

THE USUAL PRACTICE: RAISING AND DECIDING  
FAILURE TO EXHAUST ADMINISTRATIVE  
REMEDIES AS AN AFFIRMATIVE DEFENSE UNDER  
THE PRISON LITIGATION REFORM ACT

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INTRODUCTION

With troubling frequency, federal courts manipulate or avoid the Federal Rules of Civil Procedure when their prescriptions prove inconvenient. The Supreme Court has, on several occasions, admonished lower courts for disregarding or misconstruing these binding rules,<sup>1</sup> which govern the procedure of all civil actions in federal district courts.<sup>2</sup> Ad hoc procedures are disturbing in our legal system because they upset traditional notions of fairness and predictability in litigation. Federal civil rights claims<sup>3</sup> brought by prisoners<sup>4</sup> are a recurrent setting for procedural abnormalities<sup>5</sup> and the misapplication, or avoidance, of clear precedent;<sup>6</sup> these procedural challenges

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<sup>1</sup> See *infra* notes 135-144 and accompanying text.

<sup>2</sup> FED. R. CIV. P. 1.

<sup>3</sup> As discussed *infra* note 34, prisoner civil filings encompass suits based on civil rights, prison conditions, and habeas petitions and similar actions. A large proportion of suits filed by prisoners involve collateral attacks on their criminal convictions. Accordingly, when analyzing the import of prisoner filings on the civil docket of federal district courts, the most appropriate filings to consider are those raising only civil rights and prison condition claims. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 n.4 (2003); see also *infra* note 34.

<sup>4</sup> Throughout this Note, the term “prisoner” is used to describe “any person incarcerated or detained in any [federal or state] facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” See 28 U.S.C. § 1915(h) (2006).

<sup>5</sup> See, e.g., *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam) (reversing dismissal of a prisoner’s Eighth Amendment claims and admonishing the lower court for ignoring the Federal Rules’ liberal pleading standards).

<sup>6</sup> See *infra* notes 92-93 and accompanying text.

compound the myriad difficulties already faced by prisoner litigants in federal court. While pleading standards for all litigants are modest<sup>7</sup> and pro se plaintiffs<sup>8</sup> enjoy liberal construction of their pleadings,<sup>9</sup> the Prison Litigation Reform Act of 1995 (PLRA) established several unique hurdles for prisoner plaintiffs.<sup>10</sup>

Relief in federal court for the most common civil rights suits<sup>11</sup> does not require the exhaustion of state<sup>12</sup> or administrative remedies.<sup>13</sup>

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<sup>7</sup> To state a claim for relief, all civil litigants, including those that are pro se, need only plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” See FED. R. CIV. P. 8(a)(2). However, the exact quantum and quality of facts needed to satisfy Rule 8 has received renewed attention from the Supreme Court recently. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (announcing that the “plausibility” standard for interpreting Rule 8 of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), applies universally to all civil actions). The *Iqbal* development may increase the pleading burden on plaintiffs asserting discrimination claims, see, e.g., *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, (D.C. Cir. 2009) (affirming dismissal of plaintiff’s equal protection claim for removal from a grand jury); however, it may not upset the established pleading expectations in typical civil rights suits. See, e.g., *Tyree v. Zenk*, No. 05-CV-2998, 2009 U.S. Dist. LEXIS 43872, at \*21 (E.D.N.Y. May 22, 2009) (applying *Iqbal* and finding the complaint contained sufficient “factual detail” about the incidents leading to the defendants’ alleged assault on the plaintiff to state a claim of conspiracy to violate the plaintiff’s due process rights). This Note does not consider the effect *Iqbal* may have on prisoner litigants seeking to vindicate their federal constitutional claims in court. However, it is worth considering whether a heightened pleading standard counsels in favor of extending greater solicitude in other areas of litigation, such as the procedural issues of deciding the defense of exhaustion of administrative remedies discussed herein.

<sup>8</sup> Unlike non-prisoner civil suits, the vast majority of prisoner civil filings come from pro se litigants. For the twelve-month period ending September 30, 2008, only 9.5% of non-prisoner civil filings were pro se cases, whereas more than 92% of prisoner filings were pro se. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 78 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> [hereinafter 2008 JUDICIAL BUSINESS].

<sup>9</sup> See, e.g., *Erickson*, 551 U.S. at 94 (“[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers . . . .” (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))).

<sup>10</sup> Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2006)); see *infra* notes 38-44 and accompanying text. See generally Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 301 & nn.74-78 (2007) (describing these PLRA provisions).

<sup>11</sup> The predominant method for bringing a civil rights claim or challenging conditions in a state prison is pursuant to 42 U.S.C. § 1983 (2006), which creates a private cause of action for violations of federal constitutional or statutory rights by a state governmental actor. Similarly, federal prisoners may raise some of the same claims pursuant to the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing in the Fourth Amendment a cause of action for money damages against federal officials). The contours and distinctions of these two types of claims are beyond the scope of this Note.

<sup>12</sup> See *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>13</sup> See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) (“Based on the legislative histories of both [42 U.S.C.] § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.”), *superseded in part by statute*, 42 U.S.C. § 1997e(a) (2006) (barring any action “with respect to prison conditions” brought under § 1983 “or any other Federal law . . . until such administrative remedies as are available are exhausted”); see also *Porter v. Nussle*, 534 U.S. 516, 523 (2002)

However, among the PLRA's most effective barriers is the requirement that prisoners exhaust all "available" administrative remedies before bringing an action in federal court "with respect to prison conditions."<sup>14</sup> Exhaustion of administrative remedies is said to serve the dual purposes of (1) protecting an agency's authority to maintain procedures and correct its own errors;<sup>15</sup> and (2) promoting efficiency by avoiding unnecessary litigation, and facilitating litigation that does result by developing an administrative record.<sup>16</sup> In the prison context, administrative exhaustion means pursuing grievances through internal prison procedures<sup>17</sup> and completing all levels of administrative appeals.<sup>18</sup> Complying with every procedural nuance is vital because the Supreme Court has held that the PLRA's exhaustion requirement includes a procedural default rule.<sup>19</sup> In other words, while certain exceptions apply,<sup>20</sup> when a prisoner fails to follow any grievance

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("Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court. Prisoner suits alleging constitutional deprivations while incarcerated once fell within this general rule." (citations omitted)).

<sup>14</sup> 42 U.S.C. § 1997e(a) (2006); *see also* Schlanger, *supra* note 3, at 1649 ("The PLRA's exhaustion requirement has emerged as the highest hurdle the statute presents to individual inmate plaintiffs."). The PLRA's exhaustion of administrative remedies requirement is separate and distinct from the exhaustion provision of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (2006), which requires state prisoners seeking to challenge their convictions to exhaust their remedies in state court before bringing a habeas petition in federal court. The AEDPA's exhaustion requirement poses its own unique hurdles. *See, e.g.*, Jonah Wexler, Note, *Fair Presentation and Exhaustion: The Search for Identical Standards*, 31 CARDOZO L. REV. 581 (2009).

<sup>15</sup> *See* Woodford v. Ngo, 548 U.S. 81, 89 (2006) ("Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures." (internal quotation marks omitted)).

<sup>16</sup> *See id.* ("Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." (internal quotation marks and citations omitted)).

<sup>17</sup> *See, e.g.*, McClain v. Alveriaz, No. 07-5551, 2009 U.S. Dist. LEXIS 100655, at \*23 (E.D. Pa. Oct. 26, 2009) ("[T]he Court is compelled to find that Plaintiff has failed to exhaust his administrative remedies . . . [because, inter alia,] Plaintiff initially filed his grievance on the wrong form—using DC-ADM 804, as opposed [to] DC-ADM 801."); Harrison v. Goord, No. 07 Civ. 1806, 2009 U.S. Dist. LEXIS 48478, at \*27 (S.D.N.Y. June 9, 2009) ("[A]lthough the undisputed evidence shows that [the plaintiff] did verbally convey his grievances to several of the Defendants, and that he sent numerous letters to various individuals and organizations relating to his complaints, including to the Superintendent of [the prison] and the Commissioner of [the New York State Department of Corrections Services], these efforts, for better or worse, just don't cut the mustard so as to satisfy the strict exhaustion requirement.").

<sup>18</sup> *See* Woodford, 548 U.S. at 84, 90-91 ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules . . .").

<sup>19</sup> *Id.* at 83-84.

<sup>20</sup> For a detailed discussion of the most common exceptions, see *infra* notes 71-82 and accompanying text.

procedure related to a complaint, he is barred from pursuing that claim in federal court.<sup>21</sup>

Frequently, prison grievance procedures include several steps.<sup>22</sup> They often involve speaking with and/or providing a written grievance to prison officials<sup>23</sup>—not infrequently, those officials who work in the area of the prison where the prisoner lives and who may be the very same officials the prisoner alleges to have violated his constitutional rights<sup>24</sup>—and pursuing one or more levels of administrative appeals.<sup>25</sup> In several states, the time limit for pursuing a grievance is as little as two business days;<sup>26</sup> in at least one state, it is as short as twenty-four

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<sup>21</sup> *Woodford*, 548 U.S. 81.

<sup>22</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (2009) (designating a three-tier grievance procedure for New York prisons); see also *Hemphill v. New York*, 380 F.3d 680, 682-83 (2d Cir. 2004) (summarizing New York's prison grievance procedures). In *Woodford*, the Court described California's prison grievance procedure, which is fairly representative, as follows: First, there is an "informal review," where a prisoner fills out two parts of a provided form, which includes describing the problem, requesting action, and "informally seek[ing] relief through discussion with the appropriate staff member." The staff member is to return the form with a written response. If the prisoner is dissatisfied with the response, the prisoner must undertake a three-step "formal" review process. First, the prisoner explains his dissatisfaction on the form, which he has fifteen working days to submit along with "a few other documents" to a prison administrator. Following an adverse response, the prisoner has another fifteen working days to appeal to the prison warden. Finally, if the prisoner is dissatisfied with the warden's decision, the prisoner must mail a written explanation of his displeasure to the Director of the California Department of Corrections and Rehabilitation within fifteen working days of the warden's response. 548 U.S. at 85-86 (internal quotation marks and citations omitted).

<sup>23</sup> See Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent at 7 & n.6, *Woodford*, 548 U.S. 81 (No. 05-416), 2006 WL 304573. Under the New York grievance procedure, complaints by general population prisoners must be filed with the Inmate Grievance Program clerk. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2009). Prisoners in the Special Housing Unit (SHU) must have the "area supervisor" collect their grievance forms and forward them to the Inmate Grievance Program office when locked deposit boxes for the forms are unavailable or broken. See *id.* § 701.7(a)(3), (b). Prisoners in the SHU are segregated from the general population and are severely restrained from movement in order to "maximize . . . security." See *id.* §§ 300.1, 300.2; see also *id.* § 305.3 (requiring inmates in SHU be handcuffed whenever outside of their cells). Even where the locked grievance form boxes are available and working, a staff representative of the Inmate Grievance Program has a key to the box. *Id.* § 701.7(b).

<sup>24</sup> See, e.g., *id.* § 701.7(a)(3) ("Area supervisors [are responsible for] ensur[ing] that the completed grievance forms are placed in sealed envelopes, collected and forwarded to the [Inmate Grievance Program] office."); *id.* § 701.7(b) (providing that Inmate Grievance Program supervisors and "staff representatives" have keys to the locked grievance deposit boxes); *id.* § 701.4(d) (providing that the superintendent has discretion to appoint staff representatives); see also LA. ADMIN. CODE tit. 22, pt. I, § 325 (2009) (requiring prisoner requests for administrative remedies to be screened by the Administrative Remedy Procedure Screening Officer, who is "a staff member, designated by the warden").

<sup>25</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(c), (d) (2009) (two levels of appeals).

<sup>26</sup> See *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting) (noting that preliminary, but often necessary, informal grievance procedures have "strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days"). As of the *Woodford* litigation in early 2006, the deadline for initiating the mandatory grievance procedure was between two and five days in at least eleven corrections departments. Brief for the Jerome N.

hours.<sup>27</sup> Because of the nature of prison grievances,<sup>28</sup> disputes often arise over whether administrative remedies are “available,” whether those remedies were properly exhausted, and if not, whether an exception applies.<sup>29</sup>

Federal courts have grappled with how to treat claims by the prison official defendants that the plaintiff prisoner failed properly to exhaust available administrative remedies.<sup>30</sup> In particular, courts have divided sharply on the overlapping questions of what is the appropriate procedural vehicle for raising a defense of failure to exhaust—e.g., by a motion to dismiss, a motion for summary judgment, or affirmatively pleading in the answer—and whether disputed factual issues raised by the exhaustion defense should be decided by the judge or a jury.<sup>31</sup>

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Frank Legal Services Organization, *supra* note 23, app. at 1-5.

<sup>27</sup> The North Carolina Department of Juvenile Justice and Delinquency Prevention “Nondisciplinary Grievance Report Form” indicates that it must be completed and delivered to “the human services coordinator within 24-hours of the incident.” Brief for the Jerome N. Frank Legal Services Organization, *supra* note 23, app. at 7 n.31.

<sup>28</sup> See *supra* note 22 and accompanying text (discussing California’s grievance procedure, which is typical and requires prisoners to begin the grievance process by speaking directly with the prison official whom the prisoner claims has violated his rights). Other common grievance-related issues include claims by prisoners that, upon request, they were denied the proper grievance forms; they feared retaliation if they requested or filed a grievance; and they were unaware of the proper grievance procedures and deadline, particularly for filing all of the required administrative appeals. Courts have developed exceptions from proper exhaustion requirements to deal with these issues. See *infra* notes 71-82 and accompanying text.

<sup>29</sup> See *Woodford*, 548 U.S. at 101 n.5 (“Questions regarding the timeliness of prisoner filings occur frequently.” (citing cases)); see also *infra* notes 71-82 and accompanying text.

<sup>30</sup> See, e.g., *Singleton v. Johnson*, No. CV406-75, 2008 WL 3887633, at \*1 (S.D. Ga. Aug. 18, 2008) (noting that “[c]ourts across the country are divided” on procedural questions of exhaustion issues); *Gilmore v. Stalder*, 2008 WL 4155332, at \*2-5 (W.D. La. Sept. 8, 2008) (noting that “circuit jurisprudence is relatively undeveloped, leaving substantial ground for reasonable minds to disagree” and requesting “guidance from the Fifth Circuit as to whether or not it will join the Seventh, Ninth and Eleventh Circuits in its treatment of dispositive motions raising this particular affirmative defense” by certifying questions of “what procedural device . . . is required for the raising of the affirmative defense of exhaustion prior to trial . . . [and] whether or not plaintiffs are entitled to trial by jury on the issue of exhaustion”).

<sup>31</sup> Compare cases that have addressed exhaustion on summary judgment, such as *Hinojosa v. Johnson*, 277 F. App’x 370, 379-80 (5th Cir. 2008); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1112 (10th Cir. 2007); *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006); *Fouk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001); *Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007) (“[D]isputed issues of fact must be resolved by the jury and not the Court.”); and *Lunney v. Brureton*, No. 04 Civ. 2438, 2007 WL 1544629, at \*10 n.4 (S.D.N.Y. May 29, 2007), with cases resolving factual disputes and disposing of the issue on a preliminary motion, such as *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (characterizing exhaustion as a “matter in abatement” that must be raised in an “unenumerated Rule 12(b) motion” to dismiss); *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), and *Pavey v. Conley*, 544 F.3d 739, 740-42 (7th Cir. 2008) (declining to follow the Ninth Circuit’s “matter in abatement” and “unenumerated Rule 12(b) motion” approach, but prescribing a process whereby the district court judge first makes a finding of fact about whether the plaintiff exhausted remedies; then, if the judge finds the plaintiff has properly exhausted, the case proceeds to trial where the jury is not bound by any fact-finding made previously by the judge), *amended by* No. 07-1426, 2008 U.S. App. LEXIS 19985 (7th Cir. Sept. 12, 2008), *cert. denied*, 129 S. Ct. 1620 (2009).

In weighing this issue, courts must contend with the Supreme Court's recent decision in *Jones v. Bock*, which held that exhaustion is not a pleading requirement, but rather an affirmative defense.<sup>32</sup> Therefore, federal courts are faced with two competing principles: In order to reduce the impact of prisoner litigation on federal courts,<sup>33</sup> the PLRA mandates proper administrative exhaustion *prior* to filing suit; however, failure to exhaust is an affirmative defense, which defendants maintain the burden to plead and prove in an inquiry that is frequently fact intensive. How can courts avoid the burden of cases with unexhausted claims where properly adjudicating the exhaustion issue is dependent on disputed facts and credibility determinations? To reconcile these interests, some courts have fashioned *sui generis* procedures for resolving an exhaustion defense.

This Note contends that courts are bound by the usual procedural rules for raising and deciding claims of prisoner non-exhaustion as with any affirmative defense, and argues that the unusual procedures employed by some courts violate the usual practice. Part I outlines the background of the PLRA, its administrative exhaustion requirement, and important case law. Part II surveys the unique procedures employed by federal courts for deciding exhaustion issues. Part III addresses the doctrinal weaknesses of these procedures in light of (a) the Supreme Court's staid enforcement of the usual practice prescribed by the rules of civil practice, (b) the historical development of the relevant rules of procedure, (c) conflicting federal statutory provisions, (d) well-established Seventh Amendment jurisprudence on the province of the jury in determining genuine factual disputes, and (e) overarching policy implications of employing these *ad hoc* procedures. Finally, this Note concludes with a recommendation for the appropriate procedure to govern this particular area of civil procedure.

## I. THE PRISON LITIGATION REFORM ACT

### A. *Background*

In response to the growing number of federal civil rights lawsuits filed by state and federal prisoners,<sup>34</sup> Congress passed the PLRA in

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<sup>32</sup> 549 U.S. 199, 212 (2007).

<sup>33</sup> See *Porter v. Nussle*, 534 U.S. 516, 524 (2002) ("Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits . . .").

<sup>34</sup> During fiscal year 1990, five years before the PLRA was passed, civil suits—which include civil rights and prison conditions claims, as well as habeas petitions and mandamus actions challenging underlying criminal convictions—filed by prisoners in the federal district courts totaled 43,209. ADMIN. OFFICE OF THE U.S. COURTS, 2007 JUDICIAL FACTS & FIGURES tbl. 4.6, available at <http://www.uscourts.gov/judicialfactsfigures/2007/Table406.pdf>. For fiscal year

1995.<sup>35</sup> Congressional sponsors of the Act expressed concern that many prisoner lawsuits were frivolous and imposed overwhelming burdens on the limited judicial and financial resources of the federal courts.<sup>36</sup> In an effort to reduce the number and improve the quality of prisoner suits, and to limit federal court intervention in prison reform, the PLRA imposed a patchwork of hurdles for prisoner litigants.<sup>37</sup> Among other

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1995, the year Congress passed the PLRA, prisoner suits totaled 63,550—a 47% increase from 1990. *Id.* It is worth noting that, between 1990 and 1995, the total number of new civil filings increased more than 14%, and several other areas of civil claims recorded notable increases in new filings, including product liability and non-prisoner civil rights claims. *Id.* tbl. 4.4, available at <http://www.uscourts.gov/judicialfactsfigures/2007/Table404.pdf>. For the twelve-month period ending September 30, 2008, the federal district courts received 54,786 civil filings from federal and state prisoners, combined, which accounted for approximately 20% of all new civil filings in the federal district courts. 2008 JUDICIAL BUSINESS, *supra* note 8, at 143-44. The number of new prisoner filings for that period marked a decrease of approximately 14% from the 1995 fiscal year filings. Compare *id.*, with 2007 JUDICIAL FACTS & FIGURES, *supra*, tbl. 4.4.

However, a leading empirical analysis of the effect of the PLRA on prisoner court filings argues that, when accounting for prisoner filings in the federal courts, habeas petitions and other similar actions raising collateral challenges to the prisoners' underlying criminal convictions are more appropriately "conceptualized as part of the criminal, rather than civil, justice system." Schlanger, *supra* note 3, at 1558 n.4. Prisoner filings consisting only of civil rights and prison conditions complaints account for only 47% of prisoner filings for the twelve-month period ending September 30, 2008; the federal courts received 25,679 new such filings—less than half of the total number of civil cases commenced by prisoner litigants. 2008 JUDICIAL BUSINESS, *supra* note 8, at 144. Habeas petitions and motions to vacate sentence comprise the majority of the remainder of prisoner litigant suits. *Id.* Therefore, prisoner civil rights claims and prison condition cases represent only 9.6% of the total civil filings in the federal district courts. *Id.* at 143-44.

In addition to the number of new filings, it is instructive to consider the proportion of cases filed by prisoner litigants that actually go to trial. Of the 4723 civil trials held in federal district courts during the twelve-month period ending September 30, 2008, 309 were cases brought by prisoners raising civil rights or prison condition claims. *Id.* at 167-70. In other words, prisoner civil rights and prison condition cases accounted for 6.5% of federal district court trials during that period. Of the federal court civil cases on which there was some court action during that period, approximately 2.6% terminated during or after trial, whereas only 1.5% of prisoner civil rights and prison conditions cases went to trial. *Id.*

<sup>35</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2006)); see 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("Over the past two decades, we have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners."); 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("Statistics compiled by the Administrative Office of the U.S. Courts show that inmate suits are clogging the courts and draining precious judicial resources. Nationally, in 1994, a total of 238,590 civil cases were brought in U.S. district court. More than one-fourth of these cases—60,086—were brought by prisoners.").

<sup>36</sup> 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("This bill will deter frivolous inmate lawsuits."); 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

<sup>37</sup> See *Porter*, 534 U.S. at 524-25 ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."). See generally Shay & Kalb, *supra* note 10, at 300-01.

provisions, the PLRA imposed early screening,<sup>38</sup> financial hurdles,<sup>39</sup> repercussions for meritless claims,<sup>40</sup> a physical injury requirement to recover for mental or emotional injuries,<sup>41</sup> and restrictions on attorney's fees<sup>42</sup> and relief that a federal court may grant.<sup>43</sup> Also, as noted previously, prisoners must exhaust administrative remedies before filing suit.<sup>44</sup>

## B. *Litigation over the PLRA's Administrative Exhaustion Requirement*

### 1. Supreme Court Decisions

As of 2009, the Supreme Court had granted certiorari four times to clarify the contours of the PLRA's administrative exhaustion requirement.<sup>45</sup> First, in *Booth v. Churner*,<sup>46</sup> the Court rejected a futility exception for exhaustion.<sup>47</sup> In other words, a prisoner must exhaust prison grievance procedures regardless of the remedy he seeks and the remedies actually available through the administrative system. For example, a prisoner seeking monetary relief must proceed through all levels of the prison grievance system even if it does not provide for monetary relief.<sup>48</sup> The following year, in *Porter v. Nussle*,<sup>49</sup> the Court

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<sup>38</sup> 28 U.S.C. § 1915(e)(2) (2006) ("Proceedings in forma pauperis"); *id.* § 1915A (2006) ("Screening"); 42 U.S.C. § 1997e(c)(1) (2006) (giving a court the power to pre-screen and dismiss an action that is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief").

<sup>39</sup> 28 U.S.C. § 1915(b)(1), (g) (limiting the availability of *in forma pauperis* status).

<sup>40</sup> *Id.* § 1932 (revoking earned release credit for inmates who have filed an action "for a malicious purpose; . . . solely to harass the party against which it was filed; or [where the plaintiff inmate] testifies falsely or otherwise knowingly presents false evidence or information to the court").

<sup>41</sup> 42 U.S.C. § 1997e(e) (2006).

<sup>42</sup> *Id.* § 1997e(d) (restricting attorney's fees, inter alia, by requiring the prisoner plaintiff to pay such fees in part from a favorable money judgment).

<sup>43</sup> 18 U.S.C. § 3626 (2006) (restricting prison release orders, injunctions, and consent decrees, and providing for termination of prospective relief).

<sup>44</sup> 42 U.S.C. § 1997e(a).

<sup>45</sup> These four cases (discussed *infra*) are: *Booth v. Churner*, 532 U.S. 731 (2001); *Porter v. Nussle*, 534 U.S. 516 (2002); *Woodford v. Ngo*, 548 U.S. 81 (2006); and *Jones v. Bock*, 549 U.S. 199 (2007). See generally Shay & Kalb, *supra* note 10, at 301-02.

<sup>46</sup> 532 U.S. 731 (2001).

<sup>47</sup> *Id.* at 741 ("Thus, we think that Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures."). The Court held that the "availability" of administrative remedies under the PLRA refers to the availability of the administrative process itself, not whether the administrative remedial scheme provided for the requested remedy. See Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 823-24 (2008).

<sup>48</sup> See *Booth*, 532 U.S. at 734-35; see also Shay & Kalb, *supra* note 10, at 302 (noting that



read the PLRA's exhaustion provision, which applies to actions "with respect to prison conditions," to encompass individual claims of excessive force.<sup>50</sup> Then, in *Woodford v. Ngo*,<sup>51</sup> the Court adopted a procedural default rule—often referred to as "proper exhaustion."<sup>52</sup> This means that if a prisoner fails to comply with any procedural requirement of the prison grievance system, the prisoner is barred from asserting that claim in federal court.<sup>53</sup> As discussed below, lower courts have filled in some of the contours of the proper exhaustion requirement—including identifying exceptions to the requirement.<sup>54</sup> The *Woodford* Court, however, also acknowledged that the PLRA's exhaustion requirement is not a jurisdictional prerequisite.<sup>55</sup>

Finally, in *Jones v. Bock*,<sup>56</sup> the Court stepped in to curb a growing trend in the federal courts of generously reading the PLRA to support a host of procedural oddities that allowed the courts to dismiss many prisoner complaints.<sup>57</sup> While the majority of the circuit courts of appeals did not believe that the PLRA required the plaintiff to plead exhaustion in the complaint,<sup>58</sup> several circuits disagreed. These

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exhaustion under the PLRA is mandatory).

<sup>49</sup> 534 U.S. 516 (2002).

<sup>50</sup> *Id.* 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 also* Shay & Kalb, *supra* note 10, at 302-03.

<sup>51</sup> 548 U.S. 81 (2006).

<sup>52</sup> *Id.* at 84; *see also* Shay & Kalb, *supra* note 10, at 303-06 ("*Woodford* is the most important of the cases interpreting the exhaustion requirement.>").

<sup>53</sup> 548 U.S. at 118 (Stevens, J., dissenting) ("[T]he Court's engraftment of a procedural default sanction into the PLRA's exhaustion requirement risks barring . . . claims when a prisoner fails, *inter alia*, to file her grievance . . . within strict time requirements . . ."); *see also* Shay & Kalb, *supra* note 10, at 312 ("The extra judicial imposition of procedural default, however, goes further, [beyond a simple exhaustion rule that would require a prisoner at least to have presented his grievance to corrections officials before pursuing his claim in federal court] by allowing corrections officials, based on their determination that a grievance is technically or procedurally deficient, to ensure that claims never see the light of day.").

<sup>54</sup> *See infra* Part I.B.2.

<sup>55</sup> 548 U.S. at 101 ("[E]ven if dismissals under § 1997e(c)(2) typically occur when the opportunity to pursue administrative remedies has passed, § 1997e(c)(2) still serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, and thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.").

<sup>56</sup> 549 U.S. 199 (2007).

<sup>57</sup> *Id.* at 202-03 ("The Sixth Circuit, along with some other lower courts, adopted several procedural rules designed to implement this exhaustion requirement and facilitate early judicial screening. These rules require a prisoner to allege and demonstrate exhaustion in his complaint, permit suit only against defendants who were identified by the prisoner in his grievance, and require courts to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint. . . . [We] conclude that these rules are not required by the PLRA, and that crafting and imposing them exceeds the proper limits on the judicial role.").

<sup>58</sup> *Anderson v. XYZ Corr. Health Servs.*, 407 F.3d 674, 681 (4th Cir. 2005) (holding that

dissenting circuits prescribed dismissing prisoner suits for failure to state a claim where the plaintiff had not affirmatively pleaded facts to support proper exhaustion.<sup>59</sup> Two of the circuits went a step further, requiring that exhaustion be pled with specificity and supported with sufficient documentation.<sup>60</sup>

The *Jones* Court held, inter alia, that administrative exhaustion under the PLRA is an affirmative defense, explicitly comparing it to the statute of limitations.<sup>61</sup> The Court found the PLRA's silence on whether exhaustion was a pleading requirement to be "strong evidence that the usual practice should be followed."<sup>62</sup> The Court found that the "usual practice" is to treat exhaustion as an affirmative defense;<sup>63</sup> and, as with other affirmative defenses, the Court held that exhaustion is not a pleading requirement.<sup>64</sup> The lower courts' treatment of exhaustion created an improperly heightened pleading standard, which the Court held conflicted with its recent pleading standard precedent.<sup>65</sup> The Court

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failure to exhaust under the PLRA must be raised by defendants as an affirmative defense); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (same); *Casanova v. Dubois*, 304 F.3d 75, 77 & n.3 (1st Cir. 2002) (same); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) (same); *Fouk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001) (same); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 2000) (same); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999) (same); cf. *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001) (treating exhaustion as an affirmative defense); see also *Jones*, 549 U.S. at 204-05 & n.2.

<sup>59</sup> See, e.g., *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1210 (10th Cir. 2003); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998); see also *Jones*, 549 U.S. at 204 & n.2.

<sup>60</sup> See *Steele*, 355 F.3d at 1210 ("[Because] it is the prisoner who can best assert the relationship between his administrative grievance and court filing[,] . . . [a] prisoner must: (1) plead his claims with 'a short and plain statement . . . showing that [he] is entitled to relief,' in compliance with Fed. R. Civ. P. 8(a)(2), and (2) 'attach[] a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome[.]'" (quoting *Knuckles El*, 215 F.3d at 642)); *Knuckles El*, 215 F.3d at 642 ("[A] prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.").

<sup>61</sup> *Jones*, 549 U.S. at 215, 220.

<sup>62</sup> *Id.* at 212.

<sup>63</sup> *Id.*

<sup>64</sup> The Court also rejected the judicially imposed requirement that prisoners name all defendants in their administrative grievance in order to adequately exhaust available administrative remedies. *Id.* at 217-19. However, the Court was deciding only the "sufficiency" of the grievance under the PLRA, not whether the administrative grievances had been "properly exhausted" under *Woodford*. See *id.* at 219. Accordingly, the Court explicitly left open the question of whether a prison grievance policy that mandated all potential defendants be named in the original complaint would have barred the claims as presented for failure to "properly exhaust." *Id.* Finally, the Court extinguished the "total exhaustion" requirement that the minority circuits had invoked to dismiss complaints in their entirety where any claim was unexhausted. *Id.* at 219-24.

<sup>65</sup> *Id.* at 212-13, 224 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002); *Hill v. McDonough*, 547 U.S. 573 (2006)).

admonished lower courts that they “should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns,”<sup>66</sup> and that “crafting and imposing [rules not required by the PLRA] exceeds the proper limits on the judicial role.”<sup>67</sup>

## 2. Unavailability of Remedies, Exceptions to Exhaustion, and Other Interstices

Despite the extensive Supreme Court litigation over the PLRA’s exhaustion requirement, several issues have been left to the lower courts to hash out. These issues illustrate the expansive breadth of factually-specific circumstances in which failure to exhaust properly will be excused or justified.

### a. Unavailability and Exceptions

Although *Woodford* held that the PLRA implied a procedural default component, the Court side-stepped the question of whether some procedural requirements or actions (or inactions) by prison officials may render administrative remedies effectively unavailable.<sup>68</sup> Circuit cases preceding *Woodford*—presumably left unaffected by the Court’s silence on the issue<sup>69</sup>—established various exceptions to the PLRA exhaustion requirement. The Second Circuit has developed a “three-part inquiry,” which provides a descriptive framework for these exceptions.<sup>70</sup> First, the actions of the institutional defendants may effectively render administrative remedies exhausted or make them unavailable.<sup>71</sup> Second,

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<sup>66</sup> *Id.* at 212.

<sup>67</sup> *Id.* at 203; *see also id.* at 224 (“We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”).

<sup>68</sup> *See Woodford v. Ngo*, 548 U.S. 81, 102-03 (2006); *see also id.* at 120-22 (Stevens, J., dissenting) (“The majority leaves open the question whether a prisoner’s failure to comply properly with procedural requirements that do not provide a ‘meaningful opportunity for prisoners to raise meritorious grievances’ would bar the later filing of a suit in federal court. . . . More generally, are remedies meaningful when prison officials refuse to hear a claim simply because a prisoner makes some hypertechnical procedural error?”). In dissent, Justice Stevens posited that “failure to comply with procedural requirements in grievance proceedings may be excused based on special circumstances, such as a prisoner’s reasonable, but mistaken, understanding of prison regulations.” *Id.* at 122.

<sup>69</sup> *See Vogelfang v. Riverhead County Jail Officers*, 07-1268-CV, 2009 U.S. App. LEXIS 1914, at \*4-6 (2d Cir. Feb. 2, 2009) (vacating the district court’s dismissal and remanding for the district court to determine whether plaintiff’s failure to exhaust was excused under the line of cases discussed in the following notes and the accompanying text).

<sup>70</sup> *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004).

<sup>71</sup> *See id.* at 686 (citing *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004)); *see also Mitchell*

even if administrative remedies were available, equitable estoppel may preclude the defendants from raising the defense because of the defendants' own actions.<sup>72</sup> Third, even if remedies were available but were not pursued, and the defendants are not estopped from raising the affirmative defense, "special circumstances" may justify a failure to exhaust properly.<sup>73</sup>

However, these categories are not clearly demarcated,<sup>74</sup> and the reasons supporting an exception or excuse in a particular case rely in large part on equitable principles according to the facts of the case. The often knotty factual disputes presented in these claims complicate the proper application of one of these exceptions. To better appreciate the import of resolving these factual disputes, which will be further elaborated below, a brief synopsis of the some of the circumstances that trigger these exceptions is useful.<sup>75</sup> Situations include those in which:

- A prisoner receives a favorable response to a grievance, but does not discover that prison officials have not carried out the prescribed remedy until after the deadline to file an appeal. Under these circumstances, all available administrative remedies are deemed to have been exhausted even though no administrative appeal was pursued.<sup>76</sup>
- Prison officials threaten a prisoner with violence or criminal prosecution to dissuade the prisoner from filing a grievance. In such cases, ordinary procedures will be considered unavailable if "a similarly situated individual of ordinary firmness [would] have deemed them [un]available,"<sup>77</sup> and prison officials may be estopped from asserting the defense of failure to exhaust.<sup>78</sup>

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v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (finding remedies rendered unavailable where prison officials refused to provide inmate with necessary grievance forms); *see also* Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002) (finding that "instructions by prison officials that are at odds with the wording of [prison regulations render] the formal grievance procedure unavailable" to the plaintiff, under circumstances in which prison officials allegedly told a prisoner—contrary to prison regulations—that he could not file a grievance prior to the completion of a security investigation); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a) . . .").

<sup>72</sup> *See Hemphill*, 380 F.3d at 688-89 (citing *Ziemba v. Wezner*, 366 F.3d 161 (2d Cir. 2004)). Also, the defendants may have effectively waived the defense by failing to raise it. *See id.* at 686 (citing *Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004)).

<sup>73</sup> *See id.* at 686, 689-90 (citing *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004)); *see also* *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004)).

<sup>74</sup> *See Giano*, 380 F.3d at 677 n.6.

<sup>75</sup> *See* JOHN BOSTON, THE LEGAL AID SOCIETY, THE PRISON LITIGATION REFORM ACT 162-83 & nn.625-79 (2009) (collecting cases).

<sup>76</sup> *See Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir. 2004) ("Where, as here, prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in Abney's situation have fully exhausted their available remedies.").

<sup>77</sup> *See Hemphill*, 380 F.3d at 688. Several corrections officers severely beat the plaintiff,

- A prisoner reasonably interprets grievance procedures to bar complaints about matters affecting a disciplinary hearing determination, and the prisoner pursues his complaint through administrative appeals of the disciplinary charge. Here, a “special circumstance[]” justifies the failure to comply with the strict letter of administrative grievance procedures.<sup>79</sup>
- Prison officials refused to provide necessary grievance forms.<sup>80</sup>
- The untimely filing of a grievance was due to a temporary physical injury—the prisoner’s broken hand prevented him from writing—and the prison rejected as untimely the inmate’s subsequent grievance filed once he could write again.<sup>81</sup>
- A prisoner is incapable of clear written communication.<sup>82</sup>

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John Hemphill, and threatened him with further violence and criminal prosecution if Hemphill complained. *Id.* at 684. Hemphill wrote a letter about the situation to the prison’s superintendent, but he did not pursue formal grievance procedures. *Id.* When failure to exhaust was raised in the subsequent suit, the Second Circuit accepted Hemphill’s argument that the officers’ threats effectively rendered unavailable to him the otherwise available administrative remedies, and the court remanded for consideration in light of its objective, “ordinary firmness” test. *Id.* at 688. The court also noted that “threats or other intimidation by prison officials may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts.” *Id.*

<sup>78</sup> See *Ziemba v. Wezner*, 366 F.3d 161 (2d Cir. 2004). In order to prevent the plaintiff, Duane Ziemba, from reporting that he was attacked by his cellmate, prison officials placed Ziemba in a segregation cell, directed him to not make a formal record of the attack, threatened him, and later brutally assaulted him. *Id.* at 162. When officials outside the prison learned of Ziemba’s condition, officials inside the prison retaliated against him by continuing to segregate him and brutally assaulted him. *Id.* Ziemba apparently did not pursue any administrative grievance procedures before filing a lawsuit; but the Second Circuit held that the state could be estopped from interposing this defense and remanded for this inquiry. *Id.* The court instructed “such consideration will require the court to look beyond the pleadings and the documents attached to the pleadings,” and therefore, “the district court must allow factual development and address the estoppel claim at the summary judgment stage.” *Id.* at 163-64.

<sup>79</sup> See *Giano*, 380 F.3d 670. The plaintiff, Julio Giano, administratively appealed a disciplinary infraction for drug use, claiming that several corrections officers deliberately contaminated his urine sample so that it would test positive for drugs and presented false evidence against him at the disciplinary hearings. *Id.* at 672-74. When failure to exhaust administrative remedies was raised in Giano’s subsequent lawsuit, Giano argued that the prison regulations said disciplinary decisions were not grievable, and, insofar as he had pursued his grievance by appealing the disciplinary hearing determination, he had adequately exhausted the available administrative procedures. *Id.* at 674. The court accepted Giano’s argument, holding that “certain special circumstances” may provide “justification” for failing to comply with the strict letter of administrative grievance procedures. *Id.* at 676, 678.

<sup>80</sup> See, e.g., *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003).

<sup>81</sup> See, e.g., *Days v. Johnson*, 322 F.3d 863, 864-65, 868 (5th Cir. 2003) (“[A]dministrative remedies are deemed unavailable when (1) an inmate’s untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmate’s subsequent attempt to exhaust his remedies based on the untimely filing of the grievance.”), *overruled in part on other grounds* by *Jones v. Bock*, 549 U.S. 199, 213-14 (2007).

<sup>82</sup> See, e.g., *Williams v. Hayman*, 657 F. Supp. 2d 488, 496 (D.N.J. 2008) (“[T]here are unresolved factual questions in this case regarding whether the administrative remedies proffered

b. Other Interstices

Lower courts have addressed several other discreet issues that raise further factual inquiries. For instance, courts have found that the affirmative defense of failure to exhaust administrative remedies can be waived by a defendant's failure to timely raise it.<sup>83</sup> Waiver claims may present questions of prejudice to the party asserting them.<sup>84</sup> Another issue is whether or not the PLRA's exhaustion requirement applies to ex-prisoners, either those who initially filed their lawsuits while incarcerated (but are free by the time of a motion to dismiss or amend), or who initially filed their complaints after they were released.<sup>85</sup> A final issue is whether a dismissal for failure to exhaust is "with prejudice" or not—and the direct and collateral effects of one type of dismissal or the other.<sup>86</sup>

The Second Circuit has expressly recognized the difficulty of identifying the appropriate circumstances for applying any of these exceptions: "It must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way"<sup>87</sup>—an exceptionally amorphous and fact-specific standard. Keeping in mind this legal morass of the defense of failure to exhaust and the opposing justifications or excuses—and the thorny underlying factual determinations upon which the defense and excuses necessarily depend—this Note will turn to the procedural methods that courts have employed for confronting this problem.

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by Defendants were 'available' to [the plaintiff] . . . . Whether [the plaintiff's] disability inhibited his capacity to express his grievances comprehensibly in writing in accordance with the [prison's] Grievance Program's requirements is a triable issue of fact in this case.").

<sup>83</sup> See generally BOSTON, *supra* note 75, at 44-47 & nn.204-11 (citing, inter alia, Handberry v. Thompson, 446 F.3d 335, 342-43 (2d Cir. 2006); Johnson v. Testman, 380 F.3d 691, 695-96 (2d Cir. 2004); Ray v. Kertes, 285 F.3d 287, 293, 295 (3d Cir. 2002); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 536 (7th Cir. 1999)).

<sup>84</sup> See generally *id.*

<sup>85</sup> See generally *id.* at 4-7 & nn.19-29 (collecting cases).

<sup>86</sup> See generally *id.* at 34-35 & nn.161-71 (collecting cases).

<sup>87</sup> *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004).

## II. PROCEDURES EMPLOYED BY COURTS FOR RAISING AND DECIDING THE AFFIRMATIVE DEFENSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Prior to *Jones*, several circuit courts had already concluded that exhaustion was an affirmative defense, and routinely disposed of exhaustion issues according to the usual procedures.<sup>88</sup> However, *Jones* accomplished little in creating uniformity among the lower courts as to the proper procedural mechanism for raising and deciding exhaustion issues.<sup>89</sup> Inconsistent decisions about which procedural vehicle to employ pervade the lower courts—even among the decisions within a single circuit.<sup>90</sup> More disconcerting, while courts have questioned the propriety after *Jones* of relying on procedural mechanisms used before *Jones*,<sup>91</sup> there is a dearth of appellate opinions considering the impact of *Jones* on the proper disposition of exhaustion disputes. Indeed, despite the Supreme Court's clear holding that exhaustion is not a pleading requirement, district courts continue to ignore *Jones* altogether and dismiss prisoner complaints for failure to plead exhaustion affirmatively.<sup>92</sup> What stands is a quilt of procedural irregularities varying from circuit to circuit, and district to district. The most unusual example of a pre-*Jones* mechanism that courts continue to follow after *Jones* is found in cases in the Ninth Circuit. This mechanism was recently adopted by the Eleventh Circuit and is beginning to crop up in the district courts of other circuits.

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<sup>88</sup> See, e.g., *Ray v. Kertes*, 130 F. App'x. 541, 543-44 (3d Cir. 2005) (vacating summary judgment for defendants because genuine issues of material fact remained regarding the availability of administrative remedies and plaintiff's allegation that he had exhausted through alternative procedures than those specified in the prison's administrative rules).

<sup>89</sup> See *Bryant v. Rich*, 530 F.3d 1368, 1374 n.9 (11th Cir. 2008) ("Although the Supreme Court recently announced in *Jones* . . . that failure to exhaust under the PLRA was an affirmative defense, it did so in resolving the question whether the PLRA required plaintiffs, instead of defendants, to plead specifically that all administrative remedies had been exhausted. *Jones* decided nothing about the independent question of whether a judge, as opposed to the jury, may resolve disputed facts about exhaustion." (citation omitted)).

<sup>90</sup> Compare the cases cited *infra* note 125 with the cases cited *infra* note 127. For another example of a split within courts of the same circuit, compare *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008) (holding that a court should decide the exhaustion issue based on limited discovery, preliminary to any further proceedings even where genuine issues of material fact arise), *amended* by No. 07-1426, 2008 U.S. App. LEXIS 19985 (7th Cir. Sept. 12, 2008), *cert. denied*, 129 S. Ct. 1620 (2009), with *Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005) (per curiam) (vacating summary judgment and remanding because "whether [the prisoner plaintiff] submitted a grievance 'in the place' required by 'administrative rules' is a disputed issue of fact") and *Dale v. Lappin*, 376 F.3d 652 (7th Cir. 2004) (per curiam) (vacating summary judgment where inmate had submitted evidence that prison officials failed to respond to his requests for required grievance forms, raising an issue of fact about the availability of administrative grievance procedures). Although *Pavey* was decided after *Jones* and directly addressed the impact of *Jones* on this issue, and *Curtis* and *Dale* pre-date *Jones*, the court in *Pavey* did not address these prior

A. *The Ninth Circuit Approach: Unenumerated Rule 12(b) Motion for a Matter in Abatement*

Several years before the Court decided *Jones*, the Ninth Circuit adopted the position that exhaustion is “a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment.”<sup>93</sup> (For ease of reference, this Note will refer to this as “the Ninth Circuit approach.”) While the Ninth Circuit has never explicitly addressed the impact, if any, that *Jones* may have on this procedure, the court has continued to endorse the application of this procedure well after *Jones* was announced.<sup>94</sup> The court described this as “a procedure closely analogous to summary judgment,” insofar as both parties must be given an opportunity to develop a record for determination of the issue;<sup>95</sup> however, it made clear that when deciding such a motion, a district court “may look beyond the pleadings and decide disputed issues of fact.”<sup>96</sup>

The Ninth Circuit justifies its approach by asserting that summary judgment is on the merits of the claim whereas failure to exhaust results in a dismissal without prejudice, i.e., a judgment that is not on the merits.<sup>97</sup> The court’s principle doctrinal support for its unenumerated Rule 12(b) motion for matter in abatement is its own, long-standing precedent, which developed this procedure in the context of claims against unions where a collective bargaining agreement provided for

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decisions of its circuit, which apparently remain good law.

<sup>91</sup> *Bryant v. Sacramento County Jail*, No. CIV S-06-0688, 2008 U.S. Dist. LEXIS 10273, at \*6-8 (E.D. Ca. Feb. 12, 2008) (questioning the continuing validity of the Ninth Circuit approach to deciding failure to exhaust claims).

<sup>92</sup> *See, e.g., Snoussi v. Bivona*, No. 05-CV-3133, 2008 U.S. Dist. LEXIS 70682, at \*16-17 (E.D.N.Y. Aug. 21, 2008) (dismissing plaintiff’s negligent denial of medical care claim “[b]ecause plaintiff has not demonstrated that he has pursued, much less exhausted, his administrative remedies pursuant to the PLRA and Bureau of Prisons policy,” without once citing *Jones v. Bock*); *see also Myers v. Goord*, No. 06-CV-850A, 2009 U.S. Dist. LEXIS 36178, at \*4-5 (W.D.N.Y. Apr. 29, 2009) (same). Courts also routinely fail to follow other Supreme Court pronouncements on the limitations of the PLRA’s exhaustion requirement. For example, despite the express holding in *Woodford v. Ngo*, 548 U.S. 81 (2006) that exhaustion of administrative remedies is not a jurisdictional prerequisite, in *Cohran v. Boykin*, No. 4:09-CV-16, 2009 U.S. Dist. LEXIS 70866, at \*1-2 (M.D. Ga. Aug. 12, 2009), the court dismissed the plaintiff’s complaint because the “Magistrate Judge found that [the] Plaintiff had failed to exhaust his administrative remedies, and thus this Court lacks subject matter jurisdiction over his claims.” Ironically, the Magistrate Judge in *Cohran* cited *Woodford* in his Report and Recommendation. 2009 U.S. Dist. LEXIS 70983, at \*8 (M.D. Ga. May 13, 2009).

<sup>93</sup> *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).

<sup>94</sup> *See Seneca v. Arizona*, 345 F. App’x 226, 229 (9th Cir. 2009).

<sup>95</sup> *Wyatt*, 315 F.3d at 1120 n.14.

<sup>96</sup> *Id.* at 1120.

<sup>97</sup> *Id.* at 1119.



mandatory internal grievance procedures or arbitration.<sup>98</sup> Those precedents, in turn, derived twin supporting rationales for this approach from two prominent civil procedure treatises. First, Charles Alan Wright and Arthur R. Miller's *Federal Practice and Procedure* provides that courts maintain an inherent power to regulate actions before them and, as a result, can entertain motions not specifically provided for in the Federal Rules that relate to judicial administration.<sup>99</sup> Second, *Moore's Federal Practice* points out that "a jurisdictional or related type of motion raising matter in abatement" is distinguishable from a motion for summary judgment because the court can resolve factual disputes on the former but not the latter.<sup>100</sup>

Well over a year after *Jones* was decided, the Eleventh Circuit adopted the Ninth Circuit's approach,<sup>101</sup> swiftly casting aside *Jones* in a footnote as addressing only the relative pleading burden and not the proper manner for resolving the issue of exhaustion.<sup>102</sup> However, whereas the Ninth Circuit at least relied on its longstanding precedent for applying the matter in abatement approach, the Eleventh Circuit had no such supporting precedent. Instead, the court reasoned that exhaustion is "a matter of judicial administration" and the PLRA's exhaustion requirement was intended to manage prisoner litigation; therefore, exhaustion should be decided on a motion to dismiss under Rule 12(b) with the judge resolving factual disputes.<sup>103</sup> Finally, the

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<sup>98</sup> See *Inlandboatmens Union of the Pac. v. Dutra Group*, 279 F.3d 1075, 1078 n.1, 1083-84 (9th Cir. 2002) (dealing with arbitration clause in union's collective bargaining agreement); *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368-69 (9th Cir. 1988) (per curiam) (finding that union members failed to exhaust contractual remedies before suing union); cf. *Studio Elec. Technicians Local 728 v. Int'l Photographers of the Motion Picture Indus.*, Local 659, 598 F.2d 551, 552 n.2 (9th Cir. 1979) (finding the court lacked jurisdiction to hear the claim, but still addressing in dictum the appropriate procedure for the defendant international union to raise its alternative defense that the plaintiff local union had failed to exhaust intra-union remedies). The Ninth Circuit has also applied this principal to government agency cases, where the agency moved the district court to remand to the agency for exhaustion of its administrative remedies even though exhaustion was not statutorily required. See, e.g., *Stauffer Chem. Co. v. FDA*, 670 F.2d 106 (9th Cir. 1982). In support of its sui generis approach, the court in *Wyatt* cited all of the aforementioned cases and *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983). See 315 F.3d at 1119-20.

<sup>99</sup> *Ritza*, 837 F.2d at 369 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360, at 633-34 (1969)).

<sup>100</sup> See *id.* (citing 6 JAMES WM. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.03, at 56-61 (2d ed. 1987)); see also *Studio Elec. Technicians Local 728*, 598 F.2d at 552 n.2 (citing 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.03 (2d ed. 1976)).

<sup>101</sup> *Bryant v. Rich*, 530 F.3d 1368, 1374 n.7 (11th Cir. 2008) (affirming a district court decision that "exhaustion constitutes a preliminary issue for which no jury trial right exists, and therefore judges can and should make credibility determinations on exhaustion-excusals issues" (internal quotation marks omitted)); see also *Turner v. Burnside*, 541 F.3d 1077 (11th Cir. 2008).

<sup>102</sup> *Bryant*, 530 F.3d at 1374 n.9 ("Jones decided nothing about the independent question of whether a judge, as opposed to the jury, may resolve disputed facts about exhaustion.").

<sup>103</sup> *Id.* at 1376 ("Where exhaustion . . . is treated as a matter in abatement . . . it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes . . .").

court drew comparisons between exhaustion and issues preliminary to a decision on the merits such as jurisdiction, venue, and service of process, and buttressed its decision with citations to the same legal treatises supporting the Ninth Circuit's precedent.<sup>104</sup> Recently, district courts in several other circuits have found this approach persuasive and have adopted it.<sup>105</sup>

### B. *The Seventh Circuit's Approach*

Following *Jones*, the Seventh Circuit squarely confronted the question of whether or not a district court should settle a genuine issue of material fact on matters of exhaustion.<sup>106</sup> The Seventh Circuit reached the same result as the Ninth Circuit—a judge and not a jury

<sup>104</sup> *Id.* at 1374-76 (citing 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360, at 78 n.15 (3d ed. 2004); 19 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 131.30(3)(b), at 104 (3d ed. 2008)).

<sup>105</sup> *See, e.g.,* McClain v. Alveriaz, No. 07-5551, 2009 U.S. Dist. LEXIS 100655, at \*8-9 (E.D. Pa. Oct. 26, 2009); Gora v. Gelabert, No. 1:08-cv-992, 2009 U.S. Dist. LEXIS 91506, at \*4-5 (W.D. Mich. July 23, 2009) (Report and Recommendation of magistrate judge), *adopted in part* by 2009 U.S. Dist. LEXIS 92243 (W.D. Mich. Sept. 30, 2009); *cf.* Gilmore v. Stalder, No. 06-1509, 2008 U.S. Dist. LEXIS 68619, at \*21 (W.D. La. Sept. 8, 2008) (certifying questions for interlocutory appeal, *inter alia*, as to “whether or not [the Fifth Circuit] will follow *Wyatt* and its progeny in its treatment of dispositive motions asserting the defense of non-exhaustion”), *dismissed as moot*, 2009 U.S. Dist. LEXIS 39734 (W.D. La. May 11, 2009).

<sup>106</sup> *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), *amended by* No. 07-1426, 2008 U.S. App. LEXIS 19985 (7th Cir. Sept. 12, 2008), *cert. denied*, 129 S. Ct. 1620 (2009). The procedural posture on which the case reached the Court of Appeals was somewhat unusual: In an earlier decision, the Seventh Circuit reversed the trial court's grant of summary judgment because it found a genuine issue of material fact regarding the exhaustion issue persisted. *Pavey v. Conley*, 170 F. App'x 4, 8-9 (7th Cir. 2006). On remand, *Pavey* filed an untimely jury demand, and the district court denied the defendants' motion to strike *Pavey's* demand as out of time. *Pavey v. Conley*, No. 3:03-CV-0662, 2006 U.S. Dist. LEXIS 88828, at \*1, \*5 (N.D. Ind. Nov. 21, 2006).

In contesting the jury demand, the defendants argued that the judge, rather than a jury, should decide disputed issues of fact related to their exhaustion defense. *Id.* at \*2. The court rejected the defendants' argument and ordered discovery proceed because “federal policy favor[s] jury decisions of disputed fact questions”:

[For the defendants to] prevail on their exhaustion defense . . . they must convince the fact finder, in this case a jury, to resolve those disputed issues of fact in their favor.

The time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief.

*Id.* at \*2-6 (internal quotation marks and citation omitted). Later, the court granted the defendants' motion to take an interlocutory appeal on the jury issue and certified the following questions for appeal: whether the PLRA's exhaustion requirement (1) “precludes discovery addressing the merits of a prisoner plaintiff's claims until after the resolution of the affirmative defense of failure to exhaust administrative remedies”; (2) “requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must be resolved before the presentation of any other evidence at trial”; and (3) “requires that genuine issues of fact related to the affirmative defense of exhaustion of administrative remedies must always be resolved by a judge and not by a jury.” *Pavey v. Conley*, No. 3:03-CV-0662, 2006 U.S. Dist. LEXIS 90523, at \*4-5 (N.D. Ind. Dec. 14, 2006).

should decide factual disputes relating to an exhaustion defense—while specifically rejecting the Ninth Circuit’s approach.<sup>107</sup> In reaching this conclusion, Judge Posner, writing for the panel, began by looking at other areas such as subject-matter jurisdiction, where a factual dispute can be decided by a judge—even in suits at law.<sup>108</sup> From this analysis, the court distilled the following “generalization”: “[J]uries do not decide what forum a dispute is to be resolved in. Juries decide cases, not issues of judicial traffic control.”<sup>109</sup> The court found that exhaustion presented an issue manifestly different from defenses based on filing deadlines, such as the statute of limitations, because, the court believed, a determination of non-exhaustion would not bar the suit but only send the matter back to prison administrators to decide the issue in the first instance.<sup>110</sup> Finally, the court rejected as “unsatisfactory” the process of having a jury try factual disputes on the exhaustion issue alongside the merits, invoking “Congress’s effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies.”<sup>111</sup>

However, the court did acknowledge the problematic scenario in which the merits of a case overlap with the exhaustion question—in fact, the case before it presented such a scenario: The plaintiff claimed that he was unable to file written grievances, as required by the prison administrative procedures, because his writing arm was broken by guards when they allegedly used excessive force to remove him from his cell.<sup>112</sup> Judge Posner offered a compromise: “[A]ny finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits.”<sup>113</sup> In conclusion, Judge Posner prescribed a *sui generis* procedure for courts in the Seventh Circuit to decide exhaustion issues. Initially, the parties are allowed limited discovery on the exhaustion issue (as deemed necessary by the judge). Then, after a hearing, the judge makes a determination either that the plaintiff properly exhausted—in which case the lawsuit proceeds normally and the judge’s resolution of factual disputes is kept from the jury—or that the plaintiff did not properly

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<sup>107</sup> *Pavey*, 544 F.3d at 741-42.

<sup>108</sup> *Id.* at 741 (listing other areas, such as subject-matter jurisdiction, personal jurisdiction, venue, abstaining in favor of another court or agency, and relinquishing supplemental jurisdiction to the state courts).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (“That distinguishes the issue of exhaustion from deadline issues that juries decide. A statute of limitations defense if successfully interposed ends the litigation rather than shunting it to another forum. If the defense is rejected, the case proceeds in the court in which it is filed.”).

<sup>111</sup> *Id.* at 742.

<sup>112</sup> *Id.* at 741-42.

<sup>113</sup> *Id.* at 742. The court prescribed a unique process for deciding non-exhaustion claims—one which parallels procedures for deciding the enumerated defenses in Federal Rule of Civil Procedure 12(b). *See id.*; *see also* FED. R. CIV. P. 12(i) (“Hearing Before Trial”).

exhaust—in which case the judge must determine whether the failure to exhaust was the fault of prison officials.<sup>114</sup> In the case of a plaintiff's innocent failure to exhaust properly, the plaintiff is allowed a new opportunity to exhaust his grievance.<sup>115</sup> However, these procedures nowhere instruct the district courts to make a determination about the *availability* of administrative procedures.<sup>116</sup>

### C. *Approaches of Other Circuit and District Courts*

Without clear guidance in this area, district courts in other circuits have turned to their own devices to reconcile the clearly established procedures of the Federal Rules and the PLRA's often competing goal of promoting efficient resolution of prisoner claims. A recent case in federal district court in Brooklyn, *Snoussi v. Bivona*,<sup>117</sup> provides one such example.

In *Snoussi*, the plaintiff, initially proceeding pro se, filed a civil rights complaint against federal officials alleging, inter alia, that some of the defendants failed to provide him with adequate medical care while he was detained in a federal prison.<sup>118</sup> The district court dismissed this claim “without prejudice” because the plaintiff had failed to plead that he had exhausted available administrative remedies—but the court did not acknowledge or even mention *Jones v. Bock*.<sup>119</sup> Subsequently, pro bono counsel moved for leave to file an amended complaint, which reasserted claims arising from the failure to provide necessary medical care.<sup>120</sup> In his moving papers—filed after he was released—the plaintiff, citing *Jones*, argued that he was not required to plead or demonstrate exhaustion at the pleading stage and, therefore, it would not be futile to allow him to amend his complaint to reassert the

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<sup>114</sup> *Pavey*, 544 F.3d at 742. Subsequently, the court amended its opinion to reflect the real world possibility that the actions of prison officials could be responsible for the failure to exhaust properly, and the prisoner plaintiff might find himself without an available administrative remedy on remand where the deadline to file a grievance has passed and so be barred procedurally from filing again in federal court. The court also amended the opinion to allow for flexibility in the allowable discovery on the issue of exhaustion in the “exceptional case[]” where the facts of the exhaustion issue overlap with facts on the underlying substantive legal claim—exactly the situation in the case considered. *Pavey v. Conley*, No. 07-1426, 2008 U.S. App. LEXIS 19985, at \*1-3 (7th Cir. Sept. 12, 2008).

<sup>115</sup> 2008 U.S. App. LEXIS 19985, at \*1-3.

<sup>116</sup> *Id.*

<sup>117</sup> No. 05 CV 3133, 2008 U.S. Dist. LEXIS 70682 (E.D.N.Y. Aug. 22, 2008).

<sup>118</sup> *See id.* at \*2, 4-5.

<sup>119</sup> *Id.* at \*17 (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)).

<sup>120</sup> *Snoussi v. Bivona*, No. 05 CV 3133, slip op. at 1-2 (E.D.N.Y. Feb. 17, 2010) (Report and Recommendation of magistrate judge).

denial of medical care claim without showing that he properly exhausted.<sup>121</sup>

Nonetheless, the magistrate judge recommended not allowing the plaintiff to reassert a denial of medical care claim because the court had earlier dismissed this claim—for failing to plead exhaustion—and the plaintiff had not presented evidence to overcome the defendant's claim that he had failed to exhaust.<sup>122</sup> However, the plaintiff had argued that his amended complaint, which pled the following facts, showed that the defendants were estopped from raising failure to exhaust as a defense, or at least demonstrated special circumstances excusing his failure to exhaust: The plaintiff spoke limited English, prison officials ignored his repeated requests for medical attention while he was held in solitary confinement, and the plaintiff's "only contact with prison officials who could help him file an administrative grievance occurred during extended and intense interrogation sessions."<sup>123</sup> But the magistrate judge rejected these allegations absent discovery and without allowing the plaintiff an opportunity to supplement the record, which was formed solely on the plaintiff's bare allegations in his proposed amended complaint and the defendants' evidence on their earlier motion to dismiss.<sup>124</sup>

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<sup>121</sup> Memorandum of Law in Support of Plaintiff's Motion to Amend His Complaint at 13, 15-16, *Snoussi v. Bivona*, No. 05 CV 3133, slip op. (E.D.N.Y. Feb. 17, 2010).

<sup>122</sup> *Snoussi*, slip op. at 16-17, 19.

Whereas plaintiff is correct that he is not required to plead exhaustion in his complaint, defendants are correct that they previously raised the affirmative defense of exhaustion as a basis for their motion to dismiss plaintiff's claims . . . . The Court ruled [previously] that "plaintiff has not demonstrated that he has pursued, much less exhausted, his administrative remedies pursuant to the PLRA." Indeed, plaintiff's second amended complaint is silent on the matter of exhaustion, and generally the Court does not consider matters outside the pleadings on a motion to amend. . . . Defendants presented evidence in their prior motion to dismiss or in the alternative for summary judgment, that plaintiff did not file any administrative grievances with the MCC related to the incidents alleged in the complaint. Therefore, this evidence is already in the record, and dismissal for failure to exhaust is appropriate, notwithstanding plaintiff's silence on the matter.

*Id.* (footnote and citations omitted) (quoting the court's earlier decision). The author of this Note was previously employed as a summer associate by the law firm that submitted the motion to amend plaintiff *Snoussi's* complaint and participated in the preparation of the memorandum of law in support of that motion. Mr. *Snoussi's* current pro bono counsel did not object to the magistrate judge's recommendation to dismiss the denial of medical care claim.

<sup>123</sup> Memorandum of Law in Support of Plaintiff's Motion to Amend His Complaint, *supra* note 121, at 16.

<sup>124</sup> *Snoussi*, slip op. at 18-19. Of particular note is the magistrate judge's rejection of the plaintiff's allegations that his limited English at the time of his initial detention presented a special circumstance. *See id.* The magistrate judge said that such an allegation fails where the prisoner litigant has filed other grievances in English, which the defendants' evidence indicated. *Id.* at 19. However, the magistrate judge acknowledged that the defendants' records demonstrated that the plaintiff had not filed his first administrative grievance in English until more than a year and a half after the events underlying the allegations in the complaint, *id.* at 19 n.12, raising the very real possibility that the plaintiff's proficiency in English improved

Other district courts in the First and Second Circuits have expressly held that because failure to exhaust is an affirmative defense under the PLRA, disputed factual issues about PLRA exhaustion must be tried to a jury, in the usual course.<sup>125</sup> These courts have rejected decisions directing factfinding by judges on the ground that they “pre-date” *Jones*, do not conform to the standard procedure of the Federal Rules, and rest instead on “perceived policy concerns.”<sup>126</sup> However, some district courts in the Second Circuit have held that the exhaustion defense should be decided by the court.<sup>127</sup>

Finally, some courts purport to follow the usual practice, but do so by stretching the limits of the procedures prescribed by the Federal Rules. For instance, a number of courts<sup>128</sup> have decided exhaustion on a motion to dismiss while relying on documentary evidence outside the pleadings—without converting to a motion for summary judgment as would be the usual practice.<sup>129</sup> A number of these courts have justified this approach by relying on judicial notice of public or “indisputably authentic” documents.<sup>130</sup> Other courts have granted summary judgment even where there are factual disputes on the issue of exhaustion based on the courts’ finding that the disputes do not concern a genuine issue of material fact.<sup>131</sup>

### III. PROBLEMS WITH THE APPROACH OF SOME OF THE LOWER COURTS

The current approach of some of the lower courts to the issue of deciding an exhaustion defense presents myriad difficulties. This Part first addresses the overarching Supreme Court precedent on the primacy

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substantially in the intervening eighteen months. The magistrate judge’s Report and Recommendation also did not consider the significance of the fact that the plaintiff was no longer incarcerated at the time he moved to amend his complaint. *See supra* note 85 and accompanying text.

<sup>125</sup> *See* *Maraglia v. Maloney*, 499 F. Supp. 2d 93, 97-98 (D. Mass. 2007) (“[D]isputed issues of fact must be resolved by the jury and not the Court.”); *Lunney v. Brureton*, No. 04 Civ. 2438, 2007 WL 1544629, at \*10 n.4 (S.D.N.Y. May 29, 2007).

<sup>126</sup> *See Maraglia*, 499 F. Supp. 2d at 94; *see also Lunney*, 2007 WL 1544629, at \*10 n.4 (doubting, in light of *Jones*, the validity of previous cases directing trial courts to resolve disputed factual issues).

<sup>127</sup> *See Sease v. Phillips*, No. 06 Civ. 3663, 2009 U.S. Dist. LEXIS 45125, at \*2 n.1 (S.D.N.Y. May 29, 2009); *Amador v. Superintendent of Dep’t of Corr. Servs.*, 2007 WL 4326747, at \*5 (S.D.N.Y. Dec. 4, 2007).

<sup>128</sup> *See BOSTON, supra* note 75, at 48 n.220 (collecting cases).

<sup>129</sup> *See infra* note 160.

<sup>130</sup> *See, e.g., Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004) (“indisputably authentic” documents); *see also BOSTON, supra* note 75, at 48 n.220 (collecting cases).

<sup>131</sup> *See, e.g., Jones v. Carroll*, 628 F. Supp. 2d 551, 557 & n.4 (D. Del. 2009) (finding that the plaintiff’s assertion that he addressed his concern to prison security, rather than through the grievance system, because of misinformation from a corrections officer did not raise a genuine issue of material fact); *see also BOSTON, supra* note 75, at 49 n.221 (collecting cases).

and rigidity of the Federal Rules of Civil Procedure. Then, to best understand the irregularity of the procedures deployed in some of these courts, this Part will explore Rule 12 of the Federal Rules of Civil Procedure, by examining its historic genesis and the significant debates surrounding adoption of its relevant sections and amendments. Next, this Part will address statutory and constitutional problems that are presented by the unusual procedures of these lower courts. Finally, this Part will look at the policy concerns and related arguments against deviating from the usual rules of civil practice.

A. *The Supreme Court Demands that Lower Courts Follow the Usual Federal Rules of Civil Procedure*

As discussed earlier, the Court in *Jones* strongly reprimanded the lower courts for adopting sui generis procedures.<sup>132</sup> Among other things, the Court admonished lower courts that crafting and imposing rules not required by the PLRA “exceeds the proper limits on the judicial role.”<sup>133</sup> The Court warned lower courts that they “should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.”<sup>134</sup> Then, less than six months after its decision in *Jones*, the Court unexpectedly issued an opinion in *Erickson v. Pardus*.<sup>135</sup> In the per curiam opinion,<sup>136</sup> the Court summarily rebuked the lower court, which had dismissed a prisoner plaintiff’s Eighth Amendment claims, for its “departure from the liberal pleading standards” prescribed in the Federal Rules of Civil Procedure.<sup>137</sup> Scholars have commented on this uncommon admonishment, particularly following so closely on the heels of *Jones*, as an indication of the Court’s outright rejection of applying sui generis procedures in prisoner litigation.<sup>138</sup>

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<sup>132</sup> See, e.g., *Jones v. Bock*, 549 U.S. 199, 203, 212 (2007); see also *supra* notes 61-67 and accompanying text.

<sup>133</sup> 549 U.S. at 203.

<sup>134</sup> *Id.* at 212.

<sup>135</sup> 551 U.S. 89 (2007) (per curiam).

<sup>136</sup> Justice Thomas dissented on substantive Eighth Amendment grounds unrelated to the core of the Court’s holding. *Id.* at 95 (Thomas, J., dissenting).

<sup>137</sup> *Id.* at 94 (majority opinion). Interestingly, the Court cited twice to its recent controversial decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to support the familiar propositions that a plaintiff need not plead specific facts, and the factual allegations in the complaint are to be accepted as true on a motion to dismiss; the Court did not invoke the widely discussed “plausibility” standard enunciated in *Bell Atlantic*. *Erickson*, 551 U.S. at 93-94.

<sup>138</sup> Professor Giovanna Shay, a noted scholar on prison litigation and counsel for amicus curiae Jerome N. Frank Legal Services Organization of the Yale Law School in both *Jones v. Bock* and *Woodford v. Ngo*, has said that the “Court’s message to lower courts in both *Jones* and [*Erickson*] could not be more clear—prisoner cases may be a pain, but you can’t make up more onerous rules to get rid of them. . . . The [PLRA] is not *carte blanche* to erect additional barriers

However, *Erickson* is not the first or only time the Court has addressed ad hoc procedures in the lower courts. Among other notable examples, in *Crawford-El v. Britton*, the Court rejected the lower court's application of a heightened burden of proof for civil rights plaintiffs who press retaliation claims.<sup>139</sup> Likewise, in *Gomez v. Toledo*, the Court refused to require plaintiffs in claims brought under 28 U.S.C. § 1983 to plead that the defendant acted in bad faith to state a claim where the defendant would otherwise be entitled to qualified immunity.<sup>140</sup> The Court recognized that since qualified immunity is an affirmative defense, the defendant bears the burden of pleading and proving good faith entitling the official to qualified immunity.<sup>141</sup> Finally, in *Swierkiewicz v. Sorema N.A.*,<sup>142</sup> the Court rejected the Second Circuit's application of heightened pleading requirements for certain employment discrimination claims.<sup>143</sup> The Court found that the lower court's approach conflicted with the "short and plain statement" standard of Rule 8.<sup>144</sup>

These opinions demonstrate that the Supreme Court generally disapproves of departures from the usual practice under the Federal Rules of Civil Procedure. Such condemnation of ad hoc procedures suggests that the unusual exhaustion procedures fare no better. More importantly, these decisions demonstrate the Court's firm stance on lower courts' adopting unusual procedural devices based on (perhaps reasonable and beneficial) policy concerns. Simply put, these decisions send the message that lower courts are bound by the rules of procedure, which can be modified only by the Supreme Court with congressional sanction.

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to court access to prisoners' cases." Posting of Giovanna Shay to ACSBlog, <http://www.americanconstitutionsociety.org/node/11543> (June 7, 2007, 13:30 EDT).

<sup>139</sup> 523 U.S. 574 (1998).

<sup>140</sup> 446 U.S. 635 (1980).

<sup>141</sup> *Id.* at 635-42.

<sup>142</sup> 534 U.S. 506 (2002).

<sup>143</sup> The plaintiff in *Swierkiewicz* raised claims under Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)) and under the Age Discrimination in Employment Act of 1967 (codified as amended at 29 U.S.C. §§ 621-634 (2006)). 534 U.S. at 509.

<sup>144</sup> 534 U.S. at 512-15.



## B. *Conflicts with the Federal Rules of Civil Procedure*

### 1. The Current Federal Rules of Civil Procedure for Raising Affirmative Defenses

Under the Federal Rules of Civil Procedure,<sup>145</sup> Rule 12 governs the timing and manner for raising defenses and objections.<sup>146</sup> This rule requires that every defense be asserted in “a responsive pleading.”<sup>147</sup> Similarly, Rule 8 provides that a responsive pleading must state any affirmative defense, and lists common affirmative defenses, such as the statute of limitations.<sup>148</sup> The only responsive pleading provided under the simplified pleading rules<sup>149</sup> is an answer.<sup>150</sup> However, Rule 12(b) identifies an alternative procedure for asserting seven<sup>151</sup> specified defenses, which a party may raise by motion.<sup>152</sup> Additionally, Rule 12(c) provides for “judgment on the pleadings,” which a party may request by motion after the parties have presented their pleadings, and is essentially the same as a Rule 12(b) motion to dismiss for failure to state a claim.<sup>153</sup> Under Rule 12(i), when requested by a party, the court will hold a pretrial hearing to resolve defenses raised under Rule 12(b) or by motion under Rule 12(c), unless the court decides to defer the issue for trial.<sup>154</sup> Finally, Rule 56 provides for a motion for summary judgment where there is “no genuine issue as to any material fact” and the moving party is entitled to judgment as a matter of law.<sup>155</sup>

Interpreting these circumscribed procedures for raising defenses, courts have struggled with the question of whether an affirmative

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<sup>145</sup> At the time of writing this Note, the Federal Rules had been modestly amended in 2007 and 2009. See Order of the Supreme Court, March 26, 2009, available at <http://www.supremecourtus.gov/orders/courtorders/frcv09.pdf>; Order of the Supreme Court, April 30, 2007, available at <http://www.supremecourtus.gov/orders/courtorders/frcv07p.pdf>. This Note refers to the Rules as of their 2009 amendments.

<sup>146</sup> FED. R. CIV. P. 12.

<sup>147</sup> *Id.* 12(b).

<sup>148</sup> FED. R. CIV. P. 8(c).

<sup>149</sup> See generally Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272 (1942).

<sup>150</sup> See FED. R. CIV. P. 7(a).

<sup>151</sup> When adopted, Rule 12(b) contained six enumerated defenses that could be raised by motion. See FED. R. CIV. P. 12(b) advisory committee’s notes (1946). In 1946, the seventh defense, “failure to join an indispensable party,” was added. See *id.*; see also *infra* notes 205-208 and accompanying text.

<sup>152</sup> FED. R. CIV. P. 12(b). These seven enumerated defenses are: (1) lack of subject-matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, (4) insufficient process, (5) insufficient service of process, (6) “failure to state a claim upon which relief can be granted,” and (7) failure to join an indispensable party. *Id.*

<sup>153</sup> *Id.* 12(c); see also 2 MILTON I. SHADURUPDATES & MARY P. SQUIERS, MOORE’S FEDERAL PRACTICE § 12.38 (3d ed. 2009).

<sup>154</sup> FED. R. CIV. P. 12(i).

<sup>155</sup> FED. R. CIV. P. 56(c).

defense may only be pleaded in the answer, or if the rules allow for affirmative defenses to be raised by motion.<sup>156</sup> Courts are largely in agreement on two procedural bases for raising an affirmative defense by motion.<sup>157</sup> First, when facts that establish an affirmative defense appear on the face of the complaint, the defendant may make a motion pursuant to Rule 12(b)(6) for failure to state a legally cognizable claim.<sup>158</sup> The rationale is simply that since the plaintiff has, through his own pleading, demonstrated that his cause of action is untenable, he has therefore failed to state a claim.<sup>159</sup> Second, if the defense can be resolved by the pleadings alone, the issue will be decided by the court as a matter of law, but where the parties bring in matters outside of the pleadings, the motion must be converted into one for summary judgment.<sup>160</sup> The most commonly accepted procedure for raising an affirmative defense is by a motion for summary judgment pursuant to Rule 56, through which the court will resolve the legal issue only insofar as there are no genuine issues of material fact—otherwise, the jury (on appropriate legal claims) will be asked to resolve the factual disputes.<sup>161</sup>

This is the usual practice. As addressed below, the genesis and development of the Federal Rules support the argument that these finely wrought rules do not, and were not intended to, prescribe “unenumerated” and obsolete procedures.<sup>162</sup>

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<sup>156</sup> See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277 (3d ed. 2009).

<sup>157</sup> See *id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”).

[O]n motion under Rule 12(b)(6) to dismiss . . . the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments . . . . The Committee believes that such practice, however, should be tied to the summary judgment rule. The term “speaking motion” is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

FED. R. CIV. P. 12(d) advisory committee’s notes (1946).

<sup>161</sup> See FED. R. CIV. P. 56(c).

<sup>162</sup> It is important to point out that this Note does not address the corresponding and important question of whether these rules *should be* the usual practice. Certainly there is plenty of case law in which courts have departed from this practice. See, e.g., *Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976) (holding that *res judicata* can be asserted by a pre-answer motion even though not specifically provided for in Rule 12(b)). However, this Note argues that those cases, as much as the cases in the exhaustion context, are a departure from the usual practice—at least the usual practice as envisioned and understood by the drafters of the rules.

## 2. Civil Practice Governing Affirmative Defenses at Common Law

Common law pleadings involved an intricate process of pleas and responses. Technical correctness in the nomenclature as well as the language of the pleas was highly important. In response to the plaintiff's writ (the claim to legal relief) and declaration (the factual allegations), the defendant had essentially two modes for disputing or defeating the plaintiff's claim. The first, and most recognizable, was the demurrer, which generally admitted the facts alleged, but challenged the legal basis for the plaintiff's claim.<sup>163</sup> The other avenue available for the defendant was a "plea," which included "dilatory" pleas that delayed the claim instead of denying it, and "peremptory" pleas ("in bar of the action" or "to the action") that defeated the claim.<sup>164</sup> Pleas in bar included defenses such as the statute of limitations.<sup>165</sup> Dilatory pleas included challenges to the jurisdiction of the court, effectively asking that the case be dismissed; to the plaintiff's capacity to bring the suit, insisting that the case be suspended until the disability was removed; or to an issue that should abate the action.<sup>166</sup> This latter category of dilatory pleas was known as pleas in abatement.<sup>167</sup>

A plea in abatement challenged the plaintiff's ability to prosecute the claim because of a legal defense as opposed to attacking the legal sufficiency or factual basis of the plaintiff's claim.<sup>168</sup> Generally, matters in abatement related to the identity of the plaintiff, the identity of the defendant, the declaration of facts, or a defect in the plaintiff's writ.<sup>169</sup> Examples of a defect in the writ included: wrong venue; a personal disability of one of the parties, i.e., the party was deceased; the action was brought prematurely; another action for the same claim was pending in another court; the parties were misnamed; or a necessary party was not joined or a party was misjoined.<sup>170</sup>

The problem with the Ninth Circuit's conceptualizing exhaustion as a "matter in abatement" is that it is a flawed analogy. First, courts and commentators that have resurrected the term have tied it specifically

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<sup>163</sup> 2 GILES JACOB & T. E. TOMLINS, THE LAW-DICTIONARY 240 (1st Am. ed. 1811).

<sup>164</sup> 5 JACOB & TOMLINS, *supra* note 163, at 165; J.J.S. WHARTON, THE LAW LEXICON, OR DICTIONARY OF JURISPRUDENCE 523 (1848). *See generally* JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING §§ 127-28, at 91 (1894).

<sup>165</sup> *See* 5 JACOB & TOMLINS, *supra* note 163, at 165.

<sup>166</sup> *Id.* at 165-66.

<sup>167</sup> *See* MCKELVEY, *supra* note 164, § 128, at 91.

<sup>168</sup> *See generally* GEORGE L. CLARK, COMMON LAW PLEADING § 61, at 136 (1931); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 225, at 388-92 (Henry Winthrop Ballantine ed., 3d ed. 1923).

<sup>169</sup> *See* SHIPMAN, *supra* note 168, at 389.

<sup>170</sup> *Id.* at 388.

to a claim of lack of jurisdiction,<sup>171</sup> which misreads the common law doctrine. As discussed above, at common law, dilatory pleas were divided separately into pleas challenging the court's jurisdiction, and those asserting a matter—often based on new facts not found in the declaration—that abated the action.<sup>172</sup> Therefore, whatever procedure at common law that attached to jurisdictional pleas is inapposite to pleas presenting matters in abatement of the action.

Furthermore, at common law, matters in abatement could only go so far as to defeat the present action, and not to demonstrate that the plaintiff was permanently disabled from bringing the claim.<sup>173</sup> However, a defense of failure properly to exhaust available administrative remedies may defeat the claim entirely—just look at the *Snoussi* litigation discussed above, or consider the cases in which the court has dismissed the claim with prejudice where the prisoner has been released and can therefore no longer pursue any administrative remedies.<sup>174</sup> Additionally, the Supreme Court has held that exhaustion is an affirmative defense, analogizing it to the statute of limitations.<sup>175</sup> At common law, the statute of limitations was a matter asserted by a plea in bar—in other words, a defense on the merits of the claim.<sup>176</sup> Whatever syllogism properly classifies some contemporary defenses as asserting “matters in abatement,” it does not properly include exhaustion.

The second, and more important, problem with the Ninth Circuit's matter in abatement approach to the defense of failure to exhaust is that it is dependent on common law pleading rules that have long been superseded by modern pleading practice. As discussed below, the scope and language of the current Federal Rules of Civil Procedure completely supplant common law pleas,<sup>177</sup> and abatement was a quintessential common law plea. By simply reframing abatement as a

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<sup>171</sup> See *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988); *Studio Elec. Technicians Local 728 v. Int'l Photographers of the Motion Picture Indus., Local 659*, 598 F.2d 551, 552 n.2 (9th Cir. 1979); see also 6 JAMES WM. MOORE, W. TAGGERT & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 56.03, at 56-55 (2d ed. 1996) (cited in both *Ritza* and *Studio Electric*).

<sup>172</sup> See *supra* notes 164-170 and accompanying text.

<sup>173</sup> See SHIPMAN, *supra* note 168, at 388.

<sup>174</sup> See *Collins v. Goord*, 438 F. Supp. 2d 399, 408-10 (S.D.N.Y. 2006) (finding the exhaustion requirement applied to a plaintiff who filed a complaint while incarcerated, and dismissing with prejudice the unexhausted claims); see also *Berry v. Kerik*, 366 F.3d 85, 86 (2d Cir. 2003) (“[Where] remedies are no longer available, dismissal with prejudice [is] proper.”); *supra* notes 118-124 and accompanying text.

<sup>175</sup> See *Jones v. Bock*, 549 U.S. 199, 211-17 (2007).

<sup>176</sup> See, e.g., 1 JOSEPH CHITTY, A TREATISE ON PLEADING AND PARTIES TO ACTIONS 471 (H. Greening ed., 14th Am. ed. 1872); WHARTON, *supra* note 164, at 523.

<sup>177</sup> See FED. R. CIV. P. 7; *id.* advisory committee's note (“Former Equity Rules . . . abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.”).

cognizable ground for a dispositive pretrial motion, courts are effectively ignoring the Federal Rules' proscription of common law pleas, and the door is thrown wide open for a motion raising any and all matters that would have been raised—either explicitly or by analogy—in a common law plea.<sup>178</sup> The complex and complicated common law system of pleas—in particular, dilatory pleas—was highly disfavored by the drafters of the Federal Rules of Civil Procedure.<sup>179</sup> The system was seen as perpetuating the unnecessary cost and delay of litigation, which rewarded the technical skill of lawyers, rather than reaching equitable resolution of the legal claims. The drafters specifically sought to oust dilatory pleas and implement a simplified system that would help isolate the real issues in the case and facilitate an efficient and just resolution of the claims. Furthermore, even under the early common law pleading practice in the United States, pleas in abatement were severely restricted from their traditional English practice,<sup>180</sup> and they should not be judicially resurrected outside of the accepted rule-making process.

### 3. Affirmative Defenses Under the Federal Rules

Even shoehorning its sui generis procedures into the framework of the contemporary Federal Rules, the Ninth Circuit's approach fails to comport with the plain language of the interlocking components of Rule 12. First, it ignores one of the most basic canons of construction: *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. Rule 12(b) was clearly drafted to provide a general rule—that *all* defenses should be raised in the answer—with a narrow exception that allows only for certain enumerated defenses to be asserted by motion: “*Every defense to a claim for relief in any pleading must be asserted in the responsive pleading . . . . But a party may assert the following defenses by motion . . . .*”<sup>181</sup> The plain language of the rule forecloses the notion of “unenumerated” motions. Furthermore, the

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<sup>178</sup> Inconsistent use of procedural terminology that lacks clear and consistent grounding in statutory text or procedural rules has been criticized for producing uncertain outcomes with unexpected collateral consequences. See generally Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65 (2002). Scholars have argued the fact that judicial precedent supports an irregular use of procedural terminology does not justify the improper application of procedure. *Id.* at 84 (“Perhaps the least excusable reason for failing to use proper procedural terminology is prior practice. . . . Though such a course of conduct is somewhat understandable (and in many situations makes eminent sense), it can lead to the perpetuation of error.” (footnotes omitted)).

<sup>179</sup> See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943).

<sup>180</sup> SHIPMAN, *supra* note 168, at 390 (“[T]he modern grounds for abatement of an action are much more limited than they were formerly. They have been, also, still further limited in most states by statute.”).

<sup>181</sup> FED. R. CIV. P. 12(b) (emphases added).

specific defenses that may be raised by motion correspond to defenses that, at common law, would have been raised by a dilatory plea, such as jurisdictional defects and failure to implead a necessary party.<sup>182</sup> That Rule 12(b) includes particular defenses and not other similar common law defenses suggests that any unenumerated defense in the rule was purposefully excluded.<sup>183</sup> Second, an “unenumerated” Rule 12(b) motion runs up against several other provisions of Rule 12 that apply specifically to certain of the enumerated defenses in the rule: Rule 12(h)(1) provides that some of the Rule 12(b) defenses are waived in certain circumstances, and Rule 12(i) provides for a pretrial hearing on a “defense listed in Rule 12(b)(1)-(7).”<sup>184</sup> How could these provisions apply to an unenumerated defense? Such a gap in rules drafted with this level of specificity at least suggests that Rule 12(b) is circumscribed to the bases provided for therein. This conclusion is further supported by the genesis and development of the rule.

The original draft of the rule governing presentment of defenses, which became Rule 12, relied on the language of its predecessor in the Equity Rules,<sup>185</sup> and followed the English model: It provided that all defenses—“whether in abatement or bar”—other than sufficiency of service of process, venue, and jurisdiction, were to be pleaded in the defendant’s answer.<sup>186</sup> Drawing on its predecessor—Equity Rule

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<sup>182</sup> See Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 266 (1939) (“Rule 12(b) enumerates six defenses which may be set up either in the answer or by a motion to dismiss . . . . The first five of these are matters in abatement.”); see also 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1349 (3d ed. 2009).

<sup>183</sup> This view is consistent with the overarching approach to the new federal pleading system advanced by leading scholars Charles E. Clark and James Wm. Moore. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291, 1303-05 (1935) (explaining that Equity Rule 29 is “the better practice on the law side of the federal courts today” because “issue-forming is speeded up by compelling matter in abatement and bar to be set forth at one time”). In their analysis, the better procedure would be to consolidate all issues for one trial and to “limit[] the wasteful preliminary hearing.” *Id.* at 1308. In order to provide efficient resolutions, they advocated for a robust summary disposition procedure that could resolve cases on the papers. *Id.* 1308-09 & n.77. This paradigm comports with the contemporary usual practice in the federal courts and the approach advocated in this Note for application to the exhaustion issue. See *supra* Part III.B.1.

<sup>184</sup> FED. R. CIV. P. 12(h), (i).

<sup>185</sup> See FED. R. CIV. P. 12 advisory committee’s note (referring to, *inter alia*, Equity Rule 29). Under Equity Rule 29, a motion to dismiss was allowed for “[e]very defense in point of law arising upon the face of the bill,” and “every such point of law going to the whole or a material part of the cause . . . of action” could be heard and decided on a preliminary hearing. Equity Rule 29, *quoted in* James A. Pike, *Objections to Pleading Under the New Federal Rules of Civil Procedure*, 47 YALE L.J. 50, 54 n.24 (1937). The rule also provided: “Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court.” *Id.*

<sup>186</sup> See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 28-29 (May 1936) [hereinafter PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE] (“Rule 16”).

29<sup>187</sup>—the proposed rule would permit a “hearing or trial” of any defense that “may finally dispose of the whole or a material part of the issues.”<sup>188</sup> Charles E. Clark—“perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure” as Reporter to the Advisory Committee<sup>189</sup>—supported this procedure for raising defenses.<sup>190</sup> However, following extensive debate, this course was rejected. Instead, the rules methodically enumerated a limited number of defenses that may be raised in a motion pursuant to Rule 12(b) and decided on a preliminary hearing pursuant to Rule 12(i).<sup>191</sup> Although the rule as enacted was disfavored by some commentators,<sup>192</sup> it is clear that it foreclosed the approach taken by the Ninth and Seventh Circuits to the exhaustion issue. The drafting committee considered leaving courts free to hear any “unenumerated” basis for dismissal but ultimately rejected such course.

In fact, Rule 12(b)’s procedures for raising defenses were specifically crafted with the goal of preventing a dilatory series of pretrial inquiries and hearings.<sup>193</sup> According to Clark, the final version of the rule reflected a compromise of interests: Generally requiring defenses to be pleaded in the answer reflected the English system that he preferred, while allowing for some limited defenses to be asserted by motion appeased the contingent preferring the old systems that allowed defendants to assert targeted defenses before responding to the complaint with an affirmative pleading.<sup>194</sup> Clark saw the trend of pleading reform leading up to the development of the Federal Rules as moving in the direction of the English system, noting that “most of the

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<sup>187</sup> See *infra* note 185.

<sup>188</sup> PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, *supra* note 186, at 29.

<sup>189</sup> See Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80 & n.259 (1989) (noting that Clark served as Reporter while Dean of Yale Law School, and he later became a judge on the Court of Appeals for the Second Circuit).

<sup>190</sup> See Clark, *supra* note 179, at 465-66 (referring to original Rule 12(d), which was then the subsection providing for a preliminary hearing on the defenses provided for in 12(b); now, the preliminary hearing is found in Rule 12(i)); see also INST. ON FEDERAL RULES OF CIVIL PROCEDURE, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO, JULY 21, 22, 23, 1938, at 239 (William W. Dawson ed., 1938) [hereinafter 1938 RULES OF CIVIL PROCEDURE] (comments of Charles E. Clark); John A. Bauman, *The Amendments to Rule 12 of the Federal Rules of Civil Procedure*, 26 N.D. B. BRIEFS 235, 238 (1950); Claude H. Brown, *Some Problems Concerning Motions Under Federal Rule 12(b)*, 27 MINN. L. REV. 415, 428 (1943).

<sup>191</sup> See FED. R. CIV. P. 12(b), (i); see also Bauman, *supra* note 190, at 238 (discussing original Rule 12(d), which is now contained in Rule 12(i)).

<sup>192</sup> See Pike, *supra* note 185, at 54-57.

<sup>193</sup> INST. ON FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. OCTOBER 6, 7, 8, 1938 AND OF THE SYMPOSIUM AT NEW YORK CITY OCTOBER 17, 18, 19, 1938, at 54-57 (Edward H. Hammond ed., 1939).

<sup>194</sup> *Id.*; see also Clark, *supra* note 179, at 465.

codes” immediately preceding the Federal Rules already “provide[d] that the plea in abatement for matters outside the complaint must be a part of the answer.”<sup>195</sup> As Clark understood Rule 12(b), it prescribed the English system generally—“all objections in the answer, and you may have all your defenses in the answer, whether in abatement or in bar, whether merely to stop this present case or to meet the merits of the issue”—“except” for the “several defenses” listed in the rule.<sup>196</sup> At one of the several conferences to explain the newly minted rules, Clark’s example of defenses that were to be presented in the answer referred to one of the rule’s forms that included “an affirmative pleading of the statute of limitations.”<sup>197</sup> Later, when specifically asked if Rule 12(b) supported a motion “to present the dilatory defenses . . . mentioned in Rule 12(b) when the defense . . . depends on facts outside the record (as where a plea in abatement was formerly used),” Clark responded that “[c]learly a motion may be used for this purpose under Rule 56,” but would also be acceptable for “the six defenses . . . specially listed” in Rule 12(b).<sup>198</sup>

The view that a Rule 12(b) motion is limited to the enumerated bases is also supported by the early judicial construction and scholarly assessment of the rule. Shortly after the Federal Rules took effect, courts were confronted with inevitable gaps. One common issue was exactly the one presented by the exhaustion defense: How should affirmative defenses be raised? The earliest reported cases applying the new Federal Rules either rejected motions to dismiss raising affirmative defenses where the defenses did not appear on the face of the complaint,<sup>199</sup> or construed the motions as answers.<sup>200</sup> In at least one

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<sup>195</sup> Clark, *supra* note 179 at 465.

<sup>196</sup> 1938 RULES OF CIVIL PROCEDURE, *supra* note 190, at 55-56.

<sup>197</sup> *Id.* at 56.

<sup>198</sup> *Id.* at 74. This answer also reflected Dean Clark’s disputed argument that a motion under Rule 12(b)(6), like any other motion under Rule 12(b), could be supported by affidavits. See James A. Pike, *Some Current Trends in the Construction of the Federal Rules*, 9 GEO. WASH. L. REV. 26, 35-36 (1940).

<sup>199</sup> See *Barnhart v. W. Md. Ry. Co.*, 41 F. Supp. 898, 904-05 (D. Md. 1941) (“It is my understanding of the new Federal Rules of Civil Procedure that ordinarily the defense of limitations must be interposed by an answer, unless the legal effect of the bar of limitations conclusively appears from the complaint.”); *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296, 300 (E.D. Okla. 1940) (“[Defendant’s motion pursuant to Rule 12(b)(6) presenting a defense of res judicata will be treated as a motion for summary judgment under Rule 56 because,] [i]n construing Rule 12(b)(6), due consideration should be given to all other rules, particularly Rule 8(c) and Rule 56(b). The construction contended for by the defendant would permit affirmative defenses, required under Rule 8(c), to be pleaded, to be presented by motion prior to the filing of a responsive pleading, and further would practically eliminate the necessity of Rule 56(b). Such a broad construction should not be given to Rule 12(b)(6).”); *Holmberg v. Hannaford*, 28 F. Supp. 216, 219 (S.D. Ohio 1939) (“[W]hether the question is one of laches or statute of limitations, these questions should be raised under Rule 8(c) of the Rules of Civil Procedure by affirmatively setting forth the claims in these respects in an answer rather than by way of motion to dismiss.” (citation omitted)); *Piest v. Tide Water Oil Co.*, 27 F. Supp. 1020, 1021 (S.D.N.Y. 1939) (stating



case, the defendant tried to raise a defense of pendency of another action.<sup>201</sup> There, the court said that the “defense of multiplicity of suits should be raised by answer.”<sup>202</sup> One scholarly commentator concluded that “[u]nder the Federal Rules, of course, the defense of lack of capacity to sue must be raised in the answer or by motion for summary judgment.”<sup>203</sup> And note, neither pendency of another lawsuit nor lack of capacity to sue—both of which were traditionally issues for a common law plea in abatement<sup>204</sup>—is included in Rule 8(c)’s list of affirmative defenses to be pleaded in an answer; but early students of the Federal Rules, who were familiar with the preceding practice and with pleas in abatement, still considered these appropriate defenses to be raised in the answer and *not* in a motion pursuant to Rule 12(b).

Another recurrent question was: How should defendants respond when the action lacked an indispensable party, which was then not an enumerated ground for a motion under Rule 12(b)? District courts heard various motions raising such a defense, including a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and for failure to state a legally cognizable claim pursuant to Rule 12(b)(6).<sup>205</sup> Contemporary commentators addressing this issue failed to perceive in Rule 12(b) tacit authority for raising by motion the issue of failure to join an indispensable party. Instead, these commentators proposed various interpretations of the enumerated grounds in Rule 12(b) that would permit raising the defense by a pre-answer motion.<sup>206</sup>

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that a statute of frauds bar “should be presented by affirmative defense under Rule 8(c)”.

<sup>200</sup> *Baker v. Sisk*, 1 F.R.D. 232 (E.D. Okla. 1938). There, the court said:

The defendants apparently were proceeding under Rule 12(b)(6) . . . . In so doing the defendants disregard Rule 8(c) which provides that the statute of limitations is an affirmative defense to be set forth in a pleading rather than a motion. The defendants may not in a motion to dismiss raise the issue of the statute of limitations. . . . The motion to dismiss provided for under the rules is not designed to reach a case in which the plaintiff would not be entitled to any relief after the matters of defense have been presented. In other words it may not be substituted for an answer. . . . And, although the defendants have designated the pleading a motion to dismiss, it is, we think, in fact an answer and will be treated as such.

*Id.* at 236.

<sup>201</sup> *Sproul v. Gambone*, 34 F. Supp. 441 (W.D. Pa. 1940).

<sup>202</sup> *Id.* at 442.

<sup>203</sup> *Raising Issue as to Capacity to Sue*, 5 Fed. R. Serv. (Callaghan) 805 (1942).

<sup>204</sup> See *supra* note 170 and accompanying text.

<sup>205</sup> See FED. R. CIV. P. 12(b) advisory committee’s notes (1946); see also Bauman, *supra* note 191, at 236 & n.9.

<sup>206</sup> *Manner of Raising Objection of Nonjoinder of Indispensable Party*, 2 Fed. R. Serv. (Callaghan) 658 (1940) (“[I]t will often be desirable to have the matter disposed of at an early stage. It will be noted however, that Rule 12 is more restrictive than the old Equity Rule: a defense may be asserted by motion, or if made by answer a preliminary hearing under Rule 12d may be had, only if the defense is one of the six listed in Rule 12b.”). This commentator went on to say that lack of subject matter jurisdiction—one of the enumerated bases for a motion under Rule 12(b)(1)—was the only possible enumerated ground—unless the defense appeared on the face of the complaint, in which case a Rule 12(b)(6) motion was appropriate. *Manner of Raising*

Then, in 1946, the Advisory Committee adopted several amendments to the Federal Rules, among which was a seventh enumerated defense in Rule 12(b) for failure to join an indispensable party.<sup>207</sup> The Committee explained that the purpose of the amendment was to “cure[] an omission in the rules, which [were] silent as to the mode of raising such failure.”<sup>208</sup> This provides strong evidence that the Advisory Committee did not consider Rule 12(b) to authorize an unspoken reservoir of defenses that could be raised by motion instead of being affirmatively pleaded.

C. *Appellate Review of a Matter in Abatement Would Be Foreclosed by Statute*

Another problem with considering a defense of failure to exhaust as a “matter in abatement” is the specter of 28 U.S.C. § 2105. This obscure statute<sup>209</sup> provides: “There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.”<sup>210</sup> The statute is most notable for the inattention it has received.<sup>211</sup> Some judges have assumed that

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*Objection of Nonjoinder of Indispensable Party*, Supplementary, 5 Fed. R. Serv. (Callaghan) 820, 821 (1942). Because the commentator found that lack of an indispensable party presented a jurisdictional bar, the commentator concluded that it was properly the subject for a motion under Rule 12(b)(1) for lack of subject matter jurisdiction. *Id.* What the commentator never suggested was that Rule 12(b) generally authorized raising by motion such a defense, although unenumerated in Rule 12(b).

<sup>207</sup> See FED. R. CIV. P. 12(b) advisory committee’s notes (1946).

<sup>208</sup> *Id.*

<sup>209</sup> This provision of the U.S. Code has been referred to as “[o]ne of the most commonly ignored provisions of the Judicial Code.” *Andrews v. King*, 398 F.3d 1113, 1117 n.4 (9th Cir. 2005) (quoting 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3903, at 139 (1992)).

<sup>210</sup> 28 U.S.C. § 2105 (2006). This section of the U.S. Code dates back to the Judiciary Act of 1789, where it was first found at section 22. An Act to Establish the Judicial Courts of the United States, § 22, 1 Stat. 73, 84-85 (1789). Later, it was reworded when re-enacted in Revised Statute § 1011, then codified at 28 U.S.C. § 879, and later moved to 28 U.S.C. § 2105. See 28 U.S.C. § 2105 notes; see also *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 27 n. 3 (1943). When the Federal Rules of Civil Procedure were adopted and Rule 7(c) substituted motions for pleas, the original words of the statute “plea in abatement” and “plea to the jurisdiction” were replaced with the words “matters in abatement.” See 28 U.S.C. § 2105 notes; see also FED. R. CIV. P. 7(c) (1995) (repealed 2007) (“Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.”). Rule 7(c) was deleted in 2007 “because it has done its work.” FED. R. CIV. P. 7 advisory committee’s note (2007). Of course, the Advisory Committee’s comment appears premature in light of the advent and recent expansion of an unenumerated motion for raising a matter in abatement, which seems to be little more than a plea in abatement dressed in contemporary procedural syntax.

<sup>211</sup> See *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 212 (3d Cir. 1983) (Rose, J., concurring) (“[Section 2105’s] ‘most important feature . . . is certainly its disuse.’” (quoting 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3903, at 412, 413 (1976))), *overruled in part on other grounds by*

§ 2105 is limited to appeals following fully completed trials because it “was intended to protect the interest of the parties and the federal courts in fully completed trials,”<sup>212</sup> while others have questioned this conclusion.<sup>213</sup> The contemporary understanding of the scope of § 2105 is that it covers “the modern equivalent of a common law plea in abatement.”<sup>214</sup> In other words, it includes a defense “‘which merely defeats the present proceeding,’ and therefore does not address the merits of the action or prevent the plaintiff from suing in the future.”<sup>215</sup>

Although infrequently asserted—and even more rarely applied—§ 2105 lurks in the wings. Its obscurity allows courts to apply it to avoid a difficult issue, or avoid it to decide an issue that might otherwise be insulated from appellate reversal. Judges have expressed concern about the impact on appellate review of the whimsical application of the black letter of § 2105. At least one concerned judge of the federal courts of appeals has warned that a strict reading of § 2105 may prevent appellate review of “a wide range of issues, such as whether the district court should have abstained or deferred to either state, administrative, or private proceedings”<sup>216</sup>—precisely the issue at stake in an exhaustion defense. Indeed, if exhaustion is properly a matter in abatement, § 2105 seems at least to foreclose any appellate *reversal* of a determination about whether administrative remedies are available and, if so, whether a prisoner plaintiff has exhausted them; also, it may present a jurisdictional bar to appellate review altogether.<sup>217</sup>

Although the case law on § 2105 is limited, there is no strong evidence that it should not be applied to a ruling on an issue of exhaustion (were it properly considered a matter in abatement). But if § 2105 does appropriately cover exhaustion as a matter in abatement, then circuit court and Supreme Court decisions on the issue—or at least those that resulted in a reversal on the issue<sup>218</sup>—are jurisdictionally

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Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989), and Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). Section 2105 has been interpreted to apply only to civil cases, *Roche*, 319 U.S. at 27 n.3, and does not apply to appeals from state courts, *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205, 213 (1912) (interpreting Revised Statute § 1011, the predecessor to 28 U.S.C. § 2105).

<sup>212</sup> See *Coastal Steel*, 709 F.2d at 197.

<sup>213</sup> *Id.* at 213 n.6 (Rosenn, J., concurring).

<sup>214</sup> *Snyder v. Buck*, 340 U.S. 15, 32 (1950) (Frankfurter, J., dissenting).

<sup>215</sup> *Hyman v. City of Gastonia*, 466 F.3d 284, 288 (4th Cir. 2006) (quoting *Stephens v. Monongahela Bank*, 111 U.S. 197, 197 (1884)).

<sup>216</sup> *Coastal Steel*, 709 F.2d at 212 (Rosenn, J., concurring).

<sup>217</sup> *Compare Merchs. Ins. Co. v. Lilgeomont, Inc.*, 84 F.2d 685, 687 (5th Cir. 1936) (finding that § 2105, then still codified as 28 U.S.C. § 879, bars only reversal, not authority to review a decision on a matter in abatement), with *Hyman*, 466 F.3d at 290 (noting that an interpretation of § 2105 that bars only reversal may result in an unconstitutional advisory opinion, and holding that “the statute completely deprives this court of authority to review the district court’s abatement ruling”).

<sup>218</sup> See, e.g., *Jones v. Bock*, 549 U.S. 199 (2007) (reversing dismissal on, inter alia, exhaustion

infirm. Clearly, this result is absurd. The fact that no court has addressed the application of this statute in cases finding exhaustion to be a matter in abatement at least suggests that the label is being erroneously applied.

Despite the infrequent contemporary application of § 2105, prison officials have raised the statute to challenge appellate jurisdiction in at least one recent case. In *Andrews v. King*,<sup>219</sup> the district court granted summary judgment for the prison official defendants and dismissed the prisoner plaintiff's complaint without prejudice because he had failed to demonstrate that he was entitled to proceed *in forma pauperis*.<sup>220</sup> On appeal, the defendants asserted that the circuit court lacked jurisdiction to review the district court's decision because of § 2105.<sup>221</sup> The defendants contended that the decision regarding the plaintiff's *in forma pauperis* status was a matter in abatement because it did not address the merits of his civil rights claim.<sup>222</sup> While the court rejected this argument, the court's reasoning would not necessarily apply to the issue of exhaustion, which the court has already held to be a matter in abatement.<sup>223</sup> Therefore, it is not clear what an appellate court will do if a defendant raises § 2105 in an appeal from a dismissal for failure to exhaust.

D. *Judicially Deciding Factual Disputes on Claims of Failure to Exhaust Properly Upsets Longstanding Seventh Amendment Jurisprudence*

The circuit courts of appeals that have faced the issue of whether plaintiffs maintain a jury right on disputed issues concerning a defense of failure to exhaust administrative remedies have not addressed Seventh Amendment implications. Instead, as discussed above, those courts that have held that the judge should decide such factual disputes have based their conclusion largely on the policy justifications of the PLRA to ferret out frivolous prisoner litigation. However, the Seventh

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grounds); *Davis v. Talisman*, No. 08-15664, 2009 U.S. App. LEXIS 23457, at \*2 (9th Cir. Oct. 23, 2009) (reversing dismissal for failure to exhaust because "[t]he face of the complaint does not clearly concede nonexhaustion").

<sup>219</sup> 398 F.3d 1113 (9th Cir. 2005).

<sup>220</sup> *Id.* at 1115-16. Under another PLRA provision, codified at 28 U.S.C. § 1915(g), when a prisoner plaintiff has thrice had prior cases or appeals, brought while the plaintiff was a prisoner, "dismissed on the ground that [they were] frivolous, malicious, or fail[ed] to state a claim," the plaintiff cannot proceed *in forma pauperis*, except where "the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (2006).

<sup>221</sup> 398 F.3d at 1117.

<sup>222</sup> *Id.* at 1117-18.

<sup>223</sup> *See supra* Part II.A.

Amendment clearly entitles plaintiffs to have a jury try factual disputes on an affirmative defense such as exhaustion.

The Supreme Court has developed a two-part test to determine whether the Seventh Amendment confers a right to a jury trial in a particular case.<sup>224</sup> First, the Court looks to whether the cause of action or an analogous cause of action was tried at law (as opposed to equity) at the time of the adoption of the Seventh Amendment.<sup>225</sup> Where history does not provide a clear answer, the Court looks to precedent and functional considerations for guidance.<sup>226</sup> Applying this analysis, the question of judge or jury is quite clear. The Court has answered the first question—whether the cause of action is one at law—for the most prevalent civil rights claims, based on 28 U.S.C. § 1983, on more than one occasion with a resounding yes.<sup>227</sup>

If the Court finds that the claim falls within the scope of the Seventh Amendment, the second part of the inquiry asks whether the particular issue or an analogous one was decided by a judge or jury in suits at common law at the time the Seventh Amendment was adopted.<sup>228</sup> Although there was no formulation for the issue of exhaustion of administrative remedies when the Seventh Amendment was adopted, the Supreme Court has provided us with a sufficient analogue: the statute of limitations.<sup>229</sup> The statute of limitations defense is an issue that was historically decided at common law by a jury.<sup>230</sup> Furthermore, under the usual practice of the Federal Rules of Civil Procedure, defenses based on the statute of limitations are still left to the

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<sup>224</sup> *Markman v. Westview Instruments Inc.*, 517 U.S. 370 (1996); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

<sup>225</sup> *City of Monterey*, 526 U.S. at 708.

<sup>226</sup> *Id.* at 718-19.

<sup>227</sup> *See Wilson v. Garcia*, 471 U.S. 261, 271-76 (1985) (considering which common law action § 1983 most closely resembles for purposes of grafting the corresponding state statute of limitations and reasoning that because “[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action,” for judicial efficiency and continuity, all § 1983 actions should be characterized as “tort action[s] for the recovery of damages for personal injuries”); *see also City of Monterey*, 526 U.S. at 725-26 (Scalia, J. concurring) (agreeing with and elaborating on the majority’s conclusion that the Seventh Amendment guarantees a jury trial for all § 1983 claims because “all § 1983 claims should be characterized in the same way”); *Owens v. Okure*, 488 U.S. 235 (1989).

<sup>228</sup> *City of Monterey*, 526 U.S. at 718.

<sup>229</sup> *See Jones v. Bock*, 549 U.S. 199, 215-20 (2007).

<sup>230</sup> *See* 35 C.J. *Juries* § 57, at 176 (1924) (“In an action at law a plea of the statute of limitations raises an issue triable by jury, unless the admissions of the pleadings show that the statute has not run . . . .” (footnotes omitted)); CHITTY, *supra* note 176, at 588 (“When the *statute of limitations* has been pleaded, either that the defendant did not undertake, or that the cause of action did not accrue, within the six years ‘before the exhibiting of the plaintiff’s bill,’ and the plaintiff could prove a promise or acknowledgment within that time, the replication might deny the *plea generally*, and conclude to the country . . . .”).

jury where genuine issues of material fact pertinent to the defense exist.<sup>231</sup>

Even if exhaustion is analyzed as a matter in abatement, the same conclusion is reached. As discussed above,<sup>232</sup> at common law, the plea in abatement would be presented in lieu of, or before, a general demurrer.<sup>233</sup> The plaintiff would have the option to respond to the plea by replication to dispute the facts alleged in the plea. There is extensive historical support that a factual dispute on a matter in abatement was decided by the jury in the same manner as a plea in bar—as documented in civil cases,<sup>234</sup> in criminal cases,<sup>235</sup> and in numerous treatises.<sup>236</sup> This

<sup>231</sup> See *Pretus v. Diamond Offshore Drilling, Inc.*, 571 F.3d 478, 479, 486 (5th Cir. 2009); see also *Gomez v. City of Torrance*, 311 F. App'x 967, 969 (9th Cir. 2009); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 833 (11th Cir. 1999); *Tiberi v. CIGNA Corp.*, 89 F.3d 1423, 1428-31 (10th Cir. 1996) (reversing a grant of summary judgment on a defense of statute of limitations where genuine issues of material facts existed as to whether to toll the statute of limitations and whether the continuing wrong doctrine applied); *Reid v. United States*, 224 F.2d 102, 105 (5th Cir. 1955).

<sup>232</sup> See *supra* Part III.B.2.

<sup>233</sup> See CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 499-502 (2d ed. 1947).

<sup>234</sup> See, e.g., *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 23-24 (1943) (“In September, 1941, respondents filed pleas in abatement, asking that the indictment be quashed for [several reasons] . . . . The Government filed replications denying generally all the allegations of the pleas, and the issues thus raised were set for trial before a jury.”); *Brenham v. German-American Bank*, 144 U.S. 173, 178 (1892) (“The plea in abatement, or to the jurisdiction of the court, was tried by a jury, which found for the plaintiff; and afterwards the issues of fact on the pleadings were tried by a jury, which found a verdict for the plaintiff . . . .”); *Lessee of Walden v. Craig's Heirs*, 39 U.S. 147, 153 (1840) (“On this plea [in abatement] the plaintiff could take issue on the fact of the decease, and have it ascertained by the verdict of a jury.”); *Fischer v. Munsey Trust Co.*, 44 App. D.C. 212, 216 (D.C. Cir. 1915) (“[U]nder that plea [in abatement] he would be entitled to a trial by jury.”); *Dorrough v. Mackenson*, 157 So. 257, 259 (Ala. 1934) (“[W]e observe that defendant duly demanded a trial by jury. Such demand applied to the plea in abatement . . . as well as to other issues of fact.”); *Am. Ins. Co. v. Waycaster*, 3 S.E.2d 922, 922 (Ga. Ct. App. 1939) (“It is well settled that issues of fact raised by a plea in abatement should be submitted to a jury.”).

<sup>235</sup> See, e.g., *Daniel v. State*, 43 So. 22, 23 (Ala. 1907) (“The defendant filed a plea of misnomer to the indictment. Issue was joined on this plea. The evidence was in conflict. The court properly submitted the question to the jury.”); *Livingston v. State*, 145 So. 761, 764 (Fla. 1933) (“[P]leas in abatement raising an issue of fact shall be tried by a jury.”); *Woodward v. State*, 15 So. 252, 255 (Fla. 1894) (“This issue was one of fact resting in *pais*, and according to the long established rule requiring such issues to be tried by a jury, it should have been submitted to such body for trial. The court tries questions of law, and the jury passes upon questions of fact, and this rule applies to issues on pleas in abatement as well as to other issues.” (emphasis added)); *People v. Corbishly*, 158 N.E. 732, 739 (Ill. 1927) (“It is a general rule according to the English and American authorities, that . . . where an issue on a plea in abatement is joined, . . . such issue of fact is tried by a jury.”). *But cf.* *Miller v. Stout*, 706 S.W.2d 785, 787-88 (Tx. Ct. App. 1986) (declaring no right to a jury in hearings “on pleas in abatement or a Rule 12 motion” under the Texas Rules of Civil Procedure where the issue is “preliminary and incidental . . . [and] do[es] not involve the question of liability,” but not addressing preliminary hearings raising “a fact issue which [may be] decisive on the ultimate question of liability”).

<sup>236</sup> See, e.g., 35 C.J. *Juries* § 60, at 178 (1924) (“Issues of fact arising upon . . . pleas in abatement, should be submitted to the jury when a jury has been impaneled in the case, unless the issue is one which must be determined by an inspection of the record.” (footnotes omitted)); *id.* §

understanding is clearly reflected in the meetings of the Advisory Committee that drafted the original Federal Rules: Committee members explicitly recognized that factual disputes on many matters in abatement were for the jury to decide, and as a result, they doubted that such matters in abatement could be asserted in a preliminary motion.<sup>237</sup>

A likely source of confusion about when factual disputes were decided by the jury at common law is the tangled and complex common law pleading mechanisms and antiquated terminology. In common law pleadings, to request a jury trial once issue was joined—i.e., once the parties recognized a factual dispute<sup>238</sup>—the party opposing the plea simply had to conclude his or her response by using the talismanic phrase, “to the country.”<sup>239</sup> (At common law, “the country” meant “the

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57, at 176 (“In an action at law a plea of the statute of limitations raises an issue triable by jury, unless the admissions of the pleadings show that the statute has not run . . . .” (footnotes omitted)); CLARK, *supra* note 168 (“[I]f the plaintiff puts in a replication to the plea in abatement and the verdict of the jury is in favor of the plaintiff on the issue of fact, the plaintiff is entitled to judgment just as if the defendant had defaulted . . . .”); SHIPMAN, *supra* note 168, at 388 n.14 (“[W]here the objection [of the defect of the writ] is founded upon extrinsic facts . . . the matter must be pleaded in abatement [as opposed to being raised by demurrer or by a motion to quash], so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact.”); 1 CHARLES VINER, ABRIDGMENT OF THE MODERN DETERMINATIONS IN THE COURTS OF LAW AND EQUITY: BEING A SUPPLEMENT TO VINERS ABRIDGMENT 5 (1799) (“To an action on a joint bond, defendant pleaded *non est factum*, and the jury founded it to be the deed of both.”); *id.* at 16 (“[Plaintiff objected to defendant’s plea in abatement for misnomer by alleging that defendant was known by two names;] thereupon issue was joined, and [jury] verdict for plaintiff . . . . [T]here is no difference whether the issue be joined upon a fact in the plea in abatement, or in a plea in bar . . . .”).

<sup>237</sup> PROCEEDINGS OF CONFERENCE OF ADVISORY COMMITTEE DESIGNATED BY THE UNITED STATES SUPREME COURT TO DRAFT UNIFORM RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT COURT OF COLUMBIA UNDER THE ACT OF CONGRESS PROVIDING FOR SUCH UNIFORM OR UNIFIED RULES 351 (Nov. 14, 1935), available at <http://www.uscourts.gov/rules/minutes.htm> (“[Robert G.] Dodge. Most [matters in abatement] cannot be raised on motion, because they involve questions of fact . . . it involves a jury trial, if it is a jury case.”); *id.* at 352-53 (“Mr. Dodge. Suppose he pleads in abatement, that he is not sued in the right district, and I think he is entitled to a jury on that. . . . In Massachusetts, a plea in abatement would be the regular method of proceeding, and it would be tried by jury. Prof. [Edson R.] Sunderland. That is true in Illinois . . . .”). *But see id.* at 352 (“Mr. [William D.] Mitchell. I never considered the matter as to a jury trial, as to whether it is a suit in the right district.”).

<sup>238</sup> When a defendant asserted a plea in abatement, the plaintiff had essentially four choices: (1) acknowledge the factual and legal validity of the defendant’s plea and acquiesce in terminating the suit; (2) demur to the plea—deny the legal foundation for the plea—which, if the defendant persisted in the plea, would create a *legal* issue to be decided by the *judge*; (3) dispute a factual premise of the plea through a “replication,” which would create a *factual* issue to be decided by the *jury* (assuming the plaintiff used a talismanic phrase discussed below); or (4) present new facts that, if true, defeated the plea, and would lead to another round of pleadings. *See* 18 THE PENNY CYCLOPÆDIA OF THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE 246 (1840).

<sup>239</sup> BLACK’S LAW DICTIONARY 308, 712 (8th ed. 2004) describes the historical terminology of “going to the country” or “conclusion to the country” as where a pleading concludes with the phrase “to the country,” “by the country,” or “upon the country,” which signifies “[t]he act of requesting a jury trial.” *See also* 18 THE PENNY CYCLOPÆDIA OF THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE, *supra* note 238, at 246 (“A plea denying either one or all of

jury.”)<sup>240</sup> Influential common law treatises describing the intricate pleading terminology for disputing the factual basis for a plea in abatement conclude with such a demand and similar variations of the phrase.<sup>241</sup> Therefore, when properly understood, the winding common law path for asserting defenses in abatement leads to a familiar glade: Disputes of facts are decided by the jury; issues of law are left to the judge.

Even without this common law history, there is another compelling reason for recognizing factual disputes about exhaustion to be an issue properly left to a jury to decide: The Supreme Court has repeatedly affirmed a significant federal interest in ensuring the Seventh Amendment right to a jury trial.<sup>242</sup> The right is not amenable to limitation based on purely procedural modifications or changes. This limitation on the ability of the Federal Rules of Civil Procedure to modify the Seventh Amendment right was of paramount concern to Congress when it first gave the Supreme Court the power to adopt a uniform system of federal rules.<sup>243</sup> Because Congress allowed the

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the allegations in the declaration must ‘conclude to the country,’ that is, the defendant must state his readiness to submit to the decision of a jury (who are called ‘the country,’ as contradistinguished from the ‘court’) the truth of the matter of fact asserted in the declaration and denied in the plea.”).

<sup>240</sup> See BLACK’S LAW DICTIONARY, *supra* note 239, at 308, 712, 1544. Instead of “country,” some common law decisions and pleadings used the term “*pais*,” which is “[a] French word, signifying country. In law, matter in *pais* is matter of fact, in opposition to matter of record: a trial *per pais*, is a trial by the country—that is, by a jury.” 2 JOHN BOUVIER, A LAW DICTIONARY 345 (15th ed. 1883); see also BLACK’S LAW DICTIONARY, *supra*, at 1544 (indicating that “trial *per pais*” is the French legal term for “trial by the country” and means “[t]rial by jury”).

<sup>241</sup> A leading treatise on common law pleadings provides an example of the “[c]ommon” response to a plea in abatement—made in a “replication” to the plea—which would “conclud[e] to the country.” 3 HENRY GREENING, CHITTY’S TREATISE ON PLEADING AND PARTIES TO ACTIONS 417 (7th ed. 1844). The wording of the conclusion of the replication would be: “And this the plaintiff prays may be inquired of by the country.” *Id.*; see also CHITTY, *supra* note 176, at 656 (“[W]hen a replication *denies* the whole of the defendant’s plea, containing matter of fact, it should conclude *to the country* . . . . And it is an established rule applicable to every part of pleading, subsequent to the declaration that when there is an affirmative on one side and a negative on the other . . . the conclusion should be to the country . . . .” (emphases added)); 5 JACOB & TOMLINS, *supra* note 163, at 171 (“And when he that denies or traverses the fact, pleaded by his antagonist, has tendered the issue, thus, ‘and this he prays may be inquired of by the country;’ . . . the issue is said to be joined; both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined not by the judges of the Court, but by some other method; the principal of which methods is that by the Country, *per pais* . . . that is, by Jury.”).

<sup>242</sup> See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (“The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.”); see also *Ross v. Bernhard*, 396 U.S. 531 (1970); *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).

<sup>243</sup> See Act of June 19, 1934, 73 Pub. L. No. 415, 48 Stat. 1064 (commonly referred to as the Rules Enabling Act); see also FED. R. CIV. P. 38(a).



Supreme Court to propose rules that would merge law and equity—a movement that had been growing for some time<sup>244</sup>—and the Seventh Amendment did not govern suits in equity, Congress made sure that the Federal Rules of Civil Procedure could not affect any jury right previously within the Seventh Amendment’s guarantee.<sup>245</sup> Therefore, without persuasive common law history indicating that juries never decided factual disputes of preliminary matters, the presumption should be in favor of respecting this significant constitutional right.<sup>246</sup>

Finally, even in the context of legal defenses that are undoubtedly within the province of the court to decide as a preliminary matter—such as jurisdiction<sup>247</sup>—where disputed jurisdictional facts intertwine with facts going to the merits, the proper division between jury and judge insists that a jury be allowed to decide the disputed facts.<sup>248</sup> This

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<sup>244</sup> See generally Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935).

<sup>245</sup> See 48 Stat. at 1064 (“The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided however*, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate.”).

<sup>246</sup> See *Beacon Theaters*, 359 U.S. at 501 (“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” (internal quotation marks and citation omitted)).

<sup>247</sup> See, e.g., *Thornhill Publ’g Co. v. Gen. Tel. & Elecs Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (“Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary.”); SHADURUPDATES & SQUIERS, *supra* note 153 § 12.30(4) (“[W]hen a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.”).

<sup>248</sup> See *Land v. Dollar*, 330 U.S. 731, 735 (1947) (“[A]lthough as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits.” (footnote omitted)); 8 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 38.34 n.6 (3d ed. 2009) (“Trial on the merits required when jurisdiction turns on merits.” (citing *Land*, 330 U.S. at 735-39)); see also *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 213 n.10 (1974) (Douglas, J., dissenting) (“[I]f the jurisdictional issue is closely intertwined with or dependent on the merits of the case, the preferred procedure is to proceed to a determination of the case on the merits.” (citing *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359, 362-63 (5th Cir. 1967))); *McBeath*, 374 F.2d at 363 (“The question of jurisdiction here[] . . . is so inextricably connected with the merits of the case itself that it was error for the court to determine that it lacked jurisdiction, thereby dismissing the suit, without according [Plaintiff] a full opportunity to prove his case on the merits, particularly considering the incomplete record and the paucity of evidence before the court.”); *Schramm v. Oakes*, 352 F.2d 143, 149 (10th Cir. 1965) (“[W]here the issue of jurisdiction is dependent upon a decision on the merits[,] . . . the trial court should determine jurisdiction by proceeding to a decision on the merits. The purpose of postponing a determination upon a jurisdictional question when it is tied to the actual merits of the case is to prevent a summary decision on the merits without the ordinary incidents of a trial including the right to jury.”); *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934, 936 (9th Cir. 1960) (noting that in deciding that defendants’ business

statement produces two logical conclusions relevant in the exhaustion context. First, a defense of failure to exhaust administrative remedies is distinct from a defense of lack of jurisdiction because the former is an affirmative defense akin to the statute of limitations and is waivable,<sup>249</sup> unlike jurisdiction, which is a necessary prerequisite to a valid final judgment. As such, there is less urgency in deciding a matter of exhaustion preliminarily than there is with deciding a jurisdictional defense. Therefore, where facts relevant to the defense of exhaustion are dependent<sup>250</sup> on facts relevant to the merits of the case, there is no logical basis for extending any more authority to the court to decide the dispute than with disputes over jurisdictional facts that overlap with the merits. Second, this limitation on the court's power to settle factual disputes at a preliminary stage demonstrates that an interest in efficiency—which may be advanced by sidestepping a jury trial and allowing the judge to decide the matter—does not trump the basic premise that juries decide issues of fact.

E. *Policy Arguments for Deciding Exhaustion on Summary Judgment and Leaving Genuine Issues of Material Fact to the Jury*

One cannot understate the importance of which procedure is employed to raise and decide exhaustion defenses. First, depending on the procedural mechanism, the court may or may not be required to take the plaintiff's allegations in the complaint as true.<sup>251</sup> Second, the scope of the court's inquiry is vastly different depending on whether the

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was not shown to affect interstate commerce, “the [trial] court took from the jury the determination of the basic issue in the case” and so “the judgment must be reversed because of the court's assumption of the jury's prerogative”).

<sup>249</sup> See *supra* note 83 and accompanying text.

<sup>250</sup> In the cases cited *supra* note 248, various standards are applied to determine the necessary nexus and significance of the jurisdictional facts to the merits of the case to decide when the dispute of those facts should be left to the jury. It is well beyond the scope of this Note to consider or suggest the appropriate threshold, and therefore, this Note relies on the simple “dependent on” standard of *Land v. Dollar*. See 330 U.S. at 735.

<sup>251</sup> Compare *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n.1 (2002) (“[On a motion to dismiss,] we must accept as true all of the factual allegations contained in the complaint.” (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993))), with FED. R. CIV. P. 56(e)(2) (“[W]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.”), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (“[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence . . .” (internal quotation marks omitted)). The Advisory Committee Notes to the 1963 amendments to Rule 56 make this clear: “The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether this is a genuine need for trial.” FED. R. CIV. P. 56 advisory committee's notes (1963).

defense is raised on a motion under an enumerated Rule 12(b) defense—e.g., for lack of jurisdiction or improper venue or for failure to state a claim—on a Rule 12(c) motion for judgment on the pleadings, as opposed to on a motion for summary judgment.<sup>252</sup> This distinction will affect whether the parties will first have the benefit of discovery to support or oppose the motion and will affect what materials the court may properly rely upon in reaching its determination. For example, if the issue is raised on a Rule 12(b) motion for reasons other than failure to state a claim, matters outside of the pleadings may be considered; but if the motion is one for failure to state a claim, once matters outside the pleadings are considered, the court is required to convert the motion to one for summary judgment.<sup>253</sup> These two considerations are uniquely important in prisoner litigation, and particularly for the issue of exhaustion of administrative remedies.

Exhaustion procedures are not always limited to written procedures and are not always readily identifiable through documentary evidence. Although written or codified procedural rules may be *prima facie* evidence of an official policy or procedure,<sup>254</sup> courts have routinely acknowledged that alternative grievance procedures may arise through the acts or assurances of prison officials.<sup>255</sup> When inmates cannot comply with grievance procedures without essential help from prison officials and that assistance is withheld, the failure of the officials to facilitate the grievance process effectively renders administrative remedies unavailable.<sup>256</sup> These types of grievance procedures are

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<sup>252</sup> See FED. R. CIV. P. 12(d) (“If, on a motion [to dismiss for failure to state a claim] or [for judgment on the pleadings], matter outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”); FED. R. CIV. P. 56(c)(2) (“The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . .”); see also *Land*, 330 U.S. at 739 (noting that where the jurisdictional facts overlap with the facts establishing the merits of the claim, the district court “has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits”).

<sup>253</sup> See FED. R. CIV. P. 12(d).

<sup>254</sup> See *Monell v. Dep’t of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 691 (1978).

<sup>255</sup> See, e.g., *Curtis v. Timberlake*, 436 F.3d 709, 712 (7th Cir. 2006) (holding that inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies); *Brown v. Valoff*, 422 F.3d 926, 936 (9th Cir. 2005) (stating that information provided to a prisoner concerning the operation of grievance procedures was relevant in deciding whether available remedies had been exhausted); *Brown v. Croak*, 312 F.3d 109, 112 (3d Cir. 2002) (holding that when prison officials told a prisoner that grievance procedures were different than official procedures, the prisoner was not required to follow written procedures).

<sup>256</sup> See, e.g., *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004) (vacating a grant of summary judgment for the defendant on a failure-to-exhaust defense where the inmate submitted evidence that prison officials failed to respond to his requests for required grievance forms); *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004) (“Defendants may . . . be estopped from raising non-exhaustion as an affirmative defense when prison officials inhibit an inmate’s ability to utilize grievance procedures.”); *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (holding that

problematic for determination at the pleading stage because, without discovery, the plaintiff cannot present the court with facts to substantiate a claim that unwritten procedures exist or that the written procedures were not followed.<sup>257</sup>

Even at the summary judgment stage, courts are not well-situated to make a factually rich determination about whether unwritten grievance procedures exist. Discovery costs are high and overwhelming difficulties are likely to arise. For instance, factual disputes about exhaustion often involve the same prison officials who are the defendants in the prisoner's underlying civil suit. Pro se prisoner plaintiffs are forced to challenge contrary assertions of the prison through depositions of the very people who have inflicted harm on them and who may still be guarding them in prison—monitoring every aspect of their daily activities.

Without the benefit of live testimony and cross-examination, pro se prisoners will face an incredible hurdle to prove that unwritten grievance procedures exist. In spite of Judge Posner's and other jurists' faith in the discovery process,<sup>258</sup> prisoners—pro se prisoners especially—are at a severe disadvantage when it comes to effective discovery. Discovery is extremely difficult for a prisoner to pursue vigorously when the plaintiff's freedom is severely curtailed.<sup>259</sup> For example, a prisoner's access to a law library or legal assistance may be severely limited.<sup>260</sup> Furthermore, overriding concerns for institutional

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administrative remedies are unavailable if prison officials fail to respond to prisoners' grievances); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (“[T]he failure to respond to a grievance within the time limits contained in the grievance policy renders an administrative remedy unavailable.”); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (explaining that a grievance process “is not an ‘available’ remedy under § 1997e(a)” if prison officials prevent its use); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (“We believe that a remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under § 1997e(a) . . .”).

<sup>257</sup> See, e.g., *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003) (remanding for the district court to address the inmate's allegation that prison officials failed to provide necessary grievance forms).

<sup>258</sup> See, e.g., *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), amended by No. 07-1426, 2008 U.S. App. LEXIS 19985 (7th Cir. Sept. 12, 2008), cert. denied, 129 S. Ct. 1620 (2009).

<sup>259</sup> Cf. *Beard v. Banks*, 548 U.S. 521, 526 (2006) (noting that prisoners in level 2 of Pennsylvania's Long Term Segregation Unit are kept in solitary confinement for twenty-three hours per day, are not allowed any phone calls, may have only one visitor per month, and have no access to newspapers); *Turner v. Safely*, 482 U.S. 78 (1987) (upholding a regulation by the Missouri Division of Corrections banning correspondence between prisoners).

<sup>260</sup> See *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996) (“[There is no] abstract, freestanding right to a law library or legal assistance . . .”); see also *Shaw v. Murphy*, 532 U.S. 223 (2001) (holding that the First Amendment does not give inmates a right to provide legal assistance to other inmates). Under the Supreme Court's jurisprudence, a prisoner may not be entitled to receive legal advice from other inmates in order to challenge a prison's allegation that he has failed properly to exhaust his administrative remedies. Although the question of whether an inmate is entitled to legal assistance from a fellow inmate at the grievance step is beyond the scope of this Note, it certainly suggests significant due process concerns that are amplified by a

safety may prevent a pro se prisoner from gathering important discovery. For instance, a prison would have good reason to bar a pro se prisoner from deposing a correction officer who works in the facility where the prisoner lives. Also, prisoners are substantially less likely to possess documentary evidence to refute the prison's assertion of failure to exhaust properly<sup>261</sup> and may be forced to rely exclusively on their own assertions that they attempted to comply with prison grievance procedures.<sup>262</sup>

Furthermore, prisoners face serious collateral consequences from the dismissal of their claims. One example is the three-strikes provision of the PLRA.<sup>263</sup> Under this rule, once a prisoner has amassed three strikes—i.e., once the prisoner has had multiple claims dismissed as “frivolous, malicious, or fail[ing] to state a claim upon which relief can be granted”—the plaintiff is no longer entitled to *in forma pauperis* status for future filings (unless he or she is facing imminent and serious physical injury).<sup>264</sup> Most courts have found that “a routine dismissal for failure to exhaust administrative remedies does not count as a strike.”<sup>265</sup> However, a dismissal for failure to state a claim because of a failure to exhaust administrative remedies has been counted as a strike.<sup>266</sup> It is not clear whether a dismissal on an unenumerated Rule 12(b) motion on a matter in abatement would count as a strike or not. These collateral consequences can produce additional rounds of litigation, which defeats the PLRA's purpose of reducing the burden of prisoner filings on federal courts.<sup>267</sup>

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process of summary dismissal for failure to exhaust.

<sup>261</sup> For example, prisoners may be transferred between facilities, are limited in the property they can possess, and are subject to searches and confiscation. See *Substantive Rights Retained by Prisoners*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 967, 976-77 & n.2918 (2009) (“[A] prisoner has no liberty interest in remaining with inmates at a particular facility . . .”); *id.* at 979-81 & nn.2927-29 (“[P]rison officials may search prisoners' cells randomly without violating the Fourth Amendment” and a “seizure of an inmate's property by prison officials does not constitute a Fourth Amendment violation if the seizure serves legitimate institutional interests.”). Therefore, the risk that they will lose documentation or have it confiscated is substantially more likely.

<sup>262</sup> *Cf.* *Colby v. Sarpy County*, No. 8:04CV52, 2006 WL 519396, at \*5 (D. Neb. Mar. 1, 2006) (“[T]he plaintiff points out discrepancies and omissions in his inmate file produced by Douglas County, and he contends that he did exhaust his administrative remedies to the extent permitted by corrections officers at [Douglas County Correctional Center].”).

<sup>263</sup> See 28 U.S.C. § 1915(g) (2006).

<sup>264</sup> *Id.*

<sup>265</sup> See, e.g., *Green v. Young*, 454 F.3d 405, 409 (4th Cir. 2006).

<sup>266</sup> See, e.g., *Johnson v. Corr. Officer*, 342 F. App'x 933, 934 (5th Cir. 2009).

<sup>267</sup> See *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (“Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits.”).

## CONCLUSION

The finely wrought rules of federal civil procedure ensure predictability and fairness in federal court litigation. These rules reflect highly specialized considerations of centuries of experience with intricate pleading systems. Problems encountered in those systems—particularly with raising and deciding defenses—led the drafters of the Federal Rules of Civil Procedure to limit attacks on the pleadings, consolidate certain enumerated defenses into one pretrial motion, and relegate the remaining issues for responsive pleadings and, if necessary, decision after trial. This approach reflects a reasoned compromise in which the drafters specifically set aside some of the old common law pleas and demurrer as deserving a distinct pretrial motion. There is little reason to believe that by enumerating certain defenses to be raised by motion the Advisory Committee intended to permit “unenumerated” motions that raise other defenses. The debates of the original Advisory Committee, the subsequent history of amendments to the Federal Rules, basic canons of construction, and historic understanding of the jury’s role in deciding factual disputes of affirmative defenses all suggest that exhaustion of administrative remedies should be construed in the usual manner, like any affirmative defense:

- Where failure to exhaust appears on the face of the complaint, defendants are allowed to challenge the legal sufficiency of the cause of action through a motion pursuant to Rule 12(b)(6) (or Rule 12(c) if the defendants have already filed their answer).
- If defendants make a motion to dismiss—ostensibly pursuant to Rule 12—and submit additional materials to plead and prove their affirmative defense, the motion should be treated as one for summary judgment under Rule 56.
- Otherwise, defendants should affirmatively plead failure to exhaust as a defense in their answer.
- Where the defendants move for summary judgment on this affirmative defense, the plaintiff must be allowed to respond with his or her own factual averments, and
  - if the court finds that a genuine issue of material fact exists, the jury must resolve any such factual disputes;
  - otherwise, the court should decide the legal adequacy of the defense (and any applicable exceptions).

While civil filings by prisoners make up a significant portion of the federal courts’ docket, this does not justify *courts* in deploying more stringent and self-styled procedures specifically for prisoner-initiated

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lawsuits. The existing, usual practice under the Federal Rules of Civil Procedure—rules promulgated by the Supreme Court with Congress’s authorization—already empowers federal courts with tremendous authority to weed out meritless suits and inhibit the filing of frivolous ones. In fact, despite the rhetoric about prisoner-filed lawsuits overwhelming the federal judiciary, the existing procedures have reduced the number of prisoner suits that go to trial to a tiny fraction of the total number of civil trials in the federal district courts. More importantly, the low number of prisoner civil suits actually tried suggests that additional, and more stringent, procedures are not needed to handle these cases. Although prisoners are an easy and seemingly sensible target for more stringent civil procedures, these policy concerns are for the Supreme Court (in its rulemaking function) and Congress to hash out. Until they decide to amend the Federal Rules to provide for an abbreviated or summary procedure for deciding the exhaustion defense—or similar affirmative defenses in general—courts should follow the usual practice.