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Taking a Toll on the Equities: Governing the Effect of the PLRA's Exhaustion Requirement on State Statutes of Limitations

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TAKING A TOLL ON THE EQUITIES: GOVERNING THE EFFECT OF THE PLRA'S EXHAUSTION REQUIREMENT ON STATE STATUTES OF LIMITATIONS

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I. INTRODUCTION

Inmates with legitimate claims regarding the condition of their imprisonment may be barred from pursuing relief in federal court due to obstacles created by current prison litigation law. Before prisoners can file suit in federal court, they must exhaust all available administrative remedies of the custodial institution.[1] If the relevant statute of limitations expires in the time it takes a prisoner to comply with this law, will the prisoner be barred from filing a claim in federal court? The Prison Litigation Reform Act of 1995[2] (PLRA) does not answer this procedurally significant question. Instead, the federal courts are left to grapple with the collateral issues generated by the Act's silence.

The PLRA was an attempt by Congress to "help put an end to the inmate litigation fun-and-games."[3] Prior to its passage, inmate litigation had rapidly increased, often burdening the federal courts with frivolous or meritless lawsuits.[4] Senators mocked state-prison litigation systems generally, ridiculing the provision of "an up-to-date library and a legal assistant," "three square meals a day," and, in the event that inmates should "get tired of legal research," the option to "watch cable TV . . . or lift weights in a nice modern gym."[5] In turn, federal courts were "overseeing the day to day operations of state prisons" by issuing injunctions and consent decrees in response to institutional reform

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[1] 42 U.S.C. § 1997e(a) (2006).

[2] *Id.* § 1997e. Notably, the Act, named the Prison Litigation Reform Act of *1995*, was actually passed in 1996, an oversight illustrating how hastily Congress moved to enact the legislation. Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998). Congress likely acted urgently to respond to the mounting public concern over inmate litigation, but in so doing, the writers of the Act failed to define key terms and included some provisions inconsistent with preexisting law. *Id.* at 1276, 1277. With little in the way of legislative history to aid statutory interpretation, litigants must look to the face of the statute alone. *See id.* at 1277 (citing 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy)) (noting the numerous gaps in the legislative history). Arguably, Congress's hastiness in drafting and passing the PLRA has contributed to the widespread collateral litigation regarding the PLRA's procedural requirements.

[3] 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

[4] *Id.*

[5] *Id.* at S14,627 (statement of Sen. Reid).

litigation.[6] To combat the burden of frivolous inmate litigation on the federal courts, Congress passed the PLRA, a substantial barrier to prisoners' access to federal court that confined inmate litigation primarily to the walls of the custodial institution itself.[7] To achieve this end, the Act imposes a mandatory exhaustion requirement, compelling inmates to exhaust the administrative grievance processes established by the custodial institutions before seeking redress in federal court.[8]

The PLRA provides few procedural guidelines for proper administration of the exhaustion requirement, and uncertainty regarding it has resulted in substantial litigation.[9] For example, the PLRA fails to address the exhaustion requirement's effect on the applicable statute of limitations. Thus, a prisoner could be prevented from bringing suit in federal court if the limitations period expires during the time it takes to exhaust administrative remedies in compliance with the PLRA.

Consider, for example, the following scenario. Inmate John suffers a cognizable grievance while imprisoned. The Bureau of Prisons has established the following administrative procedures for inmate redress: The inmate must first seek informal resolution of the issue,[10] and if informal resolution cannot be had, then the inmate may file a grievance with the Warden within twenty days.[11] If the inmate is not satisfied with the Warden's response, he or she may then submit an appeal within twenty calendar days to the Regional Director.[12] Finally, "an inmate who is not satisfied

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[6] SHELDON H. NAHMOD, MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL TORTS 653 (3d ed. 2010).

[7] *See* 141 CONG. REC. at S14,627 (statement of Sen. Hatch) ("This legislation will not prevent [legitimate] claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."); *see also id.* at S14,626 ("Jailhouse lawyers with little better to do are tying our courts in knots with the endless flow of frivolous litigation.").

[8] 42 U.S.C. § 1997e(a) (2006) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

[9] *See infra* Part II.C–D.

[10] 28 C.F.R. § 542.13(a) (2012).

[11] *Id.* § 542.14(a).

[12] *Id.* § 542.15(a).

with the Regional Director's response may submit an Appeal" within thirty calendar days to the General Counsel for the Federal Bureau of Prisons.[13] If John complies with each step of the available administrative procedures, he has properly exhausted his administrative remedies[14] and, at least in theory, may lawfully file suit in federal court.

The catch lies in the time lapse between the initiation of the administrative grievance process and the exhaustion of it. Inmate claims often travel slowly through these systems, and some claims remain pending for long periods of time.[15] Generally, by the time the claimant reaches the last required step in the institutional process, much time has passed. Suppose our hypothetical inmate, John, brought a claim with a two-year statute of limitations. If the institutional grievance system took longer than two years to address his claim, then by the time John could file in federal court, the statute of limitations would bar his claim. While hypothetical, John's situation suggests that an inmate always runs the risk that the statute of limitations will expire during the time it takes to comply with the PLRA's exhaustion requirement.[16]

A clear rule governing the effect of the PLRA's exhaustion requirement on the applicable statute of limitations is crucial. Unless the statute of limitations is tolled while a prisoner exhausts the administrative remedies, there could be significant problems for prisoner-litigants. First and foremost, inmates with meritorious claims could be denied access to federal court should the statute of limitations run while they dutifully exhaust

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[13] *Id.*

[14] *See* Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) (establishing the parameters of proper exhaustion under the Act).

[15] *See* Gonzalez v. Hasty, 651 F.3d 318, 323 (2d Cir. 2011) ("In some instances, it is certainly possible that a full three years could pass while an inmate exhausts his administrative remedies.").

[16] Granted, the particular scenario at issue is predicated on unsatisfactory results at each step of the administrative process; thus, to arrive at the issue of a statute of limitations inequitably running on an inmate's claim, the inmate would have to dutifully exhaust his or her administrative remedies, having been unsatisfied with the results at each stage, and the entire process would have to endure for the time period of the applicable statute of limitations. Nevertheless, the issue has presented itself on a number of occasions, which are the focal point of this Note.

administrative remedies. Second, because tolling of the PLRA's exhaustion requirement is not mandatory under the statute,[17] litigants never know if their claims will be forever barred. Congressional silence creates disuniformity among courts, which, in turn, breeds unnecessary litigation. Further, a court's refusal to equitably toll the statute of limitations while an inmate pursues administrative remedies could lead to inequitable consequences that transgress the very fibers of our justice system.[18] The evils threatened by this void in the PLRA could be prevented by a federal procedure governing inmate suits brought subject to the Act. This Note champions a move away from discretionary tolling and toward mandatory tolling.

In Part II, this Note examines the pre-PLRA world and the public concerns that spurred congressional action. Part II then provides an overview of the PLRA's exhaustion requirement and discusses the collateral legal issues that the legislation has generated, including the various approaches to the issue that the federal circuits have taken. In light of these decisions, this Note concludes that tolling of the statute of limitations underlying an inmate's claim should be tolled while he or she pursues the available administrative remedies

After concluding that tolling should be uniformly applied to inmates' claims, Part III proposes an amendment to the PLRA that would govern the effect of the exhaustion requirement on statutes of limitations. The proposed amendment would remove from the courts the discretionary authority to apply equitable tolling and, instead, make tolling a mandatory. Thus, under the proposed amendment, the inmate's initiation of the administrative grievance process would trigger the tolling of the applicable statute of limitations as a matter of law.

The proposed amendment addresses the inequities that arise due to the Act's failure to dictate the effect of the exhaustion requirement on the statute of limitations. By creating a uniform

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[17] *See infra* Part II.E.

[18] "The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted." *Woodford*, 548 U.S. at 104 (Stevens, J., dissenting).

rule to guide the courts, an amendment to the Act would further the original goal of the PLRA to reduce the amount of frivolous inmate litigation in federal court.[19] If district courts were required to toll the statute of limitations during the time in which a prisoner was exhausting administrative remedies, the treatment of the Act in federal court would be more uniform, the volume of PLRA litigation would decrease, and the equitable principles on which the American judicial system depends would be more faithfully upheld.

In the absence of an amendment to the PLRA, Part IV argues that the Eleventh Circuit, which has not yet addressed the effect of the PLRA's exhaustion requirement on the applicable statute of limitations,[20] should follow those circuits that have held that tolling is appropriately applied to an inmate's claim during the time spent exhausting administrative remedies.[21]

II. BACKGROUND

A. THE PRE-PLRA WORLD: INCREASING LITIGATION AND FRIVOLITY

Prior to the passage of the PLRA, the procedural aspects of inmate litigation were governed by the Civil Rights of Institutionalized Persons Act (CRIPA).[22] The aim of CRIPPA was to make federal courts more accessible to institutionalized persons by authorizing "actions for redress in cases involving deprivations of rights . . . secured or protected by the Constitution or laws of the United States."[23] Though CRIPA's intended purpose was realized, it was to the detriment of the courts. With no absolute requirement that inmates exhaust the remedies available through the correctional facility's internal grievance system,[24] inmates

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[19] *See supra* notes 6–7 and accompanying text.

[20] *See infra* notes 81–82 and accompanying text.

[21] *See infra* Part II.E.

[22] Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997–1997j (2006 & Supp. V 2011)).

[23] *Id.* § 1, 94 Stat. at 349.

[24] *Id.* § 7(a), 94 Stat. at 352; *see also* NAHMOD, WELLS & EATON, *supra* note 6, at 21 ("Exhaustion under the Act was only ordered, however, where the applicable administrative

were often permitted to proceed directly to federal court, and the courts were empowered only to delay, but not to dismiss, plaintiffs' claims.[25] As a result, the number of federal suits filed by prisoners steadily increased and "ultimately compris[ed] a grossly disproportionate portion of the federal civil docket."[26] In the fifteen years between the enactment of CRIPA and the passage of the PLRA, federal suits filed by prisoners rose by 227%.[27]

While rates of filing certainly varied from state to state and institution to institution, inmate filing nationally exceeded noninmate filing by 35%.[28] By 1995, federal suits filed by inmates occupied approximately one-fifth of the federal civil docket.[29] Inmates filed federal civil cases at an alarming rate of nearly 25 per 1,000 inmates, while nonminates filed federal civil suits at an approximate rate of just 0.7 per 1,000.[30] In the five years immediately preceding the passage of the PLRA, petitions filed by prisoners increased by 47%.[31]

In large part, these suits alleged civil rights violations committed by state officials under 42 U.S.C. § 1983 or by federal officials under the Constitution.[32] Despite the seemingly

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procedures were either certified by the Attorney General or were determined by the court to comply substantially with certain minimum acceptable standards.").

[25] *See* Civil Rights of Institutionalized Persons Act § 7(a)(1) (requiring courts, "if . . . appropriate and in the interests of justice," to *continue* a case for up to ninety days to require exhaustion of administrative remedies).

[26] Robert Warring, Comment, *Better Late Than Never?: A Faithful Interpretation of the Prison Litigation Reform Act's Exhaustion Requirement Says No*, 80 TEMP. L. REV. 365, 368 (2007) (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003) (noting that inmate litigation accounted for fifteen percent of the federal docket in 1995)).

[27] Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 FORDHAM L. REV. 2289, 2294 (2005).

[28] Schlanger, *supra* note 26, at 1575.

[29] JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 3 (2002), *available at* http://www.bjs.gov/content/pub/pdf/ppfusd00.pdf ("Between 1980 and 1995, the rate at which State inmates filed civil rights petitions was stable, averaging 40 petitions per 1,000 inmates . . . .").

[30] Schlanger, *supra* note 26, at 1575.

[31] Admin. Office of the U.S. Courts, *Judicial Facts and Figures 2010*, tbl.4.6, http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table406.pdf.

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

meritorious bases for these causes of action, many claims proved meritless or frivolous.[33] Statistics show an alarmingly low rate of inmate success in litigation. For example, between 1990 and 1995, 80% of inmate civil rights cases were resolved pretrial in favor of the defendants,[34] often on initiative of the judge absent any motions by the defendants.[35] Inmates settled with the defendants in 6%–7% of cases, and in only 1% of cases prior to the passage of the PLRA did inmates actually receive a *judgment* for relief.[36] In a remaining 6%–8% of cases, inmates voluntarily withdrew their claims.[37]

While these statistics suggest that most prisoner claims were meritless, the best evidence is the substantive claims themselves. Prisoner's filed suits alleging federal civil rights violations for confiscated bath towels,[38] bad haircuts,[39] tight underwear,[40] melted ice cream,[41] broken cookies,[42] and receiving creamy peanut butter when chunky was requested.[43] In response to the filing of

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[33] *See id.* at 1777 (discussing examples of frivolous lawsuits emphasized by politicians and the media). Critics of the PLRA argue, with merit, that proponents of the Act fail to recognize that at the same time frivolous inmate litigation increased prior to the passage of the PLRA, the rate of filings *per prisoner* decreased, suggesting that "what the United States was really experiencing was an epidemic of incarceration, of which increased litigation was merely a symptom." *Id.*; *see also* JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 5 (1997), *available at* http://www.bjs.gov/content/pub/pdf/ppfc96.pdf ("[A]ccounting for the increase in the prison population, the rate at which inmates filed petitions declined by approximately 17% between 1980 and 1996.").

[34] Schlanger, *supra* note 26, at 1594.

[35] *Id.*

[36] *Id.* at 1597.

[37] *Id.*

[38] Jon O. Newman, Foreword, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996).

[39] Associated Press, *Group Seeks To Cuff Frivolous Inmate Lawsuits*, ORLANDO SENTINEL, Aug. 2, 1995, at A8.

[40] *Id.*

[41] *Id.*

[42] Sandra Ann Harris, *Prisoners' Lawsuits Swamp Federal Courts*, TACOMA NEWS TRIB., Oct. 26, 1995, at D10).

[43] Liz Halloran, *Quayle, Others Debate What Ails Legal System*, HARTFORD COURANT, Jan. 29, 1995, at B1. This particular case became the seminal case exemplifying the frivolous nature of inmate claims and the need for prison litigation reform. *See, e.g.*, 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Reid) ("This next one is a dandy. Inmate's claim: He ordered two jars of chunky peanut butter from the prison

these and similar complaints, the National Association of Attorneys General (NAAG) hailed the media to turn its attention to prison litigation, compiling lists of their "top ten" frivolous lawsuits that were then distributed to the press.[44] By 1995, stories of outlandish prisoner suits claimed center stage in news sources nationwide,[45] and with sudden, media-induced public scrutiny of the burden that prison litigation placed on the courts, Congress faced increasing public demand for prison litigation reform.[46]

B. CONGRESS RESPONDS: THE ENACTMENT OF THE PLRA

When introducing the PLRA in the Senate, Senator Orrin Hatch explained that the purpose of the legislation was to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits . . . tying our courts in knots with the endless flow of frivolous litigation."[47] Then-Senator Joe Biden, commenting on the new legislation, emphasized that Congress "must not lose sight of the fact that some of these lawsuits have merit" and that the proposed legislation "places too many road-blocks to meritorious

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canteen and was sent one jar of chunky and one jar of creamy."); Dennis C. Vacco, Frankie Sue del Papa, Pamela Fanning Carter & Christine O. Gregoire, Letter to the Editor, *Free the Courts from Frivolous Prisoner Suits*, N.Y. TIMES, Mar. 3, 1995, at A26 (referring to the same case).

[44] Newman, *supra* note 38, at 520; *see, e.g.*, Kris Newcomer, *Norton's Top 10 Lawsuits: Attorney General Compiles a List of Wildest Inmate Claims*, ROCKY MOUNTAIN NEWS (Denver), Aug. 3, 1995, at 4A (providing the Colorado Attorney General's top ten list). Arguably, these news reports were misleading and overly provocative of public disdain for inmate litigation. *See* Newman, *supra* note 38, at 522 (arguing that the NAAG's poster-child cases may have been neither as frivolous nor as emblematic of prison litigation as the media suggested they were). Nevertheless, media exposure focusing on the more outrageous inmate claims spurred the public outcry for legislative reform that eventually produced the PLRA. Slutsky, *supra* note 27, at 2297. Now that the Act governs, the question is not whether it was warranted but rather how to safeguard against its negative collateral effects.

[45] *See* Schlanger, *supra* note 26, at 1568 n.38 (listing as examples thirteen newspaper articles reporting frivolous inmate lawsuits).

[46] *See* Slutsky, *supra* note 27, at 2297 ("[C]ases from the 'top ten' lists came to symbolize inherent flaws in the United States legal system. With the onslaught of media scrutiny, Congress was practically forced to address the perceived problems, and the PLRA followed on April 26, 1996.").

[47] 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

prison lawsuits."[48] Despite Senator Biden's thoughtful objections to the weaknesses of the proposed legislation, the focus of the media, and therefore the public, rested not on those claims that might be meritorious but instead on asinine claims such as those presented in the "Top Ten" lists. Thus, against a backdrop of increased inmate filings and public uproar over the frivolous nature of that litigation, the PLRA was born.

The Act was passed in 1996 and rewrote the procedure for inmates to present their grievances in federal court. Seeking to restrain inmate litigation to administrative remedies within institutional facilities,[49] Congress intended to shift the responsibility of "micromanaging" correctional facilities from the judiciary to the institutions themselves.[50] The various provisions of the Act provide, among other things, restrictions on prospective relief,[51] a requirement that indigent prisoners pay filing fees if funds are available in their personal prison accounts,[52] a mandate for judicial screening of complaints,[53] limitations on awards of attorney's fees should an inmate with a retained attorney prevail,[54] a prohibition of claims for mental or emotional distress where no showing of physical injury has been made,[55] and a

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[48] *Id.* at S14,628 (statement of Sen. Biden).

[49] *See id.* at S14,627 (statement of Sen. Hatch) ("[I]t is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.").

[50] *See id.* at S14,628 (statement of Sen. Thurmond) (noting that provisions of the bill would limit federal judges who had been "micromanaging prisoners"); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 489 (2001) (commenting that the PLRA had two goals: "to end perceived judicial micromanaging of correctional facilities and to curb the purported flood of frivolous prisoners' lawsuits").

[51] 18 U.S.C. § 3626 (2006) (reducing, by statute, courts' ability to grant prospective relief). The term *prospective relief* means "all relief other than compensatory monetary damages." *Id.* § 3626(g)(7).

[52] 28 U.S.C. § 1915(b)(1) (2006). This section also provides that a prisoner's account will not be debited if the balance is less than ten dollars, and a prisoner will not be denied the opportunity to file suit solely on the grounds that he cannot pay the initial filing fees. *Id.* § 1915(b)(2), (4).

[53] *Id.* § 1915A.

[54] 42 U.S.C. § 1997e(d) (2006).

[55] *Id.* § 1997e(e).

mandatory exhaustion requirement[56] that amended the earlier, discretionary exhaustion provision contained in the CRIPA.[57]

The new procedural requirements of the PLRA made a clear impact on prison litigation. By 2001, inmate filings decreased by 43% since their peak in 1995 despite a concurrent 23% increase in the number of people incarcerated.[58] Although these effects seem perfectly in accord with Congress's intentions for the Act, the PLRA has generated many collateral legal issues.[59] In particular, the exhaustion requirement left many procedural questions unanswered and as a result produced significant litigation that garnered widespread academic attention.[60]

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[56] *See id.* § 1997e(a) ("No action shall be brought . . . until such administrative remedies as are available are exhausted.").

[57] *See supra* notes 24–25 and accompanying text; *see also* Porter v. Nussle, 534 U.S. 516, 524 (2002) ("The current exhaustion provision differs markedly from its predecessor. Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory. All 'available' remedies must now be exhausted; those remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.' " (citations omitted)).

[58] Schlanger, *supra* note 26, at 1559–60; *accord* Scalia, *supra* note 29, at 1 (offering data showing a 39% decrease in prisoner filings between 1995 and 2000).

[59] Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 218 (2004) ("The exhaustion requirement has not reduced litigation, but rather has generated more litigation interpretting [sic] its application.").

[60] *Id.* Of the seven Supreme Court decisions specifically addressing the PLRA, four have dealt with the exhaustion requirement. *See* Brown v. Plata, 131 S. Ct. 1910, 1942–44 (2011) (holding that the three-judge district court satisfied the PLRA's requirement of giving substantial weight to public safety); Jones v. Bock, 549 U.S. 199, 216, 219, 221–22 (2007) (concluding (1) that failure to exhaust is an affirmative defense to be raised by defendants and that exhaustion does not have to be shown by the prisoner; (2) that the PLRA does not require prisoners to name defendants in their initial grievances in order to sue them later; and (3) that failure to exhaust administrative remedies for one claim does not mandate dismissal of other, exhausted claims in the same lawsuit); Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) (concluding that exhaustion under the PLRA requires *proper* exhaustion, meaning compliance with all procedural requirements of an inmate grievance system); *Porter*, 534 U.S. at 532 (finding the PLRA exhaustion requirement applicable to all inmate suits concerning prison life); Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that prisoners must exhaust administrative remedies for all claims, even those for money damages although monetary relief may not be available through the prison grievance system); Miller v. French, 530 U.S. 327, 350 (2000) (holding that the automatic stay provision of the PLRA does not violate the separation of powers doctrine); Martin v. Hadix, 527 U.S. 343, 347 (1999) (addressing the retroactive application of the PLRA provision limiting attorney's fees).

C. THE EXHAUSTION REQUIREMENT AND COLLATERAL ISSUES

Historically, the Court has held that exhaustion requirements generally are not mandatory prerequisites to filing suit in federal court,[61] but the PLRA presents a unique situation in which "Congress has replaced the 'general rule of non-exhaustion' with a general rule of exhaustion."[62] The exhaustion requirement does not set forth a standard administrative grievance process to be implemented by correctional facilities; instead, the PLRA leaves states free to establish their own administrative procedures,[63] and the exhaustion requirement only directs a prisoner to comply with those locally established processes before bringing a claim to federal court.[64] Effectively, then, the PLRA's exhaustion requirement strips federal courts of jurisdiction to hear inmate claims until the internal grievance process has been exhausted.[65]

The Act remains silent, however, as to how the exhaustion requirement itself should be administered in legal proceedings. This leaves litigants to grapple with questions like: how a prisoner sufficiently satisfies the exhaustion requirement, what happens if a grievance is untimely filed, how specific a grievance must be to satisfy exhaustion, and what happens if one claim is exhausted but

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[61] *See, e.g.*, Patsy v. Bd. of Regents, 457 U.S. 496, 507 (1982) ("[E]xhaustion of state administrative remedies is not a prerequisite to an action under § 1983 . . . ."); Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

[62] NAHMOD, WELLS & EATON, *supra* note 6, at 649 n.18.

[63] *See* 42 U.S.C. § 1997e(b) (2006) (stating that a state's failure to adopt an administrative grievance procedure will not give rise to an action under other provisions of the Title, thereby demonstrating that states are to establish their own processes under the Act). *See generally* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 490–519 (2012) (analyzing and comparing the grievance procedures of several states and investigating the integrity of those schemes).

[64] *See* 42 U.S.C. § 1997e(a) (requiring that "such administrative remedies as are available" be exhausted).

[65] Championing the PLRA prior to its enactment, Senator Hatch proclaimed, "It is time to lock the revolving prison door and to put the key safely out of reach of overzealous Federal courts." 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995). The PLRA's exhaustion requirement has accomplished just that. At issue here is whether Congress locked the door to federal court where it should instead be open.

others are not.[66] After nearly ten years of uncertainty, the Supreme Court issued two landmark rulings to quiet the chaos over the exhaustion requirement and resolve the splits that had emerged among the circuits.[67]

In 2006, the Court fashioned the "proper exhaustion"[68] rule by interpreting the exhaustion requirement to demand a prisoner's complete compliance with the grievance process "in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court."[69] To avoid default, proper exhaustion is required even where the administrative remedies are no longer available to the inmate because of a missed deadline or other error.[70] In *Woodford v. Ngo*, a prisoner failed to meet California's requirement that a grievance be filed within fifteen working days of the action being challenged.[71] The Ninth Circuit held that the inmate had exhausted his administrative remedies within the meaning of the PLRA because the ability to submit a grievance to the California Department of Corrections was not available to him due to him missing the filing deadline.[72] The Supreme Court disagreed. Writing for the majority, Justice Alito stated that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules."[73] In effect, the Court's ruling determined that even when an institution's grievance process is made unavailable to the prisoner, the prisoner is not considered to have exhausted administrative remedies for purposes of the PLRA. Only when claims have

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[66] *See* Chen, *supra* note 59, at 218 (noting that the Act has resulted in litigation regarding its application); *see also* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 303 (2007) (expounding the various uncertainties that the PLRA has spawned).

[67] Jones v. Bock, 549 U.S. 199 (2007); Woodford v. Ngo, 548 U.S. 81 (2006); *see supra* note 60 and accompanying text.

[68] *Woodford*, 548 U.S. at 93.

[69] *Id.* at 88.

[70] *See id.* at 87 (reversing the Ninth Circuit's decision that the inmate "had exhausted administrative remedies simply because no such remedies remained available to him").

[71] *Id.*

[72] Ngo v. Woodford, 403 F.3d 620, 631 (9th Cir. 2005), *rev'd*, 548 U.S. 81 (2006).

[73] *Id.* at 90.

traveled through "one complete round" of the institution's review process has the prisoner properly exhausted the administrative remedies in compliance with the PLRA's exhaustion requirement.[74] Later, in 2007, the Court determined that the exhaustion requirement should be recognized as an affirmative defense rather than an issue to be raised and pleaded in the complaint.[75]

The Supreme Court's decisions in *Woodford* and *Jones* undeniably resolved heavily litigated issues generated by the PLRA, but the proper effect of the exhaustion requirement on the statute of limitations for a plaintiff's underlying claim has yet to be determined.

D. THE EXHAUSTION REQUIREMENT AND THE STATUTE OF LIMITATIONS: AN UNCERTAIN RELATIONSHIP

1. The Circuits Generally. The circuits are without guidance as to the proper interplay between the PLRA's mandatory exhaustion requirement and statutes of limitations. Specifically, whether the statute of limitations is tolled while the plaintiff exhausts administrative remedies remains unclear.

A majority of inmate claims are brought under § 1983,[76] the federal civil rights statute that, among other things, looks to analogous state law causes of action to derive the applicable statute of limitations.[77] Because of this deference to state law

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[74] *Id.* at 92 (internal quotation marks omitted). Although the Court was discussing habeas relief, it drew a parallel to the PLRA.

[75] Jones v. Bock, 549 U.S. 199, 212 (2007). Although the *Jones* decision was hugely important, the matters discussed therein are not particularly relevant to those with which this Note is concerned.

[76] Roosevelt, *supra* note 32, at 1771. From 1999 to 2006, the number of civil rights prison petitions filed in U.S. district courts averaged 24,500 annually. TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 8 (2008), *available at* http://www.bjs.gov/content/pub/pdf/crcusdc06.pdf. The total number of prison suits filed in 2009 amounted to 52,237. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 210 tbl.333 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0333.pdf.

[77] *See, e.g.*, Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004) (explaining that in § 1983 actions, "courts apply the forum state's statute of limitations for personal injury actions"); Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) ("Federal courts apply their forum

statutes of limitations in prison civil rights cases, it follows that whether the statute of limitations is tolled during exhaustion will vary with the particular statute of the state in which the federal court sits. Where the state statute expressly prohibits or fails to provide for tolling, the risk of inequity arises—the possibility that an inmate's claim will be denied in the administrative proceedings and then time-barred in the courts.[78] The federal courts sitting in states with statutes that do not provide for tolling[79] *could* exercise judicial discretion to apply equitable tolling, but nothing requires those courts to do so. As a result, the relevant statute of limitations could expire by the time a prisoner exhausts all administrative remedies, depriving him or her of the opportunity to bring the claim to federal court.

The Supreme Court has not yet ruled on the issue, but the circuits that have considered it have recognized the inequitable effects of denying a prisoner access to federal court merely because the statute of limitations period lapsed while the prisoner exhausted administrative remedies as required by the PLRA. Those circuits have largely applied the doctrine of equitable tolling.[80]

2. The Eleventh Circuit. Though the Eleventh Circuit has not adopted a rule regarding the effect of the PLRA's mandatory

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state's statute of limitations for personal injury actions to actions brought pursuant to 42 U.S.C. § 1983." (quoting Uboh v. Reno, 141 F.3d 1000, 1002 (11th Cir. 1998)) (internal quotation marks omitted)).

[78] *See* Johnson v. Rivera, 272 F.3d 519, 522 (7th Cir. 2001) ("The 'catch 22' in this case is self-evident: the prisoner who files suit under § 1983 prior to exhausting administrative remedies risks dismissal based upon § 1997e; whereas the prisoner who waits to exhaust his administrative remedies risks dismissal based upon untimeliness.").

[79] *See, e.g.*, O.C.G.A. § 9-3-33 (2007) (declaring that actions for personal injuries in Georgia shall be brought within two years and including no tolling provision for exhaustion requirements or incarceration). *But see* CAL. CIV. PRO. CODE § 352.1(a) (West 2012) (recognizing imprisonment as a disability that tolls the statute of limitations).

[80] *See, e.g.*, Gonzalez v. Hasty, 651 F.3d 318, 323–24 (2d Cir. 2011) (holding that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (same); *Johnson*, 272 F.3d at 522 (holding that a federal court borrowing a state statute of limitations in a § 1983 case must toll the limitations period while a prisoner exhausts his administrative remedies); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000) (stating that the relevant statute of limitations was tolled while the prisoner exhausted the available state remedies); Harris v. Hegmann, 198 F.3d 153, 158 (5th Cir. 1999) (per curiam) (same).

exhaustion requirement on the applicable statute of limitations,[81] it has at least addressed the issue, noting the severe inequities that could arise in the absence of a tolling provision:

> The Eleventh Circuit has not yet been faced with a case that involves a prisoner's claim that is both barred by the PLRA during imprisonment and barred by the applicable statute of limitations after release from prison, thereby giving the plaintiff no opportunity to ever have his claim heard on the merits by a federal court. We proffer, but do not hold, as that issue is not before us, that such a result may be mitigated by the doctrine of equitable tolling, as other circuits have applied that doctrine to the administrative exhaustion requirement for prison condition suits under 42 U.S.C. § 1997e(a).[82]

The concerns expressed in *Napier v. Preslicka* artfully illustrate the harm that could occur should a federal court, in the absence of a procedural rule directing the court to toll the limitations period, deny a plaintiff access to the court on the grounds that the limitations period expired while he pursued administrative remedies in compliance with the PLRA.[83]

The first time a court within the Eleventh Circuit definitively applied equitable tolling was in January 2013 when Judge Lisa Godbey Wood in the Southern District of Georgia held that the statute of limitations was tolled during the time the plaintiff

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[81] In *Leal v. Georgia Department of Corrections*, the Eleventh Circuit "decline[d] to decide in the first instance the legal issue of whether the mandatory exhaustion requirement of 42 U.S.C. § 1997e(a) and the actual exhaustion of remedies by a prisoner will operate to toll the statute of limitations." 254 F.3d 1276, 1280 (11th Cir. 2001).

[82] Napier v. Preslicka, 314 F.3d 528, 534 n.3 (11th Cir. 2002).

[83] At least one district court within the Eleventh Circuit has similarly recognized that the exhaustion requirement *may* operate to toll the statute of limitations, though it declined to decide the issue. *See* Baldwin v. Benjamin, No. 5:09-CV-372(CAR), 2010 WL 1654937, at *1 (M.D. Ga. Apr. 23, 2010) (recognizing that the Eleventh Circuit has not adopted a rule regarding the effect of exhaustion on tolling but noting that the exhaustion requirement may operate to toll the statute of limitations).

exhausted his administrative remedies.[84] Subsequent to his release from prison, the plaintiff filed a complaint in federal district court alleging forcible treatment by prison officials occurring on October 29, 2009.[85] In response, the defendants asserted that the claim, filed on February 15, 2012, should be dismissed because the applicable two-year statute of limitations had run on the claim as of October 29, 2011.[86] The plaintiff argued that the statute of limitations did not begin to run until March 19, 2010, when he received the final rejection of his appeal in the institution's internal grievance system, thereby exhausting the administrative process.[87] The defendants further argued that the PLRA—and therefore its exhaustion requirement—should not apply to the plaintiff because when he filed suit in the Southern District, he had already been released from prison.[88] Relying on the court's "proffer" in *Napier*,[89] Magistrate Judge Graham recommended dismissal of the government's motion to dismiss, stating that "[t]he applicable statute of limitations period was tolled while Plaintiff pursued his administrative remedies, which was a prerequisite to filing suit while he was imprisoned."[90] Subsequently, Judge Godbey Wood concurred with Judge Graham's recommendation and held the statute of limitations appropriately tolled.[91]

Without a clear ruling by the Eleventh Circuit to dictate the effect of the PLRA's exhaustion requirement on the statute of limitations, the law remains unsettled. Conceivably, Judge Godbey

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[84] Order at 9,Watkins v. Jesup FCI Chain of Command, No. CV 212-037 (S.D. Ga. Jan. 11, 2013), ECF No. 52.

[85] Magistrate Judge's Report & Recommendation at 1, 3, *Watkins*, No. CV 212-037 (S.D. Ga. July 10, 2012), ECF No. 35.

[86] *Id.* at 3.

[87] *Id.*

[88] Defendants' Objections to Magistrate Judge's Report & Recommendation at 2, *Watkins*, No. CV 212-037 (S.D. Ga. July 13, 2012), ECF No. 37 ("The only relevant inquiry is whether the plaintiff was imprisoned *at the time he filed his complaint.*" (citing Napier v. Preslicka, 314 F.3d 528, 532 (11th Cir. 2002))).

[89] *Napier*, 319 F.3d at 534 n.3; *see supra* note 82 and accompanying text.

[90] Magistrate Judge's Report & Recommendation, *supra* note 85, at 1, 5.

[91] Order, *supra* note 84, at 1, 9.

Wood's order in *Watkins* could be reversed on appeal due to her application of tolling where state law makes no provision for it.[92]

E. DISCRETIONARY TOLLING AND PER SE RULES: THE CIRCUIT APPROACHES

Among the most problematic results of the PLRA's failure to address the effect of the exhaustion requirement on the statute of limitations is that the application of tolling remains in the *discretionary* authority of the courts. Some circuits have adopted a per se rule that the relevant statute of limitations is tolled for the time a prisoner exhausts his or her administrative remedies, while other circuits have preserved the discretion of the federal judge to apply tolling on a case-by-case basis.

The Ninth, Seventh, and Second Circuits have adopted per se rules requiring the courts in those circuits to toll the relevant statute of limitations while a prisoner complies with the PLRA's exhaustion requirement. For example, the Ninth Circuit held that the applicable statute of limitations "*must* be tolled while a prisoner completes the mandatory exhaustion process."[93] Similarly, the Seventh Circuit held that a "federal court relying on the Illinois statute of limitations in a § 1983 case *must* toll the limitations period while a prisoner completes the administrative grievance process."[94] The Second Circuit addressed the issue after the Seventh and Ninth Circuits and joined its sister circuits by ruling that "the applicable statute of limitations *must* be tolled while a prisoner completes the mandatory exhaustion process."[95]

Though the Ninth, Seventh, and Second Circuits adopted definitive rules governing the effect of the exhaustion requirement on the statute of limitations in all cases brought subject to the PLRA, other courts remain hesitant to adopt a new rule. Compare

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[92] A district court's application of equitable tolling is reviewed de novo, as the question is "solely an issue of law." Helton v. Sec'y for the Dep't of Corr., 233 F.3d 1322, 1325 (11th Cir. 2000), *reh'g granted and opinion rev'd*, 259 F.3d 1310 (2001).

[93] Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (emphasis added).

[94] Johnson v. Rivera, 272 F.3d 519, 522 (7th Cir. 2001) (emphasis added).

[95] Gonzalez v. Hasty, 651 F.3d 318, 323–24 (2d Cir. 2011) (emphasis added) (quoting *Brown*, 422 F.3d at 943) (internal quotation marks omitted).

the Ninth, Seventh, and Second Circuit rulings with the Fifth and Eleventh Circuits. The Fifth Circuit in *Clifford v. Gibbs* recognized equitable tolling as a defense to the exhaustion requirement and held that tolling under the circumstances was "appropriate" but not mandatory.[96] Likewise, the Eleventh Circuit in *Napier* stated that the inequitable effects of the statute of limitations expiring on an inmate's claim while he or she exhausts the administrative remedies "*may* be mitigated by the doctrine of equitable tolling."[97] Magistrate Judge Graham, who recommended equitable tolling in *Watkins*,[98] reasoned that equitable tolling was "the proper course *in [that] case*,"[99] indicating that the court would retain discretion to apply tolling on a case-by-case basis rather than adopt a per se rule. Importantly, however, Judge Godbey Wood used broader language, suggesting that tolling should be applied every time a prisoner initiates administrative remedies in compliance with the PLRA.[100]

While the Sixth Circuit has issued two opinions on this issue, those decisions are equivocal on whether tolling is mandatory or discretionary while a prisoner exhausts administrative remedies. The court first addressed the issue in *Brown v. Morgan*[101] and then four years later in *Waters v. Evans*.[102] In *Brown*, the court conclusively stated that the statute of limitations was tolled during the time in which *that* inmate pursued his administrative remedies.[103] In a similar discussion, the court in *Waters* ruled that the relevant statute of limitations was tolled, just as it had

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[96] 298 F.3d 328, 333 (5th Cir. 2002) (citing Underwood v. Wilson, 151 F.3d 292, 294–95 (5th Cir. 1998) (observing that § 1997e's exhaustion requirement may be subject to defenses such as waiver, estoppel, and equitable tolling)).

[97] Napier v. Preslicka, 314 F.3d 528, 534 n.3 (11th Cir. 2002) (emphasis added); *see supra* note 82 and accompanying text.

[98] *See supra* text accompanying notes 83–90.

[99] Magistrate Judge's Report & Recommendation, *supra* note 85, at 5 (emphasis added).

[100] Order, *supra* note 84, at 9 ("[T]his Court holds that the statute of limitations tolls while a plaintiff pursues his administrative remedies . . . .").

[101] 209 F.3d 595 (6th Cir. 2000).

[102] 105 F. App'x 827 (6th Cir. 2004).

[103] 209 F.3d at 596 (citing Harris v. Hegmann, 198 F.3d 153, 157–59 (5th Cir. 1999)).

previously done in *Brown*.[104] But without a more definitive statement, these decisions offer insufficient support for an assertion that the Sixth Circuit has adopted mandatory tolling where the inmate complies with the exhaustion requirement, yet they suggest that the Sixth Circuit's view is closer to that of the Second, Seventh, and Ninth Circuits than that of the Fifth or Eleventh Circuits.[105]

Though differing as to whether tolling is mandatory or remains discretionary, the circuits that have addressed this issue have ruled uniformly as to *when* tolling, if applicable, should be triggered. The circuits have consistently held that the statute of limitations is tolled upon a prisoner's *initiation* of the administrative grievance process, as opposed to his *completion* of it.[106] This necessarily means that tolling, if applied, should be lifted when the inmate completes the administrative remedy process and satisfies the exhaustion requirement.[107] The prescriptive period should then resume.

III. THE PROPOSED AMENDMENT

Just as the PLRA replaced the CRIPA's discretionary exhaustion requirement with a mandatory exhaustion requirement for prison litigation,[108] this Note proposes an amendment to the PLRA that would make tolling of the relevant

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[104] 105 F. App'x at 829 ("[T]he statute of limitations that applied to Waters's civil rights action was tolled for the period during which his available state remedies were being exhausted." (citing *Brown*, 209 F.3d at 596)) .

[105] Note that in *Brown*, the court's determination that the statute of limitations was tolled rested not upon an analysis of the facts of that particular case but rather upon the presence of the exhaustion requirement as a bar to litigation, which suggests that the court may have adopted a per se rule. 209 F.3d at 596–97.

[106] This conclusion is supported by the language of those courts holding that the statute of limitations should be tolled "during the time period the inmate is exhausting his administrative remedies." Gonzalez v. Hasty, 651 F.3d 318, 319 (2d Cir. 2011); *see supra* notes 94–105 and accompanying text.

[107] *See, e.g.*, Nickolich v. Rowe, 299 F. App'x 725, 725–26 (9th Cir. 2008) (holding that the plaintiff's complaint was timely where he commenced the prison grievance process immediately after his claim accrued and filed a complaint within two years of completing the mandatory process).

[108] *See supra* notes 22–24 and accompanying text.

statute of limitations mandatory[109] while a prisoner completes the administrative grievance process. In the absence of an amendment to the PLRA, this Note also proposes that the Eleventh Circuit should follow the Seventh, Ninth, and Second Circuits and adopt a per se rule requiring that the statute of limitations be tolled during the time in which an inmate pursues administrative remedies in compliance with the PLRA's exhaustion requirement.

A. THE AMENDMENT

Congress should implement a federal procedure to govern the effect of the PLRA's mandatory exhaustion requirement on the applicable statute of limitations. As illustrated above, the application of equitable tolling in some circuits remains discretionary and subject to a case-by-case analysis.[110] Thus, the effect of the exhaustion requirement on the statute of limitations

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[109] Despite the circuit courts' language indicating that tolling should occur upon initiation of administrative remedies, *see supra* note 106, an argument could nevertheless be made that the federal cause of action in a prisoner suit subject to the PLRA does not *accrue* until exhaustion is complete. In certain due process challenges, a decision adverse to the plaintiff may amount to a de facto requirement that the plaintiff exclusively pursue state judicial remedies because the Constitution has not formally been violated until all state appeals have been exhausted. NAHMOD, WELLS & EATON, *supra* note 6, at 19; *see, e.g.*, Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding that where adequate post-deprivation remedies are available under state law, no violation of procedural due process is implicated by an intentional deprivation of property). The holdings in these cases suggest that "the availability of post-deprivation state remedies can preclude a substantive due process claim as well." NAHMOD, WELLS & EATON, *supra* note 6, at 160. Were a plaintiff's federal cause of action not to accrue until exhaustion, tolling of the statute of limitations would not be an issue because an inmate would not risk expiration of his claim during the period of exhaustion.

Generally, the Court has held that a cause of action accrues on the date of the challenged conduct, *e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980), or on the date of discovery, *e.g.*, United States v. Kubrick, 444 U.S. 111, 124 (1979). But those cases did not involve prisoner suits subject to the PLRA. Arguably, the unique mandatory exhaustion requirement of the PLRA makes federal prisoner suits more analogous to Due Process and Takings Clause claims, which do not accrue until some other remedial measure has been pursued, than to claims governed by the ordinary rules of accrual. The courts' uniform concern with inequitable dismissal, however, indicates that the proper reading of the PLRA is that accrual begins at the time of injury rather than exhaustion.

[110] *See supra* Part II.E.

remains uncertain even in some circuits that have addressed the issue, and inmate litigants remain subject to the risk that they will be barred from federal court should the statute of limitations lapse while they pursue the available institutional remedies in compliance with the PLRA. Such uncertainty can and should be remedied by an amendment to the PLRA setting forth a uniform rule to govern the effect of the exhaustion requirement on statutes of limitations.[111]

This amendment should require that the relevant statute of limitations be tolled upon an inmate's initiation of the administrative grievance process in compliance with the PLRA's exhaustion requirement. Tolling should continue while the inmate properly exhausts all administrative remedies.[112] Once the inmate has properly exhausted the grievance process, tolling should be lifted, and the statute of limitations should recommence, as the inmate gains access to federal court upon proper exhaustion of administrative remedies.[113]

1. Defining Prisoner. The amendment should address whether the PLRA applies to a plaintiff whose cause of action arose while incarcerated but who files suit after being released. This Note argues that the PLRA applies to such a plaintiff *if* he or she initiated the administrative grievance process while incarcerated

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[111] To say that an exhaustion requirement operates to toll the statute of limitations is consistent with other analogous legal operations. For example, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets forth an exhaustion requirement as well as a tolling provision. 28 U.S.C. § 2244(d) (2006). The Supreme Court determined that the AEDPA's tolling provision and the exhaustion requirement work together to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions *as soon as possible*." Lawrence v. Florida, 549 U.S. 327, 333 (2007) (quoting Duncan v. Walker, 533 U.S. 167, 181 (2001) (internal quotation mark omitted)); *see also id.* at 342 (Ginsburg, J., dissenting) ("[O]ne purpose of tolling is to allow adequate time for exhaustion . . . .").

[112] Proper exhaustion is satisfied upon compliance with all procedural requirements of an inmate grievance system. Woodford v. Ngo, 548 U.S. 81, 92–93 (2006).

[113] 42 U.S.C. § 1997e(a) (2006). To the extent that it strips the federal court of jurisdiction to hear the prisoner's claim until he or she satisfies the exhaustion requirement, the PLRA's exhaustion provision operates much like other recognized "handicaps," such as age, mental impairment, or imprisonment, that toll the statutory period until removed. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-502 (2012) (tolling the statute of limitations for an action brought by a minor or a mentally incompetent claimant until such disability is removed); CAL. CIV. PRO. CODE § 352.1(a) (West 2012) (recognizing imprisonment as a disability that tolls the statute of limitations).

but does not apply to such a plaintiff who took no steps to seek administrative remedies while incarcerated. An inmate who does not pursue institutional remedies simply risks that the claim will expire before he or she is released;[114] thus, such a plaintiff would not receive the benefit of tolling, whether under the proposed amendment or in circuits that apply equitable tolling.

Return for a moment to *Watkins*, the case in which Magistrate Judge Graham recommended denial of the defendants' motion to dismiss.[115] There, the defendants argued that the PLRA, and therefore its exhaustion requirement, did not apply to the plaintiff because he filed suit subsequent to his release from prison, thereby making the question whether to apply equitable tolling unnecessary.[116] The problem with that argument is that the plaintiff was not in the class of plaintiffs who take no steps to seek redress while incarcerated, risking the expiration of their claims upon release; instead, the plaintiff had completely exhausted his available remedies.[117] While the PLRA and its exhaustion requirement technically do not apply to nonprisoners, a prisoner's release "does not change the fact that, at the time [the inmate

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[114] *See* Johnson v. Rivera, 272 F.3d 519, 522 (7th Cir. 2001) ("[T]he prisoner who waits to exhaust his administrative remedies risks dismissal based upon untimeliness."). In that case, the statute of limitations may run on the claim unless applicable state law provides for tolling based on incarceration alone.

[115] Magistrate Judge's Report & Recommendation, *supra* note 85, at 9.

[116] Defendants' Objections to Magistrate Judge's Report & Recommendation, *supra* note 88, at 2. The PLRA does not apply to a plaintiff who is no longer imprisoned at the time he initiates legal proceedings of any sort, but where a prisoner sought administrative redress and was subsequently released, the requirements of the PLRA—as well as the equitable benefit of tolling—should apply to that plaintiff. *Accord* Order, *supra* note 84, at 9–10 ("The PLRA does not apply to Watkins's claims in that his suit could not be dismissed for failure to exhaust administrative remedies. However, that does not change the fact that, at the time Watkins pursued his administrative remedies, he was required by the PLRA to do so prior to filing suit. This Court sees no reason why a plaintiff who remains in prison should receive the benefit of equitable tolling, whereas a plaintiff who has released after exhausting his administrative remedies should not.").

[117] Magistrate Judge's Report & Recommendation, *supra* note 85, at 6 ("[H]e had the according onus to exhaust his administrative remedies before he could file a cause of action. . . . Plaintiff was attempting to exhaust his administrative remedies as late as March 19, 2010 . . . .").

plaintiff] pursued his administrative remedies, he was required by the PLRA to do so prior to filing suit."[118]

2. Reducing Inmate Gaming: A Right Understanding of the Tolling Doctrine. Arguably, an amendment of this sort could generate inmate gaming. Inmates could initiate the administrative grievance process, neglect to exhaust it, and essentially leverage the tolling provision to preserve their claim until they are released from prison. At that point, they would no longer be a "prisoner" for the purposes of the PLRA[119] and could file suit in federal court. This concern, however, relies on a misguided understanding of the issue. Any argument that the proposed amendment would invite inmate gaming is a fiction based on a nuanced misunderstanding of the operation of the doctrine of tolling.

Begin with this simple fact: Tolling is lifted upon the removal of the condition that triggered it.[120] Under the PLRA, tolling would be triggered by an inmate's initiation of the administrative grievance process, not by imprisonment itself. Therefore, prisoners could not initiate the administrative remedy process in order to trigger tolling, gain time on their claim, and then simply decline to exhaust their remedies with the ultimate goal of filing suit subsequent to release from prison. Instead, because the condition that would toll the statute of limitations under the circumstances is the *initiation* of the administrative remedy process, rather than imprisonment, only *proper exhaustion* of those remedies[121] would legally operate to lift the tolling and start the

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[118] Order, *supra* note 84, at 10.

[119] *See* Defendants' Objections to Magistrate Judge's Report & Recommendation, *supra* note 88, at 2 (arguing that plaintiff was not subject to the PLRA and its exhaustion requirement because he filed suit after being released from prison).

[120] 109 A.L.R. 954 (originally published in 1937) ("Statute providing that an insane person, minor, or other person under disability may bring suit within specified time *after removal of disability* as affecting right to bring action before disability removed." (emphasis added)); Order, *supra* note 84, at 10 ("Tolling in the present case, however, is not a result of [the inmate's] incarceration. Instead, the statute tolled because [he] was barred from initiating suit until after he exhausted his administrative remedies.").

[121] *See* Woodford v. Ngo, 548 U.S. 81, 93 (2006) (holding that the PLRA's exhaustion requirement demands *proper* exhaustion).

clock ticking on the cause of action.[122] Furthermore, under the PLRA, the condition that would trigger tolling (i.e., the exhaustion requirement) is also a provision that effectively strips the federal courts of jurisdiction to hear the claims.[123] Thus, although the claim would remain *alive* by virtue of tolling, the claimant would not retain the *right* to file suit at any time so long as the statute of limitations has not run; instead, tolling under these circumstances would remain subject to the jurisdiction-stripping effect of the exhaustion requirement. Therefore, an amendment of this sort would not open a backdoor for inmates to manipulate the tolling provision as a means to keep their claims alive until release from prison.[124]

Should a prisoner pursue administrative remedies and subsequently decline to exhaust them, the claim would remain tolled,[125] but the prisoner would not gain access to federal court until those remedies were properly exhausted. The jurisdiction-stripping effect of the exhaustion requirement would act as a safeguard against inmate manipulation of any tolling provision.

B. POLICY CONCERNS

An amendment to the PLRA calling for mandatory tolling upon a prisoner's initiation of the administrative grievance process is

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[122] The critique of tolling under the PLRA relies on the presumption that imprisonment itself is the condition that would trigger tolling. The argument thus fails to recognize that the imposition of the exhaustion requirement is the condition that must be lifted—by proper exhaustion—before the statutory period would commence.

[123] *See* 42 U.S.C. 1997(e)(a) (2006) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

[124] In jurisdictions with statutes of limitations that include tolling provisions for incarcerated plaintiffs, an inmate would have little incentive to exhaust his administrative remedies if his ultimate goal were to seek redress in federal court because his action would be preserved until release regardless of exhaustion. The proposed amendment has no bearing on situations of this sort.

[125] Moreover, the statute of repose would ultimately kick in to bar the claim in the interest of finality. *See* 54 C.J.S. *Limitations of Actions* § 134 (2013) ("Statutes of repose differ from statutes of limitation in that statutes of repose are not subject to equitable tolling."). Thus, an inmate's claim could not remain alive indefinitely if he fails to properly exhaust available remedies.

supported by the congressional goals behind the PLRA.[126] Absent a tolling provision of the sort proposed here, the exhaustion requirement invites abuse by prison officials and generates disuniformity in the application of federal law—effects that ultimately increase the volume of inmate litigation.

1. Abuse by Institutional Officials. A mandatory tolling requirement would safeguard against intrainstitutional inequities and biases and hold institutional officials accountable. Inmates are not the only actors that may be charged with system gaming. Prison officials also have incentive to manipulate the exhaustion requirement by indefinitely delaying response to inmate grievances—such that an inmate would never exhaust these remedies—in order to ensure that the statute of limitations runs on the claim.[127] Courts generally apply equitable tolling "where necessary to prevent unfairness to a plaintiff who is not at fault for her lateness in filing."[128] It follows that where a prison official's negligent or intentional delay of an inmate's claim is the cause for untimeliness, but where the inmate's compliance with the PLRA is otherwise timely, the statute of limitations should be tolled according to general principles of equitable tolling.

The exhaustion requirement manages the actions that a *prisoner* must take regarding internal institutional remedies, but it does not direct the actions of prison officials, perhaps presuming that those officials will act with integrity to move inmate complaints through the established processes. Unfortunately, the Act may presume too much. Too often the exhaustion requirement has been nothing but a "legal cause which prevent[s] the courts or their officers from taking cognizance of or acting on the plaintiff's action."[129] Mandatory application of tolling upon an inmate's

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[126] *See* discussion *supra* notes 47–50 and accompanying text.

[127] The Second and Seventh Circuits acknowledge that a narrow interpretation of the PLRA would permit prison officials "to exploit the exhaustion requirement through indefinite delay in responding to grievances." Gonzalez v. Hasty, 651 F.3d 318, 323 (2d Cir. 2011) (quoting Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002)) (internal quotation marks omitted).

[128] Veltri v. Bldg. Serv. 32B–J Pension Fund, 393 F.3d 318, 322 (2d Cir. 2004).

[129] Harris v. Hegmann, 198 F.3d 153, 158 (5th Cir. 1999) (quoting Burge v. Parish of St. Tammany, 996 F.2d 786, 788 (5th Cir. 1993)) (internal quotation marks omitted).

initiation of administrative process would shield inmates from the inequity of being unable to properly exhaust the administrative remedies due to delay by institution officials.[130] A mandatory tolling provision would diminish incentives to manipulate the exhaustion requirement to the inmate's detriment because such attempts would be ineffective.

2. Disuniformity and Increased Litigation. Not only does the PLRA's failure to mandate tolling create opportunity for officials to manipulate the exhaustion requirement, but it also undermines the very purpose for which the PLRA was initially enacted: to ease the burden on federal courts created by the high volume of inmate litigation.[131] Where a governing rule or statute leaves procedural questions unanswered, the result is nearly always disuniformity among the circuits; this disuniformity in turn breeds increased litigation.[132] Because the PLRA leaves the procedural effect of the exhaustion requirement on the statute of limitations undetermined, litigants are left to argue the issue before the courts, and the courts have reached differing conclusions as to how the issue should properly be resolved.[133]

An amendment to the PLRA dictating the effect of the exhaustion requirement on the applicable statute of limitations would provide direction for litigants and courts alike, freeing each from wasteful, time-consuming litigation. It would also ensure that the PLRA's exhaustion requirement would not operate to deny a prison litigant an opportunity to have that claim heard on the merits by a federal court.[134] Ultimately, then, the proposed amendment would cure the present weaknesses of the PLRA and

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[130] *See supra* notes 68–70 and accompanying text (describing the requirement of proper exhaustion).

[131] *See supra* notes 47–50 and accompanying text.

[132] *See supra* notes 59–60 and accompanying text.

[133] *See supra* Part II.D–E.

[134] *See* Napier v. Preslicka, 314 F.3d 528, 534 n.3 (11th Cir. 2002) (suggesting that equitable tolling might mitigate potentially harsh results of the exhaustion requirement and the statute of limitations).

further intended policy goals by "reduc[ing] the quantity and impro[ving] the quality of prisoner suits."[135]

Administrative procedures exist to further this goal by discouraging excessive or frivolous litigation.[136] An amendment requiring that an inmate's pursuit of administrative remedies act as a trigger to toll the statute of limitations would reinforce the underlying policy goals of the PLRA and encourage inmates with nonfrivolous claims to comply with the exhaustion requirement.[137] Accordingly, the proposed amendment would not only safeguard against abuse by prison officials, but it also would comport with the policy goals of the PLRA, enhancing the PLRA's ability to achieve its own purpose.

C. STATE AND FEDERAL LAW: ADDRESSING CONCERNS OF *ERIE* AND FEDERALISM GENERALLY

Amending the PLRA to govern the tolling of applicable statutes of limitations necessarily involves an intersection between state and federal law. Where a federal statute does not provide a statute of limitations, such as in § 1983 and *Bivens* actions, federal courts "borrow" the statute of limitations and the tolling rules of

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[135] Woodford v. Ngo, 548 U.S. 81, 93–94 (2006) (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)) (internal quotation marks omitted); *see also* Jones v. Bock, 549 U.S. 199, 203 (2007) ("Our legal system, however, remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law.").

[136] *See* 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Reid) ("The amendment establishes procedural hurdles that will prevent frivolous lawsuits.").

[137] An argument could be made that a tolling provision would only serve to preserve inmates' claims, ultimately producing the undesired effect of increasing inmate litigation. However, the PLRA was not enacted merely to deny inmates access to federal courts but rather to deny their access to federal courts when bringing *frivolous* claims. *See* 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("This legislation will not prevent [legitimate] claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system."). Furthermore, the PLRA specifically provides that a court may dismiss a claim if it is frivolous or meritless. 42 U.S.C. § 1997e(c) (2006). Thus, if an inmate brings a valid, nonfrivolous claim, that action should not be barred simply by the running of the statute of limitations while the prisoner exhausts administrative remedies.

the state in which the action arose for personal injury torts.[138] Should the proposed amendment to the PLRA be adopted, the *state* statute of limitations would be subject to the governance of a *federal* tolling provision in some suits. When federal law threatens to encroach upon state law in some way, it is imperative to determine whether the federal provision is appropriate.[139] The federal provision thus must be scrutinized under the *Erie* doctrine[140] as well as under general principles of federalism.

1. The Erie *Doctrine.* The PLRA only closes federal courts to inmates whose claims concern prison conditions and are brought under § 1983 or any other federal law.[141] Put another way, the Act unambiguously governs claims over which district courts would have federal question jurisdiction. Because the *Erie* doctrine applies only to federal courts sitting in *diversity*,[142] it does not bear on this analysis.

2. Principles of Federalism. Section 1983 suits are brought in federal court based on original, federal question jurisdiction. The limitations period for a § 1983 suit is determined by the state's personal injury statute.[143] Though federal standards govern when

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[138] Wallace v. Kato, 549 U.S. 384, 387, 394 (2007); *see also* Salas v. Pierce, 297 F. App'x 874, 877 (11th Cir. 2008) (stating that "state law generally determines tolling rules" in § 1983 actions).

[139] *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable . . . as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.").

[140] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Under the *Erie* doctrine, federal courts exercising diversity jurisdiction must, except in matters governed by the Federal Constitution or acts of Congress, apply the substantive law of the state in which they sit, including statutes of limitation. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

[141] 42 U.S.C. § 1997e(a).

[142] *See Erie*, 304 U.S. at 78 (stating that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," thus indicating that *Erie* only applies in diversity actions).

[143] *Wallace*, 549 U.S. at 387; *see also* Sharpe v. Cureton, 319 F.3d 259, 266 (6th Cir. 2003) ("[T]he duration of the statute of limitations for § 1983 actions is governed by state law; however, federal standards govern when the statute begins to run."); Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004) ("For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, except to the extent any of these laws is inconsistent with federal law.").

that statute begins running,[144] state rules govern when the limitations period may be *tolled*.[145] Unless the state tolling rule is "inconsistent with the Constitution [or the] laws of the United States,"[146] the federal court must apply state tolling rules only.[147]

In *Board of Regents v. Tomanio*, a plaintiff brought suit under § 1983, subject to the state statute of limitations and tolling rules, but the circuit court did not apply the state tolling rules.[148] The Supreme Court reversed the lower court's ruling, holding that where Congress has not "establish[ed] a statute of limitations or a body of tolling rules applicable to actions brought in federal court . . . . Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision."[149]

Absent an amendment to the PLRA, a federal court would run into a problem with *Tomanio* should it seek to apply federal equitable tolling to a prisoner's action, as *Tomanio* demands that federal courts borrow state tolling rules if they are to toll the statutory period.[150] An amendment to the PLRA tolling the applicable statute of limitations during the period of exhaustion would be consistent with the rule set forth in *Tomanio* because it would constitute a *congressionally established* body of tolling rules applicable to actions brought in federal court.[151] Under *Tomanio*, where Congress has enacted a federal tolling rule, the federal court is no longer bound to apply state tolling rules for analogous

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[144] *Wallace*, 549 U.S. at 388.

[145] *Id.* at 394.

[146] Bd. of Regents v. Tomanio, 446 U.S. 478, 485 (1980) (quoting Robertson v. Wegmann, 436 U.S. 584, 588 (1978)) (internal quotation marks omitted).

[147] *See* Shropshear v. Corp. Counsel, 275 F.3d 593, 596 (7th Cir. 2001) ("We now hold . . . that the state, rather than the federal, doctrine of equitable tolling governs cases of borrowing."); *id.* at 600 (Ripple, J., concurring) ("Today, we take the view that *only* state tolling rules ought to apply.").

[148] *Tomanio*, 446 U.S. at 484.

[149] *Id.* at 483–84 (alteration in original) (quoting *Robertson*, 436 U.S. at 593).

[150] *Id.*

[151] *See id.* ("Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action.").

actions and may follow the federal rule instead.[152] For federal question claims that invoke federal statutes of limitations, the application of an amended tolling provision would merely constitute application of federal law to federal statutes of limitations, raising none of the same federalism concerns as the scenario in which federal law regulates state statutes of limitations.

Thus, even though § 1983 claims as a rule look to comparable state causes of action to determine the limitations period and tolling rules, the proposed amendment would not impermissibly encroach upon state autonomy. First, the *Erie* doctrine is inapplicable because in PLRA litigation the federal court does not sit in diversity, and second, the principle that a congressionally established tolling rule may govern a federal action supports the proposed amendment as consistent with federal procedural law.[153]

IV. A DIRECTIVE FOR THE ELEVENTH CIRCUIT IN THE ABSENCE OF A FEDERAL PROCEDURAL RULE

In the Eleventh Circuit, equitable tolling is permitted "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence."[154] The PLRA's mandatory exhaustion requirement should qualify as an "extraordinary circumstance" beyond the inmate's control that prohibits him from filing suit, but the ruling in *Tomanio* prohibits the federal courts from applying federal equitable tolling rules when they borrow statutes of limitations and tolling rules from state law.[155] Because *Tomanio* dictates that the federal court apply the relevant state tolling rules,[156] it is not

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[152] *See id.* at 485 (noting that federal courts may "disregard an otherwise applicable state rule of law" if Congress has enacted a conflicting and applicable provision).

[153] *See supra* notes 143, 146 and accompanying text.

[154] Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999); *see also* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.").

[155] *Tomanio*, 446 U.S. at 483–84.

[156] *Id.* at 484 ("Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision . . . ." (alteration in original) (quoting Robertson v. Wegmann, 436 U.S. 584, 593 (1978))).

enough to call on the Eleventh Circuit to follow the Ninth, Seventh, and Second Circuits and adopt a per se rule that pursuit of administrative remedies under the PLRA tolls the statute of limitations.[157] To do so would violate *Tomanio* by judicially creating a federal law of tolling that ignores the state tolling rules. Instead, the Eleventh Circuit should hold that the Georgia tolling rules support the application of equitable tolling to an inmate's claim brought subject to the PLRA's mandatory exhaustion requirement.[158]

In recommending that the statute of limitations be tolled in *Watkins v. Jesup FCI Chain of Command*,[159] Judge Graham overlooked the *Tomanio* rule when he concluded that applying federal standards of equitable tolling was the proper course[160] even

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[157] *See supra* notes 93–95 and accompanying text. Given the rule in *Tomanio* mandating application of state tolling rules in the absence of congressionally enacted tolling rules, those circuits presumably applied the tolling rules of the states in which they sit. The only other alternative to explain their application of tolling rests on a finding that the state tolling rules conflicted with either the Constitution or a federal law. *See Tomanio*, 446 U.S. at 485 (noting that federal courts can ignore otherwise applicable state laws only if they are inconsistent with the Constitution or federal law). None of the opinions, however, reference such a finding by the courts.

[158] Importantly, this Note's discussion of Eleventh Circuit doctrine, where borrowed from the state law, is concerned solely with Georgia's laws of tolling. The tolling laws of Florida and Alabama are accordingly outside the purview of this Note. Thus, when the Eleventh Circuit addresses an inmate's claim, where the underlying statute of limitations comes from Alabama or Florida law, the court should consider the tolling doctrines of the specific state, in light of *Tomanio*. This is all, of course, is the absence of an amendment to the PLRA itself.

[159] Magistrate Judge's Report & Recommendation, *supra* note 85, at 5. There, the plaintiff exhausted available remedies on March 19, 2010, approximately three months before his release on June 7, 2010. *Id.* at 6. He did not file a complaint in the District Court for the Southern District of Georgia until February 15, 2012, over twenty months subsequent to his release but within one month of the March 19, 2012, expiration date for the claim. *Id.* at 6–7. While the date of filing demonstrates little diligence on the plaintiff's part, the filing was nevertheless timely by the measure of the statutory period as tolled during the plaintiff's exhaustion of administrative remedies.

[160] *See id.* at 5 ("While the undersigned recognizes that Georgia law does not permit tolling, the undersigned concludes that this is the proper course in this case. The applicable statute of limitations period was tolled while Plaintiff pursued his administrative remedies, which was a prerequisite to filing suit while he was imprisoned."). The Report and Recommendation does not explicitly reference federal equitable tolling, but the language of the report echoes the Eleventh Circuit's standard for applying equitable tolling. *See supra* note 154 and accompanying text.

though Georgia law did not permit tolling under the circumstances.[161] In her Order denying the defendants' motion to dismiss as recommended by Judge Graham, Judge Godbey Wood did not reach the question whether applying state tolling rules would be inconsistent with the Constitution or federal law and therefore rejected the application of a federal tolling doctrine to the inmate's claim.[162] Instead, she reasoned that Georgia tolling rules strongly supported tolling the statute of limitations while an inmate pursues administrative remedies.[163] Judge Godbey Wood found that the rationale supporting tolling in other areas of state law also supported the application of tolling in prisoner suits subject to the PLRA's exhaustion requirement.[164] For example, in the context of class action suits, the doctrine of equitable tolling applies under Georgia law to "all asserted members of the class during the pendency of the action" so that class members do not have to worry that the statute of limitations will run on their individual claims "should class certification ultimately be denied."[165] In the same way, equitable tolling in inmate litigation

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[161] *See* Magistrate Judge's Report & Recommendation, *supra* note 85, at 4 ("Georgia law does not allow tolling of the statute of limitations based on a litigant's incarceration status." (citing O.C.G.A. § 9-3-90(b) (2007))). Magistrate Judge Graham's analysis of the statute of limitations issue is flawed because it erroneously turns on an evaluation of tolling based on *incarceration* in Georgia. The relevant inquiry is not whether Georgia law permits tolling based upon incarceration—as incarceration is not the condition under the PLRA that would require tolling—but whether Georgia's tolling rules support tolling where it would be inequitable to allow the statute to continue running while a prisoner exhausts administrative remedies as required by the PLRA. *See supra* Part III.A.*1*.

[162] *See* Order, *supra* note 84, at 3–4 (noting the rule from *Tomanio* and holding that the federal equitable tolling doctrine is "inapplicable in cases such as this one where the statute of limitations is borrowed from state law").

[163] *See id.* at 4–8 (discussing several instructive instances of Georgia courts applying tolling to support the application of tolling to prisoner claims subject to the PLRA).

[164] *See id.* (citing State v. Private Truck Council of Am. Inc., 371 S.E.2d 378, 380 (Ga. 1988) (applying equitable tolling to the claims of individual members of a class in a class action); Butler v. Glenn Oak's Turf, Inc., 395 S.E.2d 277, 279–80 (Ga. Ct. App. 1990) (tolling the statute of limitations for a common law tort claim while an employee's worker's compensation case was pending); Antinoro v. Browner, 478 S.E.2d 392, 395 (Ga. Ct. App. 1996) (tolling the statute of limitations in insurance cases when a plaintiff voluntarily pursues nonbinding arbitration); O.C.G.A. § 36-33-5(d) (2012) (requiring tolling for a state-imposed exhaustion requirement in suits seeking money damages against a municipal corporation).

[165] *Private Truck*, 371 S.E.2d at 380.

subject to the PLRA "would allow prisoners who are required to pursue a prison's administrative remedies to concentrate on those remedies without concern that, for each day they spend pursuing those remedies, the time frame for them to initiate a federal court action is dwindling."[166] Moreover, equitable tolling is more narrowly applied in prison litigation than in state class action suits. Unlike tolling in class actions, which applies to the claims of all plaintiffs even if they are unaware of their inclusion in the class, tolling in prison litigation would apply only to one plaintiff and only upon the condition of dutifully pursing administrative remedies as required by federal law.[167]

Judge Godbey Wood's ruling marks the first instance in which a court within the Eleventh Circuit has addressed the effect of the PLRA's exhaustion requirement on the underlying state statute of limitations, and her prudent application of Georgia's equitable tolling doctrine mitigated the negative effects of barring the plaintiff's claim from federal court.[168] While the language of Magistrate Judge Graham's recommendation was narrow and retained judicial discretion for the application of tolling,[169] Judge Godbey Wood adopted a rule tolling the statute of limitations for prisoner suits subject to the PLRA.[170] Though federal courts must

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[166] Order, *supra* note 84, at 5.

[167] *Id.*

[168] *See* Napier v. Preslicka, 314 F.3d 528, 534 n.3 (11th Cir. 2002) (proffering, but not holding, that the doctrine of equitable tolling could mitigate the inequity of denying a prisoner the opportunity to have his claim heard in federal court if the statutory period expires while he exhausts administrative remedies).

[169] Judge Graham ruled that tolling was "the proper course in *this* case," thereby indicating that whether the exhaustion requirement would operate to toll the limitations period would remain subject to a case-by-case analysis. Magistrate Judge's Report & Recommendation, *supra* note 85, at 5 (emphasis added).

[170] Order, *supra* note 84, at 9. Notably, the opinions issued by Judge Graham and Judge Godbey Wood held that Watkins had until March 19, 2012, two full years from the date of exhaustion, to file suit in federal court. Magistrate Judge's Report & Recommendation, *supra* note 85, at 6–7; Order, *supra* note 84, at 1 (concurring with Judge Graham's recommendation). Because Judge Godbey Wood held "that the statute of limitations tolls while a plaintiff pursues his administrative remedies, regardless of the amount of time remaining in the original limitations period after his claims are exhausted," Order, *supra* note 84, at 9, the March 19, 2012, calculation assumes that Watkins initiated the administrative grievance process on October 29, 2009—the day of the injury. *Id.* at 2. But in fact, Watkins began pursuit of administrative remedies seven days later on November 5,

borrow state tolling doctrines, Judge Godbey Wood astutely found in the body of Georgia's tolling doctrine rationales that clearly support tolling during the period of exhaustion. In order to most closely comport with the purpose of the PLRA—namely, to lift the burden of increased prison litigation on the federal courts[171]—the Eleventh Circuit should affirm the decision of Judge Godbey Wood and adopt a per se rule that the statute of limitations is tolled where the plaintiff is required by the PLRA to exhaust administrative remedies before proceeding to federal court.

V. CONCLUSION

Passed hastily in 1995, the PLRA contained gaping ambiguities, the greatest of which was the mandatory exhaustion requirement, which resulted in significant collateral litigation.[172] While the PLRA was intended to reduce frivolous and excessive prison litigation, its exhaustion requirement has not only engendered *more* litigation, but it can also bar litigation, irrespective of whether the claim is meritorious or frivolous.[173] The Act is silent

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2009. Complaint at 14–15, Watkins v. Jesup FCI Chain of Command, No. CV212-037 (S.D. Ga. Feb. 15, 2012), ECF No. 1.

Under Judge Godbey Wood's ruling, a correct calculation would find that the statute of limitations expired not on March 19, 2012, but on March 12, 2012, a date that accounts for the seven days between the date of the injury and the date of Watkins's initiation of the remedial process during which the statute of limitations would not have been tolled. Perhaps the court found the seven days to be of little importance to the ruling because Watkins's February 15, 2012, filing would still have been timely under the accurate measure of the statutory expiration date. Magistrate Judge's Report & Recommendation, *supra* note 85, at 6–7. Or perhaps the court simply made a mistake in calculating the statutory period. Regardless, the decision suggests that the court gave Watkins the full two-year statutory period once he exhausted his remedies. This interpretation of the opinion would comport with an argument that suits brought subject to the PLRA do not *accrue* until exhaustion is satisfied. *See supra* note 109. However, given the court's focus on the doctrine of tolling as opposed to the doctrine of accrual, the court most likely made a mistake in not deducting those seven days from the statutory period. Thus, the language of the court applying state equitable tolling to prisoner suits subject to the PLRA's mandatory exhaustion requirement should be followed. Should the Eleventh Circuit take up the issue on appeal, it should pay particular attention to its calculation of the statutory period to avoid this sort of confusion.

171 *See supra* notes 47–50 and accompanying text.

172 *See supra* Part II.B–C.

173 *See supra* Part II.B–C.

as to the operation of the exhaustion requirement on the applicable statute of limitations, and no tolling provision accompanies the exhaustion requirement;[174] thus, should the statute of limitations expire during the time it takes a plaintiff to exhaust administrative remedies in compliance with the Act, the plaintiff may lose the opportunity to be heard in federal court.

Of the six circuits that have addressed the issue, three have clearly adopted a per se rule that the PLRA's exhaustion requirement necessarily operates to toll the statute of limitations, while the other three have discretionally applied tolling on a case-by-case basis.[175] Though an optimistic start, the discretionary application of equitable tolling breeds inconsistent results and is inadequate to cure the ills of a mandatory exhaustion requirement with no provision for tolling. Injustice would result if a plaintiff were denied access to federal court because the statute of limitations ran on his claim while he made good faith efforts to comply with a federal law's procedural requirements.

An amendment to the PLRA making tolling a mandatory operation of the exhaustion requirement would cure these inequities. A federal procedure governing the interplay between the exhaustion requirement and statutes of limitations would remove the application of tolling from the discretion of the courts. In this way, the proposed procedural amendment would promote uniformity in PLRA suits, lead to decreased inmate litigation, and secure fairness by ensuring that inmates with legitimate claims would have access to federal court in accordance with Congress's express purposes for enacting the PLRA.[176] Collectively, these desirable effects would conserve judicial resources that would otherwise be squandered on judicial micromanagement of correctional facilities.

Where a federal statutory cause of action does not provide a federal statute of limitations or tolling rule, federal courts borrow analogous state law to determine the limitations period. Conflicts between federal and state law regarding when the statute of

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[174] 41 U.S.C. § 1997e(a) (2006).

[175] *See supra* Part II.E.

[176] *See supra* notes 47–50 and accompanying text.

limitations begins to run are resolved by following the federal law. For that reason, an amendment to the PLRA governing when the applicable statute of limitations may be tolled would be consistent with Supreme Court precedent.

In the absence of a federal provision governing the effect of the PLRA's exhaustion requirement on the applicable statute of limitations, the Eleventh Circuit should follow the Ninth, Seventh, and Second Circuits and adopt a per se rule requiring that the statute of limitations be tolled upon an inmate's initiation of the administrative grievance process in compliance with the PLRA. One court within the jurisdiction of the Eleventh Circuit has found that state tolling doctrines support equitable tolling as applied to a prisoner's claim during exhaustion. To ensure that equity is served, the Eleventh Circuit should affirm that holding and adopt a rule requiring that the statute of limitations be tolled during the time it takes a prisoner to satisfy the PLRA's mandatory exhaustion requirement.

Keri E. McCrary