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How the Court Got It Wrong in Woodford v. NGO By Saying No to Simple Administrative Exhaustion Under the PLRA

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How the Court Got It Wrong in *Woodford v. Ngo* by Saying No to Simple Administrative Exhaustion Under the PLRA

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I. INTRODUCTION

Congress has estimated that the number of people who have been sexually assaulted in America's prisons over the past twenty years tops one million.[1] Some inmates are sexually assaulted by guards, and some by other inmates, facilitated by guards.[2] The problem is so rampant that Congress enacted the Prison Rape Elimination Act of 2003.[3] Though the State has a constitutional obligation to "provide humane conditions of confinement," sometimes it fails.[4] To receive compensation for or relief from such harm, a prisoner must conform to the guidelines provided in

1. Woodford v. Ngo, 126 S. Ct. 2378, 2401 (2006) (Stevens, J., dissenting) (citing the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (Supp. III 2003)).
2. *Id*. at 2402.
3. 42 U.S.C. §§ 15601–15609 (Supp. III 2003); *see Woodford*, 126 S. Ct. at 2401 (Stevens, J., dissenting). Although this introductory example focuses on sexual assault, a variety of federal rights might be violated in a prison environment. Sexual assault is one such violation, but it is not the focus of this Note.
4. *Woodford*, 126 S. Ct. at 2401–02 (Stevens, J., dissenting) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

the Prison Litigation Reform Act of 1995 (PLRA),[5] which requires an inmate to file a grievance for his injury with the very administration responsible for *not* providing humane conditions.[6] Additionally, a prisoner who has just suffered the assault has a limited time in which to lodge his complaint, generally no more than fifteen days, and in nine states only between two and five days.[7]

In addition to the strict procedural requirements imposed by the PLRA, case law interprets it to prevent injured inmates from filing federal lawsuits until they exhaust the available administrative remedies. Significantly, a recent Supreme Court decision imposes a procedural default rule: when an inmate does not file or appeal his grievance within the specified time limits, he is barred from receiving any remedy via federal suit, regardless of the reason for missing the deadlines.[8]

This Note evaluates that June 22, 2006 Supreme Court decision, *Woodford v. Ngo*.[9] At issue in *Woodford* was whether the PLRA requires proper exhaustion or simple exhaustion. A proper exhaustion requirement precludes an inmate from filing a lawsuit in federal court unless he has proceeded through each step of his prison's grievance procedure while

5. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (2000) [hereinafter PLRA]. The PLRA refers an inmate to the procedures his detention center requires.

6. This Note refers to prisons and prisoners or inmates. The PLRA applies to prisons, jails, and other correctional facilities, including juvenile detention centers at both the state and federal level. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under . . . Federal law, by a prisoner confined in *any jail, prison*, *or other correctional facility* . . . .") (emphasis added). In this Note, the words *prisons*, *prisoners*, and *inmates* include all facilities and persons the PLRA covers.

7. *Woodford*, 126 S. Ct. at 2402 (Stevens, J., dissenting); Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae app. at 2–5, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573 at *28. The Brief includes a chart which lists time limitations for prisoners to file their initial complaint. Indiana has the shortest time limit among adult correctional institutions: two days. *Id.* North Carolina institutions have both the longest and shortest time periods: one year in the North Carolina Department of Correction, and twenty-four hours in the North Carolina Department of Juvenile Justice and Delinquency Prevention. *Id.*; *see also* Brief of the American Civil Liberties Union et al. as Amici Curiae at 6, n.1, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 284226 at *6 n.1. Prisoners are responsible for discovering their institutions' administrative exhaustion requirements. *See infra* note 134. Although the Introduction offers rape as an example of an inhumane condition about which a prisoner might file a grievance, this Note will not discuss rape in any detail.

8. *Woodford*, 126 S. Ct. at 2382–93.

9. 126 S. Ct. 2378 (2006).

meeting all procedural requirements, including deadlines.[10] On the other hand, simple exhaustion, or exhaustion *simpliciter*, permits an inmate to file a lawsuit as long as the administrative grievance procedure is no longer available, provided that he has not intentionally circumvented the administrative process.[11] If an inmate is not able to proceed through the administrative process because he has not met the procedural requirements, including time limits, he has exhausted his remedies and may file suit in federal court. The Supreme Court's holding in *Woodford* rejects simple exhaustion and instead creates a procedural default rule which bars an inmate from filing a lawsuit in federal court absent *proper* exhaustion.[12] However, the dissent provides a better reading of the statute. The dissent posits that the PLRA requires simple exhaustion, which only prohibits federal actions by an inmate who intentionally circumvents the administrative process's procedural requirements.[13]

Part II of this Note explains the statute at issue in *Woodford*, examines its history, discusses the details of the case, and outlines the majority's main arguments for creating a procedural default rule. Part III explains why these arguments are flawed and why both public policy and the plain language of the PLRA demand a simple exhaustion rule. Part IV

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10. Errors that might prevent a prisoner from meeting all procedural requirements include using the incorrect form, sending correct documentation to the wrong official within the appropriate time limitations, or failing to name an official in a complaint even though administrators have actual knowledge of the official involved. Brief of the American Civil Liberties Union et al., *supra* note 7, at 26–27. The majority does not explicitly define what kinds of procedural errors would result in a forfeiture of the right to file a federal lawsuit. Instead, it focuses on "critical procedural rules" without defining what those might be. *Woodford*, 126 S. Ct. at 2386 ("Proper exhaustion demands compliance with . . . critical procedural rules . . . ."). The dissent spends more time discussing the types of procedural errors that would preclude filing a lawsuit, specifically expressing concern that under the majority's interpretation of the PLRA, inmates who make "hypertechnical procedural error[s]" will be unable to bring a lawsuit. *Id.* at 2404 (Stevens, J., dissenting). The Court does not offer a brightline definition of "critical procedural rules," and its holding leaves administrative procedure to the discretion of the individual prisons. Thus, the examples provided by the ACLU Brief seem legitimate illustrations of what the future may hold.

11. *Woodford*, 126 S. Ct. at 2384 ("Under this ['exhaustion *simpliciter*'] interpretation, the reason why administrative remedies are no longer available is irrelevant.").

12. The term *procedural default* comes from habeas law; administrative law has not used this terminology in the past. *Id*. at 2387. The Court repeatedly refers to the imposition of a bar to filing federal suit absent *proper* exhaustion as a procedural default rule. *See id.* at 2392–93. This Note's references to a procedural default rule and proper exhaustion are synonymous. Based on the Court's reading of the PLRA, when a prisoner has not properly exhausted administrative remedies, he is barred from filing a federal lawsuit. This is called a procedural default because the default rule requires the prisoner to follow proper procedure.

13. *Id*. at 2402 (Stevens, J., dissenting). Under a simple exhaustion reading, the dissent notes that courts could dismiss cases using abstention principles, which "allow federal district courts to dismiss suits brought by prisoners who have deliberately bypassed available state remedies." *Id.*

explains the best reading of the PLRA exhaustion language and applies the simple exhaustion rule to the facts of Mr. Ngo's case to demonstrate how it best leads to just results. Ultimately, this Note concludes the Court improperly interpreted the PLRA's administrative exhaustion requirement by engrafting a procedural default rule onto its simple exhaustion language.

II. BACKGROUND AND HISTORY

A. Administrative Procedure Background of Woodford v. Ngo

Prison officials placed Mr. Ngo in administrative segregation for allegedly inappropriate activity in the prison chapel.[14] Two months later, the prisoner returned to the general population.[15] Upon his return, prison officials repeatedly prohibited him from participating in "special programs," including religious activities.[16] After six months of attempting to participate without success, Mr. Ngo filed a grievance.[17] Prison officials rejected his grievance as untimely because it arrived more than fifteen working days after the first time they imposed the restriction.[18]

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14. *Id.* at 2383 (majority opinion). No adjudicative body ever found Mr. Ngo guilty of violating any prison rules, including any which would lead to administrative segregation. Brief of Respondent at 1, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 271821. The facts available do not indicate exactly what allegedly "inappropriate activity" was involved. Further, while one may wonder why Mr. Ngo was serving a prison sentence, this information, however interesting, is not relevant to the prisoner's civil rights in a § 1983 action. 42 U.S.C. § 1983 (2000).

15. *Woodford*, 126 S. Ct. at 2383.

16. *Id.*

17. *Id.* at 2384. This case involves California's grievance procedure. *Id*. at 2383–84 (citing CAL. CODE REGS. tit. 15, §§ 3084.3(c)(6), 3084.6(c) (2004)). The California grievance procedure requires an inmate to follow an administrative process to address his complaints. CAL. CODE REGS. tit. 15, § 3084.2 (2007). With some exceptions, the process requires an inmate to begin by attempting to informally resolve his dispute. *Id.* § 3084.2(b); *see also id.* §§ 3084.5(a)(3), 3084.7 (providing exceptions to the informal review requirement). As evidence of this attempt at informal resolution, when "an appellant attempts to resolve an appeal at the informal level . . . [t]he employee shall report the action taken in the response space provided on the appeal form, and shall sign and date the form." *Id.* § 3084.5(a)(2). The Code of Regulations refers to Form 602, which is used throughout the administrative process. *Id.* § 3084.2(a). The statute requires "evidence of an attempt to obtain informal level review . . . before an appeal may be accepted for formal review." *Id.* § 3084.5(a)(1); *see also id.* §§ 3084.5(a)(3), 3084.7 (providing exceptions). If a prisoner is dissatisfied with the outcome of the informal review, or if the State waives such a review, an inmate must pursue the formal review process. *Id.* § 3084.5(b).

18. *Woodford*, 126 S. Ct. at 2384. Pursuant to the California grievance procedure, an inmate initiates the formal process by completing part D of Form 602, explaining why

Mr. Ngo filed a second complaint, arguing his previous grievance was timely because the restriction from participation in religious acts was ongoing.[19] Prison officials rejected this claim as well.[20]

B. Litigation History of Woodford v. Ngo

After unsuccessfully appealing the rejection internally, Mr. Ngo sued California correctional officials for violating his civil rights under 42 U.S.C. § 1983 in federal district court.[21] His complaint stated: "'Two appeals submitted. San Quentin Appeals Office refused to process claiming time constraints for filing not met. However, my righ[ts] are still being

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he is dissatisfied with the outcome of the informal process. He submits this form to the appeals coordinator within fifteen working days. CAL. CODE REGS. tit. 15, § 3084.6(c). The reviewer completes part E of the Form to inform the inmate of the outcome of the appeal, and he returns it to the inmate within another thirty working days. CAL. CODE REGS. tit. 15, § 3084.6(b)(2).

19. *Woodford*, 126 S. Ct. at 2403 (Stevens, J., dissenting) ("[T]he denial of respondent's capacity to engage in religious activities was clearly ongoing, and thus had occurred within the prison's 15-day statute of limitations."). California procedure allows an inmate whose second request has been denied to request a second level of review. He first completes part F of Form 602 and submits it within fifteen days of the decision. CAL. CODE REGS. tit. 15, § 3084.5(c), (e)(1). The prison warden has twenty working days to provide a decision in a letter, which he attaches to the form. *Id.* § 3084.6(b)(3).

20. *Woodford*, 126 S. Ct. at 2384. Typically, if a prisoner in California is unhappy with an outcome that is based on the complaint's merits, he must explain his dissatisfaction in writing on part H and mail it to the Director of the California Department of Corrections and Rehabilitation within fifteen working days. CAL. CODE REGS. tit. 15, § 3084.5(e)(2). If an inmate does not meet the required timelines, his appeal may properly be denied. *Id.* § 3084.3(c)(6). In this case, Mr. Ngo's complaint was denied for procedural problems, not because his claim lacked merit. *Woodford*, 126 S. Ct. at 2384.

21. *Woodford*, 126 S. Ct. at 2384. Mr. Ngo was not able to pursue review to the third level because the officials denied relief on procedural grounds. If he had been able to carry his claim through all three review levels, or if the requested relief were provided, Mr. Ngo would have exhausted his administrative remedies. United States District Courts in California have held that when an inmate's requested relief has been granted, he has exhausted the administrative process. Brady v. Attygala, 196 F. Supp. 2d 1016, 1023 (C.D. Cal. 2002); Clement v. Dep't of Corrs., 220 F. Supp. 2d 1098, 1106 (N.D. Cal. 2002). Mr. Ngo filed suit under 42 U.S.C. § 1983, which provides that:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, *any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000) (emphasis added). Mr. Ngo claimed a § 1983 violation alleging prison officials were depriving him of his First Amendment right to free exercise of religion. *Woodford*, 126 S. Ct. at 2403 (Stevens, J., dissenting); U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Prisoners' religious free exercise is also statutorily protected by the Protection of Religious Exercise in Land Use and by Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000) [hereinafter RLUIPA]. *See also* Cutter v. Wilkinson, 544 U.S. 709, 720–21 (2005).

denied on an ongoing basis.'"[22] Prison officials moved to dismiss the case, claiming the prisoner had not exhausted his administrative remedies because he neglected to file his grievance within the specified time period. The district court granted the dismissal.[23]

The Ninth Circuit reversed this decision, explaining that the prisoner had fully exhausted his administrative remedies, as required by law, because there were no administrative remedies available once the statute of limitations expired.[24] The United States Supreme Court granted certiorari because of a split among the Circuit Courts of Appeals.[25] The Ninth and Sixth Circuits had held that where administrative remedies were no longer available, regardless of the reason, the administrative process was exhausted.[26] Four other Circuits required an inmate to follow all procedural requirements in order to exhaust the administrative process.[27] This meant that if an inmate did not file an administrative grievance within the prescribed time period, he would be barred from seeking relief in federal court as well.

In a split decision, with Justices Roberts, Scalia, Kennedy, and Thomas joining Justice Alito's opinion and Justice Breyer concurring, the Supreme Court held that "proper exhaustion of administrative

22. Supplemental Answering Brief of Defendants-Appellees at 2–3, Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005) (No. 03-1604), 2003 WL 23525363.

23. *Woodford*, 126 S. Ct. at 2384. Though not discussed in the Court's decision, the California Code of Regulations does not identify which *act* tolls the time limits. Here, officials repeatedly restricted Mr. Ngo's participation in religious activities and claimed the fifteen-day period began the first time they imposed the restriction. *Id.* at 2403 (Stevens, J., dissenting). However, Mr. Ngo did file his grievance within fifteen days of the most recent restriction.

24. *Id.* at 2384 (majority opinion); Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005), *rev'd*, 126 S. Ct. 2378 (2006).

25. *Woodford*, 126 S. Ct. 2378.

26. *Id.*; Ngo v. Woodford, 403 F.3d 620, 629–30 (9th Cir. 2005), *rev'd*, 126 S. Ct. 2378 (2006); Thomas v. Woolum, 337 F.3d 720, 726–27 (6th Cir. 2003). *But see* Woodford v. Ngo, 126 S. Ct. 2378 (2006) (reversing a similar holding in Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005)).

27. *Woodford*, 126 S. Ct. at 2384; Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir. 2005); Ross v. County of Bernalillo, 365 F.3d 1181, 1185–86 (10th Cir. 2004); Spruill v. Gillis, 372 F.3d 218, 230 (3d Cir. 2004); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002). Interestingly, though the Supreme Court cites the Seventh Circuit case *Pozo v. McCaughtry* as supporting the requirement for a procedural default rule, an Illinois district court case notes that there is a "*Perez* exception" provided for in dictum which allows a prisoner seeking *only* monetary damages to forego the administrative exhaustion where this remedy is not available through the prison administrative process. Nitz v. French, No. 01 C 0229, 2001 WL 747445, at *2–3 (N.D. Ill. July 2, 2001).

remedies is necessary"[28] and created a procedural default rule. Justice Stevens authored the dissent, joined by Justices Souter and Ginsberg.[29] To understand the Court's decision, it is necessary to become familiar with the PLRA, which this Note discusses in the next section.

C. The Prison Litigation Reform Act of 1995 (PLRA) and Its Predecessors

1. Prior to the PLRA, Courts Had Discretion Regarding Administrative Exhaustion

Before 1960, prisoners could not file suit under §1983.[30] During the 1960s, though, courts began recognizing prisoner rights.[31] This came about because of "[t]he combination of increased judicial activism, abrogation of long-held legal doctrine, and the obviously deplorable conditions of many state penal institutions" which "opened the door to prisoners seeking legal redress through §1983 actions."[32] Within a decade of providing inmates with access to federal court, the Supreme Court began limiting that access by taking a more deferential approach toward prison officials' decisions regarding grievances.[33] Despite this, between 1972 and 1991 the number of prisoner cases grew from approximately 3000 to more than 26,000.[34] This can be partly explained by the number of people incarcerated, which nearly quadrupled.[35] In 1980, to help deal with the increasing number of suits, Congress

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28. *Woodford*, 126 S. Ct. at 2382. Justice Breyer's concurrence is brief. He explains that his concurrence rests on his belief that Congress "intended the term 'exhausted' to 'mean what the term means in administrative law, where exhaustion means proper exhaustion.'" *Id.* at 2393 (Breyer, J., concurring) (quoting majority opinion). However, Justice Breyer departs from the majority because he believes there should be exceptions to the proper exhaustion rule, as there are in both administrative and habeas law. *Id.* He notes that the Third and Fourth Circuits have interpreted proper exhaustion in the PLRA not to be absolute, so that when prisoners "can demonstrate cause and prejudice to overcome a procedural default" or when the rule would "result in a miscarriage of justice," it would not apply. *Id.* (quoting Stevens's dissenting opinion) (internal citations omitted).

29. *Id*. at 2393 (Stevens, J., dissenting).

30. Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away With More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 208 (2004) (citing Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 422 (1993)). Prior to 1960, an inmate could not sue prison officials for inhumane or unsafe prison conditions. Eisenberg, *supra,* at 422.

31. Chen, *supra* note 30.

32. Eisenberg, *supra* note 30, at 425. This change in law allowed a prisoner to file a lawsuit challenging the conditions of confinement in which the state forced him to reside.

33. *Id.* at 426.

34. *Id.* at 435.

35. *Id.*

amended the Civil Rights Act to permit courts to require administrative exhaustion.[36]

This law, the Civil Rights of Institutionalized Persons Act (CRIPA),[37] did not appear to reduce prison litigation. CRIPA permitted district courts to require inmates to exhaust administrative procedures before filing suit.[38] However, states needed to meet certification requirements for their grievance procedures to qualify for the exhaustion requirement, and many states opted not to request certification.[39] Nevertheless, some courts exercised judicial discretion to eliminate meritless claims in other ways. But their methods lacked uniformity and had little impact on total litigation.[40] In 1995, 40,569 state prisoner civil rights lawsuits were filed in federal court.[41] In response to concerns over the number of lawsuits, Congress passed the Prison Litigation Reform Act.[42]

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36. *Id.* at 436; Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1980) [hereinafter CRIPA], *superseded by* PLRA, 42 U.S.C. § 1997e (Supp. II 1996).

37. CRIPA, 42 U.S.C. § 1997e (1980), *superseded by* PLRA, 42 U.S.C. § 1997e (Supp. II 1996).

38. Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 543 (2002).

39. *Id.* at 543 n.43. To receive certification, a state attorney general had to demonstrate his state's administrative proceedings met specific standards outlined by what was then § 1997e. Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act,* 71 IOWA L. REV. 935, 939 (1986). Congress intended the certification requirement to ensure prisoners would not be precluded from filing a federal suit unless they had adequate due process at the state administrative level. *See id.* at 937.

40. Mathews, *supra* note 38, at 543–45 (explaining the various measures courts took to curb frivolous prisoner lawsuits).

41. Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners,* 73 FORDHAM L. REV. 2289, 2294 (2005) (citing Pub. L. No. 96-247, § 7, 94 Stat. 349, 352 (1980) (codified at 42 U.S.C. § 1997e (2000))). It is worth noting that "[w]hile the number of prisoner cases can be accurately determined, the merit of such actions is not amenable to such objective determination." Eisenberg, *supra* note 30, at 436–37. Thus, while the number of lawsuits continued to grow, it is not clear that the total increase in lawsuits met with an even greater increase in meritless claims.

42. *See* Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006). The PLRA's legislative history provides little record to analyze. As one writer explained:

> Congress passed the PLRA as a rider to the Omnibus Consolidated Rescission and Appropriations Act of 1996. The debate and legislative processes leading to the passage of the PLRA were hasty, one-sided, and did not give much thought to the possible ramifications on prisoners' constitutional rights. After only one week of debate, the House passed its version on July 26, 1995. Similarly, the Senate debated the legislation for a mere five days before approving it. The bare legislative history clearly shows that there was "hardly the type of thorough review that a measure of this scope deserve[d]."

2. The PLRA Makes Administrative Exhaustion Mandatory

Congress enacted the PRLA[43] to reduce the number of meritless lawsuits filed by prison inmates.[44] Support for the PRLA began to build when attorneys general publicly promoted the notion that prisoner litigation was often frivolous. They generated a list of top ten frivolous lawsuits and distributed it to the media and Congress.[45] Four attorneys general wrote a letter published by the *New York Times* complaining that taxpayers were unjustifiably footing the bill "for the special privileges provided to prisoners when they file their suits."[46] Public reaction was strong, and it prompted creation of the PLRA to reduce frivolous prisoner lawsuits.[47] However, the information the attorneys general provided the public was misleading.[48] For example, among the list of

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Chen, *supra* note 30, at 209–10 (footnotes omitted). For a thorough explanation of the Act's legislative process and why it was not a thorough review, see Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was it Meant to?* 49 UCLA L. REV. 1655, 1659–60 (2002).

43. 42 U.S.C. § 1997e (Supp. II 1996).

44. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006); Moore v. Smith, 18 F. Supp. 2d 1360, 1362 (N.D. Ga. 1998) ("Congress enacted the Prison Litigation Reform Act (PLRA) to 'stem the tide of meritless prisoner cases.'" (citing 141 CONG. REC. S7526–27 (daily ed. May 25, 1995) (statement of Sen. Kyl))).

45. *See* Ngo v. Woodford, 403 F.3d 620, 623 (9th Cir. 2005), *rev'd*, 126 S. Ct. 2378 (2006); *accord* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks,* 62 BROOK. L. REV. 519, 520 (1996) ("[T]he attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous. Their national association canvassed the attorneys general for their lists of top ten frivolous prisoner lawsuits and widely disseminated to the press the lists the association collected.").

46. Dennis C. Vacco et al., Letter to the Editor, *Free the Courts From Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at 26. The letter states:

> Typical of such suits is the case where an inmate sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen. Or the inmate who sued because there were no salad bars or brunches on weekends and holidays. Or the case where a prisoner is suing New York because his prison towels are white instead of his preferred beige.

Id.

47. *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1772 (2003); *see also* Mathews, *supra* note 38, at 546–47 (citing 141 CONG. REC. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (explaining the goal was not to prevent legitimate claims)).

48. The peanut butter case was not actually about the *type* of peanut butter at all, but instead it was about the prison debiting the inmate's prison account for a jar of (creamy) peanut butter which the inmate did not consume and returned. Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks,* 62 BROOK. L. REV. 519, 521 (1996). Likewise, the towel color case, as one might imagine, was not about the color of the inmate's towels at all. In fact, the prisoner's complaint was that the prison confiscated towels his family had sent him, then punished him for receiving the package. *Id.* (citing Rivera v. New York, No. 90811 (N.Y. Ct. Cl. filed Dec. 21, 1994)).

frivolous cases was one involving the absence of a salad bar in prison facilities on weekends and holidays.[49] The salad bar case was not really about the availability of salad bars on weekends and holidays. Instead, it was a class action suit brought by forty-three inmates complaining of "major prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents."[50] The inmates mentioned the salad bar in passing as part of their allegations that the prison administrators had neglected inmates' nutritional needs.[51] Nevertheless, the complaint about the absence of a salad bar was cited during congressional consideration of various proposals.[52]

The PLRA's goal is to bring inmate litigation under control, and it does so via several provisions, including a requirement that district courts dismiss claims which clearly lack merit,[53] a prohibition against claims for emotional distress absent physical harm,[54] and restrictions on claims for attorneys' fees.[55] Most significantly, the PLRA requires that: "No action shall be brought with respect to prison conditions under §1983 of this title, 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."[56] This change is particularly

49. Vacco, *supra* note 46, at 26.

50. Newman, *supra* note 48, at 521 (citing Tyler v. Carnahan, No. 4 94 CV 0017WSB (E.D. Mo. filed Dec. 17, 1993)).

51. *Id.*

52. *Id.* at 522.

53. 42 U.S.C. § 1997e(c)(1) (2000) ("The court shall on its own motion or on the motion of a party dismiss any action brought . . . if the court is satisfied that the action is frivolous, malicious, [or] fails to state a claim upon which relief can be granted . . . .").

54. § 1997e(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

55. § 1997e(d) ("In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded except [within certain limitations] . . . ." (footnote omitted)).

56. § 1997e(a). A prisoner is responsible for ascertaining his facility's administrative grievance procedure, which might not be a statewide program. *See* Concepcion v. Morton, 306 F.3d 1347, 1352–55 (3d Cir. 2002) (holding that a prisoner must exhaust the administrative procedure outlined in a prison handbook but not formally adopted by the state's department of corrections).

significant because it adds a requirement that a prisoner must seek relief via his prison's grievance processes prior to filing suit.[57]

D. The Majority's Rationale for Establishing a Procedural Default Rule

The Supreme Court sought to determine whether a prisoner could satisfy the PLRA exhaustion requirement with an untimely or procedurally defective administrative grievance or appeal. It held an inmate could not.[58] This created a procedural default rule which precludes an inmate from filing a lawsuit claiming violation of federal law if he has not *properly* exhausted the administrative process.[59] The majority's rationale for this court-created rule can be broken into five basic arguments. First, the new procedural default rule will protect the prison administration's authority.[60] Second, the exhaustion requirement as interpreted will promote efficiency by reducing the quantity of lawsuits and improving their quality.[61] Third, requiring *proper* exhaustion fits the general scheme of the PLRA.[62] Next, reading a procedural default rule into the PLRA's requirements is permissible because the Court took similar action with respect to habeas corpus petitions.[63] Finally, the majority

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57. Prior to the current version of the PLRA, exhaustion only applied to § 1983 violations. Moore v. Smith, 18 F. Supp. 2d 1360, 1362 (N.D. Ga. 1998). The courts also had discretion to determine whether applying the exhaustion requirement was in the interests of justice. *Id.* (citing Gartrell v. Gaylor, 981 F.2d 254, 259 (5th Cir. 1993) (per curiam)). The earlier provision required the court to evaluate the grievance procedure to make sure it complied with minimum acceptable standards. *Id.*; *see* Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006) (quoting Porter v. Nussle, 534 U.S. 516, 523 (2002) (explaining the prior version of the PLRA made exhaustion discretionary but allowable only if the grievance system met federal standards and was "appropriate in the interests of justice")). The new version does not require the prison's grievance procedures to meet any requirements, and it applies to suit under *any* federal law, not just § 1983 violations. *Woodford*, 126 S. Ct. at 2382–83.

58. *Woodford*, 126 S.Ct. at 2382.

59. Prior to this holding, the Ninth and Sixth Circuits required mere simple exhaustion; this approach allows a suit to proceed when administrative remedies are no longer available due to missed deadlines or other procedural errors. *See supra* note 26 and accompanying text.

60. *Woodford*, 126 S. Ct. at 2385.

61. *Id*. The Court points out, for example, that litigation quality improves when there is a useful record produced by the administrative process. *Id*.

62. *Id*. at 2387.

63. *Id*. Each of the majority's arguments can be characterized as supporting public policy as identified by other statutes with similar purposes. The dissent points out: "Of course, if the majority were serious that 'what matters is not whether proper exhaustion was necessary to reach [policy goals], but whether proper exhaustion was mandated by Congress,' *ante,* at 2388 n.4, its opinion would not rest almost entirely on policy arguments." *Id.* at 2400 n.9 (Stevens, J., dissenting).

contends the statutory language connotes proper exhaustion.[64] This section explains each of these arguments in turn, and Part III explains the problems inherent in each.

1. Proper Exhaustion Requirements Protect Administrative Authority

The majority opinion explains that an administrative exhaustion requirement protects administrative agency authority.[65] By giving an agency the opportunity to correct its own mistakes, administrative exhaustion discourages disregard for agencies' procedures.[66] A procedural default requires a prisoner to file a complaint and follow the proper channels, even in instances where he may prefer bypassing the administrator by filing a suit directly in federal court.[67] The Court promotes agency authority by requiring inmates to "give the agency a fair and full opportunity to adjudicate their claims."[68] Moreover, by

64. *Id.* (majority opinion) ("The text of 42 U.S.C. § 1997e(a) strongly suggests that the PLRA uses the term 'exhausted' to mean what the term means in administrative law, where exhaustion means proper exhaustion."); *see also id.* at 2391 (discussing the use of the term *until* and the present tense in the statute).

65. The Court's general discussion of administrative exhaustion does not distinguish proper exhaustion from simple exhaustion in concluding that it protects agency authority. *See id.* at 2385. However, the majority goes on to define proper exhaustion as "demand[ing] 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." *Id.* at 2386. The question of what is *proper* is the focus of the decision in this case. Although the majority requires compliance with deadlines and other rules, the dissenting opinion disagrees. *Id*. at 2386 n.2, 2398 (Stevens, J., dissenting). Whether or not the goal of administrative authority can be achieved through simple exhaustion is discussed in Part III.A. of this Note. *See infra* notes 89–97 and accompanying text.

66. *Woodford*, 126 S. Ct. at 2385. The majority does not explicitly connect providing prison administration with an opportunity to correct its mistakes and discouraging disregard for procedures. However, this seems to be a fair reading based on the Court's presentation of this rationale.

67. *See id.* The majority's initial discussion of the benefits of preserving administrative authority and promoting efficiency via exhaustion of the administrative procedure does not distinguish procedurally *proper* exhaustion from simple exhaustion. *See id*. Yet its citations and conclusion indicate that when the majority refers to the advantages of requiring administrative exhaustion, it means proper exhaustion. *See id.* (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002) (explaining exhaustion "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).")).

68. *Id*. The majority contends a procedural default rule eliminates "unwarranted federal-court interference with the administration of prisons" and provides corrections officials the time to address complaints prior to the initiation of a federal suit. *Id.* at 2387.

requiring proper exhaustion, the Court acknowledges that administrative systems need structure to function properly; the procedural requirements of the grievance process serve that purpose.[69] The majority contends a procedural default rule respects administrative authority and encourages inmates to do the same.[70]

2. Proper Exhaustion Promotes Efficiency

The Court also argues that proper exhaustion promotes efficient resolution of complaints.[71] Under the majority's reading of the PLRA, a prisoner must completely and properly exhaust the administrative remedies *prior* to filing suit in federal court.[72] This exhaustion requirement will likely reduce the number of lawsuits because prison officials will address some grievances and grant the relief requested, making it unnecessary for those prisoners to file suit.[73] Alternatively, the grievance process

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69. *Id*. at 2386 ("Proper 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.").

70. The Court does not explicitly argue these goals cannot be met by a simple exhaustion rule. Rather, it explains how they *can* be met with a procedural default rule. *Id*. at 2385–86.

71. *Id.* (citing McCarthy v. Madigan, 503 U.S. 140, 145 (1992)); *see also* Porter v. Nussle, 534 U.S. 516, 525 (2002) ("In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation.").

72. *Woodford*, 126 S. Ct. at 2385. The PLRA leaves the details of the process up to the individual prison systems. *See* Concepcion v. Morton, 306 F.3d 1347, 1352–54 (3d Cir. 2002) (explaining that Congress intended an inmate to use his prison's administrative procedure, whether or not adopted by a state administrative agency). Most systems include a statute of limitations for filing a grievance and commencing the administrative process. These deadlines exist to aid prison officials in being fair, consistent, and orderly. Brief of Petitioners at 24–25, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 3598180. Additionally, the deadlines help ensure investigations based on fresh memories and improve a prisoner's opportunities for timely remedial action. *Id.* at 25.

73. *Woodford*, 126 S. Ct. at 2388. One issue that *Woodford* does not seem to address is the definition of exhaustion. Previous cases have defined exhaustion to include both completion of the administrative process *and* granting of relief. For example, in one California district court case, an inmate whose eye was damaged in a fight used the administrative grievance process to request an appointment with an ophthalmologist outside the prison. Brady v. Attygala, 196 F. Supp. 2d 1016, 1017–18 (C.D. Cal. 2002). Prison officials granted his request at the second level of formal review. Brady then filed suit in federal court for monetary compensation, a remedy unavailable through the grievance process. *Id.* at 1019 ("The grievance system, however, allows for the award of prospective relief, but not monetary damages (aside from a nominal amount for property damage)."). The court held that administrative procedure does not require an inmate to appeal a favorable decision. *Id.* at 1022. This suggests that where a request is granted, the inmate has exhausted the administrative remedies available and met the PLRA's exhaustion requirement. As one Illinois federal court noted, "It would be a strange rule that an inmate who has received all he expects or

may persuade a prisoner not to file suit because he is unlikely to receive the requested relief in court.[74] Additionally, the majority explains that a procedural default rule improves the quality of cases because the short time period in which a prisoner may file his complaint ensures quick identification of witnesses while memories remain fresh.[75] The Court explains that even "where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration."[76] Such a record aids the court, improving the quality of litigation.[77]

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reasonably can expect must nevertheless continue to appeal, even where there is nothing to appeal." Nitz v. French, No. 01 C 0229, 2001 WL 747445, at *3 (N.D. Ill. July 2, 2001).

74. *Woodford*, 126 S. Ct. at 2385 ("In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court." (citing Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. 185, 195 (1969))). Though the goal of the PLRA is to reduce the number of *meritless* lawsuits, the majority opinion appears to focus on reducing the *overall* number of lawsuits inmates file in federal court. *See infra* Part III.B.1.

75. *Woodford*, 126 S. Ct. at 2388. Permitting inmates to exhaust administrative remedies beyond a strict time limitation makes sense in light of the brief period of time provided to a prisoner to file his grievance. *See* Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, app. at 2–5.

76. McCarthy v. Madigan, 503 U.S. 140, 145 (1992). In *Woodford*, the Court does not discuss the goal of protecting administrative authority specifically. Instead, the *Woodford* Court refers to its earlier decision in *McCarthy v. Madigan*. *Woodford*, 126 S. Ct. at 2388. Though the PLRA superceded the Court's *McCarthy* holding, the rationale remains valid. In *McCarthy*, the Supreme Court explains that exhaustion doctrine shows deference to congressional delegation of authority in coordinating the branches of government. *McCarthy*, 503 U.S. at 145, *superseded by* PLRA, 42 U.S.C. § 1997e (Supp. II 1996). In *McCarthy*, the Court explained: "[T]he exhaustion doctrine recognizes the notion . . . that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *Id.* Further, the Court points out that "[e]xhaustion concerns apply with particular force" to agencies exercising discretionary power or special expertise. *Id.* Finally, the Court notes that it is a "commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Id.* Allowing individuals to bypass the administrative process may weaken an agency's effectiveness "by encouraging disregard of its procedures." *Id.* (citing McKart v. United States, 395 U.S. 185, 195 (1969)). The *Woodford* Court specifically emphasizes the strength a state has in its prison system: "[I]t is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford*, 126 S. Ct. at 2388 (quoting Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973)). However, in comparing habeas law to the PLRA exhaustion requirement, the Ninth Circuit noted that the state's interests are not the same: "A state's sovereignty . . . is less threatened when a federal court reviews a 'non-criminal state administrative process' for

3. Proper Exhaustion Eliminates Frivolous Lawsuits

The majority's third main argument for creating a procedural default rule is that it promotes the public policy intended by the PLRA, because this rule eliminates meritless lawsuits and prevents an inmate from intentionally bypassing the administrative procedure.[78] The Court characterizes the purpose of the PLRA as intending to "deal with what was perceived as a disruptive tide of frivolous prisoner litigation," and it suggests simple exhaustion would permit an inmate to circumvent the administrative remedies intended to weed out such meritless cases.[79] The majority opinion explains that it could not support an interpretation that fails to "proscribe[] deliberate bypass"[80] and concludes that it must create a procedural default rule, lest its reading of the rule be "unlike any other exhaustion scheme."[81]

4. PLRA Exhaustion Requirements Are Analogous to Habeas Corpus Exhaustion Requirements

Next, the majority opinion suggests that the PLRA exhaustion requirement is comparable to the exhaustion requirement in habeas petitions, which operate under a procedural default rule. In habeas law, a prisoner must "exhaust state remedies before filing a habeas petition in federal court."[82] The purpose of this rule is to respect federalism and avoid the indecorum of a federal court overturning a state court decision without providing the state court an opportunity to correct its own error.[83] In habeas law,

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violations of constitutional rights compared to when a federal court reviews a collateral attack on a sovereign state court's judgment." Ngo v. Woodford, 403 F.3d 620, 628 (9th Cir. 2005), *rev'd*, 126 S. Ct. 2378 (2006).

77. When the court speaks of efficient resolution throughout the *Woodford* case, it speaks both of reducing the *number* of lawsuits and improving the *quality* of lawsuits.

78. *Woodford*, 126 S. Ct. at 2388–89. The majority does not appear to offer a positive construction of why its interpretation of the PLRA reduces *frivolous* suits; nor does it discuss how a procedural default rule would eliminate intentional circumvention of the administrative process. It merely suggests a simple exhaustion approach would not achieve either of these goals. *Id*.

79. *Id*.

80. *Id.* at 2390.

81. *Id.* This section of the majority opinion does not explain in depth how a simple exhaustion rule promotes circumvention of procedural requirements. However, the inference is that a prisoner could bypass administrative procedures by intentionally waiting until administrative time limits had expired and then filing his complaint in federal court.

82. *Id.* at 2386; 28 U.S.C. § 2254(b)(1), (c) (2000).

83. *Woodford*, 126 S. Ct. at 2386 (quoting O'Sullivan v. Boerckel, 536 U.S. 838, 845 (1999) ("This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state-

procedural default and administrative exhaustion are two separate doctrines; procedural default is the court-created sanction for failure to properly exhaust state court remedies.[84] In both cases, remedies are correctly defined as simply "'exhausted' when they are no longer available, regardless of the reason for their unavailability."[85] The Court explains:

> [I]f state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted . . . but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding.[86]

The Court concludes that just as habeas law incorporates a preclusion rule following improper administrative exhaustion, so should the PLRA.[87]

5. The Language of the PLRA Supports a Proper Exhaustion Reading

Last, the Court concludes the plain language of the PLRA does not support a simple exhaustion reading. Without elaboration, the majority states that "saying a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court."[88]

III. THE MAJORITY OPINION INCORRECTLY INTERPRETS THE PLRA

The creation of a new procedural bar is unfounded; the PLRA only requires simple exhaustion. This section addresses each of the majority's arguments in turn by offering criticism of the Court's analysis and conclusions.

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court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.")).

84. *Id*. at 2386–87.

85. *Id.* at 2387 (citing Gray v. Netherland, 518 U.S. 152, 161 (1996)).

86. *Id*. at 2387 (internal citations omitted) (citing *Gray,* 518 U.S. at 161 and Coleman v. Thompson, 501 U.S. 722, 731–32 (1991)).

87. *Id*. at 2386.

88. *Id*. at 2391.

A. The New Procedural Default Rule Does Not Enhance Administrative Authority

One of the major principles promoted by an exhaustion requirement is the protection of administrative authority to correct errors in the system.[89] This rationale does not justify finding the PLRA requires a procedural default. Barring a prisoner from filing suit because he missed administrative procedure deadlines does not protect prison officials' authority any better than not banning such a suit.

Prison officials already have discretion in most jurisdictions to address procedurally defective claims.[90] The prison administration retains control over grievances if it so chooses. In fact, a simple exhaustion rule does not excuse an inmate from filing a grievance.[91] Most state prison systems already provide administrators with the discretion to hear procedurally defective claims. Where such discretion exists, a prisoner must still file the complaint and await its rejection on procedural grounds prior to filing suit in federal court.[92] Thus, if a prisoner ignores time restrictions and files a lawsuit after the time limits have expired, his lawsuit would not be redressable by the court because he would not have exhausted the administrative remedies required under the PLRA.[93]

For instance, Mr. Ngo's situation indicates procedurally defective prison grievances promote administrative authority. Here, Mr. Ngo filed a grievance with the California prison system pursuant to California's requirements.[94] However, the prison administrators rejected his claim because it was not timely.[95] They could have instead reviewed the case

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89. *Id.* at 2385. The Court's explanation of this reason for finding an administrative default rule is discussed more completely in Part II.D.1. *See supra* notes 65–70 and accompanying text.

90. *Woodford*, 126 S. Ct. at 2400 (Stevens, J., dissenting).

91. A simple exhaustion requirement would not *encourage* an inmate to file a timely grievance. However, given the disadvantage to filing a stale complaint, there is still some incentive to file a timely grievance. *See supra* notes 75–77 and accompanying text; *see also infra* note 110 and accompanying text.

92. *Woodford*, 126 S. Ct. at 2400.

93. *Id*. at n.10 ("If a prison regulation explicitly grants prison officials discretion to consider untimely or otherwise procedurally defective grievances, of course prison grievance remedies would still be 'available,' and thus unexhausted, if a prisoner had not even tried to file a grievance simply because it was untimely or otherwise procedurally defective."). The majority of jurisdictions provide prison administrators discretion to entertain untimely complaints. Roosevelt III, *supra* note 47, at 1810. It is not clear if all jurisdictions explicitly provide prison officials the discretion to hear untimely grievances. However, the absence of such a provision would not necessarily preclude the power to do so.

94. *Woodford*, 126 S. Ct. at 2383–84.

95. *Id.*

on its merits and provided relief.[96] Mr. Ngo respected the authority of the prison system by filing his complaint and appealing its rejection. The majority does not make a clear argument as to *why* the procedural default rule is necessary to demonstrate respect for administrative authority in a case like Mr. Ngo's. If the Court considered the substance of Mr. Ngo's lawsuit because he met the simple exhaustion requirements, it would still have shown appropriate respect for the officials' authority. Even an exhaustion *simpliciter* requirement does what the majority calls for; it "provides prisons with a fair opportunity to correct their own errors."[97]

Moreover, one wonders why it is better to provide the State with ultimate power and control over its prison grievances than to offer a backup method of correcting the system's flaws and providing justice, knowing that some of the existing problems—including violations of basic constitutional rights—will not be resolved. While the majority explains that the State has a strong interest in the administration of its prisons, this does not justify permitting continued harm, particularly where the interests of justice *and* the interests of State sovereignty can be served simultaneously otherwise.

B. The Procedural Default Rule Promotes Efficiency at the Expense of Justice

The majority opines that a procedural default rule promotes efficiency both by reducing the quantity of cases and improving the quality of the records in cases that prisoners *do* file.[98] However, while a procedural default rule may actually reduce the number of lawsuits and establish quality records, such efficiency is not worth the price it commands. This focus on efficiency ignores the true intent of the statute, which is to

96. "California, like the vast majority of state prison systems, explicitly gives prison administrators an opportunity to hear untimely or otherwise procedurally defective grievances." *Id.* at 2400 (Stevens, J., dissenting) (citing CAL. CODE REGS. tit. 15, § 3084.3(c)).

97. *Id.* at 2387–88 (majority opinion). In citing the advantages of proper exhaustion, the majority explains the importance of allowing prisons to correct themselves. *Id.* However, this goal appears to be achievable with either proper or simple exhaustion.

98. *Id*. at 2388. The term *efficiency* in this Note addresses the speed with which a court can litigate a case, due to both the number of cases before it and the quality of the record in those cases. For a detailed explanation of the Court's position on efficiency resulting from the PLRA, see Part II.D, *supra* notes 71–77 and accompanying text.

create a more efficient system by minimizing the number of *frivolous* lawsuits.[99]

1. A Proper Exhaustion Requirement May Not Reduce the Number of Cases Filed in Federal Courts

The first part of the efficiency argument is that proper exhaustion will lead to fewer lawsuits. However, a procedural default rule would not necessarily reduce the number of *filings* in federal court. And even if such a rule *does* reduce the number of filings, one must balance this against the costs of doing so. A study comparing filings before and after enactment of the PLRA showed a dramatic drop in the number of suits filed, even *without* a procedural default rule in place.[100] The majority contends the likely causes of the reduction are two of the PLRA's requirements: first, that the district court screen prisoner civil complaints before docketing whenever possible; and second, a prohibition on frequent filers from proceeding *in forma pauperis*.[101]

As the majority points out, the study cited by the dissent is correlative, not causal.[102] Given this, it is not possible for the majority to know the additional provisions it cites are the cause of the reduced number of lawsuits.[103] Regardless of which element of the PLRA is responsible for reducing the number of suits filed, it *is* clear the goal of efficiency has been met *absent* a procedural default rule. Presumably, the reduction in suits has already allowed courts to proceed through litigation on the merits more efficiently, because when there are fewer cases filed, courts have more time to attend to evaluating their merits. However, it is not entirely clear that a procedural default rule would actually significantly reduce the number of cases *filed* in federal court.[104] It would likely reduce the number of cases ultimately litigated by dismissing all cases suffering a procedural error. But even dismissals take up courts' time

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99. In other words, though the majority concedes the goal of the PLRA is to reduce the number of meritless lawsuits, it seems to attempt to achieve this end by reducing the total number of lawsuits. *Woodford*, 126 S. Ct. at 2388.

100. *Id.* at 2400 (Stevens, J., dissenting). The number of prisoner civil rights suits filed in federal court was 41,679 in 1995, prior to the PLRA's enactment. *Id.* In 2000 the number had dropped to 25,504. *Id.* The ratio of prisoners filing suits also dropped from 37 for every 1000 inmates to only 19 per 1000 inmates during that same period. *Id.* This reduction in prison litigation occurred before the first appellate decision to add a procedural default sanction to the PLRA. *Id.*

101. *Id.* at 2388 n.4 (majority opinion); *see also* 28 U.S.C. §§ 1915, 1915A (2000).

102. *Woodford*, 126 S. Ct. at 2388 n.4.

103. *See id.* at 2400 n.11 (Stevens, J., dissenting).

104. It is not clear whether or not new cases that have violated the procedural default rule would be dismissed prior to placement on the docket, thereby potentially reducing crowding of the courts' calendars, though presumably it would.

and resources. Thus, a procedural default rule will not necessarily significantly improve efficiency by attempting to reduce the number of lawsuits.

For instance, if a procedural default rule were in place in California at the time of Mr. Ngo's case, it is not certain that he would have opted *not* to file his lawsuit in federal court. The federal court would have had to dismiss it because of the administrative authority's finding that there was a procedural error. However, the dismissal itself would require court resources, suggesting no greater efficiency than a simple exhaustion rule would provide.[105]

Of course, if the courts screen the cases prior to docketing, a procedural default rule will reduce the number of cases. The cost of doing so is the rejection of potentially meritorious cases which have suffered procedural errors.[106] Efficiency should not prevail at the price of ignoring meritorious claims. The goal of the PLRA is not a reduction in the overall number of suits; it is to keep *frivolous* suits out of the federal system.[107] Otherwise, why allow a prisoner to bring a case into the federal court system at all? Why not just prohibit all cases from judicial review? The answer to these questions is in *balancing* proper administrative power with providing relief in cases where it was not

105. Of course one might argue that it takes much less time to dismiss a case for procedural error than to allow it to proceed through litigation. However, the Court does not address whether or not federal courts will review the administrative authority's finding of a procedural default. It is certainly possible courts will hear arguments regarding the accuracy of the finding, requiring court resources to address the procedural question.

106. *See Woodford*, 126 S. Ct. at 2388 n.4. The dissenting opinion acknowledges that "the majority's creation of a waiver sanction for procedural missteps during the course of exhaustion will have an even more significant effect in reducing the number of lawsuits filed by prisoners." *Id.* at 2401 (Stevens, J., dissenting). The overall numbers might also decline if the procedural default rule effectively discouraged prisoners from filing federal lawsuits after procedural errors.

107. The majority complains that PLRA suits comprised between 8.3% and 9.8% of new filings in federal courts, which averaged to "one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country." *Id*. at 2388 n.4 (majority opinion) (citing Administrative Office of the United States Courts, Judicial Facts and Figures, tbls. 1.1, 4.4, 4.6 (2006), http://www.uscourts.gov/judicialfacts figures/2006/alljudicialfactsfigures.pdf). However, the majority offers no basis upon which to conclude that this proportion is inappropriate. The goal of the PLRA is to reduce frivolous lawsuits, not total numbers. *See supra* notes 43–44 and accompanying text.

properly granted.[108] Thus, it is not clear that *proper* exhaustion via a procedural default rule is the best way to create efficiency in the quantity of suits before the federal court. Although a procedural default rule will likely reduce the total number of suits to some degree, the gains in efficiency are not likely to be significant enough to warrant the resulting injustice. The best way to keep the number of *frivolous* lawsuits down is to apply a simple exhaustion rule, as California did until the holding in this case.[109]

2. The Procedural Default Rule Does Not Result in Higher Quality Lawsuits

With respect to the *quality* of suits filed in court, the majority opinion explains: "When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved."[110] While this makes sense as a general rule, it is not clear that the time periods prescribed by the grievance procedures justify such a position. In fact, the suggestion leads one to wonder how long is too long. The majority of administrative remedies appear to set a time limit of approximately three calendar weeks to file a complaint, but limits range from twenty-four hours to one year.[111] Certainly a line must be drawn at

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108. As one amicus brief points out, "engrafting a procedural default rule onto the PLRA would improperly interfere with a prisoner's right to pursue valid constitutional claims." Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 5, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 282165 ("'[P]risoners have a constitutional right of access to the courts.'" (quoting Bounds v. Smith, 430 U.S. 817, 821 (1977), *overruled on other grounds by* Lewis v. Casey, 518 U.S. 343, 354 (1996))). The ABA Brief explains that "[t]he PLRA did not change the principle that federal courts must take cognizance of the valid constitutional claims of prison inmates." *Id.* at 6. Further, the dissent quotes *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam), in support of this notion:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Woodford, 126 S. Ct. at 2401 (Stevens, J., dissenting) (quoting *Rodriguez*, 480 U.S. at 525–26 (emphasis omitted)). This is not to say that the legislative intent is irrelevant, but instead that it must be balanced against rights guaranteed by the Constitution. *Id.* at 2404 ("[T]he majority's interpretation of the PLRA may cause the statute to be vulnerable to constitutional challenges.").

109. While an argument in favor of efficiency does not distinguish meritorious suits from frivolous ones, it is this writer's contention that not doing so would ignore the PLRA's goal of limiting the number of frivolous lawsuits.

110. *Woodford*, 126 S. Ct. at 2388.

111. *Id*. at 2402 (Stevens, J., dissenting); Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, app. at 2–5.

some point, but imposition of an arbitrary limit does not mean that prison officials will be unable to locate witnesses, that memories will have faded, or that evidence will have been forever lost because a prisoner files a grievance after that time limit.[112]

Regardless of how long after the deadline an inmate files a grievance, prison officials have the discretion to address a prisoner's grievance and create "an administrative record that is helpful to the court."[113] It is not clear, however, that officials must include any particular information in the record to improve case quality. Whatever information arrives at the federal court from administrative exhaustion, even untimely administrative exhaustion, would certainly aid the courts, because any information is helpful. Further, although the Court limits its discussion of quality to the record available, the quality of lawsuits rests just as much on the *merits* of the case. Eliminating suits for procedural errors most certainly means eliminating meritorious suits deserving of judicial attention.[114] Thus, the overall quality of suits may actually be harmed by the procedural default rule.

112. Likewise, even where there is a short time limit for filing grievances, witnesses could have been transferred or released, memories could become inaccurate, and evidence could be lost.

113. *See Woodford*, 126 S. Ct. at 2388; *see also id*. at 2401 (Stevens, J., dissenting). The majority of jurisdictions provide prison administrators discretion to entertain untimely complaints. Roosevelt III, *supra* note 47, at 1810. It is not clear if all jurisdictions explicitly provide prison officials the discretion to hear untimely grievances. However, the absence of such a provision would not preclude the power to do so.

114. Roosevelt III, *supra* note 47, at 1814 ("[T]here is no reason to think that this [procedural default] approach would pick out frivolous suits, and some reason to think it would not."); Slutsky, *supra* note 41, at 2318 ("The categorization of inmate litigation as frivolous, however, has led to significant limitations on both meritorious and trivial claims alike."). Professor Margo Schlanger conducted a study of inmate litigation trends. She explains: "Numerous researchers who have conducted systematic reviews of case records have concluded that a large portion of inmates present serious claims that are supported factually, and that even most frivolous cases are neither fanciful, ridiculous, nor vexing." Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1692 (2003) (internal quotation marks and citations omitted). Though the Court limits its discussion of lawsuit quality to efficiency via accurate records before the court, this ignores the notion that the quality of a lawsuit is not only about efficient resolution. Instead, in discussing the quality of a suit, the Court should have considered the merits of the cases, even though this does not go directly to the issue of efficiency.

C. A Procedural Default Rule is Not Necessary to Combat Circumvention of the Administrative Exhaustion Requirement

The Court's third major argument is that creating a procedural default rule creates an incentive for an inmate to comply with grievance procedure requirements.[115] While the majority's concern is logical, the dissenting opinion explains that an inmate typically lacks both the incentive and the capacity to intentionally circumvent administrative requirements. Bypassing the grievance process provides little benefit to an inmate in the final substantive outcome of the complaint, because the federal court's review of prison officials' decision is de novo, offering no deference to prison officials.[116] Additionally, prison officials can "thwart efforts by prisoners to avoid the grievance process by simply exercising their discretion to excuse any procedural defect in the presentation of the prisoners' claims."[117] In other words, if prison officials were concerned that inmates were strategically bypassing administrative review, officials could opt to conduct the administrative review on the merits of the complaint.[118]

Despite the majority's concern that simple exhaustion will lead to circumvention, there is no real strategic advantage to withholding an administrative claim.[119] Proper exhaustion likewise allows an inmate to intentionally bypass administrative procedures by sabotaging his grievance on substantive grounds.[120] "A rule that keys on procedural error, then, will not stop clever inmates who do not wish to give the grievance proceedings a fair shake; it will simply redirect their efforts into substantive issues. What it will do is catch the less sophisticated and less

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115. *Woodford*, 126 S. Ct. at 2388. The primary concern here is that a prisoner could intentionally miss filing deadlines without providing any explanation to strategically bypass the administrative process. *See id*.; *see also* Brief of Petitioners, *supra* note 72, at 29 ("[T]he PLRA's exhaustion mandate is rendered meaningless by a rule that permits prisoners to 'exhaust' state remedies by not complying with the available state process."). Though the opinion emphasizes circumvention of the administrative process via violations of time limits, the Court noted that an inmate could also get around the exhaustion requirements by ignoring or violating other procedural requirements as well. *Woodford*, 126 S. Ct. at 2388. For a more complete discussion of the Court's rationale, see Part II.D.3. *See supra* notes 78–81 and accompanying text.

116. *Woodford*, 126 S. Ct. at 2402 (Stevens, J., dissenting).

117. *Id*.

118. *See supra* notes 90–93 and accompanying text. This would have the additional bonus of demonstrating administrative authority in a situation where an inmate believed he was outwitting officials.

119. Roosevelt III, *supra* note 47, at 1810.

120. *Id*.

informed who are unable to satisfy complex and demanding procedural requirements."[121]

This leaves just one major reason for a prisoner to *intentionally* circumvent the administrative exhaustion requirement: fear of retaliation from prison guards and officials.[122] If an inmate delays in filing a grievance for fear of physical or psychological retaliation, the procedural default rule would discourage filing a complaint altogether, because an inmate would run out of time to state his grievance. "By contrast, a simple exhaustion rule encourages inmates to report problems, and allows prison officials to determine whether they will seek to remedy them or decline to do so on the grounds that the information is too stale."[123] An inmate does not avoid exhaustion requirements under either the procedural default rule or the simple exhaustion rule. However, grievances initially unfiled for fear of retaliation would never be heard under a procedural default rule. Under a simple exhaustion rule, on the other hand, an inmate would have time to build courage prior to filing his suit.

Moreover, not only would a simple exhaustion rule not encourage circumvention of the administrative process, but because an inmate would ultimately have to file his grievance via the appropriate procedure prior to filing a federal action, this rule provides prison officials the opportunity to hear the case on its merits and resolve any problems.[124] As one amici notes, procedural default rules are designed to ensure finality to administrative and legal decisions, whereas prison grievance procedures serve as a management tool.[125] They bring attention to officials who have the ability to correct problems in the system.[126] This suggests that *untimely* grievances would serve an important function by promoting administrative autonomy and ensuring improvement in prison conditions, because they would still alert prison officials to problems.

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121. *Id*.
122. Woodford v. Ngo, 126 S. Ct. 2378, 2402 (2006). There may be other reasons for attempting to bypass procedural requirements, including fear of retaliation from other inmates and embarrassment.
123. Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, at 13–14.
124. State statutes of limitation for personal injury actions govern § 1983 actions, protecting federal officials in cases with stale facts. *Id*.
125. *Id*.
126. *Id*.

D. It is Improper to Analogize the Procedural Default Rule in Habeas Corpus Law to the Exhaustion Requirement in the PLRA

Finally, the Court analogizes the judicially-created procedural default rule with federal habeas corpus law. Both require exhaustion at the state level prior to filing in federal court.[127] In habeas petitions, if a prisoner makes a procedural error at the state level, including missing a deadline, the remedies available at the state level have been exhausted.[128] Yet there, courts distinguish between exhaustion and barring future litigation on the issue.[129] Because improper exhaustion of state remedies in habeas law precludes state prisoners from filing federal lawsuits, it is easy to see how the majority concluded that habeas law lends support to a procedural default sanction under the PLRA.

However, a procedural bar may be appropriate in habeas law for reasons that are inapplicable to PLRA litigation. First, habeas cases usually involve multiple issues, while PLRA litigation may be about a single incident.[130] Where a prisoner files a habeas petition that includes a mixture of exhausted and unexhausted issues, he has the option of deleting and forfeiting the unexhausted claims and proceeding or requesting a stay so he may return to state courts to pursue the unexhausted claims

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127. *Woodford*, 126 S. Ct. at 2386; *see also* 28 U.S.C. § 2254(b)(1), (c) (2000).

128. *Woodford*, 126 S. Ct. at 2387 ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."); *id.* at 2396 (Stevens, J., dissenting) ("[A] habeas petitioner satisfies the statutory exhaustion requirement so long as state-court remedies are no longer available to him at the time of the federal-court filing, regardless of the reason for their unavailability."). For a more complete discussion of the Court's explanation connecting the comparison between habeas law and the PLRA, see Part II.D.4. *See supra* notes 82–87 and accompanying text.

129. For instance, if the California Supreme Court opts not to hear the merits of a case because of a procedural default at the state level, the state court remedies have been exhausted. However, the federal courts will not take up the case, despite the exhaustion of all available state remedies, because the procedural errors resulted in a forfeiture of review.

130. For example, in *Harper v. Laufenberg*, No. 04-C-699-C, 2005 WL 79009 (W.D. Wis. Jan. 6, 2005), prison officials dismissed a claim for procedural error where the prisoner complained that he was encouraged to commit suicide by a prison employee, but wrote that it was a "medical complaint." *Id.* at *1. The Wisconsin Administrative Code allows only one issue on each complaint, and officials expressed confusion over whether this was a complaint about the actions of the prison employee or a grievance requesting psychological care. *Id.* at *3. Although his original complaint was filed within the fourteen-day statute of limitations, his resubmission to correct his error did not relate back to the original filing, and the examiner dismissed the case without reviewing its merits. *Id.*

first.[131] Thus, a habeas petitioner will still have his day in court with respect to the *broader* questions of both the appropriateness of the conviction and length of sentence. However, a PLRA litigant who made a procedural misstep will not likely have his day in court at all; his *entire* claim will probably be barred because there is no administrative remedy available if the time limit expires and there is only one claim.[132]

Another difference between federal habeas petitions and claims by PLRA litigants is that the courts recognize that the quality of argumentation and the reason for non-exhaustion will vary between practitioners and pro se litigants in habeas petitions but not in PLRA cases. Courts read pro se petitions in habeas cases more liberally than those drafted by attorneys so that the requirements do not become a trap for the unschooled pro se inmate.[133] However, in cases brought under the PLRA, almost *all* litigants are pro se and must not only meet the court procedural requirements, but must first navigate the administrative procedures set forth by their prison systems.[134] This allows correctional

131. BRIAN R. MEANS, FEDERAL HABEAS PRACTITIONER GUIDE § 64 (2006) (citing Rose v. Lundy, 455 U.S. 509, 518–19 (1982)). A habeas corpus petition operates as follows: The prisoner appeals his conviction or length of prison sentence with state appellate courts. He may provide a number of reasons to justify his claims, such as ineffective assistance of counsel, improper jury instructions, or improper admission of evidence. Next, he files a petition for review at the state supreme court level. *See id.* § 6. He must file the petition within the prescribed period of time to exhaust the available remedies. *See id.* § 9. If the state supreme court declines to review the appeal, the federal courts consider the remedies at the state level to be exhausted. *See id.* § 6. However, if the petition to federal court for habeas review includes issues not raised anywhere at the state level, those claims have not been exhausted. This results in a mixed petition. *See id.* §§ 27, 64. Federal courts may not address mixed petitions for reasons of comity, not jurisdictional limits. Rose v. Lundy, 455 U.S. 509, 515, 518–19 (1982)).

132. Some prison grievances include more than one claim and are called mixed complaints. The PLRA is silent on how to address these cases. For a thoughtful discussion of how to approach a mixed complaint, see Slutsky, *supra* note 41, at 2315–18. Some prisons require inmates to file separate forms for each complaint to avoid having any mixed complaints to address. *See* Brief for the American Civil Liberties Union et al., *supra* note 7, at 26–27 (citing Harper v. Laufenberg, No. 04-C-699-C, 2005 WL 79009, at *3 (W.D. Wis. Jan. 6, 2005) (finding a prisoner's complaint to be procedurally inadequate for failing to file separate forms for each complaint)).

133. Sanders v. Ryder, 342 F.3d 991, 999 (9th Cir. 2003) ("[F]or the purposes of exhaustion [in habeas corpus petition cases], *pro se* petitions are held to a more lenient standard than counseled petitions."); *see also* Peterson v. Lampert, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc) ("[F]or purposes of exhaustion, counseled petitions in state court may, and sometimes should, be read differently from pro se petitions.").

134. *See Harper*, 2005 WL 79009, at *3. In *Harper*, once the prisoner turned in the procedurally defective grievance, he had sealed his fate. Even though he filed the

officials to design the grievance procedures in a way that makes it difficult for an inmate to maneuver properly so he may obtain relief,[135] a decidedly different result than one which gives leniency to a pro se applicant attempting to exhaust the required remedies. Even if a court were to read the claim's contents liberally, under the holding of *Woodford* it is not likely a court would consider the substantive merits of the complaint. The *Woodford* decision mandates strict adherence to the administrative procedures prior to filing suit at all; a court is not likely to

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complaint within the prescribed statute of limitations, the procedural problem precluded relief. If he appealed the original rejection, he would have lost because the complaint was unclear as to whether it was regarding one action or two actions. Moreover, it would have been impossible to meet the timeliness requirement because he filed the grievance at the end of the permissible term and there was "no provision in the Wisconsin Administrative Code that require[d] an institution complaint examiner to accept a revised complaint filed after the 14-day period . . . as having been filed on the date the original complaint was submitted *or returned*." *Id.* (emphasis added). In other words, the fourteen-day period began tolling on the date of the incident, and the prisoner had to file a procedurally adequate complaint within that time. One amicus brief explains: "[T]he procedures that prisoners are required to navigate are not restricted to compliance with short filing deadlines, but they may encompass a variety of pleading and other formal requirements." Brief of the American Bar Association, *supra* note 108, at 7. The ABA Brief cites *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), as "holding that exhaustion has not occurred unless the prisoner files a grievance in the place, at the time, and with the level of detail required by the prison administrative rules." *Id.* (citing *Strong*, 297 F.3d at 649). Further, the PLRA applies to local jails and detention centers, as well as prisons. "[T]he smaller and more local the facility, the more difficult it is to obtain a copy of its grievance policy." Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, at 12. Thus, detainees must determine what the rules of the particular institution housing them require in order to properly exhaust the administrative remedies.

135. Brief of the American Bar Association, *supra* note 108, at 7. Adult inmates, a large number of whom are illiterate or have poor reading skills, may have difficulty complying with the administrative exhaustion requirements. *See* Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, at 20 ("The National Adult Literacy Survey (NALS), conducted in 1992 by the United States Department of Education, concluded that the vast majority of inmates—seven out of ten—operate at the lowest two levels of literacy on a five-level scale.") (citing U.S. DEPT. OF EDUCATION, OFFICE OF EDUCATION AND RESEARCH, LITERACY BEHIND PRISON WALLS: PROFILES OF THE ADULT PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii (1994)). Further, indigent inmates have limited access to legal information within the strict time limits of the grievance procedures. *Id.* at 21–22. Even when an inmate can determine the appropriate procedure, his complaint may be rejected because prison conditions do not allow him to meet the requirements. For instance, in *Keys v. Craig*, 160 Fed. Appx. 125 (3d Cir. 2005), an inmate proceeded through two levels of administrative review properly. *Id.* at 126. However, when he reached the third level, he did not attach copies of required documents. *Id.* He explained that the prison took two weeks to make the photocopies for him, so he sent the remaining paperwork ahead for appeal while he waited for the copies. *Id.* When the copies arrived, he forwarded them attached to a note explaining their delay. *Id.* The court held this action to be procedurally defective and dismissed his federal lawsuit. *Id.*

consider the substantive claims if the procedural requirements have not been met.[136]

Finally, the judicially created habeas corpus procedural default rule is distinguishable because it intends to protect state *court* powers while the *Woodford* rule intends merely to protect the powers of an administrative agency. The Court has recognized the difference between a procedural default rule in habeas corpus petitions and administrative exhaustion.[137] However, the reason for application of the procedural default rule in habeas law is one of comity and federalism; it does not apply in the PLRA administrative exhaustion context. The Court explains:

> Without the [procedural default] rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.[138]

The interests of a State in effectuating its own criminal justice system cannot be said to equate with the interests of the State in running its prison system, a mere subset of the criminal justice system. Yet that is what the *Woodford v. Ngo* holding seems to do. Section 1983 claims simply "do not raise the same concerns about the autonomy of state courts as habeas corpus challenges to the confinement itself."[139] After administrative exhaustion, §1983 cases are reviewed *de novo*, providing no deference to the prison administration on issues of law or fact.[140] The purpose of these claims is "not to obtain direct review of an order entered in the grievance procedure, but to obtain redress for an alleged violation of

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136. *See supra* notes 105–06 and accompanying text.

137. The Court in *Woodford* discusses both administrative exhaustion and the procedural default rule in habeas cases as being the same in practical terms despite using different terminology. *See* Woodford v. Ngo, 126 S. Ct. 2378, 2387 (2006) ("In practical terms, the law of habeas, like administrative law, requires proper exhaustion . . . . The law of habeas, however, uses terminology that differs from that of administrative law.").

138. Coleman v. Thompson, 501 U.S. 722, 730–31 (1991).

139. Brief of the American Bar Association, supra note 108, at 14 (citing Wilkinson v. Dotson, 544 U.S. 74 (2005)). The Court in *Wilkinson* explained:

> Our earlier cases, however, have already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement.

Wilkinson v. Dotson, 544 U.S. 74, 84 (2005).

140. *Woodford*, 126 S. Ct. at 2399 (Stevens, J., dissenting).

federal law committed by state corrections officials."[141] Unlike habeas cases, PLRA cases "bear no resemblance to appellate review of lower court decisions,"[142] suggesting that concerns of comity and federalism are also not equally warranted. It would therefore be improper to establish a proper exhaustion requirement for PLRA litigants simply because one exists for habeas petitioners.[143]

E. The Plain Text of the PLRA Supports Finding a Simple Exhaustion Requirement

While the majority opinion emphasizes an underlying public policy rationale, it is significant to note what the majority opinion does *not* provide as a positively constructed reason for creating a procedural default: the statute's plain text.[144] In fact, "[t]he majority does not claim that the plain language of the statute dictates its decision, but rather that the text 'strongly suggests' that the PLRA includes a procedural default sanction."[145] In determining the meaning of the statute's plain text, one need look no further than case law in which the Court has provided "a definitive interpretation of the language in one statute" which is "nearly identical [to the] language in another statute."[146] In such an instance, the Court interprets language in the second statute identically, unless there is some "clear indication in the text or legislative history" that it should not do so.[147] The dissent provides such an analysis in its opinion.[148]

Comparing the language of the habeas corpus statute in 28 U.S.C. § 2254 to the language of the PLRA, the dissent concludes that the PLRA, *like the habeas statute*, creates only simple exhaustion.[149] The

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141. *Id*.
142. *Id*.
143. The habeas analogy simply does not work:

> The policy aims served by the procedural default doctrine in the habeas context . . . are generally irrelevant to suits under the PLRA. Exhaustion via neglect is impossible; deliberate bypass could be achieved by other means, given the lack of collateral consequences; and the federalism concern that drove the *Wainwright* Court to identify state courts as preferred forums is absent. The habeas analogy is simply not a very good one.

Roosevelt III, *supra note* 47, at 1811.
144. *Woodford*, 126 S. Ct. at 2391.
145. *Id*. at 2395 n.2
146. *Id*. at 2395.
147. *Id*. (referencing United States v. Wells, 519 U.S. 482, 495 (1997)).
148. *Id.* at 2395–96.
149. *Id*. Though habeas law carries with it a procedural default, this is the result of judge-made law, not a plain reading of the language. *Id.* at 2396 n.5. Recall that the majority and dissenting opinions concur that the habeas statute itself does not create such a procedural default. *See* note 131 and accompanying text. Even though the Court focuses on exhaustion requirements when it defines the terms of the habeas statute, the agreement of the majority and dissenting opinions that the plain language of the habeas

habeas statute bars review "*unless* it appears that . . . the applicant has exhausted the remedies available in the courts of the State."[150] The PLRA prohibits filing a suit in federal court "*until* such administrative remedies as are available are exhausted."[151] Both statutes call for exhausting the remedies available prior to taking action in federal court. The only real difference in the statutes is that one uses the word "unless," while the other uses the word "until." Justice Stevens argues "[t]he word 'until' indicates a temporal condition whereas the word 'unless' would have been more appropriate for a procedural bar."[152]

The definition of *unless* is "except on condition that," as in: "[It] would not have been destroyed [unless] a regiment . . . had been sent."[153] The habeas law could properly be read to mean that federal courts will not honor the petition except on condition that the applicant has exhausted his state-court remedies. Said another way, federal courts will only accept a habeas petition if the applicant has already met all exhaustion requirements. The definition of *until* is "up to the time that" or "before the time that."[154] Thus, the PLRA requirement should be read to mean that an inmate may not file a complaint in federal court before exhausting available administrative remedies. Put another way, an inmate cannot proceed in federal court up until the time that he has exhausted the state grievance requirements, or the inmate may only file a federal lawsuit *after* he has exhausted administrative remedies.

While the distinction may not appear to make much difference in meaning upon first glance, it is quite significant. The majority takes the position that *until* and *unless* are essentially synonymous: "[S]aying a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court."[155] The dissent does not argue that an inmate should be permitted to bring suit without pursuing all available administrative remedies. The dissent's explanation of

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statute calls for *simple* exhaustion bolsters the position that the plain language of the PLRA also calls for simple exhaustion.

150. 28 U.S.C. § 2254(b)(1)(A) (2000) (emphasis added).

151. 42 U.S.C. § 1997e(a) (2000) (emphasis added).

152. *Woodford*, 126 S. Ct. at 2396.

153. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2503 (1986) (ellipses in original).

154. *Id.* at 2513.

155. *Woodford*, 126 S. Ct. at 2391.

prison administrations' ability to hear grievances after the expiration of the statutory time period cuts against this reading of its position.

The word *unless* connotes propriety in a way *until* does not. *Unless* indicates a person who has not followed administrative procedure to exhaust a claim cannot later file a lawsuit. *Until* suggests the law does not limit whether or not a lawsuit may be filed; rather, it addresses *when* the suit may be filed. Moreover, even interpreting *until* and *unless* to be synonymous in meaning, no one suggests that the federal habeas statute's exhaustion requirement *incorporates* a default sanction.[156] The most appropriate way to read the statute is to read it as requiring simple exhaustion.

Ultimately, none of the majority's main arguments adequately justifies creating a procedural default rule. Simple exhaustion protects administrative authority and promotes efficiency by minimizing the number of lawsuits filed while ensuring their quality. Simple exhaustion comports with the goals of the PLRA without creating opportunities for circumventing its requirements. The existence of a procedural default rule in habeas cases is inapposite to interpreting the language of the PLRA, and the plain text of the PLRA suggests the correct reading is one of exhaustion *simpliciter*.

IV. THE PROPER READING OF THE PLRA EXHAUSTION REQUIREMENT

Part IV discusses the simple exhaustion reading more fully. It applies the exhaustion *simpliciter* rule to the facts of the *Woodford v. Ngo* case, demonstrating why simple exhaustion, rather than proper exhaustion, would best protect the rights granted to inmates under the laws of the United States and ensure justice.

The *Woodford* dissent offers an effective interpretation which incorporates a simple exhaustion reading, as dictated by the statute's plain text, while discouraging intentional circumvention of exhaustion requirements. Courts could punish a prisoner who intentionally bypasses state administrative remedies without imposing the same sanction on an inmate "who make[s] 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[s] some procedural misstep

156. *Id.* at 2396 (Stevens, J., dissenting) ("[S]tate-court remedies are 'exhausted' for the purposes of the federal habeas statute so long as 'they are no longer available, regardless of the reason for their unavailability' . . . . [T]he exhaustion requirement in the federal habeas statute does *not* incorporate a procedural default sanction."); *see also supra* notes 127–43 and accompanying text (discussing the distinctions between federal habeas law and the PLRA).

along the way."[157] By dismissing suits where an inmate clearly engaged in strategic circumvention, federal courts would send a clear message that administrative authority should be taken seriously without imposing draconian punishments.[158]

The goals of the PLRA are best met by utilizing exhaustion *simpliciter*. In fact, the Court's creation of a procedural default rule "bars litigation at random, irrespective of whether a claim is meritorious or frivolous."[159] Consider the facts of the instant case. Though prison officials initially prevented Mr. Ngo from engaging in religious activities six months before he filed his first grievance, the prohibition continued beyond its initial invocation. Mr. Ngo's grievance complained of his inability to "participate in Catholic observances, such as Confession, Holy Week services, and Bible study."[160] When prison officials rejected this grievance as untimely, he filed a second complaint, explaining that the denial of capacity to participate in religious activities was ongoing and therefore within the fifteen-day limit.[161] The prison rejected this grievance as untimely as well.[162]

Assuming the prison officials were accurate in their reading of the administrative rule time limitations as applying to the *first* instance, the procedural default rule bars Mr. Ngo from having his grievance heard in federal court, despite the fact that it may be a violation both of § 1983 of the Civil Rights Act and of his First Amendment right to the free

157. *Woodford,*126 S. Ct. at 2402 (Stevens, J., dissenting); *see id*. at 2393 (Breyer, J., concurring) ("I do not believe that Congress desired a system in which prisoners could *elect* to bypass prison grievance systems without consequences. Administrative law, however, contains well established exceptions to exhaustion.") (emphasis added). Even Justice Breyer, in his concurring opinion, appears to recognize there are cases in which the majority's strict procedural default rule should not apply, including cases where there are inadequate or unavailable administrative remedies and cases in which the procedural default rule would result in injustice. *Id.* at 2393.

158. The dissent suggests any intentional circumvention can be overcome with basic abstention principles. *See supra* note 13.

159. *Woodford*,126 S. Ct. at 2401 (Stevens, J., dissenting). Justice Stevens also points out that this strict rule will disproportionately reward inmates who file suits repeatedly: "[P]risoners who file frivolous claims are probably more likely to be repeat filers, and to learn the ins and outs of all procedural requirements." *Id.* at 2401 n.13.

160. *Id.* at 2403. The Catholic Church encourages participation in regular confession to clear one's conscience prior to receiving Holy Communion. CATECHISM OF THE CATHOLIC CHURCH ¶ 1385 (U.S. Catholic Conference, Inc. ed. & trans., Ligouri Pubs. 1994) ("Anyone conscious of a grave sin must receive the sacrament of Reconciliation before coming to communion.").

161. *Woodford*, 126 S. Ct. at 2403.

162. *Id*.

exercise of religion.[163] Mr. Ngo did not wait six months to file his complaint to thwart consideration by prison administration and thereby undercut their administrative authority; he filed his grievance twice in hopes that its merits would be considered. Moreover, Mr. Ngo's complaint was not frivolous; it involved concerns about his religious freedoms. His complaint did not intentionally circumvent the administrative process for strategic advantage. If anything, Mr. Ngo attempted to navigate the California Code of Regulations to file his complaint in a timely manner, within fifteen days of being denied the ability to engage in religious activities. Finally, no one appears to argue that Mr. Ngo failed to exhaust all available administrative remedies, as required under the PLRA. Instead, this decision merely holds that because the prison administration rejected his complaint on procedural grounds, he is not entitled to have his case heard in federal court. Mr. Ngo's case warranted a different outcome. It is not difficult to imagine the impact this holding will have on other prisoner complaints, particularly those never filed because the inmate with the grievance is not savvy enough to navigate the administrative process or fears retaliation for doing so.[164]

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163. Of course, an argument could be made that the administration responsible for receiving the grievance improperly applied the statute of limitations. Absent a review by a federal court, however, Mr. Ngo will not be able to find relief.

164. Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538, at *3 (N.D. Ind. July 27, 2005). Mr. Zick was repeatedly beaten and kicked by other inmates, raped at least once, and once beaten so badly that it resulted in a seizure-like reaction. *Id*. at *1. Prison employees had knowledge of the violence because video cameras captured the incidents. *Id.* at *1–2. Some prison employees would handcuff one juvenile so other inmates could beat him. *Id.* at *2. Unlike Mr. Ngo, Mr. Zick did not file a grievance during his stay in the juvenile facility out of fear of retaliation. *Id.* Mr. Zick's mother and legal guardian, Cathy Minix, complained to the staff about her son's treatment and ultimately took her complaint to a juvenile magistrate judge who reported the situation to the governor's office, resulting in Zick's eventual release. *Id*. She filed a lawsuit on his behalf in both their names; the district court dismissed the case because Mr. Zick did not exhaust the available procedures. *Id*. at *2, *7 ("[T]he exhaustion issue disposes of the federal claims."). The court noted that Mrs. Minix's attempts to notify authorities of the detention center's conditions were insufficient in part because they "did not issue within anything near the prescribed time," and because "her communications didn't comply with the general time constraints built into the grievance process, which allow investigation and corrective action while evidence and memories are still available." *Id*. at *4. Putting aside whether or not it should be appropriate for a parent to file a grievance on behalf of her minor child, the fact that Mrs. Minix filed the complaint after the forty-eight hour time limit had expired played a factor in the court's decision. Under the Seventh Circuit's reading of the PLRA at the time, a procedural default rule applied; thus, even had Mr. Zick filed a complaint with the detention center after the forty-eight hour time limit expired, a federal lawsuit would have been barred. Here was a case, in which the prison officials were aware of the inadequate conditions of confinement, and in which a crusading mother's complaint reached all the way to the Governor's office, and still the officials did not change those conditions. A Department of Justice investigation ultimately concluded that the juvenile facility violated the constitutional and federal statutory rights of its residents, in part by failing to "adequately protect the juveniles in its care from

V. CONCLUSION

The *Woodford v. Ngo* creation of a procedural default rule provides ample opportunities for frivolous lawsuits without protecting the interests of inmates who have meritorious cases but are unfamiliar with the proper grievance procedures. In Mr. Ngo's case, though he filed a complaint within fifteen days of what he considered to be a violation of his civil rights, the finding of a procedural error precluded him from having his day in court. He did not make a strategic decision to undercut prison authority. He attempted to follow the grievance rules. But because of this new procedural default rule, Mr. Ngo will never get the justice he deserves.

In engrafting a procedural default rule onto the PLRA, the Supreme Court has created an unnecessarily draconian scheme that does not meet the PLRA's intended goals. A procedural default rule prohibits inmates from filing meritorious claims in federal court if they do not follow the precise requirements required by their prisons' administrative procedures. Whether a prisoner's freedom of religious exercise has been impinged or he is one of the nearly one million prisoners who have suffered rape while in confinement, his remedy will be limited by his savvy in navigating these. Requiring *proper* exhaustion may reduce the number of lawsuits filed in federal court, but it will also prevent inhumane prison conditions from ever being corrected.

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harm." Brief for the Jerome N. Frank Legal Services Organization, *supra* note 7, at 19 n.19 (quoting Letter from Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf). The same letter "concluded that, '[th]e dysfunctional grievance system at South Bend contributes to the State's failure to ensure a reasonably safe environment.'" *Id.* at 19. It was only after this Department of Justice investigation that the juvenile facility changed its errant ways. But it was too late for Mr. Zick, who lost the opportunity to challenge the conditions of his confinement. If instead the court applied a simple exhaustion rule, Mr. Zick would have been able to report the abuse to prison authorities after the forty-eight hour time limit expired. If prison officials opted to evaluate the complaint on its merits, they could have exercised their authority and potentially corrected a grievous condition. Such relief may have made it unnecessary for Mr. Zick to file a federal suit at all. Alternatively, if prison officials opted not to hear the case, Mr. Zick would have been able to file suit. Once the prison officials rejected his claim and each subsequent appeal, he would have met the simple exhaustion requirement, as his efforts would have eliminated all available remedies. The application of a procedural default rule failed Mr. Zick, and it will fail other prisoners like him, afraid to step forward initially for fear of retaliation.