Exhausted

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The Prison Litigation Reform Act (PLRA) exhaustion requirement applies an administrative exhaustion requirement to suits challenging prison conditions. I have argued elsewhere that corrections rules and procedures should not be immune from regular administrative law principles.[2] This article, inspired by Justice Breyer's concurrence in *Woodford v. Ngo*,[3] is a plea to take administrative law seriously in cases involving PLRA exhaustion.

The PLRA 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."[4]

In 2006, in *Woodford*, the Supreme Court interpreted this provision to include a procedural default component, so that a procedural misstep in a prison grievance procedure (e.g., a missed deadline) can preclude courts from hearing a prisoner's claim.[5]

Concurring in the judgment in *Woodford,* Justice Breyer, a former professor of administrative law and author of an influential textbook in the area,[6] wrote that he agreed with the majority that "Congress intended the term 'exhausted' to 'mean what the term means in administrative law, where exhaustion means proper exhaustion.'"[7] He explained, "I do not believe that Congress desired a system in which prisoners could elect to bypass prison grievance systems without consequences."[8]

However, Justice Breyer took the administrative law reasoning one step further than the majority, writing that "[a]dministrative law . . . contains well-established exceptions to exhaustion."[9] He listed some of those exceptions, including constitutional claims, futility, hardship, and "inadequate or unavailable" administrative remedies.[10] Breyer's concurrence then noted that some courts, including the Second Circuit, already had "concluded that the PLRA's proper exhaustion requirement is not absolute."[11]

This article makes the case that, as long as the statutory language of the PLRA remains as currently enacted, courts should heed Justice Breyer's concurrence. Part I provides context by discussing criticisms of the PLRA exhaustion requirement and proposed legislative and regulatory reforms. Part II examines Justice Breyer's *Woodford* concurrence and court decisions consistent with it. Building on the work of Professor Richard Pierce in his *Administrative Law Treatise*,[12] and other commentators including John Boston,[13] it argues that the PLRA invokes regular administrative law doctrine to the extent it is not inconsistent with the statute. The article concludes that Justice Breyer's *Woodford* concurrence sketches the proper approach to interpreting the PLRA exhaustion requirement.

I. Proposed Legislative and Regulatory Reform of the PLRA

Much has been written about the PLRA exhaustion requirement. Some advocates and commentators (and Justice Stevens in his *Woodford* dissent[14]) say that serious abuses will go unchecked following *Woodford*. They point to cases involving juveniles, sexual abuse, and religious freedom to argue for elimination of the exhaustion requirement.[15] State attorneys general counter that without an exhaustion requirement with teeth, prisoners will skip over administrative grievance procedures and head straight to court.[16]

Advocates have proposed a legislative solution to the excesses of PLRA exhaustion—simply amend the statute. Bills have been introduced to Congress, and the ABA supports this approach. Regulatory changes also have been proposed, particularly under the auspices of the Prison Rape Elimination Act of 2003 (PREA).[17]

A. Proposed Legislative Amendment

The Prison Abuse Remedies Act of 2009, a bill introduced by Rep. Robert Scott (D-VA), proposed a solution that required only "presentation" of a claim to corrections authorities within the "generally applicable statute of limitations period,"[18] thus doing away with any procedural default component added by *Woodford*. However, PARA did not completely dispense with an exhaustion requirement. Under the bill, courts were usually required to stay a prisoner's lawsuit for ninety days if this requirement had not been met to permit prison officials to consider the grievance: whether they considered it was up to them.[19] The bill did not leave committee.[20]

The ABA in its 2010 *Standards on the Treatment of Prisoners* has called for rules that would permit courts to stay

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an action for up to ninety days for a prisoner to exhaust an administrative grievance procedure.[21] The ABA version, unlike PARA, does not state expressly that prisoners can satisfy the PLRA exhaustion provision through "presenting" a claim within the statute of limitations.

B. Proposed Regulatory Solutions

The PREA created a National Prison Rape Elimination Commission to study the problem of prison sexual violence and propose standards to the Department of Justice (DOJ).[22] Following further notice-and-comment periods, the DOJ currently is in the process of finalizing its PREA regulations.[23] During this process of promulgating PREA regulations, both the NPREC and the DOJ have addressed the issue of PLRA exhaustion.

Among the standards proposed by the NPREC in its 2009 report was a modification of the exhaustion requirement in sex abuse cases. The NPREC would deem any complaint of sex abuse to be exhausted at the time that the corrections agency completed its investigation or, at the latest, within ninety days of when the complaint was made.[24] Thus, in essence, the NPREC's proposed regulations dictated the meaning of "exhaustion" in cases involving allegations of sex abuse. The NPREC's proposed standard also expressly permitted complaints from any source—including family or outside agencies—as opposed to restricting complaints solely to prisoners.[25] It also permitted an emergency procedure, deeming an urgent request for protection to be exhausted within forty-eight hours.[26]

During the period for notice-and-comment on the proposed regulations, corrections officials criticized this standard as inconsistent with the PLRA mandate.[27] They further complained that such a rule "would allow filing of stale claims [of sexual abuse] that would be difficult to investigate due to the passage of time."[28]

In response, the DOJ proposed PREA regulations taking a very different tack. The DOJ's proposed regulations impose a twenty-day time limit in which prisoners must file grievances regarding sexual abuse,[29] which follows the Bureau of Prisons (BOP) time limit.[30] While the NPREC proposal deemed complaints of sexual abuse "exhausted" no matter when they were filed, under the DOJ proposal, prisoners are permitted an extra ninety days in which to file a grievance if they provide documentation that filing within twenty days was "impractical," due to transfer, trauma, or some other circumstance.[31] Some commentators criticize this extension as unrealistic and unlikely to help prisoners in the worst situations—those subject to intimidation or retaliation, and those denied treatment or documentation.[32]

The DOJ's proposed regulations would treat complaints from someone other than the prisoner as the initial stage of the grievance process, although unlike the NPREC version, the DOJ's would require the prisoner to complete subsequent steps of the process.[33] The DOJ regulations also provide that corrections authorities should set up systems for the parents or guardians of juveniles to file complaints.[34] The DOJ stopped short of adopting the NPREC recommendation to deem emergency requests to be exhausted after forty-eight hours.[35] However, it did require agencies to establish emergency grievance procedures for handling claims of imminent sexual abuse.[36]

Both the NPREC and the proposed DOJ PREA regulations would apply only in cases involving prison sexual violence or custodial sexual abuse. Accordingly, they do not address many other important types of prison cases, such as excessive force, inadequate medical or mental health treatment, and dangerous environmental conditions.

II. Justice Breyer's Solution: More Administrative Law

Unless the language of the PLRA is amended, and in cases that do not implicate the PREA regulations, courts and advocates should look to Justice Breyer's *Woodford* concurrence. At first blush, Justice Breyer's suggestion that courts apply regular administrative law exceptions to PLRA exhaustion may seem inconsistent with decisions of the Supreme Court interpreting the PLRA,[37] particularly its 2001 opinion *Booth v. Churner*[38] and its 2002 decision *Porter v. Nussle*.[39] However, it can be reconciled easily if understood to mean that the PLRA exhaustion provision references administrative law principles that are not inconsistent with the statute.

The opinion in *Booth*, in particular, appears at least superficially discordant with Justice Breyer's *Woodford* concurrence.[40] In *Booth*, the Court concluded that the PLRA exhaustion is required even if the prisoner seeks a remedy, such as money damages, that cannot be obtained in the prison grievance system.[41] The prisoner in *Booth* and his *amici* had argued that exhaustion should not be required in this situation under the traditional futility exception to administrative exhaustion requirements.[42] The Court rejected this claim, concluding that the PLRA mandated exhaustion "regardless of the relief offered through administrative procedures."[43] In the final footnote of the opinion, the Court explained, "[W]e will not read futility or other exceptions into statutory exhaustion requirements *where Congress has provided otherwise*."[44]

The decision in *Booth* was followed the next year by *Porter*. While "[o]rdinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court,"[45] the *Porter* Court acknowledged that the PLRA mandates administrative exhaustion in "all inmate suits about prison life."[46] In reaching its conclusion in *Porter*, the Supreme Court contrasted the PLRA exhaustion provision with its predecessor, enacted in 1980 in the Civil Rights of Institutionalized Persons Act (CRIPA).[47] The 1980 CRIPA exhaustion provision vested courts with discretion to stay prisoners' suits for up to 180 days to permit exhaustion of administrative remedies, if the court believed it "appropriate and in the interests of justice" and the prison grievance procedure was certified as "plain, speedy, and effective" under federal standards.[48] The PLRA exhaustion provision, wrote Justice Ginsburg, "differ[ed] markedly from its

predecessor."[49] Under the PLRA, exhaustion was "mandatory," rather than discretionary, and required regardless of whether grievance procedures met federal standards.[50]

Against this backdrop, the result in *Booth* can be understood as the Court's recognition of Congress's implicit overruling of the pre-PLRA opinion *McCarthy v. Madigan*.[51] In *McCarthy*, the question was whether a federal prisoner seeking money damages was required to exhaust BOP grievance procedures.[52] The *McCarthy* Court rejected the argument that CRIPA indicated a congressional preference for exhaustion, in part because CRIPA applied to state but not federal prisoners,[53] and also because the "effective administrative remedies" language of the CRIPA statute excluded grievance procedures that did not provide the relief sought by the inmate.[54] The Court noted in *McCarthy* that "Congress has not meaningfully addressed the appropriateness of requiring exhaustion in this context."[55] It concluded that the inmate was not required to exhaust.[56] Four years after *McCarthy*, Congress passed the PLRA, eliminating the reference to "plain, speedy, and effective" administrative remedies in CRIPA.[57] Analyzing the amended statute in *Booth* in 2001, the Court wrote, "It has to be significant that Congress removed the very term we had previously emphasized in reaching the result Booth now seeks, and the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result."[58]

However, the fact that the PLRA imposes an "invigorated" exhaustion requirement[59] and makes exhaustion "mandatory" rather than a matter of judicial discretion[60]—even the fact that it requires exhaustion in cases involving money damages—does not mean that the statute suspends all aspects of administrative law doctrine. While the question of whether a prisoner must exhaust is no longer committed entirely to the court's judgment, Professor Richard Pierce argues that the PLRA does not abolish established administrative law exceptions to the duty to exhaust.[61] In his *Administrative Law Treatise*, Pierce explains: "Courts interpret general references to the duty to exhaust as mere codifications of the common law duty, subject to the usual pragmatic judge-made exceptions to the duty."[62] Surveying case law, Pierce concludes that the PLRA "codifies the common law duty to exhaust," rather than creating an "independent, jurisdictional, statutory duty to exhaust."[63] Pierce writes that Breyer's *Woodford* concurrence directs the lower court to "determine whether the plaintiff's complaint fell within an exception to the duty to exhaust that Congress implicitly incorporated in the statute at issue."[64] After a review of *Booth*, one aspect of Breyer's *Woodford* concurrence, and of Pierce's discussion of it, seems especially deserving of emphasis: administrative law doctrine is incorporated into the PLRA exhaustion requirement *to the extent that it is not inconsistent with the statute*.[65]

Justice Breyer's concurrence cites a 2004 Second Circuit precedent, *Giano v. Goord*, as an example of how courts may recognize established exceptions.[66] *Giano* recognized that "[s]pecial circumstances may exist that amount to a justification for not complying with administrative procedural requirements."[67] However, the Second Circuit declined to adopt wholesale doctrine from other areas, specifically the law of federal habeas.[68] It explained: "What is justification in the PLRA context for not following procedural requirements . . . cannot be decided by borrowing from other areas of the law. It must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[69]

The same day that it decided *Giano*, the Second Circuit issued an opinion in a companion case, *Hemphill v. New York*,[70] that set out a three-part framework to determine whether a prisoner's failure to properly exhaust may be excused. Under *Hemphill*, a court is to inquire "whether administrative remedies were in fact 'available' to the prisoner," whether defendants either failed to raise exhaustion or are estopped from doing so because of "actions inhibiting the inmate's exhaustion of remedies," and whether, within the meaning of *Giano*, "special circumstances have been plausibly alleged that justify the prisoner's failure to comply with administrative procedural requirements."[71] The Second Circuit concluded that the test for determining whether grievance procedures were "available" is objective: whether "a similarly situated individual of ordinary firmness [would] have deemed them available."[72] Following *Woodford*, the Second Circuit noted in one case that it did not need to decide whether *Woodford* called into question its *Hemphill* framework.[73]

Other circuit courts have recognized important exceptions to exhaustion after *Woodford*. Most recently, the Tenth Circuit in *Tuckel v. Grover* cited the Second Circuit, along with the Seventh[74] and Eleventh,[75] in concluding that "intimidation or threats by prison officials can render an administrative remedy unavailable under the PLRA's exhaustion provision."[76] Like the Seventh and Eleventh Circuits,[77] the Tenth Circuit tied its analysis to the "available remedies" language of the PLRA.[78] Rejecting the defendants' reliance on language from *Woodford* that exhaustion under the PLRA is no longer committed to judges' discretion, the Tenth Circuit pointed out that "[t]hroughout *Woodford*, the Court is careful to acknowledge that the PLRA's exhaustion requirement applies only to 'available' remedies."[79] The Tenth Circuit emphasized that its "holding concerns *when* remedies are available" but does not permit courts "discretion to fabricate exceptions" to the exhaustion requirement.[80]

More generally, Justice Breyer's concurrence suggests that administrative law principles beyond recognized exceptions to exhaustion doctrine apply to PLRA exhaustion. Administrative exhaustion is designed to "protect[] administrative agency authority" and to "promote[] efficiency."[81] However, it also imposes some obligations on agencies. For example, Professor Pierce notes that "in a long line of cases, the [Supreme] Court has excused the petitioner from exhausting available administrative remedies

when the petitioner challenges the constitutionality of some feature of the agency's decision-making process."[82] In the prison context, in which the grievance system is a relatively informal process administered by the defendants in prisoners' civil rights suits, this might be an important consideration.[83] After all, the *Woodford* majority recognized that prison systems that "create procedural requirements for the purpose of tripping up all but the most skillful prisoners" might be subject to challenge.[84]

III. Conclusion

Under the current statutory framework, Justice Breyer's solution to the problem of PLRA exhaustion is the most intellectually coherent approach. It does not require creation of new administrative deadlines or rules applying to particular categories of cases. It rests on a simple premise: if the PLRA exhaustion requirement imports administrative law into the prison context, then relevant administrative law doctrines apply, so long as they are not inconsistent with the statute. This is a fair reading of the PLRA exhaustion requirement, one that furthers its aims while avoiding unintended consequences.

Notes

1 The author is a Co-Chair of the Corrections Committee of the American Bar Association Criminal Justice Section. The views expressed here, however, are the author's alone, and do not necessarily reflect ABA policy. Thanks to John Boston for very helpful comments and for sharing his unpublished treatise, *The Prison Litigation Reform Act* (2011), and to Elliott Hibbler for research assistance.

2 Giovanna Shay, *Ad Law Incarcerated*, 14 Berkeley J. Crim. L. 329 (2009) (arguing that corrections regulations should be subject to notice-and-comment rule making).

3 Woodford v. Ngo, 548 U.S. 81, 103 (2006) (Breyer, J., concurring). *See* Shay, *supra* note 2, at 343 (describing Justice Breyer's concurrence and its reminder that administrative law principles should not be applied selectively).

4 42 U.S.C. § 1997e(a) (2011).

5 *Woodford*, 548 U.S. 81.

6 Stephen G. Breyer, Administrative Law & Regulatory Policy: Problems, Text and Cases (1999).

7 *Woodford,* 548 U.S. at 103 (Breyer, J., concurring) (quoting *Woodford*, 548 U.S. at 93).

8 548 U.S. at 103 (Breyer, J., concurring).

9 *Id.*

10 *Id.*

11 *Id.*

12 2 Richard J. Pierce, Jr., Administrative Law Treatise § 15.3, at 1245 (5th ed. 2010).

13 *See* John Boston, *Mysteries of the PLRA: Major Unresolved Questions, Fifteen Years Later*, Prison Law 2011, *at* 113, 153 (PLI Course Handbook 2011).

14 548 U.S. at 103 (Stevens, J., dissenting).

15 *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. J. Const. L. 139 (2008); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 Cardozo L. Rev. 291 (2007); Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 Cardozo Women's L.J. 37 (2004); Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 Va. J. Soc. Pol'y & L. 281 (2010); Joseph Alvarado, *Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the Fourteenth* Amendment, 8 Seattle J. for Soc. Just. 323 (2009).

16 Brief of the State of New York et al. as Amici Curiae in Support of Petitioners, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416), 2005 WL 3598179, at *4 (warning that "PLRA's exhaustion requirement will be largely rendered toothless unless it is construed to include a procedural default component").

17 42 U.S.C. §§ 15601–15609 (2012).

18 The full text of the bill is available at http://www.govtrack.us/congress/billtext.xpd?bill=h111-4335. It proposes to amend subsection (a) of section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997e(a)) to read as follows:

> (a) Administrative Remedies–(1) PRESENTATION–No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.
>
> (2) STAY–If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

19 *Id.*

20 http://www.govtrack.us/congress/bill.xpd?bill=h111-4335.

21 ABA Standards for Criminal Justice: Treatment of Prisoners Std. 23-9.2(d) (2010), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-9.2.

22 42 U.S.C. § 15606 (2012).

23 *See* National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248 (note of proposed rulemaking Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf. *See also How Committed Is Justice Dept. to Ending Rape Behind Bars?*, Wash. Post, Nov. 25, 2011 (reporting that DOJ had delivered proposed PREA regulations to Office of Management and Budget for review).

24 Nat'l Prison Rape Elimination Comm'n, Report 217 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf. The text of RE-2, the NPREC proposed regulation on administrative exhaustion, reads:

> Under agency policy, an inmate has exhausted his or her administrative remedies with regard to a claim of sexual abuse either (1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report was made, whichever occurs sooner. A report of sexual abuse triggers the 90-day exhaustion period regardless of the length of time that has passed between the abuse and the report. An inmate seeking immediate protection

from imminent sexual abuse will be deemed to have exhausted his or her administrative remedies 48 hours after notifying any agency staff member of his or her need for protection.

[25] *Id.*

[26] *Id.*

[27] National Standards to Prevent, Detect, and Respond to Prison Rape, *supra* note 23, at 6259.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Letter from Thomas M. Susman, ABA Governmental Affairs Office, to the Dep't of Justice (Apr. 4, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr04_dojcomments_o.authcheckdam.pdf.

[33] National Standards to Prevent, Detect, and Respond to Prison Rape, *supra* note 23, at 6259–60 (to be codified at 28 C.F.R. pt. 115.51 (c)).

[34] *Id.*

[35] *Id.* at 6260.

[36] *Id.* (to be codified at 28 C.F.R. pt. 115.51(d)).

[37] *See* Boston, *supra* note 13, at 153 (recognizing "tension" between Justice Breyer's *Woodford* concurrence and Supreme Court opinions including *Booth*).

[38] Booth v. Churner, 532 U.S. 731 (2001).

[39] Porter v. Nussle, 534 U.S. 516, 532 (2002).

[40] *See* Boston, *supra* note 13, at 153.

[41] *Booth* 532 U.S. 731.

[42] *Id.* at 741 n.6.

[43] *Id.* at 741.

[44] *Id*. at 741 n.6 (emphasis added).

[45] Porter v. Nussle, 534 U.S. 516, 523 (2002) (citing Patsy v. Bd. of Regents of Florida, 457 U.S. 496 (1982)). *See also* 2 Pierce, *supra* note 12, § 15.9, at 1295.

[46] *Porter*, 534 U.S. at 532 ("[W]e 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.") See 2 Pierce, *supra* note 12, § 15.9, at 1301.

[47] *Porter*, 534 U.S. at 523.

[48] *Id.*

[49] *Id.* at 524.

[50] *Id.*

[51] McCarthy v. Madigan, 503 U.S. 140 (1992).

[52] *Id.*

[53] *Id.* at 150.

[54] *Id.* ("[I]n contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, the statute conditions exhaustion on the existence of 'effective administrative remedies.'")

[55] *Id.* at 149.

[56] *Id.* at 156.

[57] *Booth*, 532 U.S. at 740.

[58] *Id.* at 740–41.

[59] Porter v. Nussle, 534 U.S. 516, 524 (2002).

[60] *Id.*

[61] 2 Pierce, *supra* note 12, §15.3, at 1245.

[62] *Id.*

[63] *Id. Cf.* Jones v. Bock, 549 U.S. 199, 216 (2007) (holding that "failure to exhaust is an affirmative defense under the PLRA" and not a jurisdictional requirement).

[64] 2 Pierce, *supra* note 12, § 15.3, at 1258. *See* Woodford v. Ngo, 548 U.S. 81, 104 (2006) (Breyer, J., concurring) ("In my view, on remand, the lower court should similarly consider any challenges that respondent may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates.")

[65] *Cf. Booth*, 532 U.S. at 741 n.6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements *where Congress has provided otherwise*." (emphasis added)). *See also* Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the PLRA*, 156 U. Pa. L. Rev. 817, 831 (2008) (arguing that "it is far from clear" that Congress intended to eliminate judicial discretion to permit exceptions to exhaustion).

[66] 380 F.3d 670, 677 (2d. Cir. 2004). *See* Robin L. Dull, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 Iowa L. Rev. 1929, 1950 (2007) (arguing that other Circuits should adopt the Second Circuit's *Hemphill* framework to "fill[] the gaps" in post-Ngo PLRA exhaustion doctrine).

[67] *Giano*, 380 F.3d at 677 (internal quotation marks and citations omitted).

[68] *Id.* at 678.

[69] *Id.* at 678.

[70] 380 F.3d 680, 686 (2004).

[71] *Id.* (internal quotation marks and citations omitted).

[72] *Id.* at 688 (internal quotation marks and citations omitted).

[73] Ruggiero v. Cnty. of Orange, 467 F.3d 170, 176 (2d Cir. 2006). *See* Boston, *supra* note 13, at 155 (noting that the Second Circuit "has not revisited the viability of this pre-*Woodford* holding in a published opinion").

[74] Kaba v. Stepp, 458 F.3d 678 (7th Cir. 2006).

[75] Turner v. Burnside, 541 F.3d 1077 (11th Cir. 2008).

[76] Tuckel v. Grover, 660 F.3d 1249, 1252 (10th Cir. 2011).

[77] *Turner,* 541 F.3d at 1084 ("A remedy has to be available before it must be exhausted, and to be 'available' a remedy must be 'capable of use for the accomplishment of its purpose."); *Kaba*, 458 F.3d at 684 ("If administrative remedies are not 'available' to an inmate, then the inmate cannot be required to exhaust.").

[78] *Tuckel*, 660 F.3d at 1255.

[79] *Id.*

[80] *Id*.

[81] Woodford v. Ngo, 548 U.S. 81, 89 (2006).

[82] 2 Pierce, *supra* note 12, § 15.5, at 1269.

[83] *Cf.* Cleavinger v. Saxner, 474 U.S. 193, 206 (1985) (noting of prison disciplinary proceedings that "few of the procedural safeguards contained in the Administrative Procedure Act [are] present.").

[84] *Woodford*, 548, U.S. at 102–03.