OVERCOMING ADMINISTRATIVE SILENCE IN PRISONER LITIGATION: GRIEVANCE SPECIFICITY AND THE "OBJECT INTELLIGIBLY" STANDARD

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The Prison Litigation Reform Act (PLRA) requires that prisoners exhaust available administrative remedies before filing a federal action challenging prison conditions. Thus, an inmate can only file a lawsuit in federal court after proceeding through each step of the prison's grievance procedure and meeting all procedural requirements. This exhaustion process is complicated by the fact that most prison systems provide little guidance about the specificity with which a prisoner must describe a grievance in order to preserve the right to assert a claim in federal court. Either they say nothing about the level of detail required in grievances or the requirement is very general. In Strong v. David*, the Seventh Circuit held that in situations where the administrative rulebook is silent as to specificity, a grievance suffices if it "object[s] intelligibly" to some asserted shortcoming. While several courts agree that a grievance must provide only enough information for prison officials to be able to investigate the prisoner's problem, other courts hold grievances inadequate when they fail to articulate legal theories or spell out the elements of legal claims. This inconsistency among courts is particularly problematic considering the common characteristics of prisoner-plaintiffs, most of whom proceed pro se. This Note argues that in situations of administrative silence, federal courts should adopt the Seventh Circuit's "object intelligibly" standard for determining the adequacy of prisoner grievances.*

INTRODUCTION

Having been tossed from institution to institution,[1] inmate Hardy Brownell, Jr. arrived at Southport Correctional Facility ("Southport") only to find that eleven of the fourteen bags containing his personal belongings were missing.[2] In an attempt to locate his property, Brownell filed a grievance with Shawangunk Correctional Facility

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1. In a period of only five weeks, Brownell was transferred two times: first from Woodbourne Correctional Facility to Eastern Correctional Facility, and then from Eastern Correctional Facility to Southport Correctional Facility. Brownell v. Krom, 446 F.3d 305, 307 (2d Cir. 2006).

2. Id. at 308. Brownell listed as missing items of clothing and footwear, "as well as 2000 pages of trial transcripts from his 1976 trial; 500 pages of hearing transcripts and motion papers; and 200 pages of research material for a federal habeas corpus" petition that was to be filed in the near future. Id. (internal quotation marks omitted).

("Shawangunk"), after being transferred there from Southport.[3] He pursued the grievance through each of the three stages mandated by the New York Department of Corrections, but relief was ultimately denied.[4]

Brownell then sued, alleging that the loss of his property resulted from intentional misconduct by prison staff to prevent him from filing a timely habeas corpus petition.[5] On appeal, the Second Circuit ruled that Brownell's grievance, which stated that his personal property was lost upon transfer and listed the various items that were lost,[6] did not meet the administrative-exhaustion requirement of the Prison Litigation Reform Act (PLRA).[7] Crediting the prison officials' argument—that, had Brownell's grievance *explicitly* alleged intentional misconduct, it would have triggered a more robust investigation[8]—the court explained that a "grievance may not be so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally."[9] Thus, Brownell's ability to sue in federal court would be further delayed,[10] even though the problem visible to Brownell was just that he did not have his property, and that fact surely gave prison officials sufficient notice that they should find his things or replace them.

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3. Id. at 307–08. Brownell was transferred to Shawangunk two months after arriving at Southport. Id. He resided at Shawangunk at the time he filed the lawsuit against the corrections officers. Id.

4. Id. at 309.

5. Id. at 307; see also supra note 2 (describing legal documentation Brownell claimed was misplaced).

6. The grievance stated: "Upon transfer . . . most of my personal property has been lost. This includes all of my legal work amounting to thousands of pages . . . . Shoes, boots, sweaters, headphones, tape player and a number of tapes plus personal sneakers." *Brownell*, 446 F.3d at 309.

7. See id. at 311 ("We have little difficulty in concluding that Brownell's grievance did not sufficiently allege intentional misconduct."); see also Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. 8, sec. 803(d), § 7(a), 110 Stat. 1321, 1321–71 (1996) (codified as amended at 42 U.S.C. § 1997e(a) (2006)) ("No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

8. See *Brownell*, 446 F.3d at 311 ("As there were no allegations of misconduct by corrections officers, [the] grievance was simply a claim for property lost in transit . . . , a claim that does not trigger the level of investigation that a grievance suggesting retaliation would trigger.").

9. Id. at 310 (citing Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004)).

10. If a grievant files a lawsuit without having first exhausted such remedies, the court must dismiss the suit or delay considering it until after the exhaustion requirement is met. See Barbara Belbot & Craig Hemmens, The Legal Rights of the Convicted 219–20 (2010) (discussing PLRA provisions generally). In *Brownell*, the court tempered its holding by reversing the dismissal of the case on the ground that there were special circumstances excusing Brownell's failure to exhaust properly. *Brownell*, 446 F.3d at 312. Specifically, the necessary information came to him long after the grievance deadline had passed, and the grievance form did not explain that late grievances could be allowed based on "mitigating circumstances," leading to a reasonable belief that he could not raise the new facts in a separate grievance. Id. at 312–13 (internal quotation marks omitted).

The PLRA requires that prisoners exhaust all available administrative remedies before filing any federal lawsuit about prison conditions.[11] This exhaustion provision, in turn, has encouraged prison administrators to establish internal grievance systems through which prisoners can formally bring their complaints to prison authorities.[12] In *Jones v. Bock*, the Supreme Court stated, "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[13] Thus, to satisfy the PLRA's exhaustion requirement, inmate grievances[14] must contain the sort of information that the particular administrative system requires; it is up to the prison administrators to determine what is necessary to manage grievances effectively, and the only constraint is that prison systems may not institute requirements in tension with the federal policy underlying 42 U.S.C. §§ 1983[15] and 1997e(a).[16]

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11. 42 U.S.C. § 1997e(a) (laying out exhaustion requirement).

12. See Kevin I. Minor & Stephen Parson, Grievance Procedures in Correctional Facilities, *in* Prison and Jail Administration: Practice and Theory 353, 354 (Peter M. Carlson ed., 3d ed. 2013) ("[I]mplementation of the [PLRA] dramatically increased the significance of [grievance procedures] in actual prison operations."). Grievance systems typically require the prisoner to complete three to four stages. First, a prisoner must attempt informal resolution of a complaint prior to filing a grievance. If the informal resolution attempt does not solve the problem, the prisoner must next file a formal grievance. Third, if the formal grievance does not result in a favorable outcome, the prisoner must file an appeal. In grievance systems requiring a second level of appeal, this is the fourth and usually final stage of the grievance process. See Derek Borchardt, Note, The Iron Curtain Redrawn Between Prisoners and the Constitution, 43 Colum. Hum. Rts. L. Rev. 469, 492–94 (2012) (providing overview of grievance procedures). The second stage—in which a prisoner files a formal grievance—is the focus of this Note.

13. 549 U.S. 199, 218 (2007). In *Woodford v. Ngo*, the Court, adopting the proper-exhaustion rule, explained, "Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust." 548 U.S. 81, 89 (2006).

14. A grievance is typically recognized as "a complaint about the substance or application of any written or unwritten policy or regulation, about the absence of a policy or regulation, or about any behavior or action directed toward an inmate." J. Michael Keating, Prison Grievance Mechanisms Manual 1 (1977). A "grievance mechanism" can be any administrative means for the expression and resolution of inmates' grievances. Id. at 2 (internal quotation marks omitted).

15. 42 U.S.C. § 1983 (2006) provides a method for individuals to sue to redress violations of federally protected rights.

16. Id. § 1997e(a) establishes the PLRA's exhaustion requirement. Reflecting the idea that prison systems may not institute requirements in tension with the federal policy underlying the exhaustion requirement, no administrative system may demand that the prisoner specify each remedy later sought in litigation. See Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002) ("The only constraint is that no prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a).").

Most state prison systems,[17] however, do not spell out the level of detail required in a grievance to satisfy the PLRA's exhaustion requirement. Either they are silent about the level of detail required in a grievance or the requirement is very broad.[18] In *Strong v. David*, Judge Easterbrook of the Seventh Circuit, applying the same "proper exhaustion" requirement later delineated by the Supreme Court in *Woodford v. Ngo*,[19] touched on this issue:

> When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is *object intelligibly* to some asserted shortcoming.[20]

This grievance pleading standard is a sensible interpretation of the PLRA's exhaustion requirement because the purpose of the requirement is to give prison officials time and opportunity to resolve problems within the prison environment before the conditions or events lead to a full-blown lawsuit.[21]

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17. Each state has its own prison system, and internal grievance procedures vary by state and system. See Borchardt, supra note 12, at 490–91 (explaining grievance procedures are promulgated in all fifty states and many correctional facilities).

18. For purposes of this Note, the term "administrative silence" will be used to refer both to situations in which the prison regulation has not articulated a standard for factual specificity *and* situations in which the prison has articulated such a standard, but the standard is unclear.

19. 548 U.S. 81, 93 (2006) ("[T]he PLRA exhaustion requirement requires *proper* exhaustion." (emphasis added)). Applying this requirement, the *Strong* court explained that "'prisoner[s] must file complaints and appeals in the place, and at the time, the prison's administrative rules require.'" *Strong*, 297 F.3d at 649 (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)).

20. *Strong*, 297 F.3d at 650 (emphasis added).

21. The Supreme Court has stated: "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Porter v. Nussle, 534 U.S. 516, 524–25 (2002). It is important to note that the fact that *Strong* was decided years before *Ngo*, one of the seminal Supreme Court cases addressing the PLRA's exhaustion requirement, does not undermine the argument that *Strong*'s "object intelligibly" standard should be applied to all cases assessing the adequacy of prisoner grievances in situations of administrative silence. Not only did *Strong* apply the same "proper exhaustion" requirement later established in *Ngo*, see supra text accompanying note 20 (providing relevant language), but, more importantly, *Ngo* offered nothing to restrict the Seventh Circuit's holding in *Strong*. In fact, while the Court in *Ngo* did not cite *Strong*, it relied on *Pozo*, 286 F.3d 1022—the same case that Judge Easterbrook in *Strong* said *Strong* was a "logical extension" of—in reaching its holding. See *Ngo*, 548 U.S. at 90 ("Administrative law . . . requir[es] proper exhaustion of administrative remedies, which 'means using all steps that the agency holds out, and doing so *properly* . . . .'" (quoting *Pozo*, 286 F.3d at 1024)); *Strong*, 297 F.3d at 649 ("We wrote in [*Pozo*] that 'prisoner[s] must file complaints and appeals in the place, and at the time, the prison's administrative rules require.' Now we add the logical extension

Despite the numerous decisions supporting this "object intelligibly" standard, some courts have insisted on a higher standard (amounting to pleading legal theories or spelling out the elements of legal claims[22]) in certain kinds of grievances. Specifically, courts have held grievances inadequate for failing to explicitly mention claims—such as discrimination in violation of the Equal Protection Clause, unlawful retaliation, or conspiracy[23]—that prisoners later allege in lawsuits, even where the grievances thoroughly state the fundamental facts.[24] Such higher grievance pleading standards are particularly problematic given the pro se nature of most PLRA litigation[25] and the notorious difficulties that pro se prisoners face in spelling out elements of legal theories in their grievances.

This Note argues that, in situations where the administrative rulebook is silent on the level of detail necessary in a grievance to satisfy the PLRA's exhaustion requirement, courts should apply the Seventh Circuit's "object intelligibly" standard to assess the adequacy of a grievance. Part I outlines the PLRA, with special emphasis on its exhaustion requirement, along with criticisms of this requirement, and describes the general characteristics of prisoners pursuing legal claims in federal court. Part II analyzes the inconsistency in approaches that courts use to resolve the exhaustion inquiry in situations where the relevant prison system has not spelled out the level of detail required in a grievance. Finally, Part III argues that courts should apply *Strong*'s "object intelligibly" standard in such situations of administrative silence.

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that the grievances must contain the sort of information that the administrative system requires." (quoting *Pozo*, 286 F.3d at 1025)).

22. For the sake of brevity, references throughout this Note to "pleading or articulating legal theories" also cover the act of spelling out the elements of legal claims. Thus, the thesis of this Note is that in situations where the administrative rulebook is silent as to grievance specificity, prisoners should only be required to "object intelligibly" in their grievances and should be expected neither to plead legal theories *nor* to spell out the elements of legal claims. For this Note's definition of the term "administrative silence," see supra note 18.

23. Courts have also held grievances inadequate for failing to state that the act complained of infringed the prisoner's First Amendment rights. See, e.g., Dye v. Kingston, 130 F. App'x 52, 56 (7th Cir. 2005) (finding prisoner's "mere listing of missing items in his grievance did not give sufficient notice to prison officials that he was contending that not having access to the missing Bibles was impeding his free exercise of his religion"); Doss v. Maples, No. 1:12-cv-00005-SWW-JTR, 2012 WL 3762452, at *2–*3 (E.D. Ark. Aug. 3, 2012) (dismissing First Amendment claim for failure to exhaust even though grievance provided officials adequate notice of issue being grieved). For reasons discussed infra note 153, however, such cases are not discussed in this Note.

24. See infra Part II.C.1 (examining such instances).

25. See Ellison v. N.H. Dep't of Corr., No. 07-cv-131-JL, 2009 WL 424535, at *5 (D.N.H. Feb. 19, 2009) ("[T]he vast majority of claims subject to the PLRA exhaustion requirement are brought by pro se plaintiffs . . . ."); Barbara Belbot, Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?, 84 Prison J. 290, 302 (2004) ("The vast majority of prisoner civil rights lawsuits are filed pro se." (citations omitted)).

I. THE PLRA AND THE NATURE OF PRISON LITIGATION

This Note focuses on the inconsistency of standards applied by the federal courts in determining whether an inmate grievance satisfies the PLRA's exhaustion requirement in instances where the relevant prison system has not articulated clear specificity requirements. Such a discussion calls for a basic understanding of the PLRA and prison litigation more generally. Part I.A discusses the principal factors motivating the enactment of the PLRA. Part I.B examines the statute's exhaustion requirement and criticisms of it. Part I.C details the common characteristics of prisoner-plaintiffs.

A. *Responding to the Prisoner-Litigation Explosion*

The PLRA was motivated by several factors. First, it was meant to address what critics considered federal-court micromanagement of state and local correctional facilities.[26] When the PLRA was passed, many state prisons were operating under consent decrees or court orders that had been monitored by the federal courts for at least twenty years.[27] Some of these decrees—such as those establishing standards for disciplining inmates and using force against them—ordered remedies that went beyond what the Constitution mandated.[28]

Perhaps most importantly, the PLRA was meant to address the soaring growth in § 1983[29] inmate litigation—which challenges the conditions of prison confinement—in federal district courts.[30] Relatedly, the

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26. See 141 Cong. Rec. 27,042 (1995) (statement of Sen. Robert Dole) (explaining PLRA would "restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems").

27. See Belbot & Hemmens, supra note 10, at 221 (discussing concerns motivating enactment of PLRA). For example, prisons in Georgia, Texas, Puerto Rico, and Rhode Island had been functioning under long-term court intervention. See Belbot, supra note 25, at 307 (attributing intervention to lawsuits challenging constitutionality of living conditions in those states' institutions).

28. See Belbot, supra note 25, at 306–08 (providing examples of consent decrees).

29. 42 U.S.C. § 1983 (2006) reads:

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

30. This growth totaled a remarkable 1,153% increase from 1972 to 1996. Mariah L. Passarelli, Broken Gate? A Study of the PLRA Exhaustion Requirement: Past, Present, and Future, 47 Crim. L. Bull. 95, 99–100 (2011). Notably, this rate of increase was more than double the rate of growth experienced by the nation's overall prison population during the same period. Id.

PLRA was intended to diminish the amount of frivolous prisoner litigation, especially by recreational "frequent filers,"[31] in the federal courts.[32]

The PLRA restricts prisoner litigation in a number of ways. Measures aimed at impeding prisoners' ability to file petitions and have their claims heard before federal courts include: a requirement that prisoners exhaust administrative remedies before filing a lawsuit;[33] a significant reduction in attorneys' fees for successful litigants;[34] a ban on claims based on mental or emotional anguish without a prior showing of physical injury;[35] the imposition of filing fees;[36] and the revocation of earned release credits of prisoners who file claims for malicious purposes or solely to harass the defendant, or who testify falsely or otherwise knowingly present false evidence or information to the court.[37]

B. *Exhaustion of Administrative Remedies*

Of the aforementioned restrictions, the major mechanism through which the PLRA impedes prisoners' access to the courts is its exhaustion

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31. This term has been used to describe prisoners that file not only a very large number of cases, but an especially high proportion of *meritless* cases. See Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1648–49 (2003) [hereinafter Schlanger, Inmate Litigation] (discussing PLRA's "frequent filer provisions").

32. Judges, state attorneys general, and legal scholars had raised concerns about the overwhelming number of frivolous prisoner civil-rights cases filed in the federal courts. See Henry F. Fradella, A Typology of the Frivolous: Varying Meanings of Frivolity in Section 1983 Prisoner Civil Rights Litigation, 78 Prison J. 465, 465–66 (1998) (discussing general concern about frivolous nature of prisoner civil-rights cases). In *Gabel v. Lynaugh*, the Fifth Circuit found that within a four-month period, one of every six appeals on its docket was a state prisoner's pro se civil-rights case, of which "[a] high percentage . . . [were] meritless, and many [were] transparently frivolous." 835 F.2d 124, 125 n.1 (5th Cir. 1988). By 1995, ludicrous stories of prisoners suing for things such as bad haircuts, broken cookies, and the provision of chunky peanut butter when smooth had been requested were a staple of newspaper articles. See, e.g., Liz Halloran, Quayle, Others Debate What Ails Legal System, Hartford Courant (Jan. 29, 1995), http://articles.courant.com/1995-01-29/news/9501290253_1_president-s-lawyer-ralph-nader-robert-s-bennett (on file with the *Columbia Law Review*) (discussing "suit filed by a prisoner who got chunky-style peanut butter instead of the creamy-style he had requested"); see also Kermit Roosevelt III, Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error, 52 Emory L.J. 1771, 1772 (2003) (giving examples of patently frivolous claims). But see Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brook. L. Rev. 519, 520 (1996) (explaining attorneys general "exaggerated" when they adopted tactic condemning all prison litigation as frivolous).

33. 42 U.S.C. § 1997e(a). This exhaustion requirement is the focus of this Note.

34. Id. § 1997e(d).

35. Id. § 1997e(e).

36. 28 U.S.C. § 1914 (2012).

37. Id. § 1932. This action is available in a civil action brought by the prisoner, but not in a proceeding brought by the government referring to past civil actions. Further, this provision is rarely invoked. See John Boston, The Prison Litigation Reform Act 300–01 (Feb. 20, 2012) (unpublished manuscript), available at http://www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf (on file with the *Columbia Law Review*) (discussing revocation of earned release credit).

requirement.[38] It provides, "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted*."[39] Thus, if a prison has an internal administrative-grievance system through which a prisoner can seek to correct a problem, the prisoner must utilize the system before filing a claim under § 1983 or any other federal law.[40] If a grievant files a lawsuit without having first exhausted such remedies, the court must dismiss the suit or delay considering it until after the exhaustion requirement is met.[41] This section discusses the PLRA's exhaustion requirement in detail. Part I.B.1 describes the scope of the exhaustion requirement. Part I.B.2 explores criticisms of the requirement.

1. *Scope of the Exhaustion Requirement.* — The PLRA's exhaustion requirement quickly gave rise to arguments concerning the meaning of "administrative remedies as are available."[42] In *Booth v. Churner*, the Supreme Court held that the applicability of the exhaustion requirement turns on whether the grievance system will *address* the prisoner's complaint, not on whether it actually provides the remedy that the prisoner seeks.[43] Thus, prisoners must utilize their prison's grievance procedures even if the relief they seek is unavailable through those procedures.

In *Porter v. Nussle*,[44] decided only a year after *Booth*, the Supreme Court overruled the Second Circuit's line of cases, which held that exhaustion is only required in challenges to "conduct which was either clearly mandated by a prison policy or undertaken pursuant to a

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38. See supra note 21 (discussing Supreme Court's understanding of congressional purpose behind § 1997e(a)). Commentators have described the exhaustion requirement as "[t]he most significant procedural obstacle to prisoner access to the courts under the PLRA." Jessica Feierman, Creative Prison Lawyering: From Silence to Democracy, 11 Geo. J. on Poverty L. & Pol'y 249, 260 (2004); see also Borchardt, supra note 12, at 484 ("Of all the roadblocks the PLRA placed between prisoners and the courts, the exhaustion requirement . . . came to pose the highest hurdle." (internal quotation marks omitted)).

39. 42 U.S.C. § 1997e(a) (emphasis added).

40. This means that the inmate must comply with the rules established by the state with respect to the form, timeliness, and content of grievances. See Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002) (explaining unless prisoner completes the administrative process by following state's rules for form and timeliness of action, exhaustion has not occurred).

41. See Roosevelt, supra note 32, at 1784 ("The hallmark of an exhaustion requirement is that it delays a federal suit *until the required procedures have been invoked*." (emphasis added)).

42. 42 U.S.C. § 1997e(a). As of 2009, the Supreme Court had granted certiorari four times to clarify the scope of the PLRA's administrative-exhaustion requirement: Jones v. Bock, 549 U.S. 199 (2007); Woodford v. Ngo, 548 U.S. 81 (2006); Porter v. Nussle, 534 U.S. 516 (2002); and Booth v. Churner, 532 U.S. 731 (2001).

43. See 532 U.S. at 741 ("[W]e think that Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures.").

44. 534 U.S. 516.

systematic practice."[45] Specifically, the Court held that exhaustion is required in "*all* inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[46]

Then, in *Woodford v. Ngo*, the Supreme Court held that "the PLRA exhaustion requirement requires *proper* exhaustion,"[47] which includes compliance with the prison's internal filing deadlines and "other critical procedural rules" as a precondition to filing a federal lawsuit.[48] *Ngo* explained that compliance with state procedural rules is necessary to achieve "[t]he benefits of exhaustion [that] can be realized only if the prison grievance system is given a fair opportunity to consider the grievance."[49]

Finally, in *Jones v. Bock*, the Court held that (1) failure to exhaust is an affirmative defense under the PLRA, and inmates are not required to "specially plead or demonstrate exhaustion in their complaints"; (2) compliance with prison grievance procedures is all that is required to "properly exhaust" a claim under the PLRA, and failure to name an individual in the initial grievance who is later sued is not inadequate if the relevant procedures do not require individuals to be identified by name; and (3) the PLRA does not follow the total exhaustion rule, so a claimant's failure to exhaust some, but not all, possible claims will not necessarily lead to dismissal of the entire complaint.[50] By setting guidelines for what a prisoner must do to properly exhaust prison grievance procedures, *Bock* refined the parameters of the PLRA's exhaustion requirement.

2. *Criticisms of the Exhaustion Requirement.* — Notwithstanding the aforementioned Supreme Court rulings, federal courts continue to struggle with how to treat arguments by prison officials that plaintiff-prisoners failed to properly exhaust administrative remedies. This struggle has generated intense criticism.[51] Most pertinent to this Note is the criticism that the mandatory exhaustion requirement bars meritorious claims in situations where the penal institution in question has not estab-

45. Marvin v. Goord, 255 F.3d 40, 42–43 (2d Cir. 2001) (footnote omitted); see also Nussle v. Willette, 224 F.3d 95, 106 (2d Cir. 2000) (holding claims applying only to plaintiff did not relate to general "prison conditions" and thus were not subject to PLRA's exhaustion requirement), overruled by *Porter*, 534 U.S. 516.

46. *Porter*, 534 U.S. at 532 (emphasis added).

47. 548 U.S. at 93 (emphasis added).

48. Id. at 90.

49. Id. at 95.

50. Jones v. Bock, 549 U.S. 199, 199, 216, 218, 223 (2007).

51. Cf. Schlanger, Inmate Litigation, supra note 31, at 1697 ("[T]he PLRA is currently sufficiently flawed, even in its own context, that any borrowing from its provisions should proceed with care and skepticism."). See generally, e.g., Cindy Chen, Note, The Prison Litigation Reform Act of 1995: Doing Away with More than Just Crunchy Peanut Butter, 78 St. John's L. Rev. 203 (2004) (arguing exhaustion requirement does great injustice to meritorious claims).

lished a clear grievance procedure.[52] In some instances, while such procedures may in fact exist, the relevant grievance system does not *appear* to cover the complaint the prisoner seeks to make.[53] Individuals confined in such institutions may not be able to exhaust the available remedies because they do not know what exhaustion entails and instead will file suit.[54] In such situations, defendant officials can raise (and the court can find) nonexhaustion as grounds for dismissal and thus preclude relief for a meritorious claim.[55]

Also relevant is the criticism that the exhaustion requirement effectively leaves prisoners' rights in the control of prison authorities who have a vested interest in obstructing lawsuits and avoiding adverse judgments against themselves or their colleagues.[56] Critics maintain that prison officials are "undoubtedly interested in shielding themselves from the consequences of meritorious claims of constitutional deprivation"[57] and that the PLRA gives them broad discretion to promulgate overly complex and rigid grievance procedures unconducive to exhaustion.[58]

Additionally, despite the PLRA's goal to cut back on frivolous suits, others argue that the exhaustion requirement has actually impeded judi-

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52. See Chen, supra note 51, at 225 (arguing mandatory nature of exhaustion requirement bars meritorious claims where penal institution does not have delineated grievance procedure).

53. Id.

54. For example, a court dismissed a prisoner's claim that he did not file a grievance because prison staff told him that his rape complaint could not be grieved through the facility's formal grievance process. Mendez v. Herring, No. 05-1690 PHX/JAT, 2005 WL 3273555, at *2 (D. Ariz. Nov. 29, 2005); see also Margo Schlanger & Giovanna Shay, Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act, 11 U. Pa. J. Const. L. 139, 147 (2008) (discussing difficulty of accessing administrative remedies).

55. In *Benfield v. Rushton*, for example, the plaintiff-inmate brought a § 1983 action alleging that he was denied protective custody and mental health treatment following two alleged rapes at two different correctional facilities. No. 8:06-2609-JFA-BHH, 2007 WL 30287, at *1 (D.S.C. Jan. 4, 2007). The plaintiff admitted that he had not filed any grievances regarding his allegations, explaining that he did not think rape was a grievable issue. Nonetheless, the court dismissed the suit on nonexhaustion grounds. Id. at *4. The *Benfield* decision, thus, indicates that while prisoner litigation may be meritorious, the exhaustion requirement can make it very difficult to obtain relief.

56. See Borchardt, supra note 12, at 489 (arguing exhaustion requirement "places prisoners' rights in the hands of prison authorities who have a vested interest in impeding lawsuits"); see also Schlanger & Shay, supra note 54, at 150 (explaining prison authorities have "understandable interest in avoiding adverse judgments against themselves or their colleagues").

57. Borchardt, supra note 12, at 489.

58. Id.; see also Schlanger & Shay, supra note 54, at 149 ("[T]he more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit."). This criticism is further explored in Part III.A.4.

cial efficiency rather than promoted it.[59] A dismissal without prejudice,[60] for example, allows the plaintiff to refile the same claim, requiring the district court to review the same case twice when it might otherwise have determined that the case lacked merit the first time.[61] This wastes judicial and legal resources, which is exactly what the PLRA was meant to prevent.[62]

Finally, the delay of certain prisoner claims for failure to exhaust may in effect be a denial of relief. One of the most common prisoner complaints in federal court is inadequate medical care,[63] and, for an inmate seeking injunctive relief for such a claim, time is of the essence.[64] Requiring such a prisoner to exhaust all administrative options is effectively to deny him or her relief. This problem is exacerbated by the fact that a prisoner's claim may be precluded altogether if the statute of limitations for the § 1983 claim expires before the prisoner has exhausted all administrative remedies.[65] While most decisions to date hold that the statute of limitations is, in fact, tolled while the prisoner-litigant is exhausting administrative remedies,[66] these limitations vary from state to

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59. See, e.g., Chen, supra note 51, at 218–22 (discussing consequences of exhaustion requirement and noting "mandatory exhaustion requirement has not significantly improved judicial efficiency, and in some areas, it may have actually impeded judicial efficiency").

60. See William C. Collins, Prisoner Access to the Courts, *in* Prison and Jail Administration: Practice and Theory, supra note 12, at 500, 507 (defining "failure to exhaust" and explaining dismissal will be "without prejudice" (internal quotation marks omitted)).

61. A prisoner who has brought three actions or appeals "while incarcerated or detained in any facility" that were dismissed as frivolous, malicious, or failing to state a claim for relief may not "bring a civil action or appeal a judgment in a civil action or proceeding under this section"—that is, file in forma pauperis—unless he or she is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g) (2012). This provision of the PLRA is commonly known as the "three strikes" provision. E.g., Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996) (referring to § 1915(g) as "three strikes provision" soon after enactment of PLRA (internal quotation marks omitted)).

62. See supra Part I.A (discussing purposes of PLRA).

63. Howard B. Eisenberg, Rethinking Prisoner Civil Rights Cases and the Provision of Counsel, 17 S. Ill. U. L.J. 417, 439 (1993); see also Schlanger, Inmate Litigation, supra note 31, at 1571 (explaining "four leading topics of correctional-conditions litigation in federal court are physical assaults (by correctional staff or by other inmates), inadequate medical care, alleged due process violations relating to disciplinary sanctions, and more general living-conditions claims").

64. Professor Howard B. Eisenberg has explained that prisoners who have repeatedly been denied some perceived type of care "will file a civil rights action in desperation" to obtain it. Eisenberg, supra note 63, at 440. Subsequently, the prisoner will receive that treatment, although the prison administrators will assert that the treatment was unrelated to any litigation. Id.

65. Federal courts apply the statute of limitations of the relevant state for § 1983 claims. Wilson v. Garcia, 471 U.S. 261, 266–67 (1985).

66. See, e.g., Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011) ("Our sister circuits that have squarely confronted the question presented here have answered in the affirmative, holding that tolling is applicable during the time period in which an inmate is

state.[67] Given the complex nature of certain grievance procedures and the short statutes of limitations in various states, prisoner-litigants with meritorious claims may be precluded from ever bringing suit.[68]

C. *Common Characteristics of Prisoner-Plaintiffs*

Criticisms of the PLRA's exhaustion requirement are especially unsurprising given that a fundamental principle of American law is that financial standing should neither determine one's access to courts nor substantially influence the outcomes of cases.[69] Namely, compared to other litigants, prisoners—most of whom choose to proceed pro se only because they cannot afford full legal representation[70]—are at an inherent disadvantage when they try to air their grievances.[71]

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actively exhausting his administrative remedies."); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) ("[W]e agree with the uniform holdings of the circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process.").

67. They are typically one, two, or three years after the incident that is the subject of the suit. See David Fathi, Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the United States 13 (Benjamin Ward et al. eds., 2009), available at http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf (on file with the *Columbia Law Review*) (discussing effect of statutes of limitations on exhaustion). Some courts have held that the period is *not* tolled under a particular state's law. See, e.g., Adams v. Wiley, No. 09-CV-00612-MSK-KMT, 2010 WL 551394, at *2 (D. Colo. Feb. 10, 2010) ("Without a showing of circumstances warranting equitable tolling under Colorado's relatively restrictive definition of that doctrine, the Court finds that the Plaintiff's action is untimely."); Smith v. Wilson, No. 3:09-CV-133, 2009 WL 3444662, at *3–*4 (N.D. Ind. Oct. 22, 2009) (holding plaintiff was not entitled to tolling while he exhausted administrative remedies because state law limited statutory tolling to persons less than eighteen years of age, mentally incompetent, or out of the United States).

68. Courts have generally not excused failure to meet even very short grievance filing deadlines, despite the existence of extenuating circumstances. See, e.g., Latham v. Pate, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007) (dismissing prisoner's lawsuit alleging he was beaten by staff because prisoner had not initiated grievance process within two business days of incident, despite prisoner's claim he was placed in segregation immediately following assault, where officers did not provide him with grievance forms); Harris v. Walker, No. 5:04CV98-JCS, 2006 WL 2669050, at *3–*4 (S.D. Miss. Sept. 18, 2006) (deciding prisoner who filed his grievance late, after being stabbed and having kidney removed in hospital, failed to exhaust); Steele v. N.Y. State Dep't of Corr. Servs., No. 99 Civ. 6111(LAK), 2000 WL 777931, at *1 (S.D.N.Y. June 19, 2000) (dismissing suit for failure to exhaust, despite fact inmate had been hospitalized outside institution during entire grievance filing period).

69. See Drew A. Swank, The Pro Se Phenomenon, 19 BYU J. Pub. L. 373, 374–75 (2005) ("The American legal ideal is that both the wealthy and the pauper could have access to the courts and could be treated equally with the resulting decisions being as fair as possible."); see also Tiffany Buxton, Note, Foreign Solutions to the Pro Se Phenomenon, 34 Case. W. Res. J. Int'l L. 103, 105 (2002) (attributing pro se phenomenon to Constitution and its Sixth Amendment guarantees).

70. See Buxton, supra note 69, at 105 (explaining, with respect to general population, "[t]he prohibitive cost of obtaining counsel remains the primary reason for the increased number of litigants appearing *pro se*"); see also Free v. United States, 879 F.2d 1535, 1539 (7th Cir. 1989) ("[T]he vast majority of prisoners are indigent,

Prisoners' access to telephones,[72] the Internet,[73] and print media[74] is severely limited. To make matters worse, the limited resources that *are* available to prisoners are often inadequate to allow prisoners to advocate for themselves effectively; libraries may have limited hours, for example, or case reporters may be missing important pages.[75] In numerous instances, prisoners must also overcome *personal* obstacles to proceeding pro se. Many enter prison with literacy and language deficits[76] that

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necessitating the filing of their complaints *in forma pauperis* . . . ."). In 2010, pro se prisoners filed 66.6% of the pro se cases filed in federal district courts and 51.7% of the petitions filed in the circuits. Michael W. Martin, Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis, 80 Fordham L. Rev. 1219, 1222 (2011).

71. See Alexander v. Hawk, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998) ("Prisoners' complaints about prison conditions are often filed pro se and generally contain a lengthy layman's recitation of complaints about the prison without articulating clearly the legal causes of action in issue . . . ."); Ira P. Robbins, Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts, 23 Geo. J. Legal Ethics 271, 273 (2010) (explaining pro se prisoners are disadvantaged compared with other litigants because "[t]hey lack many of the resources enjoyed by non-prisoner litigants").

72. See Ben Iddings, Comment, The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?, 8 N.C. J.L. & Tech. 159, 162 (2006) ("[C]ollusive arrangements between private phone companies and state prison systems encourage price gouging"); Peter R. Shults, Note, Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use, 92 B.U. L. Rev. 369, 370 (2012) ("The telephone is an essential way for many prisoners to communicate with the outside world, yet prisoner telephone calls cost much more than telephone calls between two nonprisoners.").

73. See Benjamin R. Dryden, Comment, Technological Leaps and *Bounds*: Pro Se Prisoner Litigation in the Internet Age, 10 U. Pa. J. Const. L. 819, 831 (2008) ("Only a few states offer any electronic legal research at all, but do so using DVD-based software rather than an Internet connection."); Titia A. Holtz, Note, Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet, 67 Brook. L. Rev. 855, 860 (2002) (quoting inmate in Washington who has analogized prisoner access to Internet to "sitting beside the information superhighway watching the traffic go by" (internal quotation marks omitted)).

74. While the Supreme Court in Bounds v. Smith, 430 U.S. 817 (1977), held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries," id. at 828, in actuality, prison law libraries can be much more limited than was contemplated in *Bounds*. John R. Shaw, Compliance with the Constitution, *in* Prison and Jail Administration: Practice and Theory, supra note 12, at 519, 522; see also John Boston & Daniel E. Manville, Prisoners' Self-Help Litigation Manual 196 (4th ed. 2010) (explaining while prisoners have First Amendment right to read, prison officials have long history of censoring publications).

75. See Robbins, supra note 71, at 279 (discussing generally prisoners' lack of access to resources); see also Boston & Manville, supra note 74, at 239 (explaining some prison systems have abolished or stopped updating their prison law libraries).

76. See Chen, supra note 51, at 215 ("A great deal of prisoners do not have adequate schooling, have learning disabilities, and are functionally illiterate." (internal quotation marks omitted)); see also Michele LaVigne & Gregory J. Van Rybroek, Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters, 15 U. Cal. Davis J. Juv. L. & Pol'y 37, 44 (2011) ("[S]tudies of correctional institutions have revealed a high rate of communication and language impairments among inmates. In some instances, the rate of severe disorders within adult

restrict their ability to collect evidence and effectively advocate on their own behalf.[77] Furthermore, many prisoners suffer from mental-health issues.[78]

Such problems are not unique to inmates filing lawsuits about prison conditions: Pro se prisoners *on the whole* face significant, and often insurmountable, barriers to court access.[79] However, in the particularly complex regime created by the PLRA's exhaustion requirement, these disadvantages are magnified for prisoners challenging prison conditions.[80] The Supreme Court has cautioned that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[81] In light of this state-

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prisons has been estimated to be at least *four to five times* that of the general population." (citation omitted)).

77. The court in *Hadix v. Johnson* explained that "[i]lliteracy or inability to use (read and write) and understand the English language precludes twenty to fifty per cent of the inmates from using any law library materials." 694 F. Supp. 259, 269 (E.D. Mich. 1988).

78. See Martin, supra note 70, at 1226 (discussing steady rise in mental-health issues in prison population); see also Alana Horowitz, Mental Illness Soars in Prisons, Jails While Inmates Suffer, Huffington Post (Feb. 4, 2013, 3:33 PM), http://www.huffingtonpost.com/2013/02/04/mental-illness-prisons-jails-inmates_n_2610062.html (on file with the *Columbia Law Review*) ("[P]eople with mental illness are overrepresented in the criminal justice system by rates of two to four times the normal population."). The most recent study performed by the Justice Department's Bureau of Statistics revealed that over half of all prison and jail inmates have some form of mental illness. See Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Mental Health Problems of Prison and Jail Inmates 1, 3 (2006), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf (on file with the *Columbia Law Review*). This figure is particularly alarming because the rate of mental illness within the general population is closer to one in ten. Id.

79. See generally Robbins, supra note 71. In his discussion of the disadvantages that pro se prisoners face in comparison to other litigants, Robbins differentiates pro se prisoners *generally* from other litigants; he does not restrict his discussion to pro se prisoners filing lawsuits about prison conditions. Id. at 274 ("This Article . . . provides information regarding the current hurdles facing prisoner litigants . . . ."). Similarly, Dryden discusses the importance of providing *all* pro se prisoners internet access to help them with legal research. See Dryden, supra note 73, at 819 ("[T]his Comment argues that the unenumerated constitutional right of access to courts entails that prisons provide *pro se* prisoner litigants with Internet access to help them with legal research.").

80. For cases substantiating this notion, see, for example, Georgacarakos v. Watts, 147 F. App'x 12, 14–15 (10th Cir. 2005) (rejecting plaintiff's plea to appoint counsel if his exhaustion presentation was inadequate, in light of his lack of "means and sophistication to comply with the court's requirement of evidence of exhaustion"); Davis v. Corr. Corp. of Am., 131 F. App'x 127, 128–29 (10th Cir. 2005) (rejecting argument that plaintiff's educational deficiencies should excuse failure to exhaust); Robertson v. Dart, No. 07 C 4398, 2009 WL 2382527, at *3 (N.D. Ill. Aug. 3, 2009) (denying summary judgment on exhaustion where illiterate plaintiff alleged staff member gave him wrong information about how to mark form to appeal his grievance decision); Williams v. Pettiford, No 9:07-0946-RBH, 2007 WL 3119548, at *2–*3 (D.S.C. Oct. 22, 2007) (rejecting argument that dyslexic and mentally ill prisoner was not required to exhaust).

81. Love v. Pullman Co., 404 U.S. 522, 527 (1971); see also Haines v. Kerner, 404 U.S. 519, 520 (1972) (explaining prisoner complaints, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers"). While these two

ment, and the personal obstacles prisoners face, one cannot help but wonder why certain courts facing administrative silence continue to hold grievances inadequate for failing to plead legal theories.

II. VARIANT APPROACHES TO RULEBOOK SILENCE

Notwithstanding the Supreme Court's holding in *Bock* that compliance with prison grievance procedures is all that is required by the PLRA to properly exhaust,[82] most grievance systems do not spell out the level of detail required in prisoner grievances to satisfy exhaustion.[83] While some courts have stated that legal theories need not be exhausted, others have insisted on what amounts to pleading legal theories in certain kinds of grievances. This Part analyzes federal courts' approaches to grievance specificity in instances where the grievance policy is silent about the level of detail required in a grievance or the requirements are very general.[84] Part II.A discusses the frequent failure of prison grievance systems to articulate the level of detail required in a grievance. Part II.B studies the "object intelligibly" standard established by the Seventh Circuit in *Strong v. David*[85] and the endorsement of this standard by other circuits. Finally, Part II.C explains the impact of the "object intelligibly" standard.

A. *Vague or Nonexistent Specificity Requirements: A Common Plight*

Section 1997e(a) does not specify how detailed a prisoner's grievance must be to satisfy exhaustion. The Supreme Court has stated: "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[86] In actuality, however, most grievance systems provide little guidance as to the level of detail required in a grievance to

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cases were decided at a time when the prison population was much lower, recent decisions have referenced them. See, e.g., Tuckel v. Grover, No. 10-cv-00215-KLM-MEH, 2012 WL 5904209, at *3 (D. Colo. Nov. 19, 2012) (citing *Haines* for proposition that courts must construe filings of pro se litigant liberally); Flory v. Claussen, No. C06-1046-RSL-JPD, 2006 WL 3404779, at *4 (W.D. Wash. Nov. 21, 2006) (quoting *Love v. Pullman Co.* in refusing to find nonexhaustion where plaintiff had followed officials' advice as to which remedy to use).

82. Jones v. Bock, 549 U.S. 199, 218 (2007). For a more detailed discussion of *Bock*, see supra text accompanying note 50.

83. The Michigan grievance system at issue in *Bock*, for example, required both that grievances "be as specific as possible" and that they be "brief and concise," but contained no specific requirements for content. *Bock*, 549 U.S. at 218.

84. As explained above, see supra note 18, the term "administrative silence" as used in this Note refers both to situations in which the prison regulation has not articulated a standard for factual specificity *and* situations where the prison has articulated such a standard, but the standard is unclear.

85. 297 F.3d 646 (7th Cir. 2002).

86. *Bock*, 549 U.S. at 218.

satisfy the PLRA's exhaustion requirement.[87] This Note does not study the grievance procedures administered in each state or each prison system,[88] but rather makes generalizations about grievance specificity requirements to provide a better sense of the type of information (or lack thereof) that prisoners are required to provide in grievance forms.[89]

As was brought to the Supreme Court's attention in the *Bock* litigation, prison grievance procedures generally require only a short and plain statement of a prisoner's complaint.[90] One formulation of grievance instructions necessitates that the inmate give only a brief description of the grievance in the grievance form.[91] In some rare instances, all that is provided on the grievance form is a blank writing space.[92]

Another category of grievance procedures seemingly provides more guidance but, in substance, is equally ambiguous. Such superficial guidance stems from the fact that these grievance forms go a step further and

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87. See Brief of Amicus Curiae American Civil Liberties Union et al. in Support of Petitioners at 9 n.6, *Bock*, 549 U.S. 199 (No. 05-7058), 2006 WL 2364683, at *9 [hereinafter *Bock* Amicus Brief] ("Generally, prison grievance procedures require only a short and plain statement of a prisoner's complaint.").

88. As explained by Derek Borchardt, grievance procedures are promulgated in all fifty states and many individual correctional facilities. Thus, within a single state, prisoners may be subject to multiple grievance procedures depending on the facility in which they are being held. See Borchardt, supra note 12, at 490–91.

89. Importantly, many grievance policies and forms are not published in a readily available form. Those referenced in this discussion represent the information currently available on individual states' department of corrections websites or provided by Margo Schlanger in her collection of prison and jail grievance policies, which she maintains is current. See Margo Schlanger, Prison and Jail Grievance Policies, U. Mich. L. Sch., http://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonGrievanceProceduresandSamples.aspx (on file with the *Columbia Law Review*) (last visited Apr. 8, 2014) [hereinafter Schlanger, Grievance Policies]. However, grievance policies may be revised frequently, so the policies and forms referenced in this section may not be the same as those currently employed in correctional facilities. Further, while Part II.A makes reference to "categories" or "types" of grievance procedures and forms, these classifications are not officially recognized, but rather are based on the author's observations of various states' grievance procedures and forms.

90. See *Bock* Amicus Brief, supra note 87, at 9 n.6 (referencing prison grievance procedures in various states).

91. See, e.g., Ind. Dep't of Corr., Policy and Administrative Procedures No. 00-02-301, Offender Grievance Process, Form No. 45471, Formal Grievance (2005), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/Indiana_Policy.pdf (on file with the *Columbia Law Review*) (asking prisoner to "[p]rovide a brief, clear statement of your grievance"); N.H. Dep't of Corr., Policy and Procedure Directive No. 1.16, Grievances and Complaints by Persons Under DOC Supervision, Attachment 3, Grievance Form (2012), available at http://www.nh.gov/nhdoc/documents/1-16.pdf (on file with the *Columbia Law Review*) (asking for "Brief Description of Grievance").

92. See, e.g., Fla. Dep't of Corr., Form No. DC1-303, Request for Administrative Remedy or Appeal (2013), available at http://www.dc.state.fl.us/oth/inmates/DC1-303.docx (on file with the *Columbia Law Review*) (signaling only that blank space is for "Inmate Grievance").

require not only a statement of the actual grievance but also a suggested *solution* to the problem.[93] While these forms are certainly wordier, they, too, are otherwise silent about the level of detail required.

Even grievance forms that provide explicit instructions about what sort of information to include can put prisoners at risk of nonexhaustion. While such forms may require that the prisoner provide pertinent documentation or information such as witness names, for example, they remain vulnerable to varying interpretations among grievants.[94] For instance, the *type* of documentation that fulfills such a requirement remains unclear.

Ultimately, none of the aforementioned grievance procedures prescribe the necessary degree of factual particularity, and there is certainly no indication in any of them that prisoners are expected to plead legal theories. Absent meaningful guidance about the specificity with which a prisoner must present an administrative grievance in order to preserve the right to assert a related claim in federal court, courts enjoy open

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93. See, e.g., Colo. Dep't of Corr., Administrative Regulation No. 850-04, Grievance Procedure, Form No. 850-04B, Offender Grievance Form (2012), available at http://www.doc.state.co.us/sites/default/files/ar/0850_04_121512.pdf (on file with the *Columbia Law Review*) (requiring prisoner to "[c]learly state basis for grievance" and "[s]tate specifically what remedy [he or she is] requesting"); Haw. Dep't of Pub. Safety, Corrections Administration Policy & Procedures No. COR.12.03, Inmate Grievance Program, Form No. PSD 8215, Administrative Remedy Form (2011), available at http://dps.hawaii.gov/wp-content/uploads/2012/10/COR.12.03.pdf (on file with the *Columbia Law Review*) (requesting "Statement of Complaint/Grievance" and "Resolution Sought"); Idaho Dep't of Corr., Policy No. 316, Appendix B, Form No. 316.04.01.001, Grievance and Appeal Form (2011), available at http://www.idoc.idaho.gov/content/form/1327 (on file with the *Columbia Law Review*) (providing section for "brief description" of grievant's problem and another for suggested solution); Ky. Dep't of Corr., Policies and Procedures No. 14.6, Inmate Grievance Procedure, Attachment II, Inmate Grievance Form (2013), available at http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH14/14-7%20Sexual%20Abuse-Assault%20Prevention%20and%20Intervention%20Programs.pdf (on file with the *Columbia Law Review*) (requiring "Brief Statement of the Problem" and "Action Requested"); Pa. Dep't of Corr., Policy Statement No. DC-ADM 804, Inmate Grievance System, Attachment 1-A, Official Inmate Grievance (2010), available at http://www.portal.state.pa.us/portal/server.pt/document/919465/804_inmate_grievances_pdf?qid=40756961&rank=1 (on file with the *Columbia Law Review*) ("Provide a brief, clear statement of your grievance . . . . State all relief that you are seeking.").

94. See, e.g., N.M. Corr. Dep't, Policy No. CD-150500, Inmate Grievances, Form No. CD-150501.1, Inmate Grievance (2012), available at corrections.state.nm.us/policies/docs/CD-150500.pdf (on file with the *Columbia Law Review*) (requiring grievant to "[i]nclude documentation and names of any witnesses to support [his or her] claim," but not specifying *type* of documentation); Vt. Dep't of Corr., Policy Directive No. 320.01, Offender Grievance System for Field and Facilities, Form No. 2, Offender/Inmate Grievance Submission Form (2007), available at http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/301-335-facilities-general/320.01.pdf (on file with the *Columbia Law Review*) (ordering grievant to "[s]tate [his or her] grievance, including the names of any witnesses (who, what, when, where)," but not clarifying meaning of "what").

license to devise their own ways of determining the adequacy of prisoner grievances.

Further, the danger with unclear prison rules and regulations generally cannot be ignored. Namely, even *prison officials*—whose job is to enforce the rules—struggle to keep their own rules straight.[95] In *Giano v. Goord*, for example, New York state prison officials argued that the plaintiff's claim that evidence in a disciplinary hearing had been falsified was not exhausted by appealing his disciplinary conviction and that he should have filed a separate grievance on the subject.[96] In a later case presenting the *same* factual situation under the *same* rules,[97] prison officials made precisely the *opposite* argument, claiming that a prisoner who had filed a separate grievance about false disciplinary charges should instead have pursued his claims through a disciplinary appeal.[98]

If prison officials are vulnerable to confusion when faced with vague rules, it is unsurprising that so, too, are prisoners.[99] And while prisoners who actually want relief would help themselves greatly by making their grievances as clear as possible, they are at a standstill when the instructions they are expected to follow provide no guidance about the specificity with which they must describe their grievances in order to preserve their right to assert a claim in federal court.

B. Strong v. David *and the "Object Intelligibly" Standard*

Many courts have yet to articulate a clear standard for assessing whether a grievance satisfies the PLRA's exhaustion requirement in instances where the prison system's grievance procedure does not specify the level of detail required of a grievance. Nonetheless, several courts have taken the view that if the system's policy lacks specific requirements, a grievance satisfies the PLRA's exhaustion requirement "if it alerts the prison to the nature of the wrong for which redress is sought."[100] Drawing an analogy between the contents of an administrative grievance and notice pleading, these courts explain that "[a]s in a notice-pleading

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95. This struggle is unsurprising given the prevalence of unclear rules in prison systems. See, e.g., Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not "clearly identif[y]" proper administrative remedy and there was no "clear route" to administrative review of certain decisions); Abney v. McGinnis, 380 F.3d 663, 668–69 (2d Cir. 2004) (noting lack of instruction in grievance rules for instances where favorable grievance decision is not carried out).

96. 380 F.3d 670, 678 (2d Cir. 2004).

97. Larkins v. Selsky, No. 04Civ.5900RMB(DF), 2006 WL 3548959, at *9 (S.D.N.Y. Dec. 6, 2006) (stating *Giano* "nearly mirrors this [case] on all fours").

98. Id.

99. After all, as explained above, many prisoners enter prison with literacy and language deficits and suffer from mental-health issues. See supra notes 76–78 and accompanying text (describing personal obstacles prisoners must overcome to proceed pro se).

100. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is *object intelligibly* to some asserted shortcoming."[101] This section discusses the grievance pleading standard established by the Seventh Circuit in *Strong v. David* and the prevalence of that standard in the federal court system. For purposes of this Note, it is irrelevant that *Strong* and several of the cases discussed in this section were decided before *Jones v. Bock*. This is because *Bock* did not directly address the extent to which a prisoner must articulate the factual and legal bases for a substantive claim in the prison grievance to satisfy the exhaustion requirement.[102] Further, these decisions are generally consistent with the notion of a notice-pleading standard, and they remain good law where the administrative rules do not demand more. Part II.B.1 introduces the "object intelligibly" standard. Part II.B.2 details the direct endorsement of the standard by other circuits that have explicitly cited it. Finally, Part II.B.3 analyzes indirect endorsement by courts that have not explicitly cited the "object intelligibly" standard.

1. Strong v. David. — In *Strong v. David*, the case that articulated the "object intelligibly" grievance pleading standard, Dion Strong, an inmate at Shawnee Correctional Center, had filed two grievances. The first complained not only about alleged sexual assault by David, a prison doctor, but also the manner in which prison officers responded to that assault.[103]

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101. Id. (emphasis added). The court in *Strong* explained that under a notice-pleading system, "the nature of the claim need only be sketched." Id. at 649. The federal-court notice-pleading standard requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the Supreme Court's subsequent decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), redefined notice pleading and raised the bar for plaintiffs, it is well established that pro se complaints are to be liberally construed. See, e.g., Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009) ("[W]e construe pro se complaints liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers."); Kaba v. Stepp, 458 F.3d 678, 681, 687 (7th Cir. 2006) ("'It is, by now, axiomatic that district courts have a special responsibility to construe *pro se* complaints liberally . . . .'" (quoting Donald v. Cook Cnty. Sheriff's Dep't, 95 F.3d 548, 555 (7th Cir. 1996))). The Supreme Court itself has indicated that a complaint filed pro se, "'however inartfully pleaded,'" is considered less stringently than formal pleadings filed with the aid of counsel. Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)).

102. While one of the issues before the Court in *Bock* was "the level of detail required in a grievance to put the prison and individual officials on notice of the claim," Jones v. Bock, 549 U.S. 199, 205 (2007), the Court explicitly declared, "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the *prison's* requirements, and not the PLRA, that define the boundaries of proper exhaustion," id. at 218 (emphasis added). Thus, since *Strong* and the other cases discussed in this section are concerned with whether the plaintiff's submissions in the grievance process were sufficient in a substantive sense, in light of the relevant grievance procedure's requirements, to exhaust his or her remedies under § 1997e(a), their holdings can be reconciled with *Bock*, even if they were decided before.

103. *Strong*, 297 F.3d at 647. After Strong informed a guard about the assault, a lieutenant in the prison's Internal Affairs division ordered him to take a polygraph test. Id. Strong did so, the examiner concluded that he was lying, and the prison initiated a

This grievance was submitted to and denied by the prison's Administrative Review Board, the prison's final reviewing body for grievances.[104]

After being transferred to a new prison,[105] Strong filed a second grievance, which repeated the first grievance's factual allegations but sought additional relief, including that those involved "be held liable for their actions" and compensation for the pain and suffering he had endured.[106] This grievance was also denied.[107] Left with no other option, Strong filed suit against David and multiple officers involved in the investigation and disciplinary proceedings against him, alleging that these officers had conspired to conceal David's misconduct and punished Strong for refusing to recant his charge against David.[108]

The defendants moved for summary judgment on the ground that Strong had failed to exhaust his administrative remedies prior to filing suit.[109] The district judge dismissed Strong's complaint without prejudice, deeming Strong's first grievance inadequate because it neither spelled out all of the legal theories nor requested the same relief that he sought in court and the second insufficient because it "had not been pursued to conclusion."[110]

On appeal, however, the Seventh Circuit reasoned that the finding that Strong had actually submitted his second grievance to the Administrative Review Board "pulls the rug out from under the district court's decision."[111] Recognizing that the PLRA's exhaustion requirement does not delineate the procedures that prisoners must follow, the court devoted the bulk of its discussion to the issue of what body of law governs the grievance-specificity inquiry.[112] Notably, the defendants did not contend that either Illinois or the Shawnee Correctional Center had implemented any rule or regulation prescribing the contents of a griev-

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disciplinary proceeding against Strong for making false accusations against a staff member. Id. The prison's Adjustment Committee found Strong guilty of the charge, and the prison's warden ordered him to six months of segregation and a transfer to another medium-security facility. Id.

104. Id.

105. As previously explained, a transfer was part of Strong's punishment. Supra note 103.

106. *Strong*, 297 F.3d at 647–48 (quoting grievance).

107. Id. at 648.

108. Id.

109. Id.

110. Id.

111. Id. The appellate judge explained that the "without prejudice" language is misleading: "Strong filed two grievances and pursued both to conclusion; there is no indication that Illinois would allow him to file another. He *has* no more remedies to exhaust, so the defect that the district judge identified is irreparable—if it is a defect at all." Id.

112. Id. at 649 (explaining "[v]ery few courts have addressed what things an administrative grievance must contain" and summarizing different circuits' approaches).

ance or the necessary degree of factual particularity, and the court's research did not locate one.[113] Thus, the court concluded:

> When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.[114]

In light of this newly articulated standard, the court ruled that there was nothing more Strong could have done to sufficiently exhaust the administrative remedies available to him.[115]

Thus, as long as the grievance is not so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally, a prisoner will satisfy the "object intelligibly" standard by simply stating the factual basis for his or her claim.[116] The standard's leniency is highlighted by the Seventh Circuit's subsequent holding in *Riccardo v. Rausch* that a prisoner adequately exhausted a claim against prison staff that he was sexually assaulted through their deliberate indifference with a grievance stating: "[T]he administration don't [sic] do there [sic] job. [A sexual assault] should've never [sic] happen again."[117] Although the court acknowledged this language was ambiguous,[118] it nevertheless

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113. Id. at 650.

114. Id.

115. Id.

116. See, e.g., Westefer v. Snyder, 422 F.3d 570, 580–81 (7th Cir. 2005) (holding plaintiffs sufficiently exhausted complaints about transfers to high-security prison by listing "Transfer from Tamms" as requested remedy in grievances about conditions at prison); Barnes v. Briley, 420 F.3d 673, 678–79 (7th Cir. 2005) (holding grievance stating "I have requested several times to be tested for Tuberculosis, H.I.V., Hepatitis, etc. for the past few years" exhausted as to past failure to respond to such requests by doctor not named in grievance and no longer employed at prison). Further, in its examination of *Strong*'s standard, one court explained:

> A statement in a grievance that medical care being received for an injury is insufficient, whether couched in terms of "inadequacy", "negligence", or "deliberate indifference," will generally satisfy the exhaustion requirement for a subsequently-filed complaint challenging that medical care under the Eighth Amendment. Similarly, a grievance which complains that prison officials are violating a prisoner's "religious rights" or freedom of religion will administratively exhaust a subsequently asserted claim, whether pursued under the First Amendment or a statutory enactment like the Religious Land Use and Institutionalized Persons Act . . . .

Pruitt v. Holland, No. 10-CV-111-HRW, 2011 WL 13653, at *4 (E.D. Ky. Jan. 4, 2011).

117. 375 F.3d 521, 524 (7th Cir. 2004) (alterations in *Riccardo*) (quoting grievance) (internal quotation marks omitted).

118. Id. ("This language is ambiguous."). In fact, the court described the grievance in dispute as "at the border of intelligibility." Id. It explained: "[I]t is hard to imagine much less that a prisoner could do and still alert the prison; yet this grievance *did* complain that Garcia had committed a rape and that 'the administration don't [sic] do there [sic] job.'" Id. (alterations in *Riccardo*) (quoting grievance).

judged it sufficiently specific under *Strong*'s "object intelligibly" standard because "[a] generous construction of this grievance would have induced the prison to consider the possibility that the guards could have prevented this assault."[119] General grievance instructions that do not identify any *particular content* that a grievance must include will not overcome this default rule.[120]

2. *Direct Endorsement by Other Circuits.* — Courts have increasingly adopted the "object intelligibly" standard, relying on *Strong* in reaching their holdings. Not only do they deem the standard sufficient to give prison officials time and opportunity to resolve problems before they escalate into lawsuits—a central purpose of the PLRA exhaustion requirement[121]—but these courts also believe that it is illogical to demand more detail at the administrative stage than is required for complaints in federal court.[122]

In addition to the Seventh Circuit, the "object intelligibly" standard has been explicitly adopted by the Second and Tenth Circuits, and in substance by the Ninth Circuit.[123] For example, in *Johnson v. Testman*, a case before the Second Circuit, plaintiff Lawrence Johnson contended that because under Federal Bureau of Prisons (BOP) regulations the appellate process for disciplinary rulings and for grievances is "one and the same," he had reason to believe that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies.[124] Turning to the exhaustion inquiry, the court recognized that Johnson's initial answer in his disciplinary proceeding did not explicitly

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119. Id.

120. This approach is consistent with *Bock*, discussed supra Part I.B.1, which held that the Michigan grievance policy, which required inmates to "be as specific as possible," but did not prescribe any specific content for grievances, did not require naming of defendants. Jones v. Bock, 549 U.S. 199, 218 (2007). On remand, the district court cited the "as specific as possible" language and the conflicting instruction on the grievance form to be "brief and concise" and held that the plaintiff's complaint that he was forced to work beyond his physical capacities gave fair notice of his claims notwithstanding the absence of detail about his injuries. Jones v. Michigan, 698 F. Supp. 2d 905, 913 (E.D. Mich. 2010).

121. Supra note 21 and accompanying text.

122. See, e.g., Sulton v. Wright, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003) ("It would be illogical to impose a higher technical pleading standard in informal administrative prison grievance proceedings than would be required in federal court.").

123. *Griffin v. Arpaio* adopted the *Strong v. David* approach without citing the "object intelligibly" language. 557 F.3d 1117, 1120 (9th Cir. 2009); see also infra notes 134–138 and accompanying text (discussing *Griffin* in detail).

124. 380 F.3d 691, 696 (2d Cir. 2004). The court did not resolve the issue of whether Johnson was justified in raising his complaint through a disciplinary appeal, rather than by filing a grievance. It viewed this issue as secondary to the determination of whether Johnson's submissions in the disciplinary process were sufficient, in a substantive sense, to exhaust his remedies under § 1997e(a). For purposes of resolving this exhaustion inquiry, the court thus treated the disciplinary appeal as a grievance and conducted its analysis accordingly. Id. at 696–97.

mention the defendant's name.[125] While the court admitted that the adequacy of Johnson's disciplinary appeal was "not manifestly obvious,"[126] it recognized the obstacles faced by pro se litigants and deemed the *Strong* standard appropriate for resolving the exhaustion issue: "Uncounselled inmates navigating prison administrative procedures without assistance cannot be expected to satisfy a standard more stringent than that of notice pleading."[127]

The Tenth Circuit addressed the exhaustion issue in *Kikumura v. Osagie*.[128] In that case, inmate Yu Kikumura, alleging "various Eighth Amendment and state tort claims against a number of different prison officials and the United States,"[129] failed to identify all of the alleged wrongdoers in his grievance.[130] Turning to the purposes of the PLRA's exhaustion requirement to determine the adequacy of the grievance, the court ultimately aligned itself with the Second and Seventh Circuits by directly endorsing the "object intelligibly" standard.[131] In reaching this conclusion, the court was particularly motivated by five key considerations: (1) "inmates typically file their grievances pro se"; (2) "BOP procedures allow prisoners just twenty days from the date of their injury to file a grievance"; (3) prisoners "are allowed less than a page and a half to write out a complaint"; (4) "because they are incarcerated . . . inmates often cannot investigate their own claims to identify the alleged wrongdoers"; and (5) "the BOP administrative remedy program does not provide inmates a procedural mechanism for amending their grievances to identify additional defendants or provide new information about their claims."[132] Thus, the court did not find it "apparent" that inmates must be required to specifically identify the wrongdoers in their initial grievance.[133]

In *Griffin v. Arpaio*, inmate Jermaine Griffin brought a § 1983 action against the prison where he resided, alleging cruel and unusual punish-

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125. Id. at 697.

126. Id.

127. Id. The Second Circuit adopted this rule on policy grounds, noting that the exhaustion requirement is meant to provide "'time and opportunity to address complaints internally'" before suit is filed, and inmates must therefore "provide enough information about the conduct of which they complaint to allow prison officials to take appropriate responsive measures." Id. (quoting Porter v. Nussle, 534 U.S. 516, 524–25 (2002)).

128. 461 F.3d 1269 (10th Cir. 2006).

129. Id. at 1273.

130. Id. at 1279.

131. See id. at 1283 (employing *Strong*'s "object intelligibly" language and explaining "grievance will satisfy the exhaustion requirement so long as it is not 'so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally'" (quoting Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006))).

132. Id. at 1284.

133. Id. at 1283 ("The Defendants . . . assert that the 'reasonableness' of a rule requiring inmates to identify alleged wrongdoers in their grievance is 'apparent.' We are unconvinced." (citation omitted)).

ment and unsafe living conditions based on the prison's failure to assign him to a lower bunk for medical reasons.[134] Notably, Griffin had not complained that prison staff members were *deliberately* indifferent to his medical needs, and the defendants contended that, without this allegation, the grievance was insufficiently specific to satisfy the PLRA's exhaustion requirement.[135] Adopting *Strong* as the appropriate grievance pleading standard,[136] the Ninth Circuit held that Griffin's failure to raise deliberate indifference did not invalidate his exhaustion attempt.[137] Specifically, the court explained:

> A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved. A grievance also need not contain every fact necessary to prove each element of an eventual legal claim. The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation.[138]

3. *Indirect Endorsement of the "Object Intelligibly" Standard.* — Even courts that do not cite *Strong*'s "object intelligibly" standard have generally not required very much specificity in grievances where the prison system's policy did not require it, and they have not accepted hypertechnical arguments by prison officials that grievances were inadequate. In *McAlphin v. Toney*, for example, prisoner James McAlphin complained in separate grievances that the defendants had failed to treat his dental problem as an emergency matter and refused to escort him to the infirmary for emergency treatment.[139] Responding to the lower court's dismissal of McAlphin's claims for failure to exhaust, the Eighth Circuit treated the plaintiff's two claims as part of a single *exhausted* claim of denial of emergency dental treatment that had put the defendants on notice of

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134. 557 F.3d 1117, 1118–19 (9th Cir. 2009).

135. Id. at 1119–20.

136. Id. at 1120 ("*Strong* provides a low floor that clarifies exhaustion requirements, but is unlikely to demand more information than prison procedures permit.").

137. Id.

138. Id. While the court explicitly adopted *Strong* as the appropriate standard, it ultimately concluded that Griffin had failed to exhaust properly:

> Griffin's problem concerned his unsatisfactory bunking situation. Notifying the prison of that problem did not require him to allege that the problem resulted from deliberate indifference . . . . *Nonetheless*, Griffin failed to exhaust properly. He did not provide notice of the prison staff's alleged disregard of his lower bunk assignments. The officials responding to his grievance reasonably concluded that the nurse's order for a lower bunk assignment solved Griffin's problem. Rather than clarifying the situation, Griffin repeatedly demanded a ladder. His grievance did not "provide enough information . . . to allow prison officials to take appropriate responsive measures."

Id. at 1120–21 (emphasis added) (quoting Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004)).

139. 375 F.3d 753, 755 (8th Cir. 2004).

claims about the grievance procedure.[140]

In *Carter v. Symmes*, the District Court for the District of Massachusetts evaluated a grievance that stated, "[I]n my cell handcuff for 4 hour Lt. Wright CO Snell push me down."[141] While the grievance made no mention of an assault on plaintiff Carter that had taken place less than a week earlier, Carter wrote a letter about that assault to the prison superintendent.[142] Turning to the exhaustion question, the court adopted the administrative law rule that "claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they 'are like or reasonably related to the substance of charges timely brought before [the agency].'"[143] In the court's view, while the formal grievance did not discuss the alleged beating, the timely letter spelled out all of the claims, thus putting the Department of Corrections on notice of the allegations.[144] Since the state grievance policy did not require Carter to use the forms provided, the letter was deemed part of the grievance,[145] and the court concluded that the defendants had not met their burden of showing nonexhaustion.[146]

Similarly, in *Grant v. Cathel*, inmate Jeffrey Grant, who suffered from non-Hodgkin lymphoma, submitted a complaint stating that he was not receiving prescribed cancer treatment and medication and was in great pain.[147] Under the prison's administrative-remedy procedures, an inmate could submit an Administrative Remedy Form (ARF), which would then be reviewed and distributed to the appropriate prison department.[148] While Grant did not submit an ARF expressly alleging that he was not provided an escort from protective custody to his medical appointments or that the defendants had failed to supervise his medical care, the District Court for the District of New Jersey nonetheless held that Grant's grievance sufficed because it "discuss[ed] the primary grievance underlying his claims, his allegedly inadequate medical treatment."[149]

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140. Id.

141. No. 06-10273-PBS, 2008 WL 341640, at *1 (D. Mass. Feb. 4, 2008) (quoting grievance). This language actually appeared in a letter the plaintiff wrote to the prison superintendent. But since the Massachusetts grievance policy did not require inmates to use the forms provided, the letter was deemed part of the grievance. See infra text accompanying notes 144–145.

142. *Carter*, 2008 WL 341640, at *1.

143. Id. at *4 (quoting Maldonado-Cordero v. AT&T, 73 F. Supp. 2d 177, 186 (D.P.R. 1999)). The court proceeded to explain that "[i]n determining whether claims are like or reasonably related, a court should inquire whether a reasonable investigation of the administrative claim would have uncovered the allegations of the civil rights complaint." Id. (internal quotation marks omitted).

144. Id. at *3.

145. Id.

146. Id. at *5.

147. No. 05-3956 (MLC), 2007 WL 119158, at *5 (D.N.J. Jan. 10, 2007).

148. Id. at *2.

149. Id. at *5.

Ultimately, these courts—whether endorsing the "object intelligibly" standard directly or indirectly—are concerned with whether the grievance provides enough information for prison officials to investigate the inmate's problem. Thus, grievances do not satisfy the PLRA's exhaustion requirement when they are so vague or incomplete that prison officials cannot reasonably be expected to understand the prisoner's complaint.[150] Courts, however, have emphasized that grievances are not required to rehearse the legal arguments and claims later asserted in a lawsuit.[151]

C. *Impact of the "Object Intelligibly" Standard*

The impact of the "object intelligibly" standard can be illustrated by comparing similar cases in which courts reached different results as to the exhaustion inquiry. These cases demonstrate that the lack of uniformity in the standard used by courts to assess exhaustion has produced different outcomes for similarly situated inmates who have filed comparable grievances, thus indicating that widespread application of the "object intelligibly" standard in instances of administrative silence would result in increased findings of exhaustion. Part II.C.1 examines numerous instances in which courts have held grievances inadequate for failure to plead legal theories. Part II.C.2 explores cases involving similar claims, but where the court concluded that the grievance under review was adequate for exhaustion purposes.

1. *Hypertechnical Arguments of Grievance Inadequacy.* — Despite the decisions discussed in Part II.B, some courts—even those that cite *Strong*—deem certain grievances inadequate when they fail to plead legal theories, even though they fully state the underlying facts giving rise to the complaint. Such decisions, which would likely result in findings of exhaustion under the lenient "object intelligibly" standard as applied in

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150. Courts are unanimous on this view. See, e.g., Thompson v. Stalder, No. 06-659-JJB-CN, 2008 WL 874138, at *4 (M.D. La. Apr. 1, 2008) (holding general statement that plaintiff was "unable to practice [his] religious beliefs" did not exhaust his specific claims to meat-free diet and Rastafarian services and literature as it did not provide fair opportunity to address claims later asserted in lawsuit); Aguirre v. Feinerman, No. 3:02 CV 60 JPG, 2005 WL 1277860, at *6 (S.D. Ill. May 10, 2005) (holding grievance mentioning physical therapy specifically, but other medical care only generally, did not exhaust as to failure to diagnose plaintiff's congestive heart failure because "[w]hile specifically identifying the ailment would not be required, there must be some indication as to what medical issues the plaintiff was complaining about").

151. See, e.g., McCollum v. Cal. Dep't of Corr. & Rehab., 647 F.3d 870, 877 (9th Cir. 2011) (holding grievance complaining of lack of paid Wiccan chaplain need not articulate underlying legal theory); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievance need not "allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory"), abrogated on other grounds by Jones v. Bock, 549 U.S. 199 (2007); Meraz v. Reppond, No. C 08-4540 MHP (pr), 2010 WL 2672002, at *3 (N.D. Cal. July 2, 2010) (holding legal theory of bystander liability need not be stated because doing so would be "particularly difficult" for prisoners "who have only 15 days to file an inmate appeal and who have limited access to any legal materials").

Strong,[152] are analyzed in this section. This Note does not maintain that the cases discussed in this section constitute an exhaustive list of the types of claims giving rise to findings of grievance inadequacy or that such claims are the most common among prisoners who end up in court. Rather, it confines the discussion to cases involving claims of unlawful retaliation, discrimination contrary to the Equal Protection Clause, and conspiracy—considered in Part II.C.1.a, Part II.C.1.b, and Part II.C.1.c, respectively—because they represent a sample of those claims that clearly highlight the problem addressed in this Note.[153]

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152. See supra notes 116–119 and accompanying text (discussing *Strong* standard's leniency); see also infra Part II.C.2 (indicating cases examined in Part II.C.1 would result in exhaustion under "object intelligibly" standard).

153. Dye v. Kingston, 130 F. App'x 52 (7th Cir. 2005), is not discussed in this section, but the case is worth addressing briefly as it was decided by the Seventh Circuit, the same court that established the "object intelligibly" standard only three years prior. In that case, Wisconsin prisoner John Dye brought suit under § 1983, alleging that prison officials withheld his religious and legal materials in violation of his First Amendment rights. Id. at 53. The prison's grievance procedure required inmates to "clearly identify the issue" on their grievance form, but otherwise did not indicate what was required of them in order to do so. See Wis. Admin. Code DOC § 310.09(1)(e) (2006). While the Seventh Circuit acknowledged its prior holding in *Strong v. David* and cited Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004), which illustrates the "object intelligibly" standard's leniency, the court nevertheless concluded that Dye's "mere listing of missing items in his grievance did not give sufficient notice to prison officials that he was contending that not having access to the missing Bibles was impeding his free exercise of religion." *Dye*, 130 F. App'x at 55–56 ("[W]e have held that absent more stringent administrative requirements an inmate need not state 'facts, legal theories, or demand relief,' so long as the grievance objects 'intelligibly to some asserted shortcoming.'") (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); see also supra notes 117–119 and accompanying text (discussing standard's leniency as highlighted in *Riccardo*).

Even though the same court that decided *Strong* went the other way in *Dye*, *Dye* would likely come out differently under the "object intelligibly" standard as applied in *Strong*. After all, in reaching its holding, the court in *Dye* ignored the clear language in *Strong* establishing that grievants "need not . . . articulate legal theories." *Strong*, 297 F.3d at 650. While it cited this crucial language in its discussion of the relevant law supporting its holding, the court in *Dye* merely cited *Strong* for the proposition that a grievance needs to alert prison officials to the "nature of the wrong" and based its holding on this flawed understanding of *Strong*. See *Dye*, 130 F. App'x at 55–56 (internal quotation marks omitted) (citing *Strong*, 297 F.3d at 650). Further, if the obligation is to "object intelligibly to some asserted shortcoming," *Strong*, 297 F.3d at 650, from Dye's standpoint, the shortcoming visible to him was just that he did not have his Bibles, and that fact surely gave prison officials sufficient notice under *Strong* that they should find the Bibles or replace them.

While the court did not mention or cite the exact language of the grievance form that Dye used, the Defendants-Appellees' brief indicates that the grievance form available to Dye at the time was the same one used by the Wisconsin Department of Corrections today. See Brief & Appendix of Defendants-Appellees at 11, *Dye*, 130 F. App'x 52 (No. 04-4066), 2005 WL 5806872 (providing summary of relevant law). *Dye* is not included in the discussion in Part II.C because the author was unable to locate any cases addressing claims of denial of First Amendment rights in which the court applied the "object intelligibly" standard and *found* exhaustion. Since the cases in Part II.C.2 are intended to complement

a. *Unlawful Retaliation.* — Various courts have held that claiming a retaliatory act *alone* is not sufficient; the prisoner's grievance must also allege retaliatory *motive*.[154] In *Emmett v. Ebner*, for example, prisoner Barry Emmett alleged that several of his constitutional rights were violated based on phone restrictions imposed on him in retaliation for his filing of other grievances.[155] The prison's grievance form instructed inmates to "be specific" but did not indicate that prisoners were expected to plead legal theories.[156] While the Fifth Circuit recognized that a grievant need not allege "full-fledged legal theories,"[157] it nevertheless concluded that since Emmett had not alleged retaliatory motive in the grievance, he failed to alert prison officials to the claims in his complaint.[158] This is a surprising outcome given that the problem visible to Emmett was that phone restrictions had been forced on him, and that fact certainly gave prison officials enough notice that they should remove those restrictions.

In a more recent case, inmate Kevin Wellington successfully claimed that the Nevada Department of Corrections had charged him twice for

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those discussed in Part II.C.1, as they involve similar claims, the discussion of *Dye* did not seem appropriate for purposes of this Note.

154. To prevail on a retaliation claim, prisoners must typically show that: (1) They engaged in protected expression; (2) they suffered an adverse action; and (3) the adverse action was causally related to the protected expression. A substantial body of case law indicates that these are the three core elements of a prima facie case of retaliation. The Fifth Circuit in *Freeman v. Texas Department of Criminal Justice*, for example, articulated the following factors: "(1) the existence of a specific constitutional right; (2) the defendant's intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation." 369 F.3d 854, 863 (5th Cir. 2004). In *Scott v. Coughlin*, the Second Circuit advanced a similar test but divided it into three parts rather than four: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." 344 F.3d 282, 287 (2d Cir. 2003) (citation omitted) (internal quotation marks omitted). A five-part test appeared in *Rhodes v. Robinson*: "(1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." 408 F.3d 559, 567–68 (9th Cir. 2004) (footnote omitted).

155. 423 F. App'x 492, 493 (5th Cir. 2011) (per curiam).

156. The Texas Department of Criminal Justice's "Offender Orientation Handbook" provides specific grievance procedures for offenders. Chapter 1, section VI of the Handbook, entitled "Grievance Procedures for Offenders," states that to appeal a Step 1 (informal resolution) decision, an offender must file a Step 2 form (I-128) with the grievance investigator. Tex. Dep't of Criminal Justice, Offender Orientation Handbook 52–53 (2004), available at http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (on file with the *Columbia Law Review*). While the court in *Emmett* did not reference the specific requirements spelled out in the I-128 form completed by Emmett, there is reason to believe that the form provided by Professor Margo Schlanger is the one used by Emmett. See Schlanger, Grievance Policies, supra note 89 (indicating most updated version of Form I-128 was last revised in 1999).

157. *Emmett*, 423 F. App'x at 493.

158. Id. at 493–94.

the same tattoo.[159] Wellington's grievances, however, failed to allege that the defendants had charged him for an improper tattoo *in retaliation for* his filing unrelated grievances against the defendants.[160] The Nevada Department of Corrections grievance procedure contained no hint that prisoners must plead legal theories—it defined a "grievance" simply as "[a] written complaint consisting of one claim, issue, circumstance or action considered by the inmate to be injurious or unjust."[161] However, the District Court for the District of Nevada concluded that Wellington's grievances did not adequately alert the defendants to his factual allegations of retaliation and "did not provide prison officials a full and fair opportunity to address plaintiff's retaliation claim."[162] This holding is especially surprising because the court, relying heavily on *Griffin v. Arpaio*,[163] explained that "[a] grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved,"[164] and yet held Wellington's grievance inadequate. The case would nonetheless likely reach a different result under the "object intelligibly" standard as applied in *Strong* and *Griffin* because the court's reliance on *Griffin* was misguided. *Griffin*, after all, held that the inmate's failure to grieve deliberate indifference did *not* invalidate his exhaustion attempt.[165] Further, the perceived shortcoming in Wellington's case—that defendants had charged him with an improper tattoo—surely gave prison officials sufficient notice that they should clear the second charge against him.

b. *Discrimination.* — Some courts take a similar approach where the prisoner grieves about adverse conduct but fails to allege that the conduct was *discriminatory*. In *Waddy v. Sandstrom*, for example, the District Court for the Western District of Virginia held that inmate Jonathan Waddy's failure to mention the specific racial slurs that prison officials had made against him in his grievance prevented the prison from conducting a thorough investigation of the alleged racial element of the complained-about incident.[166] Of note, the state's offender grievance procedure merely provided that "[t]he offender is to write the issue on

159. Wellington v. Snider, No. 3:10-cv-00760-HDM-VPC, 2012 WL 3999871, at *6 (D. Nev. June 19, 2012).

160. Id.

161. Nev. Dep't of Corr., Administrative Regulation No. 740, Inmate Grievance Procedure (2004), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/Nevada_Policy.pdf (on file with the *Columbia Law Review*).

162. *Wellington*, 2012 WL 3999871, at *6.

163. 557 F.3d 1117, 1120 (9th Cir. 2009). For a discussion of *Griffin*'s direct endorsement of the "object intelligibly" standard, see supra notes 134–138 and accompanying text.

164. *Wellington*, 2012 WL 3999871, at *5 (internal quotation marks omitted).

165. *Griffin*, 557 F.3d at 1120.

166. No. 7:11CV00320, 2012 WL 2023519, at *4 (W.D. Va. June 5, 2012).

the space provided on the *Regular Grievance*, preferably in ink."[167] Due to Waddy's omission, however, the court deemed the grievance inadequate for purposes of PLRA exhaustion and dismissed Waddy's civil-rights action.[168] This holding is inconsistent with an "object intelligibly" standard that does not require the inmate to plead legal theories; the perceived shortcoming was that Waddy was mistreated by prison officials, and that fact clearly provided officials adequate notice that they should conduct an investigation.

In another case, inmate David Andrews sued various prison employees, alleging that they had placed him in wrist restraints because of his race while he was in the prison law library.[169] The prison's grievance form asked prisoners to "[e]xplain your issue" and provided a writing space for the "[a]ction requested"[170] but did not include a legal-theory pleading requirement. Andrews's grievance asked for removal of the restraints so that he could freely conduct legal work, but it contained no allegation that the defendants had violated his equal protection rights or treated Andrews differently than the other inmates.[171] The District Court for the Northern District of California thus concluded that his grievance was too factually broad to satisfy the administrative-exhaustion requirement.[172] While the court in reaching its holding quoted *Strong*'s language that "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought,"[173] it disregarded the crucial language in *Strong*

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167. Va. Dep't of Corr., Operating Procedure No. 866.1, Offender Grievance Procedure, § (VI)(A)(2)(a) (2013), available at http://www.vadoc.virginia.gov/about/procedures/documents/800/866-1.pdf (on file with the *Columbia Law Review*). Although the offender grievance procedure in effect at the time Waddy filed his grievance is not available online, a comparison of the 1998 and 2013 procedures, which contain virtually the same requirements as to initiation of the "regular grievance procedure," suggests that Waddy faced similar requirements. Compare id., with Va. Dep't of Corr., Operating Procedure No. 866, Inmate Grievance Procedure, § 7.14(1) (1998), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/Virginia_Policy.pdf (on file with the *Columbia Law Review*).

168. *Waddy*, 2012 WL 2023519, at *4.

169. Andrews v. Evert, No. C 09-5858 LHK (PR), 2011 WL 4479480, at *1 (N.D. Cal. Sept. 23, 2011).

170. See Cal. Dep't of Corr. & Rehab., Form No. CDCR 602, Inmate/Parolee Appeal (2009), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2011NCR/11-02/602.pdf (on file with the *Columbia Law Review*). At the time Andrews filed suit, in order to properly exhaust available administrative remedies, a California prisoner was required to submit a complaint on Form CDCR 602 and proceed through several levels of appeal. See Cal. Code Regs. tit. 15, §§ 3084.2(a), 3084.5 (2004), available at http://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/California_Policy.pdf (on file with the *Columbia Law Review*).

171. *Andrews*, 2011 WL 4479480, at *2.

172. Id.

173. Id. at *1. The court quoted Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009), which in turn quoted Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

that grievants "need not . . . articulate legal theories."[174] Thus, the case would likely come out differently under the "object intelligibly" standard as applied in *Strong*, especially considering that the shortcoming visible to Andrews was that he could not freely conduct legal work, and that fact certainly gave prison officials enough notice that they should remove the wrist restraints.

c. *Conspiracy*. — Some courts also hold grievances inadequate when they fail to specifically mention claims of conspiracy that prisoners later assert in their lawsuits. In *Means v. Lambert*, for example, plaintiff William Means alleged violation of his religious rights through conspiracy.[175] While the exact requirements of the grievance form filed by Means are unclear, the District Court for the Western District of Oklahoma admitted that the relevant grievance process "does not specify the level of detail required in a grievance" and explicitly endorsed a notice-pleading standard.[176] Nonetheless, even though Means had grieved the denial of religious articles by the defendants,[177] the court stated that he "did not include anything in the administrative documents about an *agreement* to violate his rights" and deemed his conspiracy claim unexhausted for this reason.[178] This holding is noteworthy because the court traced back to *Strong*'s standard by citing *Kikumura v. Osagie*, which explicitly endorsed it,[179] and yet held Means's grievance inadequate. However, the case would likely come out differently under the "object intelligibly" standard as applied in *Strong*. First, in reaching its holding as to the conspiracy claims specifically, the court in *Means* ignored the clear language in *Kikumura* that "a grievance will satisfy the exhaustion requirement so long as it is not so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally."[180] Further, if the obligation is to "object intelligibly to some asserted shortcoming,"[181] the perceived problem was that Means was denied certain religious materials, and that fact surely gave prison officials sufficient notice that they should give him the items.

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174. *Strong*, 297 F.3d at 650.

175. No. Civ-06-1137-HE, 2007 WL 4591251, at *2 (W.D. Okla. Dec. 28, 2007).

176. Id at *3. Relying on *Kikumura v. Osagie*, which, as discussed in Part II.B.2, explicitly endorsed *Strong*'s "object intelligibly" standard, the court explained that "the test is whether the grievance was sufficiently specific to allow prison officials to 'tak[e] appropriate measures to resolve the complaint internally.'" Id. (alteration in original) (quoting Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006)).

177. Id.

178. Id. (emphasis added).

179. See supra note 176 (noting court's reliance on *Kikumura*, which explicitly endorsed *Strong*'s "object intelligibly" standard).

180. *Kikumura*, 461 F.3d at 1283 (internal quotation marks omitted). The court cited related language in its discussion of Means's emotional-distress claims, *Means*, 2007 WL 4591251, at *3, but it cited no such language in its discussion of Means's conspiracy claims.

181. See Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

Similarly, in *Jackson v. Harrison*, inmate Christopher Jackson sued various prison officials and medical personnel for conspiring to violate his constitutional rights.[182] The prison's grievance form "require[d] an inmate only to describe the problem and action that is requested" but was "otherwise silent regarding the requisite degree of specificity or level of detail."[183] While the subject matter of Jackson's grievance complaining about the so-called "Dozier Search Incident" was not that the defendant had conspired with others—Jackson merely complained in his grievance about the defendant's actions on the day of the incident[184]—his grievance was relevant to the merits of his conspiracy claim because the defendant's actions were allegedly part of the conspiracy.[185] The District Court for the Central District of California, however, noted that Jackson's grievance "did not alert the prison that plaintiff was complaining about any wrongful *agreement*—let alone a broad ranging conspiracy—to deprive plaintiff of his constitutional rights";[186] thus, the suit was dismissed for failure to exhaust. While the court in reaching its holding cited *Griffin v. Arpaio*, which explicitly endorsed *Strong*,[187] for the proposition that "'[a] grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved,'"[188] it disregarded the crucial language in *Griffin* that "*Strong* . . . is unlikely to demand more information than prison procedures permit."[189] Thus, the case does not comport with the "object intelligibly" standard as applied in *Strong*, especially considering that the shortcoming visible to Jackson was that he was mistreated by the defendant, and that fact certainly provided prison officials adequate notice that they should investigate the issue.

These holdings are startling and certainly in tension with an "object intelligibly" standard that does not require the grievant to articulate legal theories. If a prisoner's obligation is to "object intelligibly to some asserted shortcoming," from the aforementioned grievants' standpoints, the substance of their grievances contained sufficient factual allegations to fairly put the individual defendants on notice of potential claims involving retaliation, discrimination, or conspiracy. Further, it is difficult to fathom how additional language in the grievances would have assisted

182. No. CV 08-8112 DOC (JC), 2010 WL 3895478, at *6 (C.D. Cal. Aug. 25, 2010).

183. Id. at *8 (describing requirements of relevant grievance form).

184. Id. at *9 (describing grievances against defendant Dozier, and complaining about "Dozier Search Incident" and "Dozier Podium Incident").

185. The court explained, "[T]he Dozier Search Incident . . . , unlike the Dozier Podium Incident and the Priest Confrontation Incident, is alleged to be an overt act in furtherance of the conspiracy." Id. at *11.

186. Id.

187. See supra notes 134–138 and accompanying text (discussing *Griffin*'s direct endorsement of *Strong*).

188. See *Jackson*, 2010 WL 3895478, at *7 (quoting Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009)).

189. *Griffin*, 557 F.3d at 1120.

the prison officials in actually resolving the grievants' problems. Similar cases in which the court *found* exhaustion are explored in the next section.

2. *Opposite Results in Similar Cases.* — The cases discussed in Part II.C.1 are inconsistent with the many decisions that say prisoners are not required to plead legal theories or spell out the elements of legal claims in grievances,[190] and they should arguably result in findings of exhaustion under *Strong*'s "object intelligibly" standard. A number of decisions support this view, holding that as long as the facts are in the grievance, the grievance is sufficiently specific for exhaustion purposes. Cases addressing claims of unlawful retaliation, discrimination, and conspiracy are discussed in Part II.C.2.a, Part II.C.2.b, and Part II.C.2.c, respectively.

a. *Unlawful Retaliation.* — In *Cromer v. Braman*, inmate Edward Cromer claimed that he had been incorrectly classified as a member of a Security Threat Group and was harassed and retaliated against for delivering a speech about the teachings of his religion.[191] Specifically, Cromer alleged that he had been given false misconduct reports, received unfair hearings regarding misconduct tickets and his security classification, and had his personal items taken or destroyed.[192] In assessing the adequacy of his grievance, the District Court for the Western District of Michigan clarified—as did the Seventh Circuit in articulating its "object intelligibly" standard in *Strong*—that Cromer was "not required to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory in [his] grievance."[193] Noting Cromer's statements in his grievance that one of the defendants had harassed him by stealing pictures of "black babies" and that the same defendant and others "are still going in my cell removing religious materials,"[194] the court concluded that the grievance placed the defendant "on notice of the alleged mistreatment or misconduct that forms the basis of his constitutional and statutory claim regarding the removal of 'pictures of black babies' and confiscation of religious materials from Plaintiff."[195] Thus, Cromer was not required to grieve a retaliatory act or motive.[196]

b. *Discrimination.* — Oklahoma prisoner Lynn Edward Reece alleged that he was subjected to racial discrimination, which resulted in loss of

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190. See supra Part II.B (discussing such cases).

191. No. 1:07-CV-09, 2008 WL 907468, at *5 (W.D. Mich. Mar. 31, 2008).

192. Id.

193. Id. at *13. While the court in *Cromer* did not apply the "object intelligibly" standard by name or cite any circuit case directly endorsing the standard, the court's cited language indicates that it is engaging in the same type of analysis as the court in *Strong*.

194. Id. (internal quotation marks omitted).

195. Id. (quoting plaintiff's grievance).

196. But see supra Part II.C.1.a (describing instances where courts have held prisoner must allege both retaliatory *act* and *motive* to prevail on retaliation claim).

pay, demotion, and altered job duties.[197] Specifically, he claimed that one of the defendants, a cook supervisor, had "used her power as a 'discriminatory tool,' victimizing 'Blacks and Hispanics' while not treating white inmates in the same manner."[198] While, in his grievance, Reece had alleged a *due process* violation, he also included an allegation that "these kinds of moves are only implemented against Black and Hispanic inmates here."[199] Relying on the Tenth Circuit's prior decision in *Kikumura*, which applied *Strong*'s "object intelligibly" standard,[200] the District Court for the Western District of Oklahoma ultimately aligned itself with the view that "a grievance satisfies the exhaustion requirement 'so long as it provides prison officials with enough information to investigate and address the inmate's complaint internally.'"[201] Thus, while Reece had not raised a discrimination claim at every level of the administrative-remedy process, he included various allegations that the job transfer by the defendant supervisor, which did not follow the proper procedure, was suggestive of her discriminatory practices.[202] The court explained that "[s]uch references to discrimination . . . should have put officials on notice of a racial discrimination claim against Defendant."[203]

c. *Conspiracy.* — The Second Circuit has held that conspiracy is a legal theory that prisoners need not allege; describing the alleged misconduct adequately is sufficient.[204] Inmate Cesar Espinal, for example, filed a § 1983 lawsuit, alleging that the defendants had conspired to assault him and deny him medical care in violation of his constitutional rights.[205] In his grievance, Espinal had stated that he was making a complaint against the prison's medical department "for deliberate indifference to his serious medical needs in connection with various '[m]andatory [c]linic [a]ppointments'" and asserted that "'the conduct of prison officials and medical personal [sic]' denied him access to medical care."[206] In assessing the adequacy of his grievance, the court,

197. Reece v. Low, No. CIV-05-307-D, 2009 WL 2761923, at *1 (W.D. Okla. Aug. 27, 2009).

198. Id. at *7 (quoting plaintiff's complaint).

199. Id. (quoting plaintiff's complaint) (internal quotation marks omitted).

200. Kikumura v. Osagie, 461 F.3d 1269, 1283, 1285 (10th Cir. 2006). In *Kikumura*, the court quoted *Strong* as holding that a grievance need not "lay out the facts, articulate legal theories, or demand particular relief." Id. at 1283 (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); see also supra notes 128–133 and accompanying text (discussing *Kikumura* in further detail).

201. *Reece*, 2009 WL 2761923, at *7 (quoting *Kikumura*, 461 F.3d at 1283).

202. Id.

203. Id.

204. See Espinal v. Goord, 558 F.3d 119, 127–28 (2d Cir. 2009) ("[I]t is sufficient that [a prisoner's] grievance adequately describe[s] the alleged misconduct.").

205. Id. at 121–23.

206. Id. at 122 (alterations in *Espinal*) (quoting Espinal's grievance).

citing *Johnson v. Testman*, which had in turn relied on *Strong*;[207] declared that the New York Department of Corrections' Inmate Grievance Program's requirement that the grievance describe the problem did not mean that the prisoner must spell out legal theories.[208] More specifically, in the court's view, "Espinal did not have to assert the existence of a conspiracy to exhaust his conspiracy claims; it is sufficient that his grievance adequately described the alleged misconduct."[209]

Ultimately, the purpose of the exhaustion requirement is to give prison administrators an opportunity to address a problem, and, as these cases demonstrate, they can do this whether or not the prisoner identifies the specific legal theory that the problem implicates. That is to say, a prisoner can "object intelligibly to some asserted shortcoming"[210] and invite corrective action without pleading legal theories in his or her grievance. In such situations, defendants cannot rely on the nonexhaustion defense.[211]

III. FEDERAL COURTS FACING ADMINISTRATIVE SILENCE SHOULD ADOPT *STRONG*'S "OBJECT INTELLIGIBLY" STANDARD

This Part proposes that in light of the courts' inconsistent results, federal courts facing administrative silence with respect to grievance specificity should adopt the Seventh Circuit's "object intelligibly" standard for determining the adequacy of prisoner grievances. After all, "[a] rule that controls access to courts not by examining the merits of a claim but by shutting the door on uncounseled inmates who fail to navigate a procedural minefield is not a good one."[212] Thus, so long as a grievance is sufficient to notify prison personnel of a problem, a prisoner's failure to plead legal theories or spell out the elements of legal claims should not render the grievance noncompliant with a prison's grievance procedures if those procedures are silent. Of course, a grievance that actually initiates an investigation of an issue should be deemed exhausted no matter how well or poorly the prisoner set it out, since the purpose of exhaustion will have clearly been served. Part III.A argues that the "object intelligibly" standard achieves the proper balance between the PLRA's competing interests. Perhaps more important, Part III.B explains that even if certain omissions by prisoners are deemed to be defects, such

207. Id. at 127–28; see also supra notes 124–127 and accompanying text (discussing Second Circuit's endorsement of *Strong* standard in *Johnson v. Testman*).

208. *Espinal*, 558 F.3d at 127–28.

209. Id. at 128.

210. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

211. See Maddox v. Love, 655 F.3d 709, 722 (7th Cir. 2011) (explaining failure-to-exhaust defense is unavailable to defendants where plaintiffs object but fail to plead legal theories); Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004) ("[W]hen a state treats a filing as timely and resolves it on the merits, the federal judiciary will not second-guess that action, for the grievance has served its function . . . .").

212. Roosevelt, supra note 32, at 1776.

errors would generally be correctable in litigation but not in the administrative process.

A. *The "Object Intelligibly" Standard Strikes a Balance Between the PLRA's Competing Interests*

A lower standard for assessing administrative exhaustion in certain circumstances will better meet the PLRA's goals[213] and thus makes for good policy. Moreover, the imposition of an inflexible rule of exhaustion may frustrate congressional intent by promoting insurmountable barriers to meritorious claims. In contrast, the "object intelligibly" standard empowers courts to serve a meaningful role in situations where inmates suffering egregious abuse at the hands of their keepers may otherwise be deprived of the only forum available to them. This section advocates for general endorsement of the "object intelligibly" standard, arguing that it strikes a balance between the PLRA's competing interests. Part III.A.1 explains that widespread adoption of the standard in situations of administrative silence may encourage the development of more effective grievance systems. Part III.A.2 discusses the importance of effective grievance mechanisms in correctional facilities. Part III.A.3 maintains that the PLRA's silence with respect to specific incentives for prison officials is not indicative of its stance on the value of effective grievance mechanisms. Finally, Part III.A.4 addresses the potential counterargument that the PLRA's "proper exhaustion" rule actually encourages prison authorities to amend their grievance systems to make it more difficult to "object intelligibly."

1. *Widespread Endorsement of the "Object Intelligibly" Standard May Give Rise to More Effective Grievance Systems.* — If courts are increasingly lenient toward grievances filed by prisoners in institutions where the relevant grievance procedure does not specify the level of detail required, prison officials may respond by implementing more adequate grievance systems.[214] Specifically, prison systems may implement more specific griev-

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213. As discussed in Part I.A, these are to eliminate unwanted federal interference in the management of state correctional facilities, to help manage the high number of inmate lawsuits, and to allow only meritorious suits to pass through to federal court.

214. A grievance system or mechanism can be "any administrative means for the expression and resolution of inmates' complaints." Keating, supra note 14, at 2. However, there is no precise definition for the concept of an *effective* grievance system or mechanism, and scholars have recognized the difficulty in formulating such a definition. See id. at 2–3 (explaining "[m]ost difficult of all the terms to be defined in this early discussion is the concept of an effective grievance mechanism" and "determining the point at which use becomes sufficiently broad and frequent to indicate effectiveness is difficult" (emphasis omitted)). According to Keating, "[A] grievance mechanism is effective if it: (1) Operates fairly and is perceived by inmates and line staff to be fair; (2) Is used; and (3) Actually solves problems . . . ." Id. at 2 (emphasis omitted). This Note shares Keating's vision of an effective grievance mechanism but recognizes that the criterion of use is flexible and contingent upon the environment in which a particular mechanism is operating.

ance rules in an attempt to reduce the risk of losing against inmates in court.[215] In other words, prisons would have an incentive to avoid employing broad rules regarding the content of grievances, which would, in turn, decrease the likelihood that prisoners file suit in federal court.

This notion is substantiated by the response of the Illinois Department of Corrections to the outcome in *Strong*, the very case on which this Note centers. Indeed, *Strong*'s holding—that Strong had exhausted his administrative remedies because the grievance rules were silent as to the requisite level of specificity—prompted significant changes in the state's grievance procedure. Less than six months later, the Illinois Department of Corrections proposed strict new regulations[216] that read, "The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is subject of or who is otherwise involved in the complaint."[217]

To argue that prison officials have responded to courts' interpretations of prison grievance procedures is not to say that they lack *inherent* incentives to implement effective grievance procedures; the origin of grievance procedures in American prisons indicates that officials strive to promote the safe and fair administration of prison systems.[218] But there is reason to believe that these inherent incentives alone do not ensure the promulgation of adequate grievance procedures. Not only does history indicate that prison officials have generally failed on their own accord to implement grievance procedures that are substantially and procedurally fair,[219] but there is very little political oversight concerning the promulga-

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215. Cf. Van Swearingen, Comment, Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process, 96 Calif. L. Rev. 1353, 1354 (2008) ("[T]he resolution of inmate grievances by prisons themselves is likely to reduce exposure to liability from inmate lawsuits, as prisons can self-correct before being forced to do so by a court."). As indicated below, see infra notes 247–249 and accompanying text, such changes in the rules are less likely to require legal articulations by prisoners than they are to require additional facts, such as the name of each individual involved in the incident that forms the basis of the complaint, or that the complaint be written only in the space provided.

216. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 26, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 284226, at *26 (explaining less than six months after *Strong* was decided, Illinois Department of Corrections proposed new, more specific regulations). The ACLU suggested that prisons and jails are "heading in [the] direction" of changing their grievance rules. Id. at 25–26.

217. Ill. Admin. Code tit. 20, § 504.810(b) (2006); see also 26 Ill. Reg. 18,124 (Dec. 27, 2002) (proposing amendment).

218. See Minor & Parson, supra note 12, at 356 (explaining prison officials initially began favoring grievance mechanisms because they "recognized the need for ways to ameliorate prisoner unrest, reduce negative publicity, and avoid relinquishing authority to the judiciary; and some had a genuine interest in opening lines of communication with prisoners and promoting greater fairness").

219. See Donald P. Lay, Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act, 71 Iowa L. Rev. 935, 951 (1986) (noting

tion of grievance procedures, as prisons are often exempt from general agency rulemaking procedures.[220] Thus, prisoners fall into the class of the detached minority that cannot influence political decisionmaking.

Ultimately, then, some level of federal judicial instruction remains a viable means of oversight for prison systems.[221] By potentially promoting the development of better grievance mechanisms within prisons—which in turn can help promote justice, reduce litigation, limit violence, and improve management[222]—a broad application of the "object intelligibly" standard may return control of prisons to local officials by giving them the initial opportunity to resolve grievances. Thus, courts would do well to incorporate the "object intelligibly" standard into their PLRA exhaustion inquiry in instances of administrative silence.

2. *Value of Effective Grievance Mechanisms in Correctional Facilities.* — Having established that endorsement of the "object intelligibly" standard by the courts may promote the development of more effective grievance mechanisms, it is worth analyzing *why* effective grievance mechanisms in correctional facilities are important. Currently, "[t]here are no legal requirements that force prison and jail systems to implement prisoner grievance systems and jurisdictions have the freedom to design grievance systems any way they choose."[223] Nonetheless, the importance of effective grievance procedures is evident to those seeking to balance a punitive environment with a rehabilitative one.[224] Moreover, prisoner perception

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although Civil Rights of Institutionalized Persons Act apparently motivated some states to reshape their grievance systems, another perspective was "no matter how reasonable the procedures, inmates would rebel and continue to harass prison administrators").

220. See Roosevelt, supra note 32, at 1776 ("[G]iven that administrative grievance procedures affect no one but prisoners . . . there is unlikely to be any significant political counterweight to administrators' understandable desire to reduce litigation against themselves and their staff."); see also Giovanna Shay, Ad Law Incarcerated, 14 Berkeley J. Crim. L. 329, 344 (2010) ("[C]orrections regulations are often exempt from normal rulemaking procedures.").

221. Cf. Swearingen, supra note 215, at 1377 ("Although internal grievance procedures in prisons have in many ways replaced courts in addressing inmate claims, prison grievance systems and courts do not appear to produce similar outcomes.").

222. See infra Part III.A.2 (discussing benefits of effective grievance mechanisms).

223. Belbot & Hemmens, supra note 10, at 226.

224. The Court in *Ngo* noted that the use of administrative remedies reduces litigation pressures "because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court." Woodford v. Ngo, 548 U.S. 81, 94 (2006). Even decades before the PLRA was passed, courts and commissions on corrections addressed the value of adequate grievance procedures. In January 1973, the National Advisory Commission on Criminal Justice Standards and Goals stated: "Peaceful avenues for redress of grievances are a prerequisite if violent means are to be avoided. Thus all correctional agencies have not only a responsibility but an institutional interest in maintaining procedures that are, and appear to offenders to be, designed to resolve their complaints fairly." Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections 57 (1973). Further, in *Ruiz v. Estelle*, the court held that vast segments of the Texas prison system were unconstitutional under the Eighth and Fourteenth Amendments. 503 F. Supp. 1265, 1305 (S.D. Tex. 1980), aff'd in

of the applicable grievance system is vital to the success of the grievance procedure;[225] inmates must feel safe using the process. If a prisoner complains about the actions of other inmates or prison staff, he or she may have a legitimate reason to fear retaliation.[226] Such fear may, in turn, cause prisoners to abandon the grievance system altogether, rendering its benefits moot.[227]

Abandonment of the grievance system by prisoners is worrisome considering the potential of a prison's internal grievance process to serve as a useful management tool.[228] One commentator has noted that "[a] good administrative remedy system can serve . . . to educate upper level officials about what is happening on the agency front lines."[229] Specifically, responsive grievance procedures alert the prison warden to patterns of dissatisfaction among the inmates, allowing him or her to take action to prevent not only serious problems that could hinder prison management, but also potential litigation on behalf of disgruntled prisoners.[230]

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part, rev'd in part, 679 F.2d 1115 (5th Cir. 1982), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982). In so doing, it addressed the state's inmate-grievance procedures, "challeng[ing] them as arbitrary and overly punitive" and "order[ing] the system to . . . establish[] more elaborate grievance mechanisms." John DiIulio, Jr., Governing Prisons: A Comparative Study of Correctional Management 214 (1987) (discussing *Ruiz*).

225. In its examination of the nature and causes of disturbances in correctional facilities, the American Correctional Association observed:

> Prompt and positive handling of inmates' complaints and grievances is essential in maintaining good morale. A firm "no" answer can be as effective as granting a request in reducing an individual inmate's tensions, particularly if he feels the problem has been given genuine consideration by appropriate officials and if given a reason for the denial. Equivocation and vague answers create false hopes and thus increase the inmate's anger when nothing is done.

Am. Corr. Ass'n, Riots and Disturbances in Correctional Institutions 11–12 (1981).

226. See Feierman, supra note 38, at 261 (citing fear of retaliation as reason for prisoners' failure to "adequately avail themselves of grievance systems").

227. See Passarelli, supra note 30, at 107 (referencing possibility that "through threats or intimidation," corrections staff can "cause[] an inmate to abandon his or her efforts to exhaust at the grievance level").

228. See Keating, supra note 14, at 16 ("One of the most important reasons for adopting an effective grievance mechanism is the potential improvement in management it can bring to an institution or program."); id. at 18 ("A grievance mechanism can provide a willing administrator with an invaluable tool for obtaining control over a system, an institution, or a program by making sure he/she has sufficient information to understand and direct it.").

229. Schlanger, Inmate Litigation, supra note 31, at 1696.

230. See Keating, supra note 14, at 18 (explaining "[t]ime after time, administrators whose institutions have exploded in violence have lamented that they had little idea of the extent of prevailing unanswered grievances" and urging "an effective grievance mechanism can break the log-jam of communications"); see also Johanna Kalb & Giovanna Shay, More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA), 29 Cardozo L. Rev. 291, 316 (2007) ("Grievance system rules and procedures are supposed to provide informal and summary resolution of complaints, not full-fledged litigation of federal claims."); Schlanger & Shay, supra note

Amidst the tenuous relationship between prison officials and inmates, effective grievance procedures can also serve to promote a safe and secure prison environment. In contrast to individuals in private society, individuals in a highly monitored and controlled setting generally cannot participate in the type of informal negotiations conducive to conflict resolution and, thus, commonly resort to riots.[231] Social scientists who have examined the state of specific prisons immediately before and after prison riots have found a positive correlation between prisoner grievances, "administrative erosion or ineffectiveness," and riots.[232] Studies in the same facilities during periods of stability revealed a virtual absence of prisoner grievances, indicating either that there were no grievances or no unresolved grievances.[233] "Only when the prison administration's response is seen as unjust or ineffective does inmate opposition increase and lead to prison riots."[234] Since a prison may face violence by prisoners if its officials disregard grievances, adequate grievance procedures work to deflate tensions in a prison.

Effective grievance procedures also help settle prisoner complaints.[235] As one commentator has noted, adequate grievance proce-

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54, at 151 ("Ideally, grievance systems actually improve agency responsiveness and performance by helping corrections officials to identify and track complaints and to resolve problems.").

231. Social-science examinations of state-centered theories of prison management provide insight into this problem. See Jack A. Goldstone & Bert Useem, Prison Riots as Microrevolutions: An Extension of State-Centered Theories of Revolution, 104 Am. J. Soc. 985, 994 (1999) ("[T]he state's response to initial protest actions can shape various actors' choices regarding further actions."); see also Edith Flynn, Nat'l Inst. Law Enforcement & Criminal Justice, Sources of Collective Violence in Correctional Institutions, *in* Criminal Justice Monograph: Prevention of Violence in Correctional Institutions 15, 28 (1973) (contending important factor contributing to prison violence is "absent or restricted communication patterns which seriously impair the airing of legitimate inmate grievances").

232. Goldstone & Useem, supra note 231, at 1019 (discussing conditions that may produce prison riots); see also Keating, supra note 14, at 17 (explaining inmates, "faced with what seems like little more than willful neglect, grow increasingly discontent with unresponsiveness and . . . revolt or, in the jargon of the psychologists, act out their discontent").

233. See Goldstone & Useem, supra note 231, at 1019 ("[S]taff grievances and initiating events were absent in all cases, and prisoner grievances were absent in all but two cases.").

234. Id. at 1016. As Kevin Minor and Stephen Parson explain, history supports this sentiment:

> In many prison systems before 1970, when officials responded at all to prisoner complaints, they did so informally, without structured guidelines or checks on discretion provided through review of decisions. The result was inconsistency, perceptions of unfairness, and heightened contentiousness. Thus, throughout the 1950s and 1960s, institutions not only saw more riots but also other indicators of increased frustration and collective protest . . . .

Minor & Parson, supra note 12, at 355.

235. See Schlanger, Inmate Litigation, supra note 31, at 1696 ("A good administrative remedy system can serve . . . to resolve some disputes.").

dures not only "foster the internal resolution of [a] correctional facility's problems,"[236] but also encourage "the resolution of issues before they reach the courts."[237] Thus, such procedures promote the PLRA's gatekeeping function by abating the pressure from prisoner litigation on the courts, in turn easing the overall burden on court dockets.

3. *The PLRA's Silence with Respect to Specific Incentives for Prison Officials Is Not Indicative of Its Stance on the Importance of Effective Grievance Mechanisms.* — The PLRA and its exhaustion requirement do not explicitly provide incentives for prison officials to promulgate effective grievance mechanisms.[238] Thus, at first glance, the statutory language appears unconcerned with grievance procedures. The statute's legislative history, however, suggests that some legislators did not intend to filter out meritorious claims, and there is no indication that the PLRA was designed to encourage pleading traps.[239]

To the extent that the PLRA is silent as to specific incentives to implement effective grievance procedures, a responsive grievance system is consistent with the PLRA's objectives. In instances of administrative silence with respect to grievance specificity, allowing the exhaustion requirement to be satisfied by claims that have "object[ed] intelligibly" to an asserted shortcoming may quell passions, filter frivolous claims, and ensure more refined litigation simply by the fact of being heard and potentially inducing administrative change.[240] As explained by the Third Circuit, a looser reading of proper exhaustion "better serves the policy of granting an agency the opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal

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236. David M. Adlerstein, Note, In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act, 101 Colum. L. Rev. 1681, 1705 (2001).

237. Id. at 1694.

238. Some scholars have suggested that the PLRA's exhaustion requirement actually provides an incentive for prison administrators to fashion *higher* procedural hurdles in their grievance processes. See Schlanger & Shay, supra note 54, at 149 ("[T]he more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit"). This criticism is further explored in Part III.A.4.

239. See 141 Cong. Rec. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Orrin G. Hatch) (stating intent that PLRA not procedurally block meritorious claims). But see Borchardt, supra note 12, at 519 ("[A] careful examination of the evolution of grievance procedures and the related case law in only a small sampling of states reveals numerous instances of officials devising such procedural traps.").

240. See supra Part III.A.1 (discussing possibility of administrative change through endorsement of "object intelligibly" standard). In *Booth v. Churner*, the Court mentioned some of the practical arguments for exhaustion, even when the administrative remedy cannot provide the type of relief sought by an inmate: "[R]equiring exhaustion in these circumstances would produce administrative results that would satisfy at least some inmates who start out asking for nothing but money, since the very fact of being heard and prompting administrative change can mollify passion even when nothing ends up in the pocket." 532 U.S. 731, 737 (2001).

court."[241] Moreover, when a prison indicates in its initial response to an inmate grievance that it carefully handles meritorious claims, it deepens the prisoner's respect for rules and bolsters the moral and rehabilitative aspects of confinement.[242]

4. *Danger of Perverse Incentives?* — Notwithstanding the benefits of widespread acceptance of the "object intelligibly" standard, some argue that *Ngo*'s "proper exhaustion" rule, as later interpreted by the Court in *Bock*, encourages prison authorities—all with an "understandable interest in avoiding adverse judgments against themselves or their colleagues"[243]—to "come up with ever-higher procedural hurdles in order to foreclose subsequent litigation."[244] "After all," the argument goes, "the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit."[245] In light of these concerns, this Note would be incomplete without addressing whether the PLRA's "proper exhaustion" doctrine incentivizes prison authorities to tailor their grievance systems to make it harder for prisoners to "object intelligibly."

Unfortunately, critics' predictions as to prison authorities' response to the PLRA have been confirmed: Certain revisions to grievance procedures have been intended to reduce the ability of prisoners to access federal courts.[246] However, while these revisions provide additional grounds for *procedural* dismissal of a grievance—such as failure to specifically name each individual involved in the incident that forms the basis of the complaint, to write a complaint only in the space provided, to attach a copy of all previous steps and responses, or to provide only one issue or incident per grievance[247]—there is no indication in any of the revisions that prisoners are expected to articulate legal theories or spell out the elements of legal claims.[248] That is, the revised procedures *lack* a require-

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241. Nyhuis v. Reno, 204 F.3d 65, 76 (3d Cir. 2000) (internal quotation marks omitted).

242. See id. at 76–77 (explaining if inmate "sees his meritorious claims handled with care by his jailers, he is more likely to respect their rules and serve his time in a manner that is as productive as possible").

243. Schlanger & Shay, supra note 54, at 150.

244. Id. at 141; see also Borchardt, supra note 12, at 472 ("Rather than promoting accountability, 'proper exhaustion' encourages incarcerating authorities to immunize themselves from liability for potentially wrongful conduct.").

245. Schlanger & Shay, supra note 54, at 149.

246. See Borchardt, supra note 12, at 498–518 (analyzing and comparing grievance procedures of several states and confirming dishonest nature of schemes).

247. See id. In his Note, Derek Borchardt discusses how certain grievance systems have been updated "in ways that are difficult, if not impossible, to understand as anything other than attempts at keeping prisoners from successfully exhausting the grievance process." Id. at 494–95.

248. See supra notes 90–94 and accompanying text (describing different grievance types and concluding none of them require prisoners to plead legal theories).

ment that the grievance must include a specific legal theory or facts that correspond to all the required elements of a particular legal theory. And since the ability to "object intelligibly" turns on a prison system's policy lacking specific requirements—in such instances a grievance satisfies exhaustion "if it alerts the prison to the nature of the wrong for which redress is sought"[249]—by remaining silent as to a legal-theory pleading requirement, these procedures have not made it more difficult for prisoners to "object intelligibly."

Furthermore, in contrast to grievance procedures that have become increasingly onerous and difficult to satisfy, grievance procedures in numerous states appear to have been amended "entirely reasonably" over the years.[250] In an extensive analysis of a sampling of grievance procedures promulgated by various state departments of corrections, one commentator found that grievance procedures in Connecticut, Hawaii, Idaho, Indiana, and Mississippi have had "facially reasonable updates."[251] While these updated regulations are arguably silent as to a legal-theory pleading requirement,[252] they demonstrate that certain states have "resisted the temptation to amend [their] grievance procedures with burdensome requirements designed to defeat prisoner lawsuits."[253]

B. *Defects Deemed Uncorrectable in the Administrative Process Would Be Amendable in Litigation*

Perhaps more importantly, even if certain omissions by prisoners—such as those in the cases discussed in Part II.C.1—are considered to be defects, for the most part they are errors that the inmate would be allowed to amend in litigation, an option that is not available in the administrative process. This Note does not propose a solution to this procedural disparity. Rather, it indicates that while application of the "object intelligibly" standard in situations of administrative silence would likely lead to increased findings of exhaustion by the federal courts,[254] there are certain obstacles that will continue to burden prisoner grievants.[255]

In certain circumstances, courts have discretion to grant the plaintiff leave to amend his or her complaint to include other information that is

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249. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002).

250. Borchardt, supra note 12, at 518 (listing examples of such states).

251. Id.

252. See id. at 518–19. There is no indication that the updated regulations contain legal-theory pleading requirements.

253. Id. at 519.

254. See supra Part II.C (discussing cases supporting notion).

255. Another such obstacle is the PLRA's three-strikes provision. This provision prohibits prisoners who have had three complaints or appeals dismissed as frivolous, malicious, or failing to state a claim from proceeding in forma pauperis unless they can show that they are in imminent danger of serious injury. See supra note 61 and accompanying text (introducing and explaining three-strikes provision).

needed to establish standing and a cause of action.[256] As one court has explained, "[W]hen a motion to dismiss a complaint is granted, courts typically permit the losing party leave to amend."[257] Under Federal Rule of Civil Procedure 15(a)(2), a party may amend its pleading only with the opposing party's consent or the court's leave, but "[t]he court should freely give leave when justice so requires."[258] Thus, if it is at all possible that the plaintiff can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend.[259]

Conversely, in the administrative process, prisoner-plaintiffs oftentimes attempt to file a supplementary grievance to add information to their initial grievance but are ultimately restricted from doing so.[260] Some courts have taken the view that amended complaints should be dismissed where the prisoner did not *initially* exhaust all administrative remedies as to each claim.[261] Others have taken the more severe stance that allowing prisoners to file suit at the outset and amend the complaint even *after exhaustion* would defeat the purpose of the PLRA—to lessen the burden

256. The Supreme Court has declared, "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, 371 U.S. 178, 182 (1962).

257. PR Diamonds, Inc. v. Chandler, 364 F.3d 671, 698 (6th Cir. 2004); see also Laurie v. Ala. Court of Criminal Appeals, 256 F.3d 1266, 1274 (11th Cir. 2001) ("There must be a substantial reason to deny a motion to amend."). In *Foman*, the Court articulated several reasons justifying a court's decision to deny leave to amend, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." 371 U.S. at 182.

258. Fed. R. Civ. P. 15(a)(2); see also Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981) (explaining Rule 15(a) "evinces a bias in favor of granting leave to amend"); Suzette M. Malveaux, Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of *Iqbal* on Civil Rights Cases, 14 Lewis & Clark L. Rev. 65, 138 (2010) ("Courts promote a liberal leave policy, permitting leave whenever possible.").

259. 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1483 (3d ed. 2010).

260. See, e.g., Jones v. Stalder, No. 06-1282-P, 2007 WL 2164243, at *2 (W.D. La. July 23, 2007) (noting plaintiff attempted to file supplementary grievance to add information and was not allowed to do so); Davison v. MacLean, No. 06-12755, 2007 WL 1520892, at *6–*7 (E.D. Mich. May 22, 2007) (indicating prisoner initially grieved harassing acts and later grieved retaliatory motive for them, but later grievance was dismissed as untimely).

261. See, e.g., Garcia v. Glover, 197 F. App'x 866, 868 (11th Cir. 2006). Garcia, a federal prisoner, alleged that he had been physically and verbally abused by multiple prison officials in the county jail in which he was detained. While admitting that he had failed to file a grievance, Garcia contended that his failure to exhaust should be excused because he feared retaliation. Id. at 867. Without considering whether the jail's administrative remedies were rendered "unavailable," the court concluded that "[b]ecause exhaustion was a precondition to filing this lawsuit, and Garcia admittedly did not exhaust all administrative remedies, his amended complaint properly was dismissed pursuant to § 1997e." Id. at 868.

on the courts.[262] These courts reason that if exhaustion under the PLRA meant only that prisoners had to exhaust administrative remedies before filing an amended complaint, they would have no incentive to exhaust those remedies prior to filing suit;[263] "prisoners could complete the [exhaustion] process while suit was pending, avoiding dismissal by later amending their complaint."[264]

On the whole, courts have been unforgiving about letting prisoners file supplemental or amended grievances. Should courts adopt the "object intelligibly" standard, however, this tendency may no longer be so problematic. Namely, as Part III.A.1 argues, widespread endorsement of the "object intelligibly" standard may compel prison officials to implement more effective grievance systems.[265] The development of such systems may in turn quell the need for inmates to supplement or amend their initial grievances, as litigants would have more guidance in terms of the level of specificity required at the outset.

CONCLUSION

Notwithstanding the legitimate concerns motivating the PLRA, the statute's exhaustion requirement creates a baffling maze in which indigent, illiterate individuals are left to determine how detailed their grievances must be. Without the assistance of counsel, these inmates will inevitably face an uphill battle absent more liberal grievance-pleading standards. Thus, the narrow reading of the PLRA's exhaustion requirement by many courts must be abandoned, and the amount of detail required in a grievance must be interpreted in light of the basic purposes behind the requirement, which include giving officials the time and opportunity to address complaints internally. Specifically, the federal courts should adopt the Seventh Circuit's "object intelligibly" standard in instances of administrative silence. The more lenient requirement that prisoners "object intelligibly" in their grievances recognizes that prisoners cannot be expected to infer the existence of a legal-theory pleading requirement. Under the standard, a grievance should be considered sufficient to the extent that it gives officials a fair opportunity to address the problem that will later form the basis of a lawsuit. Thus, where the relevant prison grievance procedure does not require prisoners to plead legal theories, neither should the PLRA for exhaustion purposes. Under

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262. See, e.g., Jackson v. District of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001) (holding prisoners did not satisfy exhaustion prior to filing suit simply by filing amended complaint once their administrative remedies were exhausted and explaining goal of PLRA is to have prison officials address grievance first, thereby lessening burden of courts).

263. Id.

264. Id.

265. See supra Part III.A.1 (explaining prison officials may promulgate more specific grievance rules in attempt to reduce risk of losing against inmate litigants in court).

such circumstances, prisoners can be expected only to "object intelligibly."