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Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law; B.S., Cornell University, 2003. I would like to thank the litigation attorneys at the New York State Attorney General's Office for their warmth, encouragement, and invaluable feedback during the summer of 2004, helping to spark my interest in this topic. Thanks to Professor Michael W. Martin for his expertise and assistance and John Boston for his insight and advice on Part III of this Note. I would also like to thank my family, friends, and Amy for their continuing love and support.

TOTALLY EXHAUSTED: WHY A STRICT INTERPRETATION OF 42 U.S.C. § 1997e(a) UNDULY BURDENS COURTS AND PRISONERS

*Adam Slutsky**

“Prison litigation may be the peaceful equivalent of a riot in bringing prisoners’ grievances to public attention and in mobilizing political support for change.”¹

“In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights. We must find the proper balance.”²

INTRODUCTION

In 1995, as part of its Contract with America,³ Congress responded to the increasing burden on the federal docket by enacting the Prison Litigation Reform Act (“PLRA”).⁴ Section 1997e(a),⁵ a provision of the PLRA, was designed to “reduce the quantity and improve the quality of prisoner suits.”⁶ It provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this

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1. Alvin J. Bronstein, *Introduction* to Daniel E. Manville, *Prisoners’ Self-Help Litigation Manual* xxvi (John Boston ed., 1986) (quoting Professor James Jacobs).

2. 142 Cong. Rec. S5194 (1996) (statement of Sen. Simon).

3. For a statement of this policy, see U.S. House of Representatives, Republican Contract with America, available at <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Feb. 28, 2005). For a further discussion on the Contract with America, see *infra* notes 56-58, 83 and accompanying text.

4. Prison Litigation Reform Act of 1995 (“PLRA”), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

5. 42 U.S.C. § 1997e(a) (2000).

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

title,⁷ 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.”⁸ Each state provides inmates with such administrative remedies, with the exhaustion requirements generally following a similar pattern.⁹ Typically, when a prisoner brings a complaint under § 1983, he will allege multiple constitutional violations.¹⁰ If all claims are unexhausted,¹¹ the complaint is generally dismissed without prejudice until the required procedures are invoked.¹² If only one of the claims is exhausted, however, resulting in a “mixed” complaint, the statute is virtually silent on the issue.¹³ This

7. Section 1983 provides a civil action for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .” 42 U.S.C. § 1983 (2000).

8. 42 U.S.C. § 1997e(a). The doctrine of exhaustion of administrative remedies, like the related doctrines of finality and ripeness, govern the timing of lawsuits in federal courts. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Exhaustion is applicable to all inmate suits about prison life, whether the suit is about general circumstances or particular episodes, regardless of what the alleged wrong is. *See Porter*, 534 U.S. at 532. The exhaustion requirement is not absolute, however, but is an affirmative defense that must be pled or it will be waived. *See Johnson v. Testman*, 380 F.3d 691 (2d Cir. 2004); *Fouk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001); *Perez v. Wisc. Dep’t of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999).

9. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7 (2001). In New York’s Inmate Grievance Program, an inmate has not fully exhausted his administrative remedies until he first files a complaint with the prison facility’s Inmate Grievance Review Committee, then appeals to the facility superintendent, and finally appeals to the Central Office Review Committee in Albany. *Id.* Once a prisoner has won all available relief under the requisite administrative proceedings, his administrative remedies are deemed exhausted. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1187 (10th Cir. 2004). Prisoners do not have to appeal favorable decisions in order to satisfy the exhaustion requirement. *Id.*

10. *See, e.g.*, *Ross*, 365 F.3d at 1183 (bringing two Eighth Amendment claims concerning separate alleged violations).

11. Section 1997e(a) does not specify how detailed a prisoner’s grievance must be in order to satisfy exhaustion. *Johnson v. Johnson*, 385 F.3d 503, 516 (5th Cir. 2004). Courts have generally not required the prisoner to allege a specific legal theory or facts to correspond to that legal theory, but rather the grievance must give prison officials fair notice of the problem that underlies the prisoner’s suit. *Id.* (citing *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003)). Thus, the amount of detail required in giving such notice must be interpreted in light of the purposes behind § 1997e(a). *Id.*

12. *See Thomas v. Woolum*, 337 F.3d 720, 722 (6th Cir. 2003) (“[The PLRA’s] text does not condition access to the federal courts on satisfying the procedures and timelines of prison administrators.”); *Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) (holding that once the prisoner exhausts his administrative remedies, he can refile the action in federal court even if the time limit had run on his grievance). *But see Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (holding that failure to exhaust not merely postpones, but bars a § 1983 suit); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 *Emory L.J.* 1771, 1773-74 (2003) (writing that although most federal courts assume that a procedural error has no consequences for a subsequent § 1983 suit, failure to exhaust may bar a suit entirely). For a further discussion on this issue, see *infra* notes 95-99 and accompanying text.

13. A “mixed” complaint might be comprised of multiple claims against one defendant (such as an Eighth Amendment and Fourteenth Amendment claim against

Note addresses the question of whether, in a mixed complaint, a prisoner should be able to go forward with just the exhausted claim, or if the entire action should be dismissed. This Note concludes, relying primarily on the U.S. Court of Appeals for the Second Circuit's policy rationale,¹⁴ that "total exhaustion" should not be required.¹⁵

To better illustrate this procedural quagmire, consider the following hypothetical.¹⁶ After repeated requests, Gus Guard refuses to change Pat Prisoner's pillows from firm to feather. Pat exhausts his administrative remedies as to this grievance, but the outcome of the administrative process does not afford him feather pillows. When Pat confronts Gus again, pleading for feather pillows, Gus allegedly puts rocks inside of the pillow and places Pat into solitary confinement for thirty days. Infuriated, Pat brings a complaint in federal court against Gus pursuant to 42 U.S.C. § 1983 regarding the conditions of his confinement. He alleges an Eighth Amendment violation for cruel and unusual punishment¹⁷ for failing to provide him with feather pillows. Additionally, he claims another Eighth Amendment violation for the rocks and a Fourteenth Amendment due process violation for the solitary confinement.¹⁸

The question confronting courts, and the focus of this Note, is whether under a so-called total exhaustion rule,¹⁹ Pat's action will have to be dismissed in its entirety despite an otherwise viable and fully exhausted claim.²⁰ Courts have formulated contradictory answers based upon conflicting interpretations of the PLRA and its

a prison guard, where only the Eighth Amendment claim is exhausted), one claim against multiple defendants (such as Eighth Amendment claims against two prison guards, where claims against only one guard are exhausted), or a combination of the two.

14. See *Ortiz v. McBride*, 380 F.3d 649, 658-59 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668).

15. See *infra* Part III.B.

16. To turn this concise hypothetical into a cause of action, a prisoner must convey in his suit why he is in need of redress. Jim Thomas makes an eloquent analogy of prisoner lawsuits as narratives— "[s]imilar in some ways to dramatic Greek tragedy, [the action must describe] the travails endured by the victim resulting from unjust powerful external forces." Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer* 135 (1988).

17. For an analysis of prisoners' rights under the Constitution, see generally Penelope D. Clute, *The Legal Aspects of Prisons and Jails* (1980); Michael G. Collins, *Section 1983 Litigation in a Nutshell* (1997); John W. Palmer, *Constitutional Rights of Prisoners* (5th ed. 1997); and Chadwick L. Shook & Robert T. Sigler, *Constitutional Issues in Correctional Administration* (2000).

18. See *supra* note 17.

19. The first court of appeals to address the "total exhaustion" issue was the Eighth Circuit in *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000). For more on this holding, see *infra* notes 108-11 and accompanying text. Throughout this Note, "total exhaustion" refers to a judicial doctrine requiring the dismissal of an entire action despite the presence of one or more exhausted claims.

20. See *Ortiz v. McBride*, 380 F.3d 649, 656 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668).

underlying policy.²¹ In *Ortiz v. McBride*, the Second Circuit announced that an impermissibly brought action (containing at least one unexhausted claim) need not be dismissed.²² In this circuit, Pat would be able to go forward with his initial Eight Amendment claim for cruel and unusual punishment. On the other hand, the Eighth Circuit and Tenth Circuit have held that where any claim in the complaint is unexhausted, § 1997e(a) requires that the action be dismissed without prejudice.²³ Accordingly, in these circuits, Pat's entire complaint would be dismissed.

This Note argues that the Eighth and Tenth Circuit's textual interpretation²⁴ and the Tenth Circuit's habeas analogy²⁵ needlessly bar some meritorious prisoner suits from court, while failing to compensate with improved judicial efficiency. The policy rationale behind the PLRA, as laid out by the Second Circuit,²⁶ reveals that there is no need for courts to dismiss exhausted claims that are ready to be adjudicated.²⁷

Part I of this Note begins with a general overview of the PLRA. Part I.A discusses inmate litigation prior to the enactment of the PLRA. Part I.B describes the legislative history leading up to the PLRA, including the policy rationale behind the statute. Part I.C assesses the impact that the statute has had on inmate litigation. Part I.D introduces the total exhaustion dilemma.

Part II of this Note explores the details of the total exhaustion dispute, viewed through the lens of the current circuit split. Part II.A states the factual background of each case. Part II.B lays out each circuit's textual interpretation of § 1997e(a). Part II.C outlines total exhaustion in the habeas context, assessing how much credence each circuit chooses to give this analogy. Part II.D then analyzes the policy considerations of the circuits.

Part III.A claims that the Tenth Circuit interpretation of § 1997e(a) is misapplied and excessive, thus supporting the Second Circuit's determination that total exhaustion is not required. Part III.B questions the assertion that prisoners' claims are frequently frivolous and argues that the PLRA's exhaustion provision is amply stringent, achieving its goal of curbing frivolous lawsuits without a need for total exhaustion.

21. See *infra* Part II.

22. *Ortiz*, 380 F.3d at 656-57.

23. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004); *Graves*, 218 F.3d at 885.

24. See *infra* Part II.B.

25. See *infra* Part II.C.

26. See *infra* Part II.D.

27. See *infra* Part III.

I. HISTORY AND DEVELOPMENT OF THE PLRA

This part describes the foundation and motivation for the PLRA. Part I.A begins by discussing the judicial policies in place prior to the PLRA along with their quantitative impact on prisoner lawsuits. Part I.B analyzes the legislative history and policy rationale behind the PLRA. Part I.C describes the PLRA's impact during its short existence. Part I.D briefly looks at the unanticipated outgrowth of § 1997e(a)—the total exhaustion doctrine.

A. Prisoner Litigation Before the PLRA

In a 1970 speech to the National Association of Attorneys General,²⁸ Chief Justice Burger commented on the burden of prison litigation upon the federal judiciary:²⁹

What we need is to supplement [judicial actions] with flexible, sensible working mechanisms adapted to the modern conditions of overcrowded and understaffed prisons . . . a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard promptly, fairly and fully.³⁰

In the years that followed, state correctional departments initiated inmate grievance procedures in order to bear some of the burden.³¹ Despite such a system, the Supreme Court held that courts were not free to require exhaustion of administrative remedies, particularly in cases involving civil rights deprivations.³² Consequently, if the claim

28. The National Association of Attorneys General eventually helped spur the enactment of the PLRA. See *infra* notes 46-48 and accompanying text.

29. Shortly before 1970, prisoners had little reason to bring their actions for constitutional deprivations in federal court because most courts refused to adjudicate such claims. See Lynn S. Branham, Am. Bar Ass'n Criminal Justice Section, *Limiting the Burdens of Pro Se Inmate Litigation: A Technical-Assistance Manual for Courts, Correctional Officers, and Attorneys General* 20 (1997). Federal courts favored this "hands-off" doctrine because they believed the operation of prisons to be the responsibility of the executive and legislative branches. *Id.* Thus, the advantage of such a policy was to leave prison-related decision making to those most knowledgeable about the correctional system. The Fed. Judicial Ctr., *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* 29 (1980) [hereinafter *Recommended Procedures*]. The disadvantage was to place contentious constitutional issues in the hands of administrative rather than judicial bodies. *Id.*

30. Chief Justice Warren E. Burger, Speech to the National Association of Attorneys General in Washington, D.C. (Feb. 8, 1970), in *Recommended Procedures*, *supra* note 29, at 24. For an in-depth analysis of the Burger Court and prisoners' rights, see John A. Fliter, *Prisoners' Rights: The Supreme Court and Evolving Standards of Decency* 93-137 (2001).

31. See *Recommended Procedures*, *supra* note 29, at 24-28; see, e.g., Comp. Codes R. & Regs. tit. 7, § 701 (2001).

32. *Ellis v. Dyson*, 421 U.S. 426, 432 (1975). In *Ellis*, the Court followed its ruling in *Steffel v. Thompson*, 415 U.S. 452 (1974), and held that "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount." *Ellis*, 421 U.S. at 432 (citation

was made under § 1983, a state inmate had an “open door” to federal courts.³³

With several key decisions opening the door in the preceding two decades,³⁴ along with the passage of the PLRA’s predecessor, the Civil Rights of Institutionalized Persons Act (“CRIPA”),³⁵ the year 1980 is a suitable point to begin quantifying the effects of prisoner civil rights litigation³⁶ on the federal court system.³⁷ The number of state prisoner civil rights lawsuits filed in federal court increased from 12,397 in 1980 to 40,569 in 1995³⁸—a 227% increase.³⁹ While it logically seems as if

omitted). In 1992, the Supreme Court found that a federal prisoner was not required to exhaust his administrative remedies because Congress had not “meaningfully addressed the appropriateness of requiring exhaustion” for federal prisoners and the individual plaintiff’s interests outweighed the countervailing institutional interests. *McCarthy v. Madigan*, 503 U.S. 140, 149 (1992).

33. See Recommended Procedures, *supra* note 29, at 30.

34. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (finding a prisoner’s right to be free from prison conditions rising to the level of cruel and unusual punishment); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (finding a prisoner’s right to due process during certain prison disciplinary proceedings); *Pell v. Procunier*, 417 U.S. 817 (1974) (finding a prisoner to have rights under the First Amendment); *Procunier v. Martinez*, 416 U.S. 396 (1974) (finding a prisoner’s right to have access to the courts); *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam) (finding a prisoner’s right to equal protection of the law).

35. Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended in scattered sections of 42 U.S.C.). The Civil Rights of Institutionalized Persons Act (“CRIPA”) was a response to reports of constitutional rights violations in prisons, jails, mental health facilities, and various other confinement institutions. 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, 493 (2001). For an overview of the legal rights of the mentally disordered, see generally Fred Cohen, *The Mentally Disordered Inmate and the Law* (1998). CRIPA’s exhaustion provision was originally limited in scope, where not every § 1983 suit required administrative exhaustion. See Branham, *supra*, at 495; Fed. Judicial Ctr., *Resource Guide for Managing Prisoner Civil Rights Litigation with Special Emphasis on the Prison Litigation Reform Act* 34-35 (1996). For example, a court could only require exhaustion if it found it to be “appropriate and in the interests of justice.” § 7, 94 Stat. at 349 (current version at 42 U.S.C. § 1997e (2000)). Additionally, under CRIPA, courts stayed cases that had not yet been exhausted. See Branham, *supra*, at 497. The PLRA modified CRIPA and § 1983 by requiring exhaustion of administrative remedies before a prisoner can file suit in federal court challenging the conditions of his confinement. See Paul Wright, *Prison Litigation Reform Act Passed*, *Prison Legal News*, July 1996, at 3.

36. The vast majority of prisoner § 1983 lawsuits are filed by state prisoners proceeding pro se. See Lynn S. Branham & Sheldon Krantz, *Sentencing, Corrections, and Prisoners’ Rights in a Nutshell* 288 (4th ed. 1994); see, e.g., *Ross v. County of Bernalillo*, 365 F.3d 1181, 1182 (10th Cir. 2004). Seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., *Literacy Behind Prison Walls* 17-19 (1994), available at <http://www.nces.ed.gov/pubs94/94102.pdf>. Thus, prisoner suits are considered burdensome because many prisoners lack the basic literacy skills typically present in litigants. See Branham, *supra* note 29, at 36; cf. Manville, *supra* note 1, at 1-10 (discussing the importance of prisoner self-education and preparation before filing a lawsuit).

37. See Branham, *supra* note 29, at 20.

38. See *id.* at 21 (citing Admin. Office of the U.S. Courts, *Annual Report of the Director of the United States Courts—1980*, at 232 (1980)); *id.* (citing Admin. Office

the open door led to an astronomical increase in prisoner litigation, in the same time-span, the number of state prisoners increased by 237%.⁴⁰ Accordingly, the per capita rate of prisoner suits in federal court actually fell from 40.7 suits per thousand state prisoners in 1980 to 39.4 suits per thousand state prisoners in 1995.⁴¹ Therefore, the increase in prisoner litigation was more likely the result of an “epidemic of incarceration,”⁴² and increased litigation was merely a byproduct of that epidemic.⁴³

Nevertheless, critics of the federal court system chose to focus on increased prisoner litigation⁴⁴ rather than the soaring prison population, and, in particular, the frivolity of these lawsuits.⁴⁵ Spearheading the campaign to amend the system was the alliance of the National Association of Attorneys General (“NAAG”) and the National District Attorneys Association (“NDAA”).⁴⁶ Of great

of the U.S. Courts, Judicial Business of the United States Courts: 1995 Report of the Director 145 (1995)).

39. For a state-by-state breakdown of prisoner lawsuits, see Branham, *supra* note 29, at 24-25. For a comparison of prison filings in federal court with civilian filings from 1960 through 1986, see Thomas, *supra* note 16, at 56 (citing Admin. Office of the U.S. Courts, Annual Report of the Director of the United States Courts—1986, at tbl. 3c (1986)).

40. See Branham, *supra* note 29, at 21-22; John Scalia, U.S. Dep’t of Justice, Prisoner Petitions in the Federal Courts 1980-96, at 5 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf>.

41. See Branham, *supra* note 29, at 21.

42. Roosevelt, *supra* note 12, at 1777. See Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1586-87 (2003) (“[I]t would be equally appropriate to talk about a ‘deluge’ of inmate requests for food.”). But see Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 Harv. L. Rev. 1661, 1668 (2004) (“Whereas Professor Schlanger set aside the increases of the 1970s as antediluvian irrelevancies, the PLRA’s proponents viewed those increases as the onset of a continuing deluge—the first wave, so to speak.”).

43. Additionally, courts cited lack of funds and judicial vacancies as exacerbating the litigation burden. See Myron J. Bromberg & Jonathan M. Korn, *Individual Judges’ Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 St. John’s L. Rev. 1, 5-6 (1994) (asserting that, despite correctable factors such as judicial vacancies, “the perceived ‘litigation explosion’ has energized a movement advocating increased judicial management—sometimes by restricting access to the federal courts in order to lessen the burden”).

44. See *Damn Lies and Statistics*, Prison Legal News, Apr. 1996, at 13. The National Association of Attorneys General (“NAAG”) provided a press release showing a twenty-two percent increase in § 1983 lawsuits between 1986 and 1992. What the NAAG failed to mention, however, was that concurrently, the number of prisoners had increased by sixty-two percent. *Id.*; see also *supra* text accompanying notes 38-41.

45. See Wright, *supra* note 35, at 1; see also Schlanger, *supra* note 42, at 1567 (stating that the driving belief behind the PLRA was that inmate litigation often turned trivial mishaps into federal litigation).

46. See Schlanger, *supra* note 42, at 1566; Wright, *supra* note 35, at 1 (“The PLRA is the culmination of a lengthy campaign waged by prisoncrats and the [NAAG] to restrict prisoners’ right of access to federal courts and to limit the ability of courts to remedy constitutional violations when they are found.”).

notoriety were the “top ten” frivolous lawsuit lists,⁴⁷ distributed throughout the media by the NAAG and certain state attorneys general.⁴⁸ The paradigmatic frivolous suit from these lists was initiated by a prisoner upset with his prison’s substitution of a jar of creamy peanut butter for a jar of chunky peanut butter.⁴⁹ Despite evidence suggesting that the triviality of many prisoner suits was exaggerated,⁵⁰ the lists, as intended, spurred a copious amount of

47. Issued by then-Attorney General of Colorado, Gale Norton, the following is an example of a state “top ten” list of inmate frivolous lawsuits:

10 – He failed to receive post-operative medical care because he refused to go to an infirmary without a television set. . . .

9 – He was taken off an ulcer diet that he didn’t comply with. . . .

8 – Serial numbers on new television sets did not always match the serial numbers on the boxes in which they were delivered. . . .

7 – He received inferior medical care after undergoing two arthroscopic surgeries on his knee. A judge described the inmate’s pharmaceutical and physical therapy as care that “would be envied by the majority of (adults) not incarcerated. . . .”

6 – He should be released because “everyone knows an inmate only serves about three years of a 10-year sentence. . . .”

5 – He was not allowed to play cards after 10 p.m. . . .

4 – The parole board failed to consider his parole on the prearranged date—a date upon which the inmate was absent because he had escaped. . . .

3 – He didn’t get a recording contract because guards [sic] confiscated a cassette tape that advocated racial violence against police. . . .

2 – Prison officials shouldn’t have intercepted pictures of nude children sent in the mail. The inmate was a convicted pedophile. . . .

And the No. 1 frivolous lawsuit: It was filed by a high school dropout claiming that the confiscation of four folders of pornography hindered his “obtaining a doctorate in obstetrics-gynecology. . . .”

Kris Newcomer, *Norton’s Top 10 Lawsuits: Attorney General Compiles a List of Wildest Inmate Claims*, Rocky Mountain News, Aug. 3, 1995, at 4A, available at LEXIS, News Library, RMTNEW File. Two lists like this eventually became part of the PLRA’s congressional record. See Schlanger, *supra* note 42, at 1568. *Contra* Anthony Lewis, *Cruel and Unusual*, Balt. Evening Sun, Feb. 20, 1995, at 11A (providing even more examples of non-frivolous suits which would be hampered by the PLRA); ACLU National Prison Project, *The Top Ten Non-Frivolous Lawsuits Filed by Prisoners* (Feb. 11, 1996) (responding to the various “top ten” frivolous lawsuit lists, which were “touted by various attorney generals [sic], during a time when state and federal lawmakers were enacting restrictions on prisoner rights”), at <http://www.prisonwall.org/ten.htm>.

48. See Roosevelt, *supra* note 12, at 1776-77 (claiming that the perception of rampant frivolous lawsuits was cued not by any actual data indicating a problem, but by an aggressive media campaign started by congressional republicans and individual state attorneys general).

49. 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. This letter was from the Attorneys General of New York, Nevada, Indiana, and Washington, respectively. *Id.*

50. See Jon O. Newman, *Not All Prisoner Lawsuits Are Frivolous*, The Corrections Prof’l., Jan. 1996, reprinted in *Prison Legal News*, Apr. 1996, at 6. Newman, then-Chief Judge of the U.S. Court of Appeals for the Second Circuit Court of Appeals, wrote this article in response to the joint letter sent to the *New York Times*, *supra* note 49. In describing his experience as a federal judge, he wrote, “though I have seen many prisoner suits that lacked merit, it has not been my

media commentary.⁵¹ Like the infamous spilled McDonald's coffee case,⁵² cases from the "top ten" lists came to symbolize inherent flaws in the United States legal system.⁵³ With the onslaught of media scrutiny, Congress was practically forced to address the perceived problems,⁵⁴ and the PLRA followed on April 26, 1996.⁵⁵

B. *The Politics and Policy Behind the PLRA*

The NAAG and NDAA found their savior to help curb frivolous lawsuits in the Republican Congress's 1994 Contract with America.⁵⁶ House of Representatives Speaker Newt Gingrich, epitomizing Republican sentiment, wrote that "America has become a litigious

experience in 23 years as a federal Judge that what the attorneys general described was at all 'typical' of prisoner litigation." Newman, *supra*, at 6. Newman goes on to discuss the peanut butter case, where it turned out that the prisoner sued not because he received creamy peanut butter instead of chunky, but instead because when he returned the creamy peanut butter and was promised to be sent the chunky peanut butter the next day, his commissary account remained charged \$2.50 for a can he never ended up receiving. *Id.*

51. See, e.g., Walter Berns, *Sue the Warden, Sue the Chef, Sue the Gardener* . . . , Wall St. J., Apr. 24, 1995, at A12.

52. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. 93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

53. See Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. Miami L. Rev. 113 (2001) (providing a detailed account of the McDonald's coffee case and its cultural ramifications).

54. The manner in which Congress went about enacting the PLRA received much academic scrutiny. For example, Professor Susan N. Herman wrote:

The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate. The Act was passed as a rider to the Balanced Budget Downpayment Act, without a Judiciary Committee Report and without committee mark-up. Its provisions, which amend a number of different sections of the United States Code, bear many signs of the haste with which they were passed. Key terms were not defined, some provisions conflicted with preexisting law, and even the title could have used editing: entitled the Prison Litigation Reform Act of 1995, it was actually passed in 1996.

Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 Or. L. Rev. 1229, 1277 (1998) (internal citation omitted); see *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 654 (1st Cir. 1997) ("The PLRA is not a paragon of clarity."). For more information pertaining to the PLRA's legislative history, see *infra* Part I.B.

55. In the opinion of Mark Tushnet and Larry Yackle, the PLRA represented a conservative victory in "the battle of sound bites" by focusing on lawsuits about peanut butter rather than the many non-frivolous lawsuits filed by prisoners. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 64 (1997).

56. See U.S. House of Representatives, *supra* note 3. The Contract with America defined frivolity as including cases that "would not stand on [their] own merits" but would cause defendants to settle "just to avoid the endless and expensive claim and appeal processes." Note, *supra* note 42, at 1665 (quoting Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation 145 (Ed Gillespie & Bob Schellhas eds., 1994) (internal quotations omitted)) [hereinafter Contract with America].

society: [w]e sue each other too often and too easily.”⁵⁷ While the Republicans were concerned with litigation in general,⁵⁸ the prisoner population was a particularly easy group to regulate.⁵⁹ As Professor Margo Schlanger writes, “[i]n the first heady days of Republican control of both chambers of Congress, prisoners made awfully attractive targets—and Republican leaders vying for support from the party faithful were happy to outbid one another in anti-criminal toughness.”⁶⁰ After more than a dozen attempts to pass legislation in a freestanding bill,⁶¹ the PLRA⁶² was signed into law by President Clinton, attached as a rider to the Omnibus Consolidated Rescissions and Appropriations Act of 1996.⁶³

The PLRA seeks to deter frivolous suits by improving judicial efficiency.⁶⁴ Administrative exhaustion is a prime example of a provision that attempts to accomplish this goal.⁶⁵ In *McCarthy v.*

57. Note, *supra* note 42, at 1662 (quoting Contract with America, *supra* note 56, at 144 (internal quotations omitted)). *But see* Christopher E. Smith, Courts, Politics, and the Judicial Process 330 (2d ed. 1997) (citing two studies: one showing that litigation rates peaked in the mid-nineteenth century and subsequent litigation rates paralleled population growth and economic change; and the second indicating that, in a cross-national comparison, the United States is not uniquely litigious).

58. Note, *supra* note 42, at 1662 (stating that Republicans believed that even meritorious lawsuits would be resolved more efficiently through mechanisms besides the federal courts).

59. *See* 141 Cong. Rec. S14571 (1995) (statement of Sen. Dole) (“The time and money spent defending most [inmate] cases are clearly time and money that could be better spent prosecuting criminals, fighting illegal drugs, or cracking down on consumer fraud.”); Roosevelt, *supra* note 12, at 1779 (“The media, which so relished describing the inventive miscreants who brought the most outrageous suits, has shown a similar enthusiasm for recounting their comeuppance.”).

60. Schlanger, *supra* note 42, at 1567.

61. For a detailed list of these attempts, see *id.* at 1559 n.9.

62. Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

63. *Id.* In expressing his concerns about the PLRA, Senator Kennedy said that enacting the proposal within an appropriations bill would be unsuitable, and that the “abbreviated nature of the legislative process” should not be interpreted as a sign of general complacency by Congress with the PLRA. 142 Cong. Rec. S5194 (1996) (statement of Sen. Kennedy); Herman, *supra* note 54, at 1277; Letter from Fred Thompson, Jim Jeffords, Ted Kennedy, Joe Biden & Jeff Bingaman, U.S. Senators, to Janet Reno, Attorney General of the U.S., Department of Justice (Feb. 2, 1996), *reprinted in* 142 Cong. Rec. S5194 (printed in the record following remarks by Sen. Kennedy, referring to the lack of thorough congressional review given to the PLRA).

64. *See* Porter v. Nussle, 534 U.S. 516, 524-25 (2002); Branham, *supra* note 35, at 487-89 (stating that the touted objective of the PLRA is to curb frivolous lawsuits by prisoners). Another aspect of the PLRA evidencing this fact besides exhaustion is the filing fee provision. 28 U.S.C. § 1915(b)(1) (2000). All prisoners now had to pay the full filing fee, thereby rendering it more difficult to gain access to federal courts. *See* Branham, *supra* note 29, at 141. For a summary of more key PLRA provisions, see Branham, *supra* note 35, at 489-93; Roosevelt, *supra* note 12, at 1778-79; and Schlanger, *supra* note 42, at 1627-33.

65. According to Branham, the PLRA narrowed CRIPA’s administrative exhaustion provision in four ways: (1) the PLRA mandates dismissal, rather than the staying of a case where administrative remedies are not yet exhausted; (2) all

Madigan, the Supreme Court explicitly laid out the twin purposes of administrative exhaustion: to protect administrative agency authority and promote judicial efficiency.⁶⁶ As to the former, agencies should have a preliminary opportunity to resolve a controversy confronting it, for they, and not the courts, are delegated power by Congress to do so.⁶⁷ The latter goal can be accomplished when the administrative agency corrects the error, thereby obviating the need for judicial review.⁶⁸ Even if this does not occur, exhaustion will, at the very least, develop a coherent factual record to aid courts⁶⁹ and filter out some frivolous claims.⁷⁰

Combining these background principles of judicial efficiency with the extensive media onslaught for reform,⁷¹ Republicans were able to enact the PLRA.⁷² The legislative history, however, is quite sparse, especially that which relates to the exhaustion requirement.⁷³ This part focuses on two exemplary precursors to the PLRA (one initiated

prisoners, including federal prisoners and incarcerated juveniles, are subject to the PLRA's exhaustion requirement; (3) the PLRA eliminated the cap on the exhaustion period, whereas under CRIPA, the prisoner only had to exhaust remedies available within 180 days; if no grievance procedure was provided, the prisoner could then proceed to court; and (4) the PLRA removed statutory language mandating that the court find that exhaustion would be "appropriate and in the interests of justice" and that the remedies be "plain, speedy, and effective"; all that remained in the PLRA was merely the requirement that remedies be "available." Branham, *supra* note 35, at 497-98 (internal quotations omitted). See Sharon I. Fiedler, Comment, *Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of "Available" in the Context of the PLRA*, 33 U.C. Davis L. Rev. 713, 724 (2000) (noting that the PLRA extended the exhaustion requirement beyond § 1983 litigation, most notably to prisoners bringing *Bivens* actions).

66. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Though this analysis pertained to CRIPA's exhaustion requirement, these central tenets of exhaustion became the basis for the PLRA's stricter policy. For an account of CRIPA's legislative history for exhaustion, see Branham, *supra* note 35, at 501-03.

67. *McCarthy*, 503 U.S. at 145.

68. *Id.* But see Branham, *supra* note 35, at 514-15. "The problem with this argument is that it would support the application of exhaustion requirements in cases in which the Supreme Court has refused to require a plaintiff to exhaust administrative or judicial remedies." *Id.* at 514 (citing *Clayton v. Int'l Union*, 451 U.S. 679, 689 (1981)).

69. *McCarthy*, 503 U.S. at 145-46. But see Branham, *supra* note 35, at 514-15 (questioning whether the administrative hearings would actually yield a complete factual record for the courts). For example, in a survey of state departments of correction, more than half of the departments surveyed claimed that when a prisoner seeks relief for which the grievance procedure cannot provide redress, no factual record is produced for the courts to rely on. *Id.* at 515.

70. See *Porter v. Nussle*, 534 U.S. 516, 525 (2002).

71. See *supra* note 46 and accompanying text.

72. See *supra* notes 54-55 and accompanying text. For an extensive compilation of the legislative history surrounding the PLRA, see Branham, *supra* note 35, at 487-88 n.12.

73. See Branham, *supra* note 35, at 503.

by the Senate and the other by the House of Representatives) that confirm this fact.⁷⁴

The PLRA's proponents in the Senate merely gave recitations of the jargon of the NAAG, NDAA, and the media,⁷⁵ giving virtually no clues as to how an updated exhaustion provision would be interpreted.⁷⁶ For instance, while introducing an unsuccessful version of the Prisoner Litigation Reform Act of 1995, Senator Bob Dole said that "[p]risoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."⁷⁷ Senator Jon Kyl only added that exhaustion of administrative remedies was needed because of the easy accessibility to these remedies and the burden placed on federal courts from non-meritorious claims.⁷⁸

The House of Representatives provided a bit more substance on the PLRA's impact on the exhaustion requirement. Representative Frank LoBiondo from New Jersey, referencing *McCarthy*, said that "[t]he real problem . . . came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding"⁷⁹ As a response, LoBiondo introduced the

74. Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. (1995); Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995).

75. In his introduction to an initial attempt at the bill, Senator Dole made appealing statements, such as, "[w]hen average law-abiding citizens file a lawsuit, they recognize that there could be an economic downside to going to court. Convicted criminals shouldn't get preferential treatment . . ." 141 Cong. Rec. S14571 (1995) (statement of Sen. Dole) (describing the filing fee provision as described *supra* note 64). Senator Kyl added that the bill would deter frivolous lawsuits, citing statistics to support the proposition "that pro se civil rights litigation has become a recreational activity for state prisoners . . ." *Id.* at S14572 (statement of Sen. Kyl) (quoting *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam)). Both Dole and Kyl referred to Walter Berns's *Wall Street Journal* article entitled *Sue the Warden, Sue the Chef, Sue the Gardener* See *supra* Berns, note 51. The entire article, along with an article from the *Tucson Citizen*, is even reprinted in the Congressional Record. 141 Cong. Rec. S14573-74 (1995) (generally discussing the troubles of inmate litigation). *But see* Note, *supra* note 42, at 1666 (arguing that the use of media commentary such as the "top ten" cases was meant to demonstrate the necessity of the PLRA, but PLRA advocates also worried about the commonly subtle examples of inmate litigation that failed to meet requisite legal standards).

76. See Branham, *supra* note 35, at 506-07.

77. 141 Cong. Rec. S14570.

78. *Id.* at S14572-73. In testimony before the Senate Judiciary Committee, Associate U.S. Attorney General John Schmidt stated that the PLRA "strengthens the administrative exhaustion rule . . . and brings [it] more into line with administrative exhaustion rules that apply in other contexts—by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted." *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, H.R. 667 Before the Senate Comm. on the Judiciary*, 104th Cong. 20-21 (1995) (testimony and statement of John Schmidt, Associate Attorney General, United States Department of Justice, Washington, D.C.).

79. 141 Cong. Rec. H35623 (1995) (remarks of Rep. LoBiondo). When interpreting the PLRA's exhaustion requirement, the Supreme Court held that

Prisoner Lawsuit Efficiency Act (“PLEA”), which would have required all federal inmates asserting a claim pertaining to the conditions of their confinement to exhaust their administrative remedies.⁸⁰ By increasing the cost to prisoners in both time and money, PLEA would help deter frivolous lawsuits and create a record to aid the federal courts.⁸¹

Though ultimately unsuccessful, the Dole-Kyl Prison Litigation Reform Act of 1995 and PLEA (among a myriad of other failed legislation)⁸² show two basic points about Congress’s intent. First, as part of their promise in the Contract with America,⁸³ the Republicans

the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result. Congress’s imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms.

Booth v. Churner, 532 U.S. 731, 740-41 (2001).

80. This proposal provided:

No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner’s incarceration until any administrative remedy procedures available are exhausted. This section applies to all actions regardless of the nominal party defendant. The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.

Prisoner Lawsuit Efficiency Act of 1995, H.R. 2468, 104th Cong. (1995). For an insightful analysis of the exhaustion requirement when the administrative remedy sought cannot be obtained through the grievance procedure, see generally Branham, *supra* note 35.

81. 141 Cong. Rec. H35624 (remarks of Rep. LoBiondo quoting former Attorney General Dick Thornburgh). LoBiondo’s desire to create a factual record for the courts is consistent with an aim expressed in *McCarthy*, but unlike the Supreme Court held in that case, LoBiondo was not willing to ever bypass the exhaustion requirement. *See id.*

82. *See Schlanger, supra* note 42, at 1559 n.9.

83. Their promise was

not just to change . . . policies, but even more important, to restore the bonds of trust between the people and their elected representatives. That is why, in this era of official evasion and posturing, we offer instead a detailed agenda for national renewal, a written commitment with no fine print. This year’s election offers the chance, after four decades of one-party control, to bring to the House a new majority that will transform the way Congress works. That historic change would be the end of government that is too big, too intrusive, and too easy with the public’s money. It can be the beginning of a Congress that respects the values and shares the faith of the American family. Like Lincoln, our first Republican president, we intend to act “with firmness in the right, as God gives us to see the right.” To restore accountability to Congress. To end its cycle of scandal and disgrace. To make us all proud again of the way free people govern themselves. On the first day of the 104th Congress, the new Republican majority will immediately pass . . . major reforms, aimed at restoring the faith and trust of the American people in their government

U.S. House of Representatives, *supra* note 3.

were committed to curing “a sudden epidemic of frivolous lawsuits.”⁸⁴ Second, they wanted to fix the problem as expeditiously as possible. However, commentators have indicated, and cases have demonstrated, that Congress’s haste led to a plethora of problems concerning the applicability of the exhaustion provision of the PLRA.⁸⁵

C. Prisoner Litigation After the PLRA

The PLRA has curbed the volume of inmate litigation substantially,⁸⁶ particularly due to the exhaustion requirement.⁸⁷ Between 1995 (a year before the Act was passed) and 2000, for example, the number of civil rights petitions was reduced by thirty-nine percent, from 41,679 to 25,504.⁸⁸ Similarly, the filing rate (the number of petitions filed per one thousand inmates) decreased from thirty-seven to nineteen.⁸⁹ As such, “to the extent that success can be measured by the volume of suits, the PLRA has worked [The] substantial decrease . . . is all the more impressive when considered in light of the growing prison population.”⁹⁰ The numbers, however, never do tell the whole story.⁹¹

Exhaustion is not unique to the PLRA, and is a doctrine with which federal courts are quite familiar⁹² in the context of administrative law⁹³

84. Roosevelt, *supra* note 12, at 1776.

85. See *Porter v. Nussle*, 534 U.S. 516, 525 (2002) (determining what the term “prison conditions” meant under § 1997e(a)). See generally Branham, *supra* note 35 (contemplating whether the exhaustion requirement should apply when a prisoner seeks redress unavailable through the internal grievance procedure); Roosevelt, *supra* note 12 (discussing the scope of the exhaustion requirement and Congress’s silence on the consequences of procedural missteps in the course of exhaustion). See also *infra* note 99. Compare *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004) (rejecting the total exhaustion doctrine), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668), with *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004) (advocating the total exhaustion doctrine), and *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000) (same).

86. See John Scalia, U.S. Dep’t of Justice, Prisoner Petitions Filed in the U.S. District Courts, 2000, with Trends 1980-2000, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>.

87. See Schlanger, *supra* note 42, at 1627-28.

88. Scalia, *supra* note 86, at 1. For a more detailed quantitative analysis, comparing both federal and state prisoners along with civil rights positions and other petitions (such as habeas corpus), see *id.* at 2-3.

89. *Id.* at 1.

90. Roosevelt, *supra* note 12, at 1779.

91. See *infra* notes 92-107 and accompanying text.

92. See, e.g., *supra* note 8.

93. Here, a party subject to an enforcement proceeding by an agency may not bring an action in federal court before fully challenging the agency at the administrative level. See Ronald A. Cass et al., *Administrative Law: Cases and Materials* 402-03 (3rd ed. 1998). The seminal case on administrative exhaustion is *Myers v. Bethlehem Shipbuilding Corp.*, where the Court found it to be a “long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” 303 U.S. 41, 50-51 (1938). Though firmly stated in *Myers*, administrative exhaustion is

and under the federal habeas statute.⁹⁴ Professor Schlanger points out that, whereas in administrative law the Supreme Court carved out certain exceptions to exhaustion,⁹⁵ it has invoked no such exceptions in dealing with the PLRA.⁹⁶ Instead, some courts are implementing the PLRA using the “extraordinarily harsh”⁹⁷ habeas “procedural default,”⁹⁸ affording themselves no discretion to excuse certain inconsequential procedural errors.⁹⁹ The only caveat is that the remedies be “available,”¹⁰⁰ which the Supreme Court has loosely interpreted to mean “regardless of the relief offered through administrative procedures.”¹⁰¹

This harsh standard arguably makes the modified exhaustion requirement the greatest hurdle for prisoners to overcome.¹⁰²

a bit more malleable, and will not be required if notions of “individual justice, efficiency, or wise judicial administration support the need for judicial review in the absence of exhaustion.” 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.2, at 967-68 (4th ed. 2002).

94. See 28 U.S.C. § 2254 (2000). A petition for habeas corpus enables a prisoner to challenge a criminal conviction, an administrative procedure, a prison regulation, or a condition of confinement. See Thomas, *supra* note 16, at 75 (citing Hillel Hoffman, *Prisoners’ Rights: Treatment of Prisoners and Post-Conviction Remedies*, Cases and Material 15 (1981 Supp.)). For a historical analysis of federal habeas corpus, see James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (2d ed. 1994); and Thomas, *supra* note 16, at 74-128. The habeas corpus exhaustion doctrine will be discussed in relation to the PLRA’s exhaustion requirement *infra* Part II.C.

95. The four possible exceptions explicated by the Supreme Court stem from the extent of the injury by requiring administrative exhaustion, the degree of difficulty of the issue to be resolved, the extent to which specialized administrative fact finding and expertise will aid the court, and the extent to which the agency has already done its fact finding or applied its expertise. Schlanger, *supra* note 42, at 1652 (citing 2 Pierce, Jr., *supra* note 93, at 976-77). Further, the Supreme Court has said that the exhaustion doctrine in administrative law is “intensely practical.” *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (internal quotations omitted).

96. Schlanger, *supra* note 42, at 1652.

97. *Id.*

98. See *id.* at 1651 n.319 (“[P]risoners waive their right to federal review by any failure to comply with state court procedural requirements.”).

99. Compare *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004) (finding that, like § 2254, the PLRA’s exhaustion requirement includes a procedural default component), and *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (same), with *Thomas v. Woolum*, 337 F.3d 720, 722-23 (6th Cir. 2003) (providing a more forgiving interpretation of the exhaustion requirement “in light of Congress’s purpose in passing the PLRA and Supreme Court precedent regarding the exhaustion doctrine’s oft-stated purpose: to give prison officials the first opportunity to address inmate complaints according to their rules and procedures without letting those timetables dictate the outcomes of § 1983 actions”).

100. 42 U.S.C. § 1997e(a) (2000).

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

102. See Schlanger, *supra* note 42, at 1628 (“The exhaustion requirement has teeth because many courts have held that an inmate’s failure to comply with the grievance system’s rules (time limits, form, and so on) usually justifies disqualification of the inmate’s lawsuit.”). Schlanger goes on to add that “seven years of experience with the statute have led [prisoners’] advocates to identify the PLRA’s exhaustion rule as the

Schlanger writes that compelling federal courts to dismiss when a prisoner has failed to exhaust administrative remedies has a twofold effect. First, some inmates will be remedied through the grievance process, which would plainly decrease the number of suits reaching federal court.¹⁰³ Consequently, this will decrease the success rate of those claims that do make it to federal court, with the meritorious filtered out by the administrative grievance process.¹⁰⁴ Second, and far more significantly, prisoners will be precluded from federal court because exhaustion “is a highly technical growth area—and one in which most courts seem to be finding ways for inmates to lose.”¹⁰⁵ Moreover, the decreased number of prisoner-filed lawsuits¹⁰⁶ can be attributed to strict court requirements, causing suits that would have been meritorious before the PLRA to be dismissed for failure to exhaust.¹⁰⁷

D. The “Total Exhaustion” Doctrine

One such strict court requirement was introduced by the Eighth Circuit in 2000¹⁰⁸ (and later corroborated by the Tenth Circuit).¹⁰⁹ The Eighth Circuit, in a cursory decision, held that “§ 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims.”¹¹⁰ Because the plaintiffs failed to exhaust some of their many claims within the action, the court of appeals affirmed the district court’s dismissal of the action without prejudice.¹¹¹

Considering the silence of the PLRA’s legislative history regarding exhaustion¹¹² and the procedural complications arising out of administrative exhaustion,¹¹³ it is not surprising that § 1997e(a) has

statute’s most damaging component.” *Id.* at 1650; *see, e.g., Pozo*, 286 F.3d at 1024 (demonstrating the high bar that prisoners may face).

103. Schlanger, *supra* note 42, at 1653 (labeling this kind of outcome as a “conflict-resolution effect”).

104. *Id.*

105. *Id.* (labeling this kind of outcome as a “decision-standard effect”).

106. *See supra* notes 86, 88, 89 and accompanying text.

107. *See Schlanger, supra* note 42, at 1654 (“I would expect, then, that many cases that would have succeeded in federal court prior to the PLRA will now lose because of failures to exhaust.”). *But see* Note, *supra* note 42, at 1675-76 (agreeing with Professor Schlanger that certain meritorious suits would be disqualified, but claiming that this would streamline the federal inmate docket—“the PLRA’s proponents would view administrative proceedings as reliable and as a significantly more efficient means of resolving inmate disputes than the federal courts would be; it is this basic difference in political opinions that explains the difference in theoretical predictions”).

108. *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000).

109. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188 (10th Cir. 2004).

110. *Graves*, 218 F.3d at 885.

111. *Id.* at 885-86.

112. *See Branham, supra* note 35, at 503 (“[M]ost of the PLRA-related legislative materials that do exist bear on provisions other than the exhaustion requirement.”).

113. *See supra* notes 95-107 and accompanying text.

produced controversy. Part II addresses the total exhaustion circuit split between the Second and Tenth Circuits.

II. DIVERGENT INTERPRETATIONS OF § 1997e(a)

Part I described an intensive media campaign, a Congress eager to initiate reform, and a federal judiciary more than willing to defer to prison grievance systems. All of this led to the acceptance and ingratiating of the PLRA into prisoner litigation. However, the characteristics that gave life to the PLRA are also responsible for the gaps in the legislation.¹¹⁴ Section 1997e(a) states that “[n]o action shall be brought . . . until such administrative remedies as are available are exhausted.”¹¹⁵ Based on the text of the provision, did Congress intend for mixed actions to be entirely barred from federal court?

This part presents the total exhaustion circuit split between the Second and Tenth Circuits.¹¹⁶ Part II.A states the facts surrounding the prisoner-plaintiffs in each case. Part II.B explores possible textual interpretations of § 1997e(a). Part II.C compares total exhaustion under the PLRA with total exhaustion in the habeas context, presenting each circuit’s determination of the applicability of such a comparison. Part II.D concludes with the policy considerations behind the courts’ decisions.

A. *The § 1983 Claims of Michael Rene Ross and Jose Ortiz*

1. *Ross v. County of Bernalillo*¹¹⁷

On November 29, 1999, Michael Rene Ross fell in the shower at the McKinley County Detention Center¹¹⁸ in New Mexico.¹¹⁹ Citing a lack of slip-resistant mats on the shower floor as the cause, he asserted that his shoulder was seriously injured in the fall.¹²⁰ On December 1, 1999,

114. Besides total exhaustion, see, for example, Branham, *supra* note 35, at 498 (analyzing congressional intent for the phrase “as are available” in § 1997e(a)).

115. 42 U.S.C. § 1997e(a) (2000).

116. The total exhaustion issue is also pending before the Ninth Circuit. The district court case is *Lira v. Director of Corrections of California*, No. 00-905, 2002 WL 1034043 at *1 (N.D. Cal. May 17, 2002).

117. 365 F.3d 1181 (10th Cir. 2004).

118. *Id.* at 1182. Until January 2000, the McKinley County Detention Center was operated by Correctional Services Corporation, a private entity and defendant in the action. *Id.* at 1183. Management & Training Corporation, another private company, took over and was also named as a defendant. *Id.* See generally Mgmt. & Training Corp., About Corrections, at <http://www.mtctrains.com/corrections/index.php> (last visited Feb. 19, 2005). Between February 4 and February 25, 2000 Ross was temporarily held at the Bernalillo County Detention Center. *Ross*, 365 F.3d at 1183.

119. *Ross*, 365 F.3d at 1183 n.3.

120. *Id.* at 1182. There were mats in the shower at one point, but they were destroyed a few weeks earlier by other prisoners. *Id.*

Ross submitted an Inmate Grievance Form,¹²¹ complaining about the lack of medical treatment he was receiving for his injury.¹²² After this date, he did not again invoke the prison's grievance process for lack of adequate medical care.¹²³

On December 6, 1999, Ross filed a Pre-Grievance Resolution Form, reporting his fall and requesting mats to be placed in the shower area.¹²⁴ Two days later, the grievance officer notified Ross that a shower mat was placed in the shower.¹²⁵

Based on his injury and the alleged lack of medical care, Ross brought a § 1983 action pro se in October 2000.¹²⁶ There were two claims in the action (on appeal),¹²⁷ both under the Eighth Amendment of the Constitution¹²⁸ for cruel and unusual punishment.¹²⁹ His first claim asserted that the defendants were required, and failed, to maintain a safe shower facility.¹³⁰ Ross's second claim alleged deliberate indifference to his medical needs by failing to provide adequate treatment for his shoulder injury.¹³¹ The Tenth Circuit, affirming the district court's dismissal of the case,¹³² concluded that Ross exhausted his claim as to the dangerous conditions of the shower facility,¹³³ but failed to exhaust his deliberate medical indifference

121. *Id.* The general purpose of these forms is to give the inmate an avenue to ask a question about a certain policy or express a concern or problem regarding a specific incident, thereby diminishing the need for a formal legal challenge. *See, e.g.*, Div. of the Sheriff, Glenn County, The Glenn County Jail Handbook at sec. II, *available at* http://www.countyofglenn.net/Jail/Section_II.pdf (last visited Feb. 16, 2005). Terms such as "Inmate Grievance Form" describe inmate grievance procedures that are typical to all prisons, though they are given different names in different facilities.

122. *Ross*, 365 F.3d at 1182-83. This grievance was partly about a housing transfer, which was deemed a "non-grievable issue." *Id.* at 1183. Also on December 1, 1999 Ross had filed a Sick Call Request, seeking medical attention for his injured shoulder. *Id.* at 1182.

123. In addition to the December 1 Sick Call Request, Ross filed more Sick Call Requests or Inmate Medical Request Forms on December 6, December 9, December 14, December 23, February 21, 2000, March 2, April 17, May 10, May 28, June 12, and July 5. *Id.* at 1183.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.* at 1183 n.3.

128. The Eighth Amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. (applied through the Fourteenth Amendment).

129. *Ross*, 365 F.3d at 1183.

130. *Id.*

131. *Id.*

132. *Id.* at 1183-84. Though the district court applied the total exhaustion rule in the same manner as the circuit court, its decision was affirmed for different reasons. *Id.* In construing the evidence, the district court believed Ross had exhausted his administrative remedies as to the deliberate medical indifference claim but failed to exhaust with respect to his dangerous conditions of confinement claim. *Id.* at 1183.

133. *Id.* at 1184. The court first found that Ross did not procedurally default on his dangerous conditions of confinement claim because he filed his Pre-Grievance Request Form "before the allegedly dangerous condition had been made safer." *Id.* at

claim.¹³⁴ In conformance with the total exhaustion doctrine, Ross's complaint was dismissed in its entirety without prejudice.¹³⁵

2. *Ortiz v. McBride*¹³⁶

On September 29, 1998, Jose Ortiz, while incarcerated in Arthur Kill Correctional Facility,¹³⁷ was confronted and accused by defendant Sergeant Dennis McBride of smuggling drugs into the prison and selling them therein.¹³⁸ On October 2, McBride brought these charges in a disciplinary hearing.¹³⁹ Based on very limited evidence,¹⁴⁰ defendant Robert O'Mara found Ortiz to be in violation of Department of Correctional Services ("DOCS") rules, sentencing him to ninety days in solitary confinement.¹⁴¹ Following the decision, Ortiz appealed pursuant to DOCS' procedural requirements.¹⁴²

1186; *see supra* notes 98-99 and accompanying text. As such, upon receiving a favorable outcome to the first step of the process, Ross did not need to move on to the second step. *Id.* at 1186-87. To force him to do so would be to "engage in entirely fruitless exercises when no form of relief is available at all." *Id.* at 1187 (citing and distinguishing the Supreme Court's holding in *Booth v. Churner*, 532 U.S. 731 (2001)).

134. *Id.* at 1184. The court referred to Ross's "laundry list" of medical treatment issues, indicating that he was seeking relief for more than just his shoulder injury. *Id.* at 1188. Because none of these post-December 1 incidents were dealt with through the grievance process, prison officials were not put on proper notice of Ross's problems. *Id.* Accordingly, Ross should not have had access to federal courts. *Id.*

135. *Id.* at 1190.

136. 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668). The court of appeals repeated the facts as set forth in the prior opinion in this case, which was decided in March 2003. *Id.* at 651. There, the Second Circuit held that Ortiz sufficiently raised the issue of whether administrative exhaustion of remedies was completed due to a lack of response by prison officials and defendant McBride's threat of assault for instituting an action. *Ortiz v. McBride*, 323 F.3d 191, 194-95 (2d Cir. 2003); *see also* *Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir. 2004) ("A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion."); *Johnson v. Testman*, 380 F.3d 691, 696-98 (2d Cir. 2004) (remanding to the district court to determine whether "the allegedly confusing nature of N.Y. [Department of Correctional Services] regulations justified the plaintiff's failure to file a grievance"); *Hemphill v. New York*, 380 F.3d 680, 686-88 (2d Cir. 2004) (same); *Giano v. Goord*, 380 F.3d 670, 675-80 (2d Cir. 2004) (same). Total exhaustion was held as an open issue before the Second Circuit pending Ortiz's appointment of counsel. *Ortiz*, 323 F.3d at 196. In the following case, Ortiz was, in fact, represented by counsel. *Ortiz*, 380 F.3d at 650.

137. Arthur Kill is operated by the New York State Department of Correctional Services ("DOCS"). *Ortiz*, 380 F.3d at 651. *See* N.Y. State Dept. of Correctional Servs., Facility Listing, at <http://www.docs.state.ny.us/faclist.html> (last visited Feb. 16, 2005) (providing a listing and brief description of DOCS' New York prisons).

138. *Ortiz*, 380 F.3d at 651.

139. *Id.*

140. *Id.* McBride instituted these proceedings despite the fact that Ortiz had passed four urine tests (showing that he was, at least, not using the drugs), and that the information McBride was acting on was based entirely on a confidential informant. *Id.*

141. *Id.* Along with this sentence came a loss of rights to "packages, commissary, phone, and recreational privileges . . ." *Id.* Euphemistically known as a "special

During the first three weeks of his confinement, Ortiz contended that he was kept in his cell for twenty-four hours a day.¹⁴³ Consequently, he was unable to shower for weeks, was denied deodorant and toothpaste, was served meals later than other inmates, and was not given utensils for his meals, leaving him to eat with the fingers he could not wash.¹⁴⁴ Ortiz also alleged that corrections officers threatened to beat him and charge him with additional violations when he complained to them about the confinement conditions.¹⁴⁵ After fifty-seven days of confinement at Arthur Kill, Ortiz was transferred to Fishkill Correctional Facility,¹⁴⁶ where he complained of being forced to share a cell with one toilet with another inmate who was an apparent threat to Ortiz.¹⁴⁷ On December 28, 1998, the very last day of Ortiz's confinement, his disciplinary ruling was reversed.¹⁴⁸

Based on the disciplinary hearing that led to his SHU sentence and the conditions of that confinement, Ortiz brought a § 1983 action in July 1999.¹⁴⁹ His first claim was under the Fourteenth Amendment's Due Process Clause,¹⁵⁰ alleging that the disciplinary hearing deprived him of his liberty interest.¹⁵¹ Next, Ortiz claimed that the conditions of his confinement rose to the level of cruel and unusual punishment in violation of the Eighth Amendment.¹⁵² Though Ortiz conceded that his Eighth Amendment claim was not viable,¹⁵³ all parties agree that he exhausted his administrative remedies as to his Fourteenth Amendment claim.¹⁵⁴ Rejecting the total exhaustion doctrine, the

housing unit" or "SHU," this type of confinement, as evidenced in *Ortiz*, has produced a slew of § 1983 litigation. *See, e.g., id.* at 651-52; *Trammell v. Keane*, 338 F.3d 155, 157 (2d Cir. 2003); *Ghana v. Holland*, 226 F.3d 175, 178 (3d Cir. 2000).

142. *Ortiz*, 380 F.3d at 651.

143. *Id.*

144. *Id.* These allegations came in Ortiz's First Amended Complaint, which further stated that his clothes were deliberately drenched with baby oil. *Id.*

145. *Id.* at 651-52.

146. *Id.* at 652. This facility is also operated by DOCS. *See supra* note 137.

147. *Ortiz*, 380 F.3d at 652.

148. *Id.*

149. *Id.*

150. The applicable part of the Fourteenth Amendment reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

151. *Ortiz*, 380 F.3d at 652.

152. *Id.* (applied through the Fourteenth Amendment).

153. *Id.* at 653. Ortiz merely complained orally about his conditions of confinement. Although these oral complaints purportedly led to officer threats of physical violence, it is not necessarily the case that Ortiz's administrative remedies were rendered "unavailable" under § 1997e(a). *Id.* at 654 (citing *Hemphill v. New York*, 380 F.3d 680, 689-91 (2d Cir. 2004)).

154. *Id.* at 653-54. Ortiz's appeal of the disciplinary hearing yielded a reversal, and no further procedure was necessary to pursue. *Id.*; *see Ross v. County of Bernalillo*,

court held that, on remand, the district court should dismiss the unexhausted claims and decide the exhausted claims.¹⁵⁵

B. Textual Analysis

The Supreme Court has declared that “[w]hen construing statutes, we look to the statutory language, which, if clear on its face, ends our analysis.”¹⁵⁶ The circuits’ textual arguments were brief because § 1997e(a) and its underlying legislative history¹⁵⁷ evade such clear meaning, giving very few palpable clues regarding total exhaustion. By its terms, once again, the PLRA provides that “[n]o action shall be brought” prior to exhaustion of administrative remedies.¹⁵⁸ In *Graves v. Norris*, the court concluded that a mixed action must be dismissed in its entirety, not merely the unexhausted claims, because “the plain language of § 1997e(a) requires” as much.¹⁵⁹ An essential question to be answered, therefore, is whether the plain language of § 1997e(a) makes any demands as to total exhaustion.

The Eighth and Tenth Circuits decidedly believed that it did, evidenced by Congress’s use of the word “action” instead of “claim.”¹⁶⁰ The Second Circuit, on the other hand, did not think the statute was clear on its face.¹⁶¹ In *Ortiz*, the court chose to focus on the term “brought” in § 1997e(a).¹⁶² Though *Ortiz*’s action clearly should not have been brought, it did follow “that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety—to kill it rather than to cure it.”¹⁶³ The Second Circuit, like the Tenth Circuit, used § 1997e(c) to augment its argument, but obviously in a different way.¹⁶⁴ That provision, entitled “Dismissal,” makes no mention of mixed actions.¹⁶⁵ Therefore, according to the Second Circuit, § 1997e(a) is facially ambiguous, and it is more likely that Congress never considered mixed actions while drafting the PLRA.¹⁶⁶

365 F.3d 1181, 1187 (10th Cir. 2004). The defendants also called for dismissal under § 1997e(c)(2) for failure to state a claim upon which relief can be granted. *Ortiz*, 380 F.3d at 652. The court, however, held that *Ortiz* satisfied the two requisites for a due process claim; he had a liberty interest and the defendants deprived him of that interest. *Id.* at 654-55.

155. *Ortiz*, 380 F.3d at 663.

156. *Id.* at 656 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

157. *See supra* Part I.B.

158. 42 U.S.C. § 1997e(a) (2000).

159. *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000).

160. *Id.*; *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004).

161. *Ortiz*, 380 F.3d at 656-57.

162. *Id.* at 657.

163. *Id.*

164. *See id.*

165. *Id.* (stating that § 1997e(c) is “the place where we would expect to find guidance as to whether dismissal of ‘mixed’ actions is required”).

166. *Id.* at 657-58.

C. *The Applicability of Habeas “Total Exhaustion” to Prisoner Civil Rights Cases*

To support its policy arguments,¹⁶⁷ the Tenth Circuit primarily relied on the total exhaustion rule under 28 U.S.C. § 2254,¹⁶⁸ which was established in the landmark Supreme Court case of *Rose v. Lundy*.¹⁶⁹ There, the Court ruled that the district court must dismiss “mixed petitions” in their entirety, as this would further the purposes of the habeas statute.¹⁷⁰ Like § 1997e, the language of § 2254 does not directly address mixed actions.¹⁷¹ Thus, stressing the doctrine of comity,¹⁷² the Court considered the policies underlying the statute.¹⁷³

The court in *Ross* provided a succinct overview of the *Rose* decision.¹⁷⁴ First, total exhaustion in the habeas context would promote a policy whereby prisoners would go first to state courts to seek relief.¹⁷⁵ This would give those courts the first chance to review

167. *See infra* Part II.D.

168. Section (b)(1) reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1) (2000).

169. 455 U.S. 509 (1982). Lundy, convicted and sentenced for rape and crime against nature, filed a petition for habeas corpus, in which he failed to exhaust his state remedies for three of the four alleged grounds for relief. *Id.* at 511. Nevertheless, after assessing the overall “atmosphere” of the trial, the district court found that Lundy’s right to a fair trial was violated. *Id.* at 511-12. This decision was affirmed by the Sixth Circuit, rejecting the argument that the petition should have been dismissed because it was “mixed.” *Id.* at 513.

170. *Id.* at 510. *But cf.* West v. Kolar, 108 Fed. Appx. 568, 570 (10th Cir. 2004) (“It also follows from the adaptation of the rule in *Rose v. Lundy* that the district court may permit an inmate who has filed a mixed complaint in a § 1983 complaint to dismiss voluntarily his unexhausted claims and to proceed only on those he has exhausted.”). Similarly, a prisoner may file a motion to amend his mixed complaint to contain only the exhausted claim. *See* Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8th Cir. 2003) (per curiam) (holding that, despite a failure to exhaust one of the claims in his action, the district court’s denial of Kozohorsky’s motion to amend his complaint was an abuse of discretion).

171. *Rose*, 455 U.S. at 516-17 (“Because the legislative history of § 2254 . . . contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem.”).

172. *Id.* at 518. Comity “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Id.* (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

173. *See id.* at 518-22.

174. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189-90 (10th Cir. 2004).

175. *Id.* at 1189 (citing *Rose*, 455 U.S. at 518-19).

claims of error.¹⁷⁶ Second, a total exhaustion rule would facilitate a more complete factual record to assist federal courts in their review.¹⁷⁷ Lastly, such a rule would relieve district courts from having to decide when claims are related, and therefore, severable from one another.¹⁷⁸ In sum, by allowing district courts to review all claims in one proceeding, total exhaustion would “promote judicial efficiency by discouraging piecemeal litigation”¹⁷⁹

Though exhaustion in the habeas context is seemingly analogous to exhaustion under the PLRA,¹⁸⁰ the Second Circuit was far more hesitant to accept the analogy.¹⁸¹ The court believed that the habeas analogy was misplaced primarily because the habeas exhaustion requirement derives from fundamental principles of sovereignty.¹⁸² Whereas federal courts apply the doctrine of comity to habeas cases,¹⁸³ prisoner § 1983 actions have no constitutionally based equivalent.¹⁸⁴

The dissimilar foundations for these actions have two procedural corollaries. First, in the prison administrative proceedings typical to prisoner civil rights claims, the prison official need not adhere to rules of evidence or other standards characteristic of courts of law (which are deferred to in habeas proceedings).¹⁸⁵ As such, prison proceedings are much less likely to facilitate a complete factual record for the federal court.¹⁸⁶ Second, by allowing the exhausted portions of a mixed complaint to proceed, prisoners are not dissuaded from making full use of the administrative procedures available to them.¹⁸⁷ Rather, prisoners will still understand that to gain access to the federal court system, they must exhaust their claim.¹⁸⁸

Another difference between habeas applications and § 1983 suits that illustrates the inapplicability of the analogy is the type of grievance usually present in each claim.¹⁸⁹ While habeas applications

176. *Id.* (citing *Rose*, 455 U.S. at 518-19). Consequently, state courts “may become increasingly familiar with and hospitable toward federal constitutional issues.” *Rose*, 455 U.S. at 519.

177. *Ross*, 365 F.3d at 1189 (citing *Rose*, 455 U.S. at 519).

178. *Id.* (citing *Rose*, 455 U.S. at 518-19).

179. *Id.* at 1190 (citing *Rose*, 455 U.S. at 520).

180. See *supra* notes 66-70 and accompanying text.

181. See *Ortiz v. McBride*, 380 F.3d 649, 660-62 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668).

182. *Id.* at 660.

183. See *supra* note 172.

184. *Ortiz*, 380 F.3d at 660 (claiming that there is no comity issue in prisoner civil rights actions because prison grievance systems, unlike state courts, limit their review to violations of prison policy).

185. *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)) (“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.”).

186. *Id.* at 661. Compare with *supra* text accompanying note 177.

187. *Ortiz*, 380 F.3d at 661.

188. *Id.* Compare with *supra* text accompanying notes 175-76.

189. *Ortiz*, 380 F.3d at 661.

predominantly concern one grievance—a conviction in state court¹⁹⁰—prisoners' § 1983 actions often seek redress for many grievances related to various events.¹⁹¹ Section 1983 claims are less likely to be interrelated and therefore would be easily discernable to the district courts.¹⁹² Moreover, in § 1983 suits, there is less complexity in determining whether the exhausted claims are severable from the unexhausted claims.¹⁹³

The Second Circuit makes one additional distinction between habeas corpus and civil rights suits. If a habeas application is dismissed for failure to exhaust, the application can be exhausted in the state courts and subsequently brought into a federal habeas proceeding.¹⁹⁴ Prison grievance procedures, however, generally have short time limits,¹⁹⁵ rendering it unlikely that an unexhausted § 1983 claim will eventually be exhausted and reasserted into a federal court case.¹⁹⁶ Therefore, piecemeal litigation is far less of a concern in § 1983 claims, as resolving all of the claims together is not generally necessary.¹⁹⁷

D. *Improving the Quality of Prisoner Suits*

In its most recent decision about the PLRA's exhaustion requirement, the Supreme Court illuminated the purpose of the provision: "[T]o reduce the quantity and improve the quality of prisoner suits."¹⁹⁸ Both the Second and Tenth Circuits deem their approach to the total exhaustion issue to be in line with the Supreme Court's statement.¹⁹⁹

190. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 510-11 (1982) (noting that Lundy's petition for a writ of habeas corpus only concerned the jury trial in which he was found guilty of rape and crime against nature).

191. *Ortiz*, 380 F.3d at 661.

192. See, e.g., *Johnson v. Testman*, 380 F.3d 691, 693-94 (2d Cir. 2004). In his action, Johnson brought one claim after receiving serious injuries and a SHU sentence for an extremely violent altercation with an inmate, allegedly caused by the provocation of a corrections officer. *Id.* Johnson's second claim was that in an unrelated incident, another corrections officer handcuffed him behind his back and left the cuffs on for seven hours, causing severe shoulder and back pain. *Id.*

193. *Ortiz*, 380 F.3d at 661. Compare with *supra* text accompanying note 178.

194. *Ortiz*, 380 F.3d at 661 (citing *Rose*, 455 U.S. at 520).

195. See, e.g., *Div. of the Sheriff, Glenn County*, *supra* note 121 ("The grievant has five working days after the occurrence of any specific incident in which to file a grievance.").

196. *Ortiz*, 380 F.3d at 662 ("[U]nexhausted prisoners' 1983 claims, once dismissed, are unlikely ever to be revived in district court. And even if they are, they may well be about facts unrelated to those underlying the claims of which the court has already disposed.").

197. *Id.*

198. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The Court later added that "the PLRA's dominant concern [is] to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court" *Id.* at 528.

199. See *Ortiz*, 380 F.3d at 658 (claiming that a rule requiring district courts to

The Tenth Circuit's view is simply an outgrowth of the habeas analogy to total exhaustion.²⁰⁰ In the civil rights context, total exhaustion would encourage prisoners to make full use of their prison's grievance process,²⁰¹ which would in turn create an administrative record that would assist federal courts if the claim was not first resolved by prison officials.²⁰² The Tenth Circuit also accepted, by way of habeas analogy, that district courts would not have "to determine whether certain exhausted claims are severable from other unexhausted claims that they are required to dismiss"²⁰³ and that "at least some piecemeal litigation" would be avoided.²⁰⁴

The Second Circuit provides three reasons why a rule of total exhaustion would not improve the quality of prisoners' § 1983 suits.²⁰⁵ First, total exhaustion could potentially create an incentive to file multiple § 1983 suits if they have multiple claims.²⁰⁶ Second, dismissing the entire action would do little more than cause prisoners with mixed actions to refile their exhausted claim with the unexhausted claim omitted.²⁰⁷ Consequently, courts would have to resolve the same claim they confronted at the beginning of the proceedings.²⁰⁸ Third, deciding whether a claim is exhausted is not a straightforward issue, but often requires familiarization with the case in order to make a determination.²⁰⁹ Moreover, it does not "aid efficiency to require that, if the court decides the claim-exhaustion

dismiss mixed actions would not be in the best interests of improving the quality of prisoner suits); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004) (arguing that the PLRA's underlying policies point toward a total exhaustion requirement).

200. See *supra* notes 174-79 and accompanying text.

201. *Ross*, 365 F.3d at 1190 (citing *Porter*, 534 U.S. at 524-25; *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982)).

202. *Id.*

203. *Id.*

204. *Id.*

205. See *Ortiz v. McBride*, 380 F.3d 649, 658-59 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668).

206. *Id.* at 658. The court acknowledged that this rationale is somewhat weak, considering that splitting claims can "be mitigated by other factors, such as a desire to avoid paying multiple filing fees or risking incurring three 'strikes.'" *Id.* at 658 n.7. With their income only a fraction of the filing fee, prisoners are strongly deterred from filing claims in federal court. See John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 *Brook. L. Rev.* 429, 430 (2001). Also, prisoners with three or more prior dismissals of an action or appeal dismissed on the grounds that it was "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted" may not proceed *in forma pauperis*. 28 U.S.C. § 1915(g) (2000). For a discussion of this provision, see Joshua D. Franklin, Comment, *Three Strikes and You're Out of Constitutional Rights? The Prison Litigation Reform Act's "Three Strikes" Provision and Its Effect on Indigents*, 71 *U. Colo. L. Rev.* 191 (2000).

207. *Ortiz*, 380 F.3d at 658. Based on the short time periods associated with prison grievance procedures, "prisoners are likely to simply amend their complaints to eliminate the unexhausted claims and refile." *Id.* at 659 (internal citation omitted).

208. *Id.*

209. *Id.* at 659; see, e.g., *supra* note 136.

issue against the prisoner, it must then dismiss any remaining exhausted claims only to allow the same case, absent the unexhausted claims, to be reinstated, heard again on the exhausted issues, and then decided.”²¹⁰

As shown, the Second and Tenth Circuits have starkly different views of how § 1997e(a) should be interpreted in order to promote judicial efficiency in prisoner litigation. Based on the underlying purposes of the PLRA, the Second Circuit’s decision to allow mixed complaints to go forward is sounder than the Tenth Circuit’s misapplication of the habeas analogy. Accordingly, Part III of this Note advocates the Second Circuit approach, simultaneously allowing a justifiable level of prisoner access to federal courts and preserving the spirit of the PLRA.

III. “TOTAL EXHAUSTION”: TAKING THE PLRA TOO FAR

The Tenth Circuit’s approach discussed in Part II would close the door to prisoner lawsuits (both frivolous and meritorious) for purely technical reasons. This part opposes a total exhaustion rule under the PLRA and instead advocates the approach of the Second Circuit. Part III.A contends that the Tenth Circuit’s interpretation of § 1997e(a) is misapplied and excessive, in contrast to the Second Circuit’s more principled and policy-oriented approach. Part III.B concludes that prisoners’ claims cannot all simply be classified as frivolous. The PLRA’s exhaustion provision, therefore, adequately achieves Congress’s goal of curbing frivolous suits without a need for total exhaustion.

A. *The Ineffectiveness of a “Total Exhaustion” Rule in the Civil Rights Context*

A total exhaustion rule is not mandated by the text of § 1997e(a), nor do the Tenth Circuit’s policy arguments demonstrate the need for such an interpretation of the statute.

1. Textual Ambiguity

The Second and Tenth Circuits disagree as to two aspects of § 1997e(a)’s language. The first issue is whether use of the term “action” instead of “claim” indicates that Congress intended a total exhaustion rule. While it is true that Congress used the term “action,”²¹¹ there is negligible evidence showing that Congress meant that language to imply total exhaustion.²¹² Because of the very sparse

210. *Ortiz*, 380 F.3d at 659 (noting this to be especially true when the court must hear the same factual background of claims that are factually interrelated).

211. See *supra* note 160 and accompanying text.

212. See *Ortiz*, 380 F.3d at 658 (“[T]he parties have not identified, and we are not

legislative record on exhaustion,²¹³ the Tenth Circuit had to rely primarily on the habeas analogy to support a total exhaustion rule,²¹⁴ rather than the unclear text of the PLRA.²¹⁵ Thus, it would be a stretch to say that the language of § 1997e(a) signifies any congressional intent on the total exhaustion issue.

The second issue, that is really ancillary to the first, is whether § 1997e(c), addressing dismissal of suits by prisoners, strengthens or weakens the argument that Congress deliberately used the word “action” in § 1997e(a).²¹⁶ It is possible that, as compared to § 1997e(c), use of the word “action” in § 1997e(a) was premeditated by a Congress that desired “action-dismissal” as opposed to “claim-dismissal.”²¹⁷ As explained by the Second Circuit in a past decision, “[w]e presume that the use of different terminology within a body of legislation evidences a Congressional purpose to differentiate.”²¹⁸ There are two problems with this argument in the context of the PLRA. First, § 1997e(a) addresses a largely different issue than § 1997e(c)(2). In the former, exhaustion is required for a prisoner to proceed to federal court. In the latter, a court may dismiss a frivolous claim without requiring exhaustion. Thus, no Congressional intent can be discerned from the use of different terms in these dissimilar sections. Second, Congress could have easily chosen to add language to § 1997e(a) explaining how courts should handle mixed actions. Congress could also have added language to § 1997e(c)(1) requiring the dismissal of mixed actions.²¹⁹ Therefore, § 1997e(c) gives no real clues about how to construe § 1997e(a)’s language.

In comparing total exhaustion in the habeas context and the PLRA context, the Tenth Circuit was correct to quote *Rose* on one point: “In all likelihood Congress never thought of the problem.”²²⁰ As such,

otherwise aware of, any legislative history suggesting that Congress directly considered [total exhaustion] or had any particular intent with respect to whether ‘mixed’ actions should be dismissed in their entirety.”); *supra* notes 71-85 and accompanying text.

213. *See supra* note 73 and accompanying text.

214. *See supra* notes 168-79 and accompanying text.

215. *See supra* notes 156-62 and accompanying text.

216. *See supra* notes 158-60, 164-65 and accompanying text.

217. *See supra* notes 159-60 and accompanying text.

218. *United States v. Gaggi*, 811 F.2d 47, 56 (2d Cir. 1987). *But see* *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 746-47 (2000) (“Nor does the statute’s basic purpose require that the two sets of different words mean the same thing.”).

219. *See supra* note 165 and accompanying text. For example, Congress could have required dismissal under § 1997e(c)(1) for an action that is “frivolous, malicious, fails to state a claim upon which relief can be granted, . . . [and] seeks monetary relief from a defendant who is immune from such relief,” 42 U.S.C. § 1997e(c)(1) (2000), or has one or more claims that are unexhausted.

220. *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004) (quoting *Rose v. Lundy*, 455 U.S. 509, 517 (1982)). After raising this point, the court went on to emphasize the Supreme Court’s policy rationale in *Rose*. *Id.* at 1189-90.

allowing exhausted claims in mixed actions to be heard in court would not go against Congress's intentions.

2. No Policy Justification

Though Congress did not consider total exhaustion when drafting the PLRA, it remains plausible that the policies underlying the statute lend support to the application of the doctrine. On the surface, a total exhaustion rule seemingly conforms to the Supreme Court's statement of the PLRA's purposes.²²¹ The Tenth Circuit sets forth three problems that stem from allowing mixed complaints to proceed. First, there would be no factual record to aid the federal courts.²²² Second, district courts would have to decide what claims are severable.²²³ Third, there would be more piecemeal litigation.²²⁴ This Note, consistent with the view of the Second Circuit, refutes this superficial rationale as both misapplied and specious, needlessly denying prisoner access to the court system.

The Tenth Circuit's rationale is misapplied because of its reliance on the total exhaustion rule in the habeas context. Although the Supreme Court stated the advantages of habeas total exhaustion in *Rose*,²²⁵ it does not necessarily follow that the same advantages exist under § 1983 prisoner claims. As enunciated by the Second Circuit, there are three fundamental differences between the claims that render the analogy invalid. First, the lower proceeding in a civil rights claim is an administrative hearing rather than a state court proceeding.²²⁶ Thus, it is unlikely that a complete factual record will be accumulated.²²⁷ As opposed to prisoners filing habeas petitions, allowing mixed complaints to proceed will have no cognizable effect on prisoner use of the grievance procedure.²²⁸ Under the PLRA, prison officials will still have the first opportunity to resolve a complaint and potentially resolve frivolous claims before they reach federal court.²²⁹ Next, there is a fundamental difference between what

221. See *supra* note 198 and accompanying text.

222. See *supra* notes 201-02 and accompanying text.

223. See *supra* text accompanying note 203.

224. See *supra* text accompanying note 204.

225. See *supra* notes 174-79 and accompanying text.

226. See *supra* notes 182-84 and accompanying text.

227. See *supra* notes 185-86 and accompanying text.

228. See *supra* notes 187-88 and accompanying text.

229. For example, allowing one of Pat Prisoner's claims in his mixed complaint to go forward will not discourage him from making full use of the grievance procedures for other claims. Conversely, he will see that prison officials must be given the first chance to rectify the problem and still must go through the same process for additional claims if he wants those to be heard in federal court. Moreover, a total exhaustion requirement would have no stronger impact on "encourag[ing] prisoners to make full use of inmate grievance procedures." *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004). As such, allowing mixed complaints to proceed is as

a prisoner is seeking in a habeas petition and a § 1983 complaint.²³⁰ Finally, due to short time limits for prison grievance procedures, the future exhaustibility of a dismissed habeas petition is far less questionable than that of a § 1983 complaint.²³¹

The Tenth Circuit's rationale is specious, even if the habeas analogy was deemed valid. Having already dismissed the contention that a total exhaustion rule would encourage use of the grievance process and facilitate an administrative record,²³² two unsound assertions remain: complications regarding severability and piecemeal litigation. Regarding severability, a district court does not really have to decide what claims are severable. The notion of severability is inapposite to civil litigation, where joinder of claims is permissive rather than compulsory.²³³ Therefore, a court would simply dismiss any unexhausted claims and proceed with whatever is left.²³⁴ Regarding piecemeal litigation, it is highly unlikely that allowing mixed complaints to proceed will have this result. Dismissing an entire action based on failure to exhaust one claim would only cause a prisoner to refile that action minus the unexhausted claim.²³⁵ As the Second Circuit noted, the likelihood that an unexhausted claim would appear again is miniscule, given the short filing deadlines for grievances.²³⁶ Consequently, under a total exhaustion regime, when the prisoner refiles, the court will inefficiently hear the same claim it heard in the initial proceeding.²³⁷ In the unlikely scenario where claims are so interrelated that they have to be tried together, a judge

likely as total exhaustion to produce an administrative record and filter out frivolous claims.

230. See *supra* notes 189-93 and accompanying text. For example, as opposed to filing a petition for a criminal conviction, Pat Prisoner asserted that the type of pillow he had was inadequate (Eighth Amendment violation) and that Gus Guard harmed him after he complained (Eighth and Fourteenth Amendment violations). The outcome of the trial of the first issue has no necessary implication for the outcome of the second issue.

231. See *supra* notes 194-97 and accompanying text.

232. See *supra* text accompanying notes 226-28; note 229 and accompanying text.

233. See Fed. R. Civ. P. 18-21.

234. So long as it conforms with the provisions of § 1997e(c).

235. See *supra* note 207 and accompanying text. Statutes of limitations are a further impediment to the possibility of piecemeal litigation. If a court dismisses the mixed complaint after the statute of limitations has run, the prisoner would not be able to refile at all. The tolling of the statute of limitations is not an improbable occurrence because prisoner suits must be processed by the pro se office and then go through standard civil litigation, which could potentially be quite lengthy. See, e.g., Benjamin Weiser, *Judge's Decisions Draw Notice, for Being Conspicuously Late*, N.Y. Times, Dec. 6, 2004, at A1.

236. See *supra* note 207 and accompanying text.

237. See *supra* text accompanying note 208. For example, if Pat Prisoner's complaint is dismissed pursuant to the total exhaustion rule, he will probably refile a complaint only alleging an Eighth Amendment violation for being forced to sleep on firm pillows, a claim the court familiarized itself with in the previous proceeding. See *supra* text accompanying notes 209-10.

could choose to direct the prisoner to notify the court as to whether he will attempt to exhaust the claim and bring it back to court. If the prisoner so attempts, the judge can delay the trial for a short time to permit that to happen. Implying that there is room for such discretion, the Second Circuit noted that “in the ordinary case, once the district court dismisses the unexhausted claims, it will proceed directly to decide the exhausted claims without waiting for the plaintiff to attempt to exhaust available administrative remedies with respect to the dismissed claims.”²³⁸

The total exhaustion doctrine does nothing to add to the effectiveness of § 1997e(a), and sometimes even goes against the intentions of the PLRA by impairing judicial efficiency. Once a prisoner files an exhausted claim (and complies with other statutory provisions), there is no justifiable reason to deny access to federal courts.

B. *The Need for a Softer Interpretation of § 1997e(a)*

Undoubtedly, one of Congress’s primary goals in enacting the PLRA was to curb frivolous suits.²³⁹ The categorization of inmate litigation as frivolous, however, has led to significant limitations on both meritorious and trivial claims alike.²⁴⁰ Although prisoner lawsuits, in the aggregate, are crowding the federal docket²⁴¹ and are not always legitimate,²⁴² these points are neither straightforward nor absolute. Prisoner lawsuits crowd the federal docket because of a booming prison population in America.²⁴³ And while there will recurrently be frivolous lawsuits, there are also countless inmate claims which present serious wrongs in need of remedy.²⁴⁴ Professor Kermit Roosevelt captured the nature of the situation in writing:

Let us be candid. There is no denying that frivolous suits make up a large number—and even a fairly large percentage—of the claims brought by inmates under § 1983. But there are also real abuses that take place within the prison system. Prisoners have, among other things, been raped, shot, and beaten to death by guards.²⁴⁵

There is no need to look any further than the facts of the cases involved in the circuit split to illustrate this point.²⁴⁶ In *Ross*, the

238. *Ortiz v. McBride*, 380 F.3d 649, 663 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668).

239. *See supra* note 64 and accompanying text.

240. *See supra* note 65.

241. *See supra* notes 38-39 and accompanying text.

242. *See supra* notes 45-49 and accompanying text.

243. *See supra* notes 40-43 and accompanying text.

244. *See, e.g., Ortiz v. McBride*, 380 F.3d 649, 651-52 (2d Cir. 2004), *cert. denied*, 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005) (No. 04-668); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1182-83 (10th Cir. 2004).

245. Roosevelt, *supra* note 12, at 1776.

246. *See supra* Part II.A.

prisoner claimed to have seriously injured his shoulder due to the inadequacy of the prison's shower facility.²⁴⁷ Even more egregious, in *Ortiz*, the prisoner alleged that he was wrongly placed in solitary confinement, and while serving his time, was denied some of the most basic life necessities.²⁴⁸

These cases are characteristic of many prisoner claims that continue to be largely ignored by an unsympathetic society. The 104th Congress also overlooked these claims²⁴⁹ because they were not sensational enough to make it onto the notorious "top ten" lists.²⁵⁰ Instead, conservatives were able to enact the PLRA by focusing on peanut butter²⁵¹ and the like, cases which were often far less trivial than they appeared on their face.²⁵² Finally, by applying the habeas "procedural default" to the PLRA's exhaustion requirement, federal district courts are exacerbating prisoners' (mostly proceeding *pro se*)²⁵³ problems by barring subsequent § 1983 actions on technical grounds.²⁵⁴ The cumulative effect has been to curb the amount of total prisoner lawsuits, both frivolous and meritorious.²⁵⁵

In no way should this suggest that the PLRA was unwarranted legislation on the whole. Rather, it implies that unaccommodating interpretations of the PLRA's provisions go against the purpose of the statute to curb frivolous lawsuits and improve judicial efficiency.²⁵⁶ While none of the proponents of the PLRA sought to deter meritorious prisoner lawsuits²⁵⁷ (at least openly),²⁵⁸ there is no question that all prisoners have felt the impact of the Act.²⁵⁹ With the efficacy of the PLRA's requirements, an extremely strict reading of § 1997e(a),²⁶⁰ requiring total exhaustion, adds little to Congress's established success in implementing the statute.²⁶¹ To the contrary, a

247. *Ross*, 365 F.3d at 1182.

248. *Ortiz*, 380 F.3d at 651-52.

249. See *supra* notes 75-78 and accompanying text.

250. See *supra* notes 47-49 and accompanying text.

251. See *supra* note 49 and accompanying text.

252. See Newman, *supra* note 50, at 6.

253. See *supra* note 36.

254. See *supra* notes 96-98, 102 and accompanying text.

255. See *supra* notes 86-90 and accompanying text.

256. See *supra* notes 64-70 and accompanying text.

257. See, e.g., 141 Cong. Rec. S14572 (1995) (statement of Sen. Kyl) ("[W]e will free up judicial resources for claims with merit by both prisoners and nonprisoners.").

258. See Branham, *supra* note 35, at 506 ("[N]one of those few members of Congress who discussed the PLRA's exhaustion requirement admitted—and Senator Hatch, who was a chief sponsor of the [PLRA], specifically denied—enacting the requirement in order to discourage inmates, through the encumbrances of exhaustion, from bringing even meritorious claims to court.").

259. See *supra* notes 86-90 and accompanying text. If the intentions of Congress are deemed to limit prisoner civil rights suits altogether, and the Tenth Circuit carries out this goal by requiring total exhaustion, such an interpretation might not pass muster under the Equal Protection Clause. See U.S. Const. amend. XIV, § 1.

260. See *supra* notes 159-60, 200-04 and accompanying text.

261. See *supra* notes 64-70 and accompanying text.

looser interpretation is needed in order to simultaneously deter frivolous claims and give the meritorious claims access to federal court—accommodating both courts and prisoners.²⁶²

CONCLUSION

Requiring total exhaustion under § 1997e(a) not only undermines prisoners' rights, but does nothing to improve the functioning of the federal court system—the underlying goal of the PLRA. As this Note demonstrates, allowing mixed complaints to go forward will benefit aggrieved prisoners without sacrificing judicial efficiency. Justice Breyer recently presented a model of statutory interpretation that eschewed relying solely on text or precedent and instead advocated interpretations that would meet community needs and champion individual rights.²⁶³ The result would be to “avoid the more rigid interpretations [and to help] harmonize a court’s daily work of interpreting statutes with the Constitution’s democratic and liberty-protecting objectives.”²⁶⁴ Extending this reasoning to § 1997e(a), the door to the federal courts should not be closed to prisoners if they wish to proceed with a viable, fully exhausted claim.

262. See *supra* notes 161-66, 205-10 and accompanying text.

263. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 260 (2002).

264. *Id.* at 268. For a recent example of Justice Breyer employing this philosophy to the federal sentencing guidelines, see *United States v. Booker*, 125 S. Ct. 738, 756-69 (2005).