COMMENTS

GRAPPLING WITH INMATES' ACCESS TO JUSTICE: THE NARROWING OF THE EXHAUSTION REQUIREMENT IN *ROSS V. BLAKE*

JACQUELINE HAYLEY SUMMS*

TABLE OF CONTENTS

---

* J.D., Candidate, 2018, American University Washington College of Law. B.A. International Relations and Political Science, University of the South, Sewanee. I am especially grateful to the *Administrative Law Review* staff for their efforts and diligence. I would also like to thank Professor Mark C. Niles for his invaluable comments and guidance. Lastly, I would like to thank Evan S. Griffis and Hugo for their endless encouragement and support.

INTRODUCTION

Over the last twenty years, federal court filings dealing with prisoners' legal rights and prison conditions have decreased substantially as prison populations continue to rise.[1] It seems the devil is in the details for inmates; more often than not, technicalities associated with inmate complaints, or grievances, present the greatest challenge to securing fair treatment of prisoners. The administrative grievance process bars inmates from accessing the courts and frequently results in the inmate's inability to address serious, even life-threatening, grievances.[2] Still, prisoners have a constitutionally protected right to meaningful access to the courts.[3] This creates an affirmative duty on prison staff to help inmates prepare or file legal documents, usually through access to a law library or to a person trained in the law at the prison facility.[4] However, this duty to provide meaningful legal access to the courts is precarious. There are several internal procedural hurdles that exist in maintaining access to a library or legal representative,[5] and wider access to the courts to file claims is severely

1. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156–158 (2015) (demonstrating that prisoner filings in federal district court have decreased by an estimated 60% since 1996).

2. These grievances often include, but are not limited to, the right to care in medical situations, to have personal property, to not endure physical abuse, or the right to practice a religion of one's choosing. *See* Van Swearingen, Comment, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CALIF. L. REV. 1353, 1354 (2008).

3. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (holding that prisoners have a well-established right to meaningful access to the courts and this creates an affirmative duty on prisons to provide adequate resources).

4. *Id.*

5. *See* Sarah Botz, *Substantive Rights Retained by Prisoners*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 1105, 1107–09 (2016).

> Courts will allow some restrictions on a prisoner's access to legal resources to accommodate legitimate administrative concerns that include: (1) maintaining security and internal order; (2) preventing the introduction of contraband,

limited by statutory requirements. One of the most challenging statutory requirements is the exhaustion provision of the Prison Litigation Reform Act of 1996 (PLRA).

Before inmates can file a suit to challenge their prison conditions, the PLRA requires that inmates exhaust such "administrative remedies as are available."[6] The exhaustion requirement mandates that inmates utilize all administrative grievance processes within their Federal Bureau of Prisons (BOP) facility before filing civil suit.[7] This administrative grievance process has several advantages such as providing quicker resolution of disputes, giving inmates an opportunity to be heard, and promoting smoother prison operations.[8] Historically, both BOP officers and courts have interpreted this requirement to be at the broad discretion of prison officials, as the guidelines for exhaustion vary by jurisdiction and institution.[9] Additionally, the BOP maintains discretion to weed out "meritless" claims.[10] This process results in intimidation and retaliation against inmates, which further deters many from pursuing claims.[11]

This Comment looks at these restrictions on inmate access to the courts through *Ross v. Blake*.[12] Blake's case questions whether a textual exception to the exhaustion requirement exists within the PLRA.[13] If an inmate can show that the administrative process was not available to him, then a claim can be brought outside the BOP's discretion.[14] While the immediate effect of the Supreme Court's decision in *Ross* may be to create more obstacles to prisoner litigants to thwart future attempts at extra-textual exceptions to the

---

particularly through mail or legal documents; (3) preventing the domination of the library by regular users; and (4) observing budget constraints.

See id.

6. 42 U.S.C. § 1997e(a) (1996).

7. *Id.*

8. *See* Swearingen, *supra* note s2, at 1378.

9. Margo Schlanger, *Prison Grievance Procedures and Samples*, U. OF MICH. (last visited Feb. 18, 2017), https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonGrievanceProceduresandSamples.aspx.

10. *See* Ross v. Blake, 136 S. Ct. 1850, 1860 (2016).

11. *Id.*

12 *See id.* at 1854–55 (holding that the Prison Litigation Reform Act (PLRA) does not allow for extra-textual exceptions to the exhaustion requirement).

13 *See id.* (finding that a textual exception does exist within the PLRA based on whether remedies are "available").

14. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 491 (2001) ("[C]ourts must screen prisoners' civil complaints and dismiss any claims that are frivolous or malicious, fail to state a claim upon which relief can be granted, or seek damages from a defendant with immunity from damages liability.").

statute, the larger significance of the case lies in the Court's decision to provide specific language to the PLRA's textual exception. The Court's decision to read into the exhaustion provision three specific instances[15] where the grievance process is unavailable may provide inmates with a clearer process for exhausting administrative procedures and bring attention to the context of many prisoners' claims.[16]

Another central issue is whether *Ross* was correctly decided given the requirements of judicial deference to agency action. This Comment argues that the Court's choice to articulate a textual exception to the PLRA's exhaustion requirement and narrow in on what constitutes unavailability in *Ross* suggests that the Court is inserting its own interpretation of statutory construction in opposition to prevailing *Chevron* doctrine.[17] This judicial failure to defer to an agency limits the BOP's interpretive power of the provisions in the PLRA, but it also signals that alternative processes are needed to curb the unwieldy discretion of this agency, especially as prison conditions become a more pressing social and political issue.

Part I of this Comment examines the history of the exhaustion requirement and the procedural obstacles the PLRA presents for inmates. Part II reviews the procedural history leading to the Supreme Court's decision in *Ross v. Blake* as well the as the issues the Court disputes. Part III discusses the Court's introduction of a new exception to the PLRA's exhaustion provision and rationale for remanding the case. Part IV offers a critical analysis of *Ross* and its impact in light of the historical treatment of the exhaustion provision. Part V applies a *Chevron* analysis to determine if the Court interfered with the BOP's authority in failing to apply judicial deference. Part VI further evaluates this analysis to determine why the Supreme Court acted outside of its discretion. Finally, Part VII concludes with recommendations as to how the BOP can reform its administrative grievance procedures to conform with the decision in *Ross* and due process interests to ensure inmates have meaningful access to courts.

---

15. *See Ross*, 136 S. Ct. at 1859–60 (describing three instances of unavailability including when officers are unable or unwilling to help, when the process is too opaque for a reasonable inmate to understand, and when prison officers thwart an inmates' attempts to utilize the grievance process).

16. *See* Steven D. Schwinn, *Argument Preview: Access to Justice in the PLRA*, LPB NETWORK (Mar. 28, 2016), http://lawprofessors.typepad.com/conlaw/2016/03/argument-preview-access-to-justice-in-the-plra.html (speculating that the Supreme Court may find that the exhaustion requirement applies less rigidly).

17. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (holding that agencies should receive deference for their reasonable interpretations of Congress's statutory language).

I. UNDERSTANDING THE IMPACT OF THE PLRA'S EXHAUSTION REQUIREMENT

In administrative law, exhaustion requirements preserve agency discretion. Administrative agencies, like the BOP, were designed to handle a large variety of situations, effectively and efficiently.[18] It is not in an agency's interest to allow contested matters to be directed prematurely to Article III courts without the opportunity for the agency to resolve the dispute and implement the legislation entrusted to it.[19] Further, federal judges are familiar with exhaustion requirements and are more hesitant to hear cases that are within the jurisdiction of an agency because of the nature of an administrative agency's role and expertise.[20]

This hesitancy is best attributed to the decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[21] In *Chevron*, the Supreme Court established that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[22] *Chevron* dramatically changed the judicial deference framework by giving agencies almost-default interpretive power[23] when the statute is at all vague or ambiguous.[24] The

18. *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1799 (2003) (arguing that administrative exhaustion is efficient because exhaustion allows the agency to correct errors and better prepare for later judicial review).

19. *Id.*

20. *See id.* at 1774 ("Exhaustion requirements are familiar to federal judges"); *see also* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (holding that it is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.").

21. 467 U.S. 837 (1984).

22. *Id.* at 866.

23. *Chevron* and the deference it gives to agency interpretation came under fire in January 2017. Peter M. Shane, *The Quiet GOP Campaign Against Government Regulation*, ATLANTIC (Jan. 26, 2017), https://www.theatlantic.com/politics/archive/2017/01/gop-complicates-regulation/514436/. The Regulatory Accountability Act of 2017 (RAA) was drafted by Republican congressmen to deter the federal courts from giving deference to federal agencies in a portion of the RAA called the "Separation of Power's Restoration Act." *Id.* The RAA was passed by the House of Representatives on January 11, 2017, and if embraced by both Houses, the RAA could have a large impact on PLRA's exhaustion requirement. *Id.* The implications for future cases like *Ross* are high as the outcome of these cases would likely be more similar to that of the Fourth Circuit and its extra-textual "special circumstances" exception. *See Infra* text accompanying note 100.

Court in *Chevron* created a two-prong analysis to determine when courts should interfere in an agency's interpretive power of a statute.[25] First, the court must determine if Congress has already demonstrated an intent for the interpretation of the statute.[26] If the intent is clear, then both the court and the agency must defer to Congress's unambiguous intention.[27] If it is not clear, the court cannot compel its own interpretation of the statute; it must defer to an agency's permissible interpretation of the statute.[28]

Exhaustion requirements, like those in the PLRA, may be clear in congressional intent but lacking in clear procedural guidelines. These requirements typically bar a party from filing for judicial review of agency actions until the case is appealed to the top of the agency.[29] However, courts do not uphold exhaustion of administrative procedures before judicial review because an administrative process exists;[30] a statute must explicitly or implicitly require the court and the petitioner to exhaust administrative procedures before seeking federal court review.[31]

A. Pre-PLRA: Statutory Interpretation in McCarthy v. Madigan

The PLRA was enacted to revise the previous prisoner's administrative exhaustion requirement in the Civil Rights of Institutionalized Persons Act (CRIPA).[32] Specifically, the PLRA was enacted to limit the broad discretion the statute previously gave to federal courts to determine when inmates exhausted administrative remedies.[33] In *McCarthy v. Madigan*,[34] the Supreme Court held that the language of § 1997e, as it existed before the

24. Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on Executive's Power to Make and Interpret the Law*, 44 LOY. U. CHI. L.J. 144, 170 (2012).

25. *Chevron*, 842–843 (explaining the test for deference).

26. *Id.* at 842.

27. *Id.* at 842–43.

28. *Id.*

29. Kathryn F. Taylor, Note, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955, 956 (2000).

30. *Id.*

31. *See* Roosevelt III, *supra* note 18, at 1799–1800 (explaining that "administrative exhaustion is now largely a creature of statute and rule" because a reviewing court's role is dependent on statutory language and the nature of the prescribed administrative proceeding).

32. Taylor, *supra* note 29, at 956, 956 n.11.

33. *See id.* at 958 (explaining that before the PLRA was enacted, the statute gave federal courts more discretion than agencies to determine when administrative remedies were exhausted by inmates).

34. 503 U.S. 140 (1992).

enactment of the PLRA, did not require exhaustion in all cases.[35] The Court interpreted the statute as allowing the lower courts to balance a prisoner's interest in access to judicial remedies against the interests of the agency's administrative system.[36] In *McCarthy*, a federal prisoner filed suit in federal court for money damages as a remedy for his alleged injury after he was denied medical care.[37] The District Court dismissed his claim for failure to exhaust administrative remedies and the Court of Appeals affirmed.[38] The Supreme Court reversed this decision agreeing that the lower court had the discretion to determine whether the exhaustion requirement was met under § 1997e, but finding that the lower court misapplied the statute to McCarthy's case.[39] The Court reasoned that "McCarthy's individual interests outweighed countervailing institutional interests favoring exhaustion."[40]

McCarthy significantly formed the PLRA's exhaustion requirement—ultimately leading to the revisal of CRIPA's more lenient exhaustion requirement to the PLRA's stricter, mandatory exhaustion provision.[41] The Court in *McCarthy* identified three circumstances that should prompt lower courts to allow inmates to forego administrative grievance requirements.[42] First, if an administrative remedy causes undue prejudice to a later court's review of the issue then exhaustion should not be required.[43] Second, courts should not require exhaustion when the agency is incapable of granting effective relief.[44] Finally, administrative remedies are inadequate where there is evidence of agency bias.[45] Ultimately, the Court reasoned that McCarthy had "everything to lose and nothing to

35. *Id.*

36. *See* Taylor, *supra* note 29, at 959 (noting that the Court assumed that "exhaustion serves the institutional interests of protecting administrative agency authority").

37. *See McCarthy*, 503 U.S. at 141 (holding that exhaustion is not required where an inmate's individual interests outweigh countervailing institutional interests).

38. *Id.*

39. *See id.* at 146 (finding that the statute requires a balancing analysis in which administrative remedies do not need to be exhausted if the inmate's interest in timely access to the courts outweighs the government's interests in administrative efficiency).

40. *Id.* at 149.

41. *Id.* at 156 (opining "Congress, of course, is free to design or require an appropriate administrative procedure for a prisoner to exhaust his claim for money damages").

42. *Id.* at 146–48.

43. *See id.* at 146–47 (explaining that such instances may include when there is a delay in agency action or an indefinite or unreasonable timeframe for agency action).

44. *See id.* at 148 (finding that the administrative process may be inadequate where the agency lacks institution competence to address the issue or grant relief).

45. *See id.* at 148–49 (citing instances where the administrative process was relied upon to harass or discourage inmates).

gain" from the processes the prison grievance system required of him because he sought a remedy that agency policy did not provide for.[46] The case was ultimately reversed with a recommendation that Congress amend the statute to clarify the procedures available to inmates.[47] Congress responded to the decision in *McCarthy*, but not in the way the Supreme Court intended.[48]

*B. Post-*McCarthy*: PLRA Textually Mandates Exhaustion*

After the decision in *McCarthy v. Madigan*, the PLRA replaced CRIPA and textually mandated exhaustion of administrative remedies for the first time.[49] Congress set out to decrease the federal court's involvement with state prisons[50] and to curb an influx of "frivolous" litigation from pro se prisoner lawsuits.[51] Pro se claims filed by inmates are considered frivolous because they often are legally meritless and, as a result, pose a managerial challenge for the courts and for prison officers.[52] Congress enacted the PLRA in 1996 to address the influx of pro se prisoner litigation, and the statute has been substantially effective "in keeping down the number of federal lawsuits by prisoners, even as incarcerated populations rise."[53] In theory, Congress's efforts could have assisted meritorious prisoner claims to be more successful.[54] In reality, the inmate cases are less successful than before the PLRA, as more cases are dismissed than settled.[55]

---

46. *Id.* at 152.

47. *See id.* at 156 (noting that Congress is free to design a more apt administrative procedure for inmates to exhaust).

48. *See* 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham) (proposing to "end frivolous lawsuits brought by prisoners, to remove our prisons from the control of Federal judges, and to return control over them to our State and local officials").

49. *Compare* 42 U.S.C. §1997e(a) (2012) (mandating exhaustion of administrative remedies), *with* 42 U.S.C. §1997e(a)(1) (1996) (requiring exhaustion where the court believes it is appropriate and in the interest of justice).

50. *Supra* note 48.

51. *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, 141 (2008) ("Pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities.").

52. *Id.* at 141.

53. *See id.* at 141–42 (arguing that the PLRA has reduced prisoner claims by 60% over an eleven-year period beginning in 1995).

54. *See* 141 CONG. REC. H1472 (daily ed. Feb. 9, 1995) (statement of Congressman Quillen) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

55. *See* Schlanger & Shay, *supra* note 51 at 142–43 (arguing that the "shrunken inmate docket is less successful than before the PLRA's enactment" because more cases are

C. Procedural Obstacles of the PLRA

At its core, the PLRA's exhaustion requirement is a procedural deterrent to seeking judicial assistance on agency action, but the impact of this requirement is not solely administrative. The PLRA mandates that a court dismiss any claims by a prisoner if the prisoner fails to exhaust available administrative procedures.[56] This requirement leads to the immediate dismissal of potential lawsuits[57] as well as indifference in prison staff when "jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law."[58] The PLRA states, "[n]o 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."[59] Thus, there is a textual mandate in the statute that prevents courts from excusing prisoners who miss an administrative deadline or have technical mistakes in their administrative grievances.[60]

The PLRA created financial obstacles as well as procedural ones.[61] While court filing fees were waived for many prisoner litigants before the PLRA, the statute now enforces the fees for prison litigants, but in monthly installments.[62] Prison litigants usually earn between $0.23 and $1.15 per hour.[63] Yet, the filing fee for a lawsuit in federal court is $400, and $500 for appeals.[64] The financial cost of filing, and the experience of appealing unanswered requests, burdens inmates in both federal and state courts.[65]

---

dismissed and even less settle).

56. *See* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1018 (2016).

57. *See id.* at 1018.

58. Schlanger & Shay, *supra* note 51, at 142.

59. 42 U.S.C. § 1997e (2012).

60. *See* Shapiro, *supra* note 56, at 1018–19 (arguing that administrative procedures make inmate errors more likely because of how complicated or contradictory these forms tend to be).

61. *See* Amy Howe, *Argument preview: Filing fees and payments under the Prison Litigation Reform Act*, SCOTUSBLOG (Nov. 3, 2015, 7:58 PM), http://www.scotusblog.com/2015/11/argument-preview-filing-fees-and-payments-under-the-prison-litigation-reform-act/ (explaining that the PLRA made it so filing fees waivers are no longer available for prisoners).

62. *Id.*

63. *Id.*

64. *See id.* ("As a general rule, the courts can waive those fees for litigants who can't afford them . . . who now generally make somewhere between $0.23 and $1.15 per hour.").

65. *Id.*

The PLRA impacts inmate claims in both federal public and private institutions, but it does not bind states.[66] While the PLRA is not statutorily binding on state prison facilities, most states now have their own version of the PLRA to limit inmate access to state courts.[67] However, state PLRAs generally apply more broadly to state and federal prisons, whether public or private.[68] Thus, any prison litigation *in any court* is likely to be impacted, if not limited, by some PLRA.[69]

II. *ROSS V. BLAKE*

Ross v. Blake provides an important analysis of the exhaustion requirement and the procedural rule's interpretation moving forward.[70] Justice Kagan delivered the majority opinion concluding that statutory review of the PLRA's text does not provide for a "special circumstances" exception as the Fourth Circuit held.[71] However, there is a textual exception to the exhaustion requirement contained in the word "available."[72] While this potentially opens the door for prisoner litigants to challenge the administrative grievance process judicially, Congress or the agency may ultimately have the last word. [73] *Ross v. Blake* does not raise a constitutional question, just a statutory one because the claim depends on the interpretation of the PLRA language.[74] Thus, in the long term,

66. 42 U.S.C. §1997e(b) (2012).

67. State attorneys general and departments of corrections anticipated that inmates would start bringing more claims in state court after the PLRA passed. Because of this foreseen shift, most states developed a system for regulating inmate's ability to file in state court. *See* Sasha Volokh, *Suing Public And Private Prisons: The Role of the Prison Litigation Reform Act*, WASH. POST (Feb. 20, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/20/suing-public-and-private-prisons-the-role-of-the-prison-litigation-reform-act/?utm_term=.559ee0fabe69.

68. *See id.* (explaining that state PLRAs may apply in federal court if the claim is based on state law).

69. *See id.* (describing how an inmate's chances of successfully litigating claims increases in states that have no PLRA equivalent because PLRAs limit prison litigation).

70. Ross v. Blake, 136 S. Ct. 1850, 1855 (2016) (holding that a textual exception to the PLRA's exhaustion requirement may allow a Maryland inmate to bring his claim against a prison guard depending on the availability of the grievance process).

71. *Id.*

72. *Id.* at 1856.

73. *See* Schwinn, *supra* note 16 (explaining that Congress can change anything the Court does during litigation through legislation).

74. *Id.*

Congress may choose to reverse through legislation any changes the Court makes through litigation because of its lack of judicial deference.[75]

Shaidon Blake, an inmate in Maryland prison, originally brought his excessive force claim against two guards, James Madigan and Michael Ross.[76] On June 21, 2007, both guards were responsible for transferring Blake to the prison's segregation unit.[77] Blake alleged that Officers Madigan and Ross used excessive force during this transfer.[78] After an investigation into the actions taken by the prisoner officers, Blake sued both guards under 42 U.S.C. § 1983.[79] Only Blake's claim against Madigan went to trial, and Blake was awarded $50,000.[80] Unlike Madigan, Ross argued in the District Court that Blake failed to abide by the prison's administrative grievance procedure.[81] He relied on the PLRA's exhaustion requirement as an affirmative defense, and the District Court rejected Blake's claim that Ross failed to take protective action.[82]

In Maryland federal prisons, inmates are encouraged to resolve problems informally by speaking with staff or submitting an informal complaint.[83] When this fails, inmates can file a formal complaint to the warden through the Administrative Remedy Procedure (ARP).[84] The purpose of the ARP process "is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."[85] A request for administrative remedy can be filed up to thirty days from the date of the incident or the date the inmate gained knowledge of the incident or injury giving rise to the complaint.[86] The ARP process gives inmates the right to appeal the warden's response to the Commissioner of Correction and then to the Inmate Grievance Office (IGO) within thirty days from the inmate's

75. *Id.*

76. *Ross*, 136 S. Ct. at 1855.

77. *Id.*

78. *Id.*

79. *Id.*; 42 U.S.C. § 1983 (2012) (allowing for claims alleging constitutional violations against state or federal employees).

80. *Ross*, 136 S. Ct. at 1855

81. *Id.*

82. *Id.*

83. *See* MARYLAND DIV. OF CORRECTIONS, INMATE HANDBOOK 30 (2007) [hereinafter MARYLAND INMATE HANDBOOK], https://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf.

84. *Id.* at 30–31.

85. *See* 28 C.F.R. § 542.10 (2014) (defining the purpose of the Administrative Remedy Procedure (ARP)).

86. *See* MARYLAND DIV. OF CORRECTION, ADMINISTRATIVE REMEDY PROCEDURE (2015), http://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=654.

receipt of a formal response.[87] Blake acknowledged that he had not complied with the ARP requirements but only because he was relying on the Internal Investigation Unit's (IIU) yearlong investigation.[88] Nonetheless, the District Court dismissed Blake's claim against Ross, and Blake appealed.[89]

The Fourth Circuit's incorrect interpretation of the PLRA's exhaustion provision is what ultimately propelled the case to the Supreme Court.[90] The Court of Appeals for the Fourth Circuit reversed the District Court's decision in favor of Blake.[91] Relying on prior decisions from the Second Circuit, the Fourth Circuit adopted an extra-textual exception in "special circumstances" to the PLRA's exhaustion requirement.[92] The Fourth Circuit agreed that there are some circumstances where failure to meet administrative remedy requirements is justified, particularly, if the inmate reasonably believed administrative remedies were exhausted.[93] Blake believed his participation in the IIU's inquiry acted as a substitute for Maryland's ARP requirements, and the Fourth Circuit concluded that Blake met this reasonable belief exception.[94]

III. THE SUPREME COURT'S REJECTION OF EXTRA-TEXTUAL EXCEPTIONS

In *Ross*, the Supreme Court rejected the Fourth Circuit's extra-textual exception in the exhaustion context.[95] The Court's analysis proceeded in two parts. In the first part, the Court concluded that the PLRA's exhaustion provision bars extra-textual exceptions through statutory analysis of the § 1997e language, historical analysis of exhaustion provisions, discussion of the congressional intent, and a review of the application of the exhaustion requirement preceding this case.[96] The second part of the Court's analysis is more specific; the question of whether Blake exhausted all the available administrative remedies.

---

87. *See* MARYLAND INMATE HANDBOOK, *supra* note 83, at 30–31.

88. *Ross*, 136 S. Ct. at 1855.

89. *See* Blake v. Maynard, No. 09-CV-2367-AW, 2013 WL 3659421, at *7 (D. Md. July 11, 2013) (holding that the "commencement of an internal investigation precludes dismissal for the failure to exhaust).

90. *See Infra* text accompanying note 96.

91. *Ross*, 136 S. Ct. at 1856.

92. *Id.*

93. *Id.*

94. *Id.*; Blake v. Ross, 787 F.3d 693, 698, 701 (4th Cir. 2015).

95. *Ross*, 136 S. Ct. at 1856.

96. *See id.* (finding that the statute and legislative history preclude the Fourth Circuit's holding).

Ultimately, the Supreme Court held "statutory text and history alike foreclose the Fourth Circuit's adoption of a 'special circumstances' extra-textual exception," but it went on to add that a statutory exception might exist in Blake's case.[97] The Court reasoned that the statute itself contains "unambiguous terms" that directly contradict what the Fourth Circuit decided.[98] Instead, the Court asserted that 42 U.S.C. § 1997e has a textual exception[99] that derives from the statute's use of the term "available."[100]

A. Mandatory Language of Section 1997e

The Supreme Court observed that the language of the PLRA has consistently been interpreted as "mandatory."[101] The statutory exhaustion provision of the PLRA, § 1997e(a), provides, "No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[102] The Court reasoned that because of the mandatory nature of the statute, courts must read this language to mean that there are no limits to the exhaustion requirement.[103] Meaning, no court, not even the Fourth Circuit, can excuse a failure to exhaust under the PLRA, even taking special circumstances into account.[104]

The opinion further emphasizes the distinction between a doctrine of exhaustion of administrative remedies and a statutory exhaustion provision.[105] Cases like *McKart v. United States*[106] highlight that a doctrine of

97. *See id.* at 1856, 1858 (finding that the "PLRA contains its own, textual exception to mandatory exhaustion").

98. *Id.* at 1856.

99. The PLRA's exhaustion requirement is dependent on administrative remedies being available; an inmate cannot exhaust remedies that are unavailable and this textual exception places a limitation on the inmate's duty to exhaust. *See id.* at 1858.

100. *See Ross v. Blake: Post-Decision SCOTUSCast*, FEDERALIST SOC'Y (July 28, 2016), http://www.fed-soc.org/multimedia/detail/ross-v-blake-post-decision-scotuscast ("The Court left open on remand the question whether an administrative remedy was in fact "available" to Blake.").

101. *Ross*, 136 S. Ct. at 1856 (citing Woodford v. Ngo, 548 U.S. 81, 85, (2006)); *accord* Jones v. Bock, 549 U.S. 199, 211 (2006) ("There is no question that exhaustion is mandatory under the PLRA.").

102. 42 U.S.C. § 1997e(a).

103. *Ross*, 136 S. Ct. at 1856.

104. *Id.*

105. *See* McKart v. United States, 395 U.S. 185, 195 (1969) (holding that in selective service cases the exhaustion requirement must be adapted to suit the administrative process that Congress establishes).

106. 395 U.S. 185, 195 (1969).

exhaustion of administrative remedies is a judicial doctrine that is subject to exceptions.[107] In *McKart*, the Supreme Court suggests that statutory exhaustion provisions like § 1997e(a) "are not judicial doctrines but legislative."[108] Where judge-made exhaustion doctrines remain subject to judge-made exceptions, mandated statutory exhaustion provisions are subject to the exceptions Congress creates. *Ross* builds on this finding that Congress's decision to exclude exceptions in the text and mandate the requirements of the exhaustion provision prevents the courts from using judicial discretion.[109] If there is no limit on the administrative grievances an inmate must exhaust, the Court cannot add unwritten limits to the statute's text.[110]

The Supreme Court takes this analysis one final step further. In weighing the congressional intent behind the PLRA's statutory language, the Court notes that Congress chose to amend the PLRA's predecessor, CRIPA, in which a court had the discretion to determine whether to excuse an inmate's failure to exhaust.[111] The Fourth Circuit's interpretation of a "special circumstances" exception failed to acknowledge Congress's rejection of CRIPA's permissive exhaustion requirement.[112] The inclusion of this part of the analysis is significant; if the Court appreciates the intent behind the statute is to limit judicial discretion, then its decision to interpret when administrative processes are unavailable creates a *Chevron* issue.[113]

B. Availability as a Sua Sponte Issue

The Court's opinion in *Ross* is exceptional because the justices chose to raises a new issue sua sponte to address the availability of administrative

107. *See Ross*, 136 S. Ct. at 1857 (citing *McKart*, 395 U.S. at 193) ("The doctrine of exhaustion of administrative remedies . . . is, like most judicial doctrines, subject to numerous exceptions.").

108. *See McKart*, 395 U.S. at 193 (explaining that the use of exhaustion procedures on individual cases requires knowledge of the particularities of the administrative process involved).

109. *Ross*, 136 S. Ct. at 1857.

110. *Id.*

111. *See Ross*, 136 S. Ct. at 1857 ("Under CRIPA, a court would require exhaustion only if a State provided 'plain, speedy, and effective' remedies meeting federal minimum standards—and even then, only if the court believed exhaustion 'appropriate and in the interests of justice.'").

112. *Id.*

113. *See supra* text accompanying notes 17– 24.

remedies when neither the petitioner's briefs nor lower court made the argument.[114] Justice Breyer described it best:

> Now we discover, having taken it, this new issue that wasn't there. We thought the question was, can you create an exception to the requirement that they have to take into account of available administrative remedies? The issue now is whether there was an administrative remedy available on the basis of what I've read.[115]

Within § 1997e(a), the Court describes the inclusion of the term "available" as a textual limitation on the obligation to exhaust administrative remedies.[116] Relying on *Booth v. Churner*,[117] availability is inferred to mean "capable of use for the accomplishment of a purpose," and, "that which is accessible or may be obtained."[118] Reviewing these definitions, its past decisions, and the lower courts' decisions, the Supreme Court held that administrative grievance procedures are unavailable in three instances.[119]

First, an administrative remedy is unavailable when officers are "unable or consistently unwilling to provide any relief to the aggrieved inmate."[120] Second, administrative schemes that become so opaque that no ordinary prisoner can navigate them are incapable of use—and unavailable.[121] Third, a grievance process is rendered unavailable when prison administrators use "machination, misrepresentation, or intimidation" to deter inmates from filing grievances.[122]

1. Hitting a Dead End: Unwilling or Unable Prison Officers

The Court's analysis of unavailability as it relates to "unwilling or unable prison officers" is confined to the considerations in *Booth v. Churner*. Yet, *Booth* deals with the question of availability in a remarkably different capacity. In *Booth*, the Supreme Court evaluated availability in terms of the

114. *See* Oral Argument at 14, Ross v. Blake, 136 S. Ct. 1850 (2016) (No. 15-339), 2016 WL 1222539.

115. *Id.*

116. *Ross*, 136 S. Ct. at 1858.

117. 532 U.S. 731, 738 (2001).

118. *Id.* (citing Booth v. Churner, 532 U.S. 731, 738 (2001)) (finding that an inmate must exhaust administrative procedures that are "capable of use").

119. *See id.* at 1858–59 (finding that administrative remedies are unavailable when officers are unwilling to provide relief, when the procedures are incomprehensible, and when officers thwart or manipulate the grievance process).

120. *Id.*

121. *Id.*

122. *Id.*

relief sought.[123] In *Ross v. Blake*, the Court dealt with a separate issue: whether Blake exhausted the available administrative processes and could file a claim.[124] As the Court held in *Booth*, even if the requested relief is unavailable, the administrative filing or grievance process still exists, and the statute mandates that it be used.[125] The inmate in *Booth* was deterred from relying on the administrative grievance process because the nature of the relief he sought.[126] In *Ross*, the inmate, Blake, was deterred from relying on Maryland's ARP system because his claim was already being investigated by the IIU, and the Court must determine whether this reliance on the IIU was reasonable.[127] While this analogy is cursory at best, it is apparent that the Supreme Court is interested in *Booth*'s textual deconstruction of the modifier "available."[128] Justice Kagan incorporated the following from *Booth*: "some redress for a wrong is presupposed by the statute's requirement of an 'available' remedy; where the relevant administrative procedure lacks authority to provide any relief, the inmate has "nothing to exhaust."[129]

2. Opaque Schemes: When the Grievance Process Is Incomprehensible

When the prison's grievance procedure is unknown or nonsensical, it is unavailable.[130] The Supreme Court described this instance of unavailability in an intentionally broad manner.[131] Its interpretation of "opaque" ranges from a procedure that has multiple reasonable interpretations to procedures that cannot be navigated to procedures that were never introduced to the inmate.[132] Further, this type of unavailability

123. Using "available" as a modifier establishes that relief is possible; the word "exhausted" applies to the procedure needed not the specified relief. *See Booth*, 532 U.S. at 738–39.

124. *Ross*, 136 S. Ct. at 1860–61.

125. *See Booth*, 532 U.S. at 738–39 (holding that claims seeking monetary relief are still subject to the exhaustion provision of the PLRA).

126. In *Booth*, the inmate argued that he was told not to file administrative grievance because monetary damages were not available for his claim. *See id.*

127. *Ross*, 136 S. Ct. at 1860.

128. *Id.* at 1859.

129. *See id.* (citing *Booth*, 532 U.S. at 736).

130. *Id.* (citing Goebert v. Lee County, 510 F.3d 1312, 1323 (11th Cir. 2007)) (explaining that when a remedy is unknowable, meaning that no ordinary prisoner can understand it, then the remedy is unavailable).

131. *Id.*

132. *See id.* ("In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it."); *see also id.* ("When an administrative process is susceptible of multiple reasonable interpretations . . . the inmate should err on the side of

focuses on a reasonable person analysis; if a reasonable inmate cannot use the administrative process, then it is unavailable.[133]

3. Thwarting the Process through Machination, Misrepresentation, or Intimidation

Lastly, the Court concluded that some prison administrators intentionally make the administrative grievance process unavailable.[134] The Court reasoned that some officials make the administrative grievance process intentionally difficult "in order to 'trip up all but the most skillful prisoners.'"[135] This last type of unavailability is crucial; inmates are often ignorant to the grievance processes in the prison or how to successfully communicate their needs to prison officials.[136] In situations where inmates fear retaliation from prison officials, the process can no longer be said to be available.[137]

IV. NARROWING OF THE EXHAUSTION REQUIREMENT IN *ROSS V. BLAKE*

Ross v. Blake challenges the flexibility of the PLRA's exhaustion provision.[138] The Court did not go so far as to hold that an administrative remedy was unavailable to Blake.[139] However, it did do much more than remand the case back to the Fourth Circuit to explore the application of the exhaustion requirement to Blake's case de novo.[140] To Justice Thomas'

---

exhaustion. But when a remedy is . . . essentially 'unknowable'—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable.").

133. *See id.*

134. *Id.* at 1860.

135. *See id.* (citing Woodford v. Ngo, 548 U.S. 81, 102 (2006) (alterations omitted)).

136. *See Goebert*, 510 F.3d at 1323 (holding that administrative grievance processes are unavailable when they are unknown or not provided to an inmate).

137. *See, e.g.*, Davis v. Hernandez, 798 F.3d 290, 295 (5th Cir. 2015) (holding that exhaustion is unavailable if the prison's officers intentionally cause the inmate to not exhaust the required procedure); *see* Tuckel v. Grover, 660 F.3d 1249, 1252–53 (10th Cir. 2011) ("When a prison official inhibits an inmate from utilizing an administrative process through threats or intimidation, that process can no longer be said to be 'available.'"); *see also Goebert*, 510 F.3d at 1323 (finding that if a prison plays "hide-and-seek" with exhaustion procedures then they are not available).

138. Steven D. Schwinn argues that Ross v. Blake questions the flexibility of the exhaustion requirement. If it applies rigidly, an inmate must exhaust all administrative processes, even if the inmate reasonably believed he completed them. *See* Schwinn, *supra* note 16.

139. *See Ross*, 136 S. Ct. at 1862 (remanding the case for the lower court to determine whether inmate had a remedy to exhaust).

140. *See* Steve Vladeck, *Opinion Analysis: Justices Hold Door Open to Prisoner Suit Even While Rejecting "Special Circumstances" Exception to PLRA Exhaustion Requirement*, SCOTUSBLOG (June

chagrin, the Opinion relies on several extra-record pieces of evidence regarding the interaction between the IIU and ARP in Maryland.[141] As a result, the Court posited that on remand the lower court will find one or more of the instances of unavailability apply to Blake.[142] The case was remanded back to the Fourth Circuit with three unavailability questions unanswered regarding the unwillingness of prison officers, incomprehensibility of ARP, and the intimidation of inmates.[143] First, the Court found there is a question as to whether IIU investigation foreclosed Blake from using Maryland's ARP process.[144] Second, the Court questioned whether this distinction was knowable to an "ordinary prisoner in Blake's situation."[145] Third, the Court wanted the lower court to determine if Maryland prison officials thwarted Blake's use of the ARP grievances systematically or individually.[146]

The Supreme Court is quick to defend the rigidity of the exhaustion provision, but this decision suggests a softer—perhaps more sympathetic—approach to reviewing inmate claims of exhaustion.[147] Even though the Court rejects the notion that an inmate's reasonable belief could enter into considerations of exhaustion, the unanimous decision in *Ross v. Blake* emphasizes the need to clearly articulate when grievance processes are unavailable.[148]

Thus, the significance of the case lies more in the Court's choice to narrow in on what constitutes unavailability and define a textual exception

---

7, 2016, 11:33 AM), http://www.scotusblog.com/2016/06/opinion-analysis-justices-hold-door-open-to-prisoner-suit-even-while-rejecting-special-circumstances-exception-to-plra-exhaustion-requirement/ (suggesting that the court intentionally expanded upon the textual exception to the exhaustion provision).

141. *See Ross*, 136 S. Ct. at 1862 (Thomas, J., concurring in part and concurring in the judgment) ("We have consistently condemned attempts to influence our decisions by submitting additional or different evidence that is not part of the certified record.").

142. *See id.* (majority opinion) (reasoning that if the lower court finds even one of three categories of unavailability to be applicable then it should find for Blake).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Vladeck, *supra* note 140 (concluding that the oral argument in *Ross* revealed that most of the Justices were sympathetic to Blake's claim and unpersuaded by Maryland's response).

148. *See id.* (concluding that a clear takeaway from *Ross v. Blake* is that if the prisoner cannot file a claim through a state's administrative scheme then the prisoner may still be able to proceed with the lawsuit).

to the exhaustion requirement.[149] This addition will make it more challenging for prison inmates to exhaust the administrative grievance process than the Fourth Circuit's textual exception.[150] Nonetheless, the Court's decision to read into the exhaustion provision these three instances where the grievance process is unavailable could provide inmates with a clearer process for exhausting the grievance process and bring attention to the context of many prisoners' claims.[151]

V. JUDICIAL DEFERENCE IN *ROSS V. BLAKE*

Ross v. Blake's answer to when federal judicial remedies are available to prisoners presents a larger administrative issue. Access to the courts is fundamentally a constitutional issue; however, *Ross* deals with a statutory question.[152] While a sense of judicial restraint emerges throughout the opinion, the Supreme Court's decision to substitute its own construction for reasonable interpretation of the statute is problematic.[153]

The interpretation of "unavailability" in *Ross v. Blake* suggests that the Supreme Court relied on their own judicial discretion. As *Chevron* made clear, if Congress's statutory intent is ambiguous, the judiciary must concede interpretive power to the executive.[154] Applying a *Chevron* analysis to the case requires an evaluation of (1) Congress's intent in enacting the legislation as well as (2) the permissibility of the agency's interpretation of the statute.[155] If Congress has directly spoken to the issue within the statute explicitly or implicitly, the Court must defer to Congress's interpretation.[156] If it is not clear, under *Chevron*, the Court should defer to the agency's interpretation of the law unless it is unreasonable.[157]

---

149. *Id.*

150. *Id.*

151. *See* Schwinn, *supra* note 16.

152. *See id.* (suggesting that Congress will make the final decision on how to interpret the exhaustion provision).

153. *Id.*

154. *See* Jellum, *supra* note 24, at 170 (arguing that *Chevron* expanded executive interpretative power).

155. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

156. *Id.*

157. *See* Jellum, *supra* note 24, at 179 ("When Congress drafts ambiguously, a court will have one source for meaning: the agency's interpretation. Only if that interpretation is unreasonable can a judge ignore it.").

The Supreme Court discusses the mandatory nature of the exhaustion requirement throughout the opinion in *Ross*.[158] Justice Kagan concluded, "mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion."[159] In fact, the Court rejects the Fourth Circuit's "special circumstances" exception because it determines that the exhaustion provision of the PLRA is textually mandated.[160] In applying the first prong of the *Chevron* test—whether the statutory intent was clear—the Court in *Ross* acknowledges that the administrative exhaustion of grievances is required.[161] Thus, Congress's intent to mandate the exhaustion prevision is undisputed. However, the reliance on the word "available" in the statute provides a gap in which interpretation of the construction of the statute is needed.

The second prong of the *Chevron* analysis requires the Court to defer interpretative power to the BOP so long as its construction of the statute is reasonable.[162] Nowhere in the *Ross* opinion are the submissions detailing BOP procedures identified as "unreasonable"; however, the Court does state that "Maryland's grievance process . . . [has], at least at first blush, some bewildering features."[163] At issue in the case is whether the exhaustion process was unavailable to Blake because the inmate believed that ARP grievances could not be filed when an IIU inquiry was being researched.[164] Blake claims that conflicting procedures exist and that the Maryland ARP process is unclear.[165] The Court seems to agree, but not definitively; several questions regarding the clarity of the Inmate Handbook

158. *See* Ross v. Blake, 136 S. Ct. 1850, 1857 (2016) (clarifying that the Supreme Court has rejected every attempt to deviate from the textual mandate of the PLRA).

159. *Id.*

160. *See id.* at 1854–55 (explaining that the PLRA mandates exhaustion of "such administrative remedies as are available" before filing a claim against the prison).

161. *See id.* at 1853 ("Time and again, this Court has rejected every attempt to deviate from the PLRA's textual mandate.").

162. 467 U.S. 837, 844 (1984).

163. *Ross*, 136 S. Ct. at 1860.

164. *See id.* at 1860–61 (finding that Ross cannot identify a single case in which the warden considered an ARP grievance during an Internal Investigation Unit (IIU) investigation where Blake provided several cases of ARP grievances being dismissed pending IIU inquiries).

165. Both Blake and Ross provided additional documents explaining the relationship between the IIU and the ARP processes. *See id.*

are raised, but left for the lower court to answer.[166] Thus, the Court suggests Maryland ARP policy is questionable, but not unreasonable.[167]

The inclusion of the three instances of unavailability ultimately provides a guideline for the lower court to follow.[168] This insertion goes beyond application to Blake; it impacts the interpretation of the statute generally—signifying a clear rejection of *Chevron* deference and hinting at a return to pre-PLRA values.

VI. GRAPPLING WITH INMATES' ACCESS TO THE COURTS AND AGENCY ACTIONS

Inmates have little choice but to rely upon the courts to intervene when their challenges to BOP living conditions or to injuries inflicted upon them are dismissed administratively.[169] This is why access to the courts is considered a fundamental right. All other prisoner rights would be left unprotected and subject to the discretion of prison officials without it.[170] It also suggests why judicial intervention is not unexpected where PLRA matters are concerned.[171] Litigation is a powerful forum for promoting reform as well as reinforcing BOP policies.[172]

In *Ross,* the Court grapples with the current state of inmates' access to justice.[173] While the opinion distinguishes the PLRA's exhaustion requirement from that of the law's predecessor, CRIPA, its construction of unavailability bears a strong resemblance to that of the pre-PLRA case,

166. *See id.* at 1861 ("And if that really is Maryland's procedure . . . why does the Inmate Handbook not spell this out?").

167. *See id.* (explaining that the Court was skeptical of the cases provided by Ross).

168. *Id.* at 1862.

169. *See generally* Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America,* 12 LOY. J. PUB. INT. L. 465 (2011) (remarking generally that prisoner claims involve prisoner conditions or injuries inflicted by prison officials).

170. *See* Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973) (explaining that all other rights are "illusory without [the right to access the courts], being entirely dependent for their existence on the whim or caprice of the prison warden").

171. *See* Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications,* 24 PACE L. REV. 433, 442 (2004) (explaining that "litigation has probably been the single most important source of change in prisons and jails during the past forty years").

172. See *id.* at 442 (explaining that litigation must be viewed as both the cause and effect of reform).

173. *See* Schwinn, *supra* note 16 (speculating that the Court's decision in *Ross v. Blake* will answer an important access to justice question about when a federal judicial remedy is available to prisoners for civil rights violations).

McCarthy v. Madigan.[174] *McCarthy* itself marks a moment of judicial activism, identifying three circumstances that should prompt the lower courts to allow inmates to forego administrative grievance requirements.[175] These include when there is a delay in agency action, when the agency is unable to grant relief for the inmate's claim, and when the administrative process was relied upon to harass or discourage inmates.[176] Congress enacted the PLRA arguably in response to the decision in *McCarthy* with the intention of curbing both frivolous lawsuits and judicial intrusion into agency actions.[177]

In *Ross*, the Court articulates a textual exception to the PLRA's administrative exhaustion requirement, establishing three instances where the grievance process would be unavailable for an inmate to exhaust.[178] These instances include when prison officers are unwilling or unable to redress the inmate's grievance, when the grievance process is incomprehensible, and when the administrative process fails because of "machination, misrepresentation, or intimidation."[179] The parallels between the recommendations in *Ross* and *McCarthy* suggest that the Court is unwilling to relinquish its role in the reform of the prisoner's administrative grievance process—and perhaps not without good reason given the state of prison conditions today.

VII. RECOMMENDATION: AGENCY REFORM THROUGH A DUE PROCESS LENS

After *Ross*, the BOP's administrative grievance procedure needs to be reevaluated to promote clearer processes for inmates and prevent further legal action against the agency. One way the BOP could do this is by integrating more informal adjudicative procedures into their administrative

174. *Compare Ross*, 136 S. Ct at 1859–60 (holding that administrative remedies are unavailable when officers refuse to address the grievance, when the grievance process is too difficult to rely upon for the grievance request, and when officer misconduct interferes with a grievance request), *with* McCarthy v. Madigan, 503 U.S. 140, 146–49 (1992) (holding that administrative grievances are unavailable when there is a delay in processing the request, when there is no relief for the request, and when officer misconduct prevents the grievance request from being remedied).

175. *See McCarthy*, 503 U.S. at 146–49.

176. *Id.*

177. *See supra* text accompanying note 41.

178. *McCarthy*, 136 S. Ct. at 1859–60.

179. *Id.*

grievance policy and standardizing regulations relied upon by prison officials.[180]

A. Applying Mathews v. Eldridge *to BOP Policies on the Administrative Grievance Process*

Under the Constitution, inmates have a fundamental right to meaningful access to the courts.[181] Yet, the exhaustion provision of the PLRA relies on procedural constraints to manage this right.[182] Due process treatment of administrative grievance requests may allow the BOP to better maintain this right of access to the court. Specifically, informal adjudicatory hearings during the grievance process could give inmates an opportunity to be heard and state their case before filing claims with Article III courts, provide an opportunity for external assistance, and ensure that there is a more detailed record of the grievance process.[183]

Ultimately, the decision in *Ross* suggests that additional procedural safeguards are needed to protect an inmate's right to access the courts.[184] To review this interest through the lens of *Mathew v. Eldridge*,[185] the private interest of the inmate must be balanced against the risk of unfair deprivation, the probable value of additional procedural safeguards, and the government's interest in limiting the costs of additional procedures.[186]

---

180. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (distinguishing that the choice between rulemaking and adjudication "lies primarily in the informed discretion of the administrative agency").

181. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (asserting that prisoners have a constitutionally-protected right to meaningful access to the courts under the Fourteenth Amendment to the Constitution).

182. *See* Schlanger & Shay, *supra* note 51, at 142 (explaining that Congress enacted the PLRA to curb pro se prisoner litigation).

183. *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (reasoning that written submissions are not as tenable as oral presentations to decide credibility issues).

184. *See Ross*, 136 S. Ct. at 1850 (remanding to determine if administrative grievance procedures were available to an inmate).

185. 424 U.S. 319 (1976). In *Mathews v. Eldridge*, the Supreme Court laid out a test for when a due process interest requires further agency procedures. *See id.* at 324–25. Eldridge challenged the constitutionality of the exhaustion requirement that caused his disability status to be terminated. *Id.* Eldridge argued that a pre-termination hearing was needed before ending his disability award to protect his due process rights. *Id.*

186. The *Mathews* test requires courts to weigh the private interest of the recipient; the risk of an unfair deprivation, as well as the probable value of additional procedural safeguards; and the government's interest in limiting fiscal and administrative burdens when determining whether additional procedure is required by an agency to protect individual due process rights. *See id.* at 321.

Due process claims require a cognizable interest, entitlement, or right.[187] To demonstrate a need for greater due process, the claim must show that the claimant's due process rights under the Fifth or Fourteenth Amendments have been violated.[188] The Supreme Court has recognized that inmates have a constitutionally-protected interest in access to the courts,[189] and this Comment has focused primarily on the risk of inmates being unfairly deprived of access to the courts.[190] While the PLRA does not deny due process claims from being resolved in administrative courts, it does deter inmate claims from being filed in Article III courts.[191]

Incorporating informal adjudicatory hearings into BOP administrative grievance policy could better protect due process interests and still promote the PLRA's objective to limit frivolous claims.[192] An informal hearing during the grievance process could be useful in creating a more significant record for potential judicial proceedings by preserving inmate requests and officer responses to administrative grievance forms.[193] It could also provide an opportunity and process for disadvantaged or disabled inmates to seek

187. *See generally id.* (discussing what factors are reviewed in determining whether an entitlement or private interest comports with due process and calls for greater procedural protections).

188. Otherwise, an individual can only rely on statutes and regulations to seek protection from government action. *See* Karen E. Boxx, *Experiments in Agency Justice: Informal Adjudicatory Procedures in Administrative Procedure Acts*, 58 WASH. L. REV 39, 40 (1992) (explaining that adjudicatory provisions apply whenever due process requires a hearing).

189. Bounds v. Smith, 430 U.S. 817, 828 (1977).

190. *Contra* Meachum v. Fano, 427 U.S. 215, 215 (1976) (holding that prisoner interest in not being transferred to a new facility without an evidentiary hearing is "too ephemeral and insubstantial to trigger procedural due process protections" because prison officials have the discretion to transfer at will).

191. The number of federal lawsuits brought by prisoners against federal prisons has dropped an estimated 60% since the PLRA was enacted twenty years ago. *See* Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016), http://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons.

192. *See supra* text accompanying note 54.

193. *See* Boxx, *supra* note 188, at 42–43 (explaining that agencies are more likely to make arbitrary decisions when they do not have to disclose the reasons behind their decision and that clear processes encourage agencies to respond more substantively to informal actions).

external help when receiving grievance responses[194] or verbally submit their grievances in cases where the risk of unfair deprivation is high.[195]

BOP facilities are still subject to the requirements of the Americans with Disabilities Act of 1990 (ADA), but many are ill-equipped to provide for disabled inmates.[196] Blind inmates are a good example. Inmates that have no sight, or are in the process of losing their vision, are at a serious disadvantage because without assistance or visual impairment equipment, it is difficult for them to comply with the current administrative grievance forms and procedures.[197] Juveniles are also required to exhaust administrative remedies under the PLRA.[198] Meaning, juveniles' allegations of rape or physical abuse are subject to the same exhaustion process as a complaint about housing or dietary restrictions.[199] Informal hearings would allow for greater individualization of the grievance process so that prison staff can address these issues internally as well as at a micro-level without the high costs of litigation, and inmates can have clearer processes and an opportunity to be heard.

The BOP has a strong interest in resolving inmate grievances internally to keep disputes out of the public sphere and to reduce agency liability from inmate suits.[200] Incorporating an informal hearing into the wider BOP grievance policy would only further this interest by deterring abuse of the

194. *See* 28 C.F.R. § 542.16 (2003) ("However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.").

195. *See, e.g.*, Turner v. Burnside, 541 F.3d 1077 (11th Cir. 2008) (holding that a prisoner did not need to exhaust additional grievance requests where officer retaliation interfered with his medical care); *see* Ricketts v. AW of UNICOR, No. CIV 1:CV-07-00049, 2009 WL 2232467, at *1 (M.D. Pa. July 24, 2009) (denying defendant's request for dismissal on the grounds that the inmate failed to file additional grievance requests while paralyzed in a hospital).

196. Libby Coleman, *Can Blind Prisoners Sue Their Way to Better Treatment*, OZY (Nov. 1, 2016), http://www.ozy.com/fast-forward/can-blind-prisoners-sue-their-way-to-better-treatment/71775.

197. This would present a clear veracity and credibility issue for the inmate as well. *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

198. *See Lewis v. Gagne*, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) ("The plain meaning of [the statute's] language clearly includes juveniles.").

199. A fifteen-year-old boy's claim that he was raped and beaten by other inmates while guards egged the inmates on was dismissed in Indiana in 2005 because of failure to exhaust. His mother had contacted the prison and the governor's office to report the abuse, but the fifteen-year-old boy failed to file a grievance. *See* Poser, *supra* note 191.

200. *See* Swearingen, *supra* note 2, at 1354 (explaining that the PLRA allows for a form of "cosmetic compliance" in the administrative grievance process that benefits the prison more than the inmates).

grievance system by prison staff and more clearly addressing inmate allegations from the start.[201] Under the PLRA, BOP facilities have broad discretion to informally resolve inmate grievances.[202] However, this discretion is problematic because it allows each BOP facility to institute its own internal procedures as long as they do not conflict with wider BOP regulations. While the administrative and financial costs of implementing an informal hearing may be challenging, the BOP can address the cost of administrative procedural reform by standardizing and strategically updating several of its program policies. This standardization would be a cost-effective way to provide a clearer process for both BOP staff and inmates. Further, informal hearings can easily be assigned to a specific schedule and in response to specific grievance topics, as determined by the BOP.

B. Administrative Reform Through Standardization of BOP Policies

Further guidance and standardization of policies amongst BOP institutions is needed to provide clearer process for inmates and BOP staff.[203] The BOP includes 145 facilities throughout the United States,[204] but its policy for administrative remedy programs gives each institution the discretion to establish individual procedures for informal resolution of grievances.[205] It is impossible to supervise the informal resolution procedures at any of these facilities because BOP policy does not require officials to maintain a record of them; officers do not have to respond to requests for grievance forms or to formally filed grievances.[206] Further,

---

201. *Id.*

202. 28 C.F.R. §542.13 (1986).

203. *See* Boxx, *supra* note 188, at 42–43 (arguing that "without a prescribed procedure, agencies have unchecked discretion over informal action").

204. FED. BUREAU OF PRISONS, https://www.bop.gov/locations/list.jsp (last visited Feb. 20, 2017).

205. *See* 28 C.F.R. §542.13 (explaining that each Warden can create their own procedures for the informal resolution of grievances).

206. "If the inmate . . . refuses to present a request informally, staff should provide the form for a formal Request . . . [T]he Coordinator shall accept the Request if, in the Coordinator's discretion, informal resolution was bypassed for valid reasons, or may reject it if there are no valid reasons for bypassing informal resolution." DOJ, FED. BUREAU OF PRISONS PROGRAM STATEMENT 1330.18(8)(b) (2014), https://www.bop.gov/PublicInfo/execute/policysearch?todo=query# (last visited Feb. 20, 2017); *see also* 28 C.F.R. § 542.18 (2003) ("If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.").

many sections of the BOP's administrative grievance policy indicate that failure to receive a response from BOP staff is a denial of that request.[207] This includes sections of the policy explaining that officers must accommodate inmates who are "illiterate, disabled, or who are not functionally literate in English."[208]

Unlike in the courtroom, the law plays an indirect role in the internal grievance process. Prison staff is trained to maintain a sense of order within the institution—not to keep up with the constitutional rights of inmates.[209] The staff is guided by BOP regulations, but as noted above, the regulations do not provide specifics about the legal nature of claims or what presents a due process issue.[210] Instead, prison officers may employ more subjective measures when deciding about the merits of an inmate's complaint.[211] This procedural subjectivity combined with a lack of training creates a stronger likelihood that employees of the prison will rely on their own conception of procedural fairness, particularly where officers recognize they are not accountable for infringements on prisoner rights under the PLRA.[212] Greater standardization of these internal processes in BOP regulations could provide more legal guidance to prison staff and produce outcomes that are more attentive to inmates' rights.[213]

---

207. 28 C.F.R. § 542.18 (2003).

208. 28 C.F.R. § 542.16 (2003) (explaining that inmates may seek assistance filling out grievance requests, but cannot have a grievance filed on their behalf and no officer responses can be directed to anyone else other than the inmate).

209. While the grievance process does not require a decision based on legal rules, the prison staff's unfamiliarity with applicable legal concepts contributes to an internal conception of what is fair procedurally. *See* Swearingen, *supra* note 2, at 1373.

210. BOP policy for administrative remedy programs gives each institution the discretion to establish individual procedures for informal resolution of grievances. *See supra* text accompanying note 206.

211. *See* Swearingen, *supra* note 2, at 1373 ("Instead of relying upon legal doctrines, complaint handlers may turn to their own conceptions of what constitutes fair treatment.").

212. *See id.* at 1374 (finding that inmate claims are more likely to be responded to based on the prison staff's perception of what the law is); *see also* David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1698 (2001) (arguing that correction officers are not held accountable for upholding prisoner rights within the prison, by the BOP, or by legislators).

213. The general ambiguity of the law as it relates to inmate complaints also provides little guidance to prison staff when making decisions regarding the merits of inmate grievances. *See id.*

CONCLUSION

The increase of inmate litigation over the last thirty years has promoted the recruitment of prison officials who are more knowledgeable about prisoner rights,[214] but prisons and their staff are still isolated from society.[215] Without adequate oversight, prisons are shielded from the public support and scrutiny needed to encourage substantive long-term reform.[216] Meaning, even prison officials who try to be responsive to prisoner grievances or to reform prison practices, are unsuccessful because "they lack the authority and support that only comes when prisons operate in public view."[217] The standardization of BOP grievance policies is one way to facilitate more reliance on written rules for prison governance in the absence of external pressure.[218] Further, instituting informal hearing procedures for inmate complaints will encourage prison staff to describe internal operations more clearly when defending institutional standards and educate staff more frequently on the status of inmates' legal rights.[219]

Establishing an informal hearing procedure for appeals of grievance requests or nonresponses may resolve some of the issues because informal hearings encourage recordkeeping and increased responses to grievances.[220] Finally, clearer guidelines for internal procedures could benefit prisons as well as prisoners. Overall standardization of this proposed BOP policy will better equip prison staff as well as facilitate more accountability within the agency, and ultimately, it can provide inmates with greater legal protections and decrease the likelihood that their claims will be dismissed for failure to exhaust.

---

214. Feeley & Swearingen, *supra* note 171, at 443 (arguing that prison conditions litigation enhanced the bureaucratization and professionalization of prison institutions).

215. Michael B. Mushlin, *"I Am Opposed to this Procedure": How Kafka's in the Penal Colony Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons*, 93 OR. L. REV. 571, 612 (2015) (arguing that the prison system's isolation from society is the result of less comprehensive and meaningful oversight).

216. *See id.* at 616 (arguing that "even prison administrators with the best of intentions are not able to achieve substantive sustainable reform").

217. *Id.* at 612–14.

218. Litigation, and similarly informal adjudication, requires staff to be able to defend written rules and policies. The clearer and more standardized that prison protocol is, the easier it will be to understand and articulate. *See* Feeley & Swearingen, *supra* note 171, at 443–44 (arguing that the professionalization of prison officers developed in response to an increased involvement in litigation proceedings).

219. *Id.*

220. *See* Boxx, *supra* note 188, at 42–43.