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Prisoner's Dilemma—Exhausted Without a Place of Rest(itution): Why the Prison Litigation Reform Act's Exhaustion Requirement Needs to Be Amended

Ryan Lefkowitz
Syracuse University

NOTE

PRISONER'S DILEMMA— EXHAUSTED WITHOUT A PLACE OF REST(ITUTION): WHY THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT NEEDS TO BE AMENDED

RYAN LEFKOWITZ*

* J.D. Candidate, Syracuse University College of Law 2018; B.A. English, State University of New York at Geneseo. The author thanks her family—Elizabeth Ryan, Arnold Lefkowitz, Madelon Finkel, and Steven Kraft—for their support and for inspiring her to always strive for more. She also thanks her friends for being there for the late nights and long phone calls that got her through the trials of law school. In addition, the author thanks the members of *The Scholar* for their dedication and hard work in preparing this Note for publication.

ABSTRACT

The Prison Litigation Reform Act (PLRA) passed in 1996 in an effort to curb litigation from prisoners. The exhaustion requirement of the PLRA requires prisoners to fully exhaust any administrative remedies available to them before filing a lawsuit concerning any aspect of prison life. If a prisoner fails to do so, the lawsuit is subject to dismissal. The exhaustion requirement applies to all types of prisoner lawsuits, from claims filed for general prison conditions to excessive force and civil rights violations. It has been consistently and aggressively applied by the courts, blocking prisoners' lawsuits from ever going to trial. Attempts to exempt prisoners from its reach to allow unexhausted, yet meritorious claims have been struck down by the Supreme Court of the United States.

The exhaustion requirement mandates the use of an inmate grievance procedure, most of which create time limits for the filing of a complaint. Therefore, many of the suits dismissed for a failure to exhaust administrative remedies cannot be subsequently exhausted. Even where lawsuits are dismissed without prejudice for a failure to exhaust, the expiration of an inmate's ability to exhaust acts as a bar on his or her lawsuit.

The PLRA also disproportionately affects black and Hispanic citizens; these minority groups comprise the majority of incarcerated individuals. In a society currently seeing increasing numbers of excessive force claims brought by black citizens against police officers, the PLRA creates a substantial obstacle for black and Hispanic inmates to bring similar claims against corrections officers, nurses, or anyone involved in life in the prison setting.

Due to its aggressive application and its subsequent restriction on access to the courts, the exhaustion requirement of the PLRA should be amended. Instead of applying a strict exhaustion requirement, the PLRA should only require a good faith attempt at exhaustion. Additionally, the good faith attempt at exhaustion should only be a requirement where a prison's grievance procedure complies with federal guidelines. This would address the issues the PLRA intended; managing increasing prisoner litigation, giving prisons notice of unfavorable conditions, and preventing meritorious claims that were not exhausted from being barred as a result of missing a deadline.

I. INTRODUCTION

"Take this, ni**er."[1] Those were the words preceding a brutal attack and sexual assault on 30-year-old Abner Louima.[2] A brawl at a club led to a police officer being punched in the head where Louima was mistakenly identified as the assailant.[3] Louima was arrested on multiple charges and taken to a police station in Brooklyn.[4] While being transported in a patrol car, he was beaten and had racial epithets hurled at him.[5] This was only the beginning. At the station house, Louima was taken into the bathroom, held down, and sodomized with a plunger before having the handle brutally forced into his mouth.[6] Louima would eventually endure emergency surgery to repair a tear in his small intestine and an injury to his bladder before being placed on critical condition status in the hospital.[7] His attacker, officer Justin Volpe, was sentenced to thirty years in prison, with the sentencing judge remarking "[s]hort of intentional murder, one cannot imagine a more barbarous misuse of power . . ."[8] Louima later brought a civil suit against Volpe alleging excessive force that settled for $7,125,000.[9]

No such civil suit was available for Erick Marshel, an inmate of the New York State prison system, when he alleged two corrections officers stripped him, beat him, and berated him with "such words as ni**er [and] Coon []" before parading his naked, bruised body in front of other

1. Maria Hinojosa, *NYC Officer Arrested in Alleged Sexual Attack on Suspect*, CNN (Aug. 14, 1997, 4:29 AM), http://edition.cnn.com/US/9708/14/police.torture/ [https://perma.cc/VY9B-G2HA].

2. *Id.*

3. *See id.* (charging Louima with "assault, resisting arrest, disorderly conduct and obstructing justice").

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Joseph P. Fried, *Volpe Sentenced to a 30-Year Term in Louima Torture*, N.Y. TIMES (Dec. 14, 1999), http://www.nytimes.com/1999/12/14/nyregion/volpe-sentenced-to-a-30-year-term-in-louima-torture.html [https://nyti.ms/2yDZUnD] (quoting Federal Judge Eugene H. Nickerson).

9. Third Supplemental Summons in a Civil Action & Third Amended Complaint & Jury Demand at 28, Louima v. City of N.Y., 2004 WL 2359943 (E.D.N.Y. Oct. 4, 2000) (No. 98 CV 5083(SJ)), http://www.chambercoalition.org/Abner%20Louima%20Complaint.pdf [https://perma.cc/7R6X-7GWV]; Alan Feuer & Jim Dwyer, *City Settles Suit in Louima Torture*, N.Y. TIMES (July 13, 2001), http://www.nytimes.com/2001/07/13/nyregion/city-settles-suit-in-louima-torture.html [https://nyti.ms/2thuDaw].

inmates.[10] On November 3, 1998, Marshel brought legal action against his attackers.[11] He filed an amended complaint on April 19, 1999, and on July 6, 1999, he filed a response to defendants' Motion to Dismiss.[12] Ultimately, these claims were dismissed based on a procedural technicality: failure to exhaust, as mandated by the PLRA.[13]

The PLRA was enacted to curb what was seen as "an alarming explosion in the number of lawsuits filed by state and federal prisoners."[14] One way this was accomplished was through the creation of an "exhaustion requirement," which prohibited prisoners from bringing legal action concerning prison conditions without first exhausting all available administrative remedies.[15] This exhaustion requirement compelled prisoners to utilize inmate grievance programs, which vary by state but typically involve filing a grievance before proceeding through several more steps, including an appeal.[16] Once a prisoner has completed all the administrative steps outlined by their state or federal prison facility, they have exhausted their remedies.[17] If a prisoner filed a suit in court prior to fully exhausting such remedies, the case would be dismissed—as was the case for Marshel.[18] In a country where the majority of inmates are black and Hispanic males,[19] and

10. *See* Marshel v. Westchester Cty., No. 98 CIV.7852(MBM), 1999 WL 1256252, at *1 n.4, *7 (S.D.N.Y. Dec. 27, 1999) (dismissing Marshel's suit for excessive force and abuse).

11. *Id.* at *2.

12. *Id.* at *2.

13. *Id.* at *3.

14. Prison Litigation Reform Act, Pub. L. No. 104–134 § 7, 110 Stat. 1321–66, 71–73 (1996) (codified as amended at 42 U.S.C. § 1997e (2012)); 141 CONG. REC. 14570 (1995) (statement of Sen. Dole).

15. 42 U.S.C. §1997e(a) (2012).

16. *See* Woodford v. Ngo, 548 U.S. 81, 85 (2006) (describing the grievance process implemented by the California Department of Corrections).

17. *See id.* at 92–93 (contrasting administrative remedies from state habeas remedies, as the latter is described as "having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability").

18. *See id.* at 93 (stating that even if the prisoner procedurally defaulted in exhausting their administrative remedies, "the prisoner is generally barred from asserting those claims in a federal habeas proceeding."); Marshel v. Westchester Cty., No. 98 CIV.7852(MBM), 1999 WL 1256252, at *3 (S.D.N.Y. Dec. 27, 1999) (stating " . . . it is uncontroverted that Marshel has not exhausted his administrative remedies as he must before bringing an action in this court.").

19. *See* ANN E. CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 at 15 (Lynne McConnell & Jill Thomas eds., 2015) https://www.bjs.gov/content/pub/pdf/p14.pdf [https://perma.cc/3LEZ-P6QX] (showing 2.7% of

racialized violence against prisoners is so commonplace as to warrant investigations,[20] a restraint on the filing of civil rights actions is statutory support of institutionalized racism.

Part I of this Note will introduce the PLRA and its legislative intent, including the flawed premise under which it was passed. Part II will look at how the Supreme Court of the United States has strictly applied the exhaustion requirement of the PLRA, further infringing on a prisoner's access to the court system. Part III will look at racial violence and discrimination in the prison system, including how these issues necessitate amending the PLRA to ensure equal access to the courts. This proposed amendment balances a prisoner's access to the courts with the original goals of the PLRA.

II. THE LEGISLATIVE HISTORY AND INTENT OF THE PLRA

On May 25, 1995, Senator Bob Dole introduced the PLRA of 1995 into the United States Senate.[21] Dole argued the legislation would curb the number of lawsuits filed by prisoners.[22] In support, Senator Dole cited a study by Walter Berns indicating "the number of 'due-process and cruel and unusual punishment' complaints filed by prisoners" as having "grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994."[23] With a quick mention of the act also requiring "[s]tate prisoners to exhaust all administrative remedies before filing a lawsuit in [f]ederal court," Dole understatedly introduced the PLRA's "Exhaustion Requirement."[24]

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black males and 1.1% of Hispanic males incarcerated were serving sentences of at least 1 year compared to 0.5% of white males).

20. *E.g.*, OFFICE OF THE INSPECTOR GEN., 2015 SPECIAL REVIEW: HIGH DESERT STATE PRISON SUSANVILLE, CA at 11-12 (2015), http://www.oig.ca.gov/media/reports/Reports/Reviews/2015_Special_Review_-_High_Desert_State_Prison.pdf [https://perma.cc/XA7B-3KQF] [hereinafter HIGH DESERT]. During a review of officer-inmate interactions in a California prison, researchers interviewed former inmates regarding several different factors. On the issue of race, several minority inmates reported incidents of racially derogatory statements made by officers, kicking of black inmates, and placing black and Hispanic inmates in longer lockdowns. *Id.* at 11–12 .

21. Prison Litigation Reform Act, Pub. L. No. 104–134 § 7, 110 Stat. 1321–66, 71–73 (1996) (codified as amended at 42 U.S.C. § 1997e (2012)); 141 CONG. REC. 14570–574 (1995) (statement of Sen. Dole).

22. 141 CONG. REC. 14570 (1995) (statement of Sen. Dole).

23. *Id.*

24. *Id.* at 14571.

In support of his assertion on the frivolity of most prisoners' lawsuits, Dole claimed "prisoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."[25] Dole argued such lawsuits significantly burden the court systems as they "tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population."[26]

Dole cited two statistics in support of his argument that prison litigation had substantially increased in recent years.[27] He referenced a finding by Arizona Attorney General Grant Woods stating "45 percent of the civil cases filed in Arizona's Federal courts last year were filed by State prisoners."[28] Dole concluded this number meant "that 20,000 prisoners in Arizona filed almost as many cases as Arizona's 3.5 million law-abiding citizens."[29] This conclusion was erroneous. The Attorney General's statistic specifically mentioned "civil cases filed in Arizona's Federal courts," and therefore what the initial number reflected was that 20,000 prisoners in Arizona filed almost as many cases *in federal court* as Arizona's 3.5 million citizens.[30] This statistic makes sense when one considers many civil lawsuits from prisoners involve civil claims under 42 U.S.C. § 1983 and end up in federal court.[31] This exercise of Article III jurisdiction is at odds with suits filed by private citizens, which typically include legal claims implicating state law and remain out of federal court.

Dole's second argument cited the increase in the gross number of lawsuits filed by prisoners as evidence of a substantial uptick in the amount of prisoner litigation filed.[32] Dole represented this increase from

25. *Id.* at 14570.

26. *Id.* at 14571.

27. *Id.* at 14570–571.

28. *Id.* at 14571.

29. *Id.*

30. *Id.* (emphasis added)

31. *See* U.S. DIST. COURT, DIST. OF MINN., PRISONER CIVIL RIGHTS FEDERAL LITIGATION GUIDEBOOK 3 (2015), http://www.mnd.uscourts.gov/Pro-Se/PrisonerCivilRightsLitigGuide.pdf [https://perma.cc/L52S-5BJL] (providing a guide to navigate through a prisoner civil rights federal litigation case).

32. 141 CONG. REC. 14570 (1995) (statement of Sen. Dole).

"6,600 in 1975" to "39,000 in 1994."[33] These statistics illustrate Dole's premise in advocating for the PLRA: to curb what was seen as a huge problem clogging the court system.[34]

This premise is erroneous. First, the *rate* of filing should be considered, not the *number* of lawsuits filed.[35] Dole's statistics fail to take into account the sharp increase in the prison population itself between 1975 and 1994.[36] In 1975, the total prison inmate population in the United States was 253,816.[37] By 1994, the number of inmates had risen to 1,053,738.[38] This means that between 1975 and 1994, the inmate population quadrupled.[39] Accordingly, the total number of lawsuits filed by inmates increased.

The actual *rate* at which inmates filed civil rights complaints in federal court reached an all-time high in 1981 with 29.3 complaints filed per 1,000 inmates.[40] By the time the PLRA was introduced in 1994, the rate had dropped to 23.2 complaints per 1,000 inmates.[41] The enactment of the PLRA was a reaction to increased incarceration in the United States, not increased rates at which prisoners filed lawsuits.[42]

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33. *Id.*

34. *See id.* at 14571 (suggesting lawsuits filed by prisoners were an encumbrance on judicial resources, stating "time and money spent defending most of these cases are clearly time and money that could be better spent prosecuting criminals, fighting illegal drugs, or cracking down on consumer fraud").

35. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578-87 (2003).

36. *See id.* at 1578–87 ("[A]fter 1981, annual increases in inmate federal civil rights filings were primarily associated, in nearly every state, with the growing incarcerated population[.]"); *see also* WILFRED J. DIXON & FRANK J. MASSEY, JR., INTRODUCTION TO STATISTICAL ANALYSIS 3 (1st ed. 1951) (providing examples of common issues in statistical analysis including variability and correlation).

37. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925–81, at 3 (1982), https://www.bjs.gov/content/pub/pdf/p2581.pdf [https://perma.cc/3922-QJKB] [hereinafter JUSTICE STATISTICS, 1981].

38. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994, at 1 (1995), https://www.bjs.gov/content/pub/pdf/Pi94.pdf [https://perma.cc/K94F-DPT5] [hereinafter JUSTICE STATISTICS, 1994].

39. *Compare* JUSTICE STATISTICS, 1981, *supra* note 37, at 3 (evidencing the total U.S. prisoner population as 253,816 in 1975), *with* JUSTICE STATISTICS, 1994, *supra* note 38, at 1 (1995), (evidencing the total U.S. prison population as 1,053,738 in 1994).

40. *See* Schlanger, *supra* note 35, at 1578–87 ("[A]bsolute filing numbers alone are helpful only if the issue is litigation processing, not litigation rates.").

41. *Id.* at 1583.

42. *See* David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH, June 16, 2009, https://www.hrw.org/report/2009/06/16/no-equal-

This sharp increase in United States incarcerations was a result of President Reagan's massive expansion of the War on Drugs.[43] This new aggressiveness in drug enforcement resulted in over 400,000 nonviolent drug offenders being imprisoned by 1997.[44] The War on Drugs not only contributed to overall high incarceration rates, but also to the increasing disparity between the racial make-up of the United States prison population.[45] During the 1980s, federal penalties for crack cocaine were exorbitantly harsher than those for powder cocaine, an inconsistency that disproportionately sentenced black offenders to much lengthier prison sentences than white offenders.[46] As Michelle Alexander noted in her book *The New Jim Crow*, "[n]othing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs."[47]

By instituting racially charged and draconian drug laws, federal sentencing schemes incarcerated African-Americans at a higher rate and for longer durations.[48] Additionally, the War on Drugs contributed to over-population and over-crowding in prisons across the United States.[49] Yet instead of addressing these issues and the subsequent increase in litigation they caused, the PLRA was passed to simply cut off the filing

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justice/prison-litigation-reform-act-united-states [https://perma.cc/9D82-GA7L] (stating that between 1995 and 1997, federal civil rights filings fell by 33% despite the 10% increase of incarcerated persons).

43. *A Brief History of the Drug War*, DRUG POLICY, http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0 [https://perma.cc/PAZ3-CR9H] [hereinafter *A Brief History*] (last visited Dec. 18, 2017). *See also* Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 2 PUB. PAPERS 1313–17 (Oct. 14, 1982).

44. *A Brief History*, *supra* note 43.

45. *Race and the Drug War*, DRUG POLICY, http://www.drugpolicy.org/race-and-drug-war [https://perma.cc/9KFW-AN37] (last visited Dec. 18, 2017).

46. *Id.*

47. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2012).

48. *See* Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow* BROOKINGS (Nov. 25, 2015), https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow [https://perma.cc/VG7Y-ADVN] (reporting African-Americans are 3 to 4 times more likely to be incarcerated for drug crimes even though they are no more likely to use or sell drugs than whites).

49. Pamela Engel, *Watch How Quickly The War on Drugs Changed America's Prison Population*, BUSINESS INSIDER (April 23. 2014, 1:19 PM), http://www.businessinsider.com/how-the-war-on-drugs-changed-americas-prison-population-2014-4 [https://perma.cc/7RUK-HJLJ].

of lawsuits.[50] In other words, it addressed a symptom of a systemic problem, not the source.[51]

III. THE PLRA AS INTERPRETED BY THE SUPREME COURT

When the PLRA was enacted in 1996, the language of its exhaustion requirement was fairly innocuous on its face.[52] It read that "[n]o action shall be brought with respect to prison conditions . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[53] Facially, it read like any other exhaustion requirement common to administrative law prohibiting judicial review prior to appealing a decision from an administrative body.[54] Almost immediately, courts began questioning the applicability of the exhaustion requirement,[55] and the Supreme Court's interpretations turned a statute already restricting access to the courts into a greater obstacle for prisoners to overcome.[56]

A. *Interpretation of "Prison Conditions" and Applicability to Excessive Force Claims*

Confusion emerged over what constituted "prison conditions" and whether the term included excessive use of physical force claims brought

50. Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're out of Court – It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471, 497 (1997).

51. Schlanger, *supra* note 35, at 1694 (highlighting PLRA reduced overall litigation by making it uneconomical for inmates to pursue low-stake cases even when such cases are high in merit).

52. 42 U.S.C. § 1997e(a) (2012).

53. *Id.*

54. Clive Lewis, *The Exhaustion of Alternative Remedies in Administrative Law*, 51 CAMBRIDGE L.J. 138, 139 (1992).

55. *Compare* Freeman v. Francis, 196 F.3d 641, 644 (6th Cir. 1999) (holding the term "prison conditions" as used in the statute included excessive force claims), *with* Lawrence v. Goord, 238 F.3d 182, 185 (2nd Cir. 2001) (holding that particularized instances of retaliatory conduct, like particularized instances of force, are not subject to the PLRA's administrative exhaustion requirements).

56. *See* Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that even though the prison grievance procedure did not provide for requested monetary relief, an inmate was nonetheless required to exhaust administrative remedies before filing suit with respect to prison conditions); *see also* Porter v. Nussle, 534 U.S. 516, 519 (2002) (holding that the exhaustion requirement applied to all prisoners seeking redress for prison conditions or occurrences, regardless of whether the claim involved general circumstances or a particular episode).

under the Eighth Amendment.[57] If such claims were not included by the broad phrasing of "prison conditions," then exhaustion of administrative remedies would not be required prior to filing.[58] The Second Circuit addressed this issue in *Nussle v. Willette*.[59] Appellant Ronald Nussle claimed a corrections officer assaulted him while he was in the custody of the Connecticut Department of Corrections.[60] Nussle alleged he was the victim of a continued pattern of "harassment and intimidation," including an incident where two corrections officers "entered his cell, instructed him to leave the cell, and proceeded to beat him without apparent provocation or justification of any sort."[61] They continued to attack him, beating him so badly "he lost control of his bowels."[62] Nussle alleged "the officers threatened to kill him if he reported the beating."[63] Nussle filed suit in district court without first filing a grievance with the prison or utilizing any administrative remedies.[64] He brought his claim under 42 U.S.C. § 1983, alleging the officers violated "his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment."[65] The suit was dismissed due to his failure to exhaust administrative remedies.[66]

Nussle appealed to the Second Circuit, which addressed the issue of "whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment."[67] The Second Circuit began their analysis by noting that as a general matter, exhaustion is not required for § 1983 claims and that the legislative intent of § 1983 supports "this presumptive rule of non-exhaustion."[68]

The "very purpose" of § 1983 claims was "to interpose the federal courts between the States and the people, as guardians of the people's

57. Nussle v. Willette, 224 F.3d 95, 99–100 (2d. Cir. 2000) *rev'd*, 534 U.S. 516 (2002).
58. *Id.* at 100; 42 U.S.C. § 1997e (2013).
59. 224 F.3d 95, 96–97 (2d. Cir. 2000) *rev'd*, 534 U.S. 516 (2002).
60. *Id.* at 97.
61. *Id.*
62. *See id.* (describing the injuries that resulted from the attack).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 97–98.

federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[69] However, the court noted the PLRA created a specific exhaustion requirement in this case, and therefore, "if claims for particular instances of assault or excessive force *are* properly considered claims 'brought with respect to prison conditions,' then Nussle must . . . exhaust 'such administrative remedies as are available' before taking his federal claims to court."[70]

The Second Circuit recognized other circuits had previously found the exhaustion requirement to apply in such circumstances.[71] The court turned to an analysis of the language of the PLRA and concluded "the use of the term 'prison conditions' in § 1997e(a) would appear to refer to 'circumstances affecting everyone in the area affected by them,' rather than 'single or momentary matter[s],' such as beatings or assaults, that are directed at particular individuals."[72] Additionally, the court looked to the Supreme Court's own handling of prisoner suits and found that the "[p]re-PLRA Supreme Court decisions disaggregate the broad category of Eighth Amendment claims so as to distinguish between 'excessive force' claims, on the one hand, and 'conditions of confinement' claims, on the other."[73] Therefore, the Second Circuit held there was a distinct difference "between 'excessive force' and 'prison conditions' claims for purposes of exhaustion under § 1997e(a) and conclude[d] that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983."[74]

Nussle's victory was short lived.[75] The Second Circuit's decision was appealed, and in an effort to resolve the circuit split, the Supreme Court granted certiorari.[76] They reversed the Second Circuit's holding and

69. *See id.* (citing Mitchum v. Foster, 407 U.S. 225, 242 (1972)); *see also* Patsy v. Bd. of Regents, 457 U.S. 496, 503 (1982) (noting the precursor to §1983 was first enacted during Reconstruction when the Federal Government established itself as a guarantor of basic federal rights against intrusions of state power).

70. *Nussle*, 224 F.3d at 100.

71. *Id.*; *see also* Booth v. Churner, 206 F.3d 289, 293–98 (3d Cir. 2000) (finding excessive force claims are actions "brought with respect to prison conditions" under § 1997e(a)).

72. *Nussle*, 224 F.3d at 101.

73. *Id.* at 106.

74. *Id.*

75. Porter v. Nussle, 534 U.S. 516, 532 (2002).

76. *Id.*

found "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[77] The Court elaborated they had previously separated suits about incarceration into two categories: "those challenging the fact or duration of confinement itself" and "those challenging the conditions of confinement."[78] The Court noted "the latter category unambiguously embraced the kind of single episode cases that petitioner's construction would exclude."[79] Contrary to the Second Circuit's argument, it further found the use of the phrase "prison conditions" could be intended to make clear pre-incarceration claims fell outside of § 1997e(a), and not to separate out single incidents that occur while incarcerated.[80] Otherwise, a prisoner who had been assaulted would not have to exhaust, whereas a prisoner who was systematically beaten and abused would have to.[81]

Porter v. Nussle established that brutality and violence against prisoners by corrections officers is, legally, a "prison condition."[82] It allowed no exception from the exhaustion requirement for instances of excessive force stemming from corrections officers or prison employees.[83] This burden firmly restricted a prisoner's access to civil remedies in cases of excessive force.[84] It seems the way to avoid these issues would be for inmates to fully exhaust before filing lawsuits, yet

77. *Id.*

78. *Id.* at 527 (citing McCarthy v. Bronson, 500 U.S. 136, 141 (1991)); *see also*, Preiser v. Rodriguez, 411 U.S. 475, 505 (1973) ("[A] prisoner may challenge the conditions of his confinement by petition for writ of habeas corpus, . . . provided he attacks only the conditions of his confinement and not its fact or duration.").

79. *Porter*, 534 U.S. at 527 (citing McCarthy v. Bronson, 500 U.S. 136, 141 (1991)).

80. *Id.* at 529.

81. *See id.* at 531 (discussing the "circumstance dichotomy" that exists within the Second Circuit's belief).

82. *See id.* at 528 (citing to the decisions of *McCarthy* and *Preiser* that "tug strongly away from classifying suits about prison guards' use of excessive force, one or many times, as anything other than actions 'with respect to prison conditions'").

83. *See id.* at 524 (explaining "exhaustion is now required for all 'actions … brought with respect to prison conditions,' whether under §1983 or 'any other Federal law'").

84. *See id.* (quoting a provision of §1983 that mandates "all available 'remedies' must . . . be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective'").

Supreme Court precedent set a high bar in determining what constituted "exhaust[ion]."[85]

B. *"Exhausted": What This Term Really Means*

Omitted from the plain language of the PLRA was a definition for "exhausted."[86] Prior to the Supreme Court's decision in *Woodford v. Ngo*, there was a circuit split concerning "whether a prisoner can satisfy the Prison Litigation Reform Act's exhaustion requirement . . . by filing an untimely or otherwise procedurally defective administrative grievance or appeal."[87] The Sixth Circuit previously found untimely grievances counted as exhaustion of remedies as they still served both "Congress's purpose in passing the PLRA and Supreme Court precedent regarding the exhaustion doctrine's oft-stated purpose: to give prison officials the first opportunity to address inmate complaints."[88] Other courts, such as the Seventh and Tenth Circuits, were more strict and "interpreted the PLRA's exhaustion requirement as requiring a timely grievance by a prisoner at the administrative level before the prisoner initiates a federal cause of action."[89]

The Supreme Court resolved this circuit split in *Woodford v. Ngo*.[90] Ngo filed a grievance concerning restricted access to religious activities against the California prison system.[91] Ngo's grievance, however, was time-barred because it was filed six months after the restriction commenced, rather than within fifteen days of the alleged occurrence in accordance with prison policy.[92] Ngo appealed that decision, but was unsuccessful; he ultimately resorted to filing a lawsuit in federal district

85. *See* Woodford v. Ngo, 548 U.S. 81, 90 (2006) (discussing the specifics of mandatory exhaustion for administrative remedies, including utilizing procedures the agency "holds out, and doing so properly" such that the merits are addressed).

86. *See id.* at 93 (inferring "exhausted" has the same meaning as it does in administrative law, given the PLRA's reference to "such administrative remedies as are available").

87. *Id.* at 83–84.

88. Thomas v. Woolum, 337 F.3d 720, 723 (6th Cir. 2003) (holding that "so long as an inmate presents his or her grievance to prison officials and appeals through the available procedures, the inmate has exhausted his or her administrative remedies, and a prison's decision not to address the grievance because it was untimely under prison rules shall not bar the federal suit.").

89. Ngo v. Woodford, 403 F.3d 620, 626–27 (9th Cir. 2005).

90. 548 U.S. 81 (2006).

91. *Id.* at 86–87.

92. *Id.* at 87.

court.[93] The district court granted a motion to dismiss for failure to exhaust based on the initial untimely grievance.[94] The Ninth Circuit reversed, holding "Ngo exhausted all administrative remedies available to him as required by the PLRA when he completed all avenues of administrative review available to him: [h]is administrative appeal was deemed time-barred and no further level of appeal remained in the state prison's internal appeals process."[95]

The Supreme Court analyzed the theory of exhaustion and found that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[96] The question then became whether the totality of "proper exhaustion" was required.[97] In looking to the statute, the Court found that "requiring proper exhaustion serves the purposes of the PLRA."[98] To construe otherwise would render the PLRA "a toothless scheme[,]" as prisoners could simply wait until their grievances were time-barred, and then proceed directly to federal court if it was rejected as untimely.[99] For these reasons, the Court held total exhaustion and compliance with internal procedures and deadlines was required prior to bringing prisoners' lawsuits.[100]

The *Woodford* decision was not unanimous. Justice Stevens, joined by Justice Souter and Justice Ginsburg, dissented.[101] The dissent noted "[t]he citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted."[102] The dissent challenged the factual allegations of the case on two grounds. First, the dissent contested the

93. *Id.*

94. *Id.*

95. Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005).

96. Woodford v. Ngo, 548 U.S. 81, 90–91 (2006).

97. *Id.* at 95.

98. *Id.* at 93–95.

99. *Id.* at 95.

100. *See id.* at 93 (alteration in original) ("The [Prison Litigation Reform Act] attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.'").

101. *Woodford*, 548 U.S. at 104 (Stevens, J., dissenting).

102. *Id.*

very idea that Ngo's grievance was untimely.[103] Stevens's dissent emphasized Ngo "filed a second grievance after his first grievance was rejected, arguing that his first grievance was in fact timely because he was challenging petitioners' continuing prohibition on his capacity to participate in Catholic observances, such as Confession, Holy Week services, and Bible study."[104]

Second, the dissent pointed out that a statute limiting a private citizen to a fifteen day window to file a lawsuit in federal court would certainly be unenforceable.[105] Justice Stevens summarized the issue as whether "Congress intended to authorize state correction officials to impose a comparable limitation on prisoners' constitutionally protected right of access to the federal courts."[106] To this question, the dissent resolutely felt "the correct interpretation of the statute would recognize that, in enacting the PLRA, [m]embers of Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty 'to respect the dignity of all persons,' even 'those convicted of heinous crimes.'"[107] The dissent further asked whether "a 48-hour limitations period [would] furnish a meaningful opportunity for a prisoner to raise meritorious grievances in the context of a juvenile who has been raped and repeatedly assaulted, with the knowledge and assistance of guards, while in detention?"[108] Scenarios such as this could raise very real constitutional challenges to the exhaustion requirement itself due to the majority's adoption of a total exhaustion requirement.[109] And yet, complying with such constitutionally questionable procedures mired by internal time-sensitive constraints is precisely what "proper exhaustion" requires.

103. *Id.* at 120–21 (asserting the prison's denial of an opportunity to engage in religious activity was ongoing, and therefore, the grievance was timely within prison's 15-day statute of limitations).

104. *Id.* at 121.

105. *Id.* at 104.

106. *Id.*

107. *Woodford*, 548 U.S. at 123 (Stevens, J., dissenting).

108. *Id.* at 121.

109. *See id.* at 122 (suggesting such strict enforcement of exhaustion conflicts with the notion that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983))).

The majority's fear that allowing untimely grievances to count as exhaustion would enable prisoners to circumvent the grievance process fails to account for the difficulty of navigating a prison grievance system. Each prison can set its own internal procedures and deadlines, including what steps are required to fully exhaust administrative remedies.

For example, in New York, there are three levels of review an inmate must go through before fully exhausting all remedies.[110] First, an inmate must file a grievance within twenty-one days of the alleged incident.[111] Once an inmate receives a written response from the Inmate Grievance Resolution Committee (IGRC), the inmate has seven days to file an appeal to the superintendent.[112] After the inmate receives a decision from the superintendent, he or she must then file an appeal to the Central Office Review Committee (CORC)[113] within seven days. The inmate must receive a final decision from CORC before he or she is able to file suit in court without fear of dismissal for failure to exhaust.[114] If a prisoner files while waiting on a final decision, the suit will be subject to dismissal.[115]

New York is only one of several state inmate grievance systems. In light of *Ngo*, a prisoner who accidentally files a grievance or appeal, even one day late, during any step in any of the state grievance systems might be permanently barred from bringing a lawsuit.[116] Roughly six months after deciding *Ngo*, the Supreme Court considered whether a lawsuit containing a mix of exhausted and unexhausted claims could proceed. In *Jones v. Bock*, the Court rejected a rule that would require judges "to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint."[117] On its face, such a holding seemed to protect prisoners from having the entirety of their suit thrown out if they failed to exhaust some claims, but fully exhausted

110. N. Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (2017).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See generally Woodford*, 548 U.S. at 81 (holding "proper exhaustion" is required in that prisoners must fully exhaust all available administrative remedies under the PLRA).

116. *Id.*

117. 549 U.S. 199, 203 (2007).

others.[118] However, the holding should have been extended to allow *all* claims to proceed as long as some in the suit were exhausted. Instead, application of the *Jones* decision potentially dismisses a prisoner's lawsuit if such lawsuit is broader in scope than the original grievance.[119] Omitting even part of an incident when filling out a grievance could lead to dismissal for that part of a prisoner's lawsuit. Again, the rationale behind this rule was based on the idea that prisoners would deliberately avoid exhaustion and gave little thought to the number of claims that may be barred simply because a prisoner failed to mention part of an altercation in their original grievance.

For a statute created to ease judicial burdens, and that has been so aggressively applied by the Supreme Court, circuit courts instead have strained to aid prisoners by carving out exceptions to the PLRA where they can.[120] A mandatory requirement of total exhaustion eliminates any space for the judiciary to exercise discretion and review meritorious claims which may not be completely exhausted. The PLRA should be amended to require only a good faith attempt at exhaustion, not the "proper exhaustion" standard held by the Supreme Court. Despite the need, attempts by the circuits to carve out exemptions allowing such claims through have been struck down by the Supreme Court.

C. *Exception to Exhaustion: Unavailability*

Amending the PLRA statute to require only a good faith attempt at exhausting administrative remedies would allow courts to exercise more discretion without forcing judicially created exceptions to the PLRA. One existing statutory exception to the exhaustion requirement is in the text itself: part (a) of Section 1997e requires exhaustion of "administrative remedies as are available."[121] This language left the

118. *See* Abdul-Muhammad v. Kempker,486 F.3d 444, 446 (8th Cir. 2007) (reversing a previous decision dismissing an inmate's entire grievance claim for failure to exhaust all available remedies for each discrete claim following the Supreme Court's *Jones* decision). The remand order in *Abdul-Muhammad* instructed the District court to determine which of the prisoner's claims had been properly exhausted. *Id.*

119. *Jones*, 549 U.S. at 203.

120. Dillon v. Rogers, 596 F.3d 260, 273 (5th Cir. 2010) (holding that "if the judge determines that the plaintiff has exhausted administrative remedies or that his or her failure to exhaust should be excused, the case may proceed to the merits.").

121. 42 U.S.C. § 1997e(a) (2013).

determination of what constitutes an available remedy to the courts.[122] The Second Circuit interpreted "available" narrowly, and carved out "special circumstances" under which failing to comply with administrative procedures for various reasons was excusable.[123] Such special circumstances might include lack of clarity in a grievance procedure[124] or a fear of retaliation.[125]

This approach was later adopted by the Fourth Circuit in *Blake v. Ross*, which noted "the exhaustion requirement is not absolute."[126] The Fourth Circuit further concluded "[t]here are certain 'special circumstances' in which, though administrative remedies may have been available . . . the prisoner's failure to comply with administrative procedural requirements may nevertheless have been justified."[127] Shaidon Blake was an inmate who failed to file a grievance after being assaulted.[128] Due to the ambiguous wording of the inmate grievance procedure, Blake believed an investigation into his assault, which found the corrections officers in fact used excessive force, meant he was not required to file a grievance.[129] He proceeded to file a § 1983 claim in court.[130] The district court dismissed the claim, and the Fourth Circuit—

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122. See generally Hemphill v. New York, 380 F.3d 680 (2d Cir. 2003) (discussing the meaning of "available" remedies in relation to the PLRA's exhaustion requirement).

123. *Id.* at 686; *see also* Giano v. Goord, 380 F.3d 670, 676 (2d. Cir. 2004) (citing Berry v. Kerik, 366 F. 3d 85, 88 (2d Cir. 2003))

> If 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, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether 'special circumstances' have been plausibly alleged that justify 'the prisoner's failure to comply with administrative procedural requirements.'

124. *Giano*, 380 F.3d at 675.

125. *Hemphill*, 380 F.3d at 691.

126. 787 F.3d 693, 698 (4th Cir. 2015).

127. *See id.* (quoting Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004)).

128. *Id.* at 695. Shaidon Blake was assaulted by two guards in a Baltimore prison. The guards punched Blake multiple times in the face while Blake was handcuffed. Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, THE NEW YORKER (May 30, 2016) https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons [https://perma.cc/5S6M-7NFJ].

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

130. *Id.* Blake's complaint fell into two agency review procedures; the Internal Investigative Unit (IIU) which investigated prison employee misconduct, and the Administrative Remedy Procedure (ARP) which prescribes procedures an inmate must follow to obtain an administrative remedy. *Id.* at 698–701. Blake originally thought the IIU investigation fulfilled his administrative remedy obligation which conflicted with the prescribed procedures under ARP. *Id.*

using its newly adopted "special circumstances" exception—reversed.[131]

The Fourth Circuit applied the Second Circuit's two-part test in determining whether to excuse total exhaustion on the grounds of faulty or unclear grievance procedures.[132] First, the court considered "whether 'the prisoner was justified in believing that his complaints in the disciplinary appeal procedurally exhausted his administrative remedies because the prison's remedial system was confusing,' and second, 'whether the prisoner's submissions in the disciplinary appeals process exhausted his remedies in a substantive sense by affording corrections officials time and opportunity to address complaints internally.'"[133] The Fourth Circuit determined this inquiry struck the appropriate balance between equity to inmates confronted with confusing internal procedures who still attempt to exhaust, while simultaneously upholding the goals of the exhaustion requirement by preventing "unnecessary and unexpected litigation."[134]

The Supreme Court disagreed. In the Court's subsequent review, it termed such an approach "freewheeling" and "inconsistent with the PLRA."[135] Yet the Court did not hold that rejecting a "special circumstances" exception necessarily precluded Blake's suit, "because the PLRA contains its own textual exception to mandatory exhaustion."[136] Instead, the Court ruled "a prisoner need exhaust only 'available' administrative remedies" and reframed Blake's argument as a "contention that the prison's grievance process was not in fact available to him."[137] The Court further defined availability, reasoning that "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'"[138] Three situations were immediately identified as fitting into that scenario: (1) where an administrative procedure is unavailable because

131. *Id.* at 698.

132. *Id.*

133. *Id.* (citing Macias v. Zenk, 495 F.3d 37, 43 (2d Cir. 2007)).

134. *Id.*

135. Ross v. Blake, 136 S. Ct. 1850, 1855 (2016).

136. *Id.* at 1856.

137. *Id.*

138. *See id.* at 1859 (quoting Booth v. Churner, 532 U.S. 731, 737–38 (2001) (considering multiple conflicting definitions for "remedies" and "available" following an inmate's allegations of cruel and unusual punishment at the hands of corrections officers)).

there is a dead end; (2) where an administrative scheme is "so opaque that it becomes, practically speaking, incapable of use" or "no ordinary prisoner can discern or navigate" it; (3) and finally, where "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[139]

Due to numerous inconsistencies and confusion in Maryland's grievance procedures, the Supreme Court found it plausible that Blake may not have had "available" remedies, and therefore, his claim may very well have been exhausted.[140] However, the Fourth Circuit's finding that Blake fit a "special circumstance" exception was reversed.[141] Instead, the case was remanded for further analysis to determine whether Maryland's unclear grievance procedures rendered administrative remedies practically unavailable.[142] These cases deciding the meaning of the exhaustion requirement work together to form an intricate network of judicial rules that prisoners must traverse in order to have a chance at their day in court.

D. *The Rules Applied*

Court rulings interpreting the exhaustion requirement work in conjunction to make any prison grievance system difficult to navigate, and amending the PLRA to require only a good faith initial attempt at exhaustion would prevent outcomes like that of *Bryant v. Rich*.[143] Although *Bryant* was decided before *Ross v. Blake*, the Eleventh Circuit had not yet adopted a *Hemphill* analysis and was therefore unaffected by the *Ross* decision.[144]

In *Bryant*, the Court addressed whether the claims of two prisoners, Andrew Priester and Gregory Bryant, had been exhausted.[145] The court held neither had exhausted their administrative remedies.[146] The analysis of Bryant's failure to exhaust is particularly enlightening as to

139. *Id.*
140. *Id.* at 1860–61.
141. *Ross*, 136 S. Ct. at 1854.
142. *Id.*
143. 530 F.3d 1368 (11th Cir. 2008).
144. *Id.* at 1371.
145. *Id.*
146. *Id.* at 1379.

the contortions courts have had to go through in an attempt to uniformly apply the PLRA.

Bryant was subjected to excessive force by corrections officers, including being kicked and beaten.[147] His filed grievance detailing the account was denied.[148] Bryant then filed an appeal within five days, instead of the mandated four, because he was misinformed as to the time frame for filing such grievances, and did not receive an appeal form until the fourth day.[149] The Court determined this did not count as exhaustion because Bryant still could have petitioned for the time limit to be waived after his appeal was dismissed as untimely.[150]

Bryant was again subjected to excessive force, this time in retaliation for filing the initial grievance.[151] Out of fear of what would happen if he reported the incident, he did not file another grievance before being transferred to a separate prison.[152] While the court did not fault him for not filing a grievance due to his fear of reprisal, it still did not consider him to be excused from exhaustion.[153] The court noted that he failed to file a grievance once transferred, despite the fact that such a grievance would be considered untimely.[154] In order to have completely exhausted, he needed to have "filed an out-of-time grievance and then shown good cause for its untimeliness."[155] As he did not do so, "Bryant failed to exhaust an administrative remedy that was available to him."[156]

The mental hoops the court jumped through in order to find the claims had not been exhausted are, themselves, exhausting to follow. Up front, the court found Bryant had not exhausted his initial claim because his appeal was untimely. It then mandated an untimely grievance in order to complete the exhaustion process. The court seemed to rely on the off chance that Bryant could have met a "good cause standard" and found his

147. *Id.* at 1372.

148. *Id.* at 1378.

149. *Bryant*, 530 F.3d at 1378.

150. *Id.* at 1379 (associating prison administration procedure allowing time limit requirements to be waived following a good cause showing with full exhaustion of remedies required by the PLRA).

151. *Id.* at 1372.

152. *Id.*

153. *Id.* at 1379.

154. *Id.*

155. *Bryant*, 530 F.3d at 1379.

156. *Id.*

failure to petition for an extension to the very deadlines outlined in the inmate grievance procedures precluded him from being heard in court.[157] But when circuit courts cannot agree on when an inmate has exhausted his or her administrative remedies under the PLRA's requirement,[158] how is an inmate supposed to know? Literature on this topic has sprouted in an attempt to help inmates decipher this critical inquiry, but it can only do so much.[159]

IV. ENDEMIC RACISM IN THE PRISON SETTING: WHY THE EXHAUSTION REQUIREMENT SHOULD BE AMENDED

The PLRA's exhaustion requirement and the complicated rules promulgated both by the courts and prison systems do not exist in a vacuum. Instead, they exist in a country where prisons host endemic racism and the majority of inmates are black and Hispanic. In 2010, the Southern Poverty Law Center found that "[i]n at least six states, guards have appeared in mock Klan attire in recent years, and guards have been accused of race-based threats, beatings and even shootings in 10 states."[160] In 2015, state officials in Northern California found an "entrenched culture" of racism after conducting an investigation of High Desert State Prison.[161] In interviews with inmates, officials reported that

157. *Id.*

158. *See e.g.*, Dillon v. Rogers 596 F.3d 260, 267–68 (5th Cir. 2010) (holding the full exhaustion requirement is not excused when an inmate fails to follow grievance procedures at their current detention facility for a beating by corrections officers when inmate was being held at a previous, temporary facility no longer in existence). Spada v. Martinez, 579 Fed. App'x. 82, 86 (3d Cir. 2014) (excusing exhaustion after an administrative remedy was deemed not available as a result of prison staff withholding grievance forms from an inmate). At the time of *Spada's* grievance request, Pennsylvania did not have a provision permitting time limits to be waived following a showing of good cause and subsequently did not require Spada to file an untimely grievance in order to comply with the full exhaustion requirement of the PLRA. *Id.* at 86, n.3. The contrast in these decisions also points out the lack of consistencies in prisoner grievance procedures which also create confusing and differing applications of the PLRA by the circuit courts.

159. Terri LeClercq, *Prison Grievances: When to Write, How to Write* (2013).

160. *Allegations of Racist Guards Are Plaguing the Corrections Industry*, INTELLIGENCE REP., SPLC, Dec. 2000, https://www.splcenter.org/fighting-hate/intelligence-report/2000/allegations-racist-guards-are-plaguing-corrections-industry [https://perma.cc/UQ9K-9W4J] (last visited December 30, 2017).

161. *See* Paige St. John, *State investigators cite culture of abuse, racism by High Desert State Prison guards*, LA TIMES, http://www.latimes.com/local/politics/la-pol-abuse-california-prison-20151216-story.html [https://perma.cc/6XBD-XG96] (last visited December 30, 2017) (asserting officers have essentially setup inmates for attack); HIGH DESERT, *supra* note 20, at 11–13.

"[b]lack inmates wouldn't get enough time to eat; the officers would 'kick' the blacks out of the chow hall first and then the Hispanics."[162] Ultimately, the investigation concluded that "[f]rom the casual use of derogatory racial terms to de facto discrimination, it became apparent to the [Office of the Inspector General] there is a serious issue at [High Desert State Prison,] and that the institution's leadership appears oblivious to these problems."[163]

A New York Times article recently uncovered some equally troubling statistics.[164] It found black and Hispanic inmates were disciplined at much higher rates than white inmates.[165] Black and Hispanic inmates were also kept in solitary confinement more frequently and for longer durations.[166] This discrepancy was most apparent in prisons with a low correlation between the racial composition of the inmate population and the racial composition of the custody staff.[167] In fact, the article found that "[a]t Clinton, a prison near the Canadian border where only one of the 998 guards is African American, black inmates were nearly four times as likely to be sent to isolation as whites, and they were held there for an average of 125 days, compared with 90 days for whites."[168]

The racial disparity in punishments seems to disappear when the racial composition of inmates is reflected in the racial composition of the guards.[169] At Sing Sing Correctional Facility in Ossining, "[b]lack officers make up the majority of the uniformed staff . . . " and according to the New York Times "[t]here were no disciplinary disparities between whites and blacks at Sing Sing."[170]

After an investigation into the brutal attack of Kevin Moore, an inmate at Downstate Correctional Facility who was savagely beaten before

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162. HIGH DESERT, *supra* note 20, at 11. At High Desert, 76% of custody staff is white, contrasting with 79% of inmates who are black or Hispanic. *Id.* at 12.

163. *Id.*

164. Michael Schwirtz, The Scourge of Racial Bias in New York State's Prisons, N.Y. TIMES, https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?smid=fb-nytimes&smtyp=cur&_r=1 [https://nyti.ms/2jDMoMz] (last visited December 30, 2017).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* (following review of 1,286 prison rule violations inmates received)

corrections officers ripped dreadlocks out of his head as keepsakes, the United States Attorney prosecuting the case announced "[e]xcessive use of force in prisons, we believe, has reached crisis proportions in New York State."[171] Investigations and studies clearly show black and Hispanic inmates are far more likely to suffer serious violations of their constitutional rights in prison,[172] and are therefore more seriously impacted by the strict exhaustion requirements.

A. *A Possible Solution*

If excessive force in prisons has reached crisis proportion, how can a statute that strictly limits remedies for excessive force in prisons possibly be justified? How many lawsuits from inmates victimized by institutional racism in High Desert State Prison, or Clinton, or Downstate Correctional were barred from ever being heard on the merits simply because they filed a grievance a day late? How many prisoners, like Erick Marshel, could have emerged victorious on his or her claims if not for a procedural technicality?

In light of the issues surrounding the correctional system today, the stringent exhaustion requirement of the PLRA should be amended to require only an initial good faith attempt at exhaustion, and only if a prison's administrative remedies comply with federal regulations. This solution would allow

> [C]ourts to punish prisoners who seek to deliberately bypass state administrative remedies, but [. . .] would not impose the draconian punishment of procedural default on prisoners who make reasonable, good-faith efforts to comply with relevant administrative rules but[,] out of fear of retaliation, a reasonable mistake of law, or simple inadvertence, make some procedural misstep along the way.[173]

171. Michael Winerip, Five New York Prison Guards Charged in '13 Beating of Inmate, N.Y. TIMES, https://www.nytimes.com/2016/09/22/nyregion/new-york-officers-downstate-correctional-facility-inmate-beating.html [https://nyti.ms/2lDpSCj] (last visited December 30, 2017).

172. Schwirtz, *supra* note 164; *see generally* HIGH DESERT, *supra* note 20 (citing a 2015 special review of High Desert State Prison in California and finding that several inmates reported experiencing overt racism).

173. Woodford v. Ngo, 548 U.S. 81, 119 (2006) (Stevens, J., dissenting).

Justice Stevens posited his own solution in his *Woodford* dissent.[174] He suggested "[f]ederal courts simply exercise their discretion to dismiss suits brought by the former group of litigants (those seeking to bypass administrative remedies) but not those brought by the latter (those inmates who have made good faith efforts, but failed to comply with administrative procedures)."[175] This was the very approach the PLRA's exhaustion requirement sought to remedy. The precursor to the PLRA's exhaustion requirement was the Civil Rights of Institutionalized Persons (CRIPA) "exhaustion of remedies" requirement.[176] It allowed the court to exercise discretion in requiring exhaustion if it felt "plain, speedy, and effective administrative remedies [were] available."[177] This approach would cause inequity amongst the districts: areas with substantially more prison litigation would be more inclined to dismiss than those less burdened by such a problem.

To prevent inequity, exhaustion should be required uniformly, but only where exhaustion remedies are available. Courts should not require the "total exhaustion" or "proper exhaustion" delineated in *Woodford*. Instead, good faith attempts to comply with a grievance procedure should be enough, regardless of whether an initial grievance was timely or whether deadlines were missed during subsequent appeals. This would encourage prisoners to utilize grievance systems where available and simultaneously give prisons notice of deficits in facility conditions.

CRIPA also did not allow exhaustion to be required unless the "Attorney General has certified[,] or the court has determined[,] that such administrative remedies are in substantial compliance" with minimum standards outlined in subsequent sections of the statute.[178] This ensured prisoners were not being routed to faulty grievance systems in an effort to bypass litigation. CRIPA's minimum standard should be adopted as part of the PLRA's exhaustion requirement. As it stands now, the only recourse available to a prisoner arguing to be excused from the exhaustion requirement of the PLRA on grounds of a faulty grievance

174. *Id.*

175. *Id.*

176. 42 U.S.C. § 1997 (1980) (modified by enforcement of PLRA exhaustion requirement under current 42 U.S.C. § 1997e).

177. *Id.*

178. *Id.*

system is to claim that very grievance system was "unavailable" under *Ross* precedent.[179]

The PLRA's exhaustion requirement should be amended to require only initial, good faith attempts at exhaustion, and only where a prison's administrative procedures meet minimum federal standards. This middle ground provides inmates with access to the court systems as long as they attempt to follow inmate grievance procedures. However, it does not bar their claims based on procedural technicalities. This approach achieves the goal of managing inmate complaints without flooding the court system with frivolous litigation. It continues to allow prisons opportunities to receive first notice of their deficiencies and to correct problems within their institution before proceeding to court. When balancing the burden placed on prisons and courts with a citizen's ability to seek redress, a citizen's basic human rights and access to the courts must be given considerable weight.

V. CONCLUSION

In light of the issues currently facing the prison system, including endemic racism and excessive force from corrections officers, the PLRA's exhaustion requirement, as it is currently enforced, is too strict. Current Supreme Court precedent mandates "proper exhaustion," which is too high a bar for prisoners to meet. Proper exhaustion requires a prisoner to fully comply with a prison's grievance system—a system which varies from state to state and currently has no federal oversight—before the prisoner files suit in court.[180] Failure to do so can cause the prisoner's lawsuit to be dismissed.[181] This grueling standard does nothing to account for the complexity of a state's particular grievance system or an inmate's misunderstanding of grievance procedures. It is a unilateral bar that does not give judges the discretion to excuse a failure to exhaust, or to allow meritorious claims to proceed through the judicial process.

The PLRA should be amended to ease the burden on prisoners by requiring only a good faith initial attempt at exhaustion, and only where a prison's grievance procedures meet minimum federal standards. This

179. Ross v. Blake, 136 S. Ct. 1850, 1860–61 (2016).

180. Nussle v. Willette, 224 F.3d 95, 97 (2d. Cir. 2000) *rev'd*, 534 U.S. 516 (2002).

181. *Id.*

solution places more discretion in the hands of the judiciary and achieves the PLRA's goals without denying prisoners access to courts for merely missing a deadline. With such an amendment, prisoners would be required to at least attempt to put prisons on notice as to detrimental conditions, but they would not be barred from pursuing claims for failing to do so in light of faulty or confusing grievance procedures. By including this good faith amendment, the PLRA can work towards improving both prisons and the lives of the prisoners within them.