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MORE STORIES OF JURISDICTION-STRIPPING AND EXECUTIVE POWER: INTERPRETING THE PRISON LITIGATION REFORM ACT (PLRA)

Giovanna Shay and Johanna Kalb***

INTRODUCTION

In the last several years, the Supreme Court has decided a number of important challenges to the government's conduct of its "War on Terror." Brought on behalf of persons alleged to be "enemy combatants," many of whom were detained at Guantánamo Bay, these suits challenged the prisoners' indefinite detention,¹ asserted their right to access federal courts,² and questioned the legality of the tribunals created to adjudicate the charges against them.³ The debate about the detainees' access to federal courts has continued in Congress, with the passage of the Military Commissions Act (MCA),⁴ and in the lower courts, with challenges to the MCA.⁵ At the time this article goes to press, the Guantánamo litigation has returned once again to the U.S.

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** Yale Law School, J.D. 2006.

¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

² *Rasul v. Bush*, 542 U.S. 466 (2004) (concluding that federal habeas jurisdiction under then-extant version of 28 U.S.C. § 2241 extended to Guantánamo detainees).

³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that military commissions then in effect were not authorized by Congress and did not comply with the Uniform Code of Military Justice or the Geneva Conventions).

⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

⁵ See *Boumediene et al. v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006).

Supreme Court with challenges to the MCA.⁶ Although the Guantánamo litigation directly concerns a limited number of people (about 357 detainees remained at Guantánamo Bay as of July 3, 2007),⁷ it presents crucial issues regarding the scope of executive authority, separation of powers, and the role of the judiciary. Because of their broad implications, these cases have captured attention in the academy,⁸ legal community,⁹ and press.¹⁰

During the same time period as the Guantánamo litigation, the Supreme Court has considered another set of cases regarding the rights

⁶ On June 29, 2007, the Supreme Court granted certiorari in *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. U.S.*, No. 06-1196, scheduling oral argument for October 2007. Also this year, Senators Spector and Leahy introduced to the newly Democrat-controlled Congress the Habeas Corpus Restoration Act of 2006, which would eliminate the provisions of the Military Commissions Act that bar any alien detained as an enemy combatant from filing a writ of habeas corpus and bar habeas review of any military commission proceeding. Habeas Corpus Restoration Act of 2006, available at http://www.fas.org/irp/congress/2006_cr/s4081.html.

⁷ Thom Shanker & David Johnston, *Legislation Could Be Path to Closing Guantánamo*, N.Y. TIMES, July 3, 2007, at A10.

⁸ See Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006) [hereinafter Katyal, *The Legal Academy Goes to Practice*]; see also Janet Cooper Alexander, *Jurisdiction-Stripping in the War on Terrorism*, 2 STAN. J. C.R. & C.L. 259 (2006) (exploring the constitutionality of the Detainee Treatment Act); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006) (describing the development of the “National Surveillance State”); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007) (making formalist arguments for the proposition that the Constitution forbids Congress from divesting the Supreme Court of jurisdiction); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006) (critiquing the Bush Administration’s attempts to expand Executive power); Neil K. Katyal, *Executive and Judicial Overreaction in the Guantánamo Cases*, 2004 CATO SUP. CT. REV. 49 (2004) (explaining the Court’s rejection of Executive power in *Rasul v. Bush* and *Al-Odah v. United States*); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006) (discussing the national and international legal regimes preventing the Executive from authorizing the use of torture); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007) (arguing that the war on terror has contributed to the development of a “new criminal process” in which war and law enforcement converge); Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens’s Influence From World War II to the War on Terror*, 92 VA. L. REV. 501 (2006) (discussing Justice Stevens’s opinion in *Rasul*, holding that federal courts could exercise jurisdiction over detainees held at Guantánamo Bay).

⁹ See Katyal, *The Legal Academy Goes to Practice*, *supra* note 8, at 74. Ultimately thirty-nine amicus briefs were filed on behalf of Mr. Hamdan. Professor Katyal writes: “There were over 150 proposed briefs, and I spent hundreds of hours convincing groups not to submit them.” *Id.* at 118.

¹⁰ See Linda Greenhouse, *The Ruling on Tribunals: The Overview; Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1; Charles Lane, *High Court Rejects Detainee Tribunals; 5 to 3 Ruling Curbs President’s Claim of Wartime Power*, WASH. POST, June 30, 2006, at A1; Warren Richey, *Supreme Court Rejects Military Tribunals, The High Court’s 5-to-3 Ruling Thursday Scuttled US Plans for Guantánamo Detainees*, CHRISTIAN SCIENCE MONITOR, June 30, 2006, at 1; David G. Savage, *The Guantánamo Decision: High Court Rejects Bush’s Claim That He Alone Sets Detainee Rules*, L.A. TIMES, June 30, 2006, at A1.

of other incarcerated persons—not enemy combatants, but prisoners and detainees in the civilian criminal justice system. These cases concern the Prison Litigation Reform Act (PLRA) and the barriers it erects to court access for domestic prisoners. They also involve the limits of executive power, access to courts, and jurisdiction-stripping.¹¹ Unlike the Guantánamo cases, however, the PLRA cases have received virtually no press coverage¹² and little scholarly attention.¹³

The watershed decision among the PLRA cases is *Woodford v. Ngo*, in which the Supreme Court decided that the PLRA's exhaustion requirement incorporates a procedural default rule.¹⁴ While a simple exhaustion provision would require that a prisoner present his complaint to prison officials before filing suit, the extra gloss of procedural default means that, if the prison rejects a grievance on procedural grounds—because it is untimely or otherwise fails to comply with institutional grievance rules—a court may never be able to consider the claim. For example, the plaintiff in *Woodford*, an inmate in the California state prison system, was barred from litigating his claims in federal court because he missed a fifteen-day deadline in the prison grievance procedure.¹⁵

While ostensibly relying on statutory interpretation, *Woodford* borrowed from habeas and administrative law to create its procedural default rule. The *Woodford* rule allows a prisoner's mistakes in the prison grievance system to scuttle potential federal constitutional claims. Even more troubling, the decision effectively leaves the ability to define the hurdles a prisoner must clear (in the form of prison grievance procedures) in the hands of prison officials, making them

¹¹ At least one court observer has drawn a connection between the “War on Terror” cases and domestic jurisdiction-stripping. See Emily Bazelon, *Block That Branch, Why Can Congress Take Cases Away From the Courts?*, SLATE, December 16, 2006, <http://www.slate.com/id/2155515/> (drawing connection between the jurisdiction-stripping of the Military Commissions Act decision in *Hamdan* and the recent Supreme Court Anti-Terrorism and Effective Death Penalty Act (AEDPA) decision in *Carey v. Musladin*) (last visited February 10, 2007).

¹² A Westlaw search of the New York Times archives performed on February 10, 2007 found 43 articles discussing *Hamdan v. Rumsfeld* and no articles discussing *Woodford v. Ngo*.

¹³ A few law review articles noted the emerging circuit splits. The most comprehensive scholarly treatment of these issues was Professor Kermit Roosevelt's article *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1806 (2003); see also 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 (2005); Jamie Ayers, Comment., *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247 (2005); Kristen S. Coy, Note, *Exhaustion Under the PLRA: Reinforcing the Rehabilitative Function of American Prisons*, 14 WIDENER L.J. 989 (2005); Andrea Jacobs, Comment, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277 (2004).

¹⁴ *Woodford v. Ngo*, 126 S. Ct. 2378 (2006).

¹⁵ *Id.* at 2384.

gate-keepers to both federal and, in some jurisdictions, state courts.¹⁶ Thus, *Woodford* enhances the already significant jurisdiction-stripping effects of the PLRA, which include limitations on the prospective relief that federal courts can order.¹⁷

The consolidated cases of *Williams v. Overton* and *Jones v. Bock*,¹⁸ decided in January 2007, presented three more procedural issues relating to the exhaustion requirement. The plaintiffs in these cases challenged a series of judicially-created rules imposed by the Sixth Circuit, whose combined effect had resulted in the dismissal of a significant number of prisoner cases in that circuit.¹⁹ The *Jones* court rejected the Sixth Circuit's rules. It concluded that exhaustion is an affirmative defense that can be raised by the defendants rather than a requirement that the prisoner must plead; that the statute does not require prisoners to name defendants in their initial grievances in order to sue them later in court; and that a failure to exhaust a single claim does not mandate dismissal of other, exhausted claims in the lawsuit.²⁰

The decision in *Jones* suggests that there is a limit to the procedural requirements that courts can impose under the ostensible rubric of the PLRA—that if the requirement has no basis in the statute and deviates from “the usual procedural practice” it goes too far.²¹ The *Jones* court reaffirmed that, “[o]ur legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law.”²²

¹⁶ See, e.g., *Richardson v. Comm. of Correction*, 863 A.2d 754, 756 (Conn. App. Ct. 2005) (assuming that the PLRA exhaustion requirement applies to federal constitutional claims in state court); *Cole v. Isherwood*, 716 N.W.2d 36, 42-43 (Neb. 2006) (same); *Baker v. Rolnick*, 110 P.3d 1284, 1287-88 (Ariz. App. Ct. 2005) (holding that § 1997e applies to § 1983 prisoner lawsuits in both state and federal court); *Bloom v. Muckenthaler*, 117 P.3d 151 at *3 (Kan. App. Ct. 2005) (unpublished) (same).

¹⁷ See *Miller v. French*, 530 U.S. 327 (2000) (concluding that provision of the PLRA that permits automatic stay of injunction upon filing of motion alleging that it does not comply with PLRA requirements for entry of prospective relief did not violate separation of powers); see also Lynn S. Branham, *Keeping The “Wolf Out of the Fold”: Separation of Powers and Congressional Termination of Equitable Relief*, 26 J. LEGIS. 185 (2000).

¹⁸ 127 S. Ct. 910 (2007).

¹⁹ The vast majority of prisoner screening orders reported on Westlaw result in dismissal of the prisoner's suit. Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7058, 05-7142), 2006 WL 2364683, at *35-36 & n.42 (“Of the nearly 500 prisoner screening orders available on Westlaw from the Sixth Circuit since *Jones Bey* was decided, only eighteen allowed the prisoner to proceed.”).

²⁰ *Id.*

²¹ *Jones*, 127 S. Ct. at 920. The Court echoed this theme again later in the 2006 term in *Erickson v. Pardus*, a brief *per curiam* opinion issued June 4, 2007 that was joined by seven Justices. 127 S. Ct. 2197 (2007). In *Pardus*, the Supreme Court granted certiorari and vacated the opinion of the Tenth Circuit, explaining that the court had improperly imposed a heightened pleading standard on the prisoner's *pro se* complaint. *Id.* at 2200. “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’” the Court explained. *Id.*

²² *Jones*, 127 S. Ct. at 914.

However, while *Jones* concluded that courts could not impose a requirement that a prisoner must name the defendants in his grievances, it said that courts could enforce such requirements if they were included in the prison grievance procedures.²³ The opinion thus reaffirms that, under *Woodford*, courts must defer to prison regulations.

The PLRA exhaustion cases may appear at first to be arcane procedural debates, not titanic constitutional struggles. However, for the more than two million Americans incarcerated in 2005,²⁴ they present significant court access issues. The case of *Minix v. Pazera*,²⁵ which was cited in the *Woodford* dissent,²⁶ demonstrates the draconian effect of a procedural default rule.²⁷ In *Minix*, a teen suffered serious abuse by other incarcerated juveniles for months, in a facility that the Department of Justice (DOJ) later found “fails to adequately protect the juveniles in its care from harm.”²⁸ Despite the fact that his mother had contacted numerous state officials to complain,²⁹ the *Minix* family’s suit was dismissed on summary judgment for failure to exhaust.³⁰ The procedures in place in Indiana juvenile facilities at the time required that a child file a grievance within two business days of an incident.³¹ In its findings letter, issued about two months after *Minix* was dismissed, the DOJ noted that “[t]he dysfunctional grievance system at South Bend contributes to the State’s failure to ensure a reasonably safe environment.”³² Thus, despite the fact that an agency of the federal government confirmed that S.Z. was incarcerated in a facility that failed to protect juveniles’ civil rights, and that the grievance system (which at the time imposed a two-working-day deadline) was ineffectual, his federal civil rights suit was dismissed for failure to file a grievance.³³

Minix illustrates the harsh operation of a procedural default rule in the PLRA exhaustion context. In the absence of procedural default, the

²³ *Id.* at 922-23.

²⁴ PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 1 (2006).

²⁵ *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005).

²⁶ *Woodford*, 126 S. Ct. at 2403 (Stevens, J., dissenting); see also Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *3-4.

²⁷ See Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263 (2006) (arguing for an amendment to the PLRA exempting juveniles from its provisions).

²⁸ Letter from Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3, 7 (Sept. 9, 2005), available at <http://www.usdoj.gov/crt/split/findsettle.htm#FindingsLetters> (click on “Investigation of the South Bend Correctional Juvenile Facility, Indiana”) (last visited February 21, 2007).

²⁹ *Id.* at *2, 4.

³⁰ The case had been removed to federal court by the defendants. The district court dismissed without prejudice and remanded to state court for litigation of the state law claims. *Id.* at *7.

³¹ *Id.* at *6.

³² *Id.*

³³ *Minix*, 2005 WL 1799538, at *7.

two-working-day deadline would not be an insurmountable stumbling block to the federal constitutional claims. The court could dismiss the suit without prejudice (or stay it) to allow the prisoner to file a late grievance, thereby giving the prison authorities the option of deciding whether to address the claim on the merits despite its tardiness.³⁴ Whether the prison authorities address the claim on the merits or dismiss it for lateness, under a simple exhaustion regime the claim would be considered “exhausted” if the prison authorities had an opportunity to address it.³⁵ Now that procedural default has been added to the exhaustion requirement, however, the prison’s determination that a claim is late generally means that it was not “properly exhausted,” and so is defaulted, thereby barring the lawsuit.³⁶ Ironically, if prison authorities deny a grievance on the merits, courts can review that decision. But if prison authorities deny it on procedural grounds, under *Woodford*, courts must defer to that determination, and the claim is procedurally barred.³⁷ Moreover, under the *Woodford* rule, a procedurally-defaulted claim is barred regardless of whether it was frivolous or meritorious.³⁸

Cases like *Minix* provide sufficient cause for concern,³⁹ but the significance of the PLRA decisions extends beyond their immediate impact on prison litigation. John Boston, the foremost practitioner expert on PLRA doctrine, has described the PLRA as “the new face of court stripping,” because it limits review through “new standards and

³⁴ Roosevelt, *supra* note 13, at 1780-82. Whether a stay (as opposed to dismissal without prejudice) would be permissible under the PLRA in the absence of a procedural default requirement is debatable. Prior to the PLRA, the exhaustion provision contemplated stays, providing that, “the court shall, if the court believes that such requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.” 42 U.S.C. § 1997e(a)(1) (1994). The PLRA removed this provision. Stays are used in the habeas corpus context to permit exhaustion of unexhausted claims. See *Rhines v. Weber*, 544 U.S. 269 (2005) (holding that district courts have discretion to stay a mixed habeas petition to permit a petitioner to present unexhausted claims to the state court and then to return to federal court for review).

³⁵ Roosevelt, *supra* note 13, at 1780-82.

³⁶ *Woodford*, 126 S. Ct. at 2382.

³⁷ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 284226, at *27-28.

³⁸ *Woodford*, 126 S. Ct. at 2401 (Stevens, J. dissenting).

³⁹ The abuse described in *Minix* is all-too-common. In the past year, the Texas juvenile justice system has faced widespread accusations of sexual abuse and cover-up by school staff members and their supervisors. See Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. TIMES, Mar. 4, 2007, at 1.24; Ralph Blumenthal, *Texas Calls for Takeover of State’s Juvenile Schools*, N.Y. TIMES, Feb. 8, 2007, at A11; see also Cassi Feldman, *State Facilities’ Use of Force is Scrutinized After a Death*, N.Y. TIMES, Mar. 4, 2007, at 1.29; HUMAN RIGHTS WATCH, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK’S JUVENILE PRISONS FOR GIRLS (2006), available at hrw.org/reports/2006/us0906; STOP PRISONER RAPE, IN THEIR OWN WORDS: RECENT EXAMPLES OF SEXUAL ABUSE OF YOUTH BEHIND BARS (2006), available at www.spr.org/pdf/prea_update_june_06.pdf.

. . . procedures,” rather than explicitly drawing “lines and erect[ing] walls.”⁴⁰ In so doing, the PLRA cases demonstrate yet another form of jurisdiction-stripping, contributing to the overall shift of power to the executive that we currently see in other contexts, including in the “War on Terror” on all its fronts.⁴¹

In this Article we seek to focus attention on some of the more important ramifications of *Woodford* and *Jones*. We begin in Part I with a short history of the Prison Litigation Reform Act, starting with the context of its enactment and concluding with the PLRA exhaustion cases of the past two terms. Next, in Part II, we explain how these cases, and particularly the Court’s decision in *Woodford*, work to strip courts of jurisdiction by adopting comity-based exhaustion rules—what we describe as the “habeas-ification” of civil rights.⁴² In Part III, we address why the habeas and administrative law analogies relied on by the Court in *Woodford* were misplaced, given the realities of prison and jail grievance systems. Finally, in Part IV, we attempt to explain the dangers of consensual jurisdiction-stripping, in which courts adopt rules that voluntarily relinquish jurisdiction, often to promote caseload management or ease of administration.

I. THE PRISON LITIGATION REFORM ACT: THE CLOSING OF THE COURTHOUSE DOOR

The passage of the Prison Litigation Reform Act (PLRA)—and the current litigation about its exhaustion provision—echo recurring debates about the proper role of the federal courts in addressing prison abuses.

⁴⁰ John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 429-30 (2001); see also Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1649-50 (2003) [hereinafter Schlanger, *Inmate Litigation*].

⁴¹ Comments from the Yale Law School Fellows’ Works-in-Progress, and in particular Asli Bali, contributed to our thinking on this point. See, e.g., Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see also *American Civil Liberties Union v. Nat’l Security Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), stay granted by 467 F.3d 590 (6th Cir. 2006) (discussing secret Terrorist Surveillance Program). The government’s “War on Terror” rhetoric already borrows from the PLRA context. In his testimony in support of the Detainee Treatment Act of 2005, Senator Kyl argued in favor of stripping federal courts of habeas jurisdiction over Guantánamo detainees by citing examples of frivolous prisoner suits that had been ridiculed nearly ten years earlier in the debates over the PLRA—including the now-infamous case of a prisoner suing for “chunky peanut butter.” Alexander, *supra* note 8 at 263 (citing 151 Cong. Rec. S12652, S12660 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl)). Commentators also have noted that certain kinds of abuse may be exported from the domestic prison context to the “War on Terror.” See Jacobs, *supra* note 13, at 277 (noting that “two of the seven MPs charged with the abusive acts [at Abu Ghraib] were prison guards in their civilian life”).

⁴² Indeed, for the reasons described *supra* in note 34, a procedural default rule may work more harsh consequences in the PLRA context than in habeas, because stay provisions are routinely used in habeas to permit exhaustion of unexhausted claims, while they have been removed from CRIPA by the PLRA.

Under the so-called “hands-off doctrine,” which prevailed until the 1960s, courts generally did not review claimed violations of state prisoners’ rights.⁴³ The ostensible rationale for the “hands-off” approach varied, but included “the theory of separation of powers; the lack of judicial expertise in penology; and the fear that intervention by the courts [would] subvert prison discipline.”⁴⁴

In the 1960s and 1970s, the “hands-off” doctrine eroded.⁴⁵ The Court “began to scrutinize various aspects of police and prosecutorial conduct” in its criminal procedure cases,⁴⁶ and took a more “expansive reading of 42 U.S.C. § 1983 in *Monroe v. Pape*.”⁴⁷ The Civil Rights Act was applied to state prisoners.⁴⁸ After the Attica riot in 1971, sophisticated civil rights organizations like the American Civil Liberties Union (ACLU) began aggressively and systematically litigating prison cases.⁴⁹ “[F]aced with sometimes uncontested proof of brutal and unhealthful jail and prison environments not just in isolation cells but throughout facilities, judges began to find that such conditions also violated the constitutional rights of inmates and to issue injunctive orders”⁵⁰

Professor Margo Schlanger has described this initial period of prison reform litigation as “a nationwide flood of class-action lawsuits.”⁵¹ Twenty-four percent of state prisons were under court order by 1984.⁵² Predictably, such orders were often criticized as judicial activism.⁵³ However, even critics of federal court intervention had to admit that prison conditions were often abysmal and in need of

⁴³ See Margo Schlanger, *The Courts, Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*]; Larijean Golichowski Dei, Note, *The New Standard of Review for Prisoners’ Rights: A “Turner” For the Worse?*, 33 VILL L. REV. 393, 399 (1988) (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)) (“Courts considered prisoners to be ‘slaves of the State,’ having ‘not only forfeited their liberty, but all their personal rights’”); see also Notes and Comments, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners’ Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Mark Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 U.M.K.C. L. REV. 1 (1978-1979).

⁴⁴ Goldfarb & Singer, *supra* note 43 at 181.

⁴⁵ *Id.* at 183.

⁴⁶ *Id.*

⁴⁷ Dei, *supra* note 43, at 401 (citing *Monroe v. Pape*, 436 U.S. 167 (1961) (concluding that illegal actions of state actors, such as illegal search and seizure, gave rise to claims under § 1983, as well as state-authorized constitutional violations)).

⁴⁸ Goldfarb & Singer, *supra* note 43, at 184 (citing *Cooper v. Pate*, 378 U.S. 546 (1964)).

⁴⁹ Schlanger, *Beyond the Hero Judge*, *supra* note 43, at 2017.

⁵⁰ *Id.* at 2003.

⁵¹ *Id.* at 2004.

⁵² *Id.*

⁵³ See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-19 (1997).

remedy. Then-Justice Rehnquist wrote, “[t]he deplorable conditions and Draconian restrictions of some of our Nation’s prisons are too well known to require recounting here, and the federal courts have rightly condemned these sordid aspects of our prison systems.”⁵⁴ But the Court continued to defer to prison officials in many other ways, including, *inter alia*, in its test for determining whether a prison regulation unduly impinged on constitutional rights.⁵⁵

At the same time that courts were beginning to consider prisoners’ complaints, the inmate population exploded. Professor Franklin Zimring has described how America’s incarceration rate began to rise in the mid-1970s, accelerated in the mid-1980s with the “War on Drugs,” and continued to expand in the 1990s as prison terms lengthened due to changes in sentence structure and the enactment of recidivism (commonly known as “three-strikes”) statutes.⁵⁶ Today, this thirty-year trend has produced the world’s highest incarceration rate.⁵⁷

In 1996, in the midst of America’s prison boom, Congress enacted the PLRA.⁵⁸ The stated purpose of the PLRA was to reduce frivolous inmate litigation and over-reaching by federal courts.⁵⁹ In some measure the legislation was a reaction to perceived judicial activism.⁶⁰ However, the PLRA also was a response to a purported “deluge” of *pro se* inmate filings, in large part attributable to “the growing incarcerated population.”⁶¹ It was accompanied by restrictions on habeas corpus enacted in the Anti-Terrorism and Effective Death Penalty Act (AEDPA),⁶² a statute which also has been described as a reaction to the nation’s unprecedented use of incarceration.⁶³

⁵⁴ Bell v. Wolfish, 441 U.S. 520, 562 (1979) (Rehnquist, J.).

⁵⁵ Turner v. Safley, 482 U.S. 78, 89 (1987) (indicating that a regulation that infringes on prisoners’ constitutional rights will be upheld if it is “reasonably related to legitimate penological interests”). See generally Dei, *supra* note 43; Tushnet & Yackle, *supra* note 53, at 12-19 (discussing how, before enactment of the PLRA, courts “began responding to arguments in favor of changing the courts’ role” in prison litigation).

⁵⁶ Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331-35 (2005).

⁵⁷ THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH (2006), available at <http://www.sentencingproject.org/pdfs/1044.pdf>.

⁵⁸ Zimring, *supra* note 56, at 331-35.

⁵⁹ Schlanger, *Inmate Litigation*, *supra* note 40, at 1586-87.

⁶⁰ James B. Jacobs, *Prison Reform Amid the Ruins of Prisoners’ Rights*, in THE FUTURE OF IMPRISONMENT 184-85 (Michael Tonry ed., 2004); see also Tushnet & Yackle, *supra* note 53 at 12-19.

⁶¹ Schlanger, *Inmate Litigation*, *supra* note 40, at 1586-87; see also Roosevelt, *supra* note 13 at 1777 (“[W]hat the United States was really experiencing was an epidemic of incarceration, of which increased litigation was merely a symptom.”).

⁶² Anthony G. Amsterdam, *Foreward*, in RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE at v (2001) (“AEDPA undertook to make sweeping changes in federal habeas corpus procedure.”).

⁶³ See generally Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006).

Passed hastily and with scant legislative history, the PLRA represented a moment when state attorneys general were able to take advantage of anti-prisoner and anti-activist court sentiment—as well as a Republican-controlled Congress—to curtail access to courts.⁶⁴ It has been described by Professors Mark Tushnet and Larry Yackle as a “symbolic statute”—one passed so that legislators can “tell their constituents that they have done something about a problem,”—but with all too “real consequences.”⁶⁵ The PLRA was one formal, legal component of the incarceration boom of the mid-1990s, which culminated in what Professor Jonathan Simon has described in a forthcoming paper as “a system whose not so unintended effect is to cast [young men and women] into a permanently diminished citizenship.”⁶⁶

The Honorable Jon O. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, has described the PLRA lobby as follows: “Laboring under the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous.”⁶⁷ The National Association of Attorneys General (NAAG) compiled a “Top Ten Frivolous Filings List,” containing the infamous “chunky peanut butter” case, in which a prisoner sued after his inmate account was charged for the wrong kind of peanut butter.⁶⁸ As Chief Judge Newman has pointed out, NAAG’s “poster child” cases may not actually have been so frivolous, and, if they were frivolous, were not so typical of prison litigation.⁶⁹ Nonetheless the examples did the work that the state officials intended—the PLRA passed.

The statute created several requirements affecting institutional litigation by incarcerated persons.⁷⁰ These include provisions creating restrictions on prospective relief⁷¹ and restrictions on prisoner release orders,⁷² as well as provisions providing for the termination of consent

⁶⁴ See generally Schlanger, *Inmate Litigation*, *supra* note 40, at 1558-59. See also Roosevelt, *supra* note 13, at 1777-78; Tushnet & Yackle, *supra* note 53, at 12-22.

⁶⁵ Tushnet & Yackle, *supra* note 53, at 2-3, 85.

⁶⁶ Jonathan Simon, *Rise of the Carceral State* 37-38 (unpublished manuscript, on file with author).

⁶⁷ Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

⁶⁸ *Id.* at 520-21.

⁶⁹ *Id.* at 522.

⁷⁰ See generally MICHAEL R. MUSHLIN, RIGHTS OF PRISONERS § 16 (3d ed. 2006).

⁷¹ 18 U.S.C. § 3626(a)(1)(A) (2000) (“[P]rospective relief . . . shall extend no further than necessary to correct the violation of the Federal right”); see MUSHLIN, *supra* note 70, at § 16:3.

⁷² 18 U.S.C. § 3626(a)(3). Prisoner release orders may be granted only by a three-judge panel; only once the defendants have had “a reasonable amount of time to comply with previous court orders;” and only if the court finds that “crowding is the primary cause of the violation of a Federal right” and that “no other relief will remedy the violation.” *Id.*; see MUSHLIN, *supra* note

decrees and injunctions.⁷³ Another set of PLRA sections were designed to reduce frivolous litigation by individual *pro se* prisoners, including a provision for screening of complaints,⁷⁴ a “three strikes” rule barring future filings once a prisoner has filed three that were “frivolous, malicious, or fail[ed] to state a claim upon which relief can be granted,”⁷⁵ and a mandate that even indigent prisoners must pay filing fees out of their inmate accounts.⁷⁶ A final set of PLRA provisions addressed various perceived abuses of prison litigation, barring recovery for mental or emotional injury without a prior showing of a physical injury,⁷⁷ and limiting attorney’s fees.⁷⁸

Although the statute faced scholarly criticism and legal challenges when it was passed,⁷⁹ it was upheld.⁸⁰ In the ensuing years, the PLRA appears to have restricted inmate litigation. Professor Schlanger, who analyzed federal court filings in her 2003 article *Inmate Litigation*, has written: “The statute has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population.”⁸¹

By creating new procedural requirements, however, the PLRA also has generated many legal issues,⁸² some of which echo earlier debates about the proper role of federal court review of prisoners’ complaints. The exhaustion requirement, in particular, has produced significant litigation. Of the six U.S. Supreme Court decisions involving the

70, at §§ 16:4, 16:6.

⁷³ 18 U.S.C. § 3626(b)(1) and (b)(3). Judgments are automatically terminated in two years unless the court makes written findings that “relief is narrowly drawn,” “extends no further than necessary to correct the violation of the Federal right; and is the least intrusive means necessary to correct the violation of the Federal right.” *Id.*; see also MUSHLIN, *supra* note 70, at § 16:5.

⁷⁴ 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c)(1); see MUSHLIN, *supra* note 70, at §§ 16:12, 16:16, 16:17.

⁷⁵ 28 U.S.C. § 1915(g); see MUSHLIN, *supra* note 70, at §§ 16:12, 16:16.

⁷⁶ 28 U.S.C. § 1915(b)(1); see MUSHLIN, *supra* note 70, at §§ 16:12, 16:14.

⁷⁷ 42 U.S.C. § 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.”); see MUSHLIN, *supra* note 70, at § 16:10.

⁷⁸ 42 U.S.C. § 1997e(d); see MUSHLIN, *supra* note 70, at § 16:22.

⁷⁹ See generally Roosevelt, *supra* note 13 at 1779. See, e.g., William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651 (2004); Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Chunky Peanut Butter*, 78 ST. JOHN’S L. REV. 203 (2004); 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 (2001); Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998).

⁸⁰ See, e.g., *Miller v. French*, 530 U.S. 327 (2000); see Roosevelt, *supra* note 13, at 1779; Herman, *supra* note 79, at 1290.

⁸¹ Schlanger, *Inmate Litigation*, *supra* note 40, at 1694.

⁸² Chen, *supra* note 79, at 218.

PLRA,⁸³ four have dealt with the exhaustion requirement,⁸⁴ including *Woodford* and *Jones*.

The exhaustion requirement provides: “No action shall be brought with respect to prison conditions under section 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.”⁸⁵ The PLRA exhaustion requirement amended an earlier exhaustion requirement contained in the Civil Rights of Institutionalized Persons Act (CRIPA), which was enacted in 1980.⁸⁶ Under CRIPA, however, the exhaustion requirement “was in large part discretionary; it could be ordered only if the State’s prison grievance system met specified federal standards, and even then, only if, in the particular case, the court believed the requirement ‘appropriate and in the interests of justice.’”⁸⁷ A district court could stay a suit for up to 180 days while a prisoner exhausted available “plain, speedy, and effective administrative remedies.”⁸⁸ The PLRA altered the nature of the CRIPA exhaustion requirement—among other things, changing it from discretionary to mandatory, eliminating the stay provision, and removing the requirement that administrative remedies be “plain, speedy, and effective.”⁸⁹

Although exhaustion requirements exist in administrative law and habeas corpus,⁹⁰ the meaning of such a provision in the civil rights context is far from clear, and has been heavily litigated. During some periods of the past two years, the exhaustion requirement has generated several district court opinions each day, ultimately producing a number of circuit splits. These splits, in turn, produced decisions in *Woodford v. Ngo* and *Jones v. Bock*.

The first wave of PLRA exhaustion litigation to reach the Supreme Court, five years after the Act’s passage, addressed the scope of the provision. In *Booth v. Churner* the Supreme Court concluded that prisoners were required to exhaust claims for money damages, even when such relief was not available through the prison grievance system.⁹¹ The following year, in *Porter v. Nussle*, the Supreme Court

⁸³ *Martin v. Hadix*, 527 U.S. 323 (1999); *Miller v. French*, 530 U.S. 327 (2000); *Booth v. Churner*, 532 U.S. 731 (2001); *Porter v. Nussle*, 534 U.S. 516 (2002); *Woodford v. Ngo*, 126 S. Ct. 2378, 2378 (2006); *Jones v. Bock*, 127 S. Ct. 910, 910 (2007).

⁸⁴ *Woodford*, 126 S. Ct. at 2378; *Jones*, 127 S. Ct. at 910.

⁸⁵ 42 U.S.C. § 1997e(a) (2000); see MUSHLIN, *supra* note 70, § 16:9.

⁸⁶ 94 Stat. 352, as amended, 42 U.S.C. § 1997e (1994) (repealed 1996); see *Porter*, 534 U.S. at 523.

⁸⁷ *Porter*, 534 U.S. at 523.

⁸⁸ 42 U.S.C. § 1997e(a)(1) (1994) (repealed 1996).

⁸⁹ *Porter*, 534 U.S. at 523-24.

⁹⁰ Roosevelt, *supra* note 13, at 1774 (“Exhaustion requirements are familiar to federal judges.”).

⁹¹ *Booth v. Churner*, 532 U.S. 731, 740-41 (2001).

concluded that “prison conditions” cases subject to the exhaustion requirement included excessive force cases, a group that the Second Circuit had carved out of the PLRA’s ambit.⁹² Justice Ginsburg, writing for a unanimous Court, said, “we hold that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”⁹³

Once *Booth* and *Porter* defined the scope and application of the statute, the skirmishing turned to questions about the procedures for administering the exhaustion doctrine. How does a prisoner satisfy the PLRA exhaustion requirement? What if a grievance is untimely? How specific must a grievance be to satisfy exhaustion? What if one claim is exhausted, while others are not exhausted? And who bears the burden of demonstrating and proving exhaustion? These questions, among others, were the focus of the most recent round of PLRA litigation. They are gate-keeper questions; they directly affect whether prisoners’ federal claims may be brought to court. The way in which the Court is answering these questions has far-reaching implications for the role played by the civil rights statute in the prison and jail context.

Decided in the 2005 term, *Woodford* is the most important of the cases interpreting the exhaustion requirement. The prisoner in *Woodford*, a California inmate, failed to file a grievance within fifteen working days of the action being challenged, as required by the California regulation.⁹⁴ The Ninth Circuit concluded that, because the prisoner was no longer able to submit a grievance to the California Department of Corrections (CDC), the administrative remedy was not “available” to him, and so he had exhausted within the meaning of the statute.⁹⁵ The Ninth Circuit’s decision conflicted with decisions of the Seventh,⁹⁶ Tenth,⁹⁷ Third,⁹⁸ and Eleventh Circuits;⁹⁹ it was consistent with the Sixth Circuit.¹⁰⁰ The Supreme Court granted certiorari and

⁹² *Porter*, 534 U.S. at 532, *reversing* *Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir. 2000).

⁹³ *Id.*

⁹⁴ 126 S. Ct. at 2384.

⁹⁵ *Id.* at 2384 (citing *Ngo v. Woodford*, 403 F.3d 620, 629-30 (9th Cir. 2005)).

⁹⁶ *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) (holding that “[t]o exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim”).

⁹⁷ *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185-86 (10th Cir. 2004) (holding that the PLRA “contains a procedural default concept within its exhaustion requirement”).

⁹⁸ *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004) (finding that “Congress’s policy objectives will be served by interpreting § 1997(e)(a)’s exhaustion requirement to include a procedural default component”).

⁹⁹ *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005) (holding “that the PLRA’s exhaustion requirement does contain a procedural default component”).

¹⁰⁰ *Thomas v. Woolum*, 337 F.3d 720, 733 (6th Cir. 2003) (holding that “a prisoner who has presented his or her grievance through one complete round of the prison process has exhausted the available administrative remedies under 42 U.S.C. § 1997e(a), regardless of whether the

reversed.¹⁰¹ While *Woodford* itself dealt with an untimely grievance, the language of the opinion suggests that the procedural default rule that it announced is not limited to time deadlines.

In an opinion written by Justice Alito, the Court concluded that the PLRA required compliance with all procedural requirements of an inmate grievance system to avoid default, writing that “the PLRA exhaustion requirement requires proper exhaustion.”¹⁰² It analogized to principles of administrative review of federal agency decisions, and to habeas doctrine, in which federal courts review decisions of state criminal court systems. Administrative exhaustion, the Court reasoned, gives an agency a chance to correct its own mistakes and promotes efficient resolution of controversies.¹⁰³ “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,” the Court explained.¹⁰⁴ Federal habeas doctrine, the Court wrote, contains a “substantively similar” requirement, which bars a prisoner from obtaining relief unless he has “properly presented his or her claims through one ‘complete round of the State’s established appellate review process.’”¹⁰⁵

Justice Breyer concurred but wrote separately to note that both administrative law and habeas doctrine contain several exceptions to the exhaustion requirement. “In my view,” Justice Breyer wrote, “on remand the lower court should similarly consider any challenges that petitioner may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates.”¹⁰⁶ Justice Breyer noted that these traditional administrative law exceptions include futility, hardship, and an exemption for constitutional claims.¹⁰⁷ He did not acknowledge that an exception for constitutional claims would swallow the rule in the PLRA context, since many prisoners’ claims are constitutional. Nor did he attempt to reconcile the futility exception with the Court’s decision in *Booth*, which concluded that prisoners must exhaust administrative procedures even when they seek remedies like money damages that are not available through the grievance system.¹⁰⁸

Three Justices—Stevens, Souter, and Ginsburg—dissented in *Woodford*. Writing for the dissent, Justice Stevens explained that,

prisoner complied with the grievance system’s procedural requirements”).

¹⁰¹ *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006).

¹⁰² *Id.* at 2387.

¹⁰³ *Id.* at 2385.

¹⁰⁴ *Id.* at 2386.

¹⁰⁵ *Id.* at 2386-87 (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

¹⁰⁶ 126 S. Ct. at 2393 (Breyer, J., concurring).

¹⁰⁷ *Id.* at 2398.

¹⁰⁸ *Booth v. Churner*, 532 U.S. 731, 731 (2001).

although the PLRA mandated exhaustion of administrative remedies, it did not distinguish between denial on the merits and denial for some other procedural reason.¹⁰⁹ In other words, in the view of the dissenters, if a court need not defer to prison officials' decision on the merits of a claim, why should it defer to their determination on procedural grounds? The adoption of the procedural default requirement, Justice Stevens wrote, is not required by the text of the statute, but rather imposed by the majority of the Court.¹¹⁰

Justice Stevens criticized the majority's reliance on "general administrative law principles, which allow courts in certain circumstances to impose procedural default sanctions as a matter of federal common law."¹¹¹ "[W]hether a court should impose a procedural default sanction for issues not properly exhausted in a prior administrative proceeding depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding," the dissent wrote.¹¹² Prison grievance procedures do not contain the kinds of procedural protections that exist in other agency hearings, the dissent explained, let alone in state court criminal proceedings. Inmate grievance procedures are quite short: "generally no more than 15 days, and . . . in nine States . . . between 2 and 5 days."¹¹³ "[B]ecause federal district court proceedings in prison condition litigation bear no resemblance to appellate review of lower court decisions," the dissenters concluded, "the administrative law precedent cited by the majority makes clear that we should not engraft a judge-made procedural default sanction into the PLRA."¹¹⁴

In addition to relying on flawed analogies, Justice Stevens also explained that the imposition of a procedural default requirement altered the role of the civil rights vehicle in ways that could not have been foreseen by Congress when the PLRA was enacted. "It is undisputed that the PLRA does nothing to change the nature of the federal action under § 1983," he wrote.¹¹⁵ "[P]risoners who bring such actions after exhausting their administrative remedies are entitled to *de novo* proceedings in the federal district court without any deference (on issues of law or fact) to any ruling in the administrative grievance

¹⁰⁹ 126 S. Ct. at 2394 (Stevens, J., dissenting).

¹¹⁰ *Id.* at 2394 ("In the words of federal courts jurisprudence, the text of the PLRA does not impose a waiver, or a procedural default, sanction, upon those prisoners who make such procedural errors.").

¹¹¹ *Id.* at 2395.

¹¹² *Id.* at 2398 (internal quotation marks and citation omitted).

¹¹³ *Id.* at 2402 (citing Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *6-13).

¹¹⁴ *Woodford*, 126 S. Ct. at 2402.

¹¹⁵ *Id.* at 2399.

proceedings.”¹¹⁶ By analogizing to administrative law, the *Woodford* majority placed state prison grievance procedures between prisoners and the federal courts, flouting “the ‘very purpose of § 1983[, which] was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights.’”¹¹⁷ Moreover, Justice Stevens noted that, while the PLRA was intended to reduce frivolous prison litigation, the exhaustion requirement “bars litigation at random, irrespective of whether a claim is meritorious or frivolous.”¹¹⁸

The cases consolidated in *Jones v. Bock* provide an important indication of how *Woodford* will be implemented. In its brief in *Jones*, the State of Michigan emphasized that judicial review of prisoners’ constitutional rights is a relatively recent innovation, and harkened back to the “hands-off” doctrine. “For most of the history of the Republic prisoners had few if any constitutional rights cognizable in the courts,” the State wrote.¹¹⁹ Under “[t]he ‘hands-off’ doctrine,” which “prevailed well into the middle part of the twentieth century,” the State continued, “federal courts would rarely, if ever, review prisoner civil rights complaints on the merits.”¹²⁰

In a unanimous opinion by Chief Justice Roberts, the Court confirmed that the PLRA is not a return to the “hands-off” doctrine. It began by recognizing that prisoner filings “account for an outsized share of filings” in federal district courts,¹²¹ but reaffirmed that the legal system remains “committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law.”¹²² The PLRA, including its exhaustion requirement, was intended to produce “fewer and better prisoner suits,” the Court explained.¹²³

The *Jones* Court turned first to the question of “whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense.”¹²⁴ It concluded that the statute’s silence on the subject “is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to recognize exhaustion as an affirmative defense.”¹²⁵ The Court reiterated its conclusion from a number of

¹¹⁶ *Id.* at 2399.

¹¹⁷ *Id.* at 2396 n.5 (quoting *Mitchum v. Foster*, 407 U.S. 225 (1972)).

¹¹⁸ *Woodford*, 126 S. Ct. at 2401.

¹¹⁹ Brief of Respondents, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7058 and 05-7142), 2006 WL 2726076, at *22.

¹²⁰ *Id.* at *22-23.

¹²¹ *Jones v. Bock*, 127 S. Ct. 910, 914 (2007). *But see* Schlanger, *Inmate Litigation*, *supra* note 40, at 1576 (demonstrating that prisoners’ rate of court filings is not higher than the general population when both state and federal court filings are counted).

¹²² *Jones*, 127 S. Ct. at 914.

¹²³ *Id.*

¹²⁴ *Id.* at 919.

¹²⁵ *Id.*

recent cases that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”¹²⁶ The Court rejected the State’s arguments that the PLRA screening requirement—which permits district courts to dismiss complaints that are frivolous, malicious, or fail to state a claim upon which relief can be granted—transformed exhaustion into a pleading requirement.¹²⁷ “The argument that screening would be more effective if exhaustion had to be shown in the complaint proves too much,” the Court said.¹²⁸ “[T]he same could be said with respect to any affirmative defense.”¹²⁹

The *Jones* court next rejected the Sixth Circuit’s conclusion that the prisoners’ suits had to be dismissed because they “had not identified in their initial grievances each defendant they later sued.”¹³⁰ The Court concluded that the PLRA itself contained no such requirement. It explained that whether a prisoner must name defendants in his initial grievance is determined by looking to the prison grievance policies. “In *Woodford*,” the Court explained, “we held 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.”¹³¹ At the time the prisoners in the *Williams* and *Walton* suits had filed their grievances, the Michigan Department of Corrections (MDOC) had not required them to identify specific defendants.¹³² The Court explained: “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”¹³³

Finally, the *Jones* court rejected the Sixth Circuit’s so-called “total exhaustion” rule. The Court concluded that the language of the PLRA exhaustion provision—“no action shall be brought”—was “boilerplate language” used in other areas, such as statutes of limitation.¹³⁴ “[S]uch language has not been thought to lead to the dismissal of an entire action if a single claim fails to meet the pertinent standards.”¹³⁵ The Court continued: “[W]e have never heard of an entire complaint being thrown out simply because one of several discrete claims was barred by

¹²⁶ *Id.*

¹²⁷ *Id.* at 921.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 922.

¹³¹ *Id.* (quoting *Woodford v. Ngo*, 126 S. Ct. 2378, 2378 (2006)).

¹³² *Id.* at 923.

¹³³ *Id.*

¹³⁴ *Id.* at 924.

¹³⁵ *Id.*

the statute of limitations, and it is hard to imagine what purpose such a rule would serve.”¹³⁶ The *Jones* court examined the habeas analogy, and noted that there might be important differences between habeas petitions and civil rights suits that would militate against a total exhaustion rule in the § 1983 context.¹³⁷ However, it concluded, such differences were of no moment because, even in habeas, “a court presented with a mixed habeas petition typically ‘allows the petitioner to delete the unexhausted claims and to proceed with the exhausted claims.’”¹³⁸

In conclusion, the *Jones* court said that not even the pressures of large numbers of prisoner suits could justify judicially-created procedures meant to block court access, in the absence of statutory or rule-based authority. “We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks,”¹³⁹ the *Jones* Court said. “We once again reiterate, however . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”¹⁴⁰

The combined message of *Woodford* and *Jones* is that it is the rules of prison grievance policies that will determine when—and if—incarcerated prisoners are able to seek relief in court. *Jones* signals to lower courts eager to unburden themselves of prisoner cases that the PLRA is not *carte blanche* to “trap the unwary pro se prisoner.”¹⁴¹ Nonetheless, the name-the-defendants portion of the *Jones* decision makes clear that if a prison system institutes rules requiring plaintiffs to identify defendants in their initial grievances, an inmate’s failure to comply with those rules might constitute a failure to “properly exhaust.”¹⁴² Accordingly, authority is shifted to prison grievance systems: if they have short deadlines, like in *Woodford*, or require detailed complaints, many prisoners will have difficulty getting into court.

¹³⁶ *Id.*

¹³⁷ *Id.* at 924-25.

¹³⁸ *Id.* at 913.

¹³⁹ *Id.* at 926.

¹⁴⁰ *Id.*

¹⁴¹ *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

¹⁴² *Jones*, 127 S. Ct. at 913.

II. THE “HABEAS-IFICATION” OF CIVIL RIGHTS: HOW THE PLRA EXHAUSTION CASES ALTER 42 U.S.C. § 1983

Woodford's jurisdiction-stripping effect operates through court-imposed limitations on prisoners' ability to use § 1983 to seek redress against state officials for federal law violations. In adopting procedural default, the *Woodford* majority, “change[d] the nature of the federal action under § 1983.”¹⁴³ Three years prior to *Woodford*, Professor Kermit Roosevelt identified this issue in his article, *Exhaustion Under the Prison Litigation Reform Act*. “Before the PLRA,” Professor Roosevelt wrote, “a § 1983 suit was quite clearly an independent federal cause of action, with no relation to any state judicial or administrative proceeding.”¹⁴⁴ “What must be decided,” he explained, “is whether Congress intended the PLRA exhaustion requirement to convert this independent action into either appellate review of prison grievance proceedings (the administrative model) or collateral attack on such proceedings (the habeas model).”¹⁴⁵ He concluded that, “[n]othing in the PLRA suggests that federal courts hearing § 1983 suits should review or defer to the results of prison grievance proceedings, a feature that one would expect to find on either a collateral attack or an appellate review approach.”¹⁴⁶

Professor Roosevelt explained that prison grievance proceedings “are insufficiently judicial in nature to warrant preclusive effect”¹⁴⁷— “[g]rievance proceedings may be nonadversarial; they may not observe rules of evidence in creating a record; they may create no record at all.”¹⁴⁸ “[T]he administrative proceeding may produce no reviewable findings, or no relevant ones; moreover, there is no guarantee that whatever findings do result will be the product of a procedure that comports with federal due process standards.”¹⁴⁹ And he warned that procedural default “requires . . . dismissal of many inmate suits without regard to their merits,”¹⁵⁰ a troubling prospect given that “there are also real abuses that take place within the prison system.”¹⁵¹

Professor Roosevelt's analysis highlights a number of important points, which we expand on here. The first is that the procedural default rule announced in *Woodford* changes the role of the civil rights statute

¹⁴³ *Woodford v. Ngo*, 126 S. Ct. 910, 2399 (Stevens, J., dissenting).

¹⁴⁴ Roosevelt, *supra* note 13, at 1806.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1807.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1806.

¹⁵⁰ *Id.* at 1775.

¹⁵¹ *Id.* at 1776.

in our federal system and curtails the ability to hale abusers into federal court. It makes 42 U.S.C. § 1983—historically a vehicle for holding local officials accountable for federal constitutional violations—more like habeas corpus,¹⁵² a vehicle in which federal courts generally review only claims that have been presented first to state courts, in accordance with state rules.¹⁵³ Professor Roosevelt's second observation is that this habeas-like deference to prison grievance procedures is inappropriate because such procedures do not provide adequate due process protections.¹⁵⁴

In this section and the one that follows, we elaborate on these two criticisms in turn, drawing on empirical support from a survey of grievance policies conducted by the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO) as part of its amicus brief in *Woodford*. In the final section, we address the *Woodford* rule's implications and the heart of Professor Roosevelt's critique—that the imposition of a judicially-created procedural default rule will allow “real abuses” to go unchecked.¹⁵⁵

Woodford's effect on § 1983 is easier to understand when viewed in the context of the statute's history. In its landmark opinion in *Monroe v. Pape*, the Supreme Court explained that the statute that is now 42 U.S.C. § 1983 was initially passed as the Ku Klux Klan Act of April 20, 1871, and was one of the means that Congress sought to enforce the provisions of the Fourteenth Amendment.¹⁵⁶ President Grant and members of Congress were concerned about “lawless conditions” existing in the South at that time.¹⁵⁷ As Justice Douglas explains in *Monroe*: “It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this ‘force bill.’”¹⁵⁸

After reviewing the debates that presaged the statute's enactment, the *Monroe* Court concluded:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.¹⁵⁹

¹⁵² *Id.* at 1798-99.

¹⁵³ 28 U.S.C. § 2254(d) (2000). See generally HERTZ & LIEBMAN, *supra* note 62, at §§ 20.2c & 23.

¹⁵⁴ Roosevelt, *supra* note 13, at 1807.

¹⁵⁵ *Id.* at 1775-76.

¹⁵⁶ 365 U.S. 167, 171 (1961).

¹⁵⁷ *Id.* at 174.

¹⁵⁸ *Id.* at 174-75.

¹⁵⁹ 365 U.S. at 180. Mr. Lowe of Kansas said: “While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American

The *Monroe* Court noted that proponents of the Act stated explicitly that they were motivated by a desire to secure minority rights. Mr. Hoar of Massachusetts had explained during the debates that the statute was to “insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.”¹⁶⁰

Because the civil rights statute is supposed to provide a federal forum for the vindication of federal constitutional rights, the Supreme Court has held that litigants are not required to exhaust state remedies.¹⁶¹ In 1982, in *Patsy v. Board of Regents of the State of Florida*, an employment discrimination suit brought against a state university under the civil rights statute, Justice Marshall, writing for the Court, confirmed that 42 U.S.C. § 1983 does not generally require exhaustion of state administrative remedies as a prerequisite to filing suit.¹⁶² In reaching this conclusion, the Court discussed the legislative history of the Civil Rights Act of 1871. “The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era,” wrote Justice Marshall.¹⁶³ “[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.”¹⁶⁴ One of the themes that the Court identified in the debates was “the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights.”¹⁶⁵

The *Patsy* Court noted that Congress had enacted a “narrow exception to the no-exhaustion rule” in CRIPA, requiring adults convicted of crimes to exhaust administrative remedies in some circumstances, provided that those remedies were deemed “plain,

citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.” 365 U.S. at 477-78. Mr. Beatty of Ohio offered similar comment: “[C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.” *Id.* at 175.

¹⁶⁰ 365 U.S. at 182-83.

¹⁶¹ See *Heck v. Humphrey*, 512 U.S. 477, 489 (1994).

¹⁶² 457 U.S. 496, 516 (1982).

¹⁶³ *Id.* at 503.

¹⁶⁴ *Id.* (internal citations and quotation marks omitted).

¹⁶⁵ *Id.* at 505.

speedy, and effective.”¹⁶⁶ In adopting the CRIPA exhaustion requirement, Justice Marshall wrote: “Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law.”¹⁶⁷ The *Patsy* Court concluded however that, “[a] *judicially imposed* exhaustion requirement would be inconsistent with Congress’ decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.”¹⁶⁸

In enacting the PLRA, Congress intended to strengthen the CRIPA exhaustion requirement—by making exhaustion mandatory and doing away with the requirement that administrative procedures be “plain, speedy, and effective” to require exhaustion.¹⁶⁹ The *Woodford* dissenters argue, however, that procedural default is an extra judicial gloss that is not required by the PLRA.¹⁷⁰ The dissenters assert that it is “judicially imposed”—much like the rule rejected by the Court in *Patsy*,¹⁷¹ and much like the habeas doctrine of procedural default.¹⁷²

Adding a procedural default component to a simple exhaustion requirement has a real effect on access to court. A requirement of simple exhaustion—that prisoners must present their grievances to corrections officials before these claims are adjudicated in federal court—guarantees prison officials the initial opportunity to address prisoners’ complaints, without curtailing prisoners’ ultimate ability to go to court. Indeed, as the *Woodford* dissenters point out, “[T]he PLRA has already had the effect of reducing the quantity of prison litigation, without the need for an extra-statutory procedural default sanction.”¹⁷³ The extra judicial imposition of procedural default, however, goes further, by allowing corrections officials, based on their determination that a grievance is technically or procedurally deficient, to ensure that claims never see the light of day.¹⁷⁴

The doctrinal implication of *Woodford* is that, if federal-state relations were mapped on a grid, the civil rights vehicle would move closer to the position occupied by habeas, at least in the prison and jail context. In habeas corpus, for comity reasons, federal review is restricted by state rules and procedures, through the doctrines of

¹⁶⁶ *Id.* at 509-10.

¹⁶⁷ *Id.* at 508.

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ See *Booth v. Churner*, 532 U.S. 731, 739 (2001).

¹⁷⁰ *Woodford v. Ngo*, 126 S. Ct. 2378, 2398 (2006) (Stevens, J., dissenting).

¹⁷¹ *Patsy*, 457 U.S. at 508.

¹⁷² *Woodford*, 126 S. Ct. at 2399 n.7.

¹⁷³ *Id.* at 2400.

¹⁷⁴ Roosevelt, *supra* note 13, at 1776 (warning that if procedural default is adopted “we should expect grievance systems to become more complex and unforgiving,” because “[p]rison administrators, who generally have control over the structure and timing of prison grievance procedures, can hardly be faulted for taking advantage of a technique handed them by the federal courts”).

exhaustion and procedural default.¹⁷⁵ Federal courts generally will not consider a criminal defendant's federal constitutional challenges to his conviction unless they first have been presented to the state courts.¹⁷⁶ Courts have adopted these procedural default rules in the habeas context to protect the primacy of state criminal proceedings—to make “the state trial on the merits the ‘main event’ . . . rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.”¹⁷⁷ To be sure, in civil rights suits, federal courts need not defer to prison officials' findings of fact or conclusions of law on the merits, as they must defer to state courts' determinations in habeas.¹⁷⁸ However, PLRA exhaustion has made barriers to federal courts in the civil rights context more equivalent to those in habeas.

While the *Woodford* Court analogized both to administrative law and habeas corpus doctrine,¹⁷⁹ it is habeas that is the usual alternative to prisoners' civil rights suits. Habeas corpus and the civil rights statute have been described as “the two most fertile sources of federal-court prisoner litigation.”¹⁸⁰ The dividing line between civil rights suits and habeas is heavily litigated and has resulted in numerous Supreme Court decisions.¹⁸¹ Litigants tend to prefer civil rights suits to habeas. Habeas is encumbered by numerous procedural disadvantages, including restricted discovery,¹⁸² arbitrary forum limitations,¹⁸³ and, previously, more burdensome exhaustion requirements. This last difference used to be particularly salient. In *Preiser v. Rodriguez*, decided in 1973, the Supreme Court explained:

[I]f a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum. . . . If, on the other hand, habeas corpus is the exclusive federal remedy in these circumstances, then a plaintiff cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate.¹⁸⁴

The reinforcement of the PLRA has made exhaustion in prison civil rights cases more like exhaustion in the habeas context. In

¹⁷⁵ *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-47 (1999); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); see also Roosevelt, *supra* note 13, at 1789-99.

¹⁷⁶ *Rose*, 455 U.S. at 518; see also HERTZ & LIEBMAN, *supra* note 62, at § 23.

¹⁷⁷ *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

¹⁷⁸ *Cf. Carey v. Musladin*, 127 S. Ct. 649 (2006).

¹⁷⁹ 126 S. Ct. at 2385-87.

¹⁸⁰ *Heck v. Humphrey*, 512 U.S. 477, 480 (1994).

¹⁸¹ See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Heck*, 512 U.S. at 477; *Edwards v. Balisok*, 520 U.S. 641 (1997); *Wallace v. Kato*, 127 S. Ct. 1091 (2007).

¹⁸² *Harris v. Nelson*, 394 U.S. 286, 290 (1969).

¹⁸³ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see Giovanna Shay & Timothy P. O'Toole, *Wilkinson v. Dotson: How a "Boring" Parole Case Can Reduce Government Forum-Shopping*, 29 CHAMPION 38 (2005).

¹⁸⁴ 411 U.S. 475, 477 (1973) (internal citations omitted).

Wilkinson v. Dotson, decided in 2005, the Court allowed certain challenges to parole procedures to go forward as a civil rights suit. Rejecting the government's argument that the suit should have been brought as a habeas action, to require prior exhaustion of state court remedies, the Court wrote, citing the PLRA and *Porter v. Nussle*, "we see no reason for moving the line these cases draw—particularly since Congress has already strengthened the requirement that prisoners exhaust state administrative remedies as a precondition to any § 1983 action."¹⁸⁵ In the courts' view, the PLRA exhaustion requirement functioned in a manner similar to habeas exhaustion.

As Professor Roosevelt has pointed out, however, it is inappropriate to import into the PLRA context rules designed to respect the authority of state courts in criminal trials.¹⁸⁶ Habeas procedural default rules are designed to promote finality in part because, at least in theory, state court criminal proceedings provide due process as required by the federal constitution.¹⁸⁷ As Justice Rehnquist explained in *Wainwright*, "the trial of a criminal case in state court [is] a decisive and portentous event . . . [T]he accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify."¹⁸⁸ By contrast, prison grievance proceedings lack all of the procedural protections of criminal trials, and they are hardly the "main event" in civil rights litigation.¹⁸⁹ In fact, after the PLRA, grievance procedures no longer even have to be "plain, speedy, and effective."¹⁹⁰ Despite the differences between prison grievance systems and other judicial and administrative proceedings, the Supreme Court has analogized to habeas and administrative law doctrine in its PLRA exhaustion cases. The next section explains in greater detail why these analogies are misplaced.

III. MISPLACED ANALOGIES: HABEAS AND ADMINISTRATIVE LAW

The *Woodford* majority opinion relies heavily on analogies to administrative law and habeas doctrine. However, prison grievance procedures differ in important respects from state court criminal proceedings and other kinds of agency proceedings. These differences are demonstrated by a survey of prison and jail grievance policies that

¹⁸⁵ *Wilkinson v. Dotson*, 544 U.S. 74, 84 (2005); see also Shay & O'Toole, *supra* note 183.

¹⁸⁶ Roosevelt, *supra* note 13, at 1806-07.

¹⁸⁷ *Id.* See also *infra* note 192, describing incorporation of federal constitutional protections and application to state court proceedings. We also thank Professor Dan Kahan for this observation.

¹⁸⁸ *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

¹⁸⁹ Roosevelt, *supra* note 13, at 1811 (contrasting *Wainwright*, 433 U.S. at 90).

¹⁹⁰ 42 U.S.C. § 1997e(a).

the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO) clinic conducted as amicus in *Woodford* and *Jones*.

Administrative proceedings in many kinds of agencies are governed by the Administrative Procedures Act and minimum requirements of due process. One study has reported: “of 42 agency programs administered through use of informal adjudication . . . most agencies use procedures that include four procedural safeguards: (1) notice of issues presented; (2) an opportunity to present data and arguments either in written or oral form; (3) a decision by a neutral decision-maker; and (4) a statement of reasons for the decision.”¹⁹¹ Obviously, the same is true of state court criminal trials, which must adhere to numerous federal constitutional protections.¹⁹² This is not true for prison grievance procedures. It is difficult to make definitive statements about correctional grievance policies because such policies are often unpublished, available only from the corrections agencies themselves, and revised frequently. However, the LSO clinic amicus brief in *Woodford* attempted a nation-wide survey of grievance policies for illustrative purposes, and succeeded in obtaining a policy (not necessarily the most current) from each of the fifty states, as well as a couple of sheriffs’ departments and a department of juvenile justice.

Although prison grievance procedures may be enacted as state law or regulation,¹⁹³ they are often mere administrative directives adopted by a corrections agency itself.¹⁹⁴ Grievance systems can be administered, particularly in the initial stages, by line corrections staff.¹⁹⁵ Even at later stages of the process, they are controlled by the

¹⁹¹ See RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.1, at 561 (4th ed. 2002) (citing Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976)).

¹⁹² See WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 1 CRIM. PROC. § 2.6 (discussing doctrine of selective incorporation of federal constitutional rights); see, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment prohibition on cruel and unusual punishment); *Ker v. California*, 374 U.S. 23 (1963) (Fourth Amendment prohibition on unreasonable searches and seizures); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront opposing witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment prohibition on double jeopardy).

¹⁹³ See, e.g., CAL. CODE REGS. tit. 15, § 3084.1 (2007); ILL. ADMIN. CODE tit. 20, § 504.10 (2007); N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (2006).

¹⁹⁴ See Appendix to Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573.

¹⁹⁵ See, e.g., CONNECTICUT DEPARTMENT OF CORRECTION (DOC), ADMINISTRATIVE DIRECTIVE 9.6 (effective 3/5/03) (grievances must be preceded by an attempt at “informal resolution” directed at “the appropriate unit Department Head or employee”), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0906.pdf>.

corrections officials who may well be potential defendants in any lawsuit resulting from the incidents at issue,¹⁹⁶ and who may also be colleagues or former co-workers of the defendants. In *Cleavinger v. Saxner*, the Supreme Court described the lack of independence of prison administrative hearing officers in a case involving disciplinary hearings, which holds true in the grievance context as well:

Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. . . . They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.¹⁹⁷

Grievance system rules and procedures are supposed to provide informal and summary resolution of complaints, not full-fledged litigation of federal claims. Professor Branham has pointed out that many grievance systems do not fulfill even their ostensible function of problem-solving very well, because they often do not provide meaningful relief that would obviate the need for litigation, such as money damages.¹⁹⁸ But setting aside whether grievance procedures actually solve problems, their formal structures indicate that they are not akin to the type of administrative or judicial adjudication in which procedural default generally applies.

A minority of states provide for hearings in grievance procedures,¹⁹⁹ but even these proceedings may not generate any

¹⁹⁶ *Id.* (providing that highest level of review is by DOC Commissioner "or designee").

¹⁹⁷ 474 U.S. 193, 203-04 (1985).

¹⁹⁸ Branham, *supra* note 79, at 521.

¹⁹⁹ The LSO survey identified about a dozen jurisdictions that provide for a hearing in which an inmate can present evidence directly to a decision-maker. Not all of these systems mandate hearings in every case; some are discretionary. *See, e.g.*, DELAWARE BUREAU OF PRISONS, PROCEDURE NO. 4.4 (revised 5/15/98); HAWAII DEP'T OF PUBLIC SAFETY, POLICY NO. 493.12.03 (effective 4/3/92); ILL. ADMIN. CODE tit. 20, § 504.830; IOWA DEPT. OF CORRECTIONS, POLICY NO. IN-V-46 (revised January 2005); KENTUCKY DEP'T OF CORRECTIONS, POLICY NO. 14.6 (effective 1/4/05), MD. CODE ANN., PUB. SAFETY & CORR. SERVS. § 12.07.01.08 (effective 11/14/05); MISSOURI DEP'T OF CORRECTIONS, INSTITUTIONAL SERVICES POLICY AND PROCEDURE MANUAL PROCEDURE NO. IS8-2.1 (effective 1/15/92); N.Y. COMP. CODES R. & REGS. tit. 7, § 701.7 (2005); SOUTH CAROLINA DEP'T OF CORRECTIONS, GA-01.12 (issued 11.1.04); TENNESSEE DEP'T OF CORRECTIONS, INDEX NO. 501.01 (effective

record.²⁰⁰ A complete grievance proceeding often consists of little more than a series of forms that a prisoner submits, which are returned with the corrections officials' responses at the bottom. For example, one Connecticut prisoner's complaint about inadequate mental health treatment was answered with the one-line response: "Adequate mental health care is provided to all inmates at [the facility]."²⁰¹

Inmate grievance procedures are characterized by multiple, short deadlines, which make the process even less analogous to a state court proceeding.²⁰² Of the policies surveyed by the LSO amicus, more than a dozen provided for less than fourteen days for the filing of the first grievance.²⁰³ More than thirty of the policies reviewed in the LSO brief required a prisoner to attempt informal resolution before filing the first official grievance, and the deadline for informal resolution was as short as two days in some jurisdictions.²⁰⁴ Some jurisdictions require a prisoner to attempt informal resolution *within* the time allowed for the filing of the first official grievance, and some of these permit prison officials a certain number of days in which to respond to the informal complaint, which further consumes a prisoner's time for filing.²⁰⁵ All of the policies that were reviewed require prisoners to pursue at least one level of appeal; the time limits for the appeal were as short as three to five days in many instances.²⁰⁶ In a prison environment, in which movement is obviously restricted and grievance forms may be difficult to obtain, such short deadlines can create high hurdles.

The PLRA applies not only to state prisons, but also to city and county jails and detention centers, and, currently, to juvenile facilities.²⁰⁷ It is even more difficult to obtain policies for these local subdivisions. However, the survey included a couple of sheriff department policies, and both of these allowed only a few days for the filing of grievances—five working days in one case, and seven in the

5/1/04); UTAH DEP'T OF CORRECTIONS, INSTITUTIONAL OPERATIONS DIVISION MANUAL (revised 7/1/03).

²⁰⁰ Roosevelt, *supra* note 13, at 1806; *see also* Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, Jones v. Bock, 127 S. Ct. 910 (2007) (Nos. 05-7085 and 05-7142), 2006 WL 2364683, at *15-16 & n.19.

²⁰¹ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, Jones v. Bock, 127 S. Ct. 910 (2007) (Nos. 05-7058 and 05-7142), 2006 WL 2364683, at n.19.

²⁰² Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, Woodford v. Ngo, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *6-13.

²⁰³ *Id.* at *6.

²⁰⁴ *Id.* at *7-8.

²⁰⁵ *Id.* at *8-9.

²⁰⁶ *Id.* at *11-12.

²⁰⁷ 42 U.S.C. § 1997e(a) (2000); *see Rapa, supra* note 27, at 271. Some courts have held that they also apply to drug treatment facilities. *See Ruggiero v. County of Orange*, 467 F.3d 170 (2d Cir. 2006); *Witze v. Femal*, 376 F.3d 744 (7th Cir. 2004).

other.²⁰⁸ The North Carolina Department of Juvenile Justice and Delinquency Prevention policy required children to appeal denials of their grievances within twenty-four hours.²⁰⁹

It is not only short deadlines that separate prison grievance procedures from other kinds of judicial or administrative proceedings. Correctional grievance policies sometimes state explicitly that their role is to solve problems, not litigate legal claims.²¹⁰ Grievance policies never require a prisoner to spell out legal claims, and they often lack the procedural protections usually associated with adversarial litigation, such as formal discovery mechanisms and evidentiary hearings.²¹¹ They usually require only a short and plain statement of the complaint, sometimes instructing inmates to state their grievance briefly and to avoid surplusage.²¹² They are informal, non-adjudicative proceedings; not at all like the state court proceedings that garner deference in the habeas context.

Although correctional grievance systems lack many formal procedural protections, they nearly uniformly provide for investigation. This makes sense, because it is easier for prison officials to investigate complaints than it is for inmates to do so.²¹³ The widespread provision of investigation suggests that submitting a grievance is more akin to lodging a complaint with the police than with filing a complaint in court; while a grievance initiates an investigative process, it is not intended to instigate adjudication of legal claims.²¹⁴

Despite these summary procedures, the rule announced in *Woodford* allows prison officials to “ding” even meritorious lawsuits due to a missed deadline or other procedural misstep—regardless of the merits of the underlying claim.²¹⁵ And it creates perverse incentives for corrections officials to deny claims on procedural rather than substantive grounds, thereby insulating their decisions from judicial scrutiny.²¹⁶

²⁰⁸ Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *12.

²⁰⁹ *Id.* at *13.

²¹⁰ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7085 and 05-7142), 2006 WL 2364683, nn.13-14.

²¹¹ *Id.* at *15-16.

²¹² *Id.* at n.6.

²¹³ *Id.* at *12.

²¹⁴ John Boston and Professor Lynn Branham each pointed out that a procedural default rule may actually frustrate investigations, by creating incentives to create complex rules, rather than simply investigate quickly and solve problems. *See infra* notes 223-36.

²¹⁵ *Woodford v. Ngo*, 126 S. Ct. 2378, 2401 (2006) (Stevens, J., dissenting).

²¹⁶ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 284226, at *27-28; *see also* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*, at 8 (March 2007) (issue brief distributed by the American

In fact, the procedural default rule creates incentives for corrections officials to develop ever more complex procedures, to make it more difficult for prisoners to sue them successfully. As the amicus brief filed by the American Civil Liberties Union and other amici in *Jones* pointed out, Illinois has amended its grievance policy to require that prisoners name all of the people involved in the incident.²¹⁷ Illinois took this action *after* the Seventh Circuit rejected a non-exhaustion defense and allowed a prisoner's case to proceed.²¹⁸ The Seventh Circuit rejected a claim that the prisoner's grievance was insufficiently specific, writing that, "Illinois has not established any rule or regulation prescribing the contents of a grievance or the necessary degree of factual particularity."²¹⁹

The counter-productive result of such changes is that grievance systems become more technical and complex, and thus less likely to lead to the quick resolution of prisoners' complaints—the ostensible purpose of the exhaustion requirement.²²⁰ Indeed, turning grievance procedures into a preliminary step in litigation could discourage officials from diligently investigating and resolving complaints, for fear of generating information that could increase their legal exposure. Under a procedural default regime, it is much safer to dispose of complaints with unassailable technical denials.

A procedural default rule falls more heavily on the least sophisticated inmates—juveniles, first-time offenders, the illiterate, the mentally ill, and non-English-speakers—than on "jailhouse lawyers."²²¹ Significant numbers of inmates fall into the former categories,²²² and

Constitution Society), available at <http://www.acslaw.org/node/4587> ("Can anyone reasonably expect a government agency to resist this kind of incentive to avoid merits consideration of grievances?"); Roosevelt, *supra* note 13, at 1776 ("A rule that controls access to courts not by examining the merits of a claim but by shutting the door on uncounseled inmates who fail to navigate a procedural minefield is not a good one.").

²¹⁷ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7058 & 05-7142), 2006 WL 2364683, at *41. Compare ILL. ADMIN. CODE tit. 20 § 504.810(b) (2005) with ILL. ADMIN. CODE tit. 20 § 504.810 (1998).

²¹⁸ *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).

²¹⁹ *Id.*

²²⁰ We thank Professor Lynn Branham and John Boston for amplifying this point. See also Roosevelt, *supra* note 13, at 1776.

²²¹ Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *17; see also Roosevelt, *supra* note 13, at 1813 ("A forfeiture regime takes an unusually vulnerable group of § 1983 plaintiffs and subjects them to an unusually heavy regime.").

²²² See Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *20-21 ("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. 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). In addition, "Bureau

they may be most in need of the assistance of prison authorities or courts.²²³ By increasing the incentives for technical denials, procedural default rules reduce the likelihood that these prisoners' claims will come to light.

Not even the assistance of counsel can forestall procedural default in many circumstances. Some grievance systems reject grievances that have been prepared with the assistance of an attorney.²²⁴ And due to the short grievance deadlines, by the time an inmate or her family finds a lawyer willing to accept the case, the claim often will be defaulted.

Ironically, some of the most serious prison abuses—beatings and sexual assault cases—are among the most likely to be barred, at least on timeliness grounds, because a specific incident starts the clock running. As Justice Stevens asked in his dissent in *Woodford*, referring to the *Minix* case, “[d]oes a 48-hour limitations period furnish a meaningful opportunity for a prisoner to raise meritorious grievances in the context of a juvenile who has been raped and repeatedly assaulted, with the knowledge and assistance of guards, while in detention?”²²⁵ As we discuss in the next section, after *Woodford*, this type of question will become the focus of litigation, as prisoners and their advocates attempt to assert inmates' constitutional right to access to court.

IV. JURISDICTION-STRIPPING BY CONSENT: THE EFFECTS SO FAR

The extra barriers to civil rights remedies erected by PLRA exhaustion merit attention for several reasons. The immediate, practical effect of the PLRA cases is to allow abuses in U.S. prisons and jails to go unchecked. Control over prisoners' complaints is placed in the hands of prison officials. Not only do corrections authorities get an opportunity to respond to the complaint before it is filed in court, but, if an incarcerated person does not obey his jailers' procedural rules for making a complaint, his case may *never* be heard by a judge. This is troubling not only for those who care about prisoners' rights, but also

of Justice Statistics (BJS) surveys report that sixteen percent of state prison inmates, seven percent of federal inmates, and sixteen percent of those in local jails 'reported either a mental condition or an overnight stay in a mental hospital.' PAULA M. DITTON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS I (1999).”)

²²³ See LINDSAY M. HAYES, TECHNICAL ASSISTANCE REPORT ON SUICIDE PREVENTION PRACTICES WITHIN THE MASSACHUSETTS DEPARTMENT OF CORRECTION (2007), available at http://www.mass.gov/Eeops/docs/doc/hays_ma_doc_report.pdf.

²²⁴ Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7085 and 05-7142), 2006 WL 2364683, at *43 (citing Memo from Legal Claims Adjudicator for Mississippi Department of Corrections (Mar. 31, 2003)).

²²⁵ *Woodford*, 126 S. Ct. at 2403 (Stevens, J., dissenting) (citing *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538, at *2 (N.D. Ind. July 27, 2005)).

for those who are concerned more generally about civil rights and access to courts.

A particularly disturbing example of why corrections staff should not hold the keys to the courthouse surfaced the day after *Woodford* was decided. A federal prison guard in Tallahassee Florida shot and killed an officer of the Inspector General's office who was attempting to arrest him for alleged participation in a sex-for-contraband ring involving numerous guards and prisoners.²²⁶ The officers involved in the abuse reportedly had threatened prisoners to keep them quiet, monitoring their calls and warning that they could be transferred far from their families.²²⁷ If the officer was willing to shoot an agent of the Inspector General's office, what would have happened to a prisoner who attempted to file a grievance about this abuse? At a minimum, the Tallahassee incident illustrates the danger of shifting control over prisoners' court access to prison officials.

Exhaustion decisions in the lower courts in the aftermath of *Woodford* provide little comfort. In a survey of reported cases citing *Woodford* in the first seven months after it was decided, the majority were dismissed entirely for failure to exhaust.²²⁸ All claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases.²²⁹ And in most of those cases, the claims survived not because the prisoner had properly exhausted, but rather because the court found that the administrative remedy was "unavailable."²³⁰

²²⁶ Abby Goodnough, *U.S. Agent Dies in Shootout with Prison Guard*, N.Y. TIMES, June 22, 2006, at A1.

²²⁷ *Id.*

²²⁸ A Westlaw search conducted on January 26, 2007 produced a list of 405 cases citing *Woodford*. After removing Supreme Court, state, and duplicate federal cases, we were left with a sample set of 392 cases. These included decisions by appellate and district courts, and recommendations by magistrate judges. In 76 of these cases, the exhaustion issue was not resolved, leaving a pool of 316 cases in which the exhaustion issue was raised, briefed, and decided by a court. In approximately 70% of those cases, or 224 cases, all claims were dismissed for failure to exhaust. Some claims survived the exhaustion analysis in 45 cases. All claims survived exhaustion in only 47 cases.

²²⁹ The fact that the claims survived the initial exhaustion challenge does not necessarily mean that they are decided on the merits. Claims that survive a motion to dismiss for non-exhaustion may still be dismissed at that stage for another reason, on summary judgment, or for some other procedural reason before trial.

²³⁰ See, e.g., *Holcomb v. Dir. of Corr.*, No. C-03-02765 RMW, 2006 WL 3302436, at *7 (N.D. Cal. Nov. 14, 2006) (holding that plaintiff's failure to timely appeal was excused because the delay was caused by physical injuries and other circumstances beyond his control); *Cahill v. Arpaio*, No. CV 05-0741-PHX-MHM (JCG), 2006 WL 3201018, at *3 (D. Ariz. Nov. 2, 2006) (holding that plaintiff's failure to appeal was excused because the Hearing Officer informed the plaintiff that no further appeal was necessary); *Coleman v. Butler*, No. 4:05cv147-RH/WCS, 2006 WL 2054355, at *3 (N.D. Fla. July 20, 2006) (plaintiff's failure to grieve was excused because he was told by the Department of Corrections that the subject of his complaint "was inappropriate for the grievance procedure"); *Wallace v. Williams*, No. CV405-140, 2006 WL 3091435, at *3 (S.D. Ga. Oct. 30, 2006) (plaintiff's failure to grieve was excused because his

Some of the dismissed suits are serious cases, in which the procedural rules at issue appear unreasonable. In one South Carolina case, *Benfield v. Rushton*, a prisoner alleged that while in custody he had been raped “numerous times during a four-year period that began in 2001.”²³¹ When he finally told a counselor about the rapes and requested protective custody and mental health treatment, he was transferred to another facility and placed in a “pod” with more violent inmates, where he again was raped.²³² At the time of the suit, the prisoner claimed that he still faced death threats and refused to go to “the yard.”²³³

Mr. Benfield’s case was dismissed for failure to exhaust in a timely manner.²³⁴ He claimed that he had not filed a grievance because he was in the hospital for a period of time following one of the rapes; because he did not know “that he could file a grievance about the rape” by other inmates; and because he had already written letters to the prison officials and state classification board about his request for protective custody.²³⁵ The court rejected all these explanations, citing *Woodford* and the South Carolina grievance policy, which provides for a fifteen-day time limit for the first step,²³⁶ and a five-day time limit for a subsequent appeal.²³⁷ The court concluded, “it is the responsibility of the prisoner to fully comply with the terms of the applicable policy regarding time limits and procedural matters.”²³⁸

In another sexual assault case, this one from Michigan, *Fitzpatrick v. Williams*, a prisoner alleged that officials had failed to protect him from another prisoner who “forcibly raped him in the shower on four occasions in August and September of 2004.”²³⁹ Mr. Fitzpatrick further alleged corrections officials had failed to get him adequate medical treatment in the aftermath of the rape, and had placed him in administrative segregation when he complained about it.²⁴⁰ He filed grievances regarding his Eighth Amendment claims and appealed them through all three steps of the Michigan Department of Corrections (MDOC) process. However, he wrote a fourth grievance about the

three requests for a grievance form were ignored).

²³¹ *Benfield v. Rushton*, No. 8:06-2609-JFA-BHH, 2007 WL 30287, at *1 (D.S.C. Jan 4, 2007).

²³² *Id.*

²³³ *Id.* at *2.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ SOUTH CAROLINA DEP’T OF CORRECTIONS, GA-01.12 (issued 11/1/04), available at <http://www.law.yale.edu/woodford>.

²³⁷ *Benfield*, 2007 WL 30287, at *3.

²³⁸ *Id.* at *4.

²³⁹ *Fitzpatrick v. Williams*, No. 106-cv-499, 2006 WL 2528446, at *1 (W.D. Mich. Aug. 31, 2006).

²⁴⁰ *Id.*

retaliation claim that was rejected by prison administrators as untimely.²⁴¹ Citing *Woodford*, the court dismissed Mr. Fitzpatrick's retaliation claim for failure to properly exhaust.²⁴² The Michigan grievance policy cited by the court requires an attempt at informal resolution within two working days, and a Step I grievance within five days of the response from informal resolution.²⁴³

The PLRA exhaustion cases illustrate jurisdiction-stripping by consent—courts tying their own hands to hear constitutional claims through rules that are (at least arguably) extra-statutory.²⁴⁴ The risk of consensual jurisdiction-stripping (or “jurisdiction-abdication” as our colleague Christopher Lasch would describe it) is heightened in prisoner cases. Courts' impatience with *pro se* prisoner cases makes some judges eager to relinquish review—so eager that they lose sight of the need to safeguard the judiciary's authority.²⁴⁵ Or courts may be ready to cooperate with a philosophy of judicial restraint shared by the politicians who appointed them,²⁴⁶ particularly when judges have been criticized for “activism” in the prison litigation context.²⁴⁷

As both *Woodford* and the Sixth Circuit decisions in the *Jones* cases demonstrate, courts may engraft onto a statute judicial glosses that further restrict court access. Or courts may suggest that they can be relieved of certain categories of cases if only federal rules are

²⁴¹ *Id.* at *2.

²⁴² *Id.* at *3. Other aspects of the court's decisions in *Fitzpatrick*—a statement that prisoners must “allege and show” exhaustion by attaching copies of grievances to their complaints, 2006 WL 2528446, at *2 and 2006 WL 3203899, at *1, and that inmates must name all defendants in their initial grievances in order to sue them later, *id.*, have been rejected by *Jones*. See *supra* notes 123-32 and accompanying text.

²⁴³ MICHIGAN DEPARTMENT OF CORRECTIONS POLICY DIRECTIVE NO. 03.02.130 (effective 12/19/03).

²⁴⁴ In 1996, soon after passage of the PLRA, Professors Tushnet and Yackle argued that it was actually Congress that was following the courts' lead in enacting the PLRA. They wrote that courts already had restricted prisoners' rights, and predicted that “courts are likely to read the AEDPA and the PLRA to make only modest adjustments to the policies the judiciary had already adopted.” Tushnet & Yackle, *supra* note 53, at 12-22, 84.

²⁴⁵ This phenomenon is not unique to prisoner claims. As Professor Judith Resnik has explained, “[f]ederal judges, in their collective voice, have become advocates for less judging and less rightsholding.” Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 192 (2003). By “permit[ting] the devolution of cases deemed to be uninteresting,” *id.* at 193, federal judges have helped to “develop[] a hierarchy of adjudicators [which] relegate[s] low status litigants to low status judges.” *Id.* at 196. The *Woodford* decision represents a significant new development in this trend, as courts delegate and defer not to a state court or an administrative agency, but to the prison administration.

²⁴⁶ Professors Jack Balkin and Sanford Levinson offer a theory of “partisan entrenchment” through the judicial appointments process. They argue that, “courts tend to cooperate with and legitimate the constitutional innovations of the political forces that entrench them” Balkin & Levinson, *supra* note 8, at 533-34; see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (“[P]olitical competition in government often tracks party lines more than branch ones.”).

²⁴⁷ See *supra* notes 53 and 64 and accompanying text.

changed.²⁴⁸

It is not hard to imagine courts' motivations for complicity in jurisdiction-stripping in the prisoners' rights context. Because many prisoners are *pro se*, their "cases [may] seem at first glance to be legally uninteresting and unworthy of more serious consideration."²⁴⁹ As Justice Breyer explained at oral argument in *Jones*:

Probably the reason [the courts] do this is that there are lots and lots of claims by prisoners in Federal courts that are hard to decipher. [The courts] don't know what it's about. They don't want to put the [institutional] defendant to the burden of coming in [to respond to] every single complaint when it's quite a good probability it's about nothing. That's the kind of reasoning that would lead to a rule like this.²⁵⁰

The problem with the type of jurisdiction-abdication that Justice Breyer describes is that, in embracing rigid, bright-line rules in order to get rid of irritating cases, courts may find that they have tied their own hands when they subsequently want to reassert authority. For example, while commentators have discussed how law made in the "War on Terror" context can affect domestic rights,²⁵¹ the converse is also true.

²⁴⁸ See *Jones v. Bock*, 127 S. Ct. 910, 919 (2007) (noting that the added specificity requirement imposed by the Sixth Circuit's rules could be enacted by amending the Federal Rules of Civil Procedure). We thank Professor Lynn Branham for pointing out this aspect of the opinion.

²⁴⁹ Jessica Feierman, "The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement, 41 HARV. C.R.-C.L. L. REV. 369, 378 (2006) (citation omitted). There is already evidence to suggest that *pro se* prisoner cases "often receive inferior treatment at the appellate level." *Id.* "Pro se prisoner petitions frequently fall into the category of cases decided without oral argument on the advice of a court staff attorney. Such cases are also less likely to be published and available for citation than the cases of wealthier litigants with representation." *Id.* (citing Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1506 (2004)); see also Schlanger, *Inmate Litigation*, *supra* note 40, at 1588 ("Judges themselves occasionally confess their disinclination to give pro se pleadings a full and fair examination.").

²⁵⁰ Transcript of Oral Argument, *Jones v. Bock*, 127 S. Ct. 910 (2007) (Nos. 05-7058 & 05-7142), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-7058.pdf. The frustration that federal judges experience in dealing with prisoner cases was also reflected in Justice Scalia's comments during oral arguments in *Winkelman v. Parma City School District*, a case in which the Court addressed whether parents of children with disabilities may represent themselves in suits filed under the Individuals with Disabilities Education Act. Justice Scalia explained to the Winkelmans' lawyer that requiring representation "protect[s] the court from frivolous suits" and that permitting plaintiffs to proceed *pro se* "make[s] a lot more work for federal district judges." Linda Greenhouse, *Justices Hear Arguments on Autism-Case Dispute*, N.Y. TIMES, Feb. 28, 2007, at A12. The Winkelman's lawyer replied that "a capable district judge" would be able to determine whether the parents' suits were meritorious. *Id.* Justice Scalia's response was telling. "And do it right after reading pro se prisoner petitions, right?" he asked. "You'd have a nice evening's work." *Id.*

²⁵¹ See, e.g., Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, available at http://works.bepress.com/sean_riordan/1/; Parry, *supra* note 8, at 834-35 ("The pressures that generate the processes associated with the war on terror apply more broadly, so that we are experiencing general modification of the way in which our government investigates and imposes punishment on people.").

The case of *Rumsfeld v. Padilla* provides a cautionary tale about the far-reaching effects of procedural rules announced in pedestrian prisoner cases. In 2004, the Supreme Court declined to reach the merits of alleged al-Qaeda operative Jose Padilla's case on jurisdictional grounds.²⁵² The government's jurisdictional argument—that a prisoner may name as a habeas respondent only his immediate physical custodian and may file a habeas petition only in the district where he is confined—was all too familiar to advocates who represent prisoners in garden-variety habeas actions.²⁵³

Unfortunately, the government had developed a habeas jurisdiction doctrine in a line of mundane parole and prison cases.²⁵⁴ Based on the weight of this precedent, the government carried the day. The courts dismissed Mr. Padilla's habeas action, which his lawyer had filed in New York two days after the government whisked him to a military brig in South Carolina; he had to re-file in the Fourth Circuit.²⁵⁵

The territorial restriction on habeas jurisdiction that scuttled the *Padilla* case gained widespread currency after it was endorsed by the D.C. Circuit in a series of routine prisoner cases.²⁵⁶ The D.C. Circuit has made clear that it adopted a territorial jurisdiction rule to avoid an onslaught of petitions and suits by federal prisoners who lacked any connection to the District of Columbia, and who were seeking to forum-shop.²⁵⁷ However, the rule that Circuit adopted was later applied in *Padilla* to deprive a federal court of the ability to inquire into the legality of the detention of a 9/11 prisoner arrested on a material witness warrant that it had issued.²⁵⁸

The *Woodford* Court's procedural default gloss on PLRA exhaustion could produce similarly far-reaching consequences that tie federal courts' hands even when they are faced with a live controversy in which ongoing violations of federal constitutional rights are occurring—or even, as in *Padilla*, when their own orders are at stake. If a prisoner misses a deadline in a grievance procedure, a federal court

²⁵² *Rumsfeld v. Padilla*, 542 U.S. 426, 442-47 (2004).

²⁵³ *Id.* at 434-47.

²⁵⁴ *Id.* at 435, 445 (citing *Blango v. Thornburgh*, 942 F.2d 1487, 1491-92 (10th Cir. 1991) (per curiam); *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Billiteri v. U.S. Bd. of Parole*, 541 F.2d 938, 948 (2d Cir. 1976)); see also *Shay & O'Toole*, *supra* note 183.

²⁵⁵ *Rumsfeld*, 542 U.S. at 431. The following year, even the Fourth Circuit tired of the government's forum-shopping, and rebuked the government when it sought to transfer Mr. Padilla from military to civilian custody, a move which would have forestalled further review by the Supreme Court. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005).

²⁵⁶ *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806 (D.C. Cir. 1988); see also *Shay & O'Toole*, *supra* note 183.

²⁵⁷ *Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371, 376 (D.C. Cir. 2000) (“*Chatman-Bey* made clear that a major implication of habeas exclusivity in cases involving federal prisoners was its impact on venue.”).

²⁵⁸ 542 U.S. at 442-47; see *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (explaining that district court had issued material witness warrant).

may not be able to inquire into the claim. Similarly, after *Jones*, if a prisoner names the wrong defendant in a system in which grievance rules require that all defendants be identified, courts may not be able to consider a claim against the proper defendant after the deadline for filing a grievance has passed.

Jones reins in courts from creating hyper-technical rules to bar prisoners' suits, but it also appears to hand prison officials *carte blanche* to design complicated procedural barriers to prisoners' court access. To be sure, the *Jones* Court warned lower federal courts that they could not go too far in creating jurisdiction-abdication rules.²⁵⁹ *Jones* makes clear that courts cannot create out of whole cloth procedural requirements with no basis in the statute or generally-applicable rules.²⁶⁰ Nonetheless, *Jones* dramatizes the damage that the Court's decision in *Woodford* already has done to the availability of relief in § 1983. As the *Jones* name-the-defendant discussion demonstrates,²⁶¹ exhaustion analysis is now focused on the meaning of prison grievance procedures.²⁶²

The question going forward is whether there is any limit to courts' total deference to prison grievance policies. At some point, will courts determine that short deadlines or detailed requirements are so stringent that they deny prisoners a "meaningful opportunity" to seek relief?²⁶³ Will courts decide that hyper-technical requirements render grievance systems "unavailable" within the meaning of the PLRA,²⁶⁴ or violate the constitutional mandate of court access?²⁶⁵

Civil rights advocates hope that rules that unreasonably block meritorious constitutional claims may be subject to constitutional challenge, or to exceptions. The *Woodford* majority recognized that "procedural requirements [adopted] for the purpose of tripping up all but the most skillful prisoners,"²⁶⁶ might be questioned, presumably under a theory that prisoners possess a right of access to courts.²⁶⁷ Justice Breyer's concurrence indicates that standard administrative law and habeas exceptions to procedural default may apply in some circumstances.²⁶⁸ For example, in the habeas corpus context, a

²⁵⁹ *Jones v. Bock*, 127 S. Ct. 910, 926 (2007).

²⁶⁰ *Id.* This message was reiterated later this term in *Erickson v. Pardus*, 127 S. Ct. 2197. See *supra* note 21.

²⁶¹ *Jones*, 127 S. Ct. at 922-23.

²⁶² In fact, the result in *Jones* could have been different had the Sixth Circuit found procedural default based on non-compliance with a grievance policy that—like the 11 policies identified by the LSO clinic survey—requires inmates to name the defendants.

²⁶³ *Woodford v. Ngo*, 126 S. Ct. 2378, 2392-93 (2006).

²⁶⁴ 42 U.S.C. § 1997e(a) (2000).

²⁶⁵ *Woodford*, 126 S. Ct. at 2403-04 (Stevens, J., dissenting).

²⁶⁶ *Id.* at 2392.

²⁶⁷ *Id.* at 2404 (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996)).

²⁶⁸ *Woodford*, 126 S. Ct. at 2393 (Breyer, J., concurring).

procedural default may be excused if the state procedural rule is not “firmly established and regularly followed.”²⁶⁹ In pre-*Woodford* decisions, the Second Circuit identified some circumstances in which a prisoner’s failure to exhaust may be excused,²⁷⁰ and recognized that threats or retaliation by the defendants may estop them from raising exhaustion as a defense.²⁷¹ It remains to be seen how the lower courts will treat such exceptions after *Woodford*,²⁷² let alone how this area of doctrine will fare on a return trip to the High Court.

It is possible that PLRA exhaustion doctrine will collapse under its own weight. Under the analysis adopted in *Woodford*, lower courts are required to pore over prison and jail regulations to determine if a prisoner has properly exhausted.²⁷³ Some courts are concluding that these questions require evidentiary hearings.²⁷⁴ The Seventh Circuit recently remanded a case for further fact-finding to answer numerous questions created by the conflicting evidence as to exhaustion including:

Could [the prisoner] have obtained the necessary forms to file a grievance against these named prison officials? Could he have appealed to the Bureau of Prisons’ Regional Director without the appropriate form? See 28 C.F.R. § 524.14(a), (d)(1). Would the Bureau of Prisons have permitted a tardy grievance after [the prisoner’s] transfer and is there any way that a prison would know whether the prison system considers such a situation ‘a valid reason for delay’? See 28 C.F.R. § 524.14(b). At what point did the prison officials’ misconduct, if there was any, rise to the level so as to prevent a grievance from being filed?²⁷⁵

Perhaps courts will tire of this exercise, and increasingly decide that grievance policies are not “available” or do not provide a “meaningful opportunity” for a prisoner to seek relief.²⁷⁶ Such rulings

²⁶⁹ *Id.*; see HERTZ & LIEBMAN, *supra* note 62, § 26.2d, at 1293.

²⁷⁰ See, e.g., *Giano v. Goord*, 380 F.3d 670, 677 (2d Cir. 2004); *Hemphill v. New York*, 380 F.3d 680, 689-90 (2d Cir. 2004).

²⁷¹ *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004).

²⁷² *Ruggiero v. County of Orange*, 467 F.3d 170, 176 (2d Cir. 2006) (“We need not determine what effect *Woodford* has on our case law in this area, however, because Ruggiero could not have prevailed even under our pre-*Woodford* case law.”).

²⁷³ See *Spruill v. Gillis*, 372 F.3d 218, 233 (3d Cir. 2004) (detailed discussion of the requirements of the Pennsylvania Department of Corrections grievance system).

²⁷⁴ See, e.g., *Maraglia v. Maloney*, No. 2001-12144-RBC, 2006 WL 3741927 (D. Mass. Dec. 18, 2006); *Parker v. Robinson*, No. 04-214-B-W, 2006 WL 2904780 (D. Me. Oct. 10, 2006); *Blount v. Boyd*, No. 7:05cv00643, 2006 WL 2381968 (W.D. Va. Aug. 17, 2006). *But see* *Williams v. Rich*, No. CV 606-003, 2006 WL 2534417, at *4-5 & *5 n.5 (S.D. Ga. Aug. 30, 2006) (noting that “factual determinations regarding exhaustion (or lack thereof) under § 1997e(a) often pose problems for the district courts,” but electing to resolve the factual dispute without an evidentiary hearing “[because] affording prisoners evidentiary hearings on exhaustion-related issues would frustrate the PLRA’s purpose of curtailing inmate litigation.”).

²⁷⁵ *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006).

²⁷⁶ 42 U.S.C. § 1997e(a) (2000); *Woodford v. Ngo*, 126 S. Ct. 2378, 2392-93 (2006). In fact, some courts have already determined in individual cases that deciding the exhaustion question is

could pressure corrections officials to implement meaningful grievance systems, which solve problems and provide relief to prisoners.²⁷⁷ Or perhaps more judges will become disillusioned by their inability to grant relief in serious cases and begin criticizing the PLRA exhaustion requirement as some have criticized mandatory minimums in sentencing law.²⁷⁸ After all, addressing constitutional issues on the merits has the added benefit of correcting abuses and clarifying prison officials' legal duties.

Woodford caused barely a ripple when it was decided. However, PLRA exhaustion is slowly gaining attention as a civil rights issue outside of the usual prisoners' rights circles. In 2006, the Commission

more time-consuming than simply proceeding to dismiss the case on the merits. *See, e.g., Fisher v. Mullin*, No. 06-7061, 2007 WL 127655, at *1 n.1 (10th Cir. 2007) (proceeding directly to the merits rather than addressing exhaustion dispute); *see also Woodford*, 126 S. Ct. at 2392 (“[The district court may] dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.”).

An alternative, and alarming, possibility is that courts will simply defer to prison officials' determination as to whether administrative remedies are “available.” In *Latham v. Pate*, a prisoner filed suit alleging that he had suffered serious injuries after being assaulted by a group of correctional officers. No. 1:06-CV-150, 2007 WL 171792 (W.D. Mich. Jan. 18, 2007). The defendants filed a motion to dismiss arguing that Latham had failed to exhaust his administrative remedies. Latham's initial grievance was rejected as untimely because it was filed one and a half years late. In his Step II appeal, Latham claimed that he had been in segregation and administration segregation since the incident and was not provided with grievance forms. The magistrate judge considering Latham's case noted that “MDOC officials investigated the matter and denied the grievance as untimely at both Steps II and III, concluding that the grievance was untimely ‘without reasonable explanation [by the inmate].’” *Id.* at *2. The magistrate judge concluded that plaintiff's claims should therefore be dismissed.

In *Garcia v. Glover*, the Eleventh Circuit upheld the lower court's dismissal for failure to exhaust. 197 Fed. Appx. 866 (11th Cir. 2006). Garcia, a federal prisoner, alleged that he had been physically and verbally abused by five unnamed prison officials in the county jail in which he was detained. While admitting that he had failed to file a grievance, Garcia contended that his failure to exhaust should be excused because he feared retaliation. *Id.* at 867. He claimed that when the officers took him to the hospital after the attack, they threatened to beat him again if he reported the incident. *Id.* at 867-68. Without considering whether the jail's administrative remedies were rendered “unavailable,” the court concluded that “[b]ecause exhaustion was a precondition to filing this lawsuit, and Garcia admittedly did not exhaust his administrative remedies, his amended complaint properly was dismissed” *Id.* at 868.

²⁷⁷ *See* LYNN S. BRANHAM, A TECHNICAL ASSISTANCE MANUAL: LIMITING THE BURDENS OF PRO SE INMATE LITIGATION (1997).

²⁷⁸ Lynette Clemetson, *Judges Look to New Congress for Changes in Mandatory Sentencing Laws*, N.Y. TIMES, Jan. 9, 2007, at A12. At least one judge has already expressed concern about the incentives *Ngo* creates. *See Parker v. Robinson*, No. 04-214-B-W, 2006 WL 2904780, at *12 (D. Me. 2006) (“I must say that in my view this case illustrates that the *Ngo* majority does seem overly optimistic about the hope of a constructive resolution of the prisoner's complaint at the pre-litigation grievance stage. . . . In Parker's case the Commissioner was given a timely, although procedurally flawed, opportunity to review his grievance concerning his cell extraction and the Commissioner, after reviewing the legible, articulate, and earnest grievance, elected to rebuff it on procedural grounds rather than deny it on its merits. In my opinion this is a case that the State's attorney might have elected to waive her § 1997e(a) argument. However, the defendants have chosen to ardently press this issue wielding § 1997e(a) as a sword rather than a shield.”).

on Safety and Abuse in America's Prisons—a private blue ribbon panel—issued a report recommending amendments to the statute.²⁷⁹ In February 2007, the American Bar Association (ABA) issued a resolution calling for reform of the PLRA, including the exhaustion requirement.²⁸⁰ Human Rights Watch is also monitoring PLRA exhaustion issues,²⁸¹ and has previously issued a report on inmate-on-inmate rape in U.S. prisons, urging Congress to amend the PLRA to require states to certify that their grievance procedures comply with standards set out in CRIPA.²⁸²

At the time this article went to press, a coalition of advocates and scholars had formed to seek revision of the PLRA.²⁸³ It remains to be seen whether Congress will respond to these calls. In the meantime, civil rights advocates can litigate possible exceptions to the *Woodford* doctrine, challenge unreasonable grievance procedures that infringe on access to courts, and collect examples of egregious cases in which meritorious claims were dismissed for non-exhaustion.

CONCLUSION

Although we recognize that creative strategies are needed to improve the quality of prisoner lawsuits filed in federal courts, the *Woodford* procedural default rule is too blunt an instrument for the job, throwing out meritorious as well as frivolous claims, and restricting courts' ability to address even the most serious abuses. It is possible that a meaningful reduction in prisoner litigation can only be accomplished by stemming the tide upstream—by designing grievance systems that meaningfully address complaints,²⁸⁴ or by appointing inspectors general for “independent oversight.”²⁸⁵ More fundamentally, and somewhat obviously, the amount of prisoner litigation could be reduced by improving conditions and incarcerating fewer people. In the short-term, however, court intervention remains an important counter-majoritarian check on the abuse of prisoners.²⁸⁶ The PLRA—and the

²⁷⁹ CONFRONTING CONFINEMENT 84-87 (John J. Gibbons & Nicholas De B. Katzenbach eds., 2006).

²⁸⁰ See <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc>.

²⁸¹ Telephone conversation with Sarah Tofte, Human Rights Watch (February 7, 2007).

²⁸² HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (April 1, 2001), available at <http://www.hrw.org/reports/2001/prison/report.html>.

²⁸³ See web site of the SAVE coalition, <http://www.savecoalition.org>, of which author Giovanna Shay is a member. See also Schlanger and Shay, *supra* note 216.

²⁸⁴ Branham, *supra* note 79, at 483-88.

²⁸⁵ CONFRONTING CONFINEMENT, *supra* note 279, at 16, 79-81.

²⁸⁶ See James D. Maynard, *One Case for an Independent Federal Judiciary. Prison Reform*

judicial gloss on it approved by *Woodford*—have disabled this mechanism.

Woodford and *Jones* mark an important shift in the balance of power between jailers and courts. The PLRA exhaustion cases occur at a time in which we see a concentration of executive power on many fronts—the “War on Terror” being the most visible example.²⁸⁷ In contrast to the “War on Terror” cases, in which the Court has in many instances reserved its authority to examine and to limit expanded claims of executive authority,²⁸⁸ in the PLRA cases, courts at all levels have been far more willing collaborators in relinquishing their own oversight authority. In large part, the judiciary’s engagement with the “War on Terror” cases may be inspired by the context in which they have been presented—high-profile, well-litigated cases involving timely issues of acknowledged national importance. In a time of perceived national security and civil liberties emergency, courts may view themselves as guardians of fundamental liberties.²⁸⁹ By contrast, America’s historic incarceration rate,²⁹⁰ and the potential for abuse that accompanies it, is not yet perceived by the judiciary as an emergency—at least not one critical enough to overcome its distaste for *pro se* prisoner lawsuits.

Litigation Spurs Structural Change in California, 37 MCGEORGE L. REV. 419, 423, 447 (2006).

²⁸⁷ See *supra* note 41.

²⁸⁸ See *supra* notes 3-5 and accompanying text.

²⁸⁹ We thank Professor Dan Kahan for this insight. *But see* Parry, *supra* note 8, at 766, 782 (arguing that a “perception of emergency” has permitted development of a “new criminal process,” and that courts, while checking the “most far-reaching executive power claims,” have not prevented “a net increase in executive power”).

²⁹⁰ THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH, http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf (reporting that the Bureau of Justice Statistics 2005 incarceration figures “represent a record 33-year continuous rise in the number of inmates in the U.S.,” producing the highest incarceration rate in the world).