
COMMENT

COMPLETELY EXHAUSTED: EVALUATING THE IMPACT OF
WOODFORD V. NGO ON PRISONER LITIGATION
IN FEDERAL COURTS

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INTRODUCTION

On June 22, 2006, the Supreme Court decided an unglamorous administrative exhaustion case involving the ability of prisoners to bring civil lawsuits in federal court.¹ The case, *Woodford v. Ngo*, split the Court 6-3 with Justice Alito writing for the majority. The decision itself hinges on a close reading of the term “exhaustion” and its requirements under administrative law and the 1996 Prison Litigation Reform Act (PLRA).² The *Woodford* majority held that, in light of the PLRA, a prisoner must “properly exhaust[.]”³ administrative remedies before filing a claim in federal court; failure to follow this procedural requirement results in dismissal of an improperly exhausted claim.⁴ “Proper exhaustion,” as defined by the Court, requires prisoners not only to go through administrative proceedings and seek the remedies “that meet federal standards,” but also to pursue “all ‘available’ [administrative] remedies” to their procedural conclusion.⁵

Thus, on its face, *Woodford* appears to make filing claims in federal court even more difficult for prisoners by strictly interpreting the relevant statutory language. However, the goal of this Comment is to demonstrate that *Woodford* has had no such effect. Ten years after the Supreme Court’s decision, prisoners’ filings of unexhausted claims in federal court have actually increased. Prisoner-litigants likely do not have adequate knowledge of the procedural prerequisites to filing a civil claim in federal court. To resolve the ongoing disconnect between the law relevant to prisoner filings and filings in reality, this Comment proposes bridging the existing knowledge gap that may be partially responsible for improperly or unexhausted claims brought by prisoners in federal court. Including an informational cover sheet on prisoner pro se civil complaint forms that gives potential claimants an overview of the exhaustion requirement may at least give prisoners pause before writing out their claims and filing a suit that would be dismissed on procedural grounds.

Without making the relevant law salient to those it directly affects, *Woodford*’s deterrent impact on improperly exhausted prisoner civil claims may remain minimal. As a result, prisoners will likely continue to file improperly

1 *Woodford v. Ngo*, 548 U.S. 81 (2006).

2 *Id.* at 85.

3 *Id.* at 92.

4 *Id.* at 84-85.

5 *Id.* at 85.

exhausted civil claims in federal court, which require courts' time and resources to dismiss, even via order (in lieu of a full opinion). For prisoners, an ongoing knowledge gap in this context will mean running up against the PLRA's three strikes rule,⁶ additional filing fees, and perhaps due to procedural failings, losing the ability to bring a substantively meritorious claim.⁷

I. *WOODFORD V. NGO*: A PRIMER

A. *The Administrative Law Exhaustion Doctrine*

The exhaustion doctrine requires full use of an available administrative process—including appeals of an agency determination—before resorting to the courts.⁸ As articulated by the Supreme Court, the exhaustion requirement holds “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”⁹ The Supreme Court's decision in *McKart v. United States* is regarded as “the leading case on exhaustion.”¹⁰ In *McKart*, the Court reiterates the exhaustion requirement,¹¹ and explains several rationales for the doctrine:

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.¹²

⁶ See Broc Gullet, Comment, *Eliminating Standard Pleading Forms That Require Prisoners to Allege Their Exhaustion of Administrative Remedies*, 2015 MICH. ST. L. REV. 1179, 1211 (In combination with pleading requirements, failure to exhaust administrative remedies counts as a strike where a prisoner-claimant fails to state a claim: “Because such dismissals count as PLRA strikes against prisoners, the pro forma complaints with questions about exhaustion may ultimately cause PLRA strikes, which, in conjunction with two other strikes, will disqualify prisoners from claiming IFP Status to access the courts.”).

⁷ See *infra* notes 26–29 and accompanying text (describing some of the hurdles created by the PLRA that plaintiffs must overcome).

⁸ See CHARLES H. KOCH, JR. & RICHARD MURPHY, 4 ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed.) (“One challenging an agency decision must exhaust all administrative remedies before seeking judicial review.”).

⁹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

¹⁰ KOCH & MURPHY, *supra* note 8 at § 12:21[7].

¹¹ *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)).

¹² *Id.* at 193–94.

The Court restated the “twin purposes” of the exhaustion doctrine in its 1992 decision in *McCarthy v. Madigan*: “Exhaustion is required because it . . . protect[s] administrative agency authority and promot[es] judicial efficiency.”¹³

In *McCarthy*, the Court also defines the parameters of applying the exhaustion doctrine: “Where Congress specifically mandates, exhaustion is required But where Congress has not clearly required exhaustion, sound judicial discretion governs.”¹⁴ Where a statute requires administrative exhaustion, “the statute defines the extent of the exhaustion requirement.”¹⁵ For example, the relevant statute may require a claimant to raise an issue before the agency or face waiving the issue in court; failure to present a claim in the administrative proceeding may foreclose the ability to raise it later.¹⁶ Statutorily mandated exhaustion in the context of the Supreme Court’s *Woodford* decision is the focus of this Comment. This decision has set the standard for evaluating the ripeness of prisoners’ claims in federal court.

B. *The PLRA: The End of Prisoner Litigation in Federal Court?*

The PLRA exemplifies congressionally-mandated exhaustion.¹⁷ To understand trends in prisoner litigation, it is first helpful to review the PLRA’s exhaustion requirement.¹⁸ The PLRA was “enacted . . . in the wake

¹³ *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute*, Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*, as recognized in *Woodford v. Ngo*, 548 U.S. 81 (2006). *See also Woodford*, 548 U.S. at 89 (2006) (quoting *McCarthy* for the proposition that “[e]xhaustion 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.’” The Court continues to rely on *McCarthy* in the same section of its *Woodford* opinion to support the contention that “exhaustion promotes efficiency.”).

¹⁴ *McCarthy*, 503 U.S. at 144 (citations omitted).

¹⁵ KOCH & MURPHY, *supra* note 8 at § 12:21[3](a); *see also* *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (noting that the “mandatory language” of the PLRA exhaustion requirement “means a court may not excuse a failure to exhaust, even to take such circumstances into account.”).

¹⁶ KOCH & MURPHY, *supra* note 8; *see also* *Unemployment Comp. Comm’n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (“A reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.”); *see also Woodford*, 548 U.S. at 111 (Stevens, J., dissenting) (“It is important to emphasize that statutory waiver requirements always mandate, by their plain terms, that courts shall not consider arguments not properly raised before the agency . . .”).

¹⁷ *See supra* notes 13–15 and accompanying text (discussing exhaustion required by the legislature, as the Court considered it in *McCarthy v. Madigan*).

¹⁸ While the PLRA and its effects on prisoner litigation are not the focus of this Comment, the PLRA plays a significant, if not decisive, role in the Supreme Court’s *Woodford* decision, and in 21st century prisoner litigation trends more generally. *See* Kathleen J. McCabe, Note, *Woodford v. Ngo: Creating a Barrier to Justice Using the PLRA Exhaustion Provision*, 17 TEMP. POL. & CIV. RTS. L. REV. 277, 277 (2007) (noting that “Congress enacted the [PLRA] to reduce the quantity of prisoner litigation, improve the quality of suits brought by inmates, and to provide prisons with an opportunity to correct their own errors before being brought into federal court.”).

of a sharp rise in prisoner litigation in the federal courts The PLRA contains a variety of provisions designed to bring this litigation under control.”¹⁹ Lawmakers who brought the PLRA to fruition offered a seemingly logical argument for statutorily shrinking prisoners’ abilities to file suits in federal court: “[I]nmates . . . were unduly litigious, making federal cases out of the most trivial mishaps; the cases were deluging both executive and judicial officials who were supposed to respond to them, and the serious cases therefore risked getting drowned out by the frivolous”²⁰ In passing the PLRA, Congress aimed to curb “some of the quirkiest lawsuits ever to enter the court system, like the case of Kenneth Parker and his two-year suit over a jar of chunky peanut butter.”²¹ In the infamous “peanut butter suit,”²² Mr. Parker, serving a 15-year sentence for robbery in Nevada State Prison, “wanted to buy two jars of chunky peanut butter from the prison canteen,” but the canteen only sent him one jar of chunky, and substituted the second for a jar of smooth peanut butter.²³ In response to the canteen running out of chunky peanut butter, “Mr. Parker filed a civil rights suit, demanding a jail term for a prison official and \$5,500 for ‘mental and emotional pain.’”²⁴ The case dragged on for two years, with Mr. Parker refusing settlement.²⁵

Codified at 42 U.S.C. § 1997e(a), the PLRA exhaustion provision states: “No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”²⁶ An intended and nearly instant effect of this clause of the PLRA was to “undermine[] prisoners’ ability to bring, settle, and win lawsuits” by conditioning “court access on prisoners’ meticulously correct prior use of onerous and error-inviting prison grievance procedures.”²⁷

¹⁹ *Woodford*, 548 U.S. at 84.

²⁰ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1567 (2003).

²¹ Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (Mar. 21, 1994), <http://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html?pagewanted=all> [https://perma.cc/N4EZ-84NK]; see also Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1777 (2003) (discussing Senator Dole’s comments “introducing the PLRA on the Senate floor,” including mention of the peanut butter suit).

²² Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 817 (2008) (detailing various Senators’ comments on and reactions to prisoner-filed litigation, including the “peanut butter lawsuit,” in which an inmate sued after being served chunky peanut butter instead of smooth”).

²³ Dunn, *supra* note 21.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 42 U.S.C. § 1997e(a) (2012).

²⁷ Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 153–54 (2015); see also Roosevelt, *supra* note 21 at 1779 (noting that “to the extent that

In addition to the exhaustion requirement, the PLRA places additional procedural demands on inmates attempting to file in federal court. First, the “three strikes” rule prohibits prisoners from filing *in forma pauperis*

if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.²⁸

Second, even if the prisoner wants to and could otherwise proceed *in forma pauperis* under the three strikes maximum, the PLRA requires all inmate litigants to pay filing fees.²⁹ When courts assess prisoner filing fees, they calculate the following:

[W]hen funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of A) the average monthly deposits to the prisoner’s account; or B) the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.³⁰

Finally, the PLRA limits the substantive scope of prisoner complaints to physical injury: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.”³¹ While all of these procedural and substantive limitations work in combination to restrict prisoners’ access to federal courts, the exhaustion requirement as interpreted in *Woodford* is the focus of this Comment.

There has been considerable empirical work done to understand the volume of prisoner litigation before and after the PLRA, and scholars appear to agree that the PLRA delivered a decisive blow to prisoner litigation.³² Margo Schlanger has studied the PLRA extensively. Schlanger, who has collected and

success can be measured by the volume of suits, the PLRA has worked. Prisoners filed 41,679 civil rights suits in 1995; in 2000, the number had fallen to 25,504.”).

²⁸ 28 U.S.C.A. § 1915(g) (2012).

²⁹ 28 U.S.C.A. § 1915(b)(1).

³⁰ 28 U.S.C.A. § 1915(b)(1)(A)-(B).

³¹ 42 U.S.C.A. § 1997e(e).

³² Schlanger, *supra* note 27, at 156-62 (depicting the year-by-year numbers of prisoner civil rights filings from 1970-2012); see also Brian J. Ostrom et al., *Congress, Courts, and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1543-44 (2003) (“Section 1983 lawsuits have dropped significantly since passage of the PLRA, confirming our first testable proposition at the national level.”).

analyzed inmate filing data pre- and post-PLRA (from as early as 1970),³³ concludes that “the evidence establishes that as of 1995, before the PLRA was enacted, plaintiffs were successful in only a small minority of inmate cases filed, and even the successful cases usually garnered quite small damages.”³⁴

The PLRA made administrative exhaustion mandatory. Previously, “‘exhaustion’ of grievance procedures was required only if the district court deemed exhaustion ‘appropriate and in the interests of justice,’ and the relevant procedures had been certified as ‘plain, speedy, and effective’ by the federal Department of Justice”³⁵ Writing in 2003, Schlanger argued that in the immediate aftermath of the PLRA, “[t]he statute has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population.”³⁶

In a more recent article, Schlanger collects and presents updated data on prisoner filings and outcomes in both federal and non-federal claims.³⁷ Schlanger shows that, nearly twenty years after the PLRA became law, “[a]fter a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade Since 2007, filing rates, prison population, and filings have all plateaued.”³⁸ One aim of this Comment is to show that prisoner filings in *federal* court are not consistent with this prior work, and that in contrast to the trends presented in the existing literature, unexhausted prisoner claims in particular continue to increase.

Ten years after the PLRA’s passage, the Supreme Court read the PLRA exhaustion requirement in such a way as to nearly guarantee future depression of prisoner litigation in federal courts. In reality, however, prisoner filings in federal court do not appear to have declined after *Woodford*.

C. *Woodford v. Ngo: Parsing the Opinion*

Mr. Viet Mike Ngo was serving a life sentence for murder in California’s San Quentin State Prison when he filed an administrative grievance.³⁹ Mr. Ngo’s grievance requested that he be allowed to participate in religious activities, including “Catholic observances . . . Holy Week services, and Bible study, as well

³³ Schlanger, *supra* note 20, at 1583 (listing inmate population and civil rights filings in federal district courts from 1970–2001).

³⁴ *Id.* at 1626.

³⁵ *Id.* at 1627 (citations omitted).

³⁶ *Id.* at 1694.

³⁷ Schlanger, *supra* note 27, at 157 (presenting a chart titled “Prison and Jail Population and Prisoner Civil Rights Filings in Federal District Court, Fiscal Years 1970–2012”).

³⁸ *Id.* at 156.

³⁹ *Woodford v. Ngo* 548 U.S. 81, 86 (2006); *see also* Brief for Respondent at 1, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 271821.

as educational and volunteer activities.”⁴⁰ These restrictions were punishment—after being in “administrative segregation”—for “alleged ‘inappropriate activity’ with Catholic volunteer priests,” even though “Ngo was not issued any disciplinary report, and was never found guilty of any rules violation.”⁴¹

Ngo was in administrative segregation in October 2000, and faced restrictions to participating in these activities as of December 2000. After he filed his administrative grievance in June 2001,⁴² Ngo was informed that “[t]he Appeals Coordinator refused to accept the appeal for filing on the ground that Ngo had not submitted it within the time period allowed by California prison regulations, which is ‘within 15 working days of the event or decision being appealed.’”⁴³ Ngo attempted to re-file by “arguing that his appeal was timely because the continuing denial of access to special programs was ‘an ongoing action,’” but this claim was denied.⁴⁴ Without access to further administrative remedies in the California prison system, Ngo filed a § 1983 claim in federal district court alleging various constitutional complaints, including violations of the First Amendment and due process guarantees.⁴⁵ Defendants moved to dismiss Ngo’s complaint for failure to exhaust administrative remedies; the district court’s grant of this motion was later reversed by the Ninth Circuit.⁴⁶ The Ninth Circuit held “that respondent had exhausted administrative remedies simply because no such remedies remained available to him.”⁴⁷ The Supreme Court later granted certiorari to “address [the] conflict” in the Courts of Appeals created by the Ninth Circuit’s holding.⁴⁸

Justice Alito’s majority opinion helpfully lays out the parties’ disagreement regarding the meaning of “exhaustion” in this case.⁴⁹ Petitioner argued “that a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a

40 Brief for Respondent at 2, *Woodford*, 548 U.S. 81 (No. 05-416).

41 *Id.* at 1.

42 *Id.* at 2.

43 *Id.* (citing Cal. Code Regs. tit. 15, § 3084.6(c)); see also *Woodford*, 548 U.S. at 87 (reviewing the procedural history of Ngo’s case: “Approximately six months after that restriction was imposed, respondent filed a grievance with prison officials challenging that action. That grievance was rejected as untimely because it was not filed within 15 working days of the action being challenged.”).

44 Brief for Respondent at 2, *Woodford*, 548 U.S. 81 (No. 05-416).

45 *Id.* at 3.

46 *Id.* For a comprehensive overview of the procedural history and posture of *Woodford*, see McCabe, *supra* note 18, at 278-81; see also Karen M. Harkins Slocumb, Note, *How the Court Got it Wrong in Woodford v. Ngo by Saying No to Simple Administrative Exhaustion Under the PLRA*, 44 SAN DIEGO L. REV. 387, 391-94 (2007).

47 *Woodford*, 548 U.S. at 87.

48 *Id.*

49 Justice Breyer filed a concurrence, and Justice Stevens, joined by Justices Ginsburg and Souter, dissented.

precondition to bringing suit in federal court.”⁵⁰ By contrast, Respondent “argue[d] that this provision demands what he termed ‘exhaustion *simpliciter*.’”⁵¹ Ngo claimed that

[PLRA Section] 1997e(a) simply means that a prisoner may not bring suit in federal court until administrative remedies are no longer available. Under this interpretation . . . [b]are unavailability suffices even if this results from a prisoner’s deliberate strategy of refraining from filing a timely grievance so that the litigation of the prisoner’s claim can begin in federal court.⁵²

The Court disagreed with Ngo, ruling that the PLRA requires “proper exhaustion,” which the Court defines as not only the remedies “that meet federal standards,” but also “all ‘available’ [administrative] remedies.”⁵³ In fact, the Court noted that Ngo’s interpretation would render “the PLRA exhaustion scheme wholly ineffective.”⁵⁴

Here, further remedies were not available to Ngo because of the time of his filing. The Court reasoned that reading the “availability” of administrative remedies in the PLRA exhaustion requirement to include remedies unavailable because of untimely filing would eviscerate the PLRA’s purpose:

A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system’s procedural rules unless noncompliance carries a sanction, and under [R]espondent’s interpretation of the PLRA noncompliance carries no significant sanction. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court.⁵⁵

Thus, under the state of exhaustion law post-PLRA and post-*Woodford*, “proper exhaustion” of all “available” administrative remedies is required. This means that “a prisoner must bring her complaint to every level of the state’s prison grievance system and follow all of its procedures” in a timely manner.⁵⁶

Writing in dissent, Justice Stevens, joined by Justices Souter and Ginsburg, argued that in passing the PLRA, Congress did not “intend[] to authorize state correction officials to impose a [] limitation on prisoners’

⁵⁰ *Id.* at 88.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 84-85.

⁵⁴ *Id.* at 95.

⁵⁵ *Id.*

⁵⁶ Gray Proctor, *Ngo Excuses: Proving, Rebutting, and Excusing Failure to Exhaust Administrative Remedies in Prisoner Suits after Woodford v. Ngo and Jones v. Bock*, 31 *HAMLIN L. REV.* 471, 473 (2008).

constitutionally protected right of access to the federal courts.”⁵⁷ The dissent goes on to note that the text of the PLRA itself says nothing about “proper” exhaustion, and faults the majority for reading this requirement into the statute.⁵⁸ Justice Stevens further points out that the PLRA exhaustion requirement “does not distinguish between a denial on the merits and a denial based on a procedural error.”⁵⁹ Justice Stevens notes that “the PLRA has already had the effect of reducing the quantity of prison litigation, without the need for an extrastatutory procedural default sanction,”⁶⁰ and that the majority’s strict reading of the PLRA exhaustion requirement does not further congressional purposes of “reducing the number of frivolous filings, on one hand, while preserving prisoners’ capacity to file meritorious claims, on the other.”⁶¹ The dissent warns that “the procedural default sanction created by this Court, unlike the exhaustion requirement created by Congress, bars litigation at random, irrespective of whether a claim is meritorious or frivolous.”⁶²

Several arguments have been advanced that the *Woodford* Court got it wrong for reasons of policy, namely that “a prisoner may intend to, and believe that he did, follow the appropriate procedures to file a claim, yet . . . the prisoner has no further recourse for obtaining justice.”⁶³ Ngo appears to have raised a version of this argument, which the Court rejected: “Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims.”⁶⁴ As Novikov echoes, the Supreme Court’s “proper exhaustion” requirement “creates a clear incentive for states and prisons to structure their administrative processes in such a way as to increase the chance that inmate complaints will terminate in procedural default; one can imagine countless subtle and not-so-subtle ways to accomplish this end.”⁶⁵

⁵⁷ *Woodford*, 548 U.S. at 104 (Stevens, J., dissenting).

⁵⁸ *Id.* at 106.

⁵⁹ *Id.* at 105.

⁶⁰ *Id.* at 115.

⁶¹ *Id.* at 117.

⁶² *Id.* at 117-18; *see also* Roosevelt, *supra* note 21, at 1776 (“A rule that controls access to courts not by examining the merits of a claim but by shutting the door on uncounseled inmates who fail to navigate a procedural minefield is not a good one.”).

⁶³ McCabe, *supra* note 18, at 306.

⁶⁴ *Woodford*, 548 U.S. at 102.

⁶⁵ Novikov, *supra* note 22, at 830.

D. Post-Woodford Developments

Less than a year after *Woodford*, the Supreme Court addressed exhaustion of prisoners' civil claims again in *Jones v. Bock*.⁶⁶ The *Jones* Court did not "determine whether the grievances filed by petitioners satisfied the requirement of 'proper exhaustion,' . . . but simply conclude[d] that exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances."⁶⁷ *Jones*' significance comes from two key holdings.

First, the Court explicitly holds that exhaustion is an affirmative defense to be raised by defendants in an action governed by the PLRA.⁶⁸ This means that prisoners alleging civil rights violations do not have to demonstrate compliance with exhaustion requirements in their pleadings.⁶⁹ The *Jones* Court finds no justifications in the PLRA for reading exhaustion into the pleading standard.⁷⁰ This holding is significant because it both clarifies the filing requirements for prisoners, and it also specifically lays out the proper procedure for dismissing improperly exhausted claims. This decision in conjunction with *Woodford* provides lower federal courts with a neat framework for easily dismissing prisoners' unexhausted civil claims.

Second, the Court distinguishes between "complete" exhaustion and "proper" exhaustion. The respondents in *Jones* encouraged the Court to uphold the Sixth Circuit's reading of the PLRA exhaustion requirement as mandating "total" exhaustion, which would require the dismissal of an entire action if one of multiple claims were not exhausted.⁷¹ Reversing the Sixth Circuit, the Court declined to adopt this reading, and held instead that while "no unexhausted claim may be considered," the failure to exhaust one claim of many asserted does not warrant dismissal of an entire action.⁷²

II. "PROPER" EXHAUSTION AND PRISONER LITIGATION: WHAT RESULT?

The goal of this Comment is to fill a perceived gap in the literature: what has been the effect, if any, of the "proper exhaustion" standard announced in *Woodford* on prisoners' improperly exhausted claims brought in federal court? Scholars and courts alike have consistently argued that the PLRA is

⁶⁶ 549 U.S. 199 (2007).

⁶⁷ *Id.* at 219.

⁶⁸ *See id.* at 212 ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.").

⁶⁹ *Id.* at 216.

⁷⁰ *Id.* at 214.

⁷¹ *Id.* at 220-22. Respondents in *Jones* cite the total exhaustion requirement in federal habeas corpus to support their argument that the PLRA should mandate the same stringency.

⁷² *Id.* at 220, 223-24.

responsible for driving down prisoner litigation, and that *Woodford* would be yet another barrier to prisoners filing in federal court.⁷³ This Comment utilizes an empirical, quantitative approach to show that, in fact, prisoners' unexhausted civil claims have not been deterred by *Woodford*. Based on data from across ninety federal district courts⁷⁴ and the total in all federal district courts—for a total ninety-one data points—while the actual number of prisoner filings may have decreased for a short time period after *Woodford*, this does not tell the complete story: prisoners' civil filings in federal court as a percentage of total civil claims filed has not consistently gone down. In fact, nationally, prisoner civil claims in federal court comprised 21.2% of all civil claims in 2006, but 25.3% of all civil claims in 2016.⁷⁵

Furthermore, the number of unexhausted prisoner civil claims brought in federal court has not actually decreased since *Woodford*. Despite the Supreme Court's decision in *Woodford*, prisoners are still filing claims for which they have failed to exhaust available administrative remedies. As a result, federal courts must still expend time and resources to dismiss these improperly exhausted claims.

This Part describes the methodology and empirical findings, Part III analyzes identified trends, and Part IV concludes with recommendations for making the *Woodford* decision a salient deterrent of unexhausted prisoner litigation.

A. Methodology

For contextual purposes, it is helpful to get a sense of trends in prisoner litigation over the past decade since the Supreme Court decided *Woodford*. In order to determine trends across all federal districts, prisoners' filings as a percentage of all civil filings for the years 2016 and 2006 were calculated. This data was retrieved from U.S. Courts' Federal Court Management Statistics.⁷⁶ The September report was selected for each year. The total number of civil filings is reported as a total across all federal districts (on the first page of each year's report). For each individual

⁷³ Proctor, *supra* note 56, at 480.

⁷⁴ For the purposes of this Comment, only federal district courts located in the fifty states are included. Courts located in territories of Puerto Rico, the Virgin Islands, Northern Mariana Islands, and Guam are excluded.

⁷⁵ All federal filing data for years 2006–2016 has been retrieved from U.S. COURTS, COURT MANAGEMENT STATISTICS, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics>. For every year, the September report was selected. For the September 2016 report used to calculate prisoner litigation as a percentage of all civil filings, see U.S. COURTS, U.S. DISTRICT CTS. – NAT'L JUD. CASELOAD PROFILE (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf. For the 2006 report, see U.S. COURTS, U.S. DISTRICT CTS. – NAT'L JUD. CASELOAD PROFILE (2006), http://www.uscourts.gov/sites/default/files/statistics_import_dir/District_FCMS_Sep_2006.pdf.

⁷⁶ *Id.*

district, the total number of civil claims filed, and prisoner petitions, coded as civil litigation type “C,” appear at the bottom of the district’s yearly profile.⁷⁷

First, the total number of prisoner filings as a percentage of civil filings was calculated across all federal districts for every year from 2006 to 2016. These percentages were calculated based on the U.S. Courts data, as described above, using the national (all-district) totals for each year:

Table 1: Percentage of Prisoner Filings in Federal Court

Year	Total Prisoner Filings (All Federal)	Total Civil Filings (All Federal)	Percentage Increase
2006	54,955	259,541	21.17%
2007	53,945	257,507	20.95%
2008	54,786	267,257	20.50%
2009	52,304	276,397	18.92%
2010	51,900	282,894	18.35%
2011	53,611	289,252	18.53%
2012	54,299	278,441	19.50%
2013	56,955	284,604	20.01%
2014	60,675	295,310	20.55%
2015	52,531	279,036	18.83%
2016	73,725	291,851	25.26%

To calculate the prisoner civil filings as a percentage of all civil filings for each district in 2006 and 2016, respectively, the total number of civil filings was the denominator, and total number of civil prisoner filings (litigation type “C”) was the numerator for each district.⁷⁸

Prisoner filings are expressed as percentages of total civil filings in federal courts for a few reasons. First, the number of prisoner filings in each district does not give sufficient context. It is hard to know whether prisoners are particularly litigious in a given jurisdiction without knowing the general traffic of civil claims in the relevant federal court. Second, percentages are useful for comparing trends across time. Looking at the relative rise or fall of total numbers of prisoner civil claims in federal court may be meaningless without understanding the trends in that district.

⁷⁷ See Appendix.

⁷⁸ For the complete calculated dataset, see the Appendix.

For example, in 2016, Vermont saw 70 prisoner-filed civil claims, while the Northern District of Texas saw 2095.⁷⁹ However, in Vermont, those 70 prisoner claims were among 323 total civil filings (21.7%), and those in Northern Texas were 2095 of 5888 civil filings (35.6%).⁸⁰ Ten years prior, in these same districts, there were 46 prisoner-filed civil suits in Vermont (of 275, thus making up 16.7% of Vermont's civil docket), and 1759 in the Northern District of Texas (of 4516, making up approximately 39% of the civil docket).⁸¹ Looking solely at the number of prisoner-filed civil suits in these districts, it appears that the Northern District of Texas sees far more prisoner litigation, and that the number of prisoner suits increased from 2006 to 2016. However, by calculating prisoner suits as a percentage of each district's civil docket to understand how much of a burden prisoner suits actually add to the workload of federal courts, it becomes clear that the volume of suits by type is not dispositive. In the Northern District of Texas, prisoner civil suits actually *declined* as a percentage of all civil suits from 2006 (39%) to 2016 (35.6%). The results of these calculations were used to select the case studies for this Comment.

The federal districts compared in this Comment are: the District of Arizona, the Western District of Oklahoma, the Southern District of New York, and the Middle District of Tennessee. Arizona is the district with the largest drop in prisoner civil filings as a percentage of all civil filings. In 2006, prisoner-filed civil litigation was about 57% of all civil claims in Arizona; this figure fell to 30% in 2016. The average across all federal districts in 2006 was 21.2% and increased to 25.3% in 2016—a 4.1% increase. The individual district closest to the federal average over this time period is the Western District of Oklahoma, from 23.9% in 2006 to 28% in 2016. The Southern District of New York, regarded as one of, if not the, single most influential district courts in the country, is also included as a case study.⁸² Finally, the district with the largest increase in prisoner filings as a percentage of all civil filings is the Middle District of Tennessee, which increased from prisoner filings making up 16.7% of the civil docket in 2006, to 68.7% in 2016:

⁷⁹ U.S. COURTS, U.S. DISTRICT CTS. – NAT'L JUD. CASELOAD PROFILE (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf [<https://perma.cc/F2TV-YUH5>].

⁸⁰ *Id.*

⁸¹ U.S. COURTS, U.S. DISTRICT CTS. – NAT'L JUD. CASELOAD PROFILE (2006), http://www.uscourts.gov/sites/default/files/statistics_import_dir/District_FCMS_Sep_2006.pdf [<https://perma.cc/PLQ3-ABS5>].

⁸² See generally JAMES D. ZIRIN, THE MOTHER COURT: TALES OF CASES THAT MATTERED IN AMERICA'S GREATEST TRIAL COURT (2014) (chronicling the history of the US District Court for the Southern District of New York as the most influential district court in the country).

Table 2: Total and Prisoner Civil Filings in Four Select District Courts

District	2006 Total	2006 Prisoner	2016 Total	2016 Prisoner
D. Ariz.	4369	2489	5307	1590
M.D. Tenn.	1535	257	3225	2217
S.D.N.Y.	10793	1147	10553	1568
W.D. Okla.	1506	360	1485	416

Using the selected jurisdictions, several keyword-based Bloomberg docket searches were conducted to better understand trends in unexhausted prisoner claims. Bloomberg dockets cover federal proceedings from 1989 to present day.⁸³ Docket searches were conducted in lieu of opinion searches in other legal databases such as Westlaw or LEXIS, because searching for opinions would not necessarily capture all filings of improperly exhausted claims.⁸⁴ Unless the court where the claim was filed issued an opinion (instead of an order), searching for opinions would not produce an accurate picture of “improperly” exhausted prisoner claims in federal court.⁸⁵ These searches were most recently conducted on March 12, 2017. Where a docket is “last updated” after a search has been conducted, the total number of search results may change slightly. For example, an earlier search of “exhaust administrative remedies” yielded 474 total results pre-*Woodford* and 722 post-*Woodford*. Despite these changes in search results based on when the search is conducted, the overall trends in the data remain the same.⁸⁶

⁸³ *Dockets*, BLOOMBERG LAW, <https://www.bloomberglaw.com/dockets/coverage/detail> [<https://perma.cc/FWN6-TDCL>].

⁸⁴ See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 517 (2016) (“Numerous studies have pointed to the skewed picture of trial courts’ workload, management, and disposition of cases that exists from examining Westlaw and Lexis opinions alone, akin to navigating the iceberg from its tip.”).

⁸⁵ See, e.g., David L. Goodwin, *The Separate Document Rule of Fed. R. Civ. P. 58: The History, the Mystery, and the Future*, 22 WIDENER L. REV. 71, 101 (2016) (noting that “[i]f a court entirely eschews an explanation and enters an order saying, ‘The motion to dismiss is granted and the complaint is dismissed,’ that suffices” and citing cases where this was adequate).

⁸⁶ The following method was used to structure docket searches in Bloomberg:

1. Selected “Dockets” in Bloomberg, add four districts (noted above) to “Courts” section of search, using the “Browse” feature.
2. Entered selected keywords (see Table 3 below) for each search.⁸⁶
3. Confined date ranges from 01/01/1996–06/22/2006 (pre-*Woodford*) and 06/22/2006–12/31/2016 (post-*Woodford*) using the “Date Range” feature.⁸⁶ Thus, each keyword-based search was conducted twice (one time for pre- and post- *Woodford* date ranges).
4. Selected “Federal Nature of Suit” using the “Browse” feature (selected all four for every search): “Prisoner Petitions – Civil Detainee – Conditions of Confinement [*560],” “Prisoner Petitions – Civil Rights [*550],” “Prisoner Petitions – General [*530],” and “Prisoner Petitions – Prison Condition [*555].”

Limitations to this methodology remain. Keyword searching dockets does not necessarily lead to every relevant result. Furthermore, docket searching is an imperfect way to capture trends because not every returned result may actually reflect the trend; for example, a docket that Search 4 (below) returned may have included a motion to dismiss for failure to exhaust that was actually denied. Due to limitations of time and resources, it was not possible to read every docket that each search returned. However, the overall trends in these search results across the four jurisdictions studied are consistent.

In addition to the limitations of keyword searching, it is unclear whether this data includes habeas petitions, which have their own exhaustion requirements separate from those of the PLRA and *Woodford*.⁸⁷ It is possible—although not explicitly clear—that prisoners’ civil filings coded as litigation type C by the U.S. Courts’ Federal Court Management Statistics datasets include habeas petitions; if all prisoner suits are coded based on the federal civil cover sheet, then all civil cases brought by prisoners may be grouped together.⁸⁸ If habeas petitions are included in litigation type “C” data, this may weaken the conclusion that all of the fluctuations in prisoner litigation calculated using this data result from increases in claims that are governed by the PLRA and *Woodford*.

However, even if habeas petitions are included in all prisoner civil litigation figures, this may not be entirely problematic here for at least two reasons. First, habeas petitions are a form of prisoner civil litigation that require exhaustion (but not exhaustion as defined in the PLRA and *Woodford*), and thus do burden federal courts. Second, it does not appear that habeas petitions account for such a sizable portion of federal prisoner civil litigation.⁸⁹ In a comprehensive study, Nancy King noted that “[s]tate prisoners file between 16,000 and 18,000 habeas cases every year.”⁹⁰ Of course, some districts see more habeas petitions than others, but this is not an incredibly large figure spread over all federal jurisdictions in the United States. In addition, because the calculation of prisoner civil suits as a percentage of each jurisdiction’s civil docket would include habeas petitions in both the numerator and the denominator, *i.e.* prisoner civil filings (numerator) that include habeas petitions would necessarily be part of the total civil filings in the jurisdiction (denominator), such that the inclusion of habeas petitions in both figures would at least slightly offset the effect of

⁸⁷ I owe much gratitude to Professor Catherine Struve for bringing this point to my attention.

⁸⁸ See Civil Cover Sheet, http://www.uscourts.gov/sites/default/files/js_044_1.pdf [<https://perma.cc/A2F5-4VUX>] (showing that Prisoner Petitions as a form of suit are all grouped together).

⁸⁹ Nancy King and Colleague Joseph Hoffman Propose Reforms in Use of Habeas Law in New Book, VANDERBILT LAW SCHOOL (Mar. 29, 2011), <https://law.vanderbilt.edu/news/nancy-king-and-colleague-joseph-hoffmann-propose-reforms-in-use-of-habeas-law-in-new-book/> [<https://perma.cc/K85G-NBAF>].

⁹⁰ *Id.*

habeas petitions on the calculated data.⁹¹ It is also possible that some of the keyword searches on Bloomberg captured prisoners' habeas petitions, if dismissed for failure to exhaust. That this was the best available data to understand the magnitude of prisoner civil filings since *Woodford* speaks to a shortcoming in data gathering and organization. As will be discussed further, one area for future improvement would be to separate habeas petitions from other prisoner civil suits for recordkeeping purposes and for there to be more detailed, type-specific data on prisoner civil filings.⁹²

The following searches yielded results that consistently showed an increase in the prevalence of exhaustion-related search terms after *Woodford* was decided (pre-*Woodford* date range was searched as Jan. 1, 1996–June 22, 2006; post-*Woodford* date range was searched as June 22, 2006–Dec. 31, 2016).

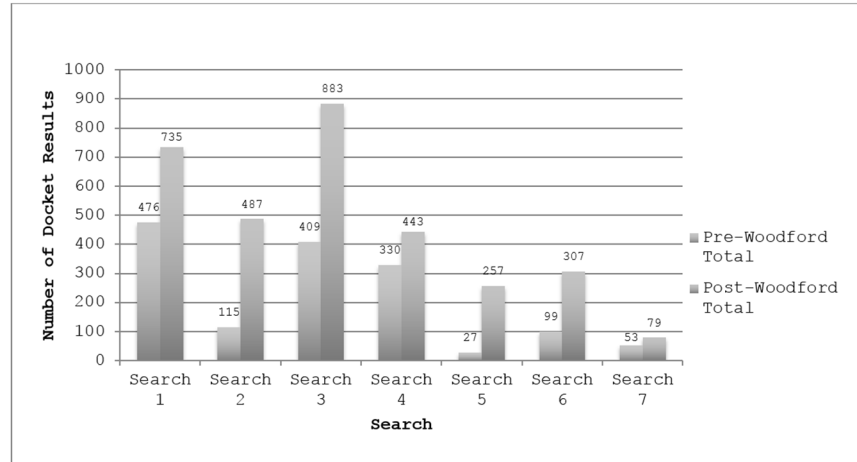
Table 3: Search Terms and Corresponding Results

Time Period	W.D. Okla.	S.D.N.Y.	M.D. Tenn.	D. Ariz.	Total
Search 1: "exhaust administrative remedies"					
Pre- <i>Woodford</i>	96	128	66	186	476
Post- <i>Woodford</i>	127	266	96	246	735
Search 2: "Prison Litigation Reform Act" AND "exhaustion"					
Pre- <i>Woodford</i>	26	46	1	42	115
Post- <i>Woodford</i>	35	251	82	119	487
Search 3: "exhaustion" AND "administrative remedies"					
Pre- <i>Woodford</i>	85	130	24	170	409
Post- <i>Woodford</i>	113	368	99	303	883
Search 4: "Failure to exhaust administrative remedies" AND "Dismiss"					
Pre- <i>Woodford</i>	70	98	35	127	330
Post- <i>Woodford</i>	77	157	46	163	443
Search 5: "Woodford v. Ngo" AND "Failure to exhaust" AND "dismiss"					
Pre- <i>Woodford</i>	0	12	0	15	27
Post- <i>Woodford</i>	12	125	23	97	257
Search 6: "1997e(a)" AND "Failure to exhaust administrative remedies"					
Pre- <i>Woodford</i>	30	40	2	27	99
Post- <i>Woodford</i>	39	137	44	87	307
Search 7: "Dismissed for failure to exhaust administrative remedies"					
Pre- <i>Woodford</i>	17	19	6	11	53
Post- <i>Woodford</i>	22	22	15	20	79

⁹¹ Of course, given the small overall number of habeas petitions relative to total civil filings across all federal jurisdictions, it is possible that some numerators were overstated here.

⁹² See Part IV, *infra*.

Figure 1: Bloomberg Docket Keyword Search Results



B. Summary: Key Findings

Based on the docket searches and data gathered, the “proper exhaustion” requirement announced in *Woodford* does not appear to have decreased the amount of prisoner filings in district courts. In fact, across all four of the jurisdictions searched, the number of instances where failure to exhaust language occurred was higher post-*Woodford*. This suggests that while total numbers of prisoner claims filed in federal court may have decreased in the years immediately following enactment of the PLRA (but have increased in more recent years), the number of nonexhausted prisoner civil filings did not respond to *Woodford* in the way that the Court may have intended. Similarly, *Woodford* does not appear to have driven down the amount of improperly exhausted claims that prisoners file in federal court. This outcome may be explained by a disconnect between the subjects of the PLRA and parties to related Supreme Court decisions and the population of people who are actually informed about developments in the law. It is unlikely that prisoners filing pro se civil claims in federal court are aware of the exhaustion requirement. Even if they have heard of “proper exhaustion,” they may not realize what it means or what it requires.

The total number of prisoner claims may have been affected in the years immediately following the PLRA, but the amount of *unexhausted* claims as a sub-set of prisoner litigation appears to have actually increased overall. The following analysis explains the significant drop in total prisoner civil filings in districts like Arizona, the explosion of prisoner litigation in jurisdictions like the Middle District of Tennessee, and the increase in the number of instances of exhaustion-related docket entries across these districts.

III. ANALYZING TRENDS: *WOODFORD*'S FAILURE TO BLOCK PRISONERS' UNEXHAUSTED CIVIL CLAIMS FROM ENTERING FEDERAL COURT

Woodford does not appear to have actually deterred prisoners from filing “improperly” exhausted claims. In fact, across all four case study districts, the data indicates that unexhausted prisoner claims have increased since *Woodford*. However, prisoner civil filings as a percentage of total civil suits in each district are less consistent. Here, Arizona and Tennessee are the key outliers, and I will analyze their experiences first. Next, two explanations will be offered to reconcile the post-*Woodford* increase in unexhausted prisoner claims in federal court and overall trends in prisoner litigation. First, prisoners are likely unaware of the proper exhaustion requirement, and second, as prison sentences have gotten longer, inmates have more time to contemplate and file civil suits while incarcerated.

A. *Explaining the Outliers*

The data collected and analyzed here suggests that unexhausted claims filed by prisoners have consistently increased, even in districts where prisoner civil claims have decreased as a percentage of all civil claims filed. The disparate experiences of these jurisdictions indicate that *Woodford* did not have a uniform, if any, effect on inmate litigation. In Arizona, prisoner-filed suits made up 57% of the district's civil docket in 2006 but only 30% in 2016. This is additionally puzzling because Arizona has one of the highest incarceration rates in the United States (596 per 100,000 in 2015).⁹³ Although the national rate of incarceration decreased in 2015 to become “the lowest since 1997,”⁹⁴ Arizona's prison population has actually increased.⁹⁵ However, Arizona prisoners' civil filings may be explained first by geography, and then by at least two other developments.

First, because of its location on the U.S.–Mexico border, Arizona frequently deals with immigration-related offenses. In 2012, the U.S. Sentencing Commission reported that the District of Arizona had more instances of illegal reentry (3873) than any individual district of Texas, the District of New Mexico,

⁹³ *State-by-State Data, Arizona*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#detail?state1Option=Arizona&state2Option=0> [<https://perma.cc/TN2V-UVV3>]. (last visited Mar. 28, 2017).

⁹⁴ E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, 1, 8 (U.S. Dep't of Justice Statistics, Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/5HBB-JPDF>].

⁹⁵ The Sentencing Project reports that in 2006, Arizona had a prison population of 31,830, but in 2015, this number had increased to 40,952. *State-by-State Data, Arizona*, *supra* note 93.

or the Southern District of California.⁹⁶ In 2015, Arizona remained in the “top five districts” of illegal reentry offenders, though it had been surpassed by the District of New Mexico and the Southern and Western Districts of Texas.⁹⁷ The increase in Arizona’s prison population can also be explained by the proportionally greater amount of marijuana trafficking cases that Arizona has dealt with. In 2012, the District of Arizona saw 1934 marijuana trafficking cases,⁹⁸ and in 2015, Arizona continued to rank as the district with the most marijuana trafficking offenders, with a total of 696.⁹⁹

Second, Arizona opened a new, privately-run prison in 2014: the Red Rock Correctional Center.¹⁰⁰ While the addition of a correctional facility suggests more prisoner-filed civil litigation, the opposite may in fact be true. As new facilities open, overcrowding becomes less problematic, and thus, prison conditions, which are often the subject of inmate litigation, may actually improve.¹⁰¹ According to Federal Bureau of Prisons data, overcrowding was higher in 2004 (at 41%) than in any year thereafter.¹⁰² There was a large increase in the number of facilities from 2004 (109) to the following year (116 in 2005), with a corresponding drop in overcrowding (to 34%).¹⁰³

In addition, in 2012, the American Civil Liberties Union (ACLU) filed a major class action, *Parsons v. Ryan*, on behalf of 33,000 Arizona prisoners.¹⁰⁴ In *Parsons*, the ACLU alleged “years of inattention to the health needs of state prisoners and improper and excessive use of solitary confinement, resulting

96 U.S. SENTENCING COMM’N, QUICK FACTS—ILLEGAL REENTRY OFFENSES FY 2012, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf [https://perma.cc/KFM4-Y58T].

97 U.S. SENTENCING COMM’N, QUICK FACTS—ILLEGAL REENTRY OFFENSES FY 2015, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry_FY15.pdf [https://perma.cc/5GKU-NAH3].

98 U.S. SENTENCING COMM’N, QUICK FACTS—MARIJUANA TRAFFICKING OFFENSES FY 2012, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Marijuana_Trafficking.pdf [https://perma.cc/FJ6Q-4UT8].

99 U.S. SENTENCING COMM’N, QUICK FACTS—MARIJUANA TRAFFICKING OFFENSES FY 2015, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY15.pdf [https://perma.cc/Y7D6-TK5Q].

100 *Red Rock Correctional Center*, ARIZ. DEP’T OF CORRECTIONS, <https://corrections.az.gov/location/112/red-rock-correctional-center> [https://perma.cc/KS6L-WDHG] (last visited Mar. 28, 2017).

101 See Robert M. Lapinsky, *Prisons Conditions: The Eighth Amendment Standard and the Remedial Authority of Judges*, 57 GEO. WASH. L. REV. 1387, 1387 (1989) (noting that prison conditions “have been a frequent subject of litigation in recent years”).

102 NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 19 (2016), <https://fas.org/sgp/crs/misc/R42937.pdf> [https://perma.cc/443M-SD2B].

103 *Id.*

104 *Parsons v. Ryan*, ACLU, (Oct. 27, 2017) <https://www.aclu.org/cases/parsons-v-ryan> [https://perma.cc/A7RX-C4V4].

in serious harm and unnecessary deaths.”¹⁰⁵ In 2014, the parties reached a settlement that “requires the Arizona Department of Corrections (ADC) to meet more than 100 health care performance measures, covering issues such as monitoring of prisoners with diabetes, hypertension, and other chronic conditions; care for pregnant prisoners; and dental care.”¹⁰⁶ The suit may also have had spillover effects that improved other aspects of the Arizona prison system. Fearing future lawsuits, the ADC may have preemptively made changes to more than just the healthcare policies and procedures in its correctional facilities. Thus, perhaps as a result of the suit, conditions improved sufficiently to eliminate the need for some prisoners to file civil suits for rights violations, since the settlement prompted change in policies that tempered (or prevented) the violations, at least for a short time.

In 2016, the ACLU reported that the “ADC’s own documents showed them to be chronically out of compliance with key health care performance measures.”¹⁰⁷ In response, the ACLU “filed a motion asking the court to order ADC to take immediate steps to comply with its obligations under the settlement agreement.”¹⁰⁸ The court issued an order requiring compliance by the ADC, including the “use [of] community medical providers if necessary to ensure that prisoners are timely provided with the health care to which they are entitled under the settlement.”¹⁰⁹ The public nature of this case and its outcome may help to account for the overall decrease in prisoner civil filings in Arizona over the 2006–2016 period. It is important to remember that total civil filings in Arizona increased during this time, further diluting the relative volume of prisoner-brought civil suits.¹¹⁰

The Middle District of Tennessee is also an outlier here because prisoner civil filings in this district increased the most out of any federal jurisdiction, from 16.7% of the district’s civil docket in 2006 to 68.7% in 2016. Tennessee’s huge upswing in prisoner civil claims may be explained by the closure of two facilities: Brushy Mountain Correctional Complex (closed in 2009)¹¹¹ and Charles Bass

¹⁰⁵ Press Release, ACLU, Arizona Agrees to Major Improvements in Prison Health Care, Crucial Limits on Solitary Confinement in Landmark Settlement (Oct. 14, 2014), <https://www.aclu.org/news/arizona-agrees-major-improvements-prison-health-care-crucial-limits-solitary-confinement> [https://perma.cc/ED9J-S6J9].

¹⁰⁶ *Id.*

¹⁰⁷ *Parsons v. Ryan*, ACLU, (Nov. 28, 2016) <https://www.aclu.org/cases/parsons-v-ryan> [https://perma.cc/MMR3-6BF6].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ In 2016, 5,307 civil suits were filed in the District of Arizona, only 1,590 of which were prisoner petitions. Other civil matters—including social security, personal injury, and labor disputes, among other types of claims—account for the remaining 70% of Arizona’s federal civil docket that year. U.S. COURTS, U.S. DISTRICT CTS.—NAT’L JUD. CASELOAD PROFILE (2016), *supra* note 79.

¹¹¹ Lindsey Ziliak, *Brushy Mountain Inmates Transferred as Prison Shuts Down After 113 Years*, KNOXVILLE NEWS SENTINEL (June 8, 2009), <http://archive.knoxnews.com/news/local/brushy->

Correctional Complex (CBCC) (closed in 2014).¹¹² In addition, the Southeastern Tennessee State Regional Correctional Facility merged with Bledsoe County Correctional Complex.¹¹³ The decrease in total number of prisons in Tennessee may contribute to overcrowding and worsening of prison conditions, which in turn gives rise to prisoners' civil claims.¹¹⁴ Despite closing two facilities and merging two others to create one larger complex, the "average daily population" of Tennessee prisons has actually increased. Between 2006 and 2007, there were sixteen facilities in Tennessee and an average daily population of 19,389 inmates.¹¹⁵ In June 2016, however, Tennessee had 14 operating facilities and an average daily population of 20,260.¹¹⁶ The Sentencing Project also reports an increase in Tennessee's total prison population: in 2006, Tennessee incarcerated 25,745 people in its prisons, but by 2014, that figure increased to 28,769.¹¹⁷

Coupled with fewer facilities and a growing prison population, Tennessee prisons have faced a Hepatitis C "epidemic."¹¹⁸ Indeed, in July 2016, the ACLU filed a class action suit against the Tennessee Department of Corrections for its failure to test inmates for Hepatitis C and treat them adequately.¹¹⁹ Failure to test and treat all inmates affected by Hepatitis C may also have contributed to the number of prisoners' civil claims skyrocketing in the Middle District.

Prison openings and closures, impact litigation, geography, and, as discussed below, the availability of inmate-specific *pro se* civil filing forms, all may help to explain various jurisdictions' experiences. These variables have operated independently of *Woodford*; indeed, these districts' varying experiences with

mountain-inmates-transferred-as-prison-shuts-down-after-113-years-ep-409958898-359369871.html [https://perma.cc/GE3T-MNF2].

¹¹² Getahn Ward, *119-Acre Former State Prison Complex in Nashville Put Up for Sale*, TENNESSEAN (Oct. 25, 2016), <http://www.tennessean.com/story/money/real-estate/2016/10/25/119-acre-former-state-prison-complex-nashville-put-up-sale/92734882/> [https://perma.cc/JKF6-WVMW].

¹¹³ *Bledsoe County Correctional Complex*, TENN. DEP'T OF CORRECTION, <https://www.tn.gov/correction/article/tdoc-bledsoe-county-correctional-complex> [https://perma.cc/7672-6HKJ].

¹¹⁴ *Supra* notes 101–103 and accompanying text.

¹¹⁵ TENNESSEE DEPARTMENT OF CORRECTIONS, ANNUAL REPORT 74 (2007), <https://www.tn.gov/content/dam/tn/correction/documents/AnnualReport2007.pdf> [https://perma.cc/2FK7-7JCL].

¹¹⁶ TENN. DEP'T OF CORRECTIONS, STATISTICAL ABSTRACT 56 (2016), <https://www.tn.gov/content/dam/tn/correction/documents/StatisticalAbstract2016.pdf> [https://perma.cc/J74P-D3JJ].

¹¹⁷ *State-by-State Data, Tennessee*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#detail?state1Option=Tennessee&state2Option=o> [https://perma.cc/TW27-CZNP] (last visited Mar. 28, 2017).

¹¹⁸ Dave Boucher, *Lawmaker: Tennessee Prisons Need to Say Which Inmates Have Hepatitis C*, TENNESSEAN (May 23, 2016), <http://www.tennessean.com/story/news/politics/2016/05/23/lawmaker-test-all-tennessee-inmates-hepatitis-c/84773870/> [https://perma.cc/T4ZU-KYZC].

¹¹⁹ *Lawsuit Challenges Tennessee Department of Corrections Hepatitis C Protocol*, ACLU (July 26, 2016), <https://www.aclu.org/news/lawsuit-challenges-tennessee-department-corrections-hepatitis-c-protocol> [https://perma.cc/R6H9-T2DX].

inmate litigation since the 2006 decision suggest that *Woodford* had very little, if any, impact on prisoners' improperly exhausted claims in federal court.

B. *Outliers vs. The Median*

Other than geography, accounting for these jurisdictions' widely diverging experiences is a challenge. They have varying levels of incarceration: three states—Oklahoma, Tennessee, and Arizona—had larger prison populations in 2014 than they did in 2006,¹²⁰ while New York's prison population has declined over the same period.¹²¹ The Southern District of New York and the Western District of Oklahoma have experienced relatively small upticks in the amount of prisoner civil litigation (changes close to the total federal figures), while Arizona and the Middle District of Tennessee's experiences are diametrically opposed.

S.D.N.Y.'s relatively small increase in prisoner litigation since *Woodford* should be understood in context. The Southern District of New York is “the largest and busiest federal trial court in the country.”¹²² In 2016, while S.D.N.Y. saw 1568 civil prisoner complaints, this comprised less than 15% of its civil docket.¹²³ In the same year, the remaining 8985 civil actions in S.D.N.Y. included, among various other types of litigation, 2128 civil rights complaints and 1491 labor suits.¹²⁴ Thus, the sheer amount of traffic that S.D.N.Y. sees per year dilutes the effect of prisoner litigation on an already congested docket. While the number of prisoner-filed civil suits is considerable in this district, as in others, it does not have an outsized impact because of the amount of civil litigation in the jurisdiction more broadly.

What may help to explain S.D.N.Y. and the Western District of Oklahoma closely approximating the national federal total is their inclusion of an exhaustion section in their respective *pro se* prisoner civil complaints, made available on their court websites. A more complete discussion of this hypothesis follows below.

¹²⁰ See *supra* notes 93 and 117 and accompanying text (discussing the prison populations of Arizona and Tennessee, respectively); see also *State-by-State Data, Oklahoma*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#detail?state1Option=Oklahoma&state2Option=0> [<https://perma.cc/P2AA-ER75>] (last visited Mar. 28, 2017) (showing an increase in the Oklahoma prison population from 23,889 in 2016 to 27,261 in 2014).

¹²¹ *State-by-State Data, New York*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/the-facts/#detail?state1Option=New%20York&state2Option=0> [<https://perma.cc/3D4K-WHS4>] (last visited Mar. 28, 2017).

¹²² Jed S. Rakoff, *The Court of Courts*, N.Y. REV. OF BOOKS (2014) (reviewing JAMES D. ZIRIN, *THE MOTHER COURT: TALES OF CASES THAT MATTERED IN AMERICA'S GREATEST TRIAL COURT* (2014)), <http://www.nybooks.com/articles/2014/06/19/southern-district-court/> [<https://perma.cc/VQN5-FA3J>].

¹²³ U.S. COURTS, U.S. DISTRICT CTS. – NAT'L JUD. CASELOAD PROFILE, NEW YORK SOUTHERN (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf [<https://perma.cc/FP96-YSZ3>].

¹²⁴ *Id.*

C. Knowledge Gaps: Setting Prisoners up to Fail

Prisoners filing *pro se* civil complaints are likely unfamiliar with the exhaustion requirement, let alone the implications of failing to exhaust a grievance properly before turning to the federal courts. The Model Pro Se Prisoner complaint available on uscourts.gov includes a section (Part VII) entitled “Exhaustion of Administrative Remedies” and gives prisoners a definition of the exhaustion requirement using 42 U.S.C. § 1997e(a).¹²⁵ Notably, however, the model complaint does not further spell out exhaustion, nor does it mention the *Woodford* standard of “proper” exhaustion. Within this section of the complaint are several questions regarding the availability of prison grievance procedures and whether the petitioner filed a grievance.¹²⁶ Furthermore, not every district has adopted the model complaint’s exhaustion language. Of the four jurisdictions studied here, three—the Southern District of New York, the Western District of Oklahoma, and Arizona—include some form of the model complaint’s suggested exhaustion language. Each is reviewed below.

The Southern District of New York has a downloadable *pro se* prisoner complaint.¹²⁷ The last page of the complaint contains a “Certification and Warning” which includes the following language: “I also understand that prisoners must exhaust administrative procedures before filing an action in federal court about prison conditions, 42 U.S.C. § 1997e(a), and that my case may be dismissed if I have not exhausted administrative remedies as required.”¹²⁸ There is no further definition of “exhaustion” or what may qualify as an administrative remedy, nor is there any mention of *Woodford*.

Similarly, the Western District of Oklahoma has a *pro se* prisoner civil rights complaint available on its website.¹²⁹ On the first page of Part V of the complaint form (“Cause of Action”), the fourth instruction states:

Be aware of the requirement that you exhaust prison grievance procedures before filing your lawsuit. If the evidence shows that you did not fully comply with an available prison grievance process prior to filing this lawsuit, the court may dismiss the unexhausted claim(s) or grant judgment against you. *See* 42 U.S.C. § 1997e(a). Every claim you raise must be exhausted in the appropriate manner.¹³⁰

¹²⁵ *Model Prisoner Complaint for Violation of Civil Rights*, U.S. COURTS 6, http://www.uscourts.gov/sites/default/files/complaint_for_violation_of_civil_rights_prisoner.pdf [<https://perma.cc/UL2B-ST76>].

¹²⁶ *Id.*

¹²⁷ *Forms Index*, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, <http://www.nysd.uscourts.gov/file/forms/complaint-prisoner-civil-rights-42-usc-sect-1983> [<https://perma.cc/WM9U-Q7E2>].

¹²⁸ *Id.*

¹²⁹ *Pro Se Prisoner Civil Rights Complaint*, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, http://www.okwd.uscourts.gov/wp-content/uploads/pro_se_complaint.pdf [<https://perma.cc/XG5R-X4JP>].

¹³⁰ *Id.*

Like the model complaint and that made available on the S.D.N.Y. court website, this complaint directs a prisoner filing a civil rights claim to 42 U.S.C. § 1997e(a), but neither defines exhaustion or administrative remedy, nor does it make any reference to the “proper exhaustion” requirement announced in *Woodford*.

The District of Arizona also makes a *pro se* prisoner complaint form available online. The complaint, which prisoners can fill in, includes a section of questions about “Administrative Remedies.” However, although the fourth page of the instructions briefly mentions exhaustion, the complaint itself does not make a reference to proper exhaustion.¹³¹ Notably, each of the three districts studied here that mention exhaustion in their publicly available prisoner complaint forms do so in unobvious places and ways: no mention of exhaustion or administrative remedies appears in these documents on the first page; prisoners may begin to write out their complaint, then read an exhaustion instruction or section, and decide to continue with filing anyway.¹³²

The Middle District of Tennessee has a blank complaint form available online, but it is not specific to prisoner litigants filing *pro se*.¹³³ There is no explanation of administrative procedures, remedies, or exhaustion. The total absence of this language, coupled with a failure to provide prisoners filing civil claims in federal court *pro se* with particularized forms or instructions, may further explain the surge in prisoner civil filings in this district.¹³⁴

Without knowing the prerequisites to filing a claim in federal court, prisoners are set up to fail. They likely do not understand the requirements of exhaustion, nor is the doctrine spelled out clearly for them. Failure to understand what “administrative remedy,” “grievance,” or “exhaustion” mean or what process is required has serious implications for whether a prisoner’s civil claim can even continue in federal court, or whether it must be dismissed. In turn, this gap in understanding may lead to prisoners’ ongoing and increasing filing of claims that federal courts must reject for failure to exhaust administrative remedies.¹³⁵ Thus, what prisoners do not know about the law cannot be expected to deter them, but it is held against them: if prisoners’ lack of knowledge regarding exhaustion results in their filing

¹³¹ *Prisoner Civil Rights Complaint*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, <http://www.azd.uscourts.gov/sites/default/files/forms/Civil%20Rights%20Complaint%20instructions-form.pdf> [<https://perma.cc/UE3A-AR4H>].

¹³² A more complete discussion of this issue and a proposed remedy appear in Part IV, *infra*.

¹³³ *Civil Complaint Form*, UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENN., <http://www.tnmd.uscourts.gov/sites/default/files/forms/ComplaintForm.pdf> [<https://perma.cc/E4EK-N4LY>].

¹³⁴ See *supra* text accompanying notes 111–118 (exploring the reasons for the huge increase in prisoner-filed civil suits in the Middle District of Tennessee).

¹³⁵ See McCabe, *supra* note 18, at 282 (noting that the Court’s *Woodford* holding made “the term ‘exhausted’ . . . a term of art and its meaning is the key to determining which interpretation of the exhaustion provision is correct.”).

procedurally flawed—but perhaps substantively meritorious—claims, courts will dismiss for failure to exhaust administrative remedies properly.¹³⁶

D. *Longer Sentences, More Time to File*

While total prison populations may be plateauing,¹³⁷ the number of prisoners in custody does not give a complete picture. For example, while prison populations are decreasing nationally,¹³⁸ in three of the states at issue here (Arizona, Oklahoma, and Tennessee), prison populations have actually increased since 2009.¹³⁹ Since these jurisdictions have widely diverging experiences in terms of the number of prisoner-filed civil suits over the past ten years,¹⁴⁰ prison population cannot explain these differences. What is consistent across all case study jurisdictions is an increase in unexhausted prisoner claims, which may be explained by longer sentence lengths.¹⁴¹ Longer incarcerations give prisoners more time to file claims in federal court. According to a 2015 Pew report,

[T]he average time served by [] federal offenders more than doubled [from 1988 to 2012] from 17.9 to 37.5 months One study found that the increase in time served by a single category of federal offenders—those convicted of drug-related charges—was the single greatest contributor to growth in the federal prison population between 1998 and 2010.¹⁴²

¹³⁶ See Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under Woodford v. Ngo and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1942 (2007) (noting that the *Woodford* Court “remained silent regarding the circumstances in which exhaustion efforts reaching less-than-full compliance with the administrative procedure might nevertheless satisfy the exhaustion requirement.”).

¹³⁷ *State-by-State Data, U.S. Total*, SENT. PROJECT, <http://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=0> [https://perma.cc/4ZGV-PMTU] (last visited Mar. 28, 2017). According to the Federal Bureau of Prisons, the number of federal prisoners has been declining since 2013; in 2013, there were 219,298 prisoners in federal facilities, but in 2016, that number dropped to 192,170. See FED. BUREAU OF PRISONS, FED. PRISON SYS. ACTUALS, https://www.bop.gov/about/statistics/raw_stats/BOP_pastPopulationTotals.pdf?v=1.1 [https://perma.cc/5862-PQJR]; see also *Trends in U.S. Corrections*, THE SENTENCING PROJECT (June 2017), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [https://perma.cc/635U-GESK].

¹³⁸ *U.S. Prison Population Trends 1999-2014: Broad Variation Among States in Recent Years*, SENT. PROJECT (Feb. 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf> [https://perma.cc/538Y-CNKK].

¹³⁹ *Id.*

¹⁴⁰ See *supra* Section II.A (Methodology).

¹⁴¹ See Erica Goode, *Average Prison Stay Grew 36 Percent in Two Decades*, N.Y. TIMES (June 6, 2012), <https://www.nytimes.com/2012/06/06/us/average-prison-stay-grew-36-percent-in-two-decades.html> [https://perma.cc/L5ZP-57JE].

¹⁴² *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TRUSTS 2 (Nov. 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates> [https://perma.cc/LGA8-CHHA].

Several factors have contributed to the spike in prison sentences. First, mandatory minimum sentences, which “set the lower limits for sentencing particular offenses and particular offenders,”¹⁴³ deprive judges of sentencing discretion¹⁴⁴ and “require[] prison terms that were longer than most prisoners sentenced before [the minimums were enacted] would have served.”¹⁴⁵ In addition, “longer sentences for nonviolent first-time offenders, and ‘three strikes’ laws mandating increased penalties for repeat offenders have all contributed to this increase.”¹⁴⁶ In other words, more time in custody gives prisoners additional time to file civil claims, regardless of their merit.¹⁴⁷

E. *Woodford’s Impact on the Courts and on Court Proceedings*

Reviewing the docket search that used “*Woodford v. Ngo*” as a keyword (Search 5), the sharp increase in post-*Woodford* docket results suggests that the case made disposing of prisoner litigation easier for federal courts. To further test this hypothesis, a citing references search was conducted on Westlaw.¹⁴⁸ Narrowing by the four jurisdictions selected here, entering “dismissed” in “Search within results,” and confining the results by date (after June 22, 2006), this Westlaw citing references search returned 741 cases that cite *Woodford v. Ngo*. By contrast, a citing references search of 42 U.S.C. § 1997e(a) of the same jurisdictions, narrowing by cases, date (before June 22, 2006), and “Search within results” keyword “dismissed” returned 527 cases. Conducting the same citing references search of the PLRA exhaustion clause, but changing the date range to “after June 22, 2006” and adding “AND ‘Woodford’” to the “Search within result” keyword filter yielded 613 cases.

Considering these search results in light of the docket data, it appears as though *Woodford* provided federal courts with a straightforward method of dismissing unexhausted prisoner claims. Relying on the proper exhaustion requirement announced by the *Woodford* Court, federal district courts can dismiss prisoners’ claims on procedural grounds, without reaching the merits. Thus, while this still creates work for district courts and generates docket entries, the *Woodford* opinion may offer courts a simple way to clear prisoners’ unexhausted claims from their dockets.

¹⁴³ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 8 (2010).

¹⁴⁴ See Michael Tonry, *Federal Sentencing “Reform” Since 1984: The Awful as the Enemy of the Good*, 44 CRIME & JUST. 99, 114 (2015) (noting Justice Heaney’s recognition of the encroachment on judicial discretion by prosecutors and probation officers).

¹⁴⁵ *Id.* at 142.

¹⁴⁶ John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 380 (2013).

¹⁴⁷ See Michael W. Martin, *Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1228 (2011) “[P]ro se prisoner litigation comprises the largest portion by far of the federal pro se docket, and threatens to overwhelm the courts.”)

¹⁴⁸ See the Appendix for pictures of the Westlaw search results.

Furthermore, combining the Court's holdings in *Woodford* and *Jones v. Bock* now appears to make defendants' motions for dismissal for failure to exhaust easier to raise and win.¹⁴⁹ Targets of prisoner civil suits—prison wardens and government officials—can raise failure to exhaust at the motion to dismiss stage. When courts find lack of proper exhaustion, they can dismiss a prisoner's claim before reaching the merits. As a result of *Woodford*'s proper exhaustion holding and the explicitly defined procedural holding of *Jones*, courts may now find flaws in prisoner-filed litigation more easily.

IV. RECOMMENDATIONS

Woodford does not appear to have operated as the Supreme Court may have intended: prisoners' filings of unexhausted claims in federal court have not been deterred. In fact, as the data collected demonstrate, the number of unexhausted claims filed in federal court appears to have increased, as has the ease with which federal courts can dismiss prisoners' civil claims for procedural defects. The remaining questions thus become twofold: to what extent is *Woodford*—and Supreme Court jurisprudence more generally—geared toward the subject(s) of the decision?¹⁵⁰ Assuming that the Court is not writing for an audience of incarcerated, *pro se*, would-be litigants attempting to file claims in federal court, but instead, for practitioners, lawmakers, scholars, and advanced, repeat players more broadly, how can the identified knowledge gap be bridged to make Supreme Court precedent salient for the subjects of these decisions that bind—and confine—their rights? This question is taken up here in the context of *Woodford* and prisoner-filed civil claims.

It is foolish to think that prisoners will abide by a procedural rule that they do not know exists. Without understanding what “proper” exhaustion means in the context of filing a civil claim in federal court, prisoners will likely continue to file unexhausted claims that district courts can easily dismiss for procedural error. To alleviate this problem, and perhaps, for *Woodford* to operate as the Court intended, district courts should better inform prisoners of the exhaustion requirement. Ideally, all courts would provide a blank *pro se* prisoner complaint form, which, as noted above, the Middle District of Tennessee currently does not do.¹⁵¹ At least in the jurisdictions studied here, prisoners filing *pro se* civil claims go through the

¹⁴⁹ See *supra* notes 56–62 and accompanying text (discussing the significance of *Jones v. Bock*, decided seven months after *Woodford*).

¹⁵⁰ See, e.g., Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1654 (2007) (“Supreme Court decisions in constitutional matters are not only events in systems studied by social scientists (i.e., economists or political scientists); these decisions are also significant for their moral and ethical content.”).

¹⁵¹ *Supra* note 133 and accompanying text.

process of detailing their complaints and *only then*, toward the end of the complaint and/or the instructions related to filing, do they see that they are required to exhaust other remedies first.

In a departure from current *pro se* forms that ask about exhausting administrative grievances in later sections of the complaint, all districts should provide a disclaimer on the front cover of prisoner *pro se* civil complaint forms that briefly explains the exhaustion requirement.¹⁵² The language of this disclaimer could read:¹⁵³

ATTENTION: READ BEFORE PROCEEDING

If you are filing a civil claim in a federal district court, *you must exhaust all available administrative remedies first*. Under the Prison Litigation Reform Act (42 U.S.C. § 1997e(a)), this means that you must go through grievance procedures available at the facility where you are incarcerated. If the prison grievance proceeding does not end in your favor, you must then appeal the decision until there are *no more administrative remedies left to pursue*.

In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court decided that incarcerated persons must *properly exhaust* all available remedies before filing a claim in federal court. This means meeting *all relevant deadlines* in filing your grievance(s). Failure to comply with the procedural requirements set out by the state, and then filing a federal civil claim, may result in dismissal for failure to exhaust administrative remedies.

This also means filing all available appeals in the prison grievance system, and *only once there are no more administrative remedies available because you have pursued them all—not because your grievance or appeal is untimely* (failed to meet deadlines), can you file a claim in federal court.

Failure to comply with these rules may result in the court granting a motion to dismiss your claim for failure to exhaust administrative remedies.

As Schlanger notes, assessing the relative merit of inmate suits is a near-impossible task from datasets alone: “[O]ne cannot infer the merits of the docket from case outcomes. So while it is likely that the inmate civil rights docket is relatively low-merit compared to other federal case categories, there

¹⁵² *Supra* notes 127–136 and accompanying text.

¹⁵³ The ACLU provides an excellent “Know Your Rights” information sheet on the PLRA. Some of the proposed language here was borrowed from the ACLU’s resource. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU, https://www.aclu.org/sites/default/files/images/asset_upload_file627_25805.pdf [<https://perma.cc/W6F4-AG5B>].

is no way to assess the magnitude of this difference.”¹⁵⁴ Thus, while one of the purposes of the PLRA, and in turn, the Supreme Court’s *Woodford* decision, may have been to “reduc[e] the number of frivolous filings, on one hand, while preserving prisoners’ capacity to file meritorious claims, on the other,”¹⁵⁵ neither the statute nor the Court’s ruling appear to have served this “filtering” goal. Instead, prisoners have continued to file unexhausted claims that federal courts can now more easily dismiss for procedural defect. If the merits are not reached, it is hard, if not impossible, to know whether a prisoner’s civil claim was substantively sufficient despite procedural error.

What is clear, however, is that those affected by the *Woodford* decision are not aware of its requirements, and the demands of exhaustion more generally are not set out for prisoners to understand adequately. Thus, bridging the knowledge gap could allow for *Woodford* and the PLRA to filter out substantively meritorious and procedurally compliant claims. Prisoners filing claims that might be successful on the merits, but who have failed to exhaust available administrative remedies, would hopefully heed the warning before writing and filing a federal suit.

Bridging gaps in prisoners’ knowledge regarding legal prerequisites to filing a civil claim in federal court may actually drive down frivolous litigation due to the PLRA’s “three strikes” and fee payment rules.¹⁵⁶ Combining the effects of these rules, alerting prisoners to the administrative exhaustion requirements may change their cost-benefit analyses in deciding when and whether to file a claim in federal court.

In addition to making prisoners more aware of the strictures of *Woodford*, better recordkeeping on prisoner-filed civil suits would be helpful to future study and understanding of trends in prisoner litigation. At present, it is unclear whether prisoner-filed civil suit data (litigation type C, as coded by Federal Court Management Statistics) includes habeas petitions. Furthermore, there is a question as to whether it is up to the prisoner filing *pro se* to fill out the civil cover sheet correctly, and if a civil case is coded based on how a *pro se* claimant identifies their own case, or whether, even if the civil cover sheet is incorrectly filled out, a certain type of prisoner civil claim is actually coded based on the content of the claim itself. Resolving these questions—and separating out habeas petitions from other civil claims by prisoners that are governed by the PLRA and *Woodford*—would be a helpful step in better understanding these phenomena.

¹⁵⁴ Schlanger, *supra* note 20, at 1600.

¹⁵⁵ *Woodford*, 548 U.S. at 117 (Stevens, J., dissenting).

¹⁵⁶ See *supra* notes 26–31 and accompanying text (discussing the various ways in which the PLRA attempts to limit prisoner litigation in federal court).

CONCLUSION

While the PLRA and *Woodford* may function to keep prisoners' civil claims out of federal courtrooms, these laws do not keep unexhausted inmate-filed litigation off of federal dockets. As a result, *Woodford* has not actually operated as the Court may have intended: improperly exhausted civil claims are still filed and dismissed by federal courts, in what appear to be greater numbers than before the *Woodford* case was decided. Information appears to be key in explaining this puzzling trend: in three of the four districts studied here, there is some mention of administrative remedies and exhaustion, while in the district with the largest spike in prisoner litigation, no such language appears in the civil complaint form made available. In none of these forms, however, is exhaustion, administrative grievance procedures, or proper exhaustion, explained clearly.

Of the three complaints that do mention exhaustion or the relevant PLRA statute, all do so in later sections of the blank form, or several pages into the directions. Alerting prisoners to this requirement explicitly and up front may help to bridge the gap between what the law requires and what prisoners are filing. Perhaps if incarcerated would-be litigants knew the prerequisites to having their claim heard in federal court before even filling out the forms, they would more carefully consider failure to exhaust before filing. Combined with the three strikes limitation and filing fee rules of the PLRA, making the exhaustion requirement clearer could serve the goals of *Woodford* by alerting the people affected by this decision cognizant of its content and implications.

APPENDIX

**U.S. Courts Federal Court Management Statistics, Percentage of Prisoner
Civil Claims Calculated for Each District**

District	Percent (2016)	Percent (2006)	Difference (Change over time)
D. Ariz.	30	57	-27.0
S.D. W. Va.	2.5	14.5	-12.0
E.D. Cal.	41.8	52.8	-11.0
C.D. Cal.	15.7	25.5	-9.8
E.D. Tex.	33.5	42.5	-9.0
D.S.D.	23.4	30.4	-7.0
D. Colo.	25.7	31.7	-6.0
M.D. La.	30.8	36.1	-5.3
D. Del.	20.1	25.1	-5.0
W.D. Wash.	16.2	20.9	-4.7
E.D. La.	3	7	-4.0
E.D. Okla.	19	22.6	-3.6
N.D. Tex.	35.6	39	-3.4
D.D.C.	17.4	20.6	-3.2
D. Kan.	23.9	26.8	-2.9
N.D. Ga.	23.6	26.3	-2.7
N.D. Cal.	17.5	19.7	-2.2
E.D. Wash.	22.9	24.1	-1.2
D. Nev.	25.9	26.6	-0.7
W.D. Mich.	44	44.2	-0.2
N.D. Fla.	46	45.9	0.1
N.D. Ind.	30.8	30.3	0.5
S.D. Ind.	27.2	26.6	0.6
D. Minn.	10.8	10.2	0.6
N.D.N.Y.	33	32.4	0.6
S.D. Cal.	27.7	26.8	0.9
N.D. Okla.	20	19	1.0
W.D. La.	37.1	35.8	1.3
W.D. Wis.	34.2	32.9	1.3
W.D. Tex.	34.5	33.1	1.4
D. Mass.	16.1	14.2	1.9
W.D. Mo.	31.4	29.4	2.0

S.D. Tex.	30.7	28.4	2.3
M.D. Pa.	40.3	37.6	2.7
M.D. Fla.	30.9	28.2	2.7
E.D.N.Y.	10.8	8	2.8
E.D. Mich.	23.8	20.9	2.9
S.D. Fla.	21.1	18.2	2.9
All Federal	25.3	21.2	4.1
W.D. Okla.	28	23.9	4.1
S.D.N.Y.	14.9	10.6	4.3
D. Vt.	21.7	16.7	5.0
D.S.C.	37.8	32.7	5.1
D.N.H.	26.2	21	5.2
D. Or.	29.8	24.6	5.2
D. Utah	21.2	16	5.2
N.D. Ill.	13.9	8.7	5.2
N.D. Miss.	29.9	24.3	5.6
S.D. Ga.	57	50.9	6.1
N.D. Ala.	28.7	22.2	6.5
W.D. Ark.	29.8	22.8	7.0
S.D. Ala.	33.5	26.3	7.2
D.N.J.	21.6	14.4	7.2
W.D.N.Y.	30.5	23.2	7.3
D. Ct.	20.7	13.3	7.4
D. Md.	33.2	25.7	7.5
S.D. Ohio	20.3	12.4	7.9
M.D. Ala.	44.2	36.3	7.9
D.N.M.	29.2	20.9	8.3
E.D. Va.	43.2	34.1	9.1
D. Me.	20.3	11.2	9.1
E.D. Wis.	35.8	26.6	9.2
D.R.I.	21.1	11.5	9.6
M.D. Ga.	52.6	42.9	9.7
D. Haw.	24	13.8	10.2
W.D. Pa.	34.6	23	11.6
E.D. Mo.	31.4	19.5	11.9
N.D. Ohio	23.1	11.2	11.9
D. Wyo.	36.4	24.4	12.0
N.D. Iowa	38	25.8	12.2
W.D. Ky.	25.1	12.4	12.7
D. Idaho	37.9	24.5	13.4
N.D. W. Va.	52.2	38.8	13.4

W.D. Va.	59.7	46.3	13.4
E.D. Ky.	30.5	16.4	14.1
W.D. Tenn.	44.2	29.9	14.3
S.D. Miss.	33.7	17.2	16.5
D. Alaska	28.6	11.6	17.0
D. Neb.	33.1	15.8	17.3
D. Mont.	41.7	24.4	17.3
M.D.N.C.	59.6	42.1	17.5
E.D. Pa.	22.9	3.8	19.1
D.N.D.	40	19	21.0
S.D. Ill.	50.7	29.7	21.0
S.D. Iowa	49.6	27.6	22.0
E.D. Tenn.	43.2	20.8	22.4
W.D.N.C.	44.5	22	22.5
C.D. Ill.	56.7	32.9	23.8
E.D.N.C.	59.9	33.6	26.3
E.D. Ark.	51.4	22.4	29.0
M.D. Tenn.	68.7	16.7	52.0

Westlaw Citing References Searches

§ 1997e. Suits by prisoners
United States Code Annotated Title 18

Document Notes of Decisions (1,220)

KeyCite Citing References (527)

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Practical Law	1
All Results	48,311

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Woodford v. Ngo
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Trial Court Orders	5
Administrative Decisions & Guidance	9
Secondary Sources	374
Appellate Court Documents	1,140
Trial Court Documents	471
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Cases	613
Trial Court Orders	36
Statutes	12
Regulations	25
Administrative Decisions & Guidance	29
Secondary Sources	1,298
Appellate Court Documents	4,025
Trial Court Documents	2,166
Practical Law	1
All Results	48,311

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