CORRECTING FOR BIAS AND BLIND SPOTS IN PLRA EXHAUSTION LAW

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INTRODUCTION

A guard sexually assaults a prisoner in her cell in the county jail—two days after four other staff members reported to their superiors that they saw the same guard remove the prisoner from her cell after lock-in, contrary to protocol. If a plaintiff was able to establish these facts in a Section 1983 action, she would be entitled to a verdict holding the guard[1]—and possibly jail and county supervisors[2]—liable for violating her constitutional rights.

However, when Jessica Woods sued a guard and his supervisors based on the allegations above, the suit went no further than defendants' motions for judgment on the pleadings.[3] The sole roadblock preventing a substantive assessment of her claims was the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).[4] Critically, from the district court's perspective, Woods had not filed a written grievance about the incident using a process described in the county jail's inmate handbook.[5] It did not matter in the court's analysis that using the handbook process would not have changed or improved the jail's response. The only result of Woods filing a written grievance would have been that the county would have opened an investigation into the guard, which it had already done in response to the staff reports it had received.[6] Jessica cooperated in that investigation, despite the fact that she was in such extreme distress that she was placed on suicide watch.[7]

The *Woods* case illustrates two central problems with the Supreme Court's jurisprudence surrounding Section 1997e(a), which states: "No

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1 *See* Carrigan v. Davis, 70 F. Supp. 2d 448, 452-53 (D. Del. 1999).

2 *See* Farmer v. Brennan, 511 U.S. 825, 837-43 (1994).

3 Woods v. York Cnty., 534 F. Supp. 2d 153, 156, 161-62 (D. Me. 2008).

4 *See id.* at 159.

5 *Id.* at 158-59.

6 *Id.*

7 *Id.* at 157.

action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted."[8]

First, there is a potential for bias built into the Supreme Court's PLRA exhaustion jurisprudence which creates a significant doctrinal dilemma. Section 1997e(a) doctrine gives unprecedented power to defendants and those whose interests are closely aligned with defendants to control the outcomes of plaintiffs' efforts to exhaust. It requires courts to defer to a correction agency's interpretation as to what is necessary for a prisoner to exhaust her claims against its staff.[9] This deference is predicated on the assumption that prison complaint procedures—referred to here as inmate grievance programs ("IGPs")—are primarily motivated by a desire to efficiently identify and resolve problems within correctional facilities. Yet, courts are encouraged to defer to corrections agencies' interpretations even in cases such as Jessica Woods's, in which the process urged by the county serves only to immunize the defendants from liability, rather than to change or improve its ability to respond to the underlying problem. By predicating itself on one assumption—that IGPs are geared toward solving problems—but ignoring an equally plausible competing one—that correction agencies have a significant stake in preventing successful lawsuits—PLRA exhaustion doctrine jeopardizes its own foundations. It encourages IGPs that will shut down complaints, rather than IGPs that might identify and solve problems, as the jurisprudence envisions, because the first kind of IGP is more likely to immunize a corrections agency and its staff from liability.

Second, the Court's PLRA exhaustion jurisprudence operates to bar suits that Congress never intended to preclude by failing to take into consideration a prisoner's capacity to exhaust. A prisoner who fails to exhaust because she *cannot* is not making an intentional end run around the prison agency in order to bring a frivolous suit. To the contrary, some of the prisoners with the strongest claims will be the most unable to exhaust—for instance, a sexual assault victim who has been placed on suicide watch. Yet, both the Court and commentators have remained blind to the vital role that a prisoner's capacity to exhaust ought to play in PLRA exhaustion case law.

Although legions of scholars have pilloried the PLRA and its exhaustion requirement,[10] this Article's critiques are novel. No scholarly attention has been given to how the twin problems of bias blindness and capacity blindness that are endemic to current PLRA exhaustion doctrine undercut

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8 42 U.S.C. § 1997e(a) (2006).

9 Jones v. Bock, 549 U.S. 199, 218 (2007) ("[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.").

10 *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1779 (2003).

the foundations of the doctrine itself.[11] And even less attention has been given to how these problems might be resolved other than by abolishing the PLRA. This Article demonstrates the importance of these problems and further puts forward a set of solutions to both challenges.

To understand this project, one must first understand the architecture of the typical IGP and what this Article terms the Supreme Court's "form first" approach to exhaustion, which privileges the form of a prisoner's administrative complaint far above its substance or its substantive effect. In its decision in *Woodford v. Ngo*,[12] the Court requires "proper exhaustion."[13] Proper exhaustion demands that a prisoner have completed—as completion is defined by the incarcerating agency—the process that the agency has designated as the "available" remedial process.[14] Typically, the available remedy is assumed to be a three- or four-step IGP that is outlined either in agency directives or state law and that is always administered by the relevant corrections agency.[15] A misstep during the IGP process, such as submitting a complaint on the wrong form[16] or one day after the seven-day

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11 Much of the criticism of the PLRA exhaustion requirement has centered on the fact that it obstructs prisoners' access to justice when they have been the victims of civil rights violations, and on the Supreme Court's decision in *Woodford v. Ngo*, 548 U.S. 81 (2006), which exacerbated the negative impact of the statute by subjecting prisoners to procedural default. *See* David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454-55 (2010) (author is the director of the National Prison Project of the American Civil Liberties Union); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 147-48 (2008); Joseph Alvarado, Student Scholarship, *Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the Fourteenth Amendment*, 8 SEATTLE J. SOC. JUST. 323, 342 (2009); Darryl M. James, Comment, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 467 (2011); *see also* Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 45 n.54 (2004); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1649-51 (2003). Schlanger and Shay, among others, have also noted that the deference shown to prison IGP rules in the PLRA exhaustion analysis creates incentives for corrections agencies to create confounding IGP procedures, which can compound the access to justice problem. *See* Schlanger, *supra* at 1650-51; Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 319 (2007); Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 829-30 (2008). However, the doctrinal consequences of these incentives have yet to be explored.

12 548 U.S. 81 (2006).

13 *Id.* at 84.

14 *See id.* at 90-91.

15 *See* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 490-94 (2012).

16 *See, e.g.*, Nev. Dep't of Corr., Admin. Reg. No. 740, Inmate Grievance Procedure, at § 740.05 (2010), *available at* http://www.doc.nv.gov/sites/doc/files/pdf/AR740.pdf.

statute of limitations imposed by IGP rules,[17] can forever foreclose a plaintiff from pursuing his complaint in federal court.

As this Article observes, this scheme incentivizes corrections departments to create IGPs that restrict prisoners' access to justice, and it promotes unnecessary procedural defaults by prisoners which the PLRA's drafters did not desire. Luckily, there is room within the law for an exceptions jurisprudence that can correct for the problems with the current PLRA exhaustion regime.

The second contribution that this project makes, in addition to identifying the doctrinal soft spots in the Supreme Court's approach to PLRA exhaustion, is to offer a remedy to them. This Article argues that a judicially administered exceptions standard can serve as a corrective to PLRA exhaustion law, and it proposes what that standard should look like. Although there has been hesitancy among the lower courts as to whether (and to what extent) traditional exceptions to exhaustion requirements persist in the PLRA era, the majority, concurring, and dissenting opinions in *Woodford* all suggest that, to varying degrees, exceptions can and should be made.[18] Scholars, most notably Professors Giovanna Shay and Richard Pierce, have suggested that traditional administrative law doctrine exceptions to exhaustion requirements largely apply in the PLRA context.[19] This Article expands and builds on this scholarship and goes a step further to propose a PLRA-specific exceptions standard.

This Article's proposed exceptions framework is rooted in the principle that, in particular cases, administrative remedies can be rendered "unavailable" for the purposes of Section 1997e(a) of the PLRA by a number of intersecting factors, including the IGP's design and operation and restraints on prisoners' capacity to exhaust. This model goes beyond exceptions models, such as the *Hemphill* framework developed by the Second Circuit,[20] to provide concrete guidance as to how courts can apply this principle, and it identifies factors that may justify a prisoner's failure to "properly exhaust."

Of course, a judicially applied exceptions doctrine is not the only way to remedy the failings in the current PLRA regime. It is, however, the best solution because it can be implemented immediately and does not require abolishing the PLRA entirely. Although there are many deep-seated, serious problems with the PLRA, a wholesale legislative reform of the PLRA is

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17 *See, e.g.*, Del. Dep't of Corr. Bureau of Prisons, Policy No. 4.4, Inmate Grievance Policy, at Art. VII.A (Sept. 26, 2011), *available at* http://bidcondocs.delaware.gov/DOC/DOC_1212Commissary Svc_Policy4.4.pdf.

18 *See Woodford*, 548 U.S. at 100-01; *id.* at 103-04 (Breyer, J., concurring in the judgment); *id.* at 119-20 (Stevens, J., dissenting). Schlanger and Shay have observed that so far the lower courts have largely ignored the Supreme Court's indications that standard administrative law and habeas exceptions may apply to the PLRA exhaustion requirement in some instances. Schlanger & Shay, *supra* note 11, at 150-51.

19 Giovanna Shay, *Exhausted*, 24 FED. SENT'G REP. 287, 289 (2012).

20 *Id.* at 289 (quoting Tuckel v. Grover, 660 F.3d 1249, 1252 (10th Cir. 2011)).

unlikely to occur anytime soon, given the political unpopularity of prisoners and the perception that there are more pressing issues on Congress's plate.[21]

Nor does it seem likely that the potential for bias can be eliminated by changing the way that IGP rules are written. There is no monolithic IGP system; the fifty states, thousands of jail systems, and various components of the federal system all have their own distinct grievance procedures that are created in their own way. Changing how IGP rules are written in each of these jurisdictions would be a herculean task. There is also no guarantee that this change would eliminate the potential for bias. Even if prison grievance rules were written in a more open and transparent way or written independently of corrections agencies, IGPs would still be administered by agency staff.[22] The information, instructions, and responses corrections staff give to prisoners seeking to lodge complaints can have a dramatic impact on their ability to exhaust the IGP "properly," as *Woodford* demands.

In the meantime, the PLRA's jurisprudential problems are obstructing plaintiffs' access to a judicial remedy for constitutional violations. This situation would be troubling in any context, but it is devastating in the context of prisoners' rights litigation because the courts are one of the few places to which prisoners can look for protection.[23] By necessity, correctional facilities "are closed environments, largely hidden from public view."[24] Prisoners cannot count on the press and the public to hold corrections departments accountable. For this extremely isolated portion of the citizenry, one of its only hopes for protection is found in litigation.[25]

This Article proceeds in four parts. Part I focuses on the twin perils of bias blindness and capacity blindness within the Supreme Court's PLRA exhaustion doctrine. Part II discusses the Supreme Court's approach to PLRA exhaustion in more detail, exploring its defining features and how it emerged. As this Part is careful to point out, although *Woodford* has been a lightning rod for criticism, it is the combined effect of all four of the Court's opinions concerning Section 1997e(a) which creates the problems

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21 The most recent legislative effort to revise the PLRA, the Prison Abuse Remedies Act of 2009, did not even leave committee. *Id.* at 287.

22 An IGP administered by a third-party agency is a theoretically ideal alternative solution to the bias problem but a practical impossibility given the resources and, accordingly, public support that such a solution would require.

23 *See* Fathi, *supra* note 11, at 1453-54.

24 *Id.* at 1453.

25 Unlike many other countries, "the United States has no independent national agency that monitors prison conditions." *Id.* at 1454; *see also* COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 16 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf ("The most important mechanism for overseeing corrections is independent inspection and monitoring. . . . Today, this is the case in only a few states and localities.").

with the current regime.[26] Part III turns to the possibilities presented by the *Hemphill* framework, an exceptions standard developed by the Second Circuit that was in its infancy when *Woodford* threw its status into uncertainty. Part IV presents a proposal for a detailed exceptions standard that federal district courts can begin to apply immediately to counteract the biases jeopardizing the integrity of PLRA exhaustion doctrine. Finally, Part V addresses the possible objection that there is no room for an exceptions standard within the Court's PLRA jurisprudence.

I. THE PROBLEM WITH PUTTING FORM FIRST

Any legal regime that requires administrative exhaustion inevitably locks some plaintiffs with meritorious claims out of court because they failed to exhaust. PLRA exhaustion law operates differently from how we tend to envision administrative exhaustion schemes. For incarcerated plaintiffs, it is defendants, their co-workers, and their supervisors—that is, corrections department staff—who control the IGP process that plaintiffs are required to have successfully navigated before they bring suit. The PLRA exhaustion regime thus creates misaligned incentives that make it vulnerable to significant bias in its operation.

The approach to PLRA exhaustion urged by the Supreme Court fails to take into account its own potential for bias. It also is largely blind to the unique and often insurmountable challenges prisoners face as they try to successfully exhaust their claims from behind bars—including the hurdles imposed by complex, unforgiving, or ambiguous IGP rules and procedures.

These blind spots are problematic for PLRA exhaustion doctrine, as well as for the individual plaintiffs who find their claims precluded on exhaustion grounds. As Part II explores, the Supreme Court's approach to exhaustion is based on an idealized view of IGPs as neutral administrative mechanisms that are primarily intended to resolve problems within jails and prisons efficiently, decisively, and fairly. The deference the courts are to show to IGPs under the proper exhaustion rule is predicated on this assumption, as is the move to make exhaustion mandatory. Yet, the doctrine ignores the incentives it generates to create biased and faltering IGPs. The PLRA jurisprudence also rests on the assumption that, left to their own devices, prisoners will intentionally circumvent the IGP. Yet, the doctrine ignores the possibility that prisoners sometimes do not exhaust because they *cannot* exhaust.

This Part takes up the problems of bias blindness and capacity blindness in turn.

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[26] *See* Jones v. Bock, 549 U.S. 199 (2007); Woodford v. Ngo, 548 U.S. 81 (2006); Porter v. Nussle, 534 U.S. 516 (2002); Booth v. Churner, 532 U.S. 731 (2001).

A. *Bias Blindness*

Prison grievance systems are markedly different than the procedures that typically bind plaintiffs in other procedural default contexts. We generally expect that the pre-litigation process that a plaintiff is required to have completed will not be controlled by his opponent in litigation as tightly as corrections agencies are able to control the grievance process within prisons and jails.

For instance, in a whistleblower suit under the Sarbanes-Oxley Act, the dispute between the plaintiff and his employer must first have been evaluated by the Occupational Safety and Health Administration ("OSHA") in a process that differs from most prisoners' exhaustion experience in at least three significant ways.[27] First, in OSHA's administrative process, it is a neutral third-party—OSHA—that creates the procedural rules with which the complainant must comply.[28] Second, those rules were subject to public notice and comment,[29] and there is transparency to the administrative process, with clarification as to the procedural requirements available to each of the parties from OSHA.[30] Finally, unlike the vast majority of prisoners attempting to grieve within prison, the parties in an OSHA investigation can be and frequently are represented by counsel at the administrative phase.[31]

The landscape is also dramatically different in the habeas corpus context than when a prisoner seeks to exhaust in a carceral setting.[32] In the habeas context, the criminal procedural rules and deadlines that govern the first set of adjudicative proceedings are established by state legislators and the courts—not prosecutors. There is, between the litigants and those controlling the process that must be exhausted, a distance that is not present in the PLRA exhaustion context.

In a prison grievance system, a prisoner is complaining *about* the actions of prison staff *to* prison staff using rules administered and often written *by* prison staff and corrections officials.[33] Many corrections departments

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27 29 C.F.R. § 1980.103 (2013) ("The complaint should be filed with the OSHA office . . . .").

28 *See* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52,104, 52,104 (Aug. 24, 2004).

29 *Id.*

30 *See* 29 C.F.R. §§ 1980.100-.105; *OSHA Fact Sheet: Filing Whistleblower Complaints Under the Sarbanes-Oxley Act*, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/Publications/osha-factsheet-sox-act.pdf (last visited January 17, 2014). Notably, OSHA's administrative complaint process also permits exceptions to its requirements in the interest of justice and for "good cause." 29 C.F.R. § 1980.115.

31 *See* 29 C.F.R. § 1980.104.

32 The majority in *Woodford* draws several analogies between habeas law and PLRA exhaustion law yet overlooks this important distinction between the two contexts. *See* Woodford v. Ngo, 548 U.S. 81, 92 (2006).

33 Similar structures may exist at other agencies. However, a problem remains a problem even if it is common. Moreover, it is difficult to imagine a system where there is the same level of intimacy

are left to write their own IGP rules and procedures.[34] And no matter who writes the rules, corrections staff and officials administer IGPs. From one perspective, giving this level of discretion to corrections agencies makes a great deal of practical sense. After all, prisoners' problems develop in prison, where corrections staff are already on the ground, and the vast majority of complaints seek action from corrections staff—for example, the return of lost property or the lifting of a programming restriction. However, from the perspective of PLRA exhaustion doctrine, it is problematic that the act of administering an IGP vests corrections agencies with a great deal of power. At each stage of the IGP process, those administering the IGP make decisions that determine a prisoner's ability to successfully exhaust and, therefore, litigate his claims.

For example, at the very first stage of the IGP process, grievance program staff typically must make an initial decision whether to grant the relief sought in a prisoner's grievance, deny the grievance, or reject or "dismiss" the grievance.[35] The response a prisoner receives at this initial stage shapes how easy or difficult it will be for him to exhaust his claims. For instance, it matters whether the committee denies or dismisses the grievance. When a grievance is denied, it is assigned a grievance number that allows the prisoner to appeal the decision through the other levels of the IGP and exhaust his claim.[36] When it is dismissed because it has been deemed procedurally insufficient in some way, the prisoner is left with nothing to appeal. He can file a second grievance challenging the IGP's failure to accept his grievance, but, unless those administering the IGP process engage with the substance of the prisoner's underlying complaint, that substantive complaint is not at issue and not addressed and, therefore, cannot be exhausted through that second grievance.[37] Similarly, it can sometimes be difficult for a prisoner to determine whether a grievance has been granted or denied. For instance, if the committee responds that it is "looking into the grievance" but does not immediately provide the relief the prisoner has requested, has the grievance been granted or denied? The answer matters because a denial must be appealed before the IGP deadline

between those administering the agency process and those charged with wrongdoing. Under many IGP systems, a grievance implicating the warden of a facility would be reviewed by the warden as part of the standard grievance procedure.

34 *See* Borchardt, *supra* note 15, at 495-518 (identifying examples). In others and within the Federal Bureau of Prisons, the grievance rules are subject to notice-and-comment and other rulemaking requirements. *Id.* at 491.

35 *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (Supp. 2013).

36 *See id.*

37 In order to properly exhaust his underlying claims, the prisoner must file and pursue the second grievance, succeed in having his second grievance granted by the corrections department (or successfully litigate the denial of the second grievance), know that exhausting his second grievance does not obviate the need to refile his first grievance, and then refile and pursue his first grievance through all three levels of the department's IGP. *See id.* § 701.5(c)(1).

for such appeals to preserve the prisoner's ability to exhaust the claim.[38] At this very early stage of the administrative exhaustion process, those involved in the IGP make decisions that can determine whether a prisoner can later litigate his claims.

The influence corrections departments have on the outcome of exhaustion determinations is heightened by the fact that courts often accept their interpretations as to what is sufficient to show that Section 1997e(a) has been satisfied. For instance, New York's Department of Corrections and Community Services ("DOCCS") asserts that "[t]he disposition of the Central Office Review Committee (CORC) constitutes sufficient proof of exhaustion" for the purposes of the PLRA,[39] and courts have adopted this as their starting point in their exhaustion analyses.[40]

Yet, corrections staff and officials have a tangible stake in whether or not prisoners "properly exhaust" their administrative complaints, as those internal complaints may turn into lawsuits in which they, their colleagues, or their staff could be held liable. It is their pocketbooks, their professional reputations, and in some cases their very livelihoods that are made vulnerable if a prisoner successfully exhausts his claims.

Corrections agency supervisors have as much of a stake in the exhaustion consequences of the grievance process as do their line officers.[41] Supervisory staff is most obviously implicated in—and named as defendants—in suits that are explicitly about prison policies, which they set and administer. However, complaints about the conduct of lower-ranking staff and other prisoners are also complaints about the action or inaction of more senior staff. Prisons are run according to a paramilitary-style chain of command.[42] A complaint that an officer did something wrong—whether it is that he used brutal and excessive force, was asleep on the job, or was ex-

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38 *See id.*

39 N.Y. DEP'T OF CORRECTIONS & CMTY. SUPERVISION, INMATE GRIEVANCE PROGRAM ANNUAL REPORT 2011, at 1 (2012), *available at* http://www.doccs.ny.gov/Research/Reports/2012/InmateGrievanceAnnualReport2011.pdf.

40 *See, e.g.*, Benitez v. Ham, No. 9:04-CV-1159, 2009 U.S. Dist. LEXIS 97495, at *55-56 (N.D.N.Y. Sept. 30, 2009) (determining that "Plaintiff never received a decision from CORC and did not exhaust his administrative remedies," although he submitted an appeal statement signed by a grievance clerk); *see also* Williams v. Burgos, No. CV206-104, 2007 WL 2331794, at *3 (S.D. Ga. Aug. 13, 2007) (applying a Bureau of Prisons regulation defining appeal as filed only when it is logged as received even where the prisoner truthfully asserts that he mailed his appeal on time); Lindell v. O'Donnell, No. 05-C-04-C, 2005 WL 2740999, at *17-18 (W.D. Wis. Oct. 21, 2005) (court ruled it could not review IGP determination that prisoner's complaint was time-barred, even though he did not discover that a letter had been confiscated until almost a year afterward and therefore it was impossible for him to have grieved by the deadline asserted by the prison agency).

41 Supervisory staff are intimately involved in the IGP process. For example, in New York's DOCCS the second level of the IGP is an appeal to the superintendent of the facility in which the prisoner is incarcerated. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (Supp. 2013).

42 *See, e.g.*, Selmeczki v. N.M. Dep't of Corr., 129 P.3d 158, 166 (N.M. Ct. App. 2006) (recognizing the Department of Corrections as a "paramilitary organization").

changing contraband for sexual favors with prisoners—signals a potential failure by prison supervisors to maintain control over what is supposed to be a high-security, highly controlled environment.[43] The professional reputation and, in some cases, legal liability of supervisors are thus tied to those of their staff. Supervisors and corrections officers also are often bound together by a strong sense of camaraderie and interpersonal ties, forged while working together in a closed and often stressful environment.[44] In short, there is a complex web of identities of interest, both legal and personal, among corrections staff and between staff and their supervisors.

This reality makes it more likely that the intra-prison proceedings will be skewed in favor of staff and will not operate as neutral problem-solving mechanisms—a risk the Supreme Court has recognized in other contexts. The Court has observed that disciplinary hearing officers "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee" and to credit staff's testimony over a prisoner's.[45] Additionally, the Court has stated that "the old situational problem of the relationship between the keeper and the kept . . . hardly is conducive to a truly adjudicatory performance."[46]

In the PLRA exhaustion context, the identity of interests tying corrections staff to one another complicates the seemingly simple logic of the form first approach. The Supreme Court jurisprudence assumes:

> Corrections officials concerned about maintaining order in their institutions 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.[47]

However, the same jurisprudence dangles a nearly irresistible reward for making administrative grievance procedures difficult to complete in front of corrections departments. Non-exhaustion confers immunity from liability on prison staff, and by casting corrections staff in a dual role—as both the entity that makes the rules and the subject of the administrative complaint—the law empowers corrections departments to grab that prize.[48]

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43 *See, e.g.*, James W. Marquart, *Prison Guards and the Use of Physical Coercion as a Mechanism of Prisoner Control*, 24 CRIMINOLOGY 347, 351 (1986) (describing the various types of physical violence used to "scare and intimidate" inmates).

44 *See* KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 85-86 (1988) (finding that correctional officers "possess a distinct subculture," with "[t]heir own beliefs and code of conduct," including an emphasis on maintaining officer "solidarity").

45 Cleavinger v. Saxner, 474 U.S. 193, 204 (1985) (citing Ponte v. Real, 471 U.S. 491, 513 (1985) (Marshall, J., dissenting)).

46 *Id.*

47 Woodford v. Ngo, 548 U.S. 81, 102 (2006).

48 *See* Schlanger & Shay, *supra* note 11, at 141 (stating that PLRA exhaustion provision "strongly encourages prison and jail authorities to come up with ever-higher procedural hurdles in order to foreclose subsequent litigation").

There is evidence that corrections departments are well aware of their capacity to stymie lawsuits through their IGP procedures. After the PLRA was enacted, several state corrections agencies made changes to their IGP rules.[49] A recent examination of these changes found that in several states "grievance procedures have been updated in ways that cannot be understood as anything but attempts at blocking lawsuits."[50]

The Arkansas Department of Corrections ("ADC"), for example, has imposed ever-more stringent rules about the form grievances should take that often seemed to be at cross-purposes with each other and efficient problem-resolution.[51] For example, the ADC began requiring that prisoners attach no additional pages to the grievance form, in effect limiting the information a prisoner could provide in his grievance.[52] Shortly thereafter, it also began to require that prisoners include specific details in their initial grievance.[53] These rules collided in at least one prisoner's case. The IGP disregarded eight additional pages that a prisoner had attached to his grievance describing events that he claimed led to him losing four of his toes.[54] The IGP then turned around and rejected the grievance, explaining the prisoner's claim of "inadequate medical treatment lacked merit because [the prisoner] had not referenced a specific incident of inadequate treatment or unprofessionalism as required by the ADC grievance policy."[55] One portion of the ADC grievance policy thus precluded prison supervisors from obtaining the information on those eight pages which, according to the second rule, presumably would have helped them address a problem within their facilities. The two rules together did, however, permit dismissal of this particular prisoner's subsequent lawsuit on PLRA non-exhaustion grounds.[56]

Other rule changes that seem to be informed more by litigation strategy than by the demands of institutional problem solving include the emergence of specific rules for claims against wardens, superintendents, and other supervisory staff. For example, Ohio's grievance program requires that special grievances be filed to exhaust claims "against the warden or inspector of institutional services," and those grievances must "show" that the named supervisor "knowingly approved or condoned [the] violation" at the heart of the prisoner's administrative complaint.[57] Rules such as these

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49 *See, e.g.*, Ariz. Dep't of Corr., Dept. Order 802, Inmate Grievance Procedure, at § 802.01-1.5 (Dec. 12, 2013).

50 Borchardt, *supra* note 15, at 473.

51 *Id.* at 509-10.

52 *See id.* at 506.

53 *Id* at 506-07.

54 *Id.* (citing Cummins v. Norris, No. 5:09CV00221 BSM/BD, 2010 WL 4510754, at *3 (E.D. Ark. Aug. 26, 2010), *report and recommendation adopted by* 2010 WL 4507984 (E.D. Ark. Nov. 2, 2010)).

55 *Id.* (alteration in original) (quoting *Cummins*, 2010 WL 4510754, at *3).

56 Borchardt, *supra* note 15, at 506.

57 *See, e.g.*, OHIO ADMIN. CODE 5120-9-31(M) (2010).

essentially import the substantive law surrounding qualified immunity and the Eighth Amendment standard for supervisory liability into the initial procedural requirements that a prisoner must meet within thirty days of an incident, typically without any assistance from counsel. While the problem-solving benefits of such a rule are difficult to identify, it can have the effect of curtailing claims against prison supervisors in the early stages of litigation, without an examination by the court of whether substantive qualified immunity and Eighth Amendment standards are satisfied by the underlying facts of the case.[58]

In the last few years, many corrections departments have also reduced the amount of time within which a prisoner must file her initial grievance and any subsequent appeals.[59] In the light of the deference shown to IGP rules in the PLRA exhaustion analysis, this reduction means that for prisoners in some systems there is effectively only a two- or three-day statute of limitations on their constitutional claims,[60] and in several states the statute of limitations is one week or less,[61] which offers an obvious benefit to potential defendants.[62] These very short deadlines also can impede problem solving within a corrections department. Take for example a prisoner who is beaten viciously during a work detail. Within the prison system in which he is incarcerated, the deadline for submitting a grievance is fifteen days from the underlying incident, but the prisoner submits a grievance sixteen days after the assault. When his grievance is rejected as untimely, the grievance program takes no further action on the complaint.[63] Nor does senior prison staff necessarily learn of the allegation, because they are not typically involved in the threshold decision as to whether to accept or deny a grievance. The security, staffing, and supervision failures that led up to the

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58 *See, e.g.*, Morgan v. Beightler, No. 1:09 CV 2190, 2011 WL 2111082, at *5 (N.D. Ohio May 26, 2011) (dismissing First Amendment retaliation claim against warden solely on non-exhaustion grounds, because although prisoner filed with the Office of the Chief Inspector a grievance specifically naming the warden, that grievance "failed to state any facts that demonstrate Defendant was 'personally and knowingly involved in a violation of the law'" (quoting OHIO ADMIN. CODE 5120-9-31(M))).

59 Borchardt, *supra* note 15, at 506.

60 *See* Mich. Dep't of Corr., Policy Directive No. 03.02.130, Prisoner/Parolee Grievances, at ¶ 03.02.130(P). (Jul. 9, 2007); 68 NEB. ADMIN. CODE § 2-005.03 (2014); Okla. Dep't of Corr., No. OP-090124, Grievance Process, at Art. IV.B (Jan 29, 2013); A.T. WALL, II, R.I. DEP'T OF CORR., INMATE HANDBOOK 30 (2007).

61 *See* Del. Dep't of Corr., Bureau of Prisons, Policy No. 4.4, Inmate Grievance Policy, at Art. VII.A (Sept. 26, 2011); Ind. Dep't of Corr., Policy No. 00-02-301, Offender Grievance Process, at Art. XIII.C (Jan. 1, 2010); Ky. Corr. Policies and Procedures, Policy No. 14.6, Inmate Grievance Procedure, at Art. J(1)(a)(2) (Aug. 6, 2012); Me. Dept. of Corr., Policy No. 29.01, Client Grievance Rights, at Art. VI.10 (Aug. 15, 2012); Mont. Dep't of Corr., Procedure No. MSP 3.3.3, Inmate Grievance Program, at Art. E (Feb. 27, 2013); N.M. Corr. Dep't, No. CD-150501, Inmate Grievances, at Art. A.1.a (Jan. 25, 2012); Tenn. Dep't of Corr., No. 501.01, Inmate Grievance Procedures, at Art. VI.C.1 (Oct. 1, 2012).

62 *See infra* note 76 and accompanying text (discussing the potentially game-ending consequences for prisoners of short IGP deadlines).

63 *See supra* note 37 and accompanying text.

beating remain hidden from supervisory staff and officials and, therefore, unaddressed.

In circumstances like these, the problem-resolution function of the IGP is ill served. This faltering of the idealized IGP system is a predictable result, because the proper exhaustion rule introduces a competing and attractive function: immunizing corrections staff from suit. A successful administrative process should allow prison officials to identify problems quickly and to resolve them "quickly and economically."[64] However, the IGP that best immunizes prison officials is one that stymies the progress of complaints through the administrative process or, better yet, prevents prisoners from initiating the process altogether and by extension prevents them from raising issues with the prison administration.

Scholars repeatedly have demonstrated that "agencies with competing mandates will adhere to the dominant one."[65] This scholarship has focused on situations in which agencies have multiple, possibly conflicting functions as a matter of institutional design. The conflict in the context of PLRA exhaustion is much more personal and, arguably, more compelling. The stakes for prison officials are their own jobs, reputations, and vulnerability to liability, and those of their colleagues. In these circumstances, it is all but inevitable that the desire to immunize staff from liability will become a dominant, if not the dominant, imperative driving the design and operation of IGPs.

Yet, the Supreme Court's jurisprudence assumes the pure motives of IGP systems,[66] and the proper exhaustion rule does not encourage courts to inquire into the functions served by the IGP procedures at issue in a particular non-exhaustion motion. This combination of naivety and blindness to the potential for bias creates a PLRA exhaustion regime that lacks legitimacy. It is a regime in which corrections departments literally write the rules with which prisoners must comply before they can successfully bring suit against those departments and their staff.

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64 *See* Woodford v. Ngo, 548 U.S. 81, 89 (2006).

65 Rachel E. Barkow, *Prosecutorial Administration* 6 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-41, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133658 (concluding that when conflicts have emerged between the Department of Justice's dominant law enforcement mandate and its functions in other areas, such as corrections, clemency, and forensic science, its prosecution mandate has won out); *see also* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 3 (2009); Sara A. Clark, Comment, *Taking a Hard Look at Agency Science: Can the Courts Ever Succeed?*, 36 ECOLOGY L.Q. 317, 324-25 (2009); Barkow, *supra*, at 33-39.

66 *See infra* Part II.

B. *Capacity Blindness*

The above examples of the potential for bias in the PLRA exhaustion analysis also highlight another troubling aspect of an absolute proper exhaustion rule—namely, that it turns a blind eye to a prisoner's capacity to exhaust when questions of capacity should be central to the exhaustion analysis.

As is discussed in more detail in Part II, the PLRA was intended to target prisoners playing "litigation fun-and-games."[67] Section 1997e(a) targets these prisoners indirectly by anticipating that prisoners with minor or baseless claims will be satisfied or disabused of the merits of their claim by the responses that they receive from the IGP, or that the burdens associated with exhausting a claim from within prison will deter a prisoner from pursuing a frivolous claim.[68] The proper exhaustion rule, in turn, is justified by the fear that manipulative prisoners will do an end run around IGP procedures if they are not made mandatory.[69] But a prisoner who *cannot* perfectly comply with prison grievance procedures is not intentionally flouting the exhaustion requirement. Nor does a prisoner's lack of capacity to exhaust neatly correlate with the merit of her claims.

Indeed, those who have suffered a serious injury often will have the greatest difficulty complying with IGP requirements.[70] Take, for example, a woman with mental illness raising claims about the care that she received,[71] or a child who experienced rights violations while in custody.[72] Each of these people may lack the ability to perfectly comply with prison grievance procedures because of factors inherent to his or her situation, such as trauma, mental illness, or youth. In those cases, a failure to properly exhaust is not traceable to any bad faith or attempt at manipulation on the prisoner's part. In contrast, freed from any real injury, prisoners raising made-up or frivolous claims do not face the same type of situational impediments to properly exhausting their claims.

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67 141 CONG. REC. 27,042 (Sept. 29, 1995) (statement of Sen. Dole).

68 *See* Woodford v. Ngo, 548 U.S. 81, 97 (2006).

69 *See infra* notes 99-100 and accompanying text.

70 *See generally* Shay & Kalb, *supra* note 11, at 320.

71 Notably, several courts have held that the strict requirements of proper exhaustion should not be relaxed when a prisoner has a mental disability or illness. *See* Johnson v. District of Columbia, 869 F. Supp. 2d 34, 39 (D.D.C. 2012) ("[T]he bulk of authority . . . has consistently held that individuals with disabilities or mental illness must nonetheless comply with the PLRA's exhaustion requirement." (collecting cases)).

72 The PLRA's requirements "apply not only to adult prisoners, but also to children confined in prisons, jails, and juvenile detention facilities," and courts have prevented attempts by parents and other adults to exhaust on incarcerated children's behalf. David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH 2 (2009), http://www.hrw.org/sites/default/files/reports/us0609web.pdf.

A strictly applied proper exhaustion rule, however, does not differentiate between these two groups. It reduces the exhaustion analysis to two questions: whether the defendant has identified an administrative complaint process in litigation and whether the prisoner correctly identified it and perfectly completed it before bringing suit.[73] This one-two-punch approach shunts aside other important—and seemingly relevant—questions, including whether the IGP procedures themselves imposed hurdles to proper exhaustion.

Let us revisit the example of a prisoner who was beaten in a system with a fifteen-day grievance deadline. The prisoner may be suffering from serious injuries that make it difficult for him to file a formal grievance in the proper format. He may also reasonably anticipate that reporting the beating will spark retaliation against him by staff who were present during the assault. These are substantial obstacles that he might not be able to overcome in two weeks. Yet, he must do so in order to properly exhaust.[74]

Likewise, the prisoner who files an initial grievance and receives a response stating that prison officials are investigating his claims is in an exhaustion bind that has litigation consequences. On its face, his grievance has not been denied. In fact, it suggests the prison is taking the grievance seriously and that the prisoner may obtain the action he is seeking. But it also creates an indeterminate timeline that is incompatible with the very determinate and short periods of time that prisoners are given to appeal an initial grievance response in most IGPs. It is not unreasonable for the prisoner to conclude that he need not appeal this response until the investigation is complete and he can evaluate whether it has resolved his problem. However, some IGPs require a prisoner to appeal a "we're looking into it" response to an initial grievance to preserve his claims.[75] To properly exhaust, this prisoner must have the wherewithal to know that he must appeal even a seemingly positive response to his grievance.[76]

As these examples demonstrate, the structure and operation of IGP rules can have a significant impact on a prisoner's ability to exhaust, but that constraint is not taken into account by the proper exhaustion rule. The rule is also blind to the other constraints inherent to the carceral setting which make it difficult for prisoners to exhaust as a general matter. The power differential between prisoners and guards may chill complaints, understandably so, since retaliation by staff for prisoner complaints is the

73 *See* Jones v. Bock, 549 U.S. 199, 218 (2007); *Woodford*, 548 U.S. at 90-91.

74 Although some IGPs include a provision that allows consideration of late-filed grievances, the decision to accept such grievances is purely discretionary. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g) (Supp. 2013).

75 *See, e.g.*, Brown v. Croak, 312 F.3d 109, 111-12 (3d Cir. 2002).

76 Prisoners must also know that in many IGPs they must appeal a lack of response to their initial grievance. That is, if the facility does not respond to a grievance within the time allotted by the grievance policy, the prisoner is to interpret that response as a denial and appeal the (lack of) decision. If he does not, the grievance will be deemed abandoned.

norm in many systems.[77] Prisoners are likely to have low educational attainment[78] and a symptomatic mental health condition.[79] Prisoners also lack access to counsel and other outside assistance in understanding and complying with IGP requirements.[80] A strictly enforced proper exhaustion rule considers none of these constraints—each of which can be compounded by complex, ambiguous, or stringent IGP requirements.

Instead, the proper exhaustion rule requires some doctrinal double-thinking. It is predicated on a worldview in which IGPs operate so as to facilitate rather than impede prisoners' complaints, and in which prisoners intentionally seek to avoid complaining to prison authorities. But it does not encourage courts to examine, or even consider, either of those predicate assumptions.

II. THE EMERGENCE OF THE FORM FIRST APPROACH

This Part traces the emergence of the Supreme Court's form first approach to PLRA exhaustion. It begins with a brief overview of the circumstances that led to the PLRA's enactment in 1996 and the objectives that its proponents envisioned the Act and Section 1997e(a) in particular would serve. It then turns to an examination of how the Supreme Court has interpreted and applied Section 1997e(a).

A. *The PLRA*

The PLRA represents the latest era in the history of prisoners' rights litigation, a history that has seen drastic swings in the extent to which the courts have been open to people in custody.

Until well into the middle of the last century, the federal courts took a hands-off approach to abuses in the country's prisons.[81] In part because

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77 *See* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 613-14 (2009).

78 Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU OF JUSTICE STATISTICS 1 (Jan. 2003), http://www.bjs.gov/content/pub/pdf/ecp.pdf (reporting that 41.3% of people in state, federal, and county custody had completed "some high school or less" and that 68% of state prisoners did not receive a high school diploma).

79 Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prisons and Jails*, BUREAU OF JUSTICE STATISTICS 1 (Sept. 2006) (reporting that 56% of state prisoners had a mental health problem that had been diagnosed or symptomatic in the past year based on criteria in the DSM-IV).

80 Schlanger, *supra* note 11, at 1609.

81 *See* LYNN S. BRANHAM & MICHAEL S. HAMDEN, CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 463 (8th ed. 2009); Shay & Kalb, *supra* note 11, at 298; *see also* JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 36-37 (1977); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999).

prisoners had no recourse through the courts, prison administrators like the warden at Illinois's notorious Stateville penitentiary were able to carve out "autonomous institution[s] accountable neither to other public agencies nor to the public at large."[82] These carceral fiefdoms often fostered conditions and conduct that, when they came to light, would shock the public.[83]

The federal courts' reluctance to hear civil rights suits originating in prisons and jails gave way in the late 1960s and 1970s.[84] This opening of the courts was met by a wave of pent-up demand.[85] Along with the ranks of incarcerated people, the number of civil lawsuits brought by prisoners increased throughout the 1980s and 1990s.[86] During this era of prisoners' rights litigation, plaintiffs were not required to have exhausted prison grievance procedures as a matter of course.[87]

By the mid-1990s, concerns about the explosion in prisoner litigation were raised from various quarters,[88] and a faction of legislators began a push to overhaul the rules governing such suits.[89] The complaints of the legislators backing what ultimately became the Prison Litigation Reform Act in 1996 were varied.[90] By far the most common and loudest complaint

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82 JACOBS, *supra* note 81, at 36.

83 *See* Schlanger, *supra* note 81, at 2003; Shay & Kalb, *supra* note 11, at 299.

84 *See* BRANHAM & HAMDEN, *supra* note 81, at 464-65; Shay & Kalb, *supra* note 11, at 298.

85 *See* Schlanger, *supra* note 81, at 2004 (describing "a nationwide flood of class-action lawsuits" as taking place in this time period); *see also* Shay & Kalb, *supra* note 11, at 298 (noting that, by 1984, roughly a quarter of state prisons were under court order).

86 *See* Schlanger, *supra* note 11, at 1557 (noting that the number of incarcerated people nearly quadrupled between 1980 and 2003); *id.* at 1557-58 (reporting that new suits by prisoners made up 19 percent of the federal civil docket in 1995).

87 Under the Civil Rights of Institutionalized Persons Act ("CRIPA"), which was enacted in 1980, the district court could, at its discretion, require the plaintiff to have exhausted if it was "appropriate and in the interests of justice," and then only if the IGP in question had been certified as "plain, speedy, and effective" by the Federal Bureau of Prisons or by a district court. 42 U.S.C. § 1997e(a)(1) (1982). This certification process was seldom used. Schlanger, *supra* note 11, at 1627.

88 Concerns were raised from obvious quarters, such as state corrections departments and the attorneys general's offices that represented them. *See, e.g.*, Letter from Inmate Litig. Task Force, Nat'l Ass'n of Attorneys Gen., to Sen. Bob Dole (Sept. 19, 1995), *reprinted in* 141 CONG. REC. 26,552-53 (1995). However, other stakeholders, such as the judiciary, also noted the strain prisoners' suits placed on judicial and state resources and the challenges of dealing with so much litigation. *See generally* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 544-45 (1982); Schlanger, *supra* note 11, at 1588-90.

89 The push grew out of a number of confluent political initiatives, including tort reform efforts, law-and-order initiatives, and the Republican Congress's Contract with America. *See* Schlanger, *supra* note 11, at 1559; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 19 (1997).

90 *See, e.g.*, 141 CONG. REC. at 27,045 (remarks of Sen. Kyl) (asserting the need to "regain control of the Federal court system, and . . . not just allow the Federal judges to dictate to the States how their prison systems will be run"); *id.* at 27,044 (remarks of Sen. Thurmond) ("[T]his bill will place limits on Federal judges who have been micromanaging prisoners with population caps.").

was not that there was too much litigation by prisoners but that there was too much of the "wrong kind" of litigation.[91] Legislative debate focused on the "frivolous lawsuit" brought in bad faith by the manipulative prisoner or the prisoner with too much time on his hands. Senator Hatch promised: "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 the endless flow of frivolous litigation."[92]

At the same time, the Act's sponsors were careful to affirm—and reaffirm—that the PLRA would not and was not intended to block meritorious claims. Senator Hatch was clear on this point as well: "I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."[93]

B. *Supreme Court Interpretations of Section 1997e(a)*

Following the enactment of the PLRA in 1996, there was an understandable and considerable shift in the federal courts' exhaustion analysis in prison litigation. Collectively, the four decisions by the Supreme Court interpreting Section 1997e(a) take what I term a "form first" approach to PLRA exhaustion.

The form first approach is marked by four key characteristics, some of which are in tension with one another. First, the framework privileges prisoners' compliance with the formal procedures and policies of prison grievance systems, requiring scrupulous compliance with prison rules. Second,

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91 *See id.* at 27,042 (remarks of Sen. Dole) ("This amendment will help put an end to the inmate litigation fun-and-games."); *id.* (remarks of Sen. Hatch) ("This is the prison litigation reform amendment to do away with frivolous lawsuits."); *id.* at 14,572 (remarks of Sen. Kyl) (stating that "[f]iling frivolous civil rights lawsuits has become a recreational activity for long-term residents of our prisons" and asserting that "[t]his bill will deter frivolous inmate lawsuits"); *see also* Jones v. Bock, 549 U.S. 199, 203 (2007) (stating in reference to the passage of the PLRA, "What this country needs, Congress decided, is fewer and better prisoner suits"); Woodford v. Ngo, 548 U.S. 81, 97 (2006) ("[T]he PLRA . . . was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation . . . ."); Porter v. Nussle, 534 U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits . . . ."); Schlanger, *supra* note 11, at 1567 ("The government officials and legislators who were the driving force behind the PLRA presented the following account of the cases: inmates, they said, were unduly litigious, making federal cases out of the most trivial mishaps; the cases were deluging both executive and judicial officials who were supposed to respond to them, and the serious cases therefore risked getting drowned out by the frivolous . . . ."); Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (March 21, 1994), http://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html?pagewanted=all&src=pm.

92 141 CONG. REC. at 27,042 (remarks of Sen. Hatch).

93 *Id.*; *see also id.* at 27,044 (remarks of Sen. Thurmond) ("This amendment will allow meritorious claims to be filed . . . .").

the framework insists on compliance even if the IGP process cannot provide the relief or resolution the prisoner is seeking or if prison supervisors were actually notified, outside of the IGP process, of the problem the prisoner is raising in the suit. That is, the approach discounts the substantive effect of following (or not following) the formal IGP procedures. Third, the approach is concerned with stopping a prisoner acting in bad faith from orchestrating an end run around the PLRA exhaustion requirement. Finally, but fundamentally, the form first approach is predicated on a belief that IGPs effectively identify, sort, and resolve problems. The form first approach assumes that the IGP will address some prisoners' complaints, will discourage prisoners with frivolous grievances from pursuing them, and will helpfully queue up meritorious claims for adjudication by the courts. Closely related to this assumption is another: namely, that IGP procedures are straightforward and that it is easy for a prisoner to determine what he must do to exhaust. The final, central assumption that the form first approach can be justified by IGPs adeptness at resolving problems is in direct tension with the second precept—that the substantive effect of complying with IGP procedures is insignificant.

This Section highlights the contribution to the form first approach that was made by each of the four Supreme Court decisions concerning the PLRA exhaustion requirement: *Booth v. Churner*;[94] *Porter v. Nussle*;[95] *Woodford v. Ngo*;[96] and *Jones v. Bock*.[97]

1. *Booth v. Churner*

The very first decision interpreting the PLRA exhaustion requirement, *Booth*, immediately placed the emphasis in the exhaustion inquiry on whether a prisoner followed the grievance process, not on whether that process was likely to yield any results.[98]

A unanimous court held in *Booth* that a plaintiff who seeks only damages was required to have first exhausted a prison IGP that could not provide any monetary relief.[99] The Court explains, "Congress has provided in § 1997e(a) that an inmate must exhaust irrespective of the forms of relief

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94 532 U.S. 731 (2001).

95 534 U.S. 516 (2002).

96 548 U.S. 81 (2006).

97 549 U.S. 199 (2007).

98 *Booth*, 532 U.S. at 738-39.

99 *Id.* at 734-35. Booth, a prisoner in Pennsylvania, alleged that corrections officers had first assaulted him and then denied him medical attention for his injuries. *Id.* He filed a grievance with the prison but failed to appeal the subsequent disposition denying him relief through the prison system's intermediate and final levels of review. *Id.* Having failed to complete the IGP, Booth could only move forward if the PLRA exhaustion requirement did not apply to his suit for damages. *See id.* at 735.

sought and offered through administrative avenues."[100] The Court further interprets the word "remedies"[101] in Section 1997e(a) to mean the administrative procedures made available to prisoners to remediate their complaints, not any relief that the prisoners might receive through those procedures. As the Court explained, "the word 'exhausted' has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered."[102] For that process to be "available" for the purposes of Section 1997e(a), it must have the "authority" to "take some action in response to a complaint."[103]

Booth raises more complex issues, particularly with regard to the seemingly simple concept it presents—namely, that exhaustion is centered on procedures, not outcomes. The opinion introduces the idea that an administrative procedure that cannot satisfy the prisoner's complaint still must be pursued and completed before a prisoner can have access to the courts.[104] The rule that a plaintiff must have complied with the formalities of the prison grievance system, no matter the substantive effect that may have (or not have), is a central precept of the form first approach.

Another precept—that IGPs serve a problem-solving function that is supported by a mandatory exhaustion rule—also emerges in *Booth*, albeit softly. Justice Souter, writing for a unanimous Court, remarks that the Court has been skeptical of arguments "that the administrative process itself would filter out some frivolous claims and foster better-prepared litigation," but the opinion allows that Congress may have taken a different view in enacting Section 1997e(a).[105]

The decision also acknowledges that the PLRA imposed a broader exhaustion requirement than the prior statute, the Civil Rights of Institutionalized Persons Act,[106] reflecting the PLRA's aim of preventing prisoners from "skip[ping] the administrative process."[107]

2. *Porter v. Nussle*

Booth was followed by *Porter v. Nussle* a year later. In another unanimous decision, the Supreme Court held that Porter's claim that he was singled out for a beating was a claim about "prison conditions," thus clari-

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100 *Id.* at 733-34, 741 n.6.

101 42 U.S.C. § 1997e(a) (2006) ("No action shall be brought . . . until such administrative remedies as are available are exhausted.").

102 *Booth*, 532 U.S. at 738-39.

103 *Id.* at 736.

104 *Id.* at 736, 740 n.5.

105 *Id.* at 737.

106 42 U.S.C. § 1997 (1982).

107 *See Booth*, 532 U.S. at 739-41.

fying that Section 1997e(a) is to be applied to all prisoners' suits,[108] including systemic challenges seeking broad-ranging injunctive relief.[109]

Porter echoed a theme that began to emerge in *Booth*, namely that because of IGPs' capacity to efficiently resolve problems, mandatory usage of IGPs could lessen the burden frivolous litigation imposes on courts.[110] It further noted Congress's hopes that "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation," or that "internal review might 'filter out some frivolous claims.'"[111]

3. *Woodford v. Ngo*

It is with the Supreme Court's decision in *Woodford v. Ngo* that the form first approach fully emerges. In that case, the Court was asked to decide whether a plaintiff could satisfy the exhaustion requirement if he filed "an untimely or otherwise procedurally defective administrative grievance or appeal."[112] The plaintiff, Viet Mike Ngo, alleged that after he was released from administrative segregation in a California state prison he was restricted from "special programs."[113] As a result, he could not participate in certain religious activities.[114] Ngo filed a grievance challenging the restrictions roughly six months after being released from administrative segregation, while he was still under the programming restriction.[115] California's prison system rejected the grievance as untimely, citing its rule that a grievance be filed within fifteen business days of the action being challenged—presumably, in that case, the initial decision to restrict him from special programs upon his release from administrative segregation.[116] Ngo unsuccessfully appealed the administrative decision to reject his grievance, then brought a Section 1983 action in federal court.[117]

Justice Alito, writing for the majority, found that Ngo had not satisfied Section 1997e(a), which requires "proper exhaustion."[118] The term "proper exhaustion" is borrowed from the California correctional parties.[119] As they

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108 Porter v. Nussle, 534 U.S. 516, 519, 527-28 (2002); *see also* 42 U.S.C. § 1997e(a) (1982) (providing that exhaustion is required for all actions about "prison conditions").

109 *Porter*, 534 U.S. at 519, 527, 532.

110 *Id.* at 524.

111 *Id.* at 525 (quoting *Booth*, 532 U.S. at 737).

112 Woodford v Ngo, 548 U.S. 81, 83-84 (2006).

113 *Id.* at 86 (internal quotation marks omitted).

114 *Id.*

115 *Id.* at 87.

116 *Id.*

117 *Id.*

118 *Woodford*, 548 U.S. at 83-84.

119 *Id.* at 88.

defined it, proper exhaustion "means . . . that 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."[120]

By adopting this principle, the *Woodford* majority explicitly ties a plaintiff's ability to satisfy the PLRA's exhaustion requirement to how well he navigated the grievance process created and defined by the corrections department. Under *Woodford*, it is not sufficient for a prisoner to have complained to prison staff before bringing suit—he must have complained in the "right way."[121]

The majority in *Woodford* roots its demand for proper exhaustion in two fundamental assumptions: first, prison grievance procedures get results, and, second, prisoners are likely to try to circumvent administrative problem-solving mechanisms.[122] Drawing on principles expressed in *McKart v. United States*,[123] the majority ascribes very specific, desirable functions to corrections departments' IGPs[124] and then requires proper exhaustion from prisoner-litigants to ensure that these systemic benefits are realized.[125] The majority asserts that grievance procedures provide corrections departments "with a fair opportunity to correct their own errors."[126] They also allegedly "reduce[] the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court."[127] And the majority asserts that grievance procedures "improve[] the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court."[128]

In order to reap these benefits, all prisoners must be required to "properly exhaust" because "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction."[129] Indeed, the majority opinion is preoccupied with the potential risk that prisoners will circumvent IGPs.[130]

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120 *Id.*

121 *See* Macias v. Zenk, 495 F.3d 37, 44 (2d Cir. 2007).

122 *Woodford*, 548 U.S. at 102-03.

123 395 U.S. 185 (1969).

124 *See Woodford*, 548 U.S. at 89, 93; *compare id.* at 94-95, *with McKart*, 395 U.S. at 193-95.

125 *Woodford*, 548 U.S. at 103.

126 *Id.* at 94.

127 *Id.*

128 *Id.* at 94-95.

129 *Id.* at 95.

130 *See id.* at 89-90 ("[S]ome aggrieved parties may prefer to proceed directly to federal court for other reasons, including bad faith."); *id*. at 90 n.1 ("One can conceive of an inmate's seeking to avoid creating an administrative record with someone that he or she views as a hostile factfinder, filing a lawsuit primarily as a method of making some corrections official's life difficult, or perhaps even specu-

The proper exhaustion rule is thus justified by the perceived benefits of IGPs together with the belief that the procedural hurdle of just having an exhaustion requirement will deter prisoners from bringing purely frivolous suits.

Remarkably, the Supreme Court takes the existence of the benefits of IGPs on faith. The *Woodford* decision cites no empirical or factual evidence that the IGP at issue in that case or any other grievance system operates as the decision imagines. Rather, its conclusions about the benefits of IGPs seem to be solely a repetition of the theoretical benefits of administrative exhaustion expressed in earlier cases, such as *McKart*.[131] In this way, the Court engages in some doublethink to justify the proper exhaustion rule. The rule is based in part on the bad faith conduct prisoners *might* engage in—i.e., intentional dodges of the administrative process—while the Court dismisses as speculative the bad faith maneuvers supervisory officials might engage in to immunize themselves and their staff.[132]

Commentators have noted that there is reason to be skeptical of the problem-resolution abilities of IGPs. Professor Margo Schlanger observes, "People with experience in inmate grievance systems emphasize that only a well-designed system can satisfy its users well enough to substitute for litigation, and there is little reason to think that the PLRA is encouraging jail and prison administrators to implement effective grievance systems."[133] To the contrary, the PLRA did away with the prior statutory regime's standards for grievance systems (a certification of the system by the attorney general) and the incentives to meet those standards.[134]

There is also something seemingly contradictory about resting a proper exhaustion rule on the assumption that IGPs can effectively address prison-

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lating that a suit will mean a welcome—if temporary—respite from his or her cell."); *id.* at 96 (assuming the goal of an exhaustion decision standard should be to "alter the conduct of a prisoner whose objective is to bypass the administrative process" and expressing concern that respondent's approach would mean "a prisoner who does not want to participate in the prison grievance process would have little difficulty in forcing the prison to dismiss his administrative case on procedural grounds"); *id.* at 96-97 (again expressing concern that respondent's approach would "allow[ ] a party to bypass deliberately the administrative process by flouting the agency's procedural rules"); *see also id.* at 118 (Stevens, J., dissenting) ("Much of the majority opinion seems to assume that, absent the creation of a waiver sanction, prisoners will purposely circumvent prison grievance proceedings.").

131 *See supra* note 99. *Woodford*'s justification of the proper exhaustion rule based on its theoretical expected downstream systemic benefits is especially interesting in light of the unanimous Court's rejection of this type of utilitarian argument in *Booth*. *See* Booth v. Churner, 532 U.S. 731, 737 (2001) ("The upshot is that pragmatism is inconclusive.").

132 *See Woodford*, 548 U.S. at 102-03 (majority opinion).

133 Schlanger, *supra* note 11, at 1653 (footnote omitted); *see also* Shay & Kalb, *supra* note 11, at 313; 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, 521 (2001).

134 *Compare* 42 U.S.C. § 1997e(a) (2000), *with* Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e(a) (1988).

er complaints, when *Booth* urges that a prisoner must follow prison grievance procedures *even if* they cannot provide the relief that the prisoner is seeking.[135]

Notably, once the problem-resolution benefits of IGPs are taken out of the equation, the only remaining justifications for insisting prisoners use IGP procedures is that they may result in a record that is useful in subsequent litigation[136]—a benefit that does not appear to have materialized in the past seven years of litigation[137] and is scanty justification for a procedural default rule that prevents courts from hearing constitutional claims.

The majority's opinion in *Woodford* further reflects an assumption that complying with IGP procedures is easy. It repeatedly emphasizes the simplicity of the California IGP that Ngo should have used.[138] It rebuffs the argument that "proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated," claiming that this argument "overlooks the informality and relative simplicity of prison grievance systems like California's."[139] In fact the majority assumes that "Corrections officials concerned about maintaining order in their institutions 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."[140] This assumption may be true, but as Part I explores, corrections officials also have reason to make it difficult for them and their staff to be held liable in federal suits.[141]

4. *Jones v. Bock*

Less than a year after *Woodford* was decided, the Supreme Court decided *Jones v. Bock*, an appeal arising from suits brought by three different Michigan prisoners who each had filed grievances before bringing suit.[142]

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135 *See Booth*, 532 U.S. at 740-41.

136 *See Woodford*, 548 U.S. at 94-95.

137 Moreover, the experience of practitioners in this area indicates that the grievance records that are generated by IGP proceedings are of very little, if any, use in subsequent litigation. *See* John Boston, The Prison Litigation Reform Act (Feb. 15, 2013) (unpublished manuscript) (on file with author).

138 *Woodford*, 548 U.S. at 85 (characterizing California's three-step formal administrative review process as "relatively simple," in that initiating the process merely requires an inmate to "fill out a simple form that is made 'readily available to all inmates'" (citation omitted) (quoting CAL. CODE REGS. tit. 15, 3084.1(c) (2004)).

139 *Id.* at 103.

140 *Id.* at 102.

141 The *Woodford* majority does allow that its insistence on proper exhaustion might waver if it was presented with a case in which "prison administrators [had] devise[d] procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims" or that "create procedural requirements for the purpose of tripping up all but the most skillful prisoners." *Id.*

142 Jones v. Bock, 549 U.S. 199, 206-11 (2007).

The opinion addressed three questions related to PLRA exhaustion. First, the Court held that a prisoner has no duty to plead that he had exhausted his claims before filing suit, because non-exhaustion is an affirmative defense.[143] Second, it held that exhausted claims could be severed and proceed separately from dismissed, unexhausted claims that had been brought in the same action.[144] Finally, the Court held that a prisoner was not required by the PLRA to identify by name in his administrative grievance all of the persons later named in his civil suit (unless the IGP in question established such a requirement).[145]

Based on these core holdings, *Jones* may be viewed as a more pro-plaintiff opinion than other Supreme Court decisions on PLRA exhaustion. However, it still reflects the same deference to prison procedural rules as in earlier decisions. *Jones* affirms that the proper exhaustion rule should be used to adjudicate the PLRA's exhaustion requirement.[146] In fact, Professors Shay and Kalb argue that in affirming that the federal courts will impose only those procedural barriers that are explicitly included in the administrative grievance procedures, *Jones* has "hand[ed] prison officials *carte blanche* to design complicated procedural barriers to prisoners' court access."[147] *Jones* also repeats the theoretical benefits generated by IGPs, including the belief that allowing prison agencies to address complaints internally will reduce litigation in the federal courts.[148]

III. A POSSIBLE SOLUTION AT THE READY: THE *HEMPHILL* FRAMEWORK

Blindly applying the proper exhaustion rule in every case in which non-exhaustion is raised as a defense undercuts the legitimacy and the doctrinal underpinnings of the Supreme Court's PLRA exhaustion jurisprudence by encouraging IGPs that are not primarily concerned with solving prison problems. To save the proper exhaustion rule, there must be exceptions.

This Part begins to explore what those exceptions might look like by examining the possibilities presented by an exceptions framework announced by the Second Circuit in *Hemphill v. New York*.[149] Established before *Woodford* was decided, but still good law today, the *Hemphill* frame-

143 *Id.* at 212.

144 *Id.* at 223-24.

145 *Id.* at 219.

146 *Id.* at 218 ("[P]risoners must 'complete the administrative review process in accordance with the applicable procedural rules,'—rules that are defined not by the PLRA, but by the prison grievance process itself. . . . [I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." (citation omitted) (quoting *Woodford*, 548 U.S. at 88)).

147 Shay & Kalb, *supra* note 11, at 326.

148 *See Jones*, 549 U.S. at 219.

149 380 F.3d 680 (2d Cir. 2004).

work provides a starting point for a better PLRA exhaustion analysis. As articulated, the framework obscures one of its most important doctrinal implications, namely that administrative remedies can be rendered unavailable in particular cases by a number of intersecting factors. However, it begins to correct for the two most serious blind spots in the form first approach to PLRA exhaustion.

Before delving into the circumstances in which a particular plaintiff's failure to "properly exhaust" is justified, it is useful to understand how exhaustion is raised in prisoners' rights litigation. Non-exhaustion is an affirmative defense; plaintiffs are not required to plead that they have satisfied Section 1997e(a).[150] It is the defendants, therefore, that first raise the PLRA's exhaustion requirement in litigation, typically as part of a motion to dismiss or for summary judgment. Any arguments that a prisoner's alleged failure to properly exhaust is justified are raised for the first time in his opposition papers.

Under the *Hemphill* framework, the district court is to ask the following questions when a plaintiff raises justifications for failing to exhaust:

∗ Were "administrative remedies . . . in fact 'available' to the prisoner?"[151]

∗ Have defendants forfeited non-exhaustion as a defense by failing to preserve it, or do "defendants' own actions inhibiting the inmate's exhaustion of remedies . . . estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense?"[152]

∗ Have "special circumstances . . . been plausibly alleged that justify 'the prisoner's failure to comply with administrative procedural requirements'"?[153]

The Second Circuit announced this framework in *Hemphill*, synthesizing its holding and the holdings in three other cases that were decided on the same day in August 2004.[154]

150 *Jones*, 549 U.S. at 216.

151 *Hemphill*, 380 F.3d at 686.

152 *Id.*

153 *Id.* (quoting Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004)).

154 *See* Johnson v. Testman, 380 F.3d 691, 695-97 (2d Cir. 2004); *Hemphill*, 380 F.3d at 686; *Giano*, 380 F.3d at 675; Abney v. McGinnis, 380 F.3d 663, 666-67 (2d Cir. 2004). Two other decisions decided earlier that year are also reflected in the *Hemphill* framework. *See* Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 487-88 (2d Cir. 2004) (holding that prisoner's belief that exhaustion was not required was reasonable and therefore the failure to exhaust should be excused); Ziemba v. Wezner, 366 F.3d 161, 163 (2d Cir. 2004) (holding that the PLRA non-exhaustion defense is subject to estoppel).

Several features of the *Hemphill* framework help correct for the bias blindness and capacity blindness of the form first approach to PLRA exhaustion urged by the Supreme Court's jurisprudence.

As an initial matter, *Hemphill* encourages courts to think comprehensively about the overlapping issues implicated by administrative exhaustion in a prison setting. Each of its three prongs considers to some extent the constraints imposed on a prisoner's ability to exhaust.[155] This more holistic and realistic approach is an improvement on the Supreme Court's PLRA jurisprudence. Simply by taking into account the constraints on a prisoner's ability to exhaust, the *Hemphill* framework undercuts the potential for bias in the proper exhaustion rule. Because the "special circumstances" justification permits prisoners who made reasonable mistakes in their exhaustion efforts to still proceed with their constitutional claims, it takes away the incentive to make exhaustion procedures so complex or confusing that they become difficult or impossible. *Hemphill* targets bias even more directly through its "effectively unavailable" and estoppel prongs, which eliminate the non-exhaustion defense where corrections staff interfered with a plaintiff's ability to exhaust.

Moreover, the *Hemphill* framework corrects for the capacity-blindness and conflict-of-interest bias endemic within the form first approach without undercutting the statutory purpose of the PLRA to deter frivolous claims through procedural hurdles. The framework avoids the type of categorical determinations that would automatically wave through throngs of prisoners.[156] Establishing one of the three *Hemphill* justifications for not completing the relevant IGP also takes considerable effort and skill. Once a defendant has asserted non-exhaustion as a defense, each individual plaintiff carries the burden of establishing a justification, in an analysis that focuses fairly narrowly on the facts of his particular case and his attempt or failure to exhaust. So although a plaintiff is not required to plead that he exhausted or to plead a specific theory as to why his non-exhaustion is justified, at the dispositive motion phase he must present sufficient facts to form the basis of a successful justification argument.[157] Furthermore, the plaintiff must demonstrate a plausible connection between the facts he has alleged and his failure to exhaust.[158] It is not sufficient to merely assert hardship.[159] A suc-

155 *See supra* notes 151-153.

156 *See Hemphill*, 380 F.3d at 686. Indeed, the Second Circuit has often avoided making definitive determinations in particular cases, preferring to remand cases if one of the three justifications might apply back to the district court for further factual findings. *See, e.g.*, Vogelfang v. Riverhead Cnty. Jail Officers, No. 07-1268-cv, 2009 U.S. App. LEXIS 1914, at *5-6 (2d Cir. Feb. 2., 2009); Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006); *see also Giano*, 380 F.3d at 678 ("We need not, and hence should not, today attempt any broad statement of what constitutes justification.").

157 *Giano*, 380 F.3d at 678.

158 *See infra* note 209.

159 *See* Reynoso v. Swezey, 238 F. App'x 660, 663 (2d Cir. 2007) ("[The plaintiff] testified that his failure to appeal was not attributable to any threats or fear of retribution from prison staff. Reynoso's

cessful justification argument, therefore, requires knowledge of PLRA exhaustion law and the skilled presentation of a justification narrative at a very early stage of litigation. Considering that most prisoners' rights actions are brought pro se,[160] this alone makes it unlikely that the *Hemphill* framework, or any exceptions doctrine for that matter, will be responsible for reopening the floodgates to prisoners' rights litigation. Like the PLRA exhaustion requirement as a whole, the *Hemphill* framework deters frivolous suits by requiring prisoners to make significant efforts up front, which, under the logic of Section 1997e(a) itself, presumably only those prisoners with meritorious claims will be willing to put in.

In practice, elements of the unavailability and estoppel inquiries often dovetail together, and factors relevant to both inquiries also enter into the special circumstances analysis. However, since *Hemphill* styles each inquiry as a distinct step in the analysis,[161] this Part will briefly examine them in turn.

A. *Unavailability*

The unavailability exception is not strictly speaking an exception to the PLRA exhaustion requirement, because Section 1997e(a) only requires plaintiffs to have exhausted those administrative remedies that were "available."[162] If an IGP process was "unavailable" to the plaintiff in the aftermath of the events giving rise to his lawsuit, there was nothing for him to exhaust from the perspective of the statute.

A remedy can be literally unavailable to a particular prisoner for unique and rare factual reasons, such as that the prisoner was incapacitated by a broken hand during the timeframe in which he was required to file his grievance.[163] Under the *Hemphill* framework, an IGP can be deemed unavailable for one of two additional reasons: it was unavailable for systemic reasons or it was rendered "effectively unavailable" by some intervention by prison staff. *Hemphill* elides the distinction between these two categories, but as they actually implicate very distinct inquiries this Article refers to them as "systemic unavailability" and "effective unavailability," respectively.

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right to appeal to CORC was therefore not rendered unavailable by intimidation (under *Hemphill*), and the prison officials are not estopped by misconduct (under *Ziemba*) from interposing the exhaustion defense.").

160 Schlanger, *supra* note 11, at 1609.

161 *See Hemphill*, 380 F.3d at 686.

162 42 U.S.C. § 1997e(a) (1982).

163 Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (per curiam), *overruling recognized by* Moran v. Jindal, 450 F. App'x 353, 353 (5th Cir. 2011). This type of literal unavailability argument appears to be inconsistently accepted by the courts. *See* Boston, *supra* note 137, at 194-200.

1. Systemic Unavailability

Systemic unavailability cases are the children of *Booth*, which held that to be an available remedy an administrative process must have the "authority to take some action in response to a complaint."[164] In systemic unavailability cases, the court determines that the corrections department has no administrative complaint mechanism that is designated with or capable of addressing the complaint that the prisoner is raising. This portion of the *Hemphill* framework has been broadly applied beyond the borders of the Second Circuit.[165]

The Second Circuit was presented with a systemic unavailability case in *Abney v. McGinnis*.[166] Horace Abney had filed three separate and successive grievances, complaining that he had not received a necessary medical device.[167] Each of the three grievances was granted at the first level of the three-stage administrative process, and each response directed that Abney receive the medical device promptly.[168] Yet, he never actually received it.[169] After nineteen months of "successfully" grieving his complaint without obtaining any relief, Abney filed a Section 1983 action.[170] The district court dismissed the suit because Abney had not administratively appealed any of the positive responses that he received to his initial grievances.[171]

The Second Circuit vacated that decision, holding that "[t]he defendants' failure to implement the multiple rulings in Abney's favor rendered administrative relief 'unavailable' under the PLRA."[172] In effect, there was no procedure within the IGP by which Abney could force implementation of a favorable decision.[173]

Systemic unavailability cases include those in which a corrections department declines to delegate authority to the IGP to address a particular topic. For instance, in the Tennessee state system a prisoner may not grieve prisoner classification decisions, and therefore there is no available administrative remedy for a prisoner's challenge to the corrections department's decision to reclassify him and assign him to a different facility.[174] Systemic unavailability also occurs in situations in which the corrections department itself has no authority over the subject area into which the prisoner's com-

164 Booth v. Churner, 532 U.S. 731, 736 (2001).

165 *See* Boston, *supra* note 137, at 190-94 (collecting cases).

166 Abney v. McGinnis, 380 F.3d 663, 666 (2d Cir. 2004).

167 *Id.* at 665-66.

168 *Id.*

169 *Id.*

170 *Id.* at 666.

171 *Id.*

172 *Abney*, 380 F.3d at 669.

173 *Id.*

174 *See* Owens v. Keeling, 461 F.3d 763, 769-70 (6th Cir. 2006).

plaint falls. For instance, the D.C. Circuit found that the Federal Bureau of Prisons' IGP was not an available administrative remedy for statutorily mandated DNA testing because the Bureau had no discretion under the statute to decline to test a particular prisoner.[175]

2. Effective Unavailability

The case at issue in the *Hemphill* decision involves the second kind of unavailable administrative remedies: those that, although ordinarily available to address the type of problem raised by the prisoner, have been rendered "effectively unavailable" by some intervention by staff. John Hemphill brought suit alleging that corrections officers had assaulted him and that he was then denied medical attention.[176] Hemphill alleged that he did not grieve the assault because multiple officers threatened him, both during and after the attack, including one who said:

> You better make up your mind right now, drop it or go to the box and face criminal charges. You don't go to the clinic, you don't do nothing but drop it; if you['re] lying I will have all my night officers watching your every move. If you go to the clinic, I will know about it and then I'll make your life a living hell throughout this penal system because I have friends all over.[177]

The Second Circuit found that because of this threat and other actions taken by staff it was unclear whether "the remedies that Hemphill failed to pursue were actually available to him" and remanded that question back to the district court.[178]

In order for remedies to be rendered effectively unavailable, there must be an apparent connection between prison staff's conduct and the prisoner's actual or perceived ability to safely complete the IGP process.[179] Put another way, the conduct could have reasonably been expected to prevent the prisoner from exhausting or seriously interfere with his ability to exhaust. It is not sufficient that the staff conduct was transgressive or repugnant. For example, a beating by staff would not automatically render

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175 Kaemmerling v. Lappin, 553 F.3d 669, 675-76 (D.C. Cir. 2008).

176 Hemphill v. New York, 380 F.3d 680, 681 (2d Cir. 2004).

177 *Id.* at 684 (alteration in original) (internal quotation marks omitted). Hemphill did later write directly to the superintendent.

178 *Id.* at 688. The district court did not issue a subsequent decision.

179 *See* Reynoso v. Swezey, 238 F. App'x 660, 663 (2d Cir. 2007); Ruggiero v Cnty. of Orange, 467 F.3d 170, 178 (2d Cir. 2006).

remedies unavailable.[180] But the same conduct accompanied by a threat that "snitches get stitches" might be.[181]

The unavailability analysis begins to correct for the blind spots in the form first approach to PLRA exhaustion. It very directly takes into account prisoner's capacity to exhaust, and it acknowledges that a range of factors can inhibit a prisoner's ability to exhaust, including physical impairment, fear for her safety, and the structure of the IGP. It also appropriately holds that when factors such as these render the IGP unavailable there is no requirement under Section 1997e(a) for plaintiffs to exhaust. In addition, by acknowledging that an administrative process may exist but fail to provide a true possibility of remediation, the unavailability analysis indirectly takes into account the potential for bias in an IGP's design.

B. *Estoppel*

Hemphill provides that "defendants may . . . forfeit[] the affirmative defense of non-exhaustion by failing to raise or preserve it" and that "defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense."[182] In order for "inhibiting" conduct to provide a basis for estoppel, it must be targeted at the prisoner's efforts at exhaustion.[183] That is, it must be the type of conduct that could reasonably be expected to deter or prevent a prisoner from exhausting.

If this principle sounds familiar, it should. The conduct that estops defendants from asserting a non-exhaustion defense is the same kind of conduct that can render administrative remedies "effectively unavailable" under the first prong of the *Hemphill* framework. Indeed, the lines between the two are so blurred that the Court of Appeals sums up its holding in another case this way: "[B]ecause administrative remedies were, in fact, available to Davis, defendants are not estopped from raising their exhaustion defense."[184]

The prototypical inhibiting conduct discussed in the jurisprudence is retaliation for a prisoner complaining, formally or informally, about mis-

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180 *See, e.g.*, Snyder v. Whittier, 428 F. App'x 89, 92 (2d Cir. 2011) (rejecting estoppel and effectively unavailable arguments where corrections officer allegedly beat plaintiff but made no threats and prisoner felt comfortable complaining informally).

181 Morrison v. Hartman, No. 07-CV-6633L, 2010 WL 811319, at *3 (W.D.N.Y. Mar. 3, 2010) (finding grievance procedures were effectively unavailable where officer allegedly threatened to kill the plaintiff and his family and told him "[g]uess what happens to snitches . . . they get stitches" (alterations in original) (internal quotation marks omitted)).

182 *Hemphill*, 380 F.3d at 686.

183 *See* Giano v. Goord, 380 F.3d 670, 677 (2d Cir. 2004); *see also* Ruggiero v. Cnty. of Orange, 467 F.3d 170, 178 (2d Cir. 2006).

184 Davis v. New York, 311 F. App'x 397, 399 (2d. Cir. 2009).

conduct or threats that the prisoner will face retaliation if he complains. In *Ziemba v. Wezner*,[185] for example, Duane Ziemba alleged that after court personnel noticed he was visibly injured and called the prison expressing concern about his condition, he was detained in the prison's segregation unit and denied food and medical care.[186] He also alleged that "prison officials escorted him to an empty shower room . . . and threatened him, intimidated him with police dogs, beat him, and sprayed pepper spray in his eyes and mouth."[187]

Like the unavailability analysis, the estoppel prong is not blind to limitations on prisoners' capacity to exhaust, because it recognizes the effect that such treatment and lesser threatening conduct can have on prisoners. The estoppel analysis further recognizes that prison staff are not entitled to a non-exhaustion defense when the actions of prison staff compromise prisoners' ability to exhaust.

The shortcoming of *Hemphill*'s estoppel prong is that, as it has been applied to date by the Second Circuit, it is applicable only to the specific defendants who inhibited the plaintiff's ability to administratively exhaust.[188] This standard is problematic since, where a plaintiff is inhibited from exhausting, he is prevented from exhausting *any* of his claims arising from the same incident, including his claims against other possible defendants. The effectively unavailable analysis recognizes this issue and justifies a plaintiff's failure to properly exhaust entirely. Inexplicably, the estoppel analysis typically does not, both within the Second Circuit and in the other jurisdictions that employ it.

C. *Special Circumstances*

Under the *Hemphill* framework, a non-exhaustion defense is defeated where "'special circumstances' have been plausibly alleged that justify 'the prisoner's failure to comply with administrative procedural requirements.'"[189] The term "special circumstances" is a remarkably broad phrase, and the Court of Appeals has resisted providing a standardized definition,

185 366 F.3d 161 (2d Cir. 2004) (per curiam).

186 *Id.* at 162.

187 *Id.* Ziemba had filed an emergency request to protect him from his cellmate. His cellmate subsequently stabbed him. Soon thereafter, Ziemba appeared at a previously scheduled court appearance exhibiting signs of injuries and subsequent mistreatment by staff. *Id.*

188 *See, e.g.*, Hemphill v. New York, 380 F.3d 680, 689 (2d Cir. 2004) ("[I]t is possible that some individual defendants may be estopped, while others may not be."); *see also* Murray v. Palmer, No. 9:03-CV-1010 (GTS/GHL), 2010 WL 1235591, at *5 (N.D.N.Y. Mar. 31, 2010); Snyder v. Whittier, No. 9:05-CV-01284, 2009 WL 691940, at *9 (N.D.N.Y. Mar. 12, 2009); Collins v. Goord, 438 F. Supp. 2d 399, 415 n.16 (S.D.N.Y. 2006); Gill v. Frawley, No. 9:02-CV-1380, 2006 WL 1742738, at *12 (N.D.N.Y. June 22, 2006).

189 *Hemphill*, 380 F.3d at 686 (quoting Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004)).

preferring to address each claim of justification on a case-by-case basis.[190] As a result, the special circumstances prong is both a unique feature of the *Hemphill* framework and its least developed aspect.

The Second Circuit first applied the special circumstances exception as part of its three-prong framework in *Giano v. Goord*.[191] In that decision, the Court used "special circumstances" to refer to a situation in which a prisoner reasonably, but mistakenly, believes he did all that he could to administratively exhaust his claim.[192]

Julio Giano brought a Section 1983 action alleging that prison and state officials retaliated against him for filing an earlier lawsuit by tampering with the results of an analysis of his urine.[193] After the urine analysis tested positive for marijuana, Giano appealed the subsequent prison disciplinary action against him in a letter to the corrections department's commissioner.[194] In his letter, Giano

> explain[ed], in detail, the circumstances that led him to believe that the urine sample was tampered with. He also contended that defendants denied him the benefit of testimony from a material witness, that the hearing officer was demonstrably biased, and that no proper foundation had been laid for the test results.[195]

Giano did not, however, file or pursue a grievance through the IGP.[196]

Giano argued that raising his claims in the disciplinary process was sufficient and that, in fact, "New York prison regulations and DOCS Directive 4040, which state that disciplinary decisions and dispositions are non-grievable, prohibited him from filing a grievance to redress the harm defendants caused."[197] The defendants asserted that Giano was misreading the corrections department's policy, which only precluded grieving the *disposition* of a disciplinary hearing.[198] The Court of Appeals found that prison policy did not make this distinction clear[199] and held that, even if the defendants' interpretation was correct, Giano's failure to use the IGP "was justified by his reasonable belief that DOCS regulations foreclosed such

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190 *See, e.g.*, *Giano*, 380 F.3d at 678 ("We need not, and hence should not, today attempt any broad statement of what constitutes justification.").

191 380 F.3d 670 (2d Cir. 2004). The general concept of a justified failure to exhaust had appeared in two earlier Second Circuit opinions. *See* Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 486 (2d Cir. 2004); Berry v. Kerik, 366 F.3d 85, 87-88 (2d Cir. 2003).

192 *See Hemphill*, 380 F.3d at 686, 690; *Giano*, 380 F.3d at 678.

193 *Giano*, 380 F.3d at 672-73.

194 *Id.* at 673.

195 *Id.* at 674.

196 *See id.* at 678.

197 *Id.* at 674.

198 *Id.* at 678-79.

199 *Giano*, 380 F.3d at 679.

recourse."[200] It then vacated the judgment dismissing Giano's suit and remanded the case with the instruction that it be allowed to proceed.[201]

Hemphill similarly held that a mistaken interpretation of a corrections department's grievance regulations can constitute special circumstances, directing the district court to consider whether the alleged "lack of clarity in DOCS regulations" was something on which Hemphill reasonably relied, such that his failure to exhaust was justified.[202] As with *Giano*'s "reasonable belief" language, *Hemphill* made clear that there is an objective component to the special circumstances justification, which prevents every explanation offered by a prisoner from becoming legal justification for the failure to exhaust.[203] The plaintiff's justification must be "plausible," as must be his factual allegations.[204] The hardship or limitation alleged by the plaintiff must also have a clear connection to the prisoner's inability to exhaust. For example, it is not sufficient for the prisoner to have low educational attainment; he must have misunderstood the particular grievance policy at issue.[205] These two requirements prevent the "special circumstances" analysis from excusing every failure to exhaust by a prisoner-litigant.

Hemphill also clarified the relationship between the special circumstances analysis and the other prongs of its exceptions framework. The Court of Appeals explained that with respect to inhibiting conduct the "facts sufficient to support a conclusion that an inmate was 'justified' [by special circumstances] in not following ordinary procedures will be less powerful than those which would lead to a holding that those procedures were not available."[206] Yet, combined with other factors, conduct by staff can be part of the set of special circumstances that justify a failure to properly exhaust.[207] The special circumstances analysis thus takes a holistic approach and examines the cumulative effect on the availability of administrative remedies of staff conduct, the responses of the IGP, and the prisoner's understanding of those circumstances. For example, the court instructed that on remand "the district court should consider the *interplay* between [Corrections Officer] Surber's threats and Hemphill's decision to write directly to Superintendent Artuz, rather than filing a level 1 grievance."[208] In

200 *Id.* at 678.

201 *Id.* at 680.

202 Hemphill v. New York, 380 F.3d 680, 690 & n.7 (2d Cir. 2004); *see also* Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 486-87 (2d Cir. 2004).

203 *See Hemphill*, 380 F.3d at 689-90.

204 *Id.* at 686-87.

205 *See id.*; *Giano*, 380 F.3d at 678-79.

206 *Hemphill*, 380 F.3d at 690 n.8. The Second Circuit hedges, even as it provides this clarification, explaining, "Because we need not decide that question at this time, however, we do not do so." *Id.*

207 *Cf. id.* at 690 (instructing that the district court consider whether "the threats themselves justified Hemphill's failure to file a grievance in the manner prescribed by DOCS" even if they did not estop defendants from raising non-exhaustion or render administrative remedies unavailable).

208 *Id.* (emphasis added).

light of Surber's alleged threats, Hemphill may have reasonably concluded that filing a formal grievance or notifying Surber's immediate supervisors was "too fraught with danger," while "writing directly to the Superintendent involved an acceptable level of risk."[209]

IV. THE WAY FORWARD

The *Hemphill* framework is available now to courts confronted with prisoners' rights litigation, and it represents a step in the right direction toward curing the problems plaguing the form first approach to PLRA exhaustion. But the *Hemphill* model is not without its flaws. It is also a relatively young doctrine, too undeveloped to fully realize its potential as a corrective to the form first approach or to offer reliable guidance to courts and litigants.[210]

This Part explores the pitfalls of the *Hemphill* framework and then proposes an alternative exceptions analysis. The Part focuses on the most innovative aspect of my proposal—which is that the estoppel, effective unavailability, and special circumstances analyses should be reshaped into a single, enlarged effective unavailability inquiry. The Part concludes by providing the concrete guidance that is missing from the precedent interpreting the *Hemphill* framework. It identifies specific factors that a district court should consider in determining whether remedies were effectively unavailable in a particular case.

A. *Rethinking the Exceptions Analysis*

My proposal begins with an argument, namely that the separate estoppel, effective unavailability, and special circumstances analyses of the *Hemphill* framework are at their core a single inquiry. Each of the various threads of the *Hemphill* framework asks the same fundamental question: was the administrative remedial process actually available to the plaintiff? This principle has a strong foundation in both the text of the statute itself[211] and the Supreme Court's jurisprudence, which accords weight only to corrections agency procedures with the authority to actually address the problem the prisoner is raising.[212]

Yet, the *Hemphill* framework obscures this central and unifying principle. It also forces a court deciding a non-exhaustion motion to engage in multiple reiterative inquiries that retread many of the same facts but inex-

209 *Id.*

210 *See supra* note 188 and accompanying text.

211 42 U.S.C. § 1997e(a) (2006).

212 Booth v. Churner, 532 U.S. 731, 736 (2001).

plicably urge different results. This examination makes the doctrinal provenance of the framework murky and difficult to build upon.

At the same time that *Hemphill* unnecessarily complicates the exceptions analysis by disaggregating what is essentially a single inquiry, it conflates two very different concepts—systemic unavailability and effective unavailability. *Hemphill*'s broad unavailability category includes not just systemic unavailability cases—that is, cases in which to the prison system's IGP *never* offered an available remedy—but situations in which some action by corrections staff rendered otherwise available remedies effectively unavailable.[213] Both questions are important and both have a strong statutory basis, as a remedy must be "available" before it is mandatory to exhaust it.[214] However, they turn on entirely different factual issues. A systemic unavailability analysis centers on the authority that a particular corrections department has to regulate in a certain substantive area and, if such authority exists, whether that authority has been delegated to its IGP. In probing an IGP's authority and ability to address the plaintiff's problem, a district court might need to consider whether there is a mechanism within the IGP for raising the issue,[215] whether the problem has been placed outside the purview of the IGP (that is, been made "non-grievable"),[216] and whether the corrections agency itself has underlying decision-making authority over the topic of the prisoner's complaint.[217] In contrast, an effective unavailability analysis centers on the actions of specific corrections staff in a particular instance and the impact of their conduct on the particular prisoner who has brought suit.

Thus, the *Hemphill* framework creates categories that are at once too narrow and too broad, making it difficult to identify the tenets on which courts can rely to decide whether a prisoner's failure to exhaust was justified—even though those doctrinal principles exist and with some work could be teased out of the jurisprudence as a whole. A simpler approach would introduce more predictability into the exceptions analysis for both courts and litigants.

In place of the four overlapping inquiries *Hemphill* encourages (estoppel, effective unavailability, systemic unavailability, and special circumstances), this Article proposes a streamlined, two-prong approach to exceptions to Section 1997e(a). The two prongs of this model—one focused on systemic availability, the other on effective unavailability—precisely and explicitly reflect their doctrinal underpinnings.

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213 *Hemphill*, 380 F.3d at 687.

214 42 U.S.C. § 1997e(a).

215 Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004).

216 *See, e.g.*, Owens v. Keeling, 461 F.3d 763, 769-70 (6th Cir. 2006).

217 *See, e.g.*, Kaemmerling v. Lappin, 553 F.3d 669, 676 (D.C. Cir. 2008).

This Article proposes that, assuming the defendants did not previously waive non-exhaustion as a defense,[218] the district court should ask one or both of the following questions in deciding PLRA exhaustion motions:

∗ *Systemic Availability*: Did the administrative process put forth by the defendants have the authority to address the type of problem that the plaintiff is raising in litigation?

∗ *Effective Unavailability*: Taking into account the totality of the circumstances, was the administrative remedial process rendered effectively unavailable to the plaintiff?

The second standard encompasses and replaces the separate but overlapping effective unavailability, estoppel, and special circumstances analyses of the *Hemphill* framework.

Which of the two inquiries the court should pursue will depend on the motions before it and the justifications that the plaintiff has raised in her opposition papers. For example, if the plaintiff asserts that there is no administrative process within the prison agency with the authority to address her claim (systemic unavailability), the question of whether that mythic administrative process was effectively unavailable to her may never be reached. Likewise, if the plaintiff concedes that the IGP does usually provide the remedy for the kind of problem that she is raising (i.e., the remedy *is* systemically available), but alleges that in her case the remedy was rendered unavailable, the court's attention is necessarily focused on the effective unavailability analysis. Where a plaintiff raises both justifications,[219] the logical course is for the court to consider questions of systemic unavailability first.

The standard this Article urges for systemic availability cases is the same standard that the federal courts have already been applying for several years, under the guidance of *Booth*.[220] That is, where a systemic unavailability argument is raised, judges should examine whether the IGP had the authority to address the problem that the prisoner is raising in litigation.[221] The standard that this Article proposes for effective unavailability requires more

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218 The *Hemphill* framework lumps in a defendant's waiver of a non-exhaustion affirmative defense with questions of whether the defendant's pre-litigation behavior at the time when the prisoners should have grieved under the IGP rules estops him from now asserting non-exhaustion. *See Hemphill*, 380 F.3d at 686. This is an imprecise grouping. As with other procedural grounds for disposing of a case, waiver arguments should be resolved as a threshold matter before any substantive arguments. *Cf.* FED. R. CIV. P. 8(c), 12(b).

219 That is, she argues there is no true available remedy and, in the alternative, that even if the process proffered by the defendants is the available remedy, it was rendered unavailable to her.

220 *See supra* Part III.A and accompanying notes; *see also* Boston, *supra* note 137, at 190-94 (collecting cases).

221 *See* Booth v. Churner, 532 U.S. 731, 736 n.4 (2001).

explanation because it requires reconceptualizing the disparate pieces of the *Hemphill* framework, but it is just as well grounded in the jurisprudence.

B. *Effective Unavailability: Eliminating Blind Spots*

This Article proposes that the estoppel, effective unavailability, and special circumstances analyses be developed into a single, enlarged effective unavailability inquiry, which considers whether, taking into account the totality of the circumstances, the administrative remedial process identified by the defendants was rendered effectively unavailable to the prisoner.

This Section argues that on a practical level the *Hemphill* framework already asks courts to engage in this type of analysis in fits and starts. The special circumstances justification introduced by *Hemphill* looks to whether, as a result of the interplay between various factors, the typically available administrative process was inaccessible to the prisoner as a practical matter. Similarly, the estoppel analysis looks to whether the defendant's actions made the administrative process unavailable, as does the portion of the *Hemphill* framework that considers whether a remedy was "effectively unavailable." However, *Hemphill* segregates the inquiry into separate analytical steps. In those cases in which a special circumstances justification is warranted, *Hemphill* asks the district court to first march through an availability analysis, followed by an estoppel analysis, and then turn to the special circumstances analysis—in which it is likely to find that factors it disregarded as insufficient the first two times now weigh in favor of granting an exception to the proper exhaustion requirement.[222] These separate and reiterative analyses present obvious inefficiencies. They are also confounding from a doctrinal perspective.

More fundamentally, the *Hemphill* framework's reiterative approach prevents it from directly addressing the potential for a pro-defendant bias to creep into the application of the proper exhaustion rule. As the framework has been applied to date, it homes in on the specific moment at which a particular prisoner tried to exhaust (or should have tried to exhaust under IGP rules). For example, the estoppel analyses consider whether prison staff's conduct blocked the particular plaintiff's access to the IGP process. The unavailability analysis similarly asks whether, in practical terms, the plaintiff could access the IGP. The special circumstances standard does consider features of IGP design, but incidentally rather than as a centerpiece of the analysis.[223] None of the *Hemphill* framework's prongs explicitly engages in a direct examination of more systemic features of the IGP—

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222 *See supra* Part III.C and accompanying notes.

223 *See, e.g.*, Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (considering whether DOCS Directive 4040 was misleading and determining, as part of the assessment of whether Giano's mistake was reasonable, that the directive was open to multiple interpretations).

including intentional bias in its design—that can render administrative remedies unavailable.

Yet, as we have seen, its blindness to the potential for bias in its application is the most significant threat to the doctrinal integrity of the form first approach to PLRA exhaustion. A manipulative design of prison grievance rules is the very thing that the *Woodford* majority allowed might scuttle application of the proper exhaustion rule.[224] For this reason, when questions are raised about whether Section 1997e(a) applies, federal courts should explicitly consider the overall structure and operation of the IGP at issue and how those structural elements interact with other factors, such as the capacity of the prisoner.

They also should consider holistically all of the various factors that affect the availability of administrative remedies to a particular prisoner. This inquiry is something that the current special circumstances analysis of the *Hemphill* framework does already[225] but that a reshaped rule could do even better.

In answering the question of whether, taking into account the totality of the circumstances, the administrative remedial process was rendered effectively unavailable to the plaintiff, a district court should weigh together each of the factors that it would evaluate separately under *Hemphill*'s unavailability, estoppel, and special circumstances prongs. Specifically, the court should assess the following four factors:

∗ *Inhibiting Conduct*: any conduct by corrections staff that was reasonably likely to deter or prevent the prisoner from using the IGP.

∗ *IGP Structures*: the design and operation of the IGP's procedures and rules.

∗ *Prisoner Comprehension*: the prisoner's understanding of what he was required to do to comply with and complete the IGP process, and whether the prisoner's understanding was reasonable.

∗ *Prisoner Capacity*: any impediments to the prisoner's capacity to exhaust, including the prisoner's reasonable perception that completing the IGP process would entail an unacceptable level of risk.

Because the focus of the court's inquiry should be whether, on balance, the administrative process ultimately was rendered unavailable, not all factors must be present in a particular case in order to hold as justified a failure to complete the IGP process. Rather, the standard is a balancing test in which one or more of the factors identified above may present as obviously dispositive of the exhaustion issue. Where that is the case, the district court should naturally focus its initial attention on that particular element.

224 Woodford v. Ngo, 548 U.S. 81, 102 (2006).

225 *See supra* Part III and accompanying notes.

In some cases, for instance, the inhibiting conduct by corrections staff will rise to such a level that it will be sufficient on its own to render administrative remedies unavailable (i.e., it would meet the traditional standard for estoppel). In such a case, the court's analysis can begin with and end on an examination of that conduct. In other cases, it will be the confluence of multiple factors that render administrative remedies unavailable.

The advantage of this Article's proposal is that it allows courts to immediately engage in a comprehensive analysis of the exhaustion issue, which is critical because it is often a combination of factors that renders administrative remedies unavailable. Take for example, a prisoner who was beaten by staff. He may be deterred from complaining to prison authorities because of the violent nature of the incident and menacing, but vague, comments made by one of his assailants (Inhibiting Conduct). He also may reasonably fear that he will be subject to reprisals if he complains (Prisoner Capacity), because complaints made through the IGP process are not kept confidential (IGP Structures). The "because" in this last sentence is critical. The lack of confidentiality of the IGP does not itself make administrative remedies unavailable. Rather, it is the lack of confidentiality *in tandem* with the beating and staff comments that makes the prisoner's fear reasonable. *Hemphill* recognizes that this confluence of factors can ultimately justify a failure to properly exhaust by making it impracticable for a prisoner to exhaust—that is, amount to special circumstances.[226] But it does not encourage courts to begin with this more comprehensive and nuanced approach.[227] This Article's analytical framework does, while maintaining courts' freedom to quickly decide that a failure to exhaust is justified based solely on staff's inhibiting conduct where such a ruling is warranted.

A holistic approach does not mean that judges have the discretion to make decisions based on gut instinct. In fact, by structuring the exceptions analysis around specific factors, the model presented here cabins judges' discretion in a way that should be reassuring to both those who are skeptical of and those who are supportive of prisoners' rights litigation. The term "special circumstances" is so broad that it does not provide judges with much in the way of concrete guidance as to how to decide the particular cases before them. As a result, it gives considerable discretion to judges to find special circumstances in order to permit their judicial intervention into matters of prison administration—a threat some of the PLRA's sponsors saw as real.[228] A vaguely defined standard also creates what is perhaps a more likely problem: it makes it more likely that overburdened judges, who

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226 Hemphill v. New York, 380 F.3d 680, 690 n.8 (2d Cir. 2004); *Giano*, 380 F.3d at 678-79; Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 486-87 (2d Cir. 2004).

227 *Hemphill*, 380 F.3d at 686 (stating that the district court should consider the "special circumstances" justification only "[i]f the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense").

228 *See supra* note 87.

have little incentive to look for reasons to foreclose an affirmative defense that could remove another case from their docket, will overlook exceptions that they should be granting. *Hemphill* tempts judges to use a "know it when I see it" standard that risks making PLRA exhaustion decisions dependent on the perspective of the judge. Litigants, who are unable to easily identify circumstances that merit an exception under the law, are also more prone to not make arguments—both for and against granting an exception—that they should be making.

C. *Measuring Effective Unavailability*

This Section takes stock of the specific types of facts and circumstances that, as this Article argues, are relevant to a district court's assessment of the four aforementioned factors: inhibiting conduct, IGP structures, prisoner comprehension, and prisoner capacity. All four factors concern themselves with the relative accessibility—or inaccessibility—of the IGP remedial process to the plaintiff. Because they each focus on availability of administrative procedures in this way, each of the factors is consistent with existing jurisprudence and the text of Section 1997e(a) itself.

1. Inhibiting Conduct

In assessing potentially inhibiting conduct by corrections staff, the court should look to, first, whether the conduct erected a barrier between the prisoner and the available administrative remedy and, second, the extent to which that barrier was insurmountable. This standard means considering whether staff's conduct involved threats that were explicitly or implicitly conditioned on the prisoner issuing a formal or informal complaint to prison authorities, or whether it involved acts of violence combined with references to complaints that the prisoner had made in the past.[229] It also means weighing whether corrections staff (including those involved in administering the IGP) provided contradictory or ambiguous information to the prisoner about the mechanism through which the prisoner should complain or about the status of his complaint.[230] Finally, it means taking into account

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229 *See* Kincaid v. Sangamon Cnty., 435 F. App'x 533, 536-37 (7th Cir. 2011) ("The threat from the superintendent that Kincaid and his family needed to 'shut the fuck up' may have intimidated Kincaid and rendered the grievance process unavailable to him."); *see also* Tuckel v. Grover, 660 F.3d 1249, 1252-54 (10th Cir. 2011); Verbanik v. Harlow, 441 F. App'x 931, 933 (3d Cir. 2011) (per curiam); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008).

230 *See*, *e.g.*, Roberts v. Jones, No. CIV-11-143-M, 2012 WL 1072218, at *4 (W.D. Okla. Feb. 29, 2012), *report and recommendation adopted by* 2012 WL 1142514 (W.D. Okla. Mar. 30, 2012); Walker v. McDonald, No. CIV S-10-2835 CKD P, 2011 WL 5513446, at *2 (E.D. Cal. Nov. 10., 2011); McLemore v. Cruz, No. 6:10-cv-766-Orl-28KRS, 2011 WL 4101729, at *3 (M.D. Fla. Sept. 14, 2011);

anything staff may have done that made it impossible to exhaust, from a practical standpoint—for instance, if staff made physically inaccessible something that was necessary to pursuing the grievance, such as a required form, all writing implements, or access to the place at which or the person with whom the grievance must be filed.[231]

2. IGP Structures

Similarly, in assessing the design and operation of the IGP procedures that the prisoner allegedly was required to properly exhaust, the court should consider whether the IGP structures themselves erected barriers to resolving the problem through the IGP. This inquiry means taking into account whether any information given to prisoners but not specifically targeted at the plaintiff—such as the grievance directive, inmate handbook, or posting on the housing unit—provided contradictory, ambiguous, or confusing information to the prisoner about how a complaint of the kind that he is raising should be made. It also means considering whether, on its face, the IGP rule that the plaintiff failed to comply with serves a legitimate problem-resolution function or erects an unjustified barrier to exhaustion.

This standard is predicated on the central principles that *Woodford* relies on, which are that IGPs should be concerned with identifying and resolving problems[232] and that effective IGPs facilitate problem-resolution by making it easy for prisoners to register complaints and for prison officials to respond. If facially a rule appears to serve no legitimate function or serves one only remotely, but it is very difficult to satisfy, that is an indication that it erected an undue obstacle in the plaintiff's path to exhaustion. Courts must also evaluate IGP requirements in context. Contradictory requirements or ones that work at cross-purposes with one another suggest that the primary purpose they serve is not problem resolution. For instance, if one IGP rule requires a very detailed complaint and another IGP rule limits the amount of space within which the prisoner must state his complaint, as is

Doner v. Mason, No. 10-58 Erie, 2011 WL 915755, at *6 (W.D. Pa. Feb. 25, 2011), *report and recommendation adopted in part and rejected in part by* 2011 WL 901008 (W.D. Pa. Mar. 15, 2011); Matthews v. Thornhill, No. C07-5376RJB, 2008 WL 2740323, at *4 (W.D. Wash. May 21, 2008).

231 *See, e.g.*, Luciano v. Lindberg, No. 1:CV-09-01362, 2012 WL 1642466, at *17 (M.D. Pa. May 10, 2012) (finding that an allegation that a prisoner was deprived writing materials for a month and the IGP then refused his late-filed grievance raised a factual issue that barred summary judgment); DeMartino v. Zenk, No. 04-CV-3880 (SLT)(LB), 2009 WL 2611308, at *7-8 (E.D.N.Y. Aug 25, 2009) (finding that lack of access to a photocopying machine with which prisoner could comply with a requirement to submit multiple copies of documents constituted grounds for estopping non-exhaustion defense); Bey v. Caruso, No. 06-14909, 2007 WL 2875196, at *1 (E.D. Mich. Sept. 28, 2007) (finding that the denial of postage to indigents to mail a grievance appeal rendered remedy unavailable).

232 Woodford v. Ngo, 548 U.S. 81, 94 (2006); Porter v. Nussle, 534 U.S. 516, 525 (2002); Booth v. Churner, 532 U.S. 731, 737, 740-41 (2001).

the case in Arkansas's state system,[233] the problem-identification and resolution justifications for the first rule become much weaker. It also creates an obligation that is very difficult to satisfy, which weighs in favor of finding the IGP unavailable, if it was not practicable for the prisoner to include the details required by the first IGP rule within the space limitations imposed by the second.

In light of the potential for bias in the operation of the proper exhaustion rule, it is also appropriate for courts to consider any evidence of improper motive in the creation of the IGP requirements. For example, a sudden rule change to make an IGP requirement more stringent after a federal court interpreted it more leniently in the course of a PLRA exhaustion determination would be suggestive that the change was motivated by a desire to win subsequent dismissal motions.

The circumstances in which IGP requirements are created could also defuse a claim of improper motive. If IGP rules were subject to notice-and-comment rulemaking, the possibility of public input and scrutiny makes it less likely that the rules impose unjustified procedural hurdles in prisoners' path than if the IGP rules were created by corrections department fiat. Thus, the presence or absence of notice-and-comment rulemaking in the creation of the IGP is something the court could weigh when a claim of rule manipulation has been raised, although it is certainly not something that the court must delve into in every case, nor is it dispositive of the exhaustion issue. The ultimate question is whether the design and operation of the IGP as a whole rendered the administrative remedy inaccessible.

3. Prisoner Comprehension and Prisoner Capacity

The court's assessment of the final two factors in the model presented here—prisoner comprehension and prisoner capacity—should also be understood in terms of how they affect the accessibility of administrative procedures. The two factors are closely related to one another, and they each should be considered in relation to the other factors in the analysis, which this model encourages.

The prisoner comprehension factor focuses on the plaintiff's understanding of what he was required to do to comply with the IGP requirements. For example, did he believe the actions he took to complain were sufficient? Did he believe that the problem he was raising was not grievable? And, critically, did the prisoner have a reasonable basis for these beliefs? These considerations are drawn directly from cases such as *Hemphill*,

233 Borchardt, *supra* note 15, at 506.

Giano, and *Rodriguez*, which expressly took prisoner comprehension into account.[234]

The prisoner capacity factor is concerned with circumstances that may impede a prisoner's ability to exhaust. Impediments that may be relevant include young age, mental health conditions, mental impairments, physical disabilities, low literacy levels, and low educational attainment. Consistent with *Hemphill*, this factor also includes prisoners' fears that they will be retaliated against, by either staff or other prisoners, if they complain.[235]

The type of claim that a prisoner is bringing may also reflect impediments on his ability to exhaust. Prisoners who allege a sexual or physical assault reportedly experienced an extreme invasion of their person of the kind that is typically accompanied by symptoms of trauma and feelings of fear and shame, as well as physical injuries. Therefore, where a prisoner is raising such claims, it is a red flag to courts that they should inquire into the plaintiff's capacity to exhaust.

Neither prisoner capacity nor prisoner comprehension should be considered in a vacuum. Critically, a mistaken understanding or a limitation on a prisoner's ability to exhaust is not alone sufficient to justify an exception to the proper exhaustion rule. A prisoner's mistake must be *reasonable*, and a prisoner's impediment must not just exist but negatively affect his ability to exhaust.[236] Resolving these issues requires considering other factors in the analysis, which is precisely why this Article advocates for a balancing test.

For instance, whether a prisoner's mistaken understanding of IGP requirements is reasonable will depend on the complexity and clarity of the prison agency's IGP policies and the responses that the prisoner received to any efforts she made to complain—that is on the IGP structures and any inhibiting conduct by staff. It may also depend on the impediments that are highlighted in the prisoner capacity analysis. For instance, if the prisoner has a mental impairment, she might reasonably misunderstand grievance instructions that others would find confusing but not confounding.

The advantage of this Article's proposed recalibration of the *Hemphill* framework is that it allows for doctrinal clarity. Systemic unavailability is treated like the distinct principle that it is. Meanwhile, tying the remaining, separate threads of the *Hemphill* analysis into a single analysis facilitates a PLRA exhaustion exceptions analysis that directly tackles bias blindness and is both comprehensive and efficient.

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234 Hemphill v. New York, 380 F.3d 680, 690 n.7 (2d Cir. 2004); Giano v. Goord, 380 F.3d 670, 678-79 (2d Cir. 2004); Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 487 (2d Cir. 2004).

235 *Hemphill*, 380 F.3d at 690 ("Hemphill may have reasonably concluded that . . . filing a level 1 grievance or notifying the immediate supervisors of his purported attackers was too fraught with danger.").

236 *Id.* at 686; *Giano*, 380 F.3d at 679.

V. CAN EXCEPTIONS BE MADE AFTER *WOODFORD*?

The need to make exceptions to the Supreme Court's form first approach to PLRA exhaustion in order to save it is real, as is the potential for a carefully structured exceptions analysis to correct for the doctrine's bias and capacity blind spots. But lingering questions may remain as to whether exceptions *can* be made to the proper exhaustion rule announced in *Woodford*, which seemed to require a prisoner's ironclad compliance with IGP rules. After *Woodford* was handed down, there certainly was hesitancy among the lower courts as to whether and to what extent traditional exceptions to exhaustion survived the Court's decision. For example, subsequent Second Circuit PLRA exhaustion decisions initially avoided addressing whether the special circumstances justification persisted in the post-*Woodford* era.[237]

This Part responds to this objection. It argues not only that exceptions should be made but that they can be made under the Court's PLRA exhaustion jurisprudence. The jurisprudence reflects that the traditional exceptions to exhaustion in administrative law doctrine apply in the PLRA context, except for those expressly and specifically eliminated by Congress. This limitation allows courts to continue to make several exceptions to exhaustion, as does the decision that is perceived to be the big bad wolf of exhaustion from prisoners' perspective—*Woodford*.

A. *Meaningful Opportunities, Traps for the Unwary*

As this Article demonstrates, the first reason that the Court's PLRA jurisprudence must be read as allowing exceptions to the proper exhaustion rule is that they are necessary to preserve the doctrinal integrity of the rule itself. Because the proper exhaustion rule is predicated on an assumption that corrections agencies' IGPs offer prisoners a genuine opportunity to resolve their complaints, the justification for the rule falls away when that predicate condition is not met. This fundamental principle is consistent with the text of the statute itself, which requires only that prisoners exhaust "available" administrative procedures.[238] There may be debates as to what it means for an IGP to be available to a prisoner, but that is a debate about where to draw the line between cases in which exhaustion is required and

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237 *See, e.g.*, Amador v. Andrews, 655 F.3d 89, 102 (2d Cir. 2011) ("We have questioned whether, in light of *Woodford*, the doctrines of estoppel and special circumstances survived."); Chavis v. Goord, 333 F. App'x 641, 643 (2d Cir. 2009) ("We have not yet decided whether [the] rule has survived *Woodford*."); *see* Ruggiero v. Cnty. of Orange, 467 F.3d 170, 175 (2d Cir. 2006); *see also* Lawyer v. Gatto, No. 03 Civ. 7577 RPP, 2007 WL 549440, at *4 n.4 (S.D.N.Y. Feb. 21, 2007); Sloane v. Mazzuca, No. 04 CV 8266(KMK), 2006 WL 3096031, at *5 (S.D.N.Y. Oct. 31, 2006).

238 42 U.S.C. § 1997e(a) (2006); *see also* Booth v. Churner, 532 U.S. 731, 736 (2001).

those in which it is excused. It does not represent a dispute as to whether exceptions can be made.

The majority in *Woodford* itself allows that the proper exhaustion rule may not apply in situations in which the prisoner has not had a meaningful opportunity to raise her complaint within the prison system. Justice Alito is careful to clarify in *Woodford* that the majority is not ruling on a case in which prison administrators "devise[d] procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims."[239] Nor, in the majority's view, was *Woodford* a case in which the plaintiff was denied "a meaningful opportunity . . . to raise meritorious grievances."[240] This interpretation preserves courts' ability to find that a prisoner's failure to comply perfectly with the IGP procedures does not preclude suit under Section 1997e(a), where those administrative procedures did not provide a "meaningful opportunity" for the prisoner to complain or where the IGP is designed to thwart future litigation. Justice Stevens explicitly states in his dissent that such rulings have not been foreclosed,[241] and certainly the majority does not reject this proposition, despite devoting considerable space to rebutting almost every other aspect of the dissent.[242]

B. *Unless Expressly Eliminated*

Woodford also leaves largely untouched the "well-established exceptions to exhaustion," including estoppel and "inadequate or unavailable administrative remedies," that are part of administrative law doctrine.[243] In his concurrence in *Woodford*, Justice Breyer takes pains to explain that the proper exhaustion rule permits most of these traditional exceptions to the exhaustion requirement.[244] His opinion demonstrates that exceptions are not incompatible with the proper exhaustion regime. Indeed, even while finding that Ngo failed to exhaust his claims under Section 1997e(a), Justice Breyer urges that on remand the Ninth Circuit "consider any challenges that respondent may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates."[245]

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239 Woodford v. Ngo, 548 U.S. 81, 102 (2006).

240 *Id.*

241 *Id.* at 120 (Stevens, J., dissenting).

242 *See, e.g.*, *id.* at 91 n.2, 94 n.4 (majority opinion); *cf. id.* at 95-103 (directly addressing the respondents' contrary interpretation of the law).

243 *Id.* at 103 (Breyer, J., concurring in the judgment) (citing McCarthy v. Madigan, 503 U.S. 140, 147-48 (1992), *superseded by statute as stated in Woodford*, 548 U.S. at 84-85).

244 *Id.* at 103-04.

245 *Woodford*, 548 U.S. at 104 (Breyer, J., concurring in the judgment). The Court of Appeals listened. *See* Ngo v. Woodford, 539 F.3d 1108, 1110 (9th Cir. 2008) (finding that Ngo was not entitled to an exception because he "hasn't shown that administrative procedures were unavailable, that prison

Against this backdrop and the Supreme Court's three other PLRA exhaustion decisions, scholars have concluded that, unless expressly eliminated by the PLRA, traditional exceptions to exhaustion remain available. Professor Shay argues convincingly in a recent piece that the PLRA should be understood to "invoke[] regular administrative law doctrine," including administrative law exceptions to the duty to exhaust, "to the extent that [administrative law doctrine] is not inconsistent with the statute."[246] Professor Richard Pierce has similarly argued that the PLRA does not abolish administrative law exceptions, because "[c]ourts interpret general references to the duty to exhaust as mere codifications of the common law duty, subject to the usual pragmatic judge-made exceptions to the duty."[247]

Supporting the conclusion that traditional administrative law principles should be generally applied in the PLRA exhaustion context is the fact that the Supreme Court carefully rejected the idea of PLRA exceptionalism in its unanimous decision in *Jones*.[248] In *Jones*, the Court describes in detail the extent to which Congress altered the language of the pre-PLRA statute governing prisoners' civil rights suits.[249] The Court found that Congress's selective editing reflected a conscious intent to overrule aspects of the jurisprudence and leave others untouched, tacitly endorsing them.[250] The Court observes, "[W]hen Congress meant to depart from the usual procedural requirements, it did so expressly."[251] In light of this, there is every reason to believe that the traditional exceptions to exhaustion largely remain intact in prisoners' rights litigation.

Indeed, *Woodford* itself draws heavily on common law administrative law principles. At the outset of its analysis, the majority observes, "Exhaustion is an important doctrine in both administrative and habeas law," and

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officials obstructed his attempt to exhaust or that he was prevented from exhausting because procedures for processing grievances weren't followed").

246 Shay, *supra* note 19, at 287, 289 (emphasis omitted).

247 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.3, at 1245 (5th ed. 2010) (concluding that the PLRA does not create an "independent, jurisdictional, statutory duty to exhaust" but rather "codifies the common law duty to exhaust"); *see also* Novikov, *supra* note 11, at 831-32 (observing that, in other contexts, there is a presumption that judicially created exceptions stand "absent an explicit statement of Congress's intent to eliminate the same, even when statutory language seems to occupy the field").

248 *See supra* note Part II.B.4 (providing a synopsis of *Jones v. Bock*, 549 U.S. 199 (2007)).

249 *See generally Jones*, 549 U.S. at 212-16. For example, as "strong evidence" of its holding that prisoners need not plead that they have exhausted, the Court cited the fact that the PLRA "dealt extensively with the subject of exhaustion but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense." *Id.* at 212 (citation omitted). This in turn suggested that PLRA non-exhaustion should be treated like non-exhaustion in other contexts, namely as an affirmative defense. *Id.*

250 *Id.* at 215-16.

251 *Id.* at 216; *see also* Booth v. Churner, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read . . . exceptions into statutory exhaustion requirements *where Congress has provided otherwise*." (emphasis added)).

the Court "therefore look[s] to those bodies of law for guidance."[252] It then delves into several pages of analysis based on administrative law doctrine before concluding that "the PLRA uses the term 'exhausted' to mean what the term means in administrative law."[253] The administrative law that the majority's opinion relies on includes the exceptions to the duty to exhaust which Justice Breyer addresses in his concurrence. Indeed, *McKart*, the decision on which the Court largely relies to justify the proper exhaustion rule,[254] excused the plaintiff in that case from exhausting administrative remedies.[255]

In sum, despite the tone and tenor of *Woodford*, which stresses the importance of proper exhaustion, the law provides that there are circumstances that warrant granting exceptions to this rule. Only those traditional exceptions to the duty to exhaust which are inconsistent with the PLRA have been eliminated by the statute. More critically, where IGP procedures are not serving their primary and presumed function of providing prisoners with a true opportunity to raise problems with the agency, a prisoner's imperfect compliance with them should not bar his suit from going forward. In such cases, the necessary predicate to *Woodford*'s proper exhaustion rule is absent. The procedural mechanism the prisoner ostensibly should have used also was not truly "available" to him.

C. *What Remains*

The question then is what remains? The answer is a wide range of exceptions. For example, the exception of estoppel remains firmly in place.[256] In fact, the Court has expressly found that Congress eliminated only one traditional administrative law exception to exhaustion, a form of the "futility" exception.[257] The *Booth* decision concludes that the futility of obtaining

252 Woodford v. Ngo, 548 U.S. 81, 88 (2006).

253 *See id.* at 88-93 ("With this background in mind, we are persuaded that the PLRA exhaustion requirement requires proper exhaustion."); *id.* at 96 (concluding that an alternate reading of the statute would be "unprecedented"); *id.* at 103-04 (Breyer, J., concurring in the judgment) (noting that the majority has adopted the meaning of the word "exhausted" used in administrative law and that habeas corpus law "informs the Court's opinion").

254 *See supra* note 124.

255 McKart v. United States, 395 U.S. 185, 203 (1969).

256 *See* Ledbetter v. Emery, No. 08-3106, 2009 WL 1871922, at *5 (CD. Ill. June 26, 2009); Tweed v. Schuetzle, No. 1:06-cv-032, 2007 WL 2050782, *8 (D.N.D. July 12, 2007); Snyder v. Goord, No. 9: 05-CV-01284, 2007 WL 957530, at *10 (N.D.N.Y. Mar. 29, 2007); *cf.* Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176-78 (9th Cir. 2000) (discussing estoppel in the context of EEOC exhaustion procedures), *overruled on other grounds by* Socop-Gonzalez v. INS, 272 F.3d 1176, 1194-96 (9th Cir. 2001).

257 Booth v. Churner, 532 U.S. 731, 741 n.6 (2001).

a particular form of relief through the administrative process is not grounds for an exception to the PLRA's exhaustion requirement.[258]

Booth, however, leaves untouched—and, in fact, reinforces—other aspects of the futility exception, albeit using the terminology of "availability." Administrative law has traditionally excused a plaintiff from exhausting administrative procedures on futility grounds when those procedures are "inadequate."[259] One reason a process can be inadequate is because it is not empowered to grant the specific relief sought, the exception rejected in *Booth*.[260] But an administrative process can be inadequate for a number of reasons beyond being unable to grant the relief that the complainant seeks, including that it lacks the competency to address the plaintiff's complaint[261] and that the complainant is challenging the adequacy of the process itself.[262] These other aspects of the inadequacy exception are endorsed by *Booth*, which advances the principle that a prisoner cannot be required to exhaust if the administrative process lacks the authority to address the problem that he has raised.[263] *Woodford* similarly suggests that exhaustion is not required when the administrative process does not provide a meaningful opportunity to address the problem.[264]

This Article's proposal—that a prisoner's failure to "properly exhaust" is justified where the IGP process identified by the defendants was rendered effectively unavailable to her by the totality of the circumstances—is consistent with these traditional, surviving exceptions and the principles outlined in *Booth* and *Woodford*. Like the various threads of the *Hemphill* framework, the exception standard presented here turns on whether the administrative remedial process was actually available to the plaintiff while she was incarcerated. This basis for justifying a failure to "properly exhaust" has a strong foundation in both the text of the statute itself[265] and the Supreme Court's jurisprudence. Indeed, federal courts both inside and out-

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258 *Id.* at 733-34.

259 McCarthy v. Madigan, 503 U.S. 140, 147 (1992) (citing Gibson v. Berryhill, 411 U.S. 564, 575 n.14. (1973)), *superseded by statute as stated in* Woodford v. Ngo, 548 U.S. 81, 84-85 (2006); *see also* Nat'l Labor Relations Bd. v. Indus. Union of Marine & Shipbuilding Workers of Am., 391 U.S. 418, 426 n.8 (1968) ("Exhaustion is not required when the administrative remedies are inadequate.").

260 *See McCarthy*, 503 U.S. at 147.

261 *See id.* at 147-48.

262 *Id.* at 148 ("[E]xhaustion has not been required where the challenge is to the adequacy of the agency procedure itself . . . ."); Barry v. Barchi, 443 U.S. 55, 63 n.10, 64 (1979) (holding that the district court was correct not to require exhaustion of procedures that were themselves being challenged as unconstitutional and noting that a challenge to the administrative remedy is "for all practical purposes identical with the merits of [the plaintiff's] lawsuit" (alteration in original) (quoting *Gibson*, 411 U.S. at 575) (internal quotation marks omitted)).

263 *Booth*, 532 U.S. at 736 n.4; *see also McCarthy*, 503 U.S. at 146-49; *cf.* Novikov, *supra* note 11, at 833.

264 *Woodford*, 548 U.S. at 102.

265 42 U.S.C. § 1997e(a) (2006).

side the borders of the Second Circuit have continued to apply essential components of this model, even after *Woodford* was decided.[266]

CONCLUSION

The Supreme Court's approach to the PLRA exhaustion requirement gives corrections agency officials unsurpassed control over prisoners' ability to hold them and their staff to account for unlawful and even unconstitutional conduct. The deference that the Court's "proper exhaustion" rule gives to prisons' internal grievance procedures encourages complex, confounding, and confusing administrative complaint procedures that are better at thwarting prisoners' ability to obtain relief than they are at allowing corrections agencies to quickly identify and resolve problems within their facilities.

The proper exhaustion rule's refusal to take into account the potential for bias in administrative rules and the constraints on prisoners' capacity to exhaust presents doctrinal, fairness, and policy problems. It undercuts the proper exhaustion rule's own doctrinal foundations. It creates a system in which defendants have an unfair advantage over plaintiffs. Most significantly, it encourages corrections agencies to create systems that make it more difficult for them to root out problems in their facilities—and then unnecessarily eliminates prisoners' access to the courts, one of the very few places to which they can look for protections from abuse and dehumanizing conditions within prison.

The aim of this Article has been to highlight the solutions, as well as the problems, to be found in the PLRA exhaustion jurisprudence. Through a judiciously applied exceptions standard, which takes seriously the potential for bias in a correction agency's internal grievance procedures, the federal courts can correct for the problems with the Supreme Court's approach to PLRA exhaustion. The surest way to cure the fundamental flaws with the PLRA is to repeal it. But we need not wait until that option becomes a political possibility. A better exhaustion regime can be built without legislative reform and without overhauling the ways in which grievance procedures are created in each of the fifty states and thousands of municipalities. And one is needed sooner, rather than later.

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266 *See, e.g.*, Tuckel v. Grover, 660 F.3d 1249, 1252-54 (10th Cir. 2011) (effective unavailability); Verbanik v. Harlow, 441 F. App'x 931, 933 (3d Cir. 2011) (per curiam) (effective unavailability); Kincaid v. Sangamon Cnty., 435 F. App'x 533, 536-37 (7th Cir. 2011) (effective unavailability); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008) (effective unavailability); Owens v. Keeling, 461 F.3d 763, 769-70 (6th Cir. 2006) (systemic unavailability); Ledbetter v. Emery, No. 08-3106, 2009 WL 1871922, at *4-5 (CD. Ill. June 26, 2009) (estoppel).