¹⁵⁷ or a defaulted claim as a result of an overly complex and difficult to follow grievance model. Nevertheless, *Woodford* is the case that ultimately decided the full scope of PLRA exhaustion and the consequences for failure to exhaust.

4. Jones v. Bock

In 2007, the Supreme Court decided *Jones v. Bock*,¹⁵⁸ the last opinion dealing with the PLRA’s exhaustion requirement. This case dealt with challenges to the Sixth Circuit’s adoption of heightened pleading standards, which were “designed to implement the exhaustion requirement and facilitate early judicial screening.”¹⁵⁹ The Sixth Circuit interpreted the PLRA’s exhaustion provision as

152. *Id.* at 88.

153. *See infra* Part III.B.

154. *See infra* Part III.A.

155. *Woodford*, 548 U.S. at 86–87.

156. *Id.* at 95.

157. *E.g.*, *Minix v. Pazera*, No. 3:06-CV-398RM, 2007 WL 4233455 (N.D. Ind. Nov. 28, 2007).

158. 549 U.S. 199 (2007).

159. *Id.* at 202–03.

requiring a prisoner to plead exhaustion as an element of the complaint, to name all defendants who might later be sued, and to exhaust each claim in the complaint separately.¹⁶⁰ On certiorari, the Supreme Court reversed and remanded the case.¹⁶¹ In a unanimous decision, Chief Justice Roberts explained that “failure to exhaust is an affirmative defense under the PLRA[;]”¹⁶² “exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances[;]”¹⁶³ and that requiring a prisoner to exhaust each claim asserted in a complaint “certainly [does] not comport with the purpose of the PLRA to reduce the quantity of inmate suits.”¹⁶⁴ Although the Court struck down these heightened pleading requirements, its rationale was not based on the standards being too complex or prejudicial to prisoner litigants, as the standards would have been judicially enforced had they been set forth as part of the prison grievance procedure.¹⁶⁵ The *Jones* Court thus reaffirmed a policy of deferral to prison administrators in rulemaking, regardless of how difficult or prejudicial those rules may be.¹⁶⁶

PART III

A. *The Stevens Dissent in Woodford*

Justice Stevens wrote a trenchant dissent in *Woodford*, arguing that the majority’s interpretation of the exhaustion requirement was wrong because it ignored the plain text of the PLRA,¹⁶⁷ it was based on flawed reasoning,¹⁶⁸ and it misconstrued precedent regarding administrative exhaustion.¹⁶⁹ Stevens further emphasized that the purposes of the PLRA—to reduce frivolity and improve the quality of

160. *Jones v. Bock*, 135 F. App’x. 837, 839 (6th Cir. 2005).

161. *Jones*, 549 U.S. at 199.

162. *Id.* at 216.

163. *Id.* at 219.

164. *Id.* at 223.

165. *Id.* at 218–19.

166. *See id.* at 218.

167. *Woodford*, 548 U.S. 81, 105–07 (2006) (Stevens, J., dissenting) (“[T]he text of the PLRA does not impose a sanction of waiver or procedural default upon those prisoners who make such procedural errors.”).

168. *Id.* at 107–15 (asserting that the majority’s application of “extratextual waiver sanctions” to a *de novo* proceeding under Section 1983 was “seriously misguided”).

169. *Id.* at 111–13 (noting the majority’s “misapprehension” of precedent by “engrafting a procedural default rule into the PLRA”).

prisoner suits—would be served “even if the Court did not engraft a procedural default sanction into the statute.”¹⁷⁰

The majority, argued Stevens, incorrectly applied principles of administrative law to the PLRA. Administrative exhaustion is an appellate concept prohibiting a reviewing court from “consider[ing] arguments not properly raised before the agency.”¹⁷¹ Section 1983 actions are unlike administrative agency appeals in that they are not filed “to obtain direct review” of the grievance procedure, rather they seek to “obtain redress for an alleged violation of federal law committed by state corrections officials.”¹⁷² “[P]risoners who bring [Section 1983] actions . . . are entitled to *de novo* proceedings in the federal district court without any deference (on issues of law or fact) to any ruling in the administrative grievance proceedings.”¹⁷³ Administrative law principles are therefore inapplicable to prisoner civil rights actions.¹⁷⁴

Habeas law, Stevens contended, was also incorrectly applied to the PLRA, citing “no fewer than six cases” in which the Supreme Court “stated explicitly” that a habeas petitioner has satisfied the exhaustion requirement “so long as state-court remedies are no longer available to him at the time of the federal-court filing, regardless of the reason for their unavailability.”¹⁷⁵ Thus, there is no procedural default consequence in the habeas statute.¹⁷⁶

One of Stevens’ strongest arguments lies in his critique of the majority’s reasoning that procedural default achieves the goals of the PLRA.¹⁷⁷ Stevens noted that in addition to reducing frivolous claims, the PLRA, as explained by various Senators during floor debates, was also designed to “preserv[e] prisoners’ capacity to file meritorious claims[.]”¹⁷⁸ The addition of proper exhaustion and procedural default, Stevens argued, “bars litigation at random, irrespective of whether a claim is meritorious or frivolous.”¹⁷⁹ Reducing the quantity and filing rates of prisoner litigation had already been achieved prior to *Pozo v. McCaughtry*,¹⁸⁰ the first appellate decision

170. *Id.* at 114–15.

171. *Id.* at 111.

172. *Id.* at 113.

173. *Id.*

174. *See id.*

175. *Id.* at 109.

176. *See id.* at 108 (“[T]he exhaustion requirement in the federal habeas statute does *not* incorporate a procedural default sanction.”).

177. *Id.* at 114–20.

178. *Id.* at 117.

179. *Id.* at 117–18.

180. 286 F.3d 1022 (7th Cir. 2002).

interpreting a procedural exhaustion requirement into the PLRA.¹⁸¹ Stevens surmised that the reduction in claims resulted from the ordinary exhaustion requirement in the plain text of the statute,¹⁸² thus undermining the majority's contention that, without proper exhaustion, the provision would be turned "into a largely useless appendage."¹⁸³ This reduction can also be attributed to other provisions in the PLRA, like the requirement that even indigent prisoners filing *in forma pauperis* pay all filing fees.¹⁸⁴

Finally, Stevens pointed out that "[o]rdinary exhaustion also improves the quality of prisoner suits[.]" because it gives prison administrators the opportunity to address a grievance on the merits and creates an administrative record that is helpful once a suit is filed.¹⁸⁵ Justice Stevens noted that rather than imposing a procedural default "punishment . . . federal courts could simply exercise their discretion to dismiss [frivolous or non-exhausted] suits[.]"¹⁸⁶

B. *Administrative Grievance Procedures – The Inherent Conflict*

Under the current model, a prisoner must submit his or her initial grievance to the same officials who create the procedural scheme, and who are often named defendants in the underlying action.¹⁸⁷ This reality creates an inherent conflict of interest in the current administrative remedy system. A complaining prisoner is usually grieving about treatment by prison officials, using the rules promulgated and enforced by those same personnel.¹⁸⁸ Although the Supreme Court believes that prison administrators "have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances[.]"¹⁸⁹ the Court fails to consider that those same officials have a self-serving interest in

181. *Woodford*, 538 U.S. at 116 (Stevens, J., dissenting). The dissent pointed to statistics in the Petitioner's Brief noting that both the number and rate of filings decreased by nearly 50% between 1995 and 2000. *Id.* at 115–16 (citing Brief for Petitioners at 21–22, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05–416), 2005 WL 3598180).

182. *Id.* at 116.

183. *Id.* at 93 (majority opinion).

184. *Id.* at 94 n.4.

185. *Id.* at 116 (Stevens, J., dissenting). Ordinary exhaustion also provides prison officials with an incentive to resolve the grievance internally, rather than opening the door for judicial intervention. *See Thomas v. Wolum*, 337 F.3d 720, 732 (6th Cir. 2003).

186. *Woodford*, 548 U.S. at 119 (Stevens, J., dissenting).

187. *See supra* note 45 and accompanying text.

188. *Woodford*, 548 U.S. at 119 (Stevens, J., dissenting).

189. *Id.* at 102 (majority opinion).

preventing the most meritorious claims from ever seeing the light of day. In fact, the Court dismisses such a contention as speculative.¹⁹⁰ In so doing, the Court seemingly reverts to the “hands off” rationale,¹⁹¹ giving prison administrators the power to procedurally bar a grievance from reaching a federal court, thus abridging federal jurisdiction.

This conflict is embodied in many cases, too numerous to list in full. In *Sanders v. Bachus*,¹⁹² for example, a prisoner’s assault claim was dismissed for non-exhaustion when the prisoner did not first present the grievance to the officer who allegedly assaulted him.¹⁹³ In *Snyder v. Whittier*,¹⁹⁴ a prisoner’s assault and excessive force claim was dismissed for failure to exhaust, even though the prisoner “testified that he was fearful of filing a grievance” with the assaulting officer out of concern for retaliation by that guard.¹⁹⁵

Interestingly, the Supreme Court recognized the inherent conflict of interests in other prisoner contexts, yet seemingly ignored this recognition when interpreting the PLRA. Disciplinary hearing officers, observed the Court, “are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.”¹⁹⁶ This “relationship between the keeper and the kept” is hardly “conducive to a truly adjudicatory performance.”¹⁹⁷ “[D]isciplinary boards, composed of correctional officials, may be overly inclined to accept the word of prison guards” over a prisoner.¹⁹⁸ The same officials who comprise disciplinary review boards are the ones responsible for handling prisoner grievances.¹⁹⁹ The syllogism is clear: if a disciplinary official is “under obvious pressure” to find in favor of the institution, surely an official who is the subject of a complaint has a similar incentive to dismiss that claim without reaching its merits. Allowing these officials to dispose of a constitutional claim for procedural reasons undermines a prisoner’s constitutional right to have the claim adjudicated on the merits. This conflict of interests promotes a competing purpose—

190. *Id.*

191. *See supra* notes 29–33 and accompanying text.

192. No. 1:07-cv-360, 2008 WL 5422857 (W.D. Mich. Dec. 10, 2008).

193. *Id.* at *5.

194. 428 F. App’x. 89 (2d Cir. 2011).

195. *Id.* at 91.

196. *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985).

197. *Id.*

198. *Ponte v. Real* 471 U.S. 491, 513 (1985) (Marshall, J., dissenting) (noting the “integral” right of a prisoner to call witnesses at a disciplinary hearing).

199. *See id.*

rather than encouraging accountability, such a system incentivizes prison officials "to immunize themselves from future liability."²⁰⁰

Also problematic is the absence of any exceptions to the proper exhaustion requirement.²⁰¹ The PLRA requires a prisoner to exhaust "such administrative remedies *as are available*."²⁰² "Availab[ility]" is presumed, unless a system "lacks authority to provide *any* relief or take *any* action whatsoever in response to a complaint."²⁰³ Equally troubling is that many courts have dismissed claims for non-exhaustion even where good cause existed for the noncompliance. These cases include a prisoner who was hospitalized outside the institution until after the filing period passed,²⁰⁴ brain injury,²⁰⁵ illiteracy,²⁰⁶ a prisoner in solitary confinement without access to the necessary forms,²⁰⁷ and a prisoner's inability to read English.²⁰⁸ Further, courts have refused to recognize an emergency exception to the exhaustion requirement.²⁰⁹ The PLRA's exhaustion requirement was never meant to be so absolute.

C. *The Consequences of Proper Exhaustion and Procedural Default*

Supporters of the PLRA emphasized that the legislation was not designed "to prevent inmates from raising legitimate claims,"²¹⁰ and that the "reasonable requirements [of the PLRA] will not impede meritorious claims by inmates."²¹¹ These assertions, however, do not

200. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 151 (2007).

201. *See supra* notes 122–26 and accompanying text. The exception doctrine is further examined in Part IV.

202. 42 U.S.C. § 1997e(a) (2012 & Supp. I 2014) (emphasis supplied).

203. *Booth v. Churner*, 532 U.S. 731, 736 (2001) (emphasis supplied).

204. *Steele v. N.Y. State Dept. of Corr. Servs.*, No. 99 Civ 6111(LAK), 2000 WL 777931, at *1 (S.D.N.Y. June 19, 2000).

205. *Williams v. Kennedy*, No. C.A. C-05-411, 2006 WL 18314, at *2 (S.D. Tex. Jan. 4, 2006).

206. *Ramos v. Smith*, 187 F. App'x. 152, 154 (3d Cir. 2006).

207. *Green v. McBride*, No. 5:04-cv-01181, 2007 WL 2815444, at *3 (S.D. W.Va. Sept. 25, 2007).

208. *Benavidez v. Stansberry*, No. 4:07CV03334, 2008 WL 42779559, at *2 (N.D. Ohio Sept. 12, 2008).

209. *See, e.g., Sanders v. Norris*, No. 5:08CV00049 JTR, 2008 WL 2926198, at *2 n.8 (E.D. Ark. July 24, 2008) ("Recognizing an exception for 'urgent medical needs' would defeat the purpose of the exhaustion requirement . . .").

210. 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

211. 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady).

correspond with the realities following the PLRA's enactment. Proper exhaustion is the biggest reason why.

Proper exhaustion has most succeeded in barring claims by inexperienced prisoner litigants. "Frequent filers"²¹²—those who file mostly frivolous lawsuits with impunity—are seasoned professionals in navigating prison grievance system requirements, and are not deterred by proper exhaustion. They know precisely what is required to properly exhaust administrative remedies simply because they have done so with great regularity. Proper exhaustion impacts the first-time filer who, until suffering some constitutional deprivation, has never encountered the prison grievance system.²¹³ It is precisely this prisoner who most needs judicial access. Yet proper exhaustion and the lack of meaningful independent oversight prevents this from occurring.

Since *Woodford*, thousands of cases have been dismissed for failure to properly exhaust. Some notable examples include a prisoner (Asberry) who was attacked by fellow inmates after guards allowed the attackers into Asberry's cell, was left unconscious and without medical attention for 12 hours, remained in a coma for many days following the attack and hospitalized for several months thereafter, and suffered permanent injuries including paralysis.²¹⁴ Asberry filed a grievance against the officers involved, but the complaint was dismissed for failure to properly exhaust because Asberry appealed the initial agency dismissal too soon.²¹⁵ In *Simpson v. Jones*,²¹⁶ a prisoner filed a grievance alleging retaliatory treatment by prison officials for filing earlier complaints.²¹⁷ The grievance was dismissed for failure to properly exhaust because the prisoner "used red ink."²¹⁸ In *Whitener v. Buss*,²¹⁹ a prisoner filed a grievance alleging Eighth Amendment violations after being placed in a cell with a defective ceiling that collapsed on him causing significant injuries.²²⁰ The court dismissed the claim for failure to properly exhaust because the initial grievance was filed after the 48 hour filing deadline, even

212. This term is used to describe prisoners who "file not only a very large number of cases, but an especially high proportion of meritless cases." Schlanger, *supra* note 78, at 1648.

213. *Id.* at 1653–54.

214. *Asberry v. Okla. Dep't. of Corr.*, No. CIV-08-214-JHP, 2009 WL 152536, at *1 (E.D. Okla. Jan. 21, 2009).

215. *Id.* at *3.

216. 316 F. App'x. 807 (10th Cir. 2009).

217. *Id.* at 808.

218. *Id.* at 810.

219. 268 F. App'x. 477 (7th Cir. 2008).

220. *Id.* at 478.

though the prisoner was required to include the officers' names in the complaint, and could not obtain them for two weeks after the incident.²²¹ These cases represent a minute sampling of *Woodford*'s detrimental effects on prisoner litigation.

Proper exhaustion and the consequence of procedural default is especially troubling because, as Justice Stevens pointed out, it bars claims at random regardless of the merits.²²² Congress surely did not intend on authorizing arbitrary and haphazard dismissals when it enacted the PLRA.²²³ PLRA proponents confidently proclaimed: "This legislation will not prevent [legitimate] claims from being raised,"²²⁴ and noted that a reduction in frivolous suits "will free up judicial resources for claims with merit."²²⁵ Proper exhaustion, however, has nothing to do with the resolution of a meritorious claim: "It requires dismissal of the case—regardless of its merit—if the prisoner has failed to comply with the procedural requirements."²²⁶

The judicial gloss of proper exhaustion has undermined the stated Congressional intent. The chairman of the National Prison Rape Elimination Commission recognized that exhaustion under the PLRA "frustrate[s] Congress's goal of eliminating sexual abuse in US prisons, jails, and detention centers."²²⁷ The PLRA was designed not only to reduce the frivolity of prisoner suits, but also to improve the quality of these claims.²²⁸ It was not designed to indiscriminately dismiss meritorious claims solely on procedural grounds.

The reason that proper exhaustion poses such a formidable challenge is two-fold. First, and contrary to the *Woodford* majority's belief that compliance with administrative requirements is easy,²²⁹ administrative procedures impose very short deadlines for filing an

221. *Id.* at 478–79.

222. *See supra* Part III.A.

223. Senator Hatch was clear: "I do not want to prevent inmates from raising legitimate claims." 141 CONG. REC. at 27,042 (1995) (statement of Sen. Hatch).

224. 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

225. 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl).

226. FATHI, *supra* note 44, at 17.

227. Letter from Reggie B. Walton, Chairman, Nat'l Prison Rape Elimination Comm'n, to Representatives Bobby Scott and Randy Forbes (Jan. 24, 2008), http://www.savecoalition.org/pdfs/PREA_letter_urgening_reform_PLRA.pdf.

228. *Id.*

229. *Woodford v. Ngo*, 548 U.S. 80, 103 (2006) (noting the "informality and relative simplicity of prison grievance systems").

initial grievance.²³⁰ Most states require that the grievance be filed “within 14 to 30 days of the action being challenged.”²³¹ This effectively shortens what would otherwise be at least a one-year statute of limitations to a matter of days.²³² Procedural default ensures that failure to file within this abbreviated limitations period forever bars the claim,²³³ because by the time a federal court reviews administrative compliance, the filing deadlines will have long since passed.²³⁴ In addition to the timing aspects, filing a grievance on the incorrect form,²³⁵ failing to correctly label a grievance,²³⁶ and sending the right form to the wrong official,²³⁷ also result in procedural dismissal. If a prisoner makes even the slightest mistake in procedural compliance, a judge cannot consider the merits of the underlying claim. This problem is exacerbated because courts will generally defer to the agency’s determination of whether exhaustion was, in fact, proper.

Second, and more troubling, grievance systems are designed by the same officials who, often times, are defendants in the ultimate action.²³⁸ Prisoners must submit their claim to the very officials who have a marked interest in dismissing the grievance on procedural grounds, thereby diminishing the chance for judicial review.²³⁹ Such

230. Brief for the Jerome N. Frank Legal Services Organization for the Yale Law School as Amicus Curiae in Support of Respondent at 6, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05–416), 2006 WL 304573.

231. Brief for the United States as Amicus Curiae Supporting Petitioners at 29, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05–416), 2005 WL 3597818.

232. FATHI, *supra* note 44, at 13; *see also Woodford*, 548 U.S. at 118 (Stevens, J., dissenting) (“[I]n nine states [filing deadlines] are between 2 and 5 days.”).

233. *E.g.*, *Woodford*, 548 U.S. at 90 (majority opinion) (holding Ngo’s failure to meet the 15-day regulatory deadline as a bar to filing his claim).

234. *See, e.g.*, *Regan v. Frank*, Civ. No. 06-00066 JMS-LEK, 2007 WL 10637, at *5 (D. Haw. Jan. 9, 2007) (“Even though [the lower court] dismissed Plaintiff’s claims without prejudice to the filing of a new action following proper exhaustion, *Ngo* makes proper exhaustion of these claims impossible.”). Under the CRIPA, such a failure would have resulted in a stay for up to 180 days to allow the prisoner time to exhaust “plain, speedy, and effecting administrative remedies[.]” *See supra* note 58 and accompanying text.

235. *Roscoe v. Dobson*, 248 F. App’x. 440, 441 (3d Cir. 2007).

236. *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (dismissing for non-exhaustion a claim labeled “administrative appeal” instead of “disciplinary appeal”).

237. *Keys v. Craig*, 160 F. App’x. 125, 126 (3d Cir. 2005).

238. *See FATHI, supra* note 44, at 12.

239. Since procedural dismissal essentially eliminates the possibility of judicial review regardless of the claim’s merits, prison officials can basically absolve themselves from the possibility of an adverse judgment. A defendant must fail to raise non-exhaustion as an affirmative defense in order to have a federal court review a procedurally defaulted claim. *See supra* notes 158–65 and accompanying text.

a dismissal precludes a prisoner from filing an action in federal court, so prison officials have a perverse incentive to procedurally default the most serious claims. Exhaustion thus encourages prison administrators to implement "high procedural hurdles" and never reach the merits of a grievance "to best preserve a defense of non-exhaustion."²⁴⁰ Although the Supreme Court scoffed at such a possibility,²⁴¹ there is significant evidence that states have created procedural requirements "that cannot be understood as anything but attempts at blocking lawsuits."²⁴²

Proper exhaustion, however, is not fatally flawed in the context of prisoner litigation. A middle ground exists between the need for reducing frivolity and increasing quality and providing prisoners with meritorious complaints a fair, meaningful, and effective avenue for redress. Proper exhaustion can, in fact, coexist with affording meaningful avenues of redress.

Regarding the first challenge, little can be accomplished in a uniform way. American prisons, after all, are not governed by a single governing entity or agency, but rather are products of their distinct jurisdictions, each with varying procedures.²⁴³ Fundamental principles of state's rights and agency autonomy create formidable obstacles in the way of federal regulations. Coupled with the Supreme Court's unwavering deference to state administrative rulemaking authority, absent Congressional intervention and amendment of the PLRA, standardizing individual agency procedural guidelines is likely unachievable.

The second challenge, however, lends itself to universal reform. Since fundamental due process rights are implicated by dispositive decisions (i.e. dismissal), standards can be promulgated to allay the inherent conflict of interests. The deference concerns arising from agency autonomy in creating their own rules are overshadowed by the abridgment of constitutional due process rights.

240. Schlanger & Shay, *supra* note 200, at 150.

241. *See* Woodford v. Ngo, 548 U.S. 81, 95 (2006) ("We are confident that the PLRA did not create such a toothless scheme.").

242. Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS L. REV. 469, 473 (2012).

243. FAY STENDER & RONALD M. SINOWAY, *Prisoners' Rights Litigation*, 22 AM. JUR. TRIALS 1, § 8 Westlaw (database updated Aug. 2015).

PART IV

A. *Exceptions to Proper Exhaustion – A Workable Solution*

Justice Breyer wrote a concurring opinion in *Woodford*, in which he agreed with the majority that “Congress intended the term ‘exhausted’ to mean what the term means in administrative law, where exhaustion means proper exhaustion,”²⁴⁴ but that proper exhaustion under the PLRA is “not absolute.”²⁴⁵ Justice Breyer’s concurrence should be given greater consideration in the implementation of the exhaustion doctrine because Breyer is “a major voice in modern administrative law,”²⁴⁶ having authored an important treatise on the subject.²⁴⁷ Focusing on the administrative law source of “exhaustion,” Breyer noted “well-established exceptions” to this doctrine.²⁴⁸ Pointing to two circuits that adopted this interpretation of the PLRA’s exhaustion requirement, Breyer posited that courts hearing prisoner cases should “consider any challenges” a prisoner may have regarding a “traditional [administrative] exception that the statute implicitly incorporates.”²⁴⁹

Breyer’s concurrence is a roadmap for the coexistence of proper exhaustion and meaningful redress for prisoners. This approach appropriately balances the need for agency autonomy in identifying and resolving internal problems with a prisoner’s ability to seek an effective remedy (for a constitutional violation).²⁵⁰ Although Breyer’s opinion seemingly contradicts the earlier holding in *Booth* regarding administrative exceptions,²⁵¹ courts have recognized similar exceptions to the PLRA itself beyond the realm of administrative law principles.²⁵²

244. *Woodford*, 548 U.S. at 103 (Breyer, J., concurring) (citations omitted). Justice Breyer noted: “Congress [could not have] desired a system in which prisoners could elect to bypass prison grievance systems without consequences.” *Id.*

245. *Id.* at 104.

246. Thomas O. Sargentich, *Symposium: Justice Stephen Breyer’s Contribution to Administrative Law*, 8 ADMIN. L.J. AM. U. 713, 720 (1995).

247. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW & REGULATORY POLICY: PROBLEMS, TEXT AND CASES (6th ed. 2006).

248. *Woodford*, 548 U.S. at 103 (Breyer, J., concurring).

249. *Id.* at 104.

250. *Id.* at 103–04.

251. See *Booth*, 532 U.S. at 735; *supra* notes 127–31 and accompanying text.

252. See, e.g., *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (asserting that prison officials may be estopped from raising non-exhaustion as an affirmative defense where they “inhibit an inmate’s ability to utilize grievance procedures”); *Ziamba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004) (“[T]he affirmative defense of exhaustion is subject to estoppel.”); *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5th Cir.

1. The *Hemphill* Framework – A Suitable Alternative

In *Hemphill v. New York*,²⁵³ the Second Circuit established a three-part test to determine whether a prisoner, in responding to the affirmative defense of non-exhaustion, is excused from properly exhausting administrative remedies: (1) were administrative remedies “in fact ‘available’ to the prisoner[?;]” (2) did the defendants forfeit “the affirmative defense of non-exhaustion by failing to raise it . . . or whether the defendants’ own actions inhibiting the inmate’s exhaustion of remedies” estop them from raising non-exhaustion; and (3) “whether ‘special circumstances’ have been plausibly alleged that justify ‘the prisoner’s’ noncompliance.”²⁵⁴ Whether remedies were “available” is an objective test: “[W]ould ‘a similarly situated individual of ordinary firmness’ have deemed them available.”²⁵⁵

The *Hemphill* test is akin to Justice Breyer’s theory that proper exhaustion “is not absolute,”²⁵⁶ and creates a fact-driven analysis considering factors beyond the prisoner’s control which may result in the “unavailability” of administrative remedies. Other circuits have applied *Hemphill* since *Woodford*’s proper exhaustion rule, recognizing “special circumstances” that excuse reasonable mistakes and still allow a claim to proceed.²⁵⁷ This approach virtually removes any incentive for prison officials to construct difficult procedural barriers, or to dismiss a claim solely on procedural grounds, because

2001) (noting that PLRA exhaustion “may be subject to certain defenses such as waiver, estoppel or equitable tolling”). See also *Moore v. Bennett*, 517 F.3d 717, 725 (4th Cir. 2008); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006).

253. 380 F.3d 680 (2d Cir. 2004).

254. *Id.* at 686 (citations omitted). Although *Hemphill* was decided prior to *Woodford*, recent decisions have relied on these factors finding that in light of *Woodford*, an exception to proper exhaustion “applies in situations such as those identified in *Hemphill* . . . where, for example, administrative remedies are not ‘available’ to the prisoner at the time of the grievable incident or where prison authorities actively interfere with an inmate’s ability to invoke such remedies.” *Collins v. Goord*, 438 F. Supp. 2d 399, 411 n.13 (S.D.N.Y. 2006).

255. *Hemphill*, 380 F.3d at 688.

256. See *supra* note 244 and accompanying text.

257. See, e.g., *Moore v. Bennett*, 517 F.3d 717, 725 (4th Cir. 2008) (“[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.”); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) (“[A] remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.”). See also *Tuckel v. Grover*, 660 F.3d 1249, 1253 (10th Cir. 2011); *Turner v. Burnside*, 541 F.3d 1077, 1085–86 (11th Cir. 2008); *Kaba v. Stepp*, 458 F.3d 678, 684–85 (7th Cir. 2006).

the claim can still be considered by a federal court. The *Hemphill* test is one way to reconcile the competing interests of proper exhaustion and protecting constitutional rights without requiring an amendment or repeal of the PLRA.

Judges should exercise discretion when considering the affirmative defense of non-exhaustion, and should grant a stay pending proper exhaustion as was once permitted under the CRIPA.²⁵⁸ Although the PLRA changed the CRIPA exhaustion standards,²⁵⁹ it does not prohibit such equitable relief.²⁶⁰ This judicial discretion should work in tandem with the other “well established” exceptions to administrative exhaustion.

B. Oversight, Accountability, and Transparency – A Long Term Approach

Even in the absence of the PLRA, or if certain problematic provisions therein were repealed or amended, judicial intervention is not the most effective method of prison oversight.²⁶¹ Court involvement generally means that a deprivation has already occurred.²⁶² The Constitution as the basis for judicial intervention sets a very low bar.²⁶³ A constitutional baseline is not necessarily adequate when ensuring human rights. Ongoing independent

258. See *supra* Part I.B.

259. See *supra* notes 117–23 and accompanying text.

260. See, e.g., *Cruz v. Jordan*, 80 F. Supp. 2d 109, 125 (S.D.N.Y. 1999) (“There is no evidence that Congress intended [in changing the CRIPA exhaustion standard] to eliminate the district court’s equitable jurisdiction in aid of the Civil Rights Act, 42 U.S.C. § 1983.”). Although Congress removed the stay provision set forth in the CRIPA “does not mean that Congress intended to eliminate equitable stays where the interest of justice require a stay rather than a dismissal.” *Id.*

261. See Michael M. O’Hear, *Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA*, 24 FED. SENT. R. 223, 226 (2012); see also David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1460 (2010) (“Judicial intervention . . . will always be ad hoc and haphazard . . .”).

262. Especially since the PLRA restricts a prisoner’s ability to petition a court for relief until all administrative remedies are properly exhausted. O’Hear, *supra* note 261, at 223.

263. E.g., *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (failure to protect claim requires that prison officials know of and be deliberately indifferent to the risk); *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (medical malpractice requires a showing of “deliberate indifference to serious medical needs”); *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (constitutional right to privacy in medical information is only violated by the “gratuitous disclosure” of that info for reasons not related to legitimate penological concerns); *Rich v. Bruce*, 129 F.3d 336, 340 & n.2 (4th Cir. 1997) (“should have known” is not enough to prove deliberate indifference, the standard is “must have known”).

oversight, however, can prevent conditions from reaching the necessity of judicial intervention.²⁶⁴ Federal courts should remain the ultimate enforcers of prisoner civil rights, but a better model exists for preemptively thwarting such violations.

At a time when such heightened concern is placed on the humane treatment of foreign detainees,²⁶⁵ the same scrutiny should be applied to American citizens incarcerated in American prisons.²⁶⁶ A crucial component of meaningful oversight is ongoing supervision. "Mission accomplished" is not an appropriate declaration in the context of prison reform. It is too naïve to believe that, even where a court order has been imposed, prison officials will implement the ordered changes over the long term.²⁶⁷ The out of sight sphere in which prisons exist necessitate independent oversight to effect meaningful change over time. We do not allow public hospitals to self-monitor, so why should prisons be different? Since prison officials only answer to their governing agencies, and those agencies are rarely subjected to judicial oversight as a result of the PLRA, independent oversight is essential. This need is enhanced by the PLRA's limitation on injunctive relief, requiring a court to terminate

264. See Fathi, *supra* note 261, at 1460.

265. See SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014), <http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf>; see also Scott Shane, *U.S. Engaged in Torture After 9/11, Review Concludes*, N.Y. TIMES (Apr. 16, 2013), http://www.nytimes.com/2013/04/16/world/us-practiced-torture-after-9-11-nonpartisan-review-concludes.html?pagewanted=all&_r=0.

266. Foreign detainees held at Guantanamo Bay, for example, were guaranteed meaningful habeas corpus review by federal civilian judges. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

267. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1930–32 (2011) (highlighting California prison system's failure to comply with court-ordered injunctive relief and failure to remedy after twelve years). Earlier in the *Plata* litigation and after years of California's failure to comply with court orders, the District Court for the Northern District of California appointed a receiver to oversee the development and implementation of a "sustainable system" providing "constitutionally adequate medical care" to prisoners in that state. *Plata v. Schwarzenegger*, No. C01-1351 TEH (N.D. Cal. Feb. 14, 2006) (Order Appointing Receiver). See also *Ruiz v. Estelle*, 503 F. Supp. 1265, 1389 (S.D. Tex. 1980), in which the federal court appointed special masters to oversee the "elimination of the unconstitutional conditions found to exist in the Texas prison system," after the Texas Department of Corrections' "record of intransigence toward previous court orders" requiring changes to these deplorable conditions.

an order unless there is a finding of “current or ongoing” constitutional violations.²⁶⁸

Another way to balance agency autonomy with ensuring constitutional rights is through periodic and random monitoring by an independent body. The United States has more prisoners than all of Europe,²⁶⁹ yet no independent entity exists to oversee and monitor prison conditions.²⁷⁰ Europe, by contrast, has a robust monitoring system that functions independent of state governments and ensures prisoner rights.²⁷¹

In Great Britain, for example, the Ministry of Justice oversees an independent administrative body known as Her Majesty’s Inspectorate of Prisons (HMIP).²⁷² HMIP’s mandate is to “provide independent scrutiny of the conditions for and treatment of prisoners,” working to promote “the concept of ‘healthy establishments’ in which staff work effectively to support prisoners” in all places of detention in Great Britain.²⁷³ Inspectors conduct routine and unannounced inspections, issue reports on the conditions of the facilities, and make recommendations.²⁷⁴ HMIP promulgated detailed criteria for conducting these inspections known as “expectations.”²⁷⁵ The Expectations are “based on international human rights standards” and “issues considered essential to the safe, respectful, and purposeful treatment” of prisoners.²⁷⁶ The Expectations also consider the “rules, regulations and guidelines” governing each facility.²⁷⁷ The reports are published and prison

268. 18 U.S.C. § 3626(b)(1) (2012).

269. *World Prison Populations*, BBC, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn1page1.stm> (last visited Nov. 13, 2015).

270. See Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1692–93 (2014).

271. See generally Silvia Casale, *Mechanisms for Custodial Oversight: The United States and Europe*, 22 WASH. U. J.L. & POL’Y 217 (2006) (discussing European oversight mechanisms, their development and evolution, and what the United States can learn from these procedures).

272. *About HMI Prisons*, HM INSPECTORATE OF PRISONS, <http://www.justiceinspectorates.gov.uk/hmiprison/about-hmi-prisons/#.VOIJZ53F98F> (last visited Nov. 13, 2015).

273. *Id.*

274. John J. Gibbons & Nicole de B. Katzenbach, *Confronting Confinement, A Report of the Commission on Safety and Abuse in America’s Prisons* 80 (June 2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf.

275. *Expectations: Inspection Criteria*, HM INSPECTORATE OF PRISONS, <http://www.justiceinspectorates.gov.uk/hmiprison/about-our-inspections/inspection-criteria/#.VOIORp3F98E> (last visited Nov. 13, 2015).

276. *Id.*

277. *Id.*

administrators are required to respond.²⁷⁸ A former warden commented on the effectiveness of this oversight: "The process of change and improvement . . . was greatly assisted by these . . . independent reports because they were able draw public attention to all the pressures which made it difficult to manage the prison properly."²⁷⁹ He concluded that "it took external inspections to get [these issues] on the public agenda."²⁸⁰

Other European countries implement monitoring standards largely based on multilateral treaties, such as the Inter-American Convention of Human Rights,²⁸¹ the European Convention on Human Rights,²⁸² and the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment of Punishment.²⁸³ Forty-seven European countries also implement the European Prison Rules,²⁸⁴ a uniform set of standards focused on preventive and systemic concerns in prison facilities. Additional oversight is conducted in countries that have ratified the Optional Protocol to the Convention Against Torture (OPCAT), by the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²⁸⁵

The United States stands in stark contrast to the rest of the world in its lack of prison oversight.²⁸⁶ The U.S. has not ratified OPCAT or submitted itself to an entity for monitoring, nor does any federal or state agency exist for this purpose.²⁸⁷ Prison administrators are self-selected, and, because of the PLRA, are insufficiently accountable for violations in their institutions. A former Oklahoma prison warden poignantly noted: "When we're not held accountable, the culture inside prisons becomes a place that is so foreign to the culture of the

278. See Gibbons & Katzenbach, *supra* note 274 at 80.

279. Andrew Coyle, *Opening up a Closed World: The International Experience With Prison Oversight*, 30 PACE L. REV. 1503, 1508 (2010).

280. *Id.*

281. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123. The United States has signed, but not yet ratified this treaty.

282. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

283. European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126.

284. Comm. of Ministers, Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2* (2006), <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

285. See G.A. Res. 57/199 (Jan. 9, 2003).

286. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 38 (2001).

287. *Id.*

real world that we develop our own way of doing things.”²⁸⁸ Glen Fine, inspector general of the U.S. Department of Justice stated: “There is tremendous pressure within an institution to keep quiet.”²⁸⁹ A former deputy assistant attorney general at the Department of Justice remarked: “Broader issues regarding the safety of the prison, the training of officers, and the adequacy of administrative processes and overall conditions in the prison [often] go unaddressed.”²⁹⁰

In 2008, the American Bar Association revived Justice Brennan’s concerns regarding the lack of oversight in the “shadow world” of prisons,²⁹¹ and passed a resolution “calling on [all levels of government] to develop comprehensive plans to make the operations of their correctional and detention facilities more transparent and accountable to the public.”²⁹² The resolution identified four primary reasons for this proposal: (1) public awareness of “significant problems” in prison will lead to safer and more constitutionally conforming institutions “equipped to better prepare inmates for a successful reentry into society[;]” (2) objective and independent oversight will detect “potential problems that have been overlooked at the facility[;]” (3) oversight can “be a cost-effective and proactive means” to avoid lawsuits; and (4) “the factual findings of the monitoring entity can substantiate the need” for additional funding and resources.²⁹³ This resolution reinforces the role of federal courts as venues of last resort, not the first line of defense for prisoners. Ongoing and independent non-judicial oversight “could make outside scrutiny of prisons and jails a comprehensive and ongoing process, in contrast to the piecemeal and episodic review that results from litigation.”²⁹⁴

Instead of the public learning of egregious violations once things become so out of control,²⁹⁵ oversight and transparency can provide

288. Gibbons & Katzenbach, *supra* note 274, at 79.

289. *Id.* at 82.

290. *Id.* at 83.

291. ABA Criminal Justice Section, *Report to the House of Delegates 2* (2008), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf.

292. *Id.* at 3.

293. *Id.* at 2.

294. Fathi, *supra* note 261, at 1461.

295. In 2009, for example, the Black Guerilla Family gang was exposed as operating a drug-trafficking and money laundering scheme from inside Maryland state prisons. The illegal activity went unchecked for years, and involved dozens of prison officials who were complicit in the conspiracy. Ann E. Marimow & John Wagner, *13 Corrections Officers Indicted in Md., Accused of Aiding Gang’s Drug Scheme*, WASH. POST (Apr. 23, 2013), <http://www.washingtonpost.com/local/thirteen-correctional->

an ongoing glimpse into the daily operations of prisons. This will not only increase public awareness, but will also have a deterrent effect. Prison officials, knowing that their actions and non-action will be publicly scrutinized, will have an incentive to operate their facilities in substantial compliance with the law. We have the EPA to monitor pollution and the FDA to monitor consumer safety. These agencies operate across all industries and sectors to proactively prevent bad behavior.²⁹⁶ We should dedicate equal resources to the treatment of human beings as we do to these other important causes.

CONCLUSION

Prisoners lose many rights upon incarceration, but fundamental human rights are not among them. The closed nature of prisons and the inability of prisoners to advocate on their own behalf for institutional reform leads to mistreatment and abuse.²⁹⁷ The PLRA severely limits a prisoner's ability to obtain meaningful redress for constitutional violations. The goals of the PLRA—to reduce frivolity and improve the quality of prisoner suits—can be accomplished through less restrictive means, without amending or repealing the legislation. Addressing the conflict of interests in the current administrative remedy procedure will foster greater trust in the system. Recognizing exceptions to the proper exhaustion rule will allow meritorious claims to proceed, and remove the incentive for prison officials to summarily dismiss them. Ongoing oversight and monitoring will promote accountability and lead to safer and more humane institutions. It is time to expose the "hidden world of punishment," and to end the "rationing of justice" in American prisons.

EPILOGUE

Shortly after the completion of this Comment, the United States Court of Appeals for the Fourth Circuit issued what should become a

officers-indicted-in-maryland/2013/04/23/6d2cbc14-ac23-11e2-a8b9-2a63d75b5459_story.html?Post+generic=%3Ftid%3Dsm_twitter_washingtonpost.

296. See *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Nov. 13, 2015); *What We Do*, FED. DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited Nov. 13, 2015).

297. The Supreme Court, 1982 Term, 97 HARV. L. REV. 70, 103, 111 (1983) (asserting that prisoners are "one of the classes of persons most in need" of Fourteenth Amendment protections because "in the closed world of a prison, . . . prisoners are very likely to be subjected to illegitimate administrative action").

landmark opinion with respect to prisoner litigation, that both supports and validates the analysis and recommendations set forth herein. *Blake v. Ross*,²⁹⁸ a case that exemplifies many of the procedurally defaulted cases since *Woodford's* “proper exhaustion” requirement, presented the appellate court with an opportunity to interpret a meaningful exception to the rigid “proper exhaustion” rule.

On June 21, 2007, Michael Ross and James Madigan, lieutenants with the Maryland Division of Correction (MDOC), moved Shaidon Blake, a prisoner committed to the MDOC, from his cell to another cell block.²⁹⁹ The officers retrieved Blake from his cell, and handcuffed Blake’s hands behind his back.³⁰⁰ As the three men proceeded to Blake’s new cell block, Madigan verbally harassed and physically shoved Blake multiple times.³⁰¹ The three men reached the door to the new cellblock when Madigan ordered Blake to stand against the wall.³⁰² “With Ross still holding Blake against the wall, Madigan wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession. Madigan paused briefly, then punched Blake in the face again.”³⁰³ Madigan and Ross then took Blake to the ground and restrained him until backup arrived.³⁰⁴ As a result of this attack, Blake suffered numerous injuries, including permanent nerve damage.³⁰⁵

Later that day, Blake filed a written report with senior corrections officers.³⁰⁶ The Internal Investigative Unit (IIU), the prison’s own investigative unit, conducted a yearlong investigation of the incident and issued a formal report, concluding that Madigan indeed “used excessive force against Blake by striking him in the face while he was handcuffed.”³⁰⁷ This report prompted the MDOC to issue Madigan an Unsatisfactory Report of Service and relieve him of his duties.³⁰⁸

298. 787 F.3d 693, 697 (4th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3132, (U.S. Sept. 17, 2015) (No. 15-339).

299. *Id.* at 695.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 696.

308. *Id.* at 698–99.

On September 8, 2009, Blake filed a Section 1983 claim against Ross and Madigan.³⁰⁹ Ross raised the affirmative defense of failure to properly exhaust all available administrative remedies.³¹⁰ Madigan, however, did not raise this defense, and Blake ultimately prevailed against Madigan at trial.³¹¹ Regarding Blake's claim against Ross, the District Court granted Ross summary judgment finding that Blake failed to properly exhaust his administrative remedies.³¹² Blake appealed the court's ruling, presenting the following question on appeal: Whether Blake satisfied the PLRA's exhaustion requirement by complying with the IIU investigation?³¹³

It is undisputed that Blake never filed a grievance through the internal administrative remedy procedure as required by MDOC regulations.³¹⁴ Blake argued that IIU's investigation of this incident removed his grievance from the administrative process requirements.³¹⁵ The court then methodically laid the foundation for interpreting an administrative exception to the doctrine of "proper exhaustion."

First, the court recognized the primary purposes of the PLRA's exhaustion requirement: (1) to give prisons a chance to internally address complaints; (2) to reduce litigation; and (3) to improve the quality of the litigation.³¹⁶ The exhaustion requirement, the court noted, is not absolute.³¹⁷

Second, the court recognized Justice Breyer's concurrence in *Woodford*, which discussed "well-established exceptions" to the "proper exhaustion" requirement, and the Second Circuit's decision in *Giano v. Goord*,³¹⁸ applying such an exception.³¹⁹

309. *Id.* at 696. Blake also named various institutional defendants and state entities, but those parties were dismissed from the action for reasons unrelated to compliance with the PLRA. *Id.*

310. *Id.* Ross failed to raise this defense in his initial answer. It was not until August 2, 2011, two years after Ross filed his answer, and after receiving consent from Blake's counsel to amend the answer, that this defense was raised. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 697. As is the case in every prison across the country, to properly preserve a claim, a prisoner must file a grievance through the established internal administrative remedy process. *See supra* notes 61–63 and accompanying text.

315. *Id.*

316. *Id.* at 697–98.

317. *Id.* at 698, *see also supra* note 244.

318. *Blake*, 787 F.3d at 698 (citing *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004)). Importantly, *Giano* was decided before *Woodford*, and although not expressly

Third, the court adopted the Second Circuit's two-pronged analysis regarding the availability of an administrative exception to the exhaustion requirement.³²⁰ This inquiry first examines whether the prisoner procedurally exhausted his remedies—was the prisoner “justified in believing” that his efforts in exhausting his claim were satisfactory because the prison's system was too confusing?³²¹ The inquiry then assesses the substantive aspect of the prisoner's exhaustion attempt—did the prisoner's actual complaint exhaust his remedies “in a substantive sense” by allowing the prison to resolve the matter internally?³²² The Fourth Circuit accepted this formulation as striking “the appropriate balance between statutory purpose and our administrative jurisprudence.”³²³

Regarding the procedural prong, the court found that the rules were sufficiently vague to justify (or at least not contradict) Blake's belief that by reporting the incident to prison administrators, and by IIU conducting an investigation, Blake had properly exhausted his administrative remedies in a procedural sense.³²⁴

Substantively, the court found that Blake “clearly” satisfied the exhaustion requirements because the MDOC conducted a yearlong investigation and ultimately fired Madigan.³²⁵ The court held that the MDOC had notice of the complaint, and a chance to develop an “extensive record” and resolve the dispute internally without a need for litigation, thus satisfying the primary purposes of the exhaustion requirement.³²⁶

The court ultimately concluded that “Blake reasonably interpreted Maryland's murky inmate grievance procedures, and the IIU investigation into his complaint provided the Department with ample notice and opportunity to address internally the issues raised.”³²⁷

The balance recognized by the Fourth Circuit—ensuring that a *pro se* prisoner litigant will not be penalized for making a good faith, but

overruled by that decision, its viability to coexist following *Woodford* was questionable. *Id.*

319. *Id.* The Second Circuit Court of Appeals issued the *Giano* opinion on the same day as *Hemphill*. See *supra* note 254 (discussing *Hemphill*). Both cases predate *Woodford*, and both incorporate the notion that the PLRA's exhaustion requirement is not absolute.

320. *Blake*, 787 F.3d at 698.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 699–700.

325. *Id.* at 698–99.

326. *Id.* at 699.

327. *Id.* at 701.

flawed, attempt at administrative compliance, with preserving a prison from unnecessary and unexpected litigation—mimics this Comment's suggestions in Part IV.³²⁸

The *Blake* decision not only embodies Justice Breyer's conception of a judicially crafted administrative exception to "proper exhaustion," it demonstrates that such an option is viable in its application, and suitable in the pursuit of justice.

The Fourth Circuit is the first federal appellate court to adopt the *Hemphill* framework,³²⁹ as further articulated in *Giano*,³³⁰ thereby interpreting an administrative exception to the "proper exhaustion" rule. This is significant for many reasons. Most importantly, *Blake* creates strong precedent for the application of this exception by federal courts on a case by case basis. This adapted methodology of determining "proper exhaustion" will ensure that prisoners with legitimate complaints will have those matters decided on the merits, rather than summarily dismissed for procedural reasons. If a claim is procedurally defaulted and the prisoner can demonstrate that the *Hemphill/Giano/Blake* guidelines were satisfied, a federal court now has precedent (and a diagramed framework) to apply an exception to "proper exhaustion."

Blake also supports the notion, as suggested by this Comment, that "proper exhaustion" and meaningful redress for constitutional violations can indeed coexist without requiring a full repeal of the PLRA. *Blake* should lead the way for a federal movement toward a more pragmatic and fact-based approach to individual prisoner claims, ensuring that these claims are decided on their merits. *Blake* represents an important paradigm shift in the way that federal courts approach prisoner litigation and apply the PLRA's requirements, and should further help pierce the "iron curtain" that has been redrawn between prisoners and their ability to vindicate constitutional violations.

328. See *supra* Part IV.

329. See *supra* notes 253–59 and accompanying text.

330. *Giano v. Goord*, 380 F.3d 670, 675–76 (2d Cir. 2004).

