

**BETTER LATE THAN NEVER?:
A FAITHFUL INTERPRETATION OF THE PRISON
LITIGATION REFORM ACT'S EXHAUSTION
REQUIREMENT SAYS NO**

FOREWORD

On June 22, 2006, while this Comment was awaiting publication, the United States Supreme Court decided *Woodford v. Ngo*.¹ In *Woodford*, a prisoner filed an administrative grievance with prison officials challenging a disciplinary restriction placed on his activities.² Prison regulations required that a grievance be filed within fifteen working days of the challenged action, but the prisoner failed to file such grievance until some six months after imposition of the restriction.³ This grievance was rejected as untimely, and the prison refused to address it on appeal.⁴

The prisoner then sued various prison officials in district court under 42 U.S.C. § 1983, but because administrative remedies had not been properly exhausted under the Prison Litigation Reform Act,⁵ (“PLRA”) the court granted the officials’ motion to dismiss.⁶ The Court of Appeals for the Ninth Circuit reversed, finding that the prisoner had “exhausted all administrative remedies available to him as required by the PLRA when he completed all avenues of administrative review available to him.”⁷ The fact that “no further level of appeal remained in the state prison’s internal appeals process” alone constituted exhaustion of administrative remedies, whether the underlying grievance was time barred or not.⁸

The Supreme Court in turn reversed the court of appeals.⁹ The Court held, as this Comment argues,¹⁰ that “the PLRA exhaustion requirement requires proper exhaustion,”¹¹ and that proper exhaustion naturally includes adherence to the prison’s internal filing deadlines, as well as “other critical procedural

1. 126 S. Ct. 2378 (2006).

2. *Woodford*, 126 S. Ct. at 2383-84.

3. *Id.*

4. *Id.* at 2384.

5. 42 U.S.C. § 1997e(a) (2006).

6. *Woodford*, 126 S. Ct. at 2384.

7. *Woodford v. Ngo*, 403 F.3d 620, 631 (9th Cir. 2005), *rev'd*, 126 S. Ct. 2378 (2006).

8. *Id.*

9. *Woodford*, 126 S. Ct. at 2393.

10. See *infra* Part IV for the argument that proper exhaustion, including timely filings of grievances and appeals, is required under the PLRA.

11. *Woodford*, 126 S. Ct. at 2387.

rules.”¹² The Court believed that barring untimely and other procedurally deficient grievances furthered the purposes behind the exhaustion requirement.¹³ First, requiring timely filing of grievances and appeals safeguards the authority of a correctional facility in two ways: (1) it affords the facility “an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court,” and (2) it demands that prisoners obey the prison’s procedural requirements governing the grievance process.¹⁴ Second, proper exhaustion promotes efficiency, ideally by rectifying meritorious grievances and encouraging the abandonment of unmeritorious ones, all in a timely manner.¹⁵ At a minimum, when a case cannot be resolved internally, a grievance filed close in time to the challenged action is likely to “produce a useful record for subsequent judicial consideration”¹⁶ because “witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.”¹⁷ Each of these results furthers the PLRA’s overarching goal of “reduc[ing] the quantity and improving the quality of prisoner suits.”¹⁸

Although *Woodford* resolved the issue addressed in this Comment—“whether a late grievance should be considered to have exhausted an inmate’s administrative remedies in accordance with the PLRA”¹⁹—this Comment continues to contribute to a more complete understanding of the PLRA’s exhaustion requirement in a number of ways. For one, this Comment gives a more detailed and comprehensive look at the “sharp rise in prisoner litigation in the federal courts,” prior to passage of the PLRA, noted in *Woodford*.²⁰ Specifically, it provides statistical documentation of the increase in prison suits, and it also discusses the perception, especially as described in the media, that many of these suits were frivolous.²¹ This apparent frivolity is itself supported in empirical terms, and two particularly egregious, and perhaps entertaining, suits

12. *Id.* at 2386.

13. *Id.* at 2387. See also *infra* note 285 and accompanying text for discussion of how allowing late grievances would conflict with the goal of ensuring that internal prison grievance systems first be given a chance to address the grievance.

14. *Woodford*, 126 S. Ct. at 2385 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). See also *infra* note 291 for a discussion of one legislator’s concerns relating to federal interference with the operation of state correctional facilities.

15. *Woodford*, 126 S. Ct. at 2385. See also *infra* note 145 and accompanying text for a discussion of the PLRA’s goal of fostering internal redress of prisoner grievances as a means of reducing the number of federal suits.

16. *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). See also *infra* note 147 and accompanying text for a discussion of the role of administrative exhaustion in producing a fuller record for federal court review.

17. *Id.* at 2388.

18. *Id.* at 2387 (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)).

19. See *infra* Part II.B.2 for a discussion of how circuit courts split over this issue.

20. 126 S. Ct. at 2382.

21. See *infra* Part II.A.1 for a discussion of the increase in inmate litigation prior to the passage of the PLRA.

are discussed at length.²² Later in the Comment, empirical evidence is offered suggesting that the PLRA is in fact meeting its goal of “reduc[ing] the quantity and improving the quality of prisoner suits.”²³

This Comment also provides insight into the legislative history of the PLRA and conveys the purposes behind it in the words of the Senators and Representatives who helped to make it law.²⁴ Of particular importance is the legislative history of the exhaustion requirement itself.²⁵

A third way that this Comment adds meaningfully to the discussion of the PLRA’s exhaustion requirement is by taking on some of the criticisms of requiring proper exhaustion—criticisms that are unlikely to disappear, regardless of the Supreme Court’s ruling in *Woodford*.²⁶ This Comment defends the belief, held by many supporters of the PLRA, that inmate litigation really was out of control, both in terms of sheer number of suits and frivolity.²⁷ Debate and passage of the PLRA are also defended.²⁸ Ultimately, this portion of the Comment attempts to reveal that much of the criticism directed against the PLRA and its exhaustion requirement is primarily political.²⁹

In these ways, despite the Court’s resolution of the meaning of exhaustion under the PLRA, this Comment will nonetheless serve a meaningful role in contextualizing the perceived need for legislative action, defending that legislative action, and providing counterarguments to criticism of the substance and passage of the PLRA. Thus, it is hoped that, unlike an untimely grievance or appeal under the PLRA’s exhaustion requirement, this Comment is indeed “better late than never.”

I. INTRODUCTION

Until 1996, inmates were not required to exhaust the remedies available to them under a correctional facility’s internal grievance system before filing suit in federal court.³⁰ When an inmate failed to exhaust administrative remedies, courts were empowered only to delay, but not dismiss, adjudication of the plaintiff’s claim.³¹ Even though the vast majority of these suits met with pretrial

22. See *infra* notes 53-79 and accompanying text for a discussion of frivolous prisoner suits.

23. *Woodford*, 126 S. Ct. at 2387 (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)).

24. See *infra* note 38 and accompanying text for Supreme Court recognition of this goal.

25. See *infra* Part III.C.1 for a discussion of the legislative history of the exhaustion requirement.

26. See *infra* Part III.B for counterarguments to some leading academic’s criticisms of the PLRA’s exhaustion requirement.

27. See *infra* Part III.B.1-2 for a discussion of the number and frivolity of inmate suits.

28. See *infra* Part III.B.3 for the argument that debate and passage of the PLRA were not atypical.

29. See *infra* Part III for the implication that much of the academic criticism of the PLRA stems from political assumptions different from those of supporters of the PLRA.

30. Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, § 7(a)(1), 94 Stat. 349, 352 (1980) (amended 1996).

31. *Id.*

judgment for the defendant,³² inmate litigation continued to rise,³³ ultimately comprising a grossly disproportionate portion of the federal civil docket.³⁴

In response to this increase in inmate litigation, Congress passed the Prison Litigation Reform Act of 1995³⁵ ("PLRA") to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits."³⁶ Foremost among the changes wrought by the PLRA is the exhaustion requirement,³⁷ added, according to the United States Supreme Court, "to reduce the quantity and improve the quality of prisoner suits."³⁸ Under the exhaustion requirement, federal courts are now required to dismiss suits in which the plaintiff-inmate has not previously exhausted his administrative remedies.³⁹

The circuits are split over what constitutes exhaustion, however.⁴⁰ Specifically, the Seventh and Tenth Circuits have held that a grievance or appeal that fails to meet an internal prison system's deadline bars the prisoner from bringing the claim in federal court.⁴¹ The Fifth and Sixth Circuits, on the other hand, have refused to apply any such bar.⁴²

This Comment argues that, based on the legislative history of the PLRA, the approach intended by Congress is to treat timed-out grievances and appeals as a failure to exhaust administrative remedies, and therefore bar these claims from federal courts. Part II.A provides a history of the PLRA, including the growth in inmate litigation in the years leading up to the passage of the PLRA, the perception that many of these claims were frivolous or otherwise lacked merit, and how members of Congress saw the PLRA as remedying the existing state of inmate litigation. Part II.A also discusses the extraordinary changes

32. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1594 (2003) (finding that eighty-two percent of inmates' civil rights cases filed from 1980 to 1995 resulted in pretrial judgment for defendant).

33. See Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 FORDHAM L. REV. 2289, 2294 (2005) (stating that inmate litigation rose 227% from 1980 to 1995).

34. See Schlanger, *supra* note 32, at 1558 (stating that inmate litigation constituted fifteen percent of federal docket in 1995).

35. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered titles and sections of U.S.C.).

36. Schlanger, *supra* note 32, at 1565-66 (quoting 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)).

37. Jessica Feerman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 260 (2004).

38. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

39. 42 U.S.C. § 1997e(a) (2000).

40. See *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185 (10th Cir. 2004) (noting circuit split).

41. See *id.* at 1185-86 (holding that filing time-barred grievance did not satisfy exhaustion requirement); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir. 2002) (holding that untimely appeal constituted failure to exhaust administrative remedies).

42. See *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003) (holding that prison's internal time constraints could not be used to invoke procedural default bar against late appeal); *Wendell v. Asher*, 162 F.3d 887, 891-92 (5th Cir. 1999) (dismissing federal suit filed before final adjudication of pending appeal in prison's internal grievance system but effectively refusing to apply procedural default rule by holding that prisoner could refile federal suit after all appeals had been completed).

wrought by both the exhaustion requirement and the PLRA as a whole—such as the frequent-filer provision and restrictions on injunctive relief—that suggest a strong reading of the exhaustion requirement. Part II.B addresses the goals of the exhaustion requirement as interpreted by the Supreme Court and provides a detailed summary of the leading cases underlying the circuit split.

Part III.A notes the state of inmate litigation after the PLRA, and Part III.B addresses the leading academic criticisms of the PLRA. Finally, Part III.C discusses how the legislative history of the PLRA calls for a bar to suits by prisoners who have not properly exhausted their administrative remedies through their failure to abide by internal prison deadlines in the filing of their grievances or appeals.

II. OVERVIEW

A. *History of the Prison Litigation Reform Act of 1995*

1. The Need for Reform

By any account, the number of federal suits filed by prisoners in the years leading up to the passage of the Prison Litigation Reform Act of 1995⁴³ increased greatly. In her comprehensive study on inmate litigation, Professor Margo Schlanger calculated that in 1995, the year before the PLRA became effective, inmates brought approximately 40,000 federal civil lawsuits.⁴⁴ This number represents an increase from 2000 in 1970⁴⁵ to 6600 in 1975.⁴⁶ In fact, by 1995, federal suits by inmates comprised nearly one-fifth of the federal civil docket.⁴⁷

The majority of these suits were claims of civil rights violations by state officials under 42 U.S.C. § 1983⁴⁸ or by federal officials under the Constitution.⁴⁹

43. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered titles and sections of U.S.C.); see also 42 U.S.C. § 1997e(a) (2000) (requiring that prisoners exhaust administrative remedies prior to filing suit). The PLRA became effective on April 26, 1996.

44. Schlanger, *supra* note 32, at 1558. Schlanger made her calculations using statistics from the Administrative Office of the United States Courts, which records data on a fiscal year basis. Fiscal year 1995 encompassed October 1, 1994 through September 30, 1995. *Id.* at 1558 n.3. Schlanger excluded collateral criminal review actions such as habeas corpus petitions and like actions from these calculations, conceptualizing these as criminal actions as opposed to civil actions. If such actions were included, the total number of federal “civil” lawsuits would be “much higher.” *Id.* at 1558 n.4.

45. Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 HARV. L. REV. 1661, 1668 (2004) (citing 141 CONG. REC. 26,553 (1995) (statement of Sen. Kyl)).

46. *Id.* (citing 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole)).

47. Schlanger, *supra* note 32, at 1558.

48. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

One observer notes that these civil rights claims grew by 227% in the fifteen years preceding the passage of the PLRA.⁵⁰ By 1995, there was, on average, one federal civil rights case filed by an incarcerated person for every forty people incarcerated.⁵¹ Nationally, inmates filed federal civil suits at roughly thirty-five times the rate that noninmates filed.⁵²

On top of this growth in claims, there was evidence—both empirical and anecdotal—that many claims were meritless or frivolous.⁵³ For instance, between 1990 and 1995, eighty percent or more of prisoner cases ended in a pretrial judgment for the defendant.⁵⁴ Another six to eight percent of cases were voluntarily withdrawn by the inmate.⁵⁵ In only about one in one hundred federal civil rights cases did the prisoner receive any relief.⁵⁶ For cases disposed of in 1995, not only did inmate plaintiffs rank lower than any other class of plaintiffs in the overall success rate, they ranked lower in every component of the overall success rate.⁵⁷ For instance, in such areas as pretrial victories, settlements, and trial win rates, inmate-plaintiffs' successes lagged behind that experienced by any other class of plaintiffs.⁵⁸

Perhaps even more illuminating than statistics, examples of particularly frivolous lawsuits help to define the problem. Prisoners filed federal lawsuits

except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

49. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1771 (2003).

50. Slutsky, *supra* note 33, at 2294. Fifteen years before the passage of the PLRA, in 1980, Congress passed the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 (1980) (amended 1996), in response to alleged constitutional rights violations in prisons and other confinement institutions. Slutsky, *supra* note 33, at 2294 n.35 (citing Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officers Can Learn from It*, 86 CORNELL L. REV. 483, 493 (2001)). Thus, the year 1980 may be particularly useful in chronicling developments in inmate civil rights litigation. *Id.* at 2294.

51. See Schlanger, *supra* note 32, at 1575 (stating that in 1995 "inmates filed federal civil rights cases at the rate of about twenty-five per 1000 inmates").

52. *Id.*

53. This point is readily acknowledged even by opponents of a broad reading of the PLRA. For example, Professor Roosevelt stated: "Let us be candid. There is no denying that frivolous suits make up a large number—and even a fairly large percentage—of the claims brought by inmates under [section] 1983." Roosevelt, *supra* note 49, at 1776.

54. Schlanger, *supra* note 32, at 1594.

55. *Id.* at 1597.

56. See *id.* (stating that about one percent "won some relief"). In another six or seven percent, the parties settled. *Id.* In the remaining cases, the defendants won at trial. *Id.*

57. Schlanger, *supra* note 32, at 1597-98; see also *id.* at 1598 tbl.II.B (comparing statistics on pretrial victories, settlements, trial win rates, and other categories for various plaintiff classes).

58. *Id.* at 1597-98.

over the lack of a salad bar on weekends,⁵⁹ the color of bath towels,⁶⁰ bad haircuts,⁶¹ pizza party invitations,⁶² lost sunglasses,⁶³ tight underwear,⁶⁴ broken cookies,⁶⁵ melted ice cream,⁶⁶ and alleged mind control devices.⁶⁷ There was also a suit over an abortive attempt to set up the so-called “Church of steak and wine” and another over receiving creamy peanut butter when chunky was requested.⁶⁸

In particular, these latter two suits—those over the so-called “Church of steak and wine” and peanut butter—took spots “in the pantheon of outrageous lawsuits.”⁶⁹ In the former, a prisoner sought to gain religious recognition for his “Church of the New Song.”⁷⁰ The court in that case found that the “religion” was really “a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities.”⁷¹ According to the court, its “theology” consisted of encouraging “a relatively non-structured and free-form, do-as-you-please philosophy, the sole purpose of which [was] to cause or encourage disruption of established prison discipline for the sake of disruption.”⁷² Some of its more serious attributes were assaults on prison personnel and property and veiled threats of murder.⁷³ One of its more innocuous ones was a request for steak and wine for a religious feast.⁷⁴

In the peanut butter case, a prisoner attempted to purchase two containers of chunky peanut butter.⁷⁵ He received one container of chunky and one container of smooth.⁷⁶ He returned the smooth one to the canteen, and the

59. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996) (citing Complaint, *Tyler v. Carnahan*, No. 4:94-cv-00017-CAS (E.D. Mo. dismissed May 1, 1996), *aff'd*, 54 F.3d 782 (8th Cir. 1995) (unpublished table opinion)).

60. *Id.* (citing *Rivera v. State*, No. 90811 (N.Y. Ct. Cl. filed Dec. 21, 1994)).

61. Roosevelt, *supra* note 49, at 1777 (citing 141 CONG. REC. S144, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole)).

62. *Id.* (citing 141 CONG. REC. S144, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole)).

63. *Id.* at 1772 n.5 (citing Associated Press, *Group Seeks to Cuff Frivolous Inmate Lawsuits*, ORLANDO SENTINEL, Aug. 2, 1995, at A8).

64. *Id.* (citing Associated Press, *supra* note 63).

65. *Id.* (citing Sandra Ann Harris, *Prisoners' Lawsuits Swamp Federal Courts*, MORNING NEWS TRIB. (Tacoma, Wash.), Oct. 26, 1995, at D10).

66. Schlanger, *supra* note 32, at 1568 (citing Associated Press, *Vacco Targets Frivolous Lawsuits Filed by Inmates*, BUFFALO NEWS, June 13, 1995, at A4).

67. *Id.* (citing Brett Leiber, *Prisoner Suits: They Want Their MTV*, HARRISBURG PATRIOT, Aug. 2, 1995, at A2).

68. *Id.* at 1568-69.

69. *Id.*

70. *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Newman, *supra* note 59, at 520-21.

76. *Id.*

guard informed the prisoner that the correct container of peanut butter (that is, the other can of chunky) would be sent the next day.⁷⁷ Prison authorities transferred the prisoner to another prison later that night, before he could receive the other container of chunky peanut butter.⁷⁸ After the account remained charged \$2.50 for the chunky peanut butter he never received, the prisoner filed a lawsuit in federal court alleging a violation of his civil rights.⁷⁹

After these and similar cases were filed, an “onslaught of media scrutiny” followed.⁸⁰ “Letterman-like”⁸¹ “top ten” lists of outlandish prisoner lawsuits became popular in the press.⁸² For many, these lists “came to symbolize inherent flaws in the United States legal system.”⁸³ As one observer noted, the legislature was “practically forced” to react.⁸⁴

2. Congress Reacts

Supporters of prison litigation reform in Congress cited to these lists in making their case for the need for reform.⁸⁵ Senator Bob Dole described these lawsuits as ““far-fetched, almost funny,””⁸⁶ and Senator Orrin Hatch noted a ““whole raft of bizarre incidents and litigation.””⁸⁷ Furthermore, support for reform in this area was widespread enough to make change politically feasible.⁸⁸

Although it may have been the patently frivolous lawsuits of the “top ten” lists that garnered the headlines, members of Congress were also concerned about those suits that made facially legitimate claims but failed to even approach the standard for recovery under the law.⁸⁹ Senators Harry Reid and Strom Thurmond complained, correctly,⁹⁰ that the number of suits filed by prisoners continued to mount despite the overwhelming odds against them.⁹¹ Many proponents of reform believed that inmates were suing in federal court over the smallest issues, and that legitimate cases were in danger of being delayed

77. *Id.* at 521.

78. *Id.*

79. *Id.*

80. Slutsky, *supra* note 33, at 2297; *see also* Schlanger, *supra* note 32, at 1568 n.38 (listing thirteen newspaper articles about frivolous inmate lawsuits).

81. Schlanger, *supra* note 32, at 1568.

82. Slutsky, *supra* note 33, at 2295-96; *see also, e.g., id.* at 2296 n.47 (citing Kris Newcomer, *Norton's Top Ten Lawsuits: Attorney General Compiles a List of Wildest Inmate Claims*, ROCKY MOUNTAIN NEWS, Aug. 3, 1995, at 4A) (providing example of one list).

83. *Id.* at 2297.

84. *Id.*

85. Note, *supra* note 45, at 1666.

86. *Id.* (quoting 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole)).

87. *Id.* (quoting 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch)).

88. *Id.* at 1669.

89. *Id.* at 1666.

90. *See supra* notes 24-29 and accompanying text for statistical evidence of inmates' lack of success.

91. Note, *supra* note 45, at 1666 (quoting 141 CONG. REC. 27,043-44 (1995) (statements of Sens. Reid & Thurmond)).

unnecessarily by the frivolous ones.⁹² With these observations in mind, as Professor Schlanger notes, “their conclusion seems logically compelled: inmate litigation was a wasteful system demanding drastic amendment, even all-but-complete elimination.”⁹³

It was in this context that the PLRA was passed. Introducing a precursor to the PLRA in the Senate,⁹⁴ Senator Hatch laid out the intent of Congress:

This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.

Our legislation . . . will ensure that Federal court orders are limited to remedying actual violations of prisoners’ rights

. . . While prison conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation’s prisons.⁹⁵

No longer would litigious inmates “tie[] up the courts with their jailhouse lawyer antics[,] . . . making a mockery of our criminal justice system.”⁹⁶ The PLRA would “help put an end to the inmate litigation fun-and-games.”⁹⁷ Under the PLRA, “overzealous Federal courts”⁹⁸ that “see violations of[] constitutional rights in every prisoner complaint”⁹⁹ would lose their power to hear every federal prisoner lawsuit.

3. The PLRA

Although this Comment is primarily concerned with the intended meaning of the exhaustion of administrative remedies requirement under the PLRA, the exhaustion requirement can be better understood in light of other key changes brought about by the PLRA as a whole. As it will be demonstrated, the PLRA’s changes to the exhaustion requirement¹⁰⁰ were part of a larger legislative scheme “to end perceived judicial micromanagement of correctional facilities and to curb the purported flood of frivolous prisoners’ lawsuits inundating the courts.”¹⁰¹ Consequently, a proper interpretation of the exhaustion requirement of the PLRA requires that it be read in this context.

92. Schlanger, *supra* note 32, at 1567.

93. *Id.* at 1567-68. Additionally, Congress intended “to fix the problem as expeditiously as possible.” Slutsky, *supra* note 33, at 2302.

94. Schlanger, *supra* note 32, at 1566 n.26. “Hatch was introducing S. 1279, a bill version nearly identical to the enacted statute.” *Id.*

95. 141 CONG. REC. 26,553 (1995) (statement of Sen. Hatch).

96. Note, *supra* note 45, at 1675 (quoting 141 CONG. REC. 27,044 (1995) (statement of Sen. Thurmond)).

97. *Id.* (quoting 141 CONG. REC. 27,042 (1995) (statement of Sen. Dole)).

98. *Id.* at 1671 (quoting 141 CONG. REC. 26, 553 (1995) (statement of Sen. Hatch)).

99. *Id.* (quoting 141 CONG. REC. 26,549 (1995) (statement of Sen. Dole)).

100. 42 U.S.C. § 1997e(a) (2000).

101. Branham, *supra* note 50, at 489.

a. *Limiting Meritless Suits*

i. Exhaustion of Administrative Remedies¹⁰²

As the “most significant procedural obstacle to prisoner access to the courts under the PLRA”¹⁰³ and the focus of this Comment, the exhaustion requirement of 42 U.S.C. § 1997e is the logical place to begin an analysis of the PLRA. The PLRA “added bite” to the previous exhaustion scheme in several ways.¹⁰⁴ Prior to the PLRA, the exhaustion requirement only applied to “adult[s] convicted of a crime confined in any jail, prison, or other correctional facility.”¹⁰⁵ The PLRA expanded the scope of the exhaustion requirement to apply to any “prisoner,”¹⁰⁶ defined as “any person incarcerated or detained in any 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.”¹⁰⁷ Thus, unlike the amended 42 U.S.C. § 1997e, the exhaustion requirement did not previously apply to pretrial detainees,¹⁰⁸ federal prisoners, or incarcerated juveniles.¹⁰⁹ Rather, the previous exhaustion requirement only applied to adult state and local prisoners.¹¹⁰

The PLRA also changed the nature of the exhaustion requirement itself. Before the PLRA, the exhaustion “requirement” was discretionary¹¹¹ and only to be applied if the court believed it was “appropriate and in the interests of justice.”¹¹² Courts were not authorized to dismiss claims for failure to exhaust administrative remedies.¹¹³ Instead, courts could only suspend adjudication of a lawsuit for a maximum of 180 days while the inmate pursued “such plain, speedy, and effective administrative remedies as are available.”¹¹⁴ If the matter had not been resolved at the end of this period of up to 180 days, the court would simply lift the stay and commence adjudication of the suit.¹¹⁵

In contrast, after the PLRA, “exhaustion is mandatory and applies to essentially all inmate suits.”¹¹⁶ Dismissal for failure to exhaust administrative

102. As Professor Roosevelt has noted, “[T]he hallmark of an exhaustion requirement is that it delays a federal suit *until* the required procedures have been invoked.” Roosevelt, *supra* note 49, at 1784.

103. Feierman, *supra* note 37, at 260.

104. Roosevelt, *supra* note 49, at 1804.

105. CRIPA, Pub. L. No. 96-247, § 7(a)(1), 94 Stat. 349, 352 (1980) (amended 1996).

106. 42 U.S.C. § 1997e(a)(1) (2000).

107. *Id.* § 1997e(h).

108. Branham, *supra* note 50, at 495.

109. *Id.* at 497.

110. *Id.* at 495.

111. Roosevelt, *supra* note 49, at 1804.

112. CRIPA § 7(a)(1).

113. Roosevelt, *supra* note 49, at 1804.

114. CRIPA § 7(a)(1).

115. Branham, *supra* note 50, at 496.

116. Roosevelt, *supra* note 49, at 1804.

remedies is, furthermore, “not only authorized . . . but required.”¹¹⁷ Additionally, when a claim is facially “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,” the court may dismiss the suit—even if administrative remedies *have* been exhausted.¹¹⁸ Finally, the 180-day maximum time limit for a prison to handle a claim has been removed.¹¹⁹ As one observer has noted, “[n]ow, there is no defined period of time in which correctional officers must process a grievance to avoid court adjudication of the claim.”¹²⁰

Finally, prior to the passage of the PLRA, internal prison grievance systems had to meet five minimum standards.¹²¹ First, inmates and employees had to be involved in an advisory role “at the most decentralized level as is reasonably possible” in the operation of the grievance system.¹²² Second, the standard required “specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system.”¹²³ Third, the old standard included “priority processing of grievances . . . in which delay would subject the grievant to substantial risk of personal injury.”¹²⁴ Fourth, the pre-PLRA law required protection of prisoners filing grievances from possible reprisals,¹²⁵ and, finally, it mandated an independent, outside reviewer of the grievance system.¹²⁶ The PLRA, on the other hand, dispenses with each of these requirements.¹²⁷ On its face, the PLRA only requires that administrative remedies be “available” for the exhaustion requirement to be applicable.¹²⁸

ii. “The Frequent-Filer Provision”¹²⁹

Additionally, “[t]he PLRA imposes a special burden on so-called frequent filers — inmates whose prior actions or appeals have been dismissed at least three times for being frivolous or malicious or for failing to state a claim upon which relief may be granted.”¹³⁰ Even if such an inmate is indigent, he must pay the entire filing fee when initiating a suit or bringing an appeal.¹³¹ The only

117. *Id.*

118. 42 U.S.C. § 1997e(c)(2) (2000).

119. Compare CRIPA § 7(a)(1) (allowing inmate’s action to continue for, at most, 180 days), with 42 U.S.C. § 1997e (dispensing with discretionary deferral period).

120. Branham, *supra* note 50, at 497 (citing 42 U.S.C. § 1997e(a)).

121. CRIPA § 7(b)(2). If the grievance system did not meet these standards, it had to be “otherwise fair and effective.” *Id.* § 7(c)(1).

122. *Id.* § 7(b)(2)(A).

123. *Id.* § 7(b)(2)(B).

124. *Id.* § 7(b)(2)(C).

125. CRIPA § 7(b)(2)(D).

126. *Id.* § 7(b)(2)(E).

127. 42 U.S.C. § 1997e (2000).

128. *Id.* § 1997e(a); Branham, *supra* note 50, at 498.

129. Note, *supra* note 45, at 1674.

130. *Id.* (citing 28 U.S.C. § 1915(g) (2000)).

131. 28 U.S.C. § 1915(g).

exception to this requirement is when the inmate is in "imminent danger of serious physical injury."¹³²

iii. Other Provisions

The PLRA contains a few more provisions that are significant in fulfilling the Act's "touted objective—to curb the filing of frivolous lawsuits by prisoners."¹³³ One is that the PLRA requires even indigent filers to pay a portion of the filing fee up front.¹³⁴ The remaining balance is then paid in monthly installments.¹³⁵ Another is that the prisoner must first show a physical injury before recovering for any mental or emotional damage.¹³⁶ Lastly, a prisoner who files a lawsuit maliciously or solely to harass the defendant, or who testifies or presents information to the court falsely, may lose any earned good time credit.¹³⁷

b. Restricting Injunctive Relief

Other portions of the PLRA deal with limiting the federal courts' power to grant injunctive, or "prospective," relief to prisoners.¹³⁸ Under the PLRA, 18 U.S.C. § 3626(a)(1)(A) provides that no relief is to be granted unless it is "narrowly drawn, extends no further than necessary . . . and is the least intrusive means necessary to correct the violation."¹³⁹ In making these determinations, the court is to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."¹⁴⁰ Any preliminary injunction issued is also subject to these constraints and cannot extend beyond ninety days.¹⁴¹ Furthermore, any relief given is terminable on motion by the defendant unless the court has issued or issues, at the time of the motion,

132. *Id.*

133. Branham, *supra* note 50, at 491.

134. 28 U.S.C. § 1915(b)(1).

135. *Id.* § 1915(b)(2). This section also provides, however, that prisoners' accounts will not be debited when the balance is below ten dollars, nor will any prisoner be denied the opportunity to bring suit because he is unable to pay the initial partial filing fee. *Id.* § 1915(b)(2)-(4).

136. 42 U.S.C. § 1997e(e) (2000).

137. 28 U.S.C. § 1932. A prisoner serving a sentence of greater than one year but less than life may receive credit toward his sentence if he exhibits "exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b)(1) (2000).

138. 18 U.S.C. § 3626 (reducing, by statute, courts' ability to grant prospective relief). "[T]he term 'prospective relief' means all relief other than compensatory monetary damages." *Id.* § 3626(g)(7). The PLRA provisions of 18 U.S.C. § 3626 were originally part of the failed Stop Turning Out Prisoners Act. *See* S. 400, 104th Cong. (1995) (proposing statutory changes later made to 18 U.S.C. § 3626).

139. 18 U.S.C. § 3626(a)(1)(A). *But see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20409(a), 108 Stat. 1796, 1827 (1994) (amended 1996) (requiring more generally that relief "shall extend no further than necessary to remove the conditions that are causing . . . cruel and unusual punishment").

140. 18 U.S.C. § 3626(a)(1)(A).

141. *Id.* § 3626(a)(2).

findings demonstrating the above constraints.¹⁴² Finally, no prisoner release order may be issued unless the court has previously issued an order for less intrusive relief with which the defendant has had a reasonable amount of time to comply, and a three-judge panel has found by clear and convincing evidence that overcrowding is the chief cause of the violation of the federal right and no other relief will remedy it.¹⁴³ The PLRA's exhaustion requirement must be interpreted against this backdrop.

B. *Interpreting the Exhaustion Requirement*

1. Goals of the Exhaustion Requirement

The Supreme Court has previously stated the objectives of the PLRA's exhaustion requirement: "Beyond doubt, Congress enacted § 1997e(a) [the exhaustion requirement] to reduce the quantity and improve the quality of prisoner suits."¹⁴⁴ The exhaustion requirement is constructed to achieve these goals in three ways. First, it provides correctional systems the chance to attend to prisoner grievances internally, possibly satisfying some prisoner complaints and reducing the overall volume of federal inmate litigation.¹⁴⁵ Second, the process may separate out a portion of frivolous complaints.¹⁴⁶ Finally, if nothing else, requiring exhaustion of administrative remedies may help build a factual record that eases the courts' reviews of those cases that do proceed to federal court.¹⁴⁷

2. The Circuit Split over the Status of Untimely Grievances

Federal appellate courts are split over whether a late grievance should be considered to have exhausted an inmate's administrative remedies in accordance with the PLRA, thus allowing the inmate to proceed to federal court with his complaint.¹⁴⁸ The Seventh and Tenth Circuits have held that a late grievance

142. *Id.* § 3626(b)(2)-(3).

143. *Id.* § 3626(a)(3). Prison population caps were a major target of PLRA supporters who believed it was "past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts." Schlanger, *supra* note 32, at 1565-66 (quoting 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)).

144. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

145. *Id.* at 524-25.

146. *Id.* at 525.

147. *Id.*

148. *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1185 (10th Cir. 2004) (noting circuit split). Under the PLRA, a prisoner must first exhaust the remedies available to him through the correctional facility's internal grievance system before filing in federal district court. 42 U.S.C. § 1997e(a) (2000). The debate arises when a prisoner files a late grievance or appeal within the prison's internal system, arguably exhausting his administrative remedies, even though the reason the remedies are no longer available to him is due to the complaint's untimeliness rather than a judgment on its merits. *Ross*, 365 F.3d at 1185.

bars the prisoner from pursuing the matter in federal court,¹⁴⁹ while the Fifth and Sixth Circuits have held that it does not.¹⁵⁰

As one circuit court noted, the dispute hinges on whether the exhaustion requirement of the PLRA contains a “procedural default rule.”¹⁵¹ Under a procedural default rule, a procedure (such as the filing of a grievance or appeal) is not considered exhausted if it is unavailable because it is time barred under the procedural rules governing a prison’s internal grievance process.¹⁵²

a. Procedural Default Bar Applies

i. Pozo v. McCaughtry

In *Pozo v. McCaughtry*,¹⁵³ a prisoner filed his initial complaint within the allotted time, but, after this initial complaint was rejected, he failed to file a timely appeal.¹⁵⁴ Under the prison’s grievance system, the prisoner had ten days to file an appeal; however, he did not appeal until a year later.¹⁵⁵ After this appeal was rejected as untimely, he then argued that this appeal nonetheless exhausted his administrative remedies because the state’s administrative law¹⁵⁶ gave the complaint examiner discretion to hear late appeals.¹⁵⁷ The Seventh Circuit rejected this argument, borrowing the rule from habeas cases and holding that “failure to take a timely appeal within the state system is a procedural default . . . even when the state court has some power to accept untimely appeals.”¹⁵⁸ Where the prisoner failed to “properly take each step within the administrative process,” exhaustion had not been achieved, and the procedural default thus barred the prisoner from litigating under 42 U.S.C. § 1997e(a).¹⁵⁹

149. *See, e.g., Ross*, 365 F.3d at 1186 (holding that filing time-barred grievance did not satisfy exhaustion requirement); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) (holding that untimely appeal constituted failure to exhaust administrative remedies).

150. *See, e.g., Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003) (holding that prison’s internal time constraints could not be used to invoke procedural default bar against late appeal); *Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) (dismissing federal suit filed before final adjudication of pending appeal in prison’s internal grievance system but effectively refusing to apply procedural default rule by holding that prisoner could refile federal suit after all appeals had been completed). The United States Court of Appeals for the Eleventh Circuit held that where a prisoner did not appeal a grievance rejected as untimely, he did not fulfill the exhaustion requirement, but the court also suggested that the requirement may have been met had the prisoner appealed. *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999).

151. *Ross*, 365 F.3d at 1186.

152. *Id.*

153. 286 F.3d 1022 (7th Cir. 2002).

154. *Pozo*, 286 F.3d at 1024.

155. *Id.*

156. *See* WIS. ADMIN. CODE DOC. § 310.13(3) (2006) (giving discretion to address late appeals when interposed delay has not rendered investigation impractical).

157. *Pozo*, 286 F.3d at 1024.

158. *Id.* at 1024-25 (citing *Coleman v. Thompson*, 501 U.S. 722, 740-44 (1991)).

159. *Id.* at 1024.

The court stated that the prisoner's position would deprive the exhaustion requirement of its "oomph," eliminating prisoners' incentive to avail themselves of the state process.¹⁶⁰ Instead, prisoners would be allowed to "thumb their noses at the specified procedures."¹⁶¹

ii. *Ross v. County of Bernalillo*

In *Ross v. County of Bernalillo*,¹⁶² the Tenth Circuit also adopted a procedural default rule from habeas corpus cases.¹⁶³ The court stated that a petitioner who fails to satisfy state procedural rules in the habeas context does meet the "'technical requirements for exhaustion'"¹⁶⁴ because his procedural default makes state remedies unavailable to him at that point.¹⁶⁵ To "'protect the integrity'" of the exhaustion requirement, however, "the Court has grafted [on] a procedural default rule."¹⁶⁶ In other words, courts ask "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those [state] remedies."¹⁶⁷

Without a procedural default rule in the habeas corpus context, its exhaustion requirement would be "utterly defeated" by prisoners who let state remedies expire or otherwise present their claims in a way that state courts cannot consider without subverting their own procedural rules.¹⁶⁸ The *Ross* court saw a parallel problem in the exhaustion requirement of the PLRA:

Allowing prisoners to proceed to federal court simply because they have filed a time-barred grievance would frustrate the PLRA's intent to give prison officials the opportunity to take corrective action that may satisfy inmates and reduce the need for litigation, to filter out frivolous claims, and to create an administrative record that would facilitate subsequent judicial review.¹⁶⁹

With that in mind, the court concluded that "[r]egardless of whether a prisoner goes through the formality of submitting a time-barred grievance, he 'may not successfully argue that he had exhausted his administrative remedies by, in essence, failing to employ them.'"¹⁷⁰

160. *Id.* at 1025.

161. *Id.*

162. 365 F.3d 1181 (10th Cir. 2004).

163. *Ross*, 365 F.3d at 1186. Although the court adopted this rule, it was not compelled to actually apply it because the administrative system accepted and responded affirmatively to the prisoner's grievance, whether timely or not, thus obviating any exhaustion or timeliness obstacles to federal court. *Id.*

164. *Id.* at 1185 (quoting *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (emphasis added)).

165. *Id.*

166. *Id.* (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)).

167. *Ross*, 365 F.3d at 1185 (quoting *O'Sullivan*, 526 U.S. at 848).

168. *Id.* (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)).

169. *Id.* at 1186.

170. *Id.* (quoting *Jernigan v. Stuchell*, 304 F.3d 1030, 1033 (2002)).

b. *No Procedural Default Bar*

i. *Wendell v. Asher*

In *Wendell v. Asher*,¹⁷¹ a prisoner filed an internal complaint alleging that a corrections officer had attacked and severely beaten him.¹⁷² After the complaint was denied, he then filed a timely appeal.¹⁷³ Rather than waiting up to forty days for the adjudication of this appeal under the prison's internal grievance system, the prisoner filed a lawsuit in federal court roughly one month after the denial of his initial complaint.¹⁷⁴ Because the prisoner did not properly exhaust administrative remedies, the circuit court affirmed the district court's dismissal of the suit.¹⁷⁵ But in so doing, the circuit court effectively refused to apply a procedural default rule by leaving open the possibility that the suit could be brought again in federal court, despite the previous failure to await completion of the prison's internal adjudication. The court stated: "Provided [the prisoner] acts promptly, we conclude that there are no apparent barriers to the refile of this action in federal district court once he exhausts his administrative remedies as required by § 1997e."¹⁷⁶

ii. *Thomas v. Woolum*

The prisoner-grievant in *Thomas v. Woolum*¹⁷⁷ received a severe beating from a corrections officer but did not file a grievance against him until approximately six months later,¹⁷⁸ well after the administrative system's deadline of thirty days.¹⁷⁹ Apparently for this reason, the prisoner's appeal was denied.¹⁸⁰ After this denial, he filed a claim in state court against the officer who administered the beating, as well as unnamed officers who allegedly witnessed it; however, this suit was also dismissed.¹⁸¹ The prisoner then took his suit to federal district court, where he was awarded damages on his claim against the officer who had attacked him.¹⁸² Nonetheless, his claim against the officers who had allegedly observed the attack was dismissed for failure to exhaust administrative

171. 162 F.3d 887 (5th Cir. 1998).

172. *Wendell*, 162 F.3d at 891.

173. *Id.*

174. *Id.*

175. *Id.* at 892.

176. *Id.*

177. 337 F.3d 720 (6th Cir. 2003).

178. The beating took place on November 5, 1997. *Thomas*, 337 F.3d at 724. The prisoner did not file a grievance until "[o]n or about May 4, 1998." *Id.* at 723.

179. *Id.* at 724.

180. *Id.*

181. *Id.*

182. *Thomas*, 337 F.3d at 724-25.

remedies because the officers, now named, had not been named in the earlier state process.¹⁸³

In this case, the Sixth Circuit held that “exhaustion is not the same as procedural default.”¹⁸⁴ The court classified the requirement as “a benefit accorded to state prisons,”¹⁸⁵ and “an accommodation of our federal system.”¹⁸⁶ It stated that the requirement could not be used “to handcuff the federal courts in adjudicating cases involving important federal rights.”¹⁸⁷ The court concluded that “if the state forgoes an opportunity to decide matters internally whether for internal time constraints or any other reason, [then] the PLRA has nonetheless served its purpose, and the prisoner may proceed to federal court.”¹⁸⁸

In coming to this determination, the court looked to what it considered to be “two similar statutory contexts requiring resort to state administrative procedures.”¹⁸⁹ In *Oscar Mayer & Co. v. Evans*,¹⁹⁰ the *Thomas* court pointed out, a plaintiff under the Age Discrimination in Employment Act was not barred from pursuing a federal claim by his failure to present his grievance to the appropriate state authority within the state’s statute of limitations.¹⁹¹ Likewise, in *EEOC v. Commercial Office Products Co.*,¹⁹² a case dealing with Title VII of the Civil Rights Act of 1964, a plaintiff was not prevented from prosecuting a federal claim due to her failure to file with the state agency within the time allotted by the state.¹⁹³

The *Thomas* court then concluded that the three arguments apparently relied on by the Supreme Court in *Oscar Mayer* and *Commercial Office Products* were also applicable to the case before it.¹⁹⁴ First, the court stated that “the absence of any mention in the statutes’ text of any requirement of timeliness under state law indicated Congress’s intent that state time requirements could not bar the federal claims.”¹⁹⁵ Second, in cases where plaintiffs are often untrained and acting pro se, state statutes of limitations should not bar suit in

183. *Id.* at 725. The prisoner maintained that it was only after the discovery phase of the state court proceeding that he was able to identify the officers who had allegedly observed the beating. *Id.* at 724.

184. *Id.* at 725.

185. *Id.* at 726.

186. *Thomas*, 337 F.3d at 726 (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

187. *Id.*

188. *Id.* This holding is actually inconsistent with two previous unpublished Sixth Circuit orders in which it was held that “the exhaustion requirement was not met because of a failure to meet a state’s procedural deadlines.” *Id.* at 726 n.1 (citing *Jacobs v. Wilkinson*, 21 F. App’x 273, 274-75 (6th Cir. 2001); *Qawi v. Stegall*, No. 98-1402, 2000 WL 571919, at *1 (6th Cir. May 3, 2000)). The court also observed, however, that “these unpublished orders have no precedential value and do not bind this panel.” *Id.*

189. *Thomas*, 337 F.3d at 727.

190. 441 U.S. 750 (1979).

191. *Thomas*, 337 F.3d at 728.

192. 486 U.S. 107 (1988).

193. *Commercial Office Prods.*, 486 U.S. at 123.

194. *Thomas*, 337 F.3d at 728.

195. *Id.*

federal court.¹⁹⁶ Finally, federal courts should not be precluded from adjudicating rights that Congress meant to protect.¹⁹⁷

III. DISCUSSION

A. *Inmate Litigation after the PLRA*

Even critics of the PLRA have reluctantly conceded the statute's effectiveness. Professor Roosevelt, certainly no fan of the PLRA,¹⁹⁸ acknowledged that "to the extent that success can be measured by the volume of suits, the PLRA has worked. . . . [T]o some extent the PLRA appears to be a successful statute."¹⁹⁹ In 1995, inmates filed 41,679 civil rights suits.²⁰⁰ In 1996, with the passage of the PLRA, new inmate suits "drop[ped] precipitously,"²⁰¹ and by 2000, inmates were only filing about 25,000 civil rights suits per year.²⁰² New filings have continued to decrease slightly each year.²⁰³

Between 1995 and 2000, prisoner civil rights suits dropped by thirty-nine percent.²⁰⁴ As Professor Roosevelt noted, "[T]hat substantial decrease . . . is all the more impressive when considered in light of the growing prison population."²⁰⁵ Coupling the decrease in new prisoner suits with the increase in the prison population, the PLRA's effectiveness in reducing litigation appears even more dramatic. Over this period, the PLRA has essentially cut the filing rate in half—from thirty-seven suits for every 1000 inmates in 1995 to nineteen suits for every 1000 inmates by 2000.²⁰⁶ The filing rate, too, has continued to decrease slightly each year.²⁰⁷

Anecdotal and empirical evidence suggests that many of the meritless and frivolous cases of the type discussed above are being filtered out and even punished under the PLRA, while meritorious cases are getting closer attention. For instance, an inmate who sued *Penthouse* because a pictorial was less graphic

196. *Id.*

197. *Id.*

198. See Roosevelt, *supra* note 49, at 1777-78 (characterizing debate over PLRA as "battle of sound bites" leading to myopic law conceived in haste rather than scrutiny (quoting Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 (1997))).

199. *Id.* at 1779-80. Indeed, if the PLRA's effectiveness in bringing about the stated goals of its proponents is to be any kind of indicator of "success," then measuring "success" by the reduction in prisoner lawsuits affords an effective barometer. See generally *supra* Part II.A.2 for a discussion of Congress's goals in passing the PLRA.

200. Roosevelt, *supra* note 49, at 1779.

201. Schlanger, *supra* note 32, at 1585.

202. Roosevelt, *supra* note 49, at 1779.

203. Schlanger, *supra* note 32, at 1585.

204. Roosevelt, *supra* note 49, at 1779.

205. *Id.*

206. *Id.*

207. Schlanger, *supra* note 32, at 1585.

than advertised was fined \$250 for his efforts.²⁰⁸ A second inmate who filed a series of suits over inadequate dinner portions was subjected to the frequent-filer provision's three strikes component²⁰⁹ and also fined.²¹⁰

Furthermore, the notion that claims lacking merit are being weeded out is bolstered by statistical evidence.²¹¹ Since the enactment of the PLRA, "vastly fewer cases are leading to negotiated outcomes."²¹² In 1995, the year before passage of the PLRA, 5.5% of cases were settled.²¹³ By 2000, that number had been reduced to 2.4%.²¹⁴ As one article pointed out, "rather than agreeing to nuisance settlements — about which the House Republicans were very concerned — defendants are scrutinizing inmate claims and responding based on the legal merit of those claims (rather than allowing the defendants' own lack of resources to determine their responses)."²¹⁵ Even the percentage of claims succeeding at trial is up, from seven or eight percent to ten percent,²¹⁶ suggesting that meritorious claims are still making it to federal court. As the article above observed, "What better statistical results could have been achieved?"²¹⁷

B. *The Academic Response to the PLRA*

Despite the statistical support for the PLRA's success, "[t]he enactment of the PLRA inspired a flurry of academic commentary, much of it critical."²¹⁸ This "predominately hostile academic reaction"²¹⁹ took many forms,²²⁰ a few of which

208. Roosevelt, *supra* note 49, at 1779.

209. The three strikes component of the frequent filer's provision states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section 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 U.S.C. § 1915(g) (2000).

210. Roosevelt, *supra* note 49, at 1779-80.

211. See Schlanger, *supra* note 32, at 1661-62 (cataloguing inmates' heightened lack of success after PLRA).

212. *Id.* at 1661.

213. *Id.*

214. *Id.*

215. Note, *supra* note 45, at 1678.

216. *Id.*

217. *Id.*

218. See Roosevelt, *supra* note 49, at 1772 (listing academic commentary on PLRA).

219. *Id.* at 1779.

220. See, e.g., Branham, *supra* note 50, at 487 (suggesting that Congress review its findings on inmate litigation and consider revising PLRA); Feirman, *supra* note 37, at 251 (maintaining that obstacles within many grievance processes make exhaustion requirement especially burdensome); Roosevelt, *supra* note 49, at 1778-79 (arguing against reading exhaustion requirement as bar to federal civil rights suits); Schlanger, *supra* note 32, at 1599 (contending that level of frivolity of inmate litigation is overstated); Slutsky, *supra* note 33, at 2290-91 (advocating that exhausted claim or claims within "mixed" claim—where administrative processes have been exhausted for one or more claims, but not for one or more others—be allowed to proceed to federal court). *But see* Note, *supra* note 45,

are discussed below. This criticism of the PLRA misses the point, however. It “fails to reflect or incorporate the PLRA proponents’ political beliefs,” instead grounding itself in “a vision that differs substantially from the ideological vision advanced by the PLRA’s proponents.”²²¹ Consequently, these authors fail to properly consider the legislative intent behind the PLRA, “leaving political arguments to carry the day.”²²² Ultimately, it will be shown that the argument against applying a procedural default rule to untimely grievances, similarly, is made at the expense of a faithful interpretation of the intended purpose of the PLRA and its exhaustion requirement.²²³

1. An Epidemic of Incarceration²²⁴

Multiple commentators took issue with the notion that the number of suits filed by inmates had exploded in the years prior to the passage of the PLRA, blaming the increase not on an epidemic of litigation but on “an epidemic of incarceration, of which increased litigation was merely a symptom.”²²⁵ Critics of the PLRA noted that the statistics on the increase in prisoner litigation used to support the Act generally failed to consider the greater number of prisoners,²²⁶ opining that “it would be equally appropriate to talk about a ‘deluge’ of inmate requests for food” as it would be to talk about a deluge of litigation.²²⁷

The prison population did in fact soar in the years preceding the PLRA, growing 237% between 1980 and 1995, the year before the passage of the PLRA.²²⁸ Over this period, the filing rate of prisoner suits dropped slightly, from 40.7 to 39.4 suits per thousand prisoners.²²⁹ Arguing that this fact undermines the supposed necessity of inmate litigation reform rests on the assumption that supporters of the PLRA were comfortable with the rate of inmate litigation throughout the years preceding passage of the PLRA.²³⁰ To the contrary,

at 1661 (concluding that much of Professor Schlanger’s disagreement with supporters of PLRA is essentially political). Despite this negative response, “the statute has survived judicial scrutiny essentially unchanged.” Roosevelt, *supra* note 49, at 1779.

221. Note, *supra* note 45, at 1664. The Note refers specifically to Schlanger, *supra* note 32, but insofar as the above criticisms also base their arguments on “controversial political assumptions that the proponents of the PLRA would be unlikely to accept,” much of the Note’s assessment of Professor Schlanger’s article may also be applied to other literature critical of the PLRA. Note, *supra* note 45, at 1661.

222. *Id.* at 1681.

223. See *infra* Part III.C for the argument that the intended meaning of PLRA’s exhaustion requirement includes a procedural default bar to late claims.

224. Roosevelt, *supra* note 49, at 1777.

225. *Id.*; see also Slutsky, *supra* note 33, at 2295 (quoting and agreeing with Professor Roosevelt’s concept of “epidemic of incarceration”).

226. Feerman, *supra* note 37, at 259.

227. Schlanger, *supra* note 32, at 1587.

228. Slutsky, *supra* note 33, at 2295.

229. *Id.*

230. See, e.g., *id.* (noting rise in inmate litigation that accompanied rise in inmate numbers in years leading up to PLRA but failing to note PLRA supporters’ position that litigation rates had been too high before increase in incarceration).

“everyone in American *was*, in their view, hyperlitigious,”²³¹ but inmate litigation represented an area where there was at least relatively widespread will to legislate.²³² With this in mind, it is inaccurate to say that the increase in inmate litigation was somehow made more palatable by the corresponding increase in inmates.²³³ To PLRA supporters, inmate litigation had been out of control for some time.²³⁴ By 1995, what had changed was not so much the rate of inmate litigation, but the desire of Congress to do something about it.²³⁵

2. The Peanut Butter Incident and the Level of Frivolity of Inmate Litigation

The lawsuit spawned by a prisoner’s receiving chunky peanut butter when creamy was requested²³⁶ is often mentioned as the “paradigmatic frivolous suit.”²³⁷ As Professor Roosevelt observed, during the increased media attention to frivolous lawsuits prior to the passage of the PLRA, “[t]he peanut butter story, in particular, proved to have legs.”²³⁸ On the other hand, critics of the PLRA cite this suit as indicative of a wider trend to overstate the frivolity of inmate litigation.²³⁹ In their view, the idea that the peanut butter case was frivolous has been “debunked”²⁴⁰ by the further information that the suit was not merely over receiving the wrong type of peanut butter per se, but over the prison’s failure to refund the inmate’s \$2.50 after accepting his return of the crunchy peanut butter.²⁴¹ Viewed in that light, the suit was not really over peanut butter at all, the argument goes, but over the prison’s wrongful appropriation of the prisoner’s personal funds.²⁴²

As reported in one commentary, “[t]he unfair loss of \$2.50 might not seem like much, but it is not trivial to a prisoner with limited funds.”²⁴³ Undoubtedly, the author makes a valid point when she insists that unwarranted taking of prisoner funds should not be dismissed out of hand; indeed, they should not be. Nonetheless, whether a prison canteen’s alleged failure to supply a prisoner with

231. Note, *supra* note 45, at 1669.

232. *Id.*

233. *See id.* at 1668 (arguing that PLRA supporters did not view increase in litigation as “a sudden, recent phenomenon”).

234. *See id.* (citing notion that there was “continuing deluge” of litigation).

235. *See id.* (noting that Republicans had to wait forty years before being able to implement reforms to PLRA).

236. *See supra* notes 75-79 and accompanying text for a discussion of the peanut butter case.

237. Slutsky, *supra* note 33, at 2296; *see also* Schlanger, *supra* note 32, at 1568 (noting peanut butter case’s “paradigmatic” status).

238. Roosevelt, *supra* note 49, at 1777.

239. Slutsky, *supra* note 33, at 2296; *see also* Schlanger, *supra* note 32, at 1692 (stating idea that prisoner lawsuits meet such limited success due to their inherent frivolity is “not true”).

240. Roosevelt, *supra* note 49, at 1777.

241. Slutsky, *supra* note 33, at 2296 n.50.

242. Feerman, *supra* note 37, at 259 n.58.

243. *Id.* (quoting Jennifer Winslow, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. REV. 1655, 1656 (2002)).

a \$2.50 jar of creamy peanut butter already paid for by the prisoner is worthy of a § 1983 suit for unconstitutional deprivation by a state actor acting under color of law is quite another story.²⁴⁴ Likely, a PLRA supporter would consider this a suit “in response to almost any perceived slight”²⁴⁵ rather than one based on a “prison condition[] that actually violate[s] the Constitution [that] should not be allowed to persist.”²⁴⁶

Overall, the definition of a frivolous lawsuit would likely be broader to a PLRA supporter than for a critic of the PLRA.²⁴⁷ While critics of the PLRA have focused on the facial legitimacy of most inmate suits,²⁴⁸ “to a PLRA proponent, inmate suits can be frivolous precisely because they have no realistic chance of standing on their merits — not necessarily because their failure is attributable to a laughable set of facts.”²⁴⁹ Consequently, by defining frivolity as requiring facial ridiculousness (and nothing less), much of the existing literature fundamentally misunderstands the type of lawsuit targeted by the PLRA.²⁵⁰

3. Passage of the PLRA

Opponents of the PLRA have characterized debate over the Act as a “battle of sound bites,” one which was ultimately won by its supporters.²⁵¹ According to Professor Schlanger, “[i]n the first heady days of Republican control of both chambers of Congress, prisoners made awfully attractive targets — and Republican leaders vying for support from the party faithful were happy to outbid one another in anti-criminal toughness.”²⁵² Only after repeated failed attempts to pass inmate litigation reform in a freestanding bill²⁵³ and an apparent inability to override President Clinton’s veto power,²⁵⁴ the argument goes,

244. See generally Note, *supra* note 45, at 1665-67 (discussing differing definitions of lawsuit frivolity held by those for and against PLRA). Aside from allowing or barring the suit, there is of course another option—simply paying the prisoner the \$2.50. As Professor Branham has pointed out, however, correctional officials “worry that if they pay money to one inmate whose grievance is legitimate, they will open a Pandora’s box of unfounded claims for compensation.” Branham, *supra* note 50, at 521. Instead, correctional officials have largely come to the conclusion that paying out on even legitimate claims will lead to “an avalanche of groundless claims for damages.” *Id.*

245. Note, *supra* note 45, at 1666 (quoting 141 CONG. REC. 26,553 (1995) (statement of Sen. Kyl)).

246. Schlanger, *supra* note 32, at 1566 (quoting 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)).

247. See Note, *supra* note 45, at 1665 (noting that narrow definition of “frivolous” enabled PLRA proponents to be criticized for failing to recognize that most inmate suits were not facially trivial despite not being based on legal merit).

248. See, e.g., Schlanger, *supra* note 32, at 1573 (contending that majority of prisoner lawsuits are not the type lambasted in “top ten” lists).

249. Note, *supra* note 45, at 1665-66.

250. See *id.* at 1667 (explaining that various studies produced differing statistics on dismissed frivolous inmate claims because each study differed on what it considered to be frivolous claims).

251. Roosevelt, *supra* note 49, at 1777-78 (quoting Tushnet & Yackle, *supra* note 198, at 64).

252. Schlanger, *supra* note 32, at 1567.

253. Slutsky, *supra* note 33, at 2298.

254. Branham, *supra* note 50, at 487 n.11.

proponents of reform finally managed to pass the PLRA, “[b]uried in the fine print” of an appropriations bill in the midst of a budget crisis.²⁵⁵

It may be difficult to resist the conclusion that the PLRA critics’ denouncement of the mode of passage of the PLRA smacks of sour grapes. If the debate over the PLRA was in fact a “battle of sound bites” as Professors Mark Tushnet and Larry Yackle have described it,²⁵⁶ it was a battle that opponents of the PLRA had a duty to win—or else live with the results. Professor Schlanger’s negative characterization of congressional “leaders vying for support from the party faithful”²⁵⁷ is even more problematic. A supporter of the PLRA might describe this process in a different way—namely, “democracy.” Whatever else critics may say about the passage of the PLRA,²⁵⁸ “the way in which the PLRA was moved through . . . Congress is not atypical.”²⁵⁹ Therefore, interpretation of the PLRA and its exhaustion requirement should not be either. It seems clear then that the proper reading is the one that best effectuates Congress’s intended purpose in enacting the legislation.²⁶⁰

C. *Interpreting the Exhaustion Requirement*

1. Legislative History

The question of whether to apply a procedural default bar against prisoners who fail to comply with prison time constraints is best answered in terms of the intended purpose of the PLRA²⁶¹ and its exhaustion requirement.²⁶² As stated by the supporters of the PLRA, “inmate litigation was a wasteful system demanding drastic amendment, even all-but-complete elimination,”²⁶³ that needed to be rectified “as expeditiously as possible.”²⁶⁴ While it was not the goal of proponents of the PLRA to deny valid suits,²⁶⁵ they also felt that “the courts [had] gone too far in micromanaging our Nation’s prisons.”²⁶⁶

PLRA supporters also weighed in on the purpose of the exhaustion requirement specifically. Senator Jon Kyl stated that exhaustion of

255. *Id.* at 537-38.

256. Roosevelt, *supra* note 49, at 1777-78 (quoting Tushnet & Yackle, *supra* note 198, at 64).

257. Schlanger, *supra* note 32, at 1567.

258. See *supra* Part II.B for a discussion of the academic literature criticizing the PLRA.

259. Branham, *supra* note 50, at 538.

260. See *supra* Part II.A.2 for a discussion of Congress’s reasons for enacting the PLRA.

261. See *supra* Part II.A.3 for a discussion of the PLRA as a whole.

262. See *supra* Part II.A.3.a.i for a discussion of the PLRA’s exhaustion requirement specifically.

263. Schlanger, *supra* note 32, at 1567-68.

264. Slutsky, *supra* note 33, at 2301-02.

265. See Roosevelt, *supra* note 49, at 1814 n.208 (“If somebody has a good case, a prisoner, let him file it.” (quoting 142 CONG. REC. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid))); Schlanger, *supra* note 32, at 1566 (noting that two themes of PLRA supporters were (1) to “prevent frivolous litigation by inmates,” and (2) to rid other “inappropriate regulatory orders imposed on prisons and jails”).

266. Schlanger, *supra* note 32, at 1566 (quoting 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)).

administrative remedies was needed because of the easy accessibility of internal prison remedies and the weight placed on federal courts from frivolous claims.²⁶⁷ Representative Frank LoBiondo, somewhat conversely but ultimately to the same effect, noted that the increased time and money costs to prisoners due to the exhaustion requirement would aid in deterring frivolous suits.²⁶⁸ Additionally, Representative LoBiondo believed that, for those cases that did proceed to federal court, the exhaustion requirement would help to create a more substantial factual record on which a federal court could rely.²⁶⁹ In *Porter v. Nussle*,²⁷⁰ the Supreme Court agreed, stating: "Beyond doubt, Congress enacted § 1997e(a) [the exhaustion requirement] to reduce the quantity and improve the quality of prisoner suits"²⁷¹

2. Application of the Exhaustion Requirement

With these goals in mind, it is clear that barring late grievances as procedurally defaulted best furthers the legislative intent behind the PLRA and its exhaustion requirement. As the court in *Ross v. County of Bernalillo*²⁷² stated, "[a]llowing prisoners to proceed to federal court simply because they have filed a time-barred grievance would frustrate the PLRA's intent to give prison officials the opportunity to take corrective action."²⁷³ The dissent in *Thomas v. Woolum*²⁷⁴ agreed:

By permitting inmates to thumb their noses at such time limits, the lead opinion thoroughly disables prison grievance systems as meaningful tools for dispute resolution More importantly, this result is wholly at odds with Congress's intent in enacting the [PLRA] and amending 42 U.S.C. § 1997e(a) to establish a strict, mandatory exhaustion requirement for prisoner § 1983 suits.²⁷⁵

To be sure, allowing grievances filed after internal administrative deadlines to nonetheless proceed to federal court would conflict with the legislature's expressed desire to filter out frivolous claims by ensuring that all claims first proceed through the prison's own grievance process. As stated in Judge Rosen's dissent in *Thomas*, "permitting inmates to thumb their noses" at time constraints

267. Slutsky, *supra* note 33, at 2300. Senator Kyl's remarks are particularly informative regarding legislative intent, since he sponsored an earlier, albeit unsuccessful, bill aimed at inmate lawsuit reform—the Dole-Kyl Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995). Slutsky, *supra* note 33, at 2301.

268. Slutsky, *supra* note 33, at 2301.

269. *Id.* Representative LoBiondo sponsored a similar, also unsuccessful bill in the House—the Prison Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. (1995). Slutsky, *supra* note 33, at 2300-01.

270. 534 U.S. 516 (2002).

271. *Porter*, 534 U.S. at 524.

272. 365 F.3d 1181 (10th Cir. 2004).

273. *Ross*, 365 F.3d at 1186.

274. 337 F.3d 720 (6th Cir. 2003).

275. *Thomas*, 337 F.3d at 737 (Rosen, J., dissenting).

would render the grievance process worthless²⁷⁶—the very process relied on by Congress to take the lead role in reducing federal inmate suits. As Judge Rosen appropriately noted, the deadlines inherent in any meaningful grievance system are “a two-way street. If prisoners no longer are bound by deadlines, the same surely must be true for prison administrators.”²⁷⁷ Failing to bar late grievances is an “invitation to chaos and delay” that must also allow prison officials to “withhold their rulings indefinitely, and then argue that any § 1983 suit is premature until a decision is eventually forthcoming.”²⁷⁸

Refusing to apply a procedural default bar directly contradicts the stated intent of Senator Kyl²⁷⁹ and Representative LoBiondo,²⁸⁰ and it effectively undermines the concerns over judicial micromanagement of state prisons expressed by Senator Hatch²⁸¹ by substituting federal jurisdiction for a prison’s own discretionary power to establish necessary deadlines for the administration of its grievance system. Additionally, barring late grievances is in accordance with Congress’s desire to allow meritorious suits to proceed to trial,²⁸² since requiring a prisoner to abide by administrative deadlines is unrelated to the merit (or lack thereof) of the prisoner’s claim.²⁸³ In other words, there is no reason meritorious suits will not continue to be considered under the PLRA—provided that the prisoner fully proceed through the prison’s internal grievance system and abide by its deadlines.²⁸⁴ Moreover, barring late grievances actually furthers Congress’s intended goal of freeing up resources from frivolous suits to be used on meritorious ones.²⁸⁵ For these reasons, it is clear that the interpretation of the exhaustion requirement of the PLRA desired by Congress is one that contains a procedural default bar to untimely grievances.

IV. CONCLUSION

When courts refuse to apply a procedural default bar to timed-out grievances and appeals, they deprive the PLRA of its most effective mechanism for limiting frivolous suits²⁸⁶ and ensuring that prisoner suits brought in federal courts have a substantial record with which the court may work.²⁸⁷ To be sure, a

276. *Id.*

277. *Id.* at 738.

278. *Id.*

279. Slutsky, *supra* note 33, at 2300.

280. Branham, *supra* note 50, at 503-04; Slutsky, *supra* note 33, at 2300-01.

281. See *supra* note 95 and accompanying text noting Senator Hatch’s belief that the PLRA would help to end frivolous inmate litigation. Senator Hatch introduced the PLRA in the Senate in September of 1995. Schlanger, *supra* note 32, at 1565-66.

282. Schlanger, *supra* note 32, at 1567.

283. See *supra* Part II.A.3.a.i for the observation that the exhaustion requirement applies equally to all inmates without any prescreening for merit.

284. Note, *supra* note 45, at 1678.

285. *Id.* at 1678 n.131.

286. Feierman, *supra* note 37, at 260.

287. See Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (identifying improving quality and reducing quantity of inmate litigation as twin aims of PLRA).

failure to bar suits in which prisoner-plaintiffs neglect to abide by the time constraints necessary for the operation of the prison's internal grievance system²⁸⁸ effectively constitutes a return to the pre-PLRA days of a discretionary exhaustion "requirement."²⁸⁹ If a prisoner may disregard the remedies available to him under the prison's internal grievance system by allowing his grievance or appeal to be timed out and yet still proceed to federal court on the matter, why have an exhaustion requirement in the first place?²⁹⁰

Certainly, Congress did not intend to allow inmates to bypass the exhaustion requirement in this fashion.²⁹¹ The legislative history of the PLRA is replete with references to the exhaustion requirement's importance in weeding out frivolous suits and creating a better factual record for those claims that do make it to federal court.²⁹² Supporters of the PLRA also explicitly voiced their desire to eliminate federal micromanagement of state prisons,²⁹³ a tradition that would be perpetuated by failing to apply a procedural default bar since a prison's internal deadlines would be made meaningless.²⁹⁴ Moreover, a strict application of the exhaustion requirement is in accordance with other restrictions on inmate litigation brought about by the PLRA.²⁹⁵

For all of these reasons, it is clear that Congress intended a procedural default bar to be built into the PLRA's exhaustion requirement. Therefore, federal suits filed by inmates who have not first exhausted the administrative remedies available to them through the prison's internal complaint system in accordance with that system's deadlines should be dismissed.

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288. See *Thomas v. Woolum*, 337 F.3d 720, 738 (6th Cir. 2003) (Rosen, J., dissenting) (noting that system's deadlines are "a two-way street" and dispensing with them is an "invitation to chaos and delay").

289. See *supra* notes 108-10 and accompanying text for a discussion of pre-PLRA state of exhaustion.

290. See *Thomas*, 337 F.3d at 737 (Rosen, J., dissenting) (arguing that allowing such course renders exhaustion requirement worthless).

291. See *supra* Part III.C.2 for the contention that Congress intended for the PLRA to contain a procedural default bar.

292. See *supra* Part III.C.1 for a discussion of the PLRA's legislative history.

293. See, e.g., Schlanger, *supra* note 32, at 1565-66 (quoting 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)) (citing ending perceived judicial micromanagement as goal of prison litigation reform).

294. *Thomas*, 337 F.3d at 738 (Rosen, J., dissenting).

295. See *supra* Part II.A.3 for a discussion of the restrictions placed on inmate litigation by the exhaustion requirement and other portions of the PLRA.

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