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Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error

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INTRODUCTION: AFTER THE DELUGE

As the twentieth century drew to a close, the number of Americans in custody soared. In 1990, state, federal, and local prisons housed slightly more than one million inmates. By 1996, that number had jumped past the one and a half million mark, and as of June 30, 2001, it hovered just below two million.[1] The rising number of inmates brought a corresponding increase in the volume of inmate litigation: from 1990 to 1996, the number of suits filed in federal court by inmates increased from 42,263 to 68,235. Civil rights suits, brought against state officials under 42 U.S.C. § 1983 or federal officials directly under the Constitution,[2] constituted the majority of prisoner suits.[3]

The volume of litigation imposed substantial costs on the state attorneys general who defended the vast majority of such suits; likewise, their processing consumed a significant portion of federal judicial resources. In 1995, prisoner civil rights suits constituted thirteen percent of all civil cases in the district courts.[4]

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* Assistant Professor, University of Pennsylvania Law School. I thank Rachel Hannaford, Seth Kreimer, Catherine Struve, and Stephen F. Williams for helpful comments and advice. Gary Feinerman and Marc Kadish, attorneys with the Chicago office of Mayer, Brown, Rowe & Maw assisted me in the litigation of an inmate's civil rights suit before the Seventh Circuit, an experience which first acquainted me with the issue addressed by this Article. None should be held responsible for any arguments or errors herein.

[1] *See* ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2001, at 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim01.pdf. The growth of the national total has slowed recently; the number of inmates grew only 1.6% from midyear 2000 to midyear 2001. *Id.*

[2] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[3] *See* JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS 1980-96, at 3 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf.

[4] *See* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996). This does not, of course, mean that they consumed thirteen percent of judicial resources; inmate suits are frequently dismissed relatively quickly. *See* SCALIA, *supra* note 3, at 7 (noting that average processing time for inmate petitions terminated in 1995 was 273.9 days, with fifty percent disposed of in fewer than 161 days).

Worse still, state officials complained, many of these lawsuits were frivolous. By 1995, stories of outrageous inmate claims were a staple of newspaper reports. No regular reader of the nation's dailies could avoid the tales of prisoners who sued for bad haircuts, broken cookies, and, most infamously, chunky peanut butter served when smooth was requested.[5] Faced with this anecdotal epidemic, Congress responded by enacting the Prison Litigation Reform Act (PLRA).[6]

Some of the PLRA's provisions address structural issues such as prospective relief and consent decrees.[7] Others impose restrictions on inmate suits.[8] Most notably for the purposes of this Article, 42 U.S.C. § 1997e(a) provides that no inmate may bring suit under any federal law "until such administrative remedies as are available are exhausted."[9]

The enactment of the PLRA inspired a flurry of academic commentary, much of it critical.[10] It likewise inspired a flurry of litigation, in which the

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[5] *See, e.g.*, Associated Press, *Group Seeks to Cuff Frivolous Inmate Lawsuits*, ORLANDO SENTINEL, Aug. 2, 1995, at A8 (bad haircuts, lost sunglasses, tight underwear, melted ice cream); Liz Halloran, *Quayle, Others Debate What Ails Legal System*, HARTFORD COURANT, Jan. 29, 1995, at B1 (peanut butter); Sandra Ann Harris, *Prisoners' Lawsuits Swamp Federal Courts*, MORNING NEWS TRIB. (Tacoma, Wash.), Oct. 26, 1995, at D10 (broken cookie).

[6] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, & 42 U.S.C.).

[7] *See, e.g.*, 18 U.S.C. § 3626(a)(1)(A) (2000) (barring entry of consent decrees without a finding of constitutional violations and requiring that prospective relief be "narrowly drawn" and "the least intrusive means necessary to correct the violation of the Federal right"); *id.* § 3626(b)(1)(B) (directing termination of existing prospective relief not meeting standards of § 3626(a)(1)(A)).

[8] *See, e.g.*, 28 U.S.C. § 1915(b) (2000) (requiring inmates to pay filing fees by installment when proceeding in forma pauperis); *id.* § 1915(g) (denying in forma pauperis status to inmates who have had three prior suits dismissed as frivolous, malicious, or for failure to state a claim, unless the inmate is in "imminent danger of serious physical injury").

[9] 42 U.S.C. § 1997e(a) (2000). In full, the relevant section provides:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) 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.

Id. By its terms, the provision applies to suits in state as well as federal court, but this Article focuses on its effect on access to federal courts.

[10] A recent and comprehensive analysis of the PLRA's effects is Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). For other discussions, see, for example, John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 85 CORNELL L. REV. 483 (2001); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998); Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*,

backers of the PLRA by and large prevailed.[11] The exhaustion requirement received less scholarly attention,[12] though cases dealing with exhaustion progressed farther through the federal hierarchy than the constitutional challenges. In the past two years, the Supreme Court has answered two questions about the scope of the requirement. In *Booth v. Churner*,[13] it held that the exhaustion requirement applies even when the grievance procedure cannot award the relief the inmate seeks, and in *Porter v. Nussle*,[14] it held that the requirement applies to inmate claims of excessive force or physical abuse. After *Booth* and *Porter*, the exhaustion requirement "applies to all inmate suits about prison life"[15] and can be excused only when prison officials lack authority to take any action in response to a complaint.[16]

But the Supreme Court's work is not done. Indeed, its recent decisions broadening the scope of the exhaustion requirement have only increased the significance of the remaining question: what happens when a prisoner makes a procedural misstep in the course of exhaustion? Though the Court had noted the question earlier, and in fact identified it as one demanding congressional

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77 N.Y.U. L. REV. 536 (2002); Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58 (1999); 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 (1997); Joshua D. Franklin, Comment, *Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and its Effects on Indigents*, 71 U. COLO. L. REV. 91 (2000). For more positive treatments, see, for example, Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879 (1997); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998); Kathryn F. Taylor, Note, *The Prison Litigation Reform Act's Administrative Exhaustion Requirement: Closing the Money Damages Loophole*, 78 WASH. U. L.Q. 955 (2000).

[11] *See, e.g.*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) (upholding termination of prospective relief); Hadix v. Johnson, 230 F.3d 840 (6th Cir. 2000) (upholding attorney fee provisions); Rodriguez v. Cook, 169 F.3d 1176 (9th Cir. 1999) (upholding three strikes provision); Nicholas v. Tucker, 114 F.3d 17 (2d Cir. 1997) (upholding in forma pauperis provisions).

[12] Branham's article is an exception notable for the breadth of its discussion. *See* Branham, *supra* note 10. Schlanger notes that inmate advocates "identify the PLRA's exhaustion rule as the statute's most damaging component," Schlanger, *supra* note 10, at 1650, and urges reform, *id.* at 1695. Other contributions tended to take the form of arguments that one or another type of claim should be exempted from the exhaustion requirement. *See, e.g.*, Allen W. Burton, *Prisoners' Suits for Money Damages: An Exception to the Administrative Exhaustion Requirement of the Prison Litigation Reform Act*, 69 FORDHAM L. REV. 1359 (2001) (claims for money damages); Mathews, *supra* note 10 (prisoners' claims of excessive force). As discussed in the text, the Supreme Court dashed these hopes within months of, or even prior to, their publication.

[13] 532 U.S. 731 (2001).

[14] 534 U.S. 516 (2002).

[15] *Id.* at 532.

[16] *See Booth*, 532 U.S. at 736.

resolution,[17] the PLRA is unfortunately silent on the issue. Federal courts have not yet confronted the question in significant numbers, though many of them seem to assume that a procedural error in an administrative grievance proceeding has no consequences for a subsequent § 1983 suit.[18]

That may soon change. In a terse opinion by Judge Easterbrook, the Seventh Circuit recently faced the issue squarely, concluding that not only does failure to exhaust defer a prisoner's federal suit, but failure to exhaust *properly* bars it entirely.[19]

The conclusion is in many ways a natural one. Exhaustion requirements are familiar to federal judges. They exist in administrative law, where a litigant must frequently pursue all available remedies from an agency before seeking judicial review of the agency's action. And they exist in the context of inmate litigation under the federal habeas statute.[20] In both these circumstances, a failure to exhaust properly will frequently serve as a barrier to a subsequent suit.[21] It is natural, then, for federal judges steeped in habeas practice or administrative law to assume that a similar result should obtain under the PLRA exhaustion requirement, that a failure to invoke state administrative remedies properly will bar a subsequent § 1983 suit via the doctrine of procedural default or some relative thereof.[22]

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17 *See* Patsy v. Bd. of Regents, 457 U.S. 496, 514 (1982).

18 *See* cases cited *infra* Part II.A.

19 Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002). In the interests of full disclosure, I should mention that while practicing with the firm of Mayer, Brown, Rowe & Maw in Chicago, I represented an inmate whose § 1983 suit was dismissed for improper exhaustion. *See* Thomas v. Doyle, 39 Fed. Appx. 373 (7th Cir. 2002). This Article is not, however, merely an attempt to reargue that case in a different forum. The issue presented is an important one, which other circuits will be forced to address and which the Supreme Court will likely be called upon to resolve in the end. My aim here is to provide resources for those future decisionmakers.

20 *See* 28 U.S.C. § 2254 (2000).

21 *See infra* Part III.A-B.

22 The Supreme Court appears at times to have made the same assumption. In *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992), when debating the wisdom of imposing an exhaustion requirement on the *Bivens* claims of federal inmates seeking money damages, Justice Blackmun observed that prisons' "short, successive filing deadlines . . . create a high risk of forfeiture," implying that failure to comply with procedural requirements would indeed bar relief. Blackmun may have been overstating matters to swell a parade of horribles; the Court had earlier suggested that such consequences would depend on congressional intent. *See Patsy*, 457 U.S. at 514. The problem presented by the PLRA is that Congress failed to address the issue. One cannot, then, simply assume either that a subsequent suit should be barred or that it should not; instead, what is needed is a careful analysis of the mechanisms by which procedural error creates a bar in other contexts and the policy reasons supporting imposition of such a rule under the PLRA.

Natural, but quite likely wrong. As this Article will show, such an assumption has little basis in Supreme Court precedent, in the policies underlying the PLRA, or in the text of the statute itself. Nor, in fact, does the treatment of exhaustion in the context of direct administrative or collateral habeas review support imposition of a procedural default rule in the quite different circumstance of a suit under § 1983.

These points are not obvious; indeed, several are quite counterintuitive. Moreover, the Seventh Circuit is an influential circuit, and Judge Easterbrook an influential judge.[23] Add the heft of that endorsement to the natural tendency to reason by analogy to the administrative and habeas contexts, and other federal courts are quite likely to follow the Seventh Circuit.[24]

For anyone who thinks that civil rights suits should be resolved on their merits, this is a very alarming prospect. The Seventh Circuit's approach allows—indeed, requires—dismissal of many inmate suits without any regard to their merits. To say that it could spell the end of civil rights litigation by state prisoners is only a small exaggeration—administrative review procedures are byzantine, and the time limits are very short.[25] The uncounseled[26] prisoner who makes it through the administrative process without some mistake is rare indeed, and under the Seventh Circuit's approach, any misstep will doom a subsequent civil rights suit. If the Seventh Circuit's approach wins broader support, of course, we should expect grievance systems to become more complex and unforgiving, precisely as a means of preventing § 1983 suits. Prison administrators, who generally have control over the structure and timing

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[23] *See* William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 278, 288 (1998) (ranking the Seventh Circuit second among circuits and Easterbrook third among judges in number of citations).

[24] *Pozo*'s out-of-circuit influence thus far appears relatively minor. One district court has refused to follow its guidance. *See* Loritz v. CMT Blues, 271 F. Supp. 2d 1252, 1254-55 (S.D. Cal. 2003). Two have accepted it. *See* Gomez v. Hill, 2003 WL 21750946, at *1 (N.D. Tex. July 25, 2003); Wallace v. Burbury, 2003 WL 21302947, at *5 (N.D. Ohio Jun. 5, 2003). *Wallace*, however, has been superseded by the Sixth Circuit's decision in *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), in which the court, relying on the absence of a specific requirement of timely filing, rejected *Pozo* and held that an untimely grievance filing did not bar a subsequent § 1983 suit. *Id.* at 727-33. Assuming that this decision survives the prospect of en banc review, it creates a clear split among the federal circuits and invites Supreme Court resolution of the issue.

[25] John Boston gives the examples of Rhode Island (a three-day initial filing period) and Florida (a forty-eight hour window of appeal). *See* Boston, *supra* note 10, at 431 n.6. For a more thorough review of state procedures, see Brief of Amici Curiae American Civil Liberties Union et al. at 11-20, Booth v. Churner, 531 U.S. 956 (2000) (No. 99-1964), *available at* WL 1868111, at *11-20.

[26] At the administrative grievance stage, prisoners will almost always be unrepresented. It is all but impossible, for one thing, to retain a lawyer and receive advice within the few days permitted by some prison systems for the initial filing of a grievance.

of prison grievance procedures, can hardly be faulted for taking advantage of a technique handed to them by the federal courts. And given that administrative grievance procedures affect no one but prisoners—unlike, say, state court filing periods and rules of procedure, which can apply to broader classes of litigants—there is unlikely to be any significant political counterweight to administrators' understandable desire to reduce litigation against themselves and their staff.

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 § 1983.[27] But there are also real abuses that take place within the prison system. Prisoners have, among other things, been raped, shot, and beaten to death by guards.[28] For those wrongs, there should be remedies. 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. As Justice Breyer has recently stated, a rule that "would close the doors of federal . . . courts to many state prisoners and . . . would do so *randomly*" is not "consistent with our human rights tradition."[29] At the least, judges should hesitate before calling into being such a rule unless it has support in precedent, statutory text, or the policies underlying the PLRA. Investigating these possible sources of justification is the task of this Article. First, however, we need a little bit of background.

I. THE PLRA: ENACTMENT AND AFTERMATH

The inspiration for the PLRA was not so much the fact that the number of inmate suits had increased as the perception that something had gone radically wrong with the system, that federal courts were struggling with a sudden epidemic of frivolous lawsuits. This perception did not rise unbidden from the data, which indicated that the rate of inmate filings had actually decreased by

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[27] A Department of Justice Report found that nineteen percent of its sample (which consisted of 2738 § 1983 suits decided in 1992) was dismissed as frivolous. *See* ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 6, 8, 20 (1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.htm. A more recent study notes that 62.7% of state inmate civil rights petitions terminated in district court in 1995 were dismissed and only 2.6% reached trial. *See* SCALIA, *supra* note 3, at 6. For useful analysis of the pre-PLRA data, see Schlanger, *supra* note 10, at 1590-1626.

[28] *See generally* Mathews, *supra* note 10, at 536-57 & nn.2-10 (discussing abuse of prisoners).

[29] Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 268 (2002).

some seventeen percent between 1980 and 1996.[30] Rather, it was the product of an aggressive media campaign by congressional Republicans and state attorneys general. The National Association of Attorneys General solicited from its members eye-catching lists of "top ten" frivolous lawsuits, which were then distributed to the press.[31] From these lists came such popular favorites as the inmate who sued over the lack of salad bars on weekends, the one who sued over the color of his towels, and the alleged Eighth Amendment violation created by the substitution of creamy peanut butter for chunky.[32] The peanut butter story, in particular, proved to have legs. Former Attorney General Edwin Meese repeated it in a public affairs forum,[33] and Senator Dole, introducing the PLRA on the Senate floor, explained the law's necessity by invoking lawsuits over defective haircuts, pizza party invitations, "and yes, being served chunky peanut butter instead of the creamy variety."[34]

Much of the substance of the media offensive turned out not to withstand scrutiny. The declining rate of filings per prisoner suggested that what the United States was really experiencing was an epidemic of incarceration, of which increased litigation was merely a symptom.[35] Several of the most-cited examples of frivolous cases, including the peanut butter story, were debunked by Second Circuit Judge Jon Newman.[36] But the temptation to treat symptoms is hard to resist, and scrutiny was not the hallmark of the PLRA's enactment, which, in the words of one commentator "was characterized by haste and lack of any real debate."[37] As Mark Tushnet and Larry Yackle put it,

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[30] *See* SCALIA, *supra* note 3, at 1 (finding drop from 72.7 to 60.5 petitions per 1000 inmates). This is not to say that the volume of suits did not present a problem.

[31] *See* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996); *see also, e.g.*, Associated Press, *supra* note 5.

[32] *See* Newman, *supra* note 31, at 520.

[33] *See* Halloran, *supra* note 5.

[34] 141 CONG. REC. S144, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). The peanut butter story appears at least five other times in the Congressional Record. *See* 142 CONG. REC. S11,492 (daily ed. Sept. 27, 1996) (statement of Sen. Reid); 142 CONG. REC. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham); 142 CONG. REC. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid); *see also* Newman, *supra* note 31, at 522 n.8 (listing congressional citations of peanut butter story).

[35] *See* SCALIA, *supra* note 3, at 5 ("Accounting for the increase in the prison population, the rate at which inmates filed petitions declined by approximately 17% between 1980 and 1996."); Herman, *supra* note 10, at 1294 (same).

[36] *See* Newman, *supra* note 31. For other attempts to combat the pro-PLRA media campaign, see, for example, Anthony Lewis, *Cruel and Unusual*, BALT. SUN, Dec. 20, 1995, at 11A (citing instances of routine sexual assault and epidemic tuberculosis as valid reasons for inmate litigation).

[37] Herman, *supra* note 10, at 1277; *see also id.* at 1296 ("In the absence of hearings, the PLRA Congress focused on anecdote . . . ."). The Act was attached as a rider to an omnibus appropriations bill, hardly a guarantee of careful consideration, and was not debated much. *See, e.g.*, McCoy v. Gilbert, 270 F.3d 503, 510

"conservatives won the battle of sound bites,"[38] and on April 26, 1996, the PLRA became law.[39]

The PLRA provisions fell into two relatively distinct categories. The first group, originally part of the 104th Congress's Stop Turning Out Prisoners Act,[40] set new (and retroactively effective) standards for federal injunctive relief and were intended to "get the federal courts out of the business of running jails."[41] Of more concern for the purposes of this Article are the provisions that target individual inmate suits and are intended to relieve courts from the alleged burden of frivolous litigation. These provisions (1) require even prisoners proceeding in forma pauperis to pay filing fees by installment;[42] (2) instruct district courts to conduct a preliminary screening of complaints and to dismiss sua sponte those that are frivolous, malicious, fail to state a claim, or seek monetary damages from a defendant who is immune to suit;[43] (3) prohibit actions for mental or emotional injury unaccompanied by physical injury;[44] (4) deny in forma pauperis status to prisoners, except those in imminent danger of serious physical injury, who have had three actions or appeals dismissed as frivolous, malicious, or failing to state a claim;[45] (5) limit the attorneys' fees that may be awarded;[46] and (6) forbid prisoners from bringing suit "with respect to prison conditions" under any federal law "until such administrative remedies as are available are exhausted."[47] This last requirement is quite important; failure to exhaust is common[48] and the Supreme Court's

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n.4 (7th Cir. 2001) ("[The PLRA's] provisions were never seriously debated . . . ."). There is general agreement that the Act is not a prime example of careful draftsmanship. *See, e.g.*, Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 654 (1st Cir. 1997) ("The PLRA is not a paragon of clarity."). Tushnet and Yackle describe the PLRA as an example of a "symbolic statute"—one enacted primarily to make a point to a legislature's constituents, without close attention to statutory design. *See* Tushnet & Yackle, *supra* note 10, at 3. Such statutes, Tushnet and Yackle observe, will occasionally produce "freakish, almost random result[s] in particular cases." *Id.* The consequence of improper exhaustion is a clear example of an issue the PLRA's drafters apparently failed to consider.

38 Tushnet & Yackle, *supra* note 10, at 64.

39 In what could be taken to suggest a lack of care, the Act declares that it "may be cited as the 'Prison Litigation Reform Act of 1995.'" *See* Pub. L. No. 104-134, § 801, 110 Stat. 1321 (1996).

40 *See* S. 400, 104th Cong. (1995).

41 Benjamin v. Jacobson, 172 F.3d 144, 182 (2d Cir. 1999) (en banc) (Calabresi, J., concurring).

42 28 U.S.C. § 1915(b)(1)-(2) (2000).

43 *Id.* § 1915(e)(2).

44 42 U.S.C. § 1997e(e) (2000).

45 28 U.S.C. § 1915(g).

46 42 U.S.C. § 1997e(d).

47 *Id.* § 1997e(a).

48 I am not aware of any studies disclosing what percentage of inmate § 1983 suits are dismissed for failure to exhaust administrative remedies. A study on habeas petitions found the rate was fifty-seven percent. *See* Duncan v. Walker, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting) (citing BUREAU OF JUSTICE

clarificatory decisions have broadened the scope of claims for which exhaustion is required to include almost every conceivable § 1983 suit.

As already mentioned, the PLRA met a predominantly hostile academic reaction and a large number of court challenges.[49] Neither of these responses has had much effect; the statute has survived judicial scrutiny essentially unchanged,[50] and, to the extent that 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.[51] That substantial decrease (thirty-nine percent) is all the more impressive when considered in light of the growing prison population. The filing rate—the number of suits per 1000 inmates—fell even further, from thirty-seven to nineteen.[52] Presumably these decreases resulted in large part from the requirement that in forma pauperis petitioners pay filing fees by installment and the three strikes provisions.

There is no way of knowing, of course, whether the suits the PLRA has evidently deterred were frivolous.[53] But there is at least anecdotal evidence that the PLRA has succeeded in meting out punishment to inmates who persisted in frivolous litigation. The media, which so relished describing the inventive miscreants who brought the most outrageous suits, has shown a similar enthusiasm for recounting their comeuppance. Recent stories have reassured the public that, for example, David Joyner, a Texas inmate who sued Penthouse on the basis of a Paula Jones pictorial that he claimed was less explicit than advertised, was fined $250.[54] Similarly, Dennis Sharpless, also

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STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995)). The figure may not translate readily into the § 1983 context, and the rates may well vary depending on whether failure to exhaust is held to bar a suit or only defer it, but it seems likely that the exhaustion requirement will intercept a substantial portion of inmate § 1983 suits.

[49] *See supra* notes 10-11.

[50] In *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 872-84 (S.D. Tex. 1999), *rev'd sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001), a district court held that the direction to terminate ongoing prospective relief violated constitutional separation of powers requirements. The Fifth Circuit reversed. *See* Ruiz, 243 F.3d at 945-48.

[51] *See* JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980 TO 2000, at 1 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf.

[52] *Id.* Oddly, the number of habeas petitions experienced a surge, *id.*, possibly in reaction to the one-year deadline of the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2244(d)(1) (2000).

[53] One might expect so. An inmate whose suit is frivolous presumably has less at stake and will be less willing to pay a filing fee; likewise, an inmate subjected to the three strikes provision is probably more likely than most to be a recreational litigator, or what courts sometimes call a "frequent filer." All of which is to say that some PLRA provisions actually target frivolous suits. The exhaustion requirement, notably, does not. For a comprehensive assessment of the PLRA's effects, see Schlanger, *supra* note 10.

[54] *See* Lawrence Hall, *Hounded by Lawsuits*, STAR-LEDGER (Newark, N.J.), July 9, 2001, at 15.

incarcerated in Texas, was likewise fined and subjected to the three strikes provision after a series of suits relating to unsatisfactory dinner portions.[55] There is also, of course, evidence that the sorts of abuses to which critics of the PLRA pointed have persisted.[56]

Thus to some extent the PLRA appears to be a successful statute. And some of its peculiarities have been explicated and smoothed out by courts. But the operation of the exhaustion requirement remains largely mysterious. We know, following *Booth* and *Porter*, that the requirement applies to virtually every suit imaginable. What we do not know is what *kind* of requirement it is—whether it can be analogized to administrative or habeas exhaustion, or whether it is something else altogether. That is the issue underlying the question of what happens when an inmate makes a procedural error, and it is the issue that the Seventh Circuit took up in *Pozo v. McCaughtry*.

II. *POZO V. MCCAUGHTRY*

A. Precursors

The Seventh Circuit is thus far the only circuit explicitly to hold that the nonmerits denial of an inmate's administrative grievance will bar a subsequent § 1983 suit.[57] Other circuits have confronted situations in which the limitations period plainly had run—indeed, because of the short filing deadlines typical of prison grievance procedures, this situation will almost always obtain when a court finds that an inmate has failed to exhaust—but, perhaps because prison officials failed to raise the argument, these decisions seem to assume that the failure to exhaust in a timely fashion has no special significance. The Fifth Circuit, for example, has stated explicitly that an inmate could return to court after exhaustion, seemingly untroubled by the fact that his grievance was obviously time-barred. In *Wendell v. Asher*,[58] the court considered, *inter alia*, due process claims relating to a disciplinary hearing conducted on June 27, 1997. The court noted that state prison procedures allowed inmates fifteen

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[55] *See* Rosanna Ruiz, *After All, This Isn't a Hilton*, HOUSTON CHRON., Dec. 1, 2001, at 35.

[56] *See* David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1694 n.74 (2001).

[57] I refer to a nonmerits denial, rather than the more specific denial for untimeliness, because procedural default doctrines in both the habeas and the administrative context draw the line between merits or nonmerits rather than focusing on timeliness. As discussed *supra* note 24, the Sixth Circuit has rejected *Pozo* and taken the contrary position.

[58] 162 F.3d 887, 889 (5th Cir. 1998).

calendar days to file a grievance, but that the inmate "ha[d] never pursued administrative remedies at all."[59] The court issued its decision on December 24, 1998, by which point the time limit had long since run on the inmate's administrative grievance. It nonetheless held that exhaustion was still possible, that the dismissal "will not . . . render judicial relief unavailable" and that "there are no apparent barriers to the refiling of this action in federal district court once [plaintiff] exhausts his administrative remedies."[60] The Second Circuit has more than once reversed district courts that dismissed with prejudice because of a failure to exhaust, commenting that "[f]ailure to exhaust administrative remedies precludes only the current lawsuit."[61]

The majority of circuits thus apparently adhere to the principle that exhaustion regulates only the timing of a lawsuit, and they dismiss without prejudice on the assumption that the inmate will invoke the time-barred remedy and then file another suit. In at least one case, this assumption has been vindicated: prisoners did exhaust remedies time-barred at the time of suit and then returned to court, where they prevailed on the merits.[62] This procedure—requiring inmates to resort to time-barred remedies as a precondition to suit, but not imposing any penalty for the nonmerits disposition of their grievances—may seem pointless and even wasteful. In fact, as explained in subsequent sections, it protects the policies behind the PLRA exhaustion requirement and is quite likely the best reading of the statute.

Some courts, though, had noted the troubling possibility that an inmate could simply refuse to file a grievance at all and, once the deadline had passed,

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[59] *Id.* at 891.

[60] *Id.* at 892. Other similar cases are easy to find. In *Walker v. Maschner*, 270 F.3d 573, 575-77 (8th Cir. 2001), for example, the court noted that the plaintiff, who faced a seven-day limitations period for appealing the denial of his grievance, did not do so; that he "concede[d] that he failed to exhaust available administrative remedies"; but that he "may file a claim in federal court once he has fully exhausted his prison remedies." The Tenth Circuit has likewise stated that exhaustion is possible for a plaintiff whose claim was based on an incident five years in the past, and hence undoubtedly time-barred under prison administrative requirements. *See* Lowe v. Sockey, 36 Fed. Appx. 353, 356 (10th Cir. 2002).

[61] *E.g.*, Morales v. Mackalm, 278 F.3d 126, 131 (2d Cir. 2002).

[62] In *Jackson v. District of Columbia*, 254 F.3d 262, 268-69 (D.C. Cir. 2001), the court dismissed a § 1983 class action for failure to file the "Level I grievance" required by prison regulations within thirty days of the occurrence giving rise to the grievance. That time period had obviously expired by the time the court ruled—the plaintiffs received preliminary relief from the district court in 1999. *See* Jackson v. District of Columbia, 89 F. Supp. 2d 48, 50 (D.D.C. 2000) (noting grant of temporary restraining order in 1999), *vacated by* 254 F.3d 262 (D.C. Cir. 2001). But the court of appeals held that the district court "should have dismissed the complaint without prejudice, allowing the prisoners to refile once they have completed the [prison] grievance procedures." *Jackson*, 254 F.3d at 270-71. The prisoners did so, and prevailed on the merits in *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002).

proceed to federal court on the theory that a time-barred remedy was not "available" within the meaning of the PLRA.[63] Such disdain for the administrative process, courts warned, would not be tolerated.[64] What the demand that prisoners respect the PLRA's exhaustion requirement amounted to in practice, however, was less clear; even courts that employed the strictest language continued to dismiss without prejudice, though some dropped hints that a procedural error could create an incurable failure to exhaust.[65]

B. Pozo *Itself*

Pozo takes a substantial step beyond these cases. The *Pozo* plaintiff, a Wisconsin inmate, brought a § 1983 suit against prison officials after exhausting his administrative remedies. However, he missed a filing deadline at one stage in the prison grievance procedure, and the prison officials' ultimate denial of his grievance relied on this procedural failing.[66] The district court attached no significance to the grounds for the administrators' decision and ruled that, because Pozo had no administrative remedies remaining, he had satisfied the PLRA exhaustion requirement.[67] The Seventh Circuit reversed.

The Seventh Circuit opinion began by distinguishing between two understandings of exhaustion.[68] One, drawn from the context of collateral attack, holds that "a prisoner exhausts state judicial remedies by using whatever is available at the moment; if no remedies are left, then the challenge may proceed in federal court," subject of course to the possible bar of procedural default.[69] The other, found in administrative law, takes exhaustion

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[63] The apparent loophole also exists for habeas petitioners, of course, and it is one that the procedural default doctrine closes. *See infra* Part III.A.

[64] *See, e.g.*, Hartsfield v. Vidor, 199 F.3d 305, 309 (6th Cir. 1999) ("[A]n inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations.").

[65] *See, e.g.*, McCoy v. Gilbert, 270 F.3d 503, 512 (7th Cir. 2001) (affirming dismissal without prejudice on the grounds that inmate retained the ability to seek a hardship exception to time limitations, but noting the possibility that an inmate's "failure to grieve would deprive him of legal relief forever"); Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) (affirming dismissal without prejudice of suit of inmate whose grievance had been denied as untimely and who had failed to appeal the denial).

[66] Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002).

[67] *Id.* at 1023.

[68] *Id.* at 1024.

[69] *Id.* "Procedural default" occurs when a habeas petitioner commits a procedural error in the course of exhausting state remedies and the last state-court decision rejecting his claim rests on a procedural ground. Absent some excuse, federal habeas courts will not address the merits of a procedurally defaulted claim and will instead dismiss with prejudice. *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (discussing procedural default).

to mean "using all steps that the agency holds out, and using them *properly* (so that the agency addresses the issues on the merits)."[70] Which sort of exhaustion was mandated by the PLRA, the court observed, was a question that need not be answered, because the old habeas understanding had been "jettisoned by *O'Sullivan v. Boerckel*"[71] and replaced by a new understanding under which "procedural default also means failure to exhaust one's remedies."[72] This conclusion would ordinarily mean little for a § 1983 plaintiff, as no court has ever held that a § 1983 claim can be procedurally defaulted. Judge Easterbrook surmounted that difficulty with the observation that "[s]ensibly, the parties have agreed" that the new understanding applies to exhaustion under § 1997e(a) of the PLRA.[73]

Pozo thus contains two distinct holdings. First, relying on *Boerckel*, it holds that, as far as habeas petitioners are concerned, a procedural default is now to be considered also a failure to exhaust. Second, it goes on to hold that civil rights suits filed after the exhaustion of prison administrative remedies required by the PLRA are governed by habeas doctrines, such as procedural default, relating to the exhaustion of state judicial remedies. Its ultimate conclusion is that an attempt at exhaustion rejected on nonmerits grounds is no exhaustion at all, and that inmates who have erred at some step in a prison grievance process should have their suits dismissed for failure to exhaust.[74]

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[70] *Pozo*, 286 F.3d at 1024. As explained in more detail *infra* Part III.B, this is an oversimplification of the law. When a litigant has failed to observe agency procedural requirements, reviewing courts will typically hold that he has waived his claims, not that he has failed to exhaust them. *See, e.g.*, Sims v. Apfel, 530 U.S. 103, 106 (2000) (describing question presented as whether a claimant "waives judicial review of an issue" by failing to request agency review); Blevins v. Dir., Office of Workers' Comp. Programs, 683 F.2d 139, 143 (6th Cir. 1982) (plaintiff who fails to timely appeal administrative law judge decision to administrative board of review "is precluded" from raising issue in court). Such a default might be more accurately termed a forfeiture, which differs from waiver in that it need not be intentional. *See* United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing between waiver and forfeiture). The distinction is not always observed. *See* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) ("[O]ur cases have so often used [the two terms] interchangeably that it may be too late to introduce precision."). In other cases, proper presentation of claims is required by the applicable statute; 42 U.S.C. § 405(g), for example, allows review only of agency action taken after a hearing, and thus excludes dismissals of untimely applications. *See, e.g.*, Dietsch v. Schweiker, 700 F.2d 865, 867 (2d Cir. 1983). Although courts have characterized this as an exhaustion requirement, *see id.*, it is a consequence not of a statutory directive to "exhaust available remedies," but rather of the specification of the types of agency action subject to review.

[71] *Pozo*, 286 F.3d at 1024 (discussing *Boerckel*, 526 U.S. 838 (1999)).

[72] *Id.*

[73] *Id.* Why such agreement was sensible is obscure at best; subsequent sections will suggest that the application of procedural default to § 1983 suits is conceptually quite hard to justify. *See* discussion *infra* Part IV.

[74] One unfortunate implication of the conclusion that a procedural error constitutes a failure to exhaust is that § 1983 plaintiffs cannot avail themselves of any of the exceptions that normally attend the doctrine of

This is, it should be clear, a substantial step beyond even the concerns expressed by some courts about disdain for the administrative process. The hallmark of an exhaustion requirement is that it delays a federal suit *until* the required procedures have been invoked.[75] That is why dismissals for failure to exhaust are without prejudice. Skepticism about the possibility of exhausting administrative remedies by ignoring them until time-barred is well founded, but the concern in such cases is with inmates who have not submitted grievances, not with ones whose grievances have been rejected on nonmerits grounds. And the inference to be drawn is perhaps that grievances must be submitted, even if patently untimely, before suit can be filed.[76] By holding that the nonmerits denial of a grievance can forever bar a subsequent § 1983 suit, *Pozo* moves from delay to denial, from "until" to "unless."[77] An inmate who has seen his grievance denied on nonmerits grounds has failed to exhaust and can never remedy that failure; his claims of constitutional violations will never be heard.

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procedural default. In the habeas context, a petition presenting a procedurally defaulted claim can nonetheless be heard if the state procedural rule producing the forfeiture is "inadequate," or if the petitioner can demonstrate "cause and prejudice," or even if failure to hear it would produce a "fundamental miscarriage of justice." *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Bousley v. United States, 523 U.S. 614, 623 (1998) (discussing actual innocence). But there is no indication that these grounds will excuse a failure to exhaust. Exhaustion, in other contexts, carries its own exceptions, such as the agency's inability to provide the relief sought. *See, e.g.*, Reiter v. Cooper, 507 U.S. 258, 269 (1993) (exhaustion required only "[w]here relief is available from an administrative agency"). But the Supreme Court has held that the PLRA does not incorporate those exceptions. *See* Booth v. Churner, 532 U.S. 731, 741 n.6 (2001). The Seventh Circuit's hybrid default/exhaustion creation thus seems to be harsher than ordinary procedural default, a surprising result, though one the state of Wisconsin embraced. *See* Respondents' Brief in Opposition to Petition for Certiorari at 14, Pozo v. McCaughtry, 286 F.3d 1022 (7th Cir. 2002) (No. 02-204), *available at* 2002 WL 32136100, at *14.

[75] *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (exhaustion "govern[s] the timing of federal-court decisionmaking"). This is not to say that errors in the exhaustion process cannot have significant consequences for a subsequent suit in other contexts. Plainly they do, both in administrative law and in habeas jurisprudence. But in those situations, as discussed in more detail *infra* Part III.A-B, what happens is that a plaintiff who is deemed to have exhausted available remedies loses on the merits—not that the claim is dismissed for failure to demonstrate an "exhaustion" that now can never be achieved. There are, moreover, identifiable mechanisms by which procedural missteps affect the merits: waiver or forfeiture rules in the administrative context, and the adequate and independent state ground doctrine in habeas practice. The question then is whether those mechanisms can operate in the PLRA context, and that is a question the Seventh Circuit never considered.

[76] This may seem an odd and purposeless requirement. However, it fits with the Supreme Court's interpretation of the PLRA, which has refused to recognize futility as an exception to the exhaustion requirement. *See Booth*, 532 U.S. at 741 n.6. More significantly, it actually makes a good deal of policy sense, for reasons explained in Part IV.C.

[77] *See Pozo*, 286 F.3d at 1024 ("Failure to do what the state requires bars, and does not just postpone, suit under § 1983.").

In offering this interpretation of the PLRA, Judge Easterbrook could have appealed to several standard forms of legal argument: textualism, doctrinalism, pragmatic or policy-based analysis, or the characteristically legal mode of analogical reasoning.[78] Of these options, Easterbrook employs only some. He ignores the text entirely, not even bothering to quote § 1997e(a). The cursory treatment is perhaps understandable; the statute sets out the exhaustion requirement with no explanation of what is meant by exhaustion or how related doctrines are to be treated. The significance that can be gleaned from the text, however, suggests that one ought not to be too casual in applying procedural default to § 1983 petitions. Section 1997e(a) simply does not mention procedural default, and the doctrine is quite distinct from exhaustion.[79] And what the statute does say suggests the standard rule that an exhaustion requirement may defer a federal suit but cannot bar it; it provides that inmates may not sue "until such administrative remedies as are available are exhausted."[80]

Pozo's primary argument is doctrinal and consists of the claim that *O'Sullivan v. Boerckel* "jettisoned" the "old understanding" of exhaustion, under which a procedurally defaulted claim was deemed exhausted, and replaced it with a new understanding under which procedurally defaulted claims are considered *un*exhausted.[81] That would be a stunning change in habeas jurisprudence, were it an accurate description of *Boerckel*. It would, for

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[78] For a description of modalities of constitutional interpretation including four similar to those listed in the text, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982). Since this Article presents a case of statutory, rather than constitutional, interpretation, the correspondence is not exact.

[79] *See, e.g.*, Franklin v. Johnson, 290 F.3d 1223, 1231 (9th Cir. 2002) (stating that the "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by a statutory reference to the other). On the other hand, the Supreme Court has "recognized the inseparability of the exhaustion rule and the procedural-default doctrine," Edwards v. Carpenter, 529 U.S. 446, 452 (2000), and of course the habeas exhaustion requirement, 28 U.S.C. § 2254 (2000), does not mention procedural default either. The question that needs to be asked is whether the theory that supports application of procedural default to a habeas petitioner can be applied to a § 1983 suit. The Seventh Circuit treated this as a very superficial policy question without any consideration of the theoretical underpinnings of procedural default.

[80] 42 U.S.C. § 1997e(a) (2000). Again, it is useful to contrast the habeas exhaustion requirement, whose language can more naturally support a bar. 28 U.S.C. § 2254 provides that the writ may not issue "*unless* . . . the applicant has exhausted the remedies available in the courts of the State" (emphasis added). The use of the word "unless" and the demand that remedies be exhausted *by the applicant* could suggest that the requirement is only satisfied by a petitioner's active invocation of state remedies. However, that reading has been decisively rejected by the Supreme Court, *see infra* note 108, and is belied by the current statutory regime, which keys exhaustion to availability of state remedies, not their active pursuit by the petitioner. *See* 28 U.S.C. § 2254(c).

[81] *See Pozo*, 286 F.3d at 1024.

one thing, effectively eliminate the cause and prejudice exception to procedural default for habeas petitioners, since a showing of cause and prejudice will not excuse a failure to exhaust. It would not get Easterbrook all the way to his conclusion, of course, since it would not establish that procedural default could be applied to a § 1983 suit. But speculating about what it would mean for the Supreme Court to eliminate the distinction between procedural default and failure to exhaust is somewhat beside the point, as *Boerckel* plainly did no such thing.

The petitioner in *Boerckel* was an Illinois inmate who sought to present, via a habeas petition, claims he had pursued through the ordinary course of state appellate review but never presented to the state supreme court in a petition for discretionary review.[82] The question that *Boerckel* confronted was whether discretionary review from a state supreme court counted as an available remedy inmates must pursue in order to satisfy the exhaustion requirement.[83] The Court concluded that it did, and thus that by failing to seek a hearing in the Illinois Supreme Court, the petitioner had failed to exhaust his state remedies.[84]

The Seventh Circuit quoted no language from *Boerckel* and never cited a particular page of the opinion. The court's neglect makes it extraordinarily difficult to figure out what aspect of the *Boerckel* opinion was believed to have "merged" the administrative law and collateral attack understandings of exhaustion, but it seems to be the conclusion just discussed. The problem, however, is that this is simply a conclusion about whether discretionary review is an available remedy for the purposes of the habeas exhaustion requirement. It says nothing about the relationship between exhaustion and procedural default, and it says nothing about whether the remedy was still unexhausted at the time of the federal petition.

The *Boerckel* Court did, however, subsequently address both those issues. The petitioner's failure to seek discretionary review lay some twenty years in

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[82] *See* O'Sullivan v. Boerckel, 526 U.S. 838, 840 (1999).

[83] *Id.* at 843.

[84] *See id.* at 839-40, 847-48. *Boerckel* thus presented a situation in which the petitioner had *never* invoked an available state remedy, not one in which he had invoked it improperly. The distinction is of little moment in the habeas context, where the procedural default doctrine in such cases essentially hypothesizes a state court decision rejecting the claim on procedural grounds, thereby curing the failure to exhaust. *See, e.g.*, Gray v. Netherland, 518 U.S. 152, 161-62 (1996) (finding that exhaustion requirement "is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law'") (alterations in original) (quoting Castille v. Peoples, 489 U.S. 356, 351 (1989)). Procedural default is significant in the prison grievance context, however, because administrators' ability to hear untimely claims creates a situation in which claims cannot be exhausted by neglect. *See infra* Part IV.C.

the past, and the Court went on to note that "this state court remedy—a petition for leave to appeal to the Illinois Supreme Court—is no longer available."[85] Consequently, the Court held, the failure to pursue it "resulted in a procedural default."[86] Again, this is assuredly not a statement that a procedural default is equivalent to a failure to exhaust, or that procedurally defaulted claims are to be deemed unexhausted. Indeed, by observing that the state court remedy was no longer available, the Court strongly intimated that it *was* exhausted at the time of the federal petition. To make matters clearer, the Court went on to point out that analysis of a habeas petition presented two distinct questions: "whether a petitioner has exhausted his state remedies" (exhaustion) and "whether he has *properly* exhausted those remedies" (procedural default).[87] *Boerckel*, as the other circuits have recognized, is simply an application of the rule that once an unexhausted remedy becomes unavailable, the failure to exhaust "mature[s] into a procedural default."[88]

One is hard pressed to account for a misreading this drastic, most of all by a judge of Easterbrook's caliber. By holding that procedural default "also means failure to exhaust one's remedies,"[89] the Seventh Circuit set itself against every other federal circuit.[90] By attributing that holding to *Boerckel*, it

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85 *Boerckel*, 526 U.S. at 848.

86 *Id.*

87 *Id.*

88 Smith v. Jones, 256 F.3d 1135, 1139 (11th Cir. 2001) (discussing *Boerckel*).

89 Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002).

90 *See, e.g.*, Franklin v. Johnson, 290 F.3d 1223, 1231 (9th Cir. 2002) ("If a petitioner failed to present his claims in state court and can no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted."); Evans v. Cockrell, 285 F.3d 370, 375 (5th Cir. 2002) ("[I]t is well established that a claim is exhausted" if it is procedurally barred.); Aparicio v. Artuz, 269 F.3d 78, 96 n.9 (2d Cir. 2001) (finding that claims "could be deemed exhausted through [petitioner's] procedural default"); Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001) (stating, in a discussion of *Boerckel*, that "[i]f a claim has not been fairly presented to the state courts but further state-court review is clearly foreclosed under state law, . . . the claim is procedurally defaulted, not unexhausted"); Lott v. Coyle, 261 F.3d 594, 608 (6th Cir. 2001) ("If no remedy exists . . . no exhaustion problem exists . . . ."); *Smith*, 256 F.3d at 1139 (noting that *Boerckel* holds that failure to exhaust "matured into a procedural default as soon as the once available remedy was closed"); United States v. Stewart, 246 F.3d 728, 729 (D.C. Cir. 2001) (failure to present claim results in procedural default, which can be excused by showing of cause and prejudice or actual innocence); Baker v. Corcoran, 220 F.3d 276, 288 (4th Cir. 2000) ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court."); Thomas v. Gibson, 218 F.3d 1213, 1221 (10th Cir. 2000) (claims not presented to state courts and procedurally barred "are considered exhausted and procedurally defaulted"); Tokar v. Bowersox, 198 F.3d 1039, 1046 (8th Cir. 1999) ("If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default.") (quoting Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995)); Townsend v. Comm'r, N.H. Dep't of Corrs., 23 F.3d 395, 395 (1st Cir. 1994) (unpublished table decision) ("Petitioner's failure to appeal

set itself against the Supreme Court, which has instead cited that case for the proposition that "a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it . . . would have 'concededly exhausted his state remedies' . . . ."[91]

The path of precedent, then, is worse than a dead end in terms of support for *Pozo*'s rule; it is better described as heading off a cliff. There are, however, two other modes of argument left, policy analysis and analogical reasoning. The policy argument, which Judge Easterbrook did deploy, is both simple and powerful: without some doctrine akin to procedural default, prisoners could "'exhaust' state remedies by spurning them,"[92] a result plainly at odds with the purpose of the exhaustion requirement, which is to promote recourse to administrative process. The argument, I will show, has some weaknesses—chiefly that its factual premise is wrong—but these will be addressed later.[93]

Analogical analysis seeks to understand the nature of the PLRA exhaustion requirement by comparing it to forms of exhaustion with which courts are more familiar. Judge Easterbrook offered two different models of exhaustion, drawn from administrative law and habeas practice.[94] Because he believed that *Boerckel* had eliminated the distinction, he found it unnecessary to choose between them. But *Boerckel* did no such thing, and if we want to understand the consequences of a procedural error in a prison grievance proceeding, we need first to understand exhaustion requirements more generally.

III. EXHAUSTION IN CONTEXT

Pozo posits two models for exhaustion: administrative exhaustion and collateral attack (which I call "habeas") exhaustion. The Seventh Circuit's assertion that *Boerckel* collapsed any difference between the two obviated the need to choose between them, but, as we have seen, the assertion is simply not correct. Consequently, we must decide which model—if either—suits the

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the denial of his state habeas petition to the New Hampshire Supreme Court constitutes a procedural default rather than a failure to exhaust . . . .").

[91] Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (quoting *Boerckel*, 526 U.S. at 854 (Stevens, J., dissenting)).

[92] *Pozo*, 286 F.3d at 1023.

[93] *See infra* Part IV.C.

[94] *See Pozo*, 286 F.3d at 1024.

PLRA requirement. Each seems superficially plausible. The requirement to invoke state procedures before turning to federal courts smacks of a federalism reminiscent of much of the Supreme Court's habeas jurisprudence.[95] And the desire to allow prison administrators a chance to resolve disputes before courts intervene echoes the logic of administrative exhaustion.[96] But in the end, I will suggest, PLRA exhaustion is a strange creature that fits well with neither model.[97]

A. Habeas Exhaustion

The first point to be noted is that, as the *Pozo* court recognized, application of the traditional habeas approach to exhaustion would not bar as unexhausted claims that had been rejected on procedural grounds. The bar comes from the analytically distinct doctrine of procedural default.[98] One resolution of the *Pozo* question, then, would be simply to say that Congress made no mention of procedural default in the PLRA, and that the "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach" one by a statutory reference to the other.[99] But this is hardly a satisfying answer; procedural default is, after all, a judge-made doctrine with no textual basis in the habeas statute, so it is at least an open question whether some similar rule

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[95] *See, e.g.*, *Edwards*, 529 U.S. at 451 (attributing procedural default doctrine to "comity and federalism").

[96] *See, e.g.*, McKart v. United States, 395 U.S. 185, 193-95 (1969) (explaining rationales for administrative exhaustion).

[97] Twenty years ago, the Supreme Court noted the "difficult" questions that would be presented by imposing an exhaustion requirement on § 1983 suits, including what preclusive effect state administrative determinations would have on subsequent federal suits, and "what consequences should attach to the failure to comply with procedural requirements of administrative proceedings." Patsy v. Bd. of Regents, 457 U.S. 496, 514 (1982). The questions are difficult, I will suggest, because a § 1983 suit seeks review neither of state judicial decisions (as a habeas petition does) nor of agency action (as claims subject to administrative exhaustion typically do). It is instead a freestanding cause of action independent of state proceedings, and for this reason neither exhaustion model comfortably applies. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 640 (1985) ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action . . . but is an independent as well as an original federal action."). Additionally, much of the policy basis for administrative exhaustion depends on an agency's ability to provide the relief sought or its expertise in applying a particular statute, neither of which is necessarily present in § 1983 suits under the PLRA. Habeas exhaustion likewise relies on the principle that state courts should be the primary decisionmakers about the liberty of individuals charged with crimes under state law. The same cannot be said of prison administrators hearing inmates' allegations of constitutional violations.

[98] *See* Gray v. Netherland, 518 U.S. 152, 161-62 (1996).

[99] Franklin v. Johnson, 290 F.3d 1223, 1231 (9th Cir. 2002) (citing Jackson v. Johnson, 194 F.3d 641, 652 n.35 (5th Cir. 1999)).

should be implied under the PLRA.[100] What we need to do, then, is to examine the conceptual and policy bases for the procedural default doctrine, in order to ascertain whether it theoretically can and pragmatically should be applied to PLRA exhaustion.

1. A Brief History of Exhaustion and Procedural Default

A person in custody may seek federal habeas relief on the grounds that his detention is "in violation of the Constitution or laws or treaties of the United States."[101] In its original form, as part of the Judiciary Act of 1789, the habeas statute offered the writ only to those detained by the federal government.[102] A post-Civil War amendment, motivated by pervasive doubt about state courts' willingness to protect federal rights, extended the scope of the writ to state prisoners.[103] Nothing in this language detailed the effects that state-court adjudications should have on the timing of a petition or its merits. The exhaustion doctrine arose to deal with the former issue, and procedural default with the latter.

The Supreme Court's early cases indicated some preference for awaiting state-court judgments but characterized the decision as to whether to intervene before judgment as one within the discretion of the habeas court.[104] Subsequent decisions narrowed the permissible occasions for prejudgment review,

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[100] One reason against judicial implication of such a rule might be provided by *Darby v. Cisneros*, 509 U.S. 137, 146-47, 153-54 (1993), which forbids judicial augmentation of statutory exhaustion schemes. *See also* Thomas v. Woolum, 337 F.3d 720, 731 (6th Cir. 2003) ("Congress did not [specify application of procedural default], and the Supreme Court has instructed that we are not to impose such requirements when Congress refuses."). But it would also be plausible—though in tension with the Fifth and Ninth Circuit cases cited in the preceding footnote—to suppose that Congress intended the exhaustion requirement it imposed to be accompanied by the handmaid of procedural default. The current codification of the habeas exhaustion requirement, 28 U.S.C. § 2254, likewise makes no mention of procedural default, but the Court continues to apply the doctrine. The reason procedural default makes sense in the habeas context but not with regard to PLRA, I will suggest, is that procedural default inheres in the nature of collateral review, and § 1983 suits are not collateral attacks. *See infra* Part IV.

[101] 28 U.S.C. § 2254(a) (2000).

[102] *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1101-02 (1995).

[103] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-2255 (2000)). The habeas statute thus provides a tidy example of the constitutional sea-change wrought by the Civil War and its aftermath, the shift from a vision of the states as bulwarks of liberty against a potentially oppressive national government to one in which the states were seen as potential oppressors and the national government as intervening to protect federal rights.

[104] *See Ex parte* Royall, 117 U.S. 241, 252-53 (1886) (habeas court has "discretion, whether it will discharge [the petitioner], upon habeas corpus, in advance of his trial in the court in which he is indicted").

describing them as "exceptional circumstances of peculiar urgency,"[105] and in 1948, Congress codified the exhaustion doctrine, providing that the writ "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."[106] The 1948 enactment explained further that "an applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented."[107] The gloss suggests that the availability of state remedies is the dominant criterion for exhaustion. And since *Fay v. Noia*, availability has been the touchstone of the exhaustion doctrine, an understanding that has persisted even as the Court has rejected much of the remainder of *Noia*.[108]

Requiring habeas courts to wait until state remedies were no longer available obviously served the purposes of reducing federal intrusion into the state criminal justice system and allowing state courts the first opportunity to rectify any mistakes. But it raised the troubling question of what effect the

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[105] United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17 (1925); *see also, e.g.*, Urquhart v. Brown, 205 U.S. 179, 182 (1907) (also noting restriction of prejudgment review to exceptional circumstances).

[106] *See* Rose v. Lundy, 455 U.S. 509, 518 n.10 (1982) (quoting H.R. 3214, 80th Cong., 1st Sess. (1947)). The enacting Congress cited *Ex parte Hawk*, 321 U.S. 114 (1944), as "correctly stating the principle of exhaustion." *Rose*, 455 U.S. at 516. *Ex parte Hawk* summarizes the exhaustion principle as follows:

> Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for [a] crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.

321 U.S. at 116-17.

[107] *Rose*, 455 U.S. at 518 n.9 (quoting 28 U.S.C. § 2254(c) as originally enacted).

[108] *See* Fay v. Noia, 372 U.S. 391, 434 (1963), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991). *Brown v. Allen* actually hinted at a different reading, stating that the "failure to use a state's available remedy . . . bars federal habeas corpus." 344 U.S. 443, 487 (1953). The reasoning appears to have been that a prisoner who fails to use an available remedy has not exhausted it, regardless of whether it has become unavailable by the time of the federal petition. "The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." *Id.*; *see also* Davis v. Burke, 179 U.S. 399, 402 (1900) (writ of habeas corpus may not issue until "after an appeal made to the state courts has been denied"). *Noia* explicitly rejects this reading, *see* 372 U.S. at 434 ("This contention is refuted by the language of the statute and by its history."), and the most recent Supreme Court decisions have adhered to *Noia* at least to that extent. *See, e.g.*, Gray v. Netherland, 518 U.S 152, 161 (1996) (exhaustion requirement "is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law.'") (alterations in original) (citations omitted); *see also* Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 113 (1959) ("In origin, the judicially developed doctrine of exhaustion of state remedies was indisputably a doctrine of exhaustion only of remedies presently available. . . . Prior to the enactment of section 2254, the doctrine seems never to have been applied unequivocally as a doctrine of forfeiture by reason of failure to exhaust previously available state remedies, nor is any warrant apparent in reason or authority for the judicial promulgation of any such doctrine.") (citations omitted).

state proceedings should have on the federal habeas action. The first possibility—and the normal consequence under ordinary rules of preclusion—was that a completed course of state-court adjudication would be res judicata, barring an inmate from litigating claims that were (and perhaps even those that could have been) presented to the state courts.[109] But the scope of claims cognizable via habeas was initially quite narrow, extending only to allegations that the state court lacked subject matter jurisdiction,[110] and because res judicata does not usually prevent collateral attacks on subject matter jurisdiction, the possibility of preclusion did not arise.[111] This interpretation persisted until 1915, when the scope of the writ began to widen, and the question of preclusive effect presented itself.[112]

Some of the early twentieth-century cases, while rejecting a strict application of res judicata to nonjurisdictional issues, did indeed state that reconsideration of issues addressed by the state courts would be unusual.[113]

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[109] *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) (state proceeding given claim preclusive effect in subsequent federal action).

[110] *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."). The fact that habeas lay only to challenge state court jurisdiction offers some explanation for the early cases' willingness to intervene before judgment, since nothing that occurred at a later point in a state proceeding could cure an initial lack of jurisdiction.

[111] *See Noia*, 372 U.S. at 423 ("[T]he familiar principle that res judicata is inapplicable in habeas proceedings . . . is really but an instance of the larger principle that void judgments may be collaterally impeached.") (citations omitted). Res judicata can bar attacks on subject matter jurisdiction in some circumstances; if a litigant was afforded an opportunity to challenge jurisdiction in the first proceeding, he will usually be denied the opportunity to contest it again. This might alternatively be described as the operation of collateral estoppel, i.e., issue preclusion rather than claim preclusion.

[112] *See id.* at 450-56 (Harlan, J. dissenting). Different Supreme Court Justices have, at various points, undertaken to chronicle the history of habeas generally, or the procedural default doctrine more specifically. Justice Harlan's analysis in *Noia* displays his customary clarity and precision of thought. Other notable examples include Justice Brennan's majority opinion in *Noia*, then-Justice Rehnquist's in *Wainwright*, and Justice Stevens's dissent in *Boerckel*. The academic commentary is voluminous. Classics include Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); and Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). For a more comprehensive listing, including more recent works, see Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV., 535, 546 n.22 (1999). An especially useful assessment of the history and competing academic interpretations of habeas is Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

[113] *See, e.g.*, *Ex parte* Hawk, 321 U.S. 114, 118 (1944) ("Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state

However, the Supreme Court definitively rejected that alternative in *Brown v. Allen*[114] and has shown but little inclination to reconsider it subsequently.[115] Habeas courts thus do decide federal issues resolved by state courts, and, before AEDPA, decided them de novo.[116] What, then, of issues the state courts do *not* resolve because the prisoner has failed to present them, or to present them in the manner state procedure requires?

The most natural conclusion might be that a state court's failure to decide an issue can have no more preclusive effect than a decision, and thus that a habeas petitioner would be entitled to de novo adjudication of federal claims never considered by state courts. With a narrow exception for cases in which the petitioner had "deliberately bypassed"[117] the state judicial system, this was essentially the Warren Court's approach.[118] But full-scale federal adjudication

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court's decision, a federal court will not ordinarily reexamine on writ of habeas corpus the questions thus adjudicated."). A similar rule prevailed with respect to petitions by federal prisoners. *See, e.g.*, Sunal v. Large, 332 U.S. 174, 183-84 (1947) (holding that habeas was unavailable for prisoners who could have taken direct appeals from their convictions but did not).

[114] 344 U.S. 443, 458 (1953).

[115] In *Wright v. West*, 505 U.S. 277 (1992), Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, suggested that some form of deferential review was appropriate, at least with respect to "mixed" constitutional questions requiring the application of law to fact. *Id.* at 288-95. Three other Justices wrote specifically to disagree with this contention. *See id.* at 300-05 (opinion of O'Connor, J., joined by Blackmun and Stevens, JJ.). AEDPA, as discussed in the following note, changed the law in the direction of Justice Thomas's suggestion.

[116] Currently, 28 U.S.C. § 2254(d)(1) effectively demands some deference to state-court application of federal law, allowing habeas relief only if the state courts have rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The "unreasonable application" clause grants state courts some latitude in their application of law to fact (as in, say, an ineffective assistance of counsel analysis): "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Williams v. Taylor, 529 U.S. 362, 410 (2000). Limiting the source of the federal law to the Supreme Court imposes another restriction: after AEDPA, a federal district court cannot, for example, grant a habeas petition on the basis of circuit law alone, even though that law is binding on the district court. *See id.* at 412.

[117] *Noia*, 372 U.S. at 438.

[118] *See id.* at 399 ("[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."). *Noia* marked a substantial break in habeas jurisprudence; in *Brown v. Allen* the Court had noted that hearing the habeas petition of a prisoner who had failed to file an appeal would allow habeas to be used "in lieu of an appeal" and "would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." 344 U.S. at 485; *see also* Darr v. Burford, 339 U.S. 200 (1950) ("[T]he federal courts will not consider on habeas corpus claims which have not been raised in the state tribunal."). In addition to the now-discredited interpretation of the statutory requirement to "exhaust" available remedies discussed *supra* note 90, *Brown* relied on a forfeiture theory. *See Brown*, 344 U.S. at 486 ("Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds."). It also suggested that a litigant's failure to

of claims not considered by state courts created an obvious tension with the statutory exhaustion command; a state criminal defendant could obtain federal habeas relief without state courts ever having had an opportunity to hear his federal claims. The possibility of such results threatened the principles underlying the exhaustion requirement: that state courts should be given a chance to correct their own mistakes, and that the state criminal process should be the "main event" rather than a "tryout on the road" preliminary to a dispositive federal habeas hearing.[119] Driven in part by a desire to preserve the efficacy of state procedural rules, the Supreme Court crafted the doctrine that has come to be known as procedural default.

The argument of this Article does not require a full discussion of the evolution of the procedural default doctrine, a task which has been undertaken elsewhere.[120] For present purposes, it is enough to note two different steps in that evolution: first, the regime of *Fay v. Noia*, and second, its successor, that of *Wainwright v. Sykes*. *Noia* broke new ground by rejecting some earlier cases suggesting that failure to present federal claims to state courts would bar subsequent habeas relief.[121] *Wainwright* rejected *Noia*, giving us the modern regime.[122] The difference between the two has to do with the standards applied to determine whether a federal claim has been forfeited. *Noia* held that forfeiture follows only from classic waiver: "an intentional relinquishment or abandonment of a known right."[123] *Wainwright*, by contrast, looked to the procedural rules of state law and held that failures to observe those rules (including, most notably, failures that result from error or ignorance) would generally forfeit federal claims for the purposes of habeas.[124]

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comply with state procedural rules might create an adequate and independent state ground supporting the judgment. *See id.* at 458 ("[W]here the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."). This theory, as discussed *infra* text accompanying notes 131-40, is the antecedent of the modern procedural default doctrine.

[119] Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

[120] *See* sources cited *supra* note 112.

[121] *See Noia*, 372 U.S. at 439 n.44. The earlier cases are discussed *supra* note 108. *See also Ex parte* Spencer, 228 U.S. 652, 659-61 (1913).

[122] *Noia* was not explicitly overruled until *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), but the delay amounted to little more than a refusal to accord it a decent burial. *See, e.g.*, Francis v. Henderson, 425 U.S. 536, 546-47 (1976) (Brennan, J., dissenting) (accusing the majority of departing from *Noia* without "com[ing] to grips with the constitutional and statutory principles and policy considerations underpinning that case").

[123] *Noia*, 372 U.S. at 439.

[124] *See Wainwright*, 433 U.S. at 87. Exceptions to the forfeiture rule include a showing of "actual innocence" or "cause and prejudice." *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446, 451 (2000); United States v. Stewart, 246 F.3d 728, 729 (D.C. Cir. 2001). The meaning of this latter has proved somewhat elusive. *See Edwards*, 529 U.S. at 451 (noting the Court's failure to "define the meaning of 'cause' with precision"). In

This change in the forfeiture standard is but a symptom of a larger conceptual shift that has occurred in the Court's understanding of the habeas action. The rule applied in *Noia* uses the waiver standard that governs acts outside of litigation and embodies the then-prevalent conception of a habeas petition as an action entirely unconnected to prior state proceedings. The forfeiture rule in *Wainwright*, in contrast, employs the standard for forfeiture of a claim within a single course of litigation, an approach that makes sense if a habeas action is viewed as a collateral attack on state-court judgments. AEDPA, which largely codified the changes in habeas worked by *Wainwright* and its successors, has made this new understanding explicit: the federal habeas court is directed to review the "decisions" of the state courts, and its review is both deferential and circumscribed.[125]

The transition from a conceptual model on which a habeas action is independent of prior state court adjudications to one on which it is an attack on those adjudications provides the theoretical basis for application of the procedural default doctrine. I suggested above that it might be natural to suppose that a state court's failure to decide an issue can have no more preclusive effect than its decision. As a matter of preclusion law, this is true, and preclusion law is the relevant consideration if a habeas action is independent of prior state proceedings.[126] But once the Court began to conceive of habeas as an attack on state adjudications, the issue became not preclusion, but rather a federal court's ability to set aside or reverse state judgments. From this perspective, the distinction between deciding a federal claim and refusing to do so appears quite different, for a state court that refuses to decide a federal claim will do so on the grounds that it has not been presented in accordance with the requirements of state procedure. Federal courts owe no deference to the decisions of state courts on matters of federal

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Murray v. Carrier, 477 U.S. 478, 488 (1986), the Court explained that attorney error not rising to the level of constitutionally ineffective assistance would not constitute cause.

[125] Even before AEDPA, the Supreme Court had indicated that the characterization of a habeas petition as a civil action independent of state decisions misrepresented both the interests at stake and the process of deciding the petition. *See, e.g.*, *Coleman*, 501 U.S. at 730 (application of adequate and independent state grounds doctrine is justified because "a state prisoner is in custody *pursuant* to a judgment"); *Noia*, 372 U.S. at 469 (Harlan, J., dissenting) ("In habeas as on direct review, ordering the prisoner's release invalidates the judgment of conviction and renders ineffective the state rule relied upon to sustain that judgment."). The use of the adequate and independent state ground doctrine as the basis for the procedural default rule makes clear that a habeas court does, in practice, review state judgments; AEDPA's statutory directive to assess the decisions of state courts has simply made that understanding explicit.

[126] More precisely, the failure to decide an issue can have as much res judicata effect as a decision, but will not give rise to collateral estoppel.

law,[127] but they do defer with regard to state law, and the refusal to decide a federal claim on state procedural grounds is, of course, a matter of state law. The key question, then, becomes the ability of a federal court to reach a federal issue despite the fact that a state decision rests on state law, and that is the question answered by the doctrine of the adequate and independent state ground.[128]

2. *Procedural Default and the Adequate and Independent State Ground*

The birthplace of the adequate and independent state ground doctrine is generally taken to be the Supreme Court's 1875 decision in *Murdock v. City of Memphis*.[129] There, the Court announced that after deciding that a state court's resolution of a federal question was erroneous, it would examine the record to see if an alternative state law ground actually decided by the state court could sustain the judgment. In such cases, the Court announced, "the judgment must be affirmed without inquiring into the soundness of the decision on [the state ground]."[130] Later cases refined the rule to make the adequate and independent state ground analysis a threshold step before review of the federal question and began the practice of dismissing for want of jurisdiction cases in which such a state ground was detected.[131] Eventually, in *Herb v. Pitcairn*, the Court decided that the barrier was one of constitutional dimension: "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[132] The general rule now may be simply stated: an adequate and independent state ground will shield a state judgment from federal review, for it implies that resolution of any federal issues will not affect the judgment.[133]

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[127] Again, AEDPA has changed this rule to some extent in the habeas context. *See supra* note 116.

[128] *Wainwright* identified the adequate and independent state ground doctrine as the source of procedural default, and the Court has frequently repeated that characterization. *See, e.g.*, Trest v. Cain, 522 U.S. 87, 89 (1997) ("[P]rocedural default is typically an instance [of] the independent and adequate state ground doctrine . . . .") (citations omitted); Harris v. Reed, 489 U.S. 255, 260 (1989) ("[T]he procedural default rule . . . has its historical and theoretical basis in the 'adequate and independent state ground' doctrine.") (citing *Wainwright* 433 U.S. at 78-79, 81-82, 87).

[129] 87 U.S. (20 Wall.) 590 (1875).

[130] *Id.* at 636.

[131] *See, e.g.*, Eustis v. Bolles, 150 U.S. 361, 370 (1893).

[132] 324 U.S. 117, 126 (1945).

[133] Like most simple statements, this one elides significant complexities, but this Article does not require us to address them. I have endeavored elsewhere to probe some of the issues presented by the procedural adequate and independent state ground. *See* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003).

Though *Murdock* concerned a substantive state ground on direct review, the Supreme Court has several times stated that the adequate and independent state ground doctrine applies to procedural grounds and collateral review as well, though in that garb it usually goes by the name of procedural default.[134] These different contexts produce some additional wrinkles in the doctrine. Though often treated as a mere corollary of its substantive counterpart, the procedural adequate and independent state ground doctrine actually gives federal courts somewhat greater freedom to reach federal questions, and in particular to look through state procedural rules deemed inadequate on qualitative grounds such as novelty, inconsistent application, or burdensomeness.[135] The distinction persists on collateral review; indeed, it grows. While in the context of direct review an adequate and independent state ground creates a jurisdictional bar, collateral review is precluded only for reasons of comity and federalism.[136] As that distinction suggests, the grounds for collateral review are broader. Not only must a state procedural rule be found adequate according to the qualitative standards discussed above, but a habeas petitioner can obtain a resolution of his federal claims by showing "cause and prejudice" or "actual innocence."[137]

Why the Court has chosen to increase the possibility of federal review in the habeas context despite a procedural bar is not entirely clear. I have suggested elsewhere that, as a theoretical matter, the natural conclusion is rather that review should be more tightly circumscribed.[138] The answer is perhaps best sought in the practical realities of habeas litigation and the differing institutional competencies of the Supreme Court and the lower federal courts. To put it simply, the best understanding of the current habeas jurisprudence may be that it functions as a dispersed version of direct review serving a function (error correction) for which the Court has neither the capacity nor the inclination.[139] Doctrinal intricacies aside, the Court has made

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[134] *See supra* note 128. If a habeas action were truly independent of state proceedings, this would not be obvious, since the doctrine operates precisely to shield state judgments. But I have already observed that the current habeas statute, as interpreted by the Supreme Court, does direct a habeas court to review state decisions. And it is hard to deny that a grant of habeas relief upsets the judgment of conviction—a state that refused to restore the civil rights of a successful habeas petitioner on the grounds that his felony conviction had not been overturned would soon find out it could no longer rely on that judgment.

[135] *See generally* Roosevelt, *supra* note 133.

[136] *See* Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

[137] *See* Meltzer, *supra* note 112, at 1150-51; Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 252, 255-64 (2003).

[138] *See* Roosevelt, *supra* note 133, at 1914-15.

[139] *See id*; *see also* Struve, *supra* note 137, at 252, 255-64. The point has been made elsewhere. *See, e.g.*,

clear that procedural default, though it differs in some particulars, is simply the procedural adequate and independent state ground doctrine applied to collateral review.[140]

3. *Habeas Exhaustion and the PLRA*

That, then, is the story of exhaustion and procedural default in the habeas context. The exhaustion requirement was a judicial creation, originating in a concern that federal courts ought not to intervene in state proceedings before they have come to a close. It is thus purely a rule about the timing of federal judicial action.[141] Both Congress's original codification of the habeas exhaustion requirement and AEDPA's more recent version specifically tie it to the availability of state remedies.[142]

Procedural default has quite different origins. The modern version was introduced by the Supreme Court in *Wainwright v. Sykes*, and it was there presented not as a judicially-created supplement to the exhaustion doctrine, but as a relatively straightforward application of the adequate and independent state ground doctrine.[143] In subsequent cases the Court reaffirmed that characterization, stating that procedural default "has its historical and theoretical basis in the 'adequate and independent state ground' doctrine."[144] The Court linked procedural default to exhaustion on policy grounds in *Coleman v. Thompson*, but again located its doctrinal source in the adequate and independent state ground, stating that procedural bars arose when "the state judgment rests on independent and adequate state procedural grounds."[145]

That leads to the main point of this excursus. Procedural default is not part and parcel of the exhaustion requirement. However effective a handmaiden it

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Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253-54 (1988); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2009-10 (1992).

[140] *See supra* note 128.

[141] *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("The doctrine of exhaustion of administrative remedies . . . govern[s] the timing of federal-court decisionmaking."); Rose v. Lundy, 455 U.S. 509, 518 (1982) (explaining that exhaustion is designed "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings" by requiring federal courts to wait until state courts "have had an opportunity to pass upon the matter").

[142] *See* 28 U.S.C. § 2254(b)(1)(A) (2000) (habeas application may not be granted unless "the applicant has exhausted the remedies available in the courts of the State").

[143] *Wainwright* in fact performs a lengthy qualitative analysis of the contemporaneous objection rule; that is, it tests it for adequacy. *See* Wainwright v. Sykes, 433 U.S. 72, 87-89 (1977).

[144] Harris v. Reed, 489 U.S. 255, 260 (1985) (quoting *Wainwright*, 433 U.S. at 78-79, 81-82, 87).

[145] Coleman v. Thompson, 501 U.S. 722, 730 (1991).

may be, its source is elsewhere. In the habeas context, that source is the current understanding of collateral review, the fact that a federal court deciding a habeas petition is reviewing a state decision which may be shielded by an adequate and independent state ground. And so to decide whether the PLRA exhaustion requirement should be accompanied by some form of the doctrine of procedural default, we need to ask first whether the PLRA converted the § 1983 cause of action into a collateral attack on prison grievance proceedings, and second whether, if not, there is some compelling need nonetheless to impose procedural default to protect the integrity of PLRA exhaustion. I will suggest that the answer to both these questions is no, but the analysis must await an explication of the second model *Pozo* proposed for understanding PLRA exhaustion, and of PLRA exhaustion itself. To those tasks I now turn.

B. Administrative Exhaustion

The second potential model for the PLRA is administrative exhaustion. Administrative exhaustion requirements are supported by policy considerations similar to those animating the demand for habeas exhaustion. Echoing (or prefiguring) its concern for the autonomy of the states, the Supreme Court has noted the desirability of "protecting administrative agency authority."[146] Administrative exhaustion also "promot[es] judicial efficiency"[147] by allowing the agency the opportunity to correct its own errors and by possibly creating a record to facilitate judicial review.

Unlike the complicated and tortuous history of procedural default in the habeas context, the rules governing administrative exhaustion are quite simple. Fifty years ago in *United States v. L.A. Tucker Truck Lines, Inc.*, the Supreme Court held that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts."[148] Administrative exhaustion is now largely a creature of statute and rule,[149] and

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[146] *McCarthy*, 503 U.S. at 145.

[147] *Id.*

[148] 344 U.S. 33, 37 (1952).

[149] In *Darby v. Cisneros*, 509 U.S. 137, 154 (1993), the Supreme Court held that in cases to which the Administrative Procedure Act (APA) applies, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration." The APA does not explicitly impose an exhaustion requirement; instead, it limits judicial review to "final" agency action. *See* 5 U.S.C. § 704 (2000). This allows agencies to require would-be plaintiffs to invoke further remedies by providing by rule that decisions are nonfinal (and inoperative) until appealed. *See id.* Section 704 is not itself an exhaustion requirement, however; the *Darby*

the precise contours of an exhaustion requirement will depend on the statutory language and the nature of the administrative proceeding under review. However, it is well established that when a statute requires presentation of claims to an agency, a reviewing court will not hear claims that have not been properly presented.[150]

The central question, however, is *how* failure to properly exhaust agency procedures bars subsequent judicial consideration. This question is harder, for the mechanism by which the bar is created is not easy to discern. Because administrative exhaustion is largely a creature of statute, courts that refuse to hear claims are in most cases simply following statutory direction.[151] The Court has, however, explained that the ordinary rule by which failure to properly invoke agency procedures bars judicial review "is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts."[152] That is, it is a waiver rule[153] designed to circumscribe judicial review of agency decisions. As the *L.A. Tucker* Court went on to explain, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."[154]

Thus, and this is the key point, waiver of a claim before an administrative agency can prevent judicial review because a lawsuit filed after administrative exhaustion seeks to "topple over administrative decisions." That is, it seeks judicial review of the agency's handling of the claim.[155] Federal courts typically exercise appellate jurisdiction over federal agencies and affirm or reverse their decisions based on statutory criteria. The APA, for example,

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Court observed "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality." 509 U.S. at 144.

[150] In *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982), for example, the Supreme Court held that a Court of Appeals lacked jurisdiction over an objection not presented to the Board, applying 29 U.S.C. § 160(e), which provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court . . . ."

[151] 42 U.S.C. § 405(g), for example, allows review only of agency action taken after a hearing, and thus excludes dismissals of untimely applications. *See, e.g.*, Dietsch v. Schweiker, 700 F.2d 865, 867 (2d Cir. 1983).

[152] Sims v. Apfel, 530 U.S. 103, 108-09 (2000).

[153] Technically, this rule is probably more accurately described as forfeiture, rather than waiver. *See supra* note 70. I use the term "waiver" here in keeping with the Court's practice. *See Sims*, 530 U.S. at 105 (describing the question presented as "whether a claimant pursuing judicial review has waived any issues that he did not include" in a request for review by the Social Security Appeals Council).

[154] United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).

[155] The text of the APA says as much. *See* 5 U.S.C. § 702 (2000) (providing that a person aggrieved by agency action "is entitled to judicial review thereof").

instructs courts to reverse agency decisions that are, inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[156]

Under these circumstances, failure to meet a procedural requirement will bar subsequent judicial merits review for much the same reason that it does in the habeas context: the court is being asked to review an agency decision that rests on a procedural ground.[157] And a decision resting on a procedural ground can very seldom be attacked as "not in accordance with law" or otherwise infirm under the APA.

This is not to say that Congress could not create a different regime, in which would-be plaintiffs were required to make timely administrative filings on pain of forfeiture but would then be entitled to file an independent civil action essentially unrelated to the administrative proceeding. Indeed, it has done so: Title VII of the Civil Rights Act of 1964 requires federal employees to exhaust administrative remedies available from their employer before filing complaints with the Equal Employment Opportunity Commission (EEOC).[158] If the EEOC declines to act on the complaint and issues a right-to-sue letter, the statute allows the plaintiff a "plenary judicial trial *de novo*," rather than merely a review of the administrative record.[159] But despite the independence of the civil action from the administrative filing, courts frequently dismiss Title VII claims for failure to make the required EEOC filings on time, characterizing such failures as a lack of exhaustion that precludes subsequent suit.[160]

I have said already that administrative exhaustion is largely a creature of statute, and Title VII's exhaustion scheme is quite unusual. Instead of employing the usual language of exhaustion, the statute uses language suggestive of a limitations period, providing that a complaint "shall be filed [with the EEOC] within one hundred and eighty days" of the alleged offense.[161]

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156 *See id.* § 706(2)(A).

157 Likewise, failure to complete an administrative process, usually described as failure to exhaust, will bar judicial review because there has been no final agency decision that can be the subject of judicial review, not because of anything intrinsic to the exhaustion requirement. *See, e.g.*, *Sims*, 530 U.S. at 107 (noting that if a claimant fails to request review from the Social Security Appeals Council, "there is no final decision and, as a result, no judicial review in most cases. In administrative-law parlance, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies.") (citations omitted).

158 *See* 42 U.S.C. § 2000e-16(c) (2000).

159 *See* Chandler v. Roudebush, 425 U.S. 840, 842 (1976).

160 *See, e.g.*, Kaanapu v. Potter, 51 Fed. Appx. 244, 244 (9th Cir. 2002).

161 42 U.S.C. § 2000e-5(e)(1). And indeed, courts have described this as a "statute of limitations." *E.g.*, Newbold v. Wis. State Pub. Defender, 310 F.3d 1013, 1015 (7th Cir. 2002).

Title VII turns out to be an exception that proves the rule—the statute explicitly makes proper timing, and not just exhaustion, a precondition to suit.[162] The PLRA, by contrast, uses language similar to that of AEDPA, invoking exhaustion by name and keying the analysis to the question of whether administrative remedies remain "available" at the time of suit.[163] Nothing in the statute indicates an intent to bar plaintiffs who do not meet administrative time requirements; so if such failures are to produce a bar, the general waiver rule of administrative exhaustion is the only plausible mechanism by which they might do so.[164]

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[162] It is not the only such exception. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(d) (2000), authorizes a civil cause of action but provides that "[n]o civil action may be commenced . . . until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]" and that "[s]uch a charge shall be filed . . . within 180 days" of the alleged discrimination. Again, the language makes no reference to the general concept of exhaustion but instead demands compliance with particular time limits. Notably, the Supreme Court has held that the ADEA's similar requirement to present claims to state agencies before filing suit, 29 U.S.C. § 633(b), does not require timely presentation under state law. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 753 (1979); Thomas v. Woolum, 337 F.3d 720, 728-31 (6th Cir. 2003) (noting analogy between the ADEA and PLRA).

[163] *See* 42 U.S.C. § 1997e(a).

[164] Another possibility might be preclusion doctrine. Normal preclusion rules do apply to § 1983 suits. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) (res judicata); Allen v. McCurry, 449 U.S. 90 (1980) (collateral estoppel). And in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), the Supreme Court held that state administrative proceedings could exert preclusive effect on subsequent § 1983 suits. There are several reasons, however, to think that prison grievance proceedings resolved on nonmerits grounds should not exert any preclusive effect on § 1983 suits. First, a litigant can invoke res judicata only with respect to claims that were or could have been brought in the prior proceeding, and prison administrators cannot decide § 1983 suits; frequently they cannot award damages for any reason. Second, collateral estoppel requires that an issue be actually litigated and necessarily determined, which of course does not occur in a nonmerits disposition. More generally, there is substantial reason to doubt that prison grievance proceedings are sufficiently judicial in nature to warrant preclusive effect at all. In *Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985), the Court held that members of a prison disciplinary committee were not entitled to the absolute immunity accorded judges because they were not "professional hearing officers, as are administrative law judges . . . [but] are, instead, prison officials." The Court noted further that disciplinary hearings were not required to observe judicial due process norms. *Id.* Prison administrative hearings differ from judicial proceedings far more substantially than do most administrative adjudications, and they are consequently less likely to receive preclusive effect. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) ("Where an administrative forum has the essential procedural characteristics of a court . . . its determinations should be accorded the same finality that is accorded the judgment of a court."). The preclusive effect of a state administrative proceeding on a subsequent claim of federal right in federal court is a question of federal common law. *See Elliott*, 478 U.S. at 794. That federal common law might incorporate state law—though *Elliott*'s analysis does not look to Tennessee preclusion law—but it would in any event displace state preclusion rules in conflict with the policies of § 1983. Preclusion of § 1983 claims by prison proceedings seems just such a conflict, and under federal preclusion law, "[r]edetermination of issues is warranted if there is reason to doubt the quantity, extensiveness, or fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147, 164 n.11 (1979). *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 810-22 (1986) (discussing source and substance of interjurisdictional preclusion law for § 1983 actions).

The question of whether administrative-style exhaustion, and its accompanying waiver rule, are appropriate models for the PLRA thus comes down to the question of whether Congress intended to convert the § 1983 action into appellate judicial review of prison grievance proceedings. And now it is time to examine the PLRA exhaustion requirement in closer detail.

C. PLRA Exhaustion

In imposing an exhaustion requirement on inmate civil rights suits, the PLRA did not write on a clean slate. The earlier Civil Rights of Institutionalized Persons Act (CRIPA),[165] enacted "primarily to ensure that the United States Attorney General has 'legal standing to enforce existing constitutional rights and Federal statutory rights of institutionalized persons,'" also authorized (but did not require) federal courts to demand exhaustion of administrative remedies as a prerequisite to some § 1983 suits brought by adult inmates.[166] Specifically, § 1997e(b)(1) instructed the Attorney General to promulgate minimum federal standards for state prison grievance procedures, and § 1997e(a) authorized courts to require exhaustion of procedures determined to be in compliance with those minimum standards if such a requirement would be "appropriate and in the interests of justice."[167] Even if the exhaustion requirement were imposed, the drafters of CRIPA evidently did not contemplate that it could bar a federal action, for § 1997e(a)(1) did not authorize courts to dismiss unexhausted claims, but only to continue the action for up to ninety days in order to allow exhaustion.

Nonetheless, there is some authority for the proposition that federal courts had the power under CRIPA to impose forfeiture as a sanction for willful neglect of prison procedures. In *Rocky v. Vittorie*, the Fifth Circuit held that if, following the ninety-day continuance, the inmate *still* had not made a good faith attempt to exhaust administrative remedies, a district court had the power to dismiss the suit.[168] *Marsh v. Jones* went further, finding that dismissal with prejudice was a proper sanction for the failure to observe administrative filing

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[165] Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997a-1997j (1994)).

[166] Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 508 (1982) (quoting H.R. CONF. REP. 96-897, at 9 (1980)).

[167] 42 U.S.C. § 1997e(a)(1) (1994) (amended 1996). *See generally* McCarthy v. Madigan, 503 U.S. 150-51 (1992) (discussing CRIPA exhaustion rules). This overlay of federal standards on state procedures in some ways replicated the operation of the adequacy analysis in habeas jurisprudence: before state law rules could have an effect in a federal action, they had to meet federal standards.

[168] 813 F.2d 734, 736 (5th Cir. 1987).

deadlines, on the reasoning that as the plaintiff's "administrative remedies were foreclosed, . . . a continuance would have served no purpose."[169]

Marsh's assumption that administrative remedies can be "foreclosed" but simultaneously "available" within the meaning of § 1997e(a) is obviously hard to square with the habeas jurisprudence interpreting similar language, which holds uniformly that foreclosed remedies are unavailable.[170] But *Marsh* is hardly scrupulous in its adherence to the text of the statute; § 1997e(a) under CRIPA did not even authorize dismissal. *Marsh* is instead motivated by its understanding of the practical requirements of prison litigation—namely that inmates who failed to observe administrative filing deadlines must be punished to preserve the efficacy of the deadlines. The same policy concerns persist under the PLRA, of course, and will be addressed in Part IV.C. What is significant about *Marsh* for present purposes is that it shows that under CRIPA, dismissal with prejudice was not understood to flow naturally from the statutory scheme; it was instead a judicially created supplement without a basis in the statutory text.

The PLRA added bite to CRIPA's permissive exhaustion regime in two primary ways. First, it broadened the application of the exhaustion requirement. Where CRIPA's requirement had been discretionary, to be applied only if the court found it "in the interests of justice,"[171] PLRA exhaustion is mandatory and applies to essentially all inmate suits. Likewise, CRIPA exhaustion had applied only to suits by adult inmates, and only in circumstances where prison grievance procedures met minimum federal standards and offered remedies that were "plain, speedy, and effective";[172] the PLRA removed both these restrictions. Second, the PLRA changed the consequences of failure to exhaust. CRIPA did not authorize courts to dismiss unexhausted claims, but only to stay the action for "a period not to exceed ninety days."[173] The PLRA not only authorized dismissal but required it.

The effect of these changes has been partially clarified by two recent Supreme Court decisions, *Booth* and *Porter*. In the first, the Court held that the exhaustion requirement applies even if the administrative process cannot

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169 53 F.3d 707, 710 (5th Cir. 1995).

170 *See supra* Part III.A. It is likewise inconsistent with the approach of most circuits under the PLRA, which dismiss without prejudice on the apparent assumption that prisoners will invoke the foreclosed remedies and then return to court.

171 42 U.S.C. § 1997e(a)(1).

172 *Id.*

173 *Id.*

award the inmate the relief sought,[174] and in the second it held that the requirement applies to claims of excessive force,[175] which had been thought by some courts not to be suits related to prison conditions.[176] By confirming the near-universal scope of the exhaustion requirement, these decisions make more significant the question of what consequences attend a failure to properly exhaust. But they do nothing to answer it. Nor are earlier cases especially helpful.[177] Last, little guidance can be gleaned from the sparse legislative history.[178] The most relevant statement simply notes that an exhaustion requirement would bring § 1983 actions "more into line with administrative exhaustion rules that apply in other contexts—by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted."[179]

What I have said thus far about the two models of exhaustion used by *Pozo* does not answer the question either. But it does tell us what an answer would look like. If PLRA exhaustion is assimilated to habeas exhaustion, procedural error will create forfeiture if the § 1983 suit is understood as a collateral attack on the prison grievance proceeding. Likewise, if it is assimilated to administrative exhaustion, the possibility of forfeiture depends on whether the § 1983 suit asks a federal court for appellate review of the grievance proceeding. And last, if the PLRA exhaustion requirement is considered sui generis, we need to examine the policy implications of the forfeiture rule and its alternative.

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174 Booth v. Churner, 532 U.S. 731, 741 (2001).

175 Porter v. Nussle, 534 U.S. 516, 532 (2002).

176 The bulk of the academic commentary, perhaps not surprisingly, ran counter to the positions the Court ultimately took on these issues. *See, e.g.*, sources cited *supra* note 12.

177 The Supreme Court has twice raised the issue, once identifying it as a difficult question to be resolved by Congress, and once seeming to assume that the normal result would be a forfeiture. *See supra* note 22.

178 As *McCoy v. Gilbert*, 270 F.3d 503, 510 n.4 (7th Cir. 2001), puts it, "the legislative history offers particularly little insight. . . . The PLRA was a substantive rider to an omnibus appropriations bill. Its provisions were never seriously debated, were never the subject of a Senate Judiciary Committee mark-up, and were never explained in any committee report."

179 *See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Committee on the Judiciary*, 104th Cong. 20-21 (1995) (statement of Associate Attorney General John R. Schmidt), *reprinted in* 2 BERNARD D. REAMS & WILLIAM H. MANZ, LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at Document 55 (1997). Schmidt's language suggests a deferral, not a bar, which is indeed the customary effect of an exhaustion requirement. But the Supreme Court has already given the PLRA exhaustion requirement more bite than it has in other contexts by eliminating some of the traditional exceptions, such as an agency's inability to provide the relief requested. *See Booth*, 532 U.S. at 741.

IV. EXHAUSTION RATIONALIZED

The basic question to which this Article is addressed can thus be stated quite simply. Before the PLRA, a § 1983 suit was quite clearly an independent federal cause of action, with no relation to any state judicial or administrative proceeding. What must be decided is whether Congress intended the PLRA exhaustion requirement to convert this independent action into either appellate review of prison grievance proceedings (the administrative model) or collateral attack on such proceedings (the habeas model).

So stated, the question is relatively easy to answer. Nothing in the PLRA suggests that federal courts hearing § 1983 suits should review or defer to the results of prison grievance proceedings, a feature that one would expect to find on either a collateral attack or an appellate review approach. The only court to address the issue has explicitly stated that § 1983 plaintiffs are entitled to a trial de novo after exhausting administrative remedies.[180] And the following discussion will point out significant difficulties with the idea that Congress intended to make § 1983 suits into appellate or collateral review of prison grievance proceedings.

A. The Habeas Analogy

The problems with the theory that the PLRA has converted § 1983 suits into collateral review of prison grievance proceedings go beyond the absence of any language either indicating such an intent or instructing courts how to treat administrative findings.[181] The more significant issue is that the administrative proceeding may produce no reviewable findings, or no relevant ones; moreover, there is no guarantee that whatever findings do result will be the product of a procedure that comports with federal due process standards.

The reason for this is that the PLRA places no constraints on what sort of grievance procedures trigger the exhaustion requirement. Where CRIPA required exhaustion of only "plain, speedy, and effective" administrative remedies offered by grievance procedures that met federal standards, the

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[180] *See* Jones v. Berge, 172 F. Supp. 2d 1128, 1132 (W.D. Wis. 2001) (observing that § 1983 action does not seek review of administrative action); *cf., e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 640 (7th Cir. 1985) ("A suit under 42 U.S.C. § 1983 is not a mode of judicial review of a state administrative agency's or state court's action.").

[181] AEDPA, by contrast, explicitly articulates a standard of review for collateral re-examination of state court rulings on issues of fact and law. *See* 28 U.S.C. § 2254(d) (2000).

PLRA requires a prisoner to exhaust all "available" remedies, regardless of the nature of the proceeding or the sort of relief offered.[182] Grievance proceedings may be nonadversarial; they may not observe rules of evidence in creating a record; they may create no record at all.[183] And as already mentioned, they are insufficiently judicial in nature to warrant preclusive effect. Deferential review of proceedings that do not comply with due process standards may itself be constitutionally doubtful.

The fact that exhaustion is required even in cases in which the grievance process does not offer the relief sought in a § 1983 suit poses another conceptual barrier to understanding the PLRA as converting § 1983 suits into collateral attacks. In the habeas context, the prisoner has sought from the state courts the same relief he requests in federal court: liberty. Determining whether the state courts erred in their disposition of his claims, as AEDPA instructs federal courts to do, thus resolves whether he is entitled to that relief. But where grievance proceedings cannot result in the award of damages, a suit conceptualized as a collateral attack on those proceedings should not be able to win damages either. In sum, if the PLRA converted § 1983 suits into collateral attacks on prison grievance proceedings, it created a truly daunting set of problems with no hint as to how they should be resolved. In the absence of any language indicating that this was Congress's intent, this is not a reasonable interpretation of the statute.

B. The Administrative Analogy

The idea that the PLRA has made a § 1983 suit into appellate review of prison grievance proceedings suffers from the same defects discussed above, with an additional one: appellate review of state administrative proceedings falls outside the original jurisdiction of federal district courts. In a number of cases dealing with state administrative proceedings, the Supreme Court has held that a federal court will have jurisdiction over a suit related to the administrative action only if it is an action de novo, conducted "wholly without reference to what may have been decided by the [state agency]."[184] Federal

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[182] *See* Porter v. Nussle, 534 U.S. 516, 532 (2002); *Booth*, 532 U.S. at 741.

[183] The Pennsylvania system considered by the Court in *Booth*, for example, featured an initial inquisitorial step, under which an inmate's complaint "was referred to a grievance officer for investigation and resolution." 532 U.S. at 734.

[184] Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 354-55 (1961). The fact that a suit in district court must be entirely independent of administrative proceedings also offers a policy reason to doubt that noncompliance with administrative filing deadlines should have any effect. Administrative deadlines are geared to the administrative process and the remedies it offers. There is no reason to think that they are

district courts have only original jurisdiction; they do not "sit to review on appeal action taken administratively or judicially in a state proceeding."[185] In *City of Chicago v. International College of Surgeons*,[186] the Court rejected the apparent suggestion that district court jurisdiction over such claims was constitutionally proscribed and held that they could be heard via supplemental jurisdiction as "claims" relating to a properly filed civil action. It did not, however, dispute the proposition that such claims by themselves would not constitute a civil action appropriate for original district court jurisdiction. Consequently, converting the § 1983 action into appellate review of a prison grievance proceeding would apparently have the result that such claims could be heard only as a matter of district court supplemental jurisdiction, something no court has come near to suggesting.

C. Policy Arguments

What the preceding two sections demonstrate is that it is extremely unlikely that Congress intended to, or could without expanding district court original jurisdiction, convert § 1983 suits into appellate or collateral review of prison grievance proceedings. The § 1983 suit remains what it was originally: an independent federal cause of action unrelated to any state proceeding. And what *that* means is that a failure to observe procedural niceties in the course of exhausting administrative remedies should not, logically, have any effect on a state prisoner's subsequent § 1983 suit.[187] Resolution of a grievance against a prisoner on the merits has no preclusive effect and is accorded no deference, and there is no reason that a nonmerits resolution should have any more impact.

This conclusion is, as I admitted earlier, counterintuitive. And if its application defeated congressional purpose in imposing the exhaustion requirement, a court might well be justified in supplementing the statutory text

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appropriate for a § 1983 cause of action, which of course has its own limitations period. In the Title VII context, in contrast, Congress explicitly put specific timing requirements into the statute creating the cause of action.

[185] Chi., Rock Island & Pac. R.R. v. Stude, 346 U.S. 574, 581 (1954).

[186] 522 U.S. 156, 166-69 (1997). At the time Congress enacted PLRA, of course, *International College of Surgeons* was no more than a gleam in the Court's eye, so for interpretive purposes the framework established by *Horton* and *Stude* is the backdrop against which Congress legislated.

[187] *Fay v. Noia*, which conceived of a habeas action as independent of state proceedings, in fact justified its rejection of procedural bars by appeal to the § 1983 context, asking rhetorically: "Would Noia's failure to appeal have precluded him from bringing an action under the Civil Rights Act against his inquisitors?" 372 U.S. 391, 428 (1963), *overruled by* Coleman v. Thompson, 501 U.S. 722 (1991).

with some kind of sanction for inmates who failed to observe prison procedures.[188] Perhaps the strongest point of the *Pozo* opinion is its warning that failure to do so will thwart congressional intent and "leave [the exhaustion requirement of] § 1997e(a) without any oomph."[189] If this were true, federal courts would presumably have the power to impose forfeiture as a sanction on inmates who fail to comply with procedural requirements, even in the absence of any statutory direction to do so.[190] But a closer look at the policy arguments reveals that the conclusion is in fact sound: the purposes behind the PLRA exhaustion requirement do not require a forfeiture penalty to be imposed on inmates who make procedural errors in prison grievance proceedings.

The policy argument starts with the premise that Congress could not have intended to allow prisoners to exhaust available remedies by spurning them. The assertion is all but undeniable. The counterargument, presented most forcefully by Justice Brennan in *Fay v. Noia*, is that prisoners have no incentive to withhold claims from a process that might give them some relief. But the *Wainwright* Court rejected this argument in the habeas context, and it is perhaps even less convincing with respect to the PLRA. A prisoner might well spurn a process that could not provide the relief requested, or even hear his claim. And if Congress agreed with Brennan that the prospect of some relief was a sufficient incentive for prisoners to file and pursue administrative complaints, it would presumably not have imposed an exhaustion requirement

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[188] Comparison of the PLRA with other statutes, like Title VII and the ADEA, in which Congress has specified that failure to comply with timing deadlines works a forfeiture, makes clear that imposing such sanctions would be judicial augmentation. The Supreme Court has indicated skepticism about judicial attempts to beef up exhaustion requirements beyond what Congress has directed. *See* Darby v. Cisneros, 509 U.S. 137, 145 (1993). The Sixth Circuit relied quite heavily on the analogy to Title VII and the ADEA in rejecting *Pozo*. *See* Thomas v. Woolum, 337 F.3d 720, 727-33 (6th Cir. 2003). But I am perfectly willing to concede that this would be appropriate if the alternative were an exhaustion requirement that could simply be ignored.

[189] Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002).

[190] *See supra* text accompanying notes 169-70 (discussing *Marsh*). This sanction would, however, presumably be sensitive to the facts of the individual case, including some sort of federal adequacy analysis and adopting a standard similar to either *Noia*'s "deliberate bypass" or *Wainwright*'s "cause and prejudice." *Pozo*, it should be noted, does not seem to contemplate either an adequacy analysis or the possibility of any excuse for procedural errors. The draconian approach is largely a consequence of the misreading of *Boerckel*: the PLRA did eliminate the CRIPA adequacy analysis, and if failure properly to exhaust is equivalent to failure to exhaust simpliciter, cause and prejudice, which pertain to procedural default and not exhaustion, cannot apply.

at all. Indeed, if exhaustion by neglect suffices, the requirement does next to nothing.[191]

In fact, however, this argument relies on a mistaken understanding of how the exhaustion requirement operates. Under most state laws, prison officials have the power to hear untimely complaints.[192] Thus, administrative remedies remain available even after filing deadlines have passed, and inmates, to satisfy the exhaustion requirement, must make untimely filings and appeal their denial all the way through the prison administrative process. In short, exhaustion by neglect is simply impossible.

And now the incentive structure starts to look quite different. Without the possibility of exhaustion by neglect, prisoners have no ability to circumvent the administrative process by not filing a grievance. Nor do they have any plausible incentive to withhold claims or seek procedural resolution rather than a decision on the merits. Habeas petitioners, if they could, might want to reserve their federal claims for federal courts, preferring a de novo trial to the deferential review that AEDPA prescribes.[193] But § 1983 plaintiffs get a de novo trial no matter what happens to their claims on the merits; nothing in the PLRA instructs federal courts to defer to the findings or legal conclusions of prison administrators.[194] Withholding a claim or sandbagging in the administrative proceeding offers inmates no strategic benefit. But if an inmate did for some reason want to sabotage his grievance, he could do so without penalty—so long as he lost on substantive grounds. In short, deliberate bypass of the administrative system may be possible—but through a merits resolution, not a procedural one. A rule that keys on procedural error, then, will not stop clever inmates who do not wish to give the grievance proceedings a fair shake; it will simply redirect their efforts into substantive issues. What it will do is catch the less sophisticated and less informed who are unable to satisfy complex and demanding procedural requirements.[195]

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[191] Not nothing, though, because it would at least require prisoners to wait until their administrative remedies expired. And if prison officials set the administrative time limits equal to the § 1983 limitations period, the § 1983 action would not outlive the administrative claim, and failure to file would be a de facto bar.

[192] *See, e.g.*, WIS. ADMIN. CODE §§ DOC 310.09(6), DOC 310.13(2) (2003). This appears to be a universal characteristic of prison grievance systems, and if it is not, prison administrators could certainly create it. And for those systems in which time limits cannot be waived, requiring inmates to file an untimely grievance and have it denied on timeliness grounds still achieves the results identified in the text. The conclusion, then, is simply that exhaustion by neglect should not be allowed—and it turns out that exhaustion by neglect is impossible in most cases anyway.

[193] *Cf.* Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (raising issue of "sandbagging").

[194] Jones v. Berge, 172 F. Supp. 2d 1128, 1132 (W.D. Wis. 2001)

[195] *Cf.* McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("As a practical matter, the filing deadlines, of

Thus, imposing forfeiture as a sanction is not necessary to steer inmates into the administrative grievance process; they must file grievances anyway, timely or not. But it was not only the fear of strategic bypass that drove the Court's analysis in *Wainwright*. *Wainwright* relied also on a vision of the proper balance in state-federal relations and the role of state courts in administering state criminal justice systems. That vision was one in which state court prosecutions were the "main event" in the determination of whether a defendant might be deprived of his liberty and not a mere "tryout on the road" to a federal habeas hearing. Trials in state courts, *Wainwright* noted, were the appropriate place for such decisions to be made: "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens."[196]

Again, this policy concern has very little weight in the context of an inmate's § 1983 claim. Prison officials are not given the primary responsibility for enforcing constitutional norms and awarding damages to inmates whose rights have been violated. They are not judges; they have no constitutional expertise; and in many cases, they cannot award damages at all. Nor, of course, must their hearing process conform to the constitutional standards governing a § 1983 suit in state or federal court. There is simply no way that an administrative grievance proceeding can be the "main event" in a prisoner's attempt to win damages to redress a constitutional violation. A § 1983 claim belongs in court, not before an administrator who cannot decide it.

The policy aims served by the procedural default doctrine in the habeas context, then, are generally irrelevant to suits under the PLRA. Exhaustion via neglect is impossible; deliberate bypass could be achieved by other means, given the lack of collateral consequences; and the federalism concern that drove the *Wainwright* Court to identify state courts as preferred forums is absent. The habeas analogy is simply not a very good one.

The administrative model remains, and indeed the Supreme Court's articulations of the policies behind the PLRA exhaustion requirement tend to hew closer to those underlying administrative exhaustion. In *Porter*, the Court explained that Congress intended § 1997e(a) "to reduce the quantity and

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course, may pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions. But they are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim.")

[196] 433 U.S. at 90.

improve the quality of prisoner suits."[197] Corrective action taken in response to complaints, the Court explained, might satisfy inmates and avert a federal suit; the internal review might filter out frivolous claims; and for suits that did make it to court, an administrative record might facilitate review.[198]

How realistic these policy aspirations are is another matter. The enacting Congress knew, or should have known, that prison grievance proceedings tended not to meet the federal standards prescribed by CRIPA; that Act's incentive system (demanding exhaustion only of such remedies as met federal standards) was largely a failure.[199] Removing the incentive made it even less likely that administrative process would create a record on which judicial review could be based. And a Congress that saw inmate litigation as largely recreational would be unlikely to believe that administrative remedies would satisfy inmates, or that frivolous suits could be "filtered out" by an administrative process. Indeed, in rejecting an exhaustion requirement for *Bivens* actions, the Court treated these policy arguments skeptically.[200]

Still, these are the policy bases the Court has given us.[201] The question is how they are affected by the presence or absence of forfeiture as a sanction for failure to observe administrative deadlines. The answer is that a forfeiture regime promotes them very little, if at all. The impossibility of exhaustion by neglect means that inmates must file grievances before filing a federal suit, and administrators therefore have the ability to take action in response. It is true, of course, that the absence of a forfeiture penalty reduces the incentive to make a timely filing, but we have seen, conversely, that inmates have no incentive to delay. (In a number of cases, inmates held to have failed to exhaust tripped up not in their initial filing but at some higher level of review.[202]) Nor does it seem likely that a delay that leaves the inmate within the § 1983 limitations period will materially hamper administrators' ability to take corrective action if they desire.[203] Likewise, administrators are free to create a record if they

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

198 *Id.* at 524-25.

199 *See* Mark Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 CONN. L. REV. 621, 641 (1990) (stating that only a few prison systems have obtained § 1997e certification of grievance procedures).

200 *See McCarthy*, 503 U.S. at 153-54 (concluding that interests supporting exhaustion are insufficient).

201 Again, not without some skepticism. In *Booth*, the Court referred to its earlier estimation of these policy concerns, and then conceded that Congress "may well have thought that we were shortsighted." Booth v. Churner, 532 U.S. 731, 737 (2001).

202 *See, e.g.*, Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002) (failure to take a timely appeal); Thomas v. Doyle, 39 Fed. Appx. 373, 375 (7th Cir. 2002) (same).

203 The Court has commented that it is not clear why prison filing deadlines tend to be so short.

choose. Last, the imposition of a forfeiture sanction is not an effective means of filtering out frivolous suits. It will certainly filter out some suits, perhaps many. But as Justice Blackmun noted in *McCarthy*, it is precisely the frivolous litigator whose experience with the system allows him to navigate whatever procedural mazes administrators may construct. The inmates whose claims are forfeited are likely to be those who are not filing lawsuits as recreation. Thus, a forfeiture regime will not winnow out frivolous suits. It will not even bar suits randomly; it is *more* likely to affect nonlitigious inmates presenting legitimate grievances.[204]

In short, the policy argument turns out to be a good deal more complex than the Seventh Circuit assumed. A forfeiture rule is not necessary to protect the policies behind the PLRA, and there are few reasons to think that it is even significantly helpful. Against whatever incremental effect it might have must be weighed the serious impact on prisoners with legitimate claims who are unrepresented, unschooled in litigation, and often ill-equipped to negotiate an administrative system far harsher in its procedural requirements than state or federal courts.[205] To take just one example, the current limitations period for § 1983 actions in Wisconsin is six years.[206] But if the plaintiff is a Wisconsin inmate who will forfeit his § 1983 claim unless he complies with prison filing rules, his filing time shrinks to fourteen days, the time permitted under Department of Corrections regulations.[207] A forfeiture regime takes an unusually vulnerable group of § 1983 plaintiffs and subjects them to an unusually heavy burden.

Again, this is not to say that Congress could not have created such a regime. But if the intent behind the PLRA was simply to make things harder

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McCarthy, 503 U.S. at 152 ("[W]e have not been apprised of any urgency or exigency justifying this timetable."). This is affected naiveté; the reason that prison filing deadlines are so short *is* obvious: they are set by the same administrators who are the targets of grievances. The § 1983 limitations period, which is drawn from state law, reflects the states' assessment of how quickly such claims must be brought to prevent evidence from going stale and to protect defendants' interest in repose. *See* Wilson v. Garcia, 471 U.S. 261, 279 (1985) (noting that drawing § 1983 limitations period from state tort law prevents discrimination against federal rights because of the number and variety of state tort plaintiffs).

[204] *See McCarthy*, 503 U.S. at 153.

[205] As the Senate Report on CRIPA put it, "[m]any [institutionalized persons] are inarticulate, and most are uneducated . . . . This ignorance of legal rights . . . is compounded by the physical isolation in which most institutionalized persons live." S. REP. NO. 95-1056, at 17 (1978). A 1994 study found that seven out of ten inmates performed at the lowest literacy levels. *See* Branham, *supra* note 10, at 530 n.221 (citing KARL O. HAIGLER ET AL., U.S. DEP'T OF EDUC., LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xvii, 17-19 (1994)).

[206] *See* Wudtke v. Davel, 128 F.3d 1057, 1061 (7th Cir. 1997).

[207] *See* WIS. ADMIN. CODE § DOC 301.09(6) (2003).

for inmates, irrespective of the merits of their claims, that intent was well hidden. No legislator made such an assertion, and Senator Orrin Hatch explicitly denied it.[208] Last, in assessing the intent of Congress, we should recall Justice Breyer's words about what he called "our human rights tradition."[209] Depriving inmates of access to the federal courts for reasons unrelated to the merits of their claims or the good faith of their attempts to comply with procedural requirements is harsh, even unfair. If our legislators desire such a result, the least federal courts can do is demand that they say so. The policy argument is simply not clear enough to justify judicial conversion of a rule governing the timing of lawsuits into one that bars them entirely.

CONCLUSION

The question of whether the PLRA's exhaustion requirement should be construed to create a bar to § 1983 suits presents courts with a stark choice. Such a rule would be extremely effective in reducing the number of such suits that courts must decide on the merits. Prison administrative procedures are difficult to comply with as things stand, and if prison administrators can use them to defeat § 1983 suits before they are filed, we should expect the procedures to become even more complex and unforgiving. But there is no reason to think that this approach would pick out frivolous suits, and some reason to think that it would not. The PLRA has other provisions that do target frivolous suits and the inmates who file them, and the evidence suggests that these have worked. The question, then, is whether we are willing to deem inmates' claims of constitutional violations so insignificant that their § 1983 suits should be deterred wholesale, without any reference to their merits. That is a choice that Congress did not make, and it is not one that federal courts should lightly take upon themselves.

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[208] *See* 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); *see also* 142 CONG. REC. S2219-03 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it.")

[209] Breyer, *supra* note 29, at 268.