

STACKING THE DECK: FUTILITY AND THE  
EXHAUSTION PROVISION OF THE  
PRISON LITIGATION REFORM ACT

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INTRODUCTION

Speaking before the Senate chamber in 1995, Bob Dole rose in support of the Prison Litigation Reform Act (PLRA). Promising that the legislation would “help put an end to the inmate litigation fun-and-games,” Senator Dole lamented that “[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens.”<sup>1</sup> Senator Orrin Hatch expressed his outrage that “[j]ailhouse lawyers with little better to do are tying our courts in knots with the endless flow of frivolous litigation.”<sup>2</sup> Senator Harry Reid openly mocked the system, which permitted prisoners to maintain frivolous litigation with the state and provided them not only “an up-to-date library and a legal assistant,” but also “three square meals a day” and the ability to “watch cable TV in the rec room or lift weights in a nice modern gym” if they “get tired of legal research.”<sup>3</sup> Much was made of the infamous “peanut butter lawsuit,” in which an inmate sued after being served chunky peanut butter instead of smooth, though it was only seventh on the list of “Top 10 Frivolous Inmate Lawsuits Nationally” that was read into the record.<sup>4</sup>

By 2000, prisoner civil rights suits had decreased by 39% from their 1995 number.<sup>5</sup> It is unclear how many of the lawsuits blocked by

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<sup>1</sup> 141 CONG. REC. S14,611, 14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

<sup>2</sup> *Id.* (statement of Sen. Hatch).

<sup>3</sup> *Id.* at S14,627 (statement of Sen. Reid).

<sup>4</sup> *Id.* at S14,629 (statement of Sen. Kyl). Topping the list was a suit by a death row inmate whose Game Boy was confiscated by prison officials. *Id.*

<sup>5</sup> John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980–2000*, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT (Bureau of Justice Statistics, U.S. Dep’t of Justice, Wash. D.C.), Jan. 2002, at 1, *available at* <http://>

the PLRA were in fact the sort of “frivolous” litigation that had so appalled the Senate,<sup>6</sup> but certainly insofar as the Act was intended to reduce the burden on court systems caused by inmate litigation, it has been successful.

As one might expect, however, some portions of the PLRA inevitably had collateral consequences. This Comment addresses one such possible unintended result: the flexibility afforded prisons and prison officials by the PLRA’s exhaustion provision, which mandates that prisoners exhaust all of their administrative remedies, including internal prison grievance processes, before they may file suit in federal court.<sup>7</sup> With no protective mechanism in place, this provision would seem to give prisons free rein to stack the deck against inmates by resorting to any of the innumerable ways to stymie prisoners’ efforts to navigate the administrative processes. This problem is compounded by recent court decisions suggesting, or outright asserting, that the exhaustion provision leaves no room for the judicially created doctrine of futility, which ordinarily gives courts the power to excuse exhaustion if they deem it futile or the administrative remedies inadequate.<sup>8</sup>

This Comment argues that these cases should be narrowly interpreted as eliminating a procedural loophole rather than precluding *all* judicial futility analysis. It also proposes alternative methods by which courts can apply the sort of scrutiny necessary to protect good faith litigants from abuse without running afoul of the PLRA. First, however, it will be useful to take a brief detour to look at the back-

[www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf). For a more detailed analysis of the PLRA’s effects, see Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1779-80 (2003), and Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1585 (2003).

<sup>6</sup> See Roosevelt, *supra* note 5, at 1779 & n.53 (suggesting that though “[o]ne might expect” that the suits deterred by the PLRA were frivolous, “[t]here is no way of [actually] knowing” whether they were).

<sup>7</sup> The PLRA’s exhaustion provision reads in its entirety, “No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a) (2000).

<sup>8</sup> See, e.g., *Booth v. Churner*, 532 U.S. 731, 741 (2001) (requiring inmates to bring cases to administrative courts, even if those courts are incapable of providing the remedy sought); *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (“[T]he exhaustion requirement cannot be waived based upon the prisoner’s belief that pursuing administrative procedures would be futile.”); *Alexander v. Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998) (“The judicially created futility and inadequacy doctrines do not survive the PLRA’s mandatory exhaustion requirement.”). An examination of these cases and their holdings follows in Part III.

ground of the PLRA and compare it to its predecessor statute, as well as to give an overview of the futility doctrine in the exhaustion context.

### I. PLRA BACKGROUND

Comprehensive accounts of the PLRA's passage are available elsewhere,<sup>9</sup> and I will not undertake another here. I will instead focus on the changes in the relevant statutory provision in an effort to set the stage for the arguments that follow.

Prior to the passage of the PLRA, the procedural aspects of inmate lawsuits in federal courts were governed by the Civil Rights of Institutionalized Persons Act (CRIPA), subtitled “[a]n Act [t]o authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.”<sup>10</sup> As the subtitle hints and the text proves, CRIPA was quite a different animal than the PLRA. Spurred by an effort to address widespread violations of the constitutional rights of confined persons,<sup>11</sup> CRIPA was intended to open the doors of the federal courts wider. This liberal aim is seen in its version of the exhaustion provision, which stands in stark contrast to the comparatively absolute language of the parallel provision in the PLRA, § 1997e(a).<sup>12</sup> CRIPA allowed a court to stay a prisoner action for up to 90 (and later 180) days so that the prisoner could exhaust “such plain, speedy, and effective administrative remedies as are available” if the court “believe[d] that such a requirement would be appropriate and in the interests of justice.”<sup>13</sup> Furthermore, a court could not require exhaustion unless the remedies were determined by the Attorney General or the court to be “in substantial compliance with the minimum acceptable standards promulgated” elsewhere in CRIPA.<sup>14</sup> Those standards contemplated, among other things, an advisory role for inmates in the formulation and implementation of the grievance processes, time limits for

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<sup>9</sup> See, e.g., Roosevelt, *supra* note 5, at 1776-80.

<sup>10</sup> Pub. L. No. 96-247, 94 Stat. 349, 349 (1980).

<sup>11</sup> See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 493-94 (2001) (describing the impetus for enacting CRIPA).

<sup>12</sup> See 42 U.S.C. § 1997e(a) (2000).

<sup>13</sup> 42 U.S.C. § 1997e(a)(1) (1994), amended by Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-70 to 1321-73 (1996).

<sup>14</sup> 42 U.S.C. § 1997e(a)(2) (1994), amended by Prison Litigation Reform Act of 1995 § 803(d).

replies to grievances, priority processing of emergency grievances, and independent review of grievance dispositions.<sup>15</sup> Thus, not only was the CRIPA exhaustion requirement left to the discretion of courts to apply or not as dictated by “the interests of justice,” but procedural safeguards to protect against the deck-stacking problem were actually built into the statute.<sup>16</sup>

As I suggested in the Introduction, the PLRA passed amid an uproar over a supposed glut of frivolous lawsuits clogging the federal court system.<sup>17</sup> Its exhaustion provision addresses the perceived problem by simply eliminating CRIPA exhaustion’s discretionary aspect, as well as the statutory safeguards to be administered by the courts and the Attorney General.<sup>18</sup> Furthermore, the PLRA eliminated the defined exhaustion period, effectively permitting prison officials an unlimited amount of time to process grievances under the administrative procedures they themselves establish.<sup>19</sup> All that the current version of the statute requires is that the administrative remedies be “available.”<sup>20</sup>

## II. OVERVIEW OF THE FUTILITY DOCTRINE

The exhaustion requirement is not unique to the prison litigation context. In fact, courts have long enforced a general rule that “[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is

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<sup>15</sup> 42 U.S.C. § 1997e(b)(2) (1994), *amended by* Prison Litigation Reform Act of 1995 § 803(d).

<sup>16</sup> Congress did amend CRIPA in 1994 to somewhat loosen these safeguards. *See* Branham, *supra* note 11, at 496. However, though the safeguards were more easily satisfied, they remained in place.

<sup>17</sup> *See* Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1525-26 (2003) (arguing that the volume, growth, and predominantly losing outcome of prisoner suits were the three factors underlying the passage of the PLRA). It is worth noting, however, that there is some evidence to suggest that the increase in at least the number of lawsuits was due to the rising inmate population rather than the increasing litigiousness of prisoners: the filing rate in 1996 was actually below the 1980 figure. John Scalia, *Prisoner Petitions in the Federal Courts, 1980-96* (Bureau of Justice Statistics, U.S. Dep’t of Justice), Oct. 1997, at 1, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf>.

<sup>18</sup> *See* 42 U.S.C. § 1997e(a) (2000).

<sup>19</sup> *Id.*; *see also* Branham, *supra* note 11, at 497 (“Now, there is no defined period of time in which correctional officials must process a grievance to avoid court adjudication of the claim.”).

<sup>20</sup> *See* 42 U.S.C. § 1997e(a) (2000); Branham, *supra* note 11, at 498.

premature and must be dismissed.”<sup>21</sup> The application of this requirement has in some cases hinged on the administrative agency’s jurisdiction or authority to grant the particular type of relief sought.<sup>22</sup> Furthermore, because of the federal courts’ “virtually unflagging obligation to exercise the jurisdiction given them,” in the absence of a statute decreeing otherwise, the courts would “balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.”<sup>23</sup> In short, the judicially created version of the exhaustion requirement in many ways parallels the scheme under CRIPA.<sup>24</sup>

Courts have superimposed a series of judicially created exceptions onto this version of the exhaustion doctrine.<sup>25</sup> This set of exceptions is framed most generally as excusing litigants from having to exhaust available remedies when the court deems those remedies to be “inadequate.”<sup>26</sup> In *McCarthy v. Madigan*, the Supreme Court outlined three “broad sets of circumstances” under which an inadequacy determination is warranted.<sup>27</sup> One exists when requiring exhaustion would prejudice a subsequent court action—if, for example, the time-frame for the administrative proceedings is so long that exhaustion would effectively bar the suit on statute of limitations grounds.<sup>28</sup> A second exists when there are indications that the agency is not em-

<sup>21</sup> *Reiter v. Cooper*, 507 U.S. 258, 269 (1993).

<sup>22</sup> *See id.* (“[The exhaustion] doctrine is inapplicable to petitioners’ reparations claims, however, because the [agency] has long interpreted its statute as giving it no power to decree reparations relief.”).

<sup>23</sup> *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (internal quotation marks omitted), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-70 to 1321-73 (1996), *as recognized in* *Booth v. Churner*, 532 U.S. 740 (2001).

<sup>24</sup> I use the term “parallels” because exhaustion of state administrative remedies is otherwise not required, as a matter of judge-made law, in § 1983 actions. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982).

<sup>25</sup> It is possible to view this part of the doctrine as simply part of the balancing “of the interest of the individual . . . against countervailing institutional interests” as described in *McCarthy*, 503 U.S. at 146, rather than a set of per se exceptions. *See id.* (“This Court’s precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion.”). Given the nature of the exhaustion *requirement*, however, and the concreteness and consistency of the concerns that have prompted courts to excuse litigants from fulfilling it, it seems to me that using the term “exceptions” to describe these “broad sets of circumstances” is appropriate.

<sup>26</sup> *Id.* at 146-49.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 146-47 (citing *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)).

powered to grant effective relief,<sup>29</sup> perhaps because it “lacks institutional competence to resolve the type of issue presented,”<sup>30</sup> because the challenge is to the adequacy of the very administrative proceeding at issue,<sup>31</sup> or because the agency does not have the authority to grant the type of relief requested.<sup>32</sup> Finally, exhaustion is excused when it is determined that the agency in question was biased or otherwise unable to give the plaintiff a fair hearing.<sup>33</sup> In connection with this, the Court in *McCarthy* cited a Fifth Circuit decision for the proposition that “administrative procedures must ‘not be used to harass or otherwise discourage those with legitimate claims.’”<sup>34</sup>

Taken together, these exceptions clearly signify a solicitude for the notion that litigants should not be forced to waste their time exhausting administrative remedies when it would be manifestly futile to do so. The “bias” exception, in particular, if applied in the PLRA context, would help eliminate the “deck-stacking” concern—courts could at least inquire into the procedures set up by the prison to determine if they are unduly labyrinthine or unfair.<sup>35</sup> For better or worse, however, the Supreme Court has cautioned that the judiciary’s freedom to craft such a futility doctrine may be severely limited when Congress has something else in mind—in particular, “[w]here Congress specifically mandates, exhaustion is required.”<sup>36</sup> The impact of the PLRA, as we will soon see, seems to have been precisely that.

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<sup>29</sup> *Id.* at 147.

<sup>30</sup> *Id.* at 147-48 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 497 n.5 (1977)).

<sup>31</sup> *Id.* at 148 (citing *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979)).

<sup>32</sup> *Id.* (citing *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963)). This is the issue dealt with in the PLRA context by *Booth v. Churner*, 532 U.S. 731 (2001), addressed in Part III.A. For an example of a pre-PLRA application of this exception to an inmate suit, see *Marsh v. Jones*, 53 F.3d 707, 711-12 (5th Cir. 1995).

<sup>33</sup> *McCarthy*, 503 U.S. at 148 (citing *Gibson*, 411 U.S. at 575 n.14 (1973)).

<sup>34</sup> *Id.* at 148-49 (citing *Patsy v. Fla. Int’l Univ.*, 634 F.2d 900, 912-13 (5th Cir. 1981), *rev’d on other grounds sub nom. Patsy v. Bd. of Regents*, 457 U.S. 496 (1982)).

<sup>35</sup> Indeed, prior to the PLRA, there were indications that such an inquiry was necessary in the § 1983 context, not merely to ensure an evenhanded application of the exhaustion requirement, but “[i]n view of the importance of the rights protected by” § 1983. *Patsy*, 634 F.2d at 912.

<sup>36</sup> *McCarthy*, 503 U.S. at 144.

## III. JUDICIAL APPROACHES TO FUTILITY AFTER THE PLRA

A. *Booth v. Churner*

By all accounts, the passage of the PLRA, amending § 1997e to impose a seemingly absolute exhaustion requirement, has wreaked havoc on the exhaustion doctrine as it existed under CRIPA and in the case law in general. The most authoritative account of this effect came from the Supreme Court in its 2001 *Booth v. Churner* decision.<sup>37</sup> That case did not concern exhaustion or futility in general, but rather addressed a narrower issue: whether an inmate plaintiff seeking monetary relief under § 1983 was required to exhaust his administrative remedies under the PLRA even though the available remedies did not provide for monetary relief.<sup>38</sup> In other words, did the *McCarthy* exception, which permitted excusal if the administrative agency did not have the power to grant the relief requested, survive the PLRA's amendment of the exhaustion statute?

The Court unanimously held that it did not.<sup>39</sup> Justice Souter's opinion focused on the meaning of the term "available,"<sup>40</sup> which, as noted previously, seems to be the only portion of § 1997e that leaves judicial wiggle room—the plaintiff had argued that the administrative remedial scheme was not "available" when the process could not result in the specific remedial action that he sought.<sup>41</sup> Though acknowledging the "intuitive appeal" of this position,<sup>42</sup> the Court interpreted "available" to refer to the administrative *processes* available, not to the forms of relief, and found that Congress intended "to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible."<sup>43</sup> In doing so, the Court put to rest the question of whether this particular *McCarthy* exception remained in force after the PLRA: after *Booth*, prisoners must exhaust administrative remedies regardless of whether they can possibly obtain the result they would seek in a federal lawsuit.

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<sup>37</sup> 532 U.S. 731 (2001).

<sup>38</sup> *Id.* at 734.

<sup>39</sup> *Id.* This holding overruled several circuit court decisions to the contrary, which are discussed in Part IV.B.

<sup>40</sup> 532 U.S. at 736.

<sup>41</sup> *See id.* at 736-37 ("Booth argues that when the prison's process simply cannot satisfy the inmate's sole demand, the odds of keeping the matter out of court are slim.").

<sup>42</sup> *Id.* at 736.

<sup>43</sup> *Id.* at 739.

This holding, on its own, is not so disturbing. There is nothing inherently problematic about having the prison administrative process address prisoners' complaints first: as the Supreme Court noted in *Booth*, it is possible that being heard at the administrative level would mollify even some inmates who would otherwise only be seeking damages, and that the process would "filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom."<sup>44</sup> But there are several roughly contemporaneous lower court cases that, while reaching conclusions along the same lines as *Booth*, seem to have broader and therefore more disturbing holdings—it is those cases that create the problems to which I have alluded.

#### B. *Alexander v. Hawk and Progeny*

One such case, *Alexander v. Hawk*,<sup>45</sup> was decided by the Eleventh Circuit some three years before the Supreme Court decided *Booth*. The *Alexander* court purported to address the same relatively narrow question that *Booth* ultimately decided (i.e., must a prisoner exhaust administrative remedies if he seeks only monetary relief and can't possibly get it from the administrative process?) but nonetheless framed its answer in sweeping language that seems to go far beyond "yes" or "no." Drawing a sharp line between exhaustion "mandated by statute" and exhaustion "imposed as a matter of judicial discretion," the *Alexander* court declared that "the judicially recognized futility and inadequacy exceptions do not survive the new mandatory exhaustion requirement of the PLRA."<sup>46</sup> Further, *Alexander* put forth an even more expansive version of the Supreme Court's argument in *Booth* regarding the meaning of the term "available" in § 1997e.<sup>47</sup> Because Congress removed the "plain, speedy, and effective" language that qualified "available" in the pre-PLRA version of the exhaustion provision, the court reasoned, it "no longer wanted courts to examine the effectiveness of administrative remedies[,] but rather to focus solely on whether an administrative remedy program is 'available' in the prison involved."<sup>48</sup> Doing so would not involve an inadequacy inquiry; rather, "the term 'available' . . . is used to acknowledge that not all

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<sup>44</sup> *Id.* at 737.

<sup>45</sup> 159 F.3d 1321 (11th Cir. 1998).

<sup>46</sup> *Id.* at 1326.

<sup>47</sup> See *supra* notes 40-43 and accompanying text.

<sup>48</sup> *Alexander*, 159 F.3d at 1326.

prisons actually have administrative remedy programs.”<sup>49</sup> The Eleventh Circuit ultimately limited its holding to the same precise issue later resolved in *Booth*,<sup>50</sup> but its reasoning seemed to flatly deny the possibility of any of the residual *McCarthy* exceptions.

The Eleventh Circuit then cited *Alexander* two years later in *Higginbottom v. Carter*, a case suggesting that exhaustion may not be excused even if the prison administrative process considers the prisoner’s particular complaints “not grievable.”<sup>51</sup> Though the court did not explicitly make such a holding,<sup>52</sup> it did not seem concerned in the least that the prison could conceivably refuse to hear certain claims in its grievance process. Instead, the court relied on *Alexander* to emphasize that “the exhaustion requirement cannot be waived based upon the prisoner’s beliefs that pursuing administrative procedures would be futile.”<sup>53</sup> The court’s per curiam opinion devoted less than two pages to disposing of the plaintiff’s claims.

These sorts of cases were not confined to the Eleventh Circuit. The same year that *Higginbottom* came down, the Sixth Circuit decided *Jones v. Smith*, in which the inmate plaintiff claimed that he should be able to proceed with his suit under the Americans with Disabilities Act, despite not having exhausted administrative remedies, because his grievance counselor refused to provide him with a grievance form so that he could begin the process.<sup>54</sup> Taking a similar approach to *Higginbottom*, the Court did not explicitly hold that exhaustion is not satisfied if the prison simply refuses to permit the inmate to file a grievance, but instead rested its disposition of the case on the notion that the plaintiff did not make a sufficient showing that he fulfilled the PLRA’s requirements.<sup>55</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1328.

<sup>51</sup> *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (per curiam). The case also reaffirmed *Alexander*’s holding that exhaustion is required even if the plaintiff seeks relief not available from the administrative process. *Id.*

<sup>52</sup> It noted instead that the plaintiff “offer[ed] no arguments supporting his assertion that his claims were ‘not grievable.’” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 266 F.3d 399, 400 (6th Cir. 2001).

<sup>55</sup> *See id.* (“Jones failed to demonstrate that he had exhausted his administrative remedies, . . . admitting that no grievance had been filed because his counselor did not give him a grievance form. . . . He does not allege that there was no other source for obtaining a grievance form or that he made any other attempt to obtain a form . . . .” (citation omitted)).

On one hand, this decision seems heartening: the *Jones* court implied that the prisoner *could* conceivably bypass the exhaustion requirement by making a showing of unacceptable administrative process shenanigans on the part of the prison, presumably by proving that there was no other way to file a grievance. On the other hand, however, the court seems to have limited this possibility to cases of absolute stonewalling, leaving prisons free to erect procedural obstacles to stymie inmates' efforts to sue in federal court.

There is, in any event, no standard, and no clear guidelines exist for inmates with legitimate claims—though the pre-PLRA futility doctrine was highly discretionary, with the determination in any individual case left up to the trial judge, at the very least plaintiffs knew what arguments they could present.<sup>56</sup> Though cases like *Jones* contain vague intimations of the sort of showing that will suffice to excuse exhaustion, they mostly leave inmate plaintiffs at sea.

### C. *Hemphill v. New York*

There is, however, a hint of a light at the end of the tunnel. Some courts, seemingly accepting the obviation of judicial futility and inadequacy doctrines by the PLRA, have taken a different approach to providing procedural safeguards in applying the exhaustion requirement. In *Hemphill v. New York*, the Second Circuit, in an opinion by Judge Calabresi, held that in some circumstances, “the behavior of the defendants may render administrative remedies unavailable.”<sup>57</sup>

The district court in *Hemphill* had dismissed the inmate's suit on nonexhaustion grounds;<sup>58</sup> the circuit court vacated and remanded.<sup>59</sup> In doing so, the court set forth a three-part inquiry for judges to undertake in considering prison officials' nonexhaustion defenses. They must first ask whether the asserted administrative remedies were in fact available to the prisoner within the meaning of the statute. The court was less than forthcoming in clarifying the doctrinal intricacies of this prong, suggesting that remedies may not be “available” to begin with, may be “nominally available [but] not so in fact,” or may be made unavailable by threats<sup>60</sup>—with the result that either “the PLRA's

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<sup>56</sup> See *supra* Part II.

<sup>57</sup> 380 F.3d 680, 686 (2d Cir. 2004).

<sup>58</sup> *Id.* at 681-82.

<sup>59</sup> *Id.* at 691.

<sup>60</sup> *Id.* at 686-87.

exhaustion requirement is inapplicable” or “all available remedies [may be deemed] exhausted.”<sup>61</sup>

Second, courts must consider “whether the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it.”<sup>62</sup> This is an estoppel argument that has its Second Circuit origins in *Ziamba v. Wezner*,<sup>63</sup> decided mere months before *Hemphill*. There, the court found that the district court “erroneously did not address [the plaintiff’s] claim that [the] defendants’ actions may have estopped the State from asserting the exhaustion defense.”<sup>64</sup> *Hemphill* makes it clear that this argument contemplates threats by defendant prison officials made to intimidate a plaintiff into abandoning her grievance,<sup>65</sup> and also that the estoppel inquiry is to be made as to each individual defendant.<sup>66</sup> This makes it unlikely that plaintiffs could use estoppel to defeat a nonexhaustion defense in a case of a prison erecting structural obstacles rather than using intimidation tactics.

Finally, and perhaps most intriguingly, the court held that “there are certain ‘special circumstances’ in which, though administrative remedies may have been available and though the government may not have been estopped from asserting the affirmative defense of non-exhaustion, the prisoner’s failure to comply with administrative procedural requirements may nevertheless have been justified.”<sup>67</sup> One such special circumstance the court contemplated is when a plaintiff’s

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<sup>61</sup> *Id.* at 686. Although this may seem like a doctrinal point too subtle to be relevant, the distinction may be crucial given some of the arguments made in *Alexander v. Hawk* and its companion cases. See *infra* Part V (explaining this distinction in more detail).

<sup>62</sup> *Hemphill*, 380 F.3d at 686.

<sup>63</sup> See 366 F.3d 161, 163 (2d Cir. 2004) (holding that “the affirmative defense of exhaustion is subject to estoppel”).

<sup>64</sup> *Id.* at 163; see also *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (“The 42 U.S.C. § 1997e exhaustion requirement is not jurisdictional and may be subject to certain defenses such as waiver, estoppel or equitable tolling.”). *Wright* should be distinguished from the broader *Hemphill* and *Ziamba* holdings, however, as the *Wright* court was sure to emphasize that “[n]othing in the Prison Litigation Reform Act . . . prescribes appropriate grievance procedures or enables judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems.” *Id.* at 358 (footnote omitted).

<sup>65</sup> See *Hemphill*, 380 F.3d at 688-89 (“*Hemphill* contends that . . . [the prison guard’s] threats should estop the defendants from presenting an affirmative defense of non-exhaustion.”).

<sup>66</sup> See *id.* at 689 (“[D]epending on the facts pertaining to each defendant, it is possible that some individual defendants may be estopped, while others may not be.”).

<sup>67</sup> *Id.* (quoting *Giano v. Goord*, 380 F.3d 670, 676 (2d Cir. 2004)). The opinion in *Giano* was handed down on the same day as *Hemphill*.

attempt to exhaust her administrative remedies “reflected a reasonable interpretation” of prison regulations, even if this interpretation is ultimately deemed erroneous or lacking.<sup>68</sup> The court also left the door open for consideration of other justifications for nonexhaustion, including—presumably as a counterpart to the estoppel argument—threats from prison officials.<sup>69</sup>

In a similar vein, a case from the Eastern District of Wisconsin, *Davis v. Milwaukee County*, held that failure to provide necessary legal materials amounts to interference with a prisoner’s ability to exhaust his administrative remedies, and thus interference with his right of access to the courts.<sup>70</sup> The case was a suit for the denial of that right, and the court’s ruling did not directly impact the fate of the plaintiff’s previous suit that was dismissed for failure to exhaust—he was simply awarded nominal damages.<sup>71</sup> However, this recognition of an “interference” concern may provide a useful mode of analysis for evaluating the merits of a defendant prison’s nonexhaustion defense.

Neither *Hemphill* nor *Davis* explicitly deals with the futility doctrine; neither court comes out and claims that it is considering the “adequacy” of the remedies that are available, even though *Hemphill* does suggest that it is doing so, if obliquely.<sup>72</sup> This, however, is precisely the point: as I discuss below, these cases and the doctrines that emerge from them may serve as a substitute for the judicially created futility exception if courts continue to deem the latter abrogated by the PLRA. Whether the PLRA actually justifies such an abrogation is the subject of the next section.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 688.

<sup>70</sup> See *Davis v. Milwaukee County*, 225 F. Supp. 2d 967, 975-76 (E.D. Wis. 2002) (“[I]f prison officials prevent an inmate from exhausting they impede his access to the courts . . .”).

<sup>71</sup> *Id.* at 980.

<sup>72</sup> See *Hemphill*, 380 U.S. at 686 (“To the extent that the plaintiff lacked ‘available’ administrative remedies, the PLRA’s exhaustion requirement is inapplicable.”).

#### IV. DOES THE PLRA JUSTIFY ABROGATION OF THE FUTILITY EXCEPTION?

##### A. *Practical Concerns*

As a starting point, it is important to clearly distinguish among the various holdings discussed in Part III, as well as the questions involved. It is hard to quarrel with the basic holding of *Booth v. Churner*—that Congress intended to require administrative exhaustion even if such exhaustion could not actually provide the relief the inmate would seek in federal court.<sup>73</sup> However, though this eminently reasonable conclusion does rule out application of one aspect of one prong of the *McCarthy* inquiry,<sup>74</sup> it by no means requires the obviation of the entire doctrine. Accepting *Booth*, which can be viewed as merely closing a procedural loophole not consonant with congressional intent, does not necessary entail the acceptance of *Alexander* and its companion cases,<sup>75</sup> which, as discussed above, argue that the PLRA was intended to eliminate judicial consideration of futility and inadequacy altogether. Specifically, once the broad proclamations made in *Alexander* (arguably in dicta) go beyond the procedural issue in question there and in *Booth*, and into substantive obstacles to fruitful grievances, as the opinions in *Higginbottom*<sup>76</sup> and *Jones*<sup>77</sup> threaten to do, there is at least a potential problem.

These concerns are compounded by the Seventh Circuit's problematic *Pozo v. McCaughtry* decision,<sup>78</sup> the troubling implications of which were explored in detail by Professor Kermit Roosevelt in his article, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*.<sup>79</sup> In *Pozo*, the court held that a prisoner has not ex-

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<sup>73</sup> *Booth v. Churner*, 532 U.S. 731, 734 (2001).

<sup>74</sup> See *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (“[A]n administrative remedy may be inadequate ‘because of some doubt as to whether the agency was empowered to grant effective relief,’” including cases in which the administrative agency “lack[s] authority to grant the type of relief requested.” (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973))), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-70 to 1321-73 (1996), *as recognized in Booth*, 532 U.S. 740.

<sup>75</sup> Note that *Booth* seems to cite *Alexander* approvingly, at least with respect to its narrow holding. See *Booth*, 532 U.S. at 735 (affirming the judgment of the Third Circuit, which reached the same conclusion as the *Alexander* court).

<sup>76</sup> See *supra* notes 51-53 and accompanying text (discussing the import of *Higginbottom*).

<sup>77</sup> See *supra* notes 54-55 and accompanying text (explaining the significance of *Jones*).

<sup>78</sup> 286 F.3d 1022 (7th Cir. 2002).

<sup>79</sup> See Roosevelt, *supra* note 5, at 1782-88 (criticizing the *Pozo* decision).

hausted her administrative remedies under § 1997e(a) unless she has complied with the procedural rules established by the prison.<sup>80</sup> Though this seems reasonable, and even commonsensical, the result is that a late grievance filing or appeal, or a similar error by an inmate, will lead to the dismissal of any federal lawsuit that arises out of the complaint,<sup>81</sup> a conclusion later reaffirmed by the Supreme Court in *Woodford v. Ngo*.<sup>82</sup> Such a scheme creates a clear incentive for states and prisons to structure their administrative processes in such a way as to increase the chance that inmate complaints will terminate in procedural default; one can imagine countless subtle and not-so-subtle ways to accomplish this end.<sup>83</sup> The problem may be further exacerbated by the Supreme Court's recent explicit pronouncement that

to properly exhaust administrative remedies[,] prisoners must “complete the administrative review process in accordance with the applicable procedural rules”—rules that are defined not by the PLRA, but by the prison grievance process itself. . . . [I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.<sup>84</sup>

There can no longer be any doubt that the exhaustion ball is fully in the prisons' court.

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<sup>80</sup> See *Pozo*, 286 F.3d at 1023 (“[U]nless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred.”).

<sup>81</sup> See *id.* at 1025 (dismissing the plaintiff's federal complaint because he failed to file a timely appeal within the state system); Roosevelt, *supra* note 5, at 1783 (“[*Pozo*'s] ultimate conclusion is that an attempt at exhaustion rejected on nonmerits grounds is no exhaustion at all, and that inmates who have erred at some step in a prison grievance process should have their suits dismissed for failure to exhaust.”). Professor Roosevelt also mentions, in a footnote, that the result in *Pozo* is all the harsher for the fact that PLRA exhaustion does not incorporate (at least some of) the traditional exceptions to exhaustion doctrine. *Id.* at 1783 n.74.

<sup>82</sup> 126 S. Ct. 2378, 2384 (2006).

<sup>83</sup> It is not necessary to ascribe malicious motives to prison officials to believe this to be the case. Administrative officials often have discretion with respect to whether or not to hear untimely appeals. See, e.g., WIS. ADMIN. CODE DOC § 310.13(2) (2006) (“Upon good cause, the [corrections complaint examiner] may accept for review an appeal filed later than 10 calendar days after receipt of the decision.”). It is easy to imagine simple economics influencing the “good cause” determination when the possibility of a federal lawsuit looms.

<sup>84</sup> *Jones v. Bock*, 127 S. Ct. 910, 922-23 (2007) (quoting *Woodford*, 126 S. Ct. at 2384).

### B. Congressional Intent

All of this is to say that myriad practical problems accompany the sort of abandonment of judicial discretion in applying the exhaustion requirement suggested by *Alexander*. Despite the rhetoric quoted at the beginning of this Comment, it is far from clear that Congress intended these manifestly unfair results when it passed the PLRA, and one may be inclined to give Congress the benefit of the doubt. It should be noted, moreover, that even the statutory interpretation case for abrogating judicial futility analysis is not open and shut, though it now boasts the support of circuit court and, to a lesser extent, Supreme Court precedent. In fact, before *Booth*, several decisions interpreted the PLRA to retain even the type-of-relief-requested prong of *McCarthy*. The Tenth Circuit, for example, had held in *Garrett v. Hawk* that, at least in the context of a *Bivens* action,<sup>85</sup> an inmate need not exhaust remedies that could not provide relief against the specific defendants and were not designated as prerequisites to a *Bivens* claim; the court determined that there were no adequate remedies to be exhausted.<sup>86</sup> An even stronger pre-*Booth* statement came from the Fifth Circuit in *Whitley v. Hunt*, which declared that “the import of *McCarthy* is clear: A district court should not require exhaustion under section 1997e if the prisoner seeks only monetary damages and the prison grievance system does not afford such a remedy.’ . . . We find nothing in the amended language of § 1997e that would undercut” that holding.<sup>87</sup> A similar holding also came from the Ninth Circuit.<sup>88</sup>

Furthermore, the strong language in *Alexander* notwithstanding, it is far from clear that Congress actually intended to remove all judicial

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<sup>85</sup> A claim for damages can be brought against the federal government directly under the Constitution. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that a private person whose constitutional rights were violated by federal agencies was entitled to money damages).

<sup>86</sup> See *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997) (holding that an inmate need not pursue Federal Tort Claims Act remedies as a prerequisite to filing a *Bivens* suit), *abrogated by Booth v. Churner*, 532 U.S. 731 (2001).

<sup>87</sup> *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998) (quoting *Marsh v. Jones*, 53 F.3d 707, 710 (5th Cir. 1995), *abrogated by Booth v. Churner*, 532 U.S. 731 (2001)). *Marsh* was a pre-PLRA decision applying *McCarthy* to the prison litigation context. See *supra* notes 10-13 and accompanying text (noting that pre-PLRA, CRIPA permitted institutionalized persons whose rights were violated to bring actions).

<sup>88</sup> See *Lunsford v. Jumao-As*, 155 F.3d 1178, 1179 (9th Cir. 1998) (“We agree with both parties that Lunsford was . . . not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the Administrative Remedy Program only provides for injunctive relief.”).

discretion and eliminate all judicially created doctrine in the exhaustion arena—or, given the precedent, that courts should assume such an intent. In other contexts, the Supreme Court has permitted longstanding, judicially created common law to survive absent an explicit statement of Congress’s intent to eliminate the same, even when statutory language seems to occupy the field. In *Tenney v. Brandhove*, for example, the Court retained the venerable doctrine of legislative immunity,<sup>89</sup> thus barring § 1983 suits against legislators in their legislative capacity *despite* statutory language indicating that the statute applies to “every person.”<sup>90</sup> The Court asked whether Congress, “by the general language”<sup>91</sup> of § 1983, meant to overturn the longstanding common law tradition of legislative immunity, and concluded (over a dissent by Justice Douglas) that it did not.<sup>92</sup>

*Pierson v. Ray*, decided sixteen years after *Tenney*, made essentially the same argument in favor of retaining the common law immunity for sitting judges acting in their judicial capacity.<sup>93</sup> Interestingly, Justice Douglas, dissenting alone, made arguments that seem to be echoed in the *Alexander* opinion. Arguing from historical context, he noted that § 1983 was passed during a “condition of lawlessness[,] . . . under which people were being denied their civil rights,” and stated that “[t]o most, ‘every person’ would mean *every person*, not every person *except* judges.”<sup>94</sup> Nonetheless, the Supreme Court rejected this interpretation and opted to retain the judicially recognized judicial immunity.

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<sup>89</sup> See *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (“We conclude . . . that . . . the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, . . . and that [§ 1983] does not create liability for such conduct.”).

<sup>90</sup> 42 U.S.C. § 1983 (2000) (emphasis added).

<sup>91</sup> *Tenney*, 341 U.S. at 376.

<sup>92</sup> See *id.* at 379 (holding that “the statute of 1871 does not create civil liability” for legislative conduct).

<sup>93</sup> See *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (noting that “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction” and concluding that the doctrine was not abolished by § 1983 despite the “every person” language because “[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities”).

<sup>94</sup> *Id.* at 559 (Douglas, J., dissenting); cf. *Alexander v. Hawk*, 159 F.3d 1321, 1323-26 (11th Cir. 1998) (noting the glut of prisoner suits at the time the PLRA was passed, and arguing that “Congress now has mandated exhaustion” in § 1997e by amending it to read that “no action shall be brought” absent exhaustion of all available remedies).

Of course, the analogy is not perfect. *Tenney* and *Pierson* involved myriad constitutional and separation of powers concerns that are simply not implicated in the PLRA context.<sup>95</sup> There was no previous version of § 1983 that the Court could have used to discern Congressional intent, whereas several colorable arguments in favor of abrogation can be made by comparing the CRIPA exhaustion scheme with the PLRA-amended § 1997e.<sup>96</sup> It could also prove relevant that the judicially created immunities at issue in *Tenney* and *Pierson* are arguably older and more entrenched than the *McCarthy* futility doctrine.<sup>97</sup>

As such, the above analysis is at best suggestive, but by no means conclusive; similarly, the fact that certain ultimately overruled decisions do not accord with the current trend of obviating *McCarthy* is hardly a decisive argument that the current trend is wrong. I do not mean to suggest that *Alexander* is necessarily incorrect, but rather that the question is close. Because the question is close, and because of the disturbing practical implications of giving full force to *Alexander*'s language, discussed above, the better approach is to view the combination of *Booth* and *Alexander* as issuing narrow commands eliminating the procedural loophole of crafting a complaint that prays for relief not available via administrative proceedings. Indeed, in his *Woodford* concurrence, Justice Breyer interpreted the PLRA to “implicitly incorporate[]” the “traditional exception[s]” set out in *McCarthy*, among other cases.<sup>98</sup> As I have attempted to show in Parts III and IV, reading the decisions broadly to sweep away all judicial futility analysis in PLRA exhaustion creates unacceptable deck-stacking concerns, with the likely result that many deserving complaints will not get to court.

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<sup>95</sup> See, e.g., *Tenney*, 341 U.S. at 376 (questioning whether Congress could constitutionally abrogate legislative immunity and noting the importance of legislative investigations in representative government).

<sup>96</sup> Indeed, this is precisely what *Alexander* purported to do. See *supra* note 94 (noting *Alexander*'s holding that Congress intentionally mandated PLRA's exhaustion requirement).

<sup>97</sup> See *Tenney*, 341 U.S. at 376 (“Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?”).

<sup>98</sup> *Woodford v. Ngo*, 126 S. Ct. 2378, 2393 (2006) (Breyer, J., concurring).

V. POSSIBLE ALTERNATIVES: CONSTRUCTIVE EXHAUSTION,  
ESTOPPEL, AND DELIBERATE INDIFFERENCE

Even if *Alexander* is embraced to its fullest extent, however, not all is lost. Several of the cases described in Part III have begun to develop alternative doctrines that can potentially provide some of the *McCarthy* futility/inadequacy test's procedural safeguards. Because these safeguards are constrained to specific situations, these alternative doctrines offer less protection than the more general inquiry contemplated by *McCarthy*, but taken together and applied consistently, they can begin to fill the gap.<sup>99</sup>

The first of these is the notion of "constructive exhaustion"<sup>100</sup> hinted at in *Hemphill v. New York*.<sup>101</sup> This would permit courts to substitute a determination that all "available" administrative remedies have been exhausted for the determination that existing remedies are inadequate. This seemingly semantic difference may appear particularly vulnerable to the criticism mentioned above<sup>102</sup>—that it is a cynical attempt to slalom around restrictions Congress intended to put in place—but it is important to remember that no one denies that the term "available" in § 1997e(a) has some meaning.<sup>103</sup> Even accepting the proposition in *Alexander* that Congress's deletion of "plain, speedy and effective" from § 1997e(a) precludes judicial consideration of whether administrative remedies are adequate, *some* point must be reached at which the remedies that have putatively been established are so inaccessible to the plaintiff as to be effectively unavailable, lead-

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<sup>99</sup> One can look at these suggestions as advocating a surreptitious evasion of congressional intent under the PLRA. However, each has its own independent justification, and none is without a basis in existing law.

<sup>100</sup> To my knowledge, this term has not been previously used in this context. However, the idea exists elsewhere, including in statute. *See, e.g.*, 5 U.S.C. § 552(a)(6)(C)(i) (2000) ("Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

<sup>101</sup> *See Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (describing *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004), where, after the plaintiff did not appeal a favorable outcome, "[b]y the time he discovered that the favorable decision was not being implemented, the deadline for appealing the administrative ruling had come and gone," and the court accordingly "held that all available administrative remedies had been exhausted").

<sup>102</sup> *See supra* note 99.

<sup>103</sup> *See, e.g.*, *Booth v. Churner*, 532 U.S. 731, 739 (2001) ("[The term 'available'] makes sense only in referring to the procedural means, not the particular relief ordered.").

ing to the conclusion that all remedies that *are* available have been exhausted, even if the number of remedies exhausted is in reality zero.

Such was the case, for example, in *Abney v. McGinnis*,<sup>104</sup> cited by Judge Calabresi in *Hemphill*. The *Abney* court held that where “prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in [Plaintiff’s] situation have fully exhausted their available remedies.”<sup>105</sup> The court distinguished between the “special circumstances” analysis discussed above in Part II and the determination that “administrative remedies are not actually ‘available’ under the PLRA,”<sup>106</sup> and then seemed to rely on both for its ultimate holding that those remedies that were available had been fully exhausted despite the fact that the plaintiff did not pursue his grievance all the way through the process.<sup>107</sup> Furthermore, under the guise of this analysis, the court effectively *engaged in an inadequacy inquiry*, finding that the established procedures did not provide sufficient time for inmates to assess whether an appeal was necessary, and were “impracticable,” “burdensome,” and “counterintuitive” as interpreted by the state.<sup>108</sup> Manifestly, then, the line of reasoning suggested by *Hemp-*

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<sup>104</sup> 380 F.3d 663 (2d Cir. 2004).

<sup>105</sup> *Id.* at 669.

<sup>106</sup> *Id.* at 667.

<sup>107</sup> *See id.* at 669 (“A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion. Accordingly, we find that [the plaintiff] has sufficiently alleged full exhaustion of all available administrative remedies.”).

<sup>108</sup> *Id.* at 668-69. A possible parallel here is the “independent and adequate state grounds” doctrine, which ordinarily prevents Supreme Court review of state court judgments when they rest on state law grounds that are “independent of the federal ground[s] and adequate to support the judgment.” *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). This is so even when the state court dismissed a particular claim on procedural grounds, because “failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in [the Supreme] Court.” *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). Under some circumstances, however, a state procedural ground may not be considered “adequate”—if, for example, the procedural rule on which the state decision rested is not “strictly or regularly followed.” *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Similarly, “[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). *Hemphill* and *Abney* seem to point toward a similar analysis to determine whether prison administrative remedies are “available.” If federal constitutional rights are too important to be thwarted by haphazardly applied state procedural law, a similar skepticism is surely justified toward decentralized prison administrative schemes.

*hill* and implemented in *Abney*<sup>109</sup> has some oomph, and may in some circumstances serve as well, or nearly as well, as an application of *McCarthy*.

A second possibility is the estoppel argument discussed in *Hemphill* and *Ziembra*. I have already discussed this aspect of those cases in some detail,<sup>110</sup> and will note only that this is a much more tightly circumscribed doctrine, and one unlikely to yield satisfactory results in nearly as many cases as either *McCarthy* or the above modified availability analysis. However, in cases where defendant officials see fit to intimidate grievants into abandoning their complaints, it will serve as a suitable safeguard.

A final alternative may provide a reprieve for frustrated plaintiffs who make Eighth Amendment claims. To the dismay of some commentators,<sup>111</sup> the Supreme Court in 2002 interpreted the PLRA exhaustion provision to apply to such Eighth Amendment lawsuits, even when they involve specific incidents of excessive force.<sup>112</sup> Eighth Amendment claims are evaluated under the “deliberate indifference” standard, which states that a defendant violates the Eighth Amendment if he is subjectively aware that his actions present a substantial risk of physical harm to the inmate.<sup>113</sup>

This creates the possibility that when inmates sue for Eighth Amendment violations and are unreasonably rebuffed during the grievance process, this in itself could constitute deliberate indifference under current Eighth Amendment doctrine. This would be par-

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<sup>109</sup> Recall that *Hemphill* merely vacated the district court’s judgment and remanded the case. *Hemphill v. New York*, 380 F.3d 680, 691 (2d Cir. 2004). I chose to use *Hemphill* instead of *Abney* in my initial discussion in Part III.C because the former contains a clearer statement of principles.

<sup>110</sup> See *supra* notes 62-66 and accompanying text (suggesting that if individual defendants fail to raise the issue of nonexhaustion, they may not use it later).

<sup>111</sup> See, e.g., Ann H. Matthews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 539 (2002) (“[T]he Court’s failure to interpret the PLRA’s exhaustion requirements narrowly to exempt excessive force claims from the mandatory exhaustion requirements constitutes an unnecessary and inappropriate retreat from longstanding federal judicial recognition and protection of prisoners’ rights.”).

<sup>112</sup> *Porter v. Nussle*, 534 U.S. 516, 532 (2002). The details are beyond the scope of this Comment, but the question was whether excessive force suits were suits about “prison conditions” within the meaning of the PLRA. *Id.* at 519-20.

<sup>113</sup> See *Farmer v. Brennan*, 511 U.S. 825, 828-29 (1994) (holding that the deliberate indifference standard requires a showing of subjective awareness). Excessive force claims, however, require something more than indifference; a plaintiff must show that the force was applied “maliciously and sadistically for the very purpose of causing harm.” *Id.* at 835 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

ticularly true when inmates attempt to file grievances respecting ongoing conditions-of-confinement violations. The exhaustion inquiry could then be subsumed into the Eighth Amendment deliberate indifference inquiry. Not only could this lead to a determination that no remedies were “available” under the PLRA, but the defendants could be held responsible for their conduct throughout the administrative process. Deterrence of this sort of behavior could end up being a positive externality.

Of course, a demonstration of deliberate indifference would not be easy to make in this context. As mentioned above, the deliberate indifference standard in prisoner cases is subjective rather than objective, meaning that a plaintiff must demonstrate actual knowledge and indifference on the part of the prison official defendants, not mere unreasonable ignorance.<sup>114</sup> However, “stacking the deck,” as I conceive of it, can include misconduct by individual officials as well as draconian grievance procedures. There is no reason why a particular implementation of prison grievance procedures by a particular official cannot meet the deliberate indifference standard.

It remains to be seen how this argument will be handled by the courts, or if it will even be made. It is clear, however, that even if courts accept *Alexander v. Hawk*, they will still have options to ensure fairness throughout the administrative process. Though they may give up a more general doctrine of judicial discretion, they may be able to replicate much of its effect using a combination of more precise tools.

#### CONCLUSION

The PLRA amendment to § 1997e(a) put courts in a precarious position. Because courts seemed to agree that the new provision served as an exhaustion mandate, the question became how many barriers they would allow prisons and prison officials to erect between inmate plaintiffs and federal courts. Plainly, given the context of the PLRA’s passage, Congress intended to erect some barriers. But some courts have come dangerously close to giving prison defendants carte blanche to keep prisoners out of court altogether. I have attempted to show that this is a real threat and to present reasons to keep it from coming to pass, as well as ways to accomplish that. I have argued that the PLRA does not necessarily mandate wholesale abrogation of the

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<sup>114</sup> *Id.* at 841-42; *see also* *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (holding that the deliberate indifference standard encompasses a subjective state-of-mind component).

*McCarthy v. Madigan* futility doctrine, but even if courts conclude otherwise, alternative tools exist to ensure that prison officials cannot unreasonably keep legitimate civil rights claims from being heard.

As I discussed at the beginning of this piece, there are some indications that the PLRA has been effective in curbing the “inmate litigation fun-and-games.”<sup>115</sup> However, as long as we are serious about giving legitimate civil rights claimants redress in the federal courts, even if they are incarcerated, we must make sure that the solution does not become worse than the problem. Section 1997e(a), the PLRA’s exhaustion provision, has been, and will continue to be, an important battleground in this conflict.

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<sup>115</sup> See *supra* note 1 and accompanying text.