

# **The Prison Litigation Reform Act**

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## Contents

<b>I.</b>	<b>Introduction</b> .....	<b><u>1</u></b>
<b>II.</b>	<b>Scope and Definitions</b> .....	<b><u>1</u></b>
<b>III.</b>	<b>Prospective Relief</b> .....	<b><u>5</u></b>
<b>IV.</b>	<b>Exhaustion of Administrative Remedies</b> .....	<b><u>10</u></b>
<b>A.</b>	<b>The Statutory Requirement</b> .....	<b><u>10</u></b>
<b>B.</b>	<b>What Cases Must Be Exhausted?</b> .....	<b><u>16</u></b>
<b>C.</b>	<b>What Happens If the Plaintiff Has Failed to Exhaust?</b> .....	<b><u>17</u></b>
<b>D.</b>	<b>How Is Exhaustion Addressed Procedurally?</b> .....	<b><u>21</u></b>
	<b>1. Burden of Pleading and Proof</b> .....	<b><u>21</u></b>
	<b>2. Procedural Vehicles for Raising Exhaustion</b> .....	<b><u>23</u></b>
<b>E.</b>	<b>What Is Exhaustion?</b> .....	<b><u>25</u></b>
	<b>1. What If the Prisoner Wins the Grievance?</b> .....	<b><u>29</u></b>
	<b>2. Exhausting All Issues</b> .....	<b><u>31</u></b>
	<b>3. Specificity of Grievances</b> .....	<b><u>36</u></b>
	<b>4. Exhausting Each Defendant</b> .....	<b><u>41</u></b>
	<b>5. Exhausting Items of Relief</b> .....	<b><u>44</u></b>
	<b>6. “Total Exhaustion”</b> .....	<b><u>45</u></b>

7. Mistakes in Exhausting: Strict or Substantial Compliance? .....	<a href="#"><u>47</u></a>
8. Compliance with Time Limits .....	<a href="#"><u>55</u></a>
a. Initial Compliance .....	<a href="#"><u>56</u></a>
b. Time Limits After Dismissals for Non-Exhaustion .....	<a href="#"><u>60</u></a>
F. What Procedures Must Be Exhausted? .....	<a href="#"><u>62</u></a>
G. "Available" Remedies .....	<a href="#"><u>73</u></a>
1. Grievable and Non-Grievable Issues .....	<a href="#"><u>74</u></a>
2. Unavailability Based on the Facts .....	<a href="#"><u>78</u></a>
3. Estoppel .....	<a href="#"><u>84</u></a>
H. Statutes of Limitations .....	<a href="#"><u>85</u></a>
I. "Prison Conditions" .....	<a href="#"><u>89</u></a>
J. Retroactivity of the Statute .....	<a href="#"><u>92</u></a>
K. Exhaustion and Class Actions .....	<a href="#"><u>92</u></a>
V. Mental or Emotional Injury .....	<a href="#"><u>97</u></a>
A. What Does the Statute Do? .....	<a href="#"><u>98</u></a>
B. What Is Mental or Emotional Injury? .....	<a href="#"><u>100</u></a>
C. What Is Physical Injury? .....	<a href="#"><u>108</u></a>
VI. Attorneys' Fees .....	<a href="#"><u>110</u></a>
VII. Filing Fees and Costs .....	<a href="#"><u>114</u></a>
VIII. Three Strikes Provision .....	<a href="#"><u>116</u></a>
IX. Screening and Dismissal .....	<a href="#"><u>121</u></a>
X. Waiver of Reply .....	<a href="#"><u>122</u></a>
XI. Hearings by Telecommunication and at Prisons .....	<a href="#"><u>123</u></a>

<b>XII. Revocation of Earned Release Credit</b> .....	<b><a href="#">123</a></b>
<b>XIII. Diversion of Damage Awards</b> .....	<b><a href="#">124</a></b>

**APPENDIX**

<b>The Prison Litigation Reform Act, as codified</b> .....	<b><a href="#">125</a></b>
<b>I. Scope and applicability of the statute</b> .....	<b><a href="#">125</a></b>
<b>II. Prospective relief restrictions</b> .....	<b><a href="#">126</a></b>
<b>III. Exhaustion of administrative remedies</b> .....	<b><a href="#">130</a></b>
<b>IV. Mental or emotional injury</b> .....	<b><a href="#">131</a></b>
<b>V. Attorneys' fees</b> .....	<b><a href="#">131</a></b>
<b>VI. Filing fees and costs/screening and dismissal</b> .....	<b><a href="#">132</a></b>
<b>VII. Three strikes provision</b> .....	<b><a href="#">134</a></b>
<b>IX. Waiver of reply</b> .....	<b><a href="#">135</a></b>
<b>X. Hearings by telecommunication and at prisons</b> .....	<b><a href="#">135</a></b>
<b>XI. Revocation of earned release credit</b> .....	<b><a href="#">135</a></b>
<b>XII. Diversion of damage awards</b> .....	<b><a href="#">136</a></b>
<b>XIII. Bankruptcy</b> .....	<b><a href="#">136</a></b>

# The Prison Litigation Reform Act

## I. Introduction

The Prison Litigation Reform Act of 1995 (PLRA), actually passed in 1996, amends and supplements the U.S. Code in a number of ways in order to restrict and discourage litigation by prisoners. Its provisions fall into two broad categories: the prospective relief provisions, directed mainly at institutional reform injunctive litigation, and the prisoner litigation provisions, directed generally at civil actions brought by prisoners. The text of the statute, as codified, is reproduced in the Appendix. This summary reviews the provisions of the statute, the most important judicial interpretations of it, and major open questions concerning its application, with emphasis on the state of the law in the Second Circuit. All opinions expressed are the author's.

## II. Scope and definitions

The prospective relief sections of the PLRA apply to “civil action[s] with respect to prison conditions,” which are defined to include “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but do not include habeas corpus proceedings challenging the fact or duration of confinement in prison.”<sup>1</sup> A “prison” is a facility “that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”<sup>2</sup> “Prospective relief” is “all relief other than compensatory money damages.”<sup>3</sup>

The prisoner litigation sections of the PLRA apply to “civil actions” brought by “prisoners.” A prisoner is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”<sup>4</sup> Case law to date holds that military prisoners are “prisoners” under the PLRA,<sup>5</sup> as are persons held in privately operated prisons and

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<sup>1</sup> 18 U.S.C. § 3626(g)(2); *see* *Valdivia v. Davis*, 206 F.Supp.2d 1068, 1074 n. 12 (E.D.Cal. 2002) (holding challenge to parole revocation procedures was not a “civil action with respect to prison conditions”).

<sup>2</sup> 18 U.S.C. § 3626(g)(5).

<sup>3</sup> 18 U.S.C. § 3626(g)(7). Interpretation of this term is discussed in § III, below.

<sup>4</sup> 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); 28 U.S.C. § 1915A(c).

<sup>5</sup> *Marrie v. Nickels*, 70 F.Supp.2d 1252, 1262 (D.Kan. 1999).

jails,<sup>6</sup> juvenile facilities,<sup>7</sup> or an “intensive drug rehabilitation halfway house.”<sup>8</sup>

Persons who are civilly committed are generally not prisoners, even if their commitment has its origins in criminal proceedings.<sup>9</sup> However, persons who are civilly committed but whose criminal charges are still technically pending remain pre-trial detainees and are therefore prisoners.<sup>10</sup> Persons who are not, in fact, lawfully subject to detention are not prisoners.<sup>11</sup> Ex-prisoners are not prisoners; after release, the PLRA does not apply to them, even if they bring suit about events that

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<sup>6</sup> See *Boyd v. Corrections Corporation of America*, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 at \*3 (6<sup>th</sup> Cir., Sept. 8, 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1184 (10<sup>th</sup> Cir. 2004); *Lodholz v. Puckett*, 2003 WL 23220723 at \*4-5 (W.D.Wis., Nov 24, 2003), *reconsideration denied in part*, 2004 WL 67573 (W.D.Wis., Jan. 13, 2004); *Herrera v. County of Santa Fe*, 213 F.Supp.2d 1288, 1293 (D.N.M. 2002) (all holding the PLRA exhaustion requirement applicable to persons held in private prisons).

<sup>7</sup> *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 994-95 (8<sup>th</sup> Cir. 2003) (holding attorneys’ fees provisions apply to juveniles); *Alexander S. v. Boyd*, 113 F.3d 1373, 1383-85 (4<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) (same); *Lewis v. Gagne*, 281 F.Supp.2d 429, 433 (N.D.N.Y. 2003) (holding exhaustion requirement applies to juveniles).

<sup>8</sup> *Witzke v. Femal*, 376 F.3d 744, 752-53 (7<sup>th</sup> Cir. 2004).

<sup>9</sup> See *Perkins v. Hedricks*, 340 F.3d 582, 583 (8<sup>th</sup> Cir. 2003) (person civilly detained in prison Federal Medical Center); *Troville v. Venz*, 303 F.3d 1256, 1260 (11<sup>th</sup> Cir. 2002) (person civilly detained for proceedings under “sexually violent predator” statute); *Agyeman v. I.N.S.*, 296 F.3d 871, 885-86 (9<sup>th</sup> Cir. 2002) (alien detained pending deportation); *Kolotronis v. Morgan*, 247 F.3d 726, 728 (8<sup>th</sup> Cir. 2001) (person committed after finding of not guilty by reason of insanity); *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9<sup>th</sup> Cir. 2000) (persons detained under a “sexual predator” law after completion of their criminal sentences); *LaFontant v. INS*, 135 F.3d 158 (D.C.Cir. 1998) (immigration detainees).

<sup>10</sup> *Kalinowski v. Bond*, 358 F.3d 978, 979 (7<sup>th</sup> Cir.) (holding that persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes), *cert. denied*, 124 S.Ct. 2843 (2004).

<sup>11</sup> *Williams v. Block*, 1999 WL 33542996 at \*6 (C.D.Cal., Aug. 11, 1999) (holding that persons held after they were entitled to be released were not prisoners); *Lee v. State Dept. of Correctional Services*, 1999 WL 673339 at \*4 (S.D.N.Y., Aug. 30, 1999) (holding that a mentally retarded person imprisoned based on mistaken identity was not a prisoner because he had not actually been accused or convicted of any crime); *Watson v. Sheahan*, 1998 WL 708803 at \*2 (N.D.Ill., Sept. 30, 1998) (holding that persons detained for 10 hours after they were legally entitled to be released were not prisoners during that period for purposes of attorneys’ fees).

occurred in prison.<sup>12</sup> Courts have differed over whether a prisoner who files suit while in prison and then is released should continue to be treated as a prisoner,<sup>13</sup> or whether the filing of an amended complaint after release means that the case is no longer “brought by a prisoner.”<sup>14</sup> It appears that prisoners cease to be prisoners upon death.<sup>15</sup> Prisoners’ relatives bringing an action for a prisoner’s death are not themselves prisoners.<sup>16</sup> Courts have taken different approaches to cases involving both

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<sup>12</sup> *Ahmed v. Dragovich*, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); *Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001); *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999). In *Segalow v. County of Bucks*, 2004 WL 1427137 at \*1 (E.D.Pa., June 24, 2004), the court held that a prisoner who was released, filed his complaint, was reincarcerated, was released again, and filed an amended complaint naming a new party was not a prisoner for PLRA purposes.

A few courts have held that, unlike the administrative exhaustion requirement, the bar on actions for mental or emotional injury without physical injury applies to cases filed by released prisoners, since the congressional purpose of weeding out frivolous cases would be served thereby. *Cox v. Malone*, 199 F.Supp.2d 135, 140 (S.D.N.Y. 2002), *aff’d*, 56 Fed.Appx. 43, 2003 WL 366724 (2d Cir. 2002); *accord*, *Lipton v. County of Orange, NY*, 315 F.Supp.2d 434, 456-57 (S.D.N.Y. 2004). That holding, though affirmed by non-precedential opinion, disregards the plain language of the statute that such actions may not “be brought by a prisoner confined in a jail, prison, or other correctional facility.” 42 U.S.C. § 1997e(e). A person on parole is not “a prisoner confined” in one of the listed types of institutions. The decision in *Morgan v. Maricopa County*, 259 F.Supp.2d 985, 991 (D.Ariz. 2003), that a released prisoner was required to exhaust prison remedies even though he had been released before he filed suit, is equally inconsistent with the statute, as well as with Ninth Circuit case law holding that only current criminal incarceration makes a plaintiff a prisoner. *See Page v. Torrey*, 201 F.3d 1136, 1139 (9th Cir. 2000); *see also* *Kritenbrink v. Crawford*, 313 F.Supp.2d 1043, 1047-48 (D.Nev. 2004) (noting *Morgan*’s inconsistency with *Page*).

<sup>13</sup> *Compare* *Harris v. Garner*, 216 F.3d 970, 973-76 (11<sup>th</sup> Cir. 2000) (en banc) (holding that plaintiffs released after filing remain prisoners for purposes of PLRA mental/emotional injury provision), *cert. denied*, 532 U.S. 1065 (2001); *Becker v. Vargo*, 2004 WL 1068779 at \*3 (D.Or., Feb. 17, 2004) (same, for purposes of exhaustion requirement), *report and recommendation adopted*, 2004 WL 1071067 (D.Or., Mar. 12, 2004) and 2004 WL 1179332 (D.Or., May 27, 2004) *with* *Dennison v. Prison Health Services*, 2001 WL 761218 at \* 2-3 (D.Me., July 6, 2001) (holding the opposite with respect to exhaustion requirement).

<sup>14</sup> *Compare* *Harris v. Garner*, *id.* (holding that filing of amended complaint does not change plaintiffs’ status) *with* *Prendergast v. Janecka*, 2001 WL 793251 at \*1 (E.D.Pa., July 10, 2001) (holding that the PLRA ceases to apply when a post-release amended complaint is filed); *see also* *Segalow v. County of Bucks*, cited in n. 12, above.

<sup>15</sup> *Greer v. Tran*, 2003 WL 21467558 at \*2 (E.D.La., June 23, 2003); *Treesh v. Taft*, 122 F.Supp.2d 887, 890 (S.D.Ohio. 2000).

<sup>16</sup> *Greer v. Tran*, 2003 WL 21467558 at \*2 (E.D.La., Jun 23, 2003).

prisoners and non-prisoners as plaintiffs.<sup>17</sup>

Civil actions do not include habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences or their calculation.<sup>18</sup> Most courts have now held that habeas proceedings not arising from the original criminal conviction or sentence are also not civil actions for PLRA purposes.<sup>19</sup> Under that holding, habeas proceedings directed at prison disciplinary convictions are not governed by the PLRA,<sup>20</sup> though subsequent damage actions would be.

In most circuits, including the Second, mandamus and other extraordinary writs are considered civil actions when the relief sought is similar to that in a civil action, but not when the writ is directed to criminal matters.<sup>21</sup> However, challenges to seizures of property related to criminal proceedings have so far been treated as civil actions,<sup>22</sup> as have motions for disclosure of matters

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<sup>17</sup> See *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir.) (holding that prisoner plaintiffs were barred for non-exhaustion but non-prisoners' claims could be decided on the merits), *cert. denied*, 534 U.S. 1062 (2001); *Montcalm Pub. Corp. v. Com. of Va.*, 199 F.3d 168, 171-72 (4th Cir. 1999) (holding that a publisher who intervened in a prisoner's challenge to prison censorship was bound by the PLRA attorneys' fees provisions, since it intervened in a case brought by a prisoner rather than filing its own complaint); *Turner v. Wilkinson*, 92 F.Supp.2d 697, 704 (S.D. Ohio 1999) (holding that a case filed by a prisoner husband and his non-prisoner wife was not "brought by a prisoner").

<sup>18</sup> See, e.g., *Jennings v. Natrona County Detention Center Officer*, 175 F.3d 775, 779 (10th Cir. 1999); *Alexander v. U.S.*, 121 F.3d 312 (7th Cir. 1997); *Zapata v. Scibana*, 2004 WL 1563239 at \*1 (W.D. Wis., July 9, 2004) (holding a habeas challenge to good time calculation not subject to the PLRA); *Neal v. Fleming*, 2004 WL 792729 at \*2 (N.D. Tex., Apr. 14, 2004) (holding a prisoner challenging the failure to release him early for completion of a drug program was not subject to PLRA exhaustion), *report and recommendation adopted*, 2004 WL 1175736 (N.D. Tex., May 26, 2004); *Monahan v. Winn*, 276 F.Supp.2d 196, 204 (D. Mass. 2003).

<sup>19</sup> *Malave v. Hedrick*, 271 F.3d 1139, 1140 (8th Cir. 2001), *cert. denied*, 537 U.S. 847 (2002); *Walker v. O'Brien*, 216 F.3d 626, 633-36 (7th Cir.), *cert. denied*, 531 U.S. 1029 (2000), *overruling* *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-41 (D.C. Cir.), *on rehearing*, 159 F.3d 591 (D.C. Cir. 1998); *Davis v. Fechtel*, 150 F.3d 486, 488-90 (5th Cir. 1998); *McIntosh v. U.S. Parole Commission*, 115 F.3d 809, 811-12 (10th Cir. 1997).

<sup>20</sup> *Walker v. O'Brien*, 216 F.3d at 638-39.

<sup>21</sup> See *In re Jacobs*, 213 F.3d 289, 289 n.1 (5th Cir. 2000); *In re Smith*, 114 F.3d 1247 (D.C. Cir. 1997); *In re Nagy*, 89 F.3d 115 (2d Cir. 1996).

<sup>22</sup> *U.S. v. Minor*, 228 F.3d 352 (4th Cir. 2000) (holding that an equitable challenge to a completed forfeiture is a civil action); *U.S. v. Jones*, 215 F.3d 467, 469 (4th Cir. 2000) (holding that

before a grand jury.<sup>23</sup> Decisions are divided concerning motions made under the caption of a criminal prosecution addressing conditions of confinement related to the prosecution.<sup>24</sup>

There is some variation in the scope of the PLRA prisoner litigation provisions. For example, the filing fees provisions apply to all civil litigation brought by prisoners,<sup>25</sup> while the exhaustion of administrative remedies provision applies to prisoners' actions "with respect to prison conditions."<sup>26</sup> Always check the language of the particular provision you are dealing with.

### III. Prospective Relief

Prospective relief in prison conditions litigation, whether contested or entered by consent, is required to be narrowly drawn, to extend no further than necessary to correct a violation of federal rights, and to be the least intrusive means of doing so; courts are to give substantial weight to adverse impacts on public safety or criminal justice operations.<sup>27</sup> This standard is not much different from pre-PLRA law governing federal court civil rights injunctions.<sup>28</sup> Settlements must meet this need-

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a motion under Rule 41(e), Fed.R.Crim.P., for the return of seized property is a civil action); U.S. v. Lacey, 172 F.3d 880, 1999 WL 143881 (10th Cir., Mar. 17, 1999) (unpublished) (assuming that civil forfeiture case is subject to fees requirement); *Pena v. U.S.*, 122 F.3d 3 (5th Cir. 1997) (same as *Jones*).

<sup>23</sup> U.S. v. Campbell, 294 F.3d 824, 826-29 (7<sup>th</sup> Cir. 2002).

<sup>24</sup> In *U.S. v. Lopez*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 1672888 (D.P.R., July 15, 2004), the court held that a motion challenging placement in administrative segregation after the government decided to seek the death penalty against the defendant was not a civil action, and granted relief. In another case raising the same issue, the court made a similar statement but ultimately disposed of the matter by holding that the motion was properly treated as a habeas corpus proceeding to which the PLRA is inapplicable. *U.S. v. Catalan-Roman*, 2004 WL 1773453 at \*8 (D.P.R., July 1, 2004), *report adopted*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 1773453 (D.P.R., Aug. 6, 2004). However, an appellate decision holds that a motion in a long-completed criminal case challenging a prison policy forbidding inmates from retaining possession of pre-sentence reports should have been treated as a separate civil action and that it required exhaustion. *U.S. v. Antonelli*, 371 F.3d 360, 361 (7<sup>th</sup> Cir. 2004).

<sup>25</sup> 28 U.S.C. § 1915(a)(2).

<sup>26</sup> 42 U.S.C. § 1997e(a).

<sup>27</sup> 18 U.S.C. § 3626(a).

<sup>28</sup> *Gilmore v. California*, 220 F.3d 987, 1006 (9<sup>th</sup> Cir. 2000); *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 647 (8<sup>th</sup> Cir. 1996) (holding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); *Morales Feliciano v.*

narrowness-intrusiveness standard to be enforceable in federal court.<sup>29</sup> Settlement that do not meet the PLRA standards are not prohibited, but these must be entered as “private settlement agreements” not enforceable in federal court.<sup>30</sup>

Prospective relief is defined as “all relief other than compensatory money damages.”<sup>31</sup> Several courts have held that special masters, court monitors, or other monitoring arrangements designed to effectuate injunctive relief are not themselves relief subject to the prospective relief restrictions.<sup>32</sup> Attorneys’ fees, even those awarded for monitoring compliance with an injunction, are not prospective relief.<sup>33</sup> One federal court has held that punitive damages are prospective relief and that after a plaintiff’s verdict the district court should have “determined” whether the jury’s punitive damage award was necessary and in the proper amount to deter future violations.<sup>34</sup> The

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Calderon Serra, 300 F.Supp.2d 321, 339-40 (D.P.R. 2004) (“This language mimics long standing requirements for injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. . . . [T]his is the old ‘over broadness’ doctrine used to measure garden variety injunctive relief under Rule 65.”), *aff’d*, 378 F.3d 42, 54-56 (1st Cir. 2004); *Dodge v. County of Orange*, 282 F.Supp.2d 41, 71-72 (S.D.N.Y. 2003), *appeal dismissed, remanded on other grounds*, \_\_\_ Fed.Appx. \_\_\_, 2004 WL 1567870 (2d Cir. 2004); *see, e.g.*, *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9<sup>th</sup> Cir. 1986), *cert. denied*, 481 U.S. 1069; *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986); *Duran v. Elrod*, 760 F.2d 756, 760-61 (7<sup>th</sup> Cir. 1985).

<sup>29</sup> 18 U.S.C. §§ 3626(a), 3626(c)(1); *see, e.g.*, *Laube v. Campbell*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 1872862 (M.D.Ala., Aug. 23, 2004) (approving settlement under PLRA standard).

<sup>30</sup> 18 U.S.C. § 3626(c)(2).

<sup>31</sup> 18 U.S.C. § 3626(g)(7).

<sup>32</sup> *See Carruthers v. Jenne*, 209 F.Supp.2d 1294, 1300 (S.D.Fla. 2002); *Benjamin v. Fraser*, 156 F.Supp.2d 333, 342-43 and n.11 (S.D.N.Y. 2001), *aff’d in part, vacated and remanded in part*, 343 F.3d 35 (2d Cir. 2003), and cases cited. However, the appeals court in *Benjamin* expressed considerable doubt about that conclusion without ruling on the matter. 343 F.3d at 49.

<sup>33</sup> *Carruthers v. Jenne*, 209 F.Supp.2d at 1299-1300.

<sup>34</sup> *Johnson v. Breeden*, 280 F.3d 1308, 1325 (11<sup>th</sup> Cir. 2002).

Other courts have mostly ignored *Johnson’s* holding. In *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003), the court expressed great skepticism about *Johnson’s* rationale: “At first blush, it seems that one can neither ‘narrowly draw’ punitive damages, nor adjust them to better ‘correct’ a violation of rights, nor render them any more or less ‘intrusive.’” *Id.* at \*6 n.7. Even accepting the *Johnson* holding *arguendo*, the court concluded that it supplemented rather than supplanted existing punitive damages law, and concluded that a \$10,000 punitive damages award satisfied *Johnson* in a case where \$1.00 in compensatory damages had been awarded for a “conniving and malicious” series of actions designed to retaliate for a prisoner’s use of the grievance

court did not comment on the potential Seventh Amendment problem its holding presents, and why it did not hold that the jury should be instructed to apply the PLRA standards.

The meaning of “narrowly drawn” and “least intrusive” is not always clear, and many decisions address the subject on an *ad hoc* basis without stating any general principles.<sup>35</sup> Courts have disagreed whether, upon finding a policy unconstitutional in a non-class action, they can simply enjoin the policy, or must restrict relief to the plaintiffs in the suit.<sup>36</sup> Systemic relief must be supported by proof of a systemic violation; if a violation is narrowly focused on a few individuals,

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system. *Id.* at \*6-7. The PLRA’s restrictions on compensatory damages in cases involving mental or emotional injury, 42 U.S.C. § 1997e(e), justify such disproportions between compensatory and punitive damages. *Id.* at \*9.

<sup>35</sup> *See, e.g.,* Morrison v. Garraghty, 239 F.3d 648, 661 (4<sup>th</sup> Cir. 2001) (affirming injunction prohibiting refusing the plaintiff a religious exemption from property restrictions solely based on his non-membership in the “Native American race”; emphasizing its narrowness); Greybuffalo v. Frank, 2003 WL 23211615 at \*5 (W.D.Wis., Nov. 4, 2003) (“Generally, a prison transfer would be a much broader form of relief than that necessary to remedy a constitutional or statutory rights violation. . . . [T]he appropriate remedy would be to provide plaintiff with the item he requested or allow him to engage in the desired religious practice.”); Dodge v. County of Orange, 282 F.Supp.2d 41, 89 (S.D.N.Y. 2003) (enjoining jail officials from strip-searching new admissions without reasonable suspicion of contraband based on crime, characteristics of arrestee, or circumstances of arrest. “I cannot imagine an injunction that is narrower, less extensive, or less intrusive. . . . I am not mandating any specific actions defendants must take. Rather, I am telling defendants that they must adhere to the reasonable suspicion standard. . . .”), *appeal dismissed, remanded on other grounds*, \_\_\_ Fed.Appx. \_\_\_, 2004 WL 1567870 (2d Cir. 2004); Charles v. Verhagen, 2002 WL 32348353 (W.D.Wis., Dec. 19, 2002) (holding in RLUIPA case that the violation was in refusing to permit Muslims to possess any quantity of prayer oil, declining on PLRA grounds to require defendants to allow it other than in expensive one-ounce bottles).

<sup>36</sup> *Compare* Clement v. California Dept. of Corrections, 364 F.3d 1148, 1152 (9<sup>th</sup> Cir. 2004) (affirming statewide injunction against prohibition on receipt of materials downloaded from the Internet); Ashker v. California Dep’t of Corrections, 350 F.3d 917, 924 (9<sup>th</sup> Cir. 2003) (citations omitted) (affirming injunction against a requirement that “approved vendor labels” be affixed to all books sent to prisoners, stating that the injunction “‘heel[s] close to the identified violation’ and is not overly intrusive because the prison still searches every incoming package and can determine from the address label and invoice whether the package came directly from a vendor.”); Williams v. Wilkinson, 132 F.Supp.2d 601, 604, 608-09, 611-12 (S.D.Ohio 2001) (finding an informal policy of refusing to call witnesses in disciplinary hearings, rejecting defendants’ argument that the PLRA limited relief to the individual plaintiff, directing defendants to promulgate a new policy) *with* Lindell v. Frank, 377 F.3d 655, 660 (7<sup>th</sup> Cir. 2004) (holding injunction against restrictions on receipt of clippings overbroad insofar as it applied to other prisoners besides the plaintiff).

or on part of a system, relief should be focused accordingly.<sup>37</sup> Agreements between the parties are “strong evidence,” if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement,<sup>38</sup> and tracking existing agency or institutional policy is further evidence of PLRA compliance.<sup>39</sup> Assuming time deadlines must meet the PLRA standard, defendants must justify delay, since “by providing defendants any time at all to implement the ordered relief the Court allows defendants to further trespass on detainees’ constitutional rights.”<sup>40</sup>

The needs-narrowness-intrusiveness test is applied with an eye towards practicality and towards the potential intrusiveness of enforcement of the remedy. Thus, where the failure to repair non-functioning jail windows was found to contribute to a constitutional violation, the court ordered the defendants to repair the windows, noting that such a requirement is not overly intrusive since it is “a routine task in any building,”<sup>41</sup> and since “a comprehensive repair program is the only rational means to correct the system-wide violation, and is far less intrusive than the Court making window-

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<sup>37</sup> See *Benjamin v. Fraser*, 343 F.3d 35, 56-57 (2d Cir. 2003) (vacating finding of no constitutional violation in jail food service, directing district court to make particular findings concerning three jails where the record showed serious sanitary problems); *Gomez v. Vernon*, 255 F.3d 1118, 1130 (9<sup>th</sup> Cir.), *cert. denied*, 534 U.S. 1066 (2001) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons).

<sup>38</sup> *Benjamin v. Fraser*, 156 F.Supp.2d 333, 344 (2001), *aff’d in part, vacated and remanded in part on other grounds*, 343 F.3d 35 (2d Cir. 2003), *quoting* *Cason v. Seckinger*, 231 F.3d at 785 n. 8 (noting particularized findings are not necessary concerning undisputed facts, and the parties may make concessions or stipulations as they deem appropriate); *accord*, *Morales Feliciano v. Calderon Serra*, 300 F.Supp.2d 321, 334 (D.P.R. 2004) (“The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intrusive at all.”) (footnote omitted), *aff’d*, 378 F.3d 42, 54-56 (1st Cir. 2004).

<sup>39</sup> *Benjamin v. Fraser*, 156 F.Supp.2d at 344 (“Requiring the Department to follow its own rules can hardly be either too broad or too intrusive.”) The court further rejected the argument that a requirement’s existence in agency policy obviates the need for its inclusion in the judgment, since its presence in policy “obviously did not cure the violation.” *Id.* at 354-55; *accord*, *Ruiz v. Johnson*, 154 F.Supp.2d 975, 994 (S.D.Tex. 2001) (noting that defendants’ policies were constitutional but must be effectuated; “The court cannot conceive of a less intrusive alternative, and neither party has proffered one.”); *see* *Gates v. Cook*, 376 F.3d 323, 337 (5<sup>th</sup> Cir. 2004) (affirming aspects of injunction even though defendants said they were already doing what they had been ordered to do; issue framed as mootness).

<sup>40</sup> *Benjamin*, 156 F.Supp.2d at 344; *see* *Skinner v. Uphoff*, 234 F.Supp.2d 1208, 1217 (D.Wyo. 2002) (directing that the parties propose remedies that “will *promptly* and effectively” abate the violations) (emphasis supplied).

<sup>41</sup> *Benjamin*, 156 F.Supp.2d at 350.

by-window repair/replace determinations.”<sup>42</sup> Although the PLRA requires that remedies be tailored to violations, it allows highly intrusive remedies where the record supports their necessity.<sup>43</sup>

Injunctions in prison conditions litigation may be terminated on motion unless the court finds that there is a “current and ongoing” violation of federal law; if the court makes such findings, relief must meet the same need/narrowness/intrusiveness requirements as for the initial entry of relief.<sup>44</sup> The “current and ongoing” requirement does not appear in, and does not apply to, the PLRA provision governing the initial entry of relief.<sup>45</sup> Presumably the pre-existing law of mootness applies at this initial stage.

The termination provision has been upheld against challenges based on the separation of powers, due process, and equal protection grounds.<sup>46</sup> When a motion is filed to terminate

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<sup>42</sup> *Id.* On appeal, the court agreed emphatically. 343 F.3d at 53-54 (“... [I]t is ironic that the City . . . invokes the PLRA, which was intended in part to prevent judicial micro-management, in support of the proposition that the district court was required to examine every window. . . . Given the impracticability of the court examining each window, ordering comprehensive repairs was a necessary and narrowly drawn means of effectuating relief—even though the Constitution would certainly permit a broken window or two.”)

<sup>43</sup> *Morales Feliciano v. Rullan*, 378 F.3d 42, 54-56 (1st Cir. 2004) (finding remedy of privatization of medical care appropriate in light of failure of less intrusive measures; “[d]rastic times call for drastic measures.”); *Gates v. Cook*, 376 F.3d 323, 337, 341-42 (5<sup>th</sup> Cir. 2004) (requiring prison to meet American Correctional Association and National Commission on Correctional Healthcare standards in mental health program; requiring provision of 20 foot candles of light in cells); *Skinner v. Uphoff*, 234 F.Supp.2d 1208, 1218 (D.Wyo. 2002) (stating that a remedy for inmate-inmate violence must address the admitted “culture” impeding the effective supervision and discipline of staff; “systematic and prophylactic measures” may be ordered if necessary to correct the violations); *see Mayweathers v. Terhune*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 1750545 (E.D.Cal., June 25, 2004) (directing parties to propose an appropriate remedy where defendants’ claims of administrative difficulty were too general for the court to formulate a remedy conforming to the PLRA standards).

<sup>44</sup> 18 U.S.C. § 3626(b); *see Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001) (affirming findings of continuing and ongoing violations); *Benjamin v. Fraser*, 161 F.Supp.2d 151 (S.D.N.Y.), *on motions for reconsideration*, 156 F.Supp.2d 333 (S.D.N.Y. 2001) (making additional findings of continuing and ongoing violations), *aff’d in part, vacated and remanded in part*, 343 F.3d 35 (2d Cir. 2003).

<sup>45</sup> 18 U.S.C. § 3626(a)(1); *see Austin v. Wilkinson*, 372 F.3d 346, 360 (6<sup>th</sup> Cir. 2004).

<sup>46</sup> *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir.) (en banc), *cert. denied*, 528 U.S. 824 (1999); *see Miller v. French*, 530 U.S. 327 (2000) (adopting same separation of powers rationale as *Benjamin*).

prospective relief, the motion operates as a stay (suspension) of the relief after 30 days, which may be extended to 90 days for good cause.<sup>47</sup> This provision too has been upheld against a separation of powers challenge.<sup>48</sup> Private settlement agreements not enforceable in federal court also are not subject to the termination provisions.<sup>49</sup>

There are additional provisions restricting “prisoner release orders,”<sup>50</sup> preliminary injunctions,<sup>51</sup> and the use of special masters in prison conditions litigation.<sup>52</sup>

#### **IV. Exhaustion of Administrative Remedies**

##### **A. The Statutory Requirement**

The most-litigated provision of the PLRA is its exhaustion requirement, which provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”<sup>53</sup> The Second Circuit has recently addressed some of the most contentious PLRA exhaustion questions in five cases argued and decided

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<sup>47</sup> 18 U.S.C. § 3626(e).

<sup>48</sup> *Miller v. French*, 530 U.S. 327 (2000); *see also Merriweather v. Sherwood*, 235 F.Supp.2d 339, 343-44 (S.D.N.Y. 2002) (upholding provision against due process challenge).

<sup>49</sup> *Shultz v. Wells*, 2003 WL 21911330 at \*1 (unpublished) (6<sup>th</sup> Cir. 2003); *York v. City of El Dorado*, 119 F.Supp.2d 1106, 1108 (E.D.Cal. 2000).

<sup>50</sup> 18 U.S.C. § 3626(a)(3); *see Castillo v. Cameron County, Texas*, 238 F.3d 339, 348 (5<sup>th</sup> Cir. 2001); *Berwanger v. Cottey*, 178 F.3d 834, 836 (7<sup>th</sup> Cir. 1999); *Ruiz v. Estelle*, 161 F.3d 814, 821-27 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999); *Tyler v. Murphy*, 135 F.3d 594, 595-96 (8<sup>th</sup> Cir. 1998) (all construing the prisoner release order provision).

<sup>51</sup> 18 U.S.C. § 3626(a)(2) (limiting duration of preliminary injunctions to 90 days); *see Mayweathers v. Newland*, 258 F.3d 930, 936 (9<sup>th</sup> Cir. 2001) (holding that courts may enter sequential preliminary injunctions if the factual justification continues to exist); *Gates v. Fordice*, 1999 WL 33537206 (N.D.Miss., July 19, 1999) (holding that the PLRA did not change the standards for granting a preliminary injunction, but the relief must meet the PLRA standards).

<sup>52</sup> 18 U.S.C. § 3626(f); *see Benjamin v. Fraser*, 343 F.3d 35, 44 (2<sup>d</sup> Cir. 2003) (holding that a court monitor without quasi-judicial powers was not a special master for PLRA purposes and that the PLRA special master provisions did not apply to pre-existing court agents); *Webb v. Goord*, 340 F.3d 105, 111 (2<sup>d</sup> Cir. 2003) (noting that the PLRA has “substantially limited” the use of special masters in prison litigation), *cert. denied*, 124 S.Ct. 1077 (2004).

<sup>53</sup> 42 U.S.C. § 1997e(a).

together.<sup>54</sup>

The PLRA's mandatory exhaustion requirement replaced the former discretionary approach to exhaustion<sup>55</sup> and rendered inapplicable "traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has 'no power to decree . . . relief,' [citation omitted], or need not exhaust where doing so would otherwise be futile."<sup>56</sup> At to its purpose, the Supreme Court has observed: "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."<sup>57</sup>

Though it is mandatory, most courts including the Second Circuit have held that the PLRA exhaustion requirement is not jurisdictional,<sup>58</sup> and that courts therefore can apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.<sup>59</sup> The Second Circuit has also held that "special circumstances" may justify failure to exhaust and allow the prisoner to proceed without

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<sup>54</sup> See *Ortiz v. McBride*, \_\_\_ F.3d \_\_\_, 2004 WL 1842644 (2d Cir., Aug. 18, 2004); *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 (2d Cir., Aug 18, 2004); *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 (2d Cir., Aug 18, 2004); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 (2d Cir., Aug 18, 2004); *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 (2d Cir., Aug. 18, 2004).

<sup>55</sup> *Salahuddin v. Mead*, 174 F.3d 271, 274 n. 1 (2d Cir. 1999).

<sup>56</sup> *Booth v. Churner*, 532 U.S. 731, 741 n. 6 (2001); *accord*, *Porter v. Nussle*, 534 U.S. 516, 523-24 (2002); *Boyd v. Corrections Corporation of America*, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 at \*8 (6<sup>th</sup> Cir., Sept. 8, 2004) and cases cited (holding that prisoners' subjective belief the process will be unresponsive does not excuse exhaustion); *Alexander v. Tippah County, Miss.*, 351 F.3d 626, 630 (5<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 2071 (2004).

<sup>57</sup> *Porter v. Nussle*, 534 U.S. at 524-25.

<sup>58</sup> See *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1208 (10<sup>th</sup> Cir. 2003), *pet. for cert. filed* (U.S., Apr. 26, 2004), and cases cited; *Richardson v. Goord*, 347 F.3d 431, 433-34 (2d Cir. 2003); *Ali v. District of Columbia*, 278 F.3d 1, 6 (D.C.Cir. 2002) and cases cited. *But see* *Chandler v. Crosby*, \_\_\_ F.3d \_\_\_, 2004 WL 1764123 at \*3 n.16 (11<sup>th</sup> Cir., Aug. 6, 2004) (noting this circuit has not decided the question).

<sup>59</sup> See *Richardson v. Goord*, 347 F.3d at 433; *Underwood v. Wilson*, 151 F.3d 292, 294 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *accord*, *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5<sup>th</sup> Cir. 2001) (reiterating this holding after *Booth v. Churner*); *Fouk v. Charrier*, 262 F.3d 687, 697 (8<sup>th</sup> Cir. 2001). See generally § IV.G.3, concerning estoppel. *But see* *Steele v. Federal Bureau of Prisons*, 355 F.3d at 1209 (holding PLRA exhaustion cannot be waived even though non-jurisdictional), *pet. for cert. filed* (U.S., Apr. 26, 2004).

exhaustion if remedies are no longer available.<sup>60</sup> It has suggested, in considering these responses to a defense of non-exhaustion, that courts ought first to consider any argument that administrative remedies were not available,<sup>61</sup> which makes sense because a finding that no remedies were available ends the inquiry as to exhaustion. Estoppel and special circumstances arguments are more complex.<sup>62</sup>

Most courts, including the Second Circuit, have held that non-exhaustion is an affirmative defense to be raised by defendants<sup>63</sup> and that it can be waived by failure to do so.<sup>64</sup> A number of courts have held exhaustion waived, or at least waivable, by failure to raise it timely.<sup>65</sup> Prison

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<sup>60</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*4-5 (2d Cir., Aug 18, 2004).

<sup>61</sup> *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*3 (2d Cir., Aug. 18, 2004).

<sup>62</sup> An estoppel argument may have different results for different defendants depending on their involvement in the conduct on which the argument is based, though it is not yet certain whether that is the case. *See* § IV.G.3, below; *see also* *Lewis v. Washington*, 300 F.3d 829, 834-35 (7<sup>th</sup> Cir. 2002) (declining to apply equitable estoppel where the defendants did not affirmatively mislead the plaintiff). An argument of justification will require consideration of whether remedies once available remain available. *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*8 (2d Cir., Aug. 18, 2004); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*10 (2d Cir., Aug. 18, 2004).

<sup>63</sup> *See Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*5 (2d Cir., Aug. 18, 2004); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999); *accord*, *Wyatt v. Terhune*, 315 F.3d 1108, 1117-18 (9<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 50 (2003) and cases cited; *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1<sup>st</sup> Cir. 2002). *Contra*, *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10<sup>th</sup> Cir. 2003); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6<sup>th</sup> Cir.) (per curiam), *cert. denied*, 525 U.S. 833 (1998). *See Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*21 n.7 (5<sup>th</sup> Cir., Sept. 8, 2004) (noting that prior decisions imply or assume exhaustion is part of the plaintiff's claim, but questioning whether the matter has been decided in that circuit); *compare Wendell v. Asher*, 162 F.3d 887, 890 (5<sup>th</sup> Cir. 1998) (holding that PLRA exhaustion "imposes a requirement, rather like a statute of limitations").

<sup>64</sup> *See Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*3-4 (2d Cir., Aug. 18, 2004) (finding waiver); *Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002) (directing court on remand to determine whether exhaustion had been waived). *But see Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1209 (10<sup>th</sup> Cir. 2003) (holding exhaustion cannot be waived), *pet. for cert. filed* (U.S., Apr. 26, 2004); *Chase v. Peay*, 286 F.Supp.2d 523, 531 (D.Md. 2003) (noting that in the Fourth Circuit affirmative defenses are not waived except for unfair surprise or prejudice), *aff'd*, 98 Fed.Appx. 253 (4<sup>th</sup> Cir. 2004).

<sup>65</sup> *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (3d Cir. 2002); *Randolph v. Rodgers*, 253 F.3d 342, 348 n. 11 (8<sup>th</sup> Cir. 2001); *Thomas v. Keyser*, 2004 WL 1594865 at \*2 (S.D.N.Y., July 16, 2004) (declining to allow assertion of non-exhaustion after 21 months of delay, where plaintiff

officials may also waive the defense in the administrative process; if they decide the merits of the grievance, they cannot later rely on alleged failures by the prisoner to follow the proper procedures.<sup>66</sup>

The exhaustion defense, once waived, may be revived procedurally<sup>67</sup> or in the exercise of the court's discretion.<sup>68</sup> However, in one case where the defendants sought relief from waiver on the ground that the law had changed to bring the claim within the exhaustion requirement, the court conditioned the relief on prison officials' permitting the prisoner to exhaust late, since the prisoner, too, had relied on prior law. As the court put it: "In other words, DOCS cannot have it both ways."<sup>69</sup>

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would be prejudiced by having to refile after investing time and effort in completing discovery); *Hightower v. Nassau County Sheriff's Dep't*, 325 F.Supp.2d 199, 205 (E.D.N.Y. 2004) (holding defense waived where raised only after trial, after 23 months' delay and plaintiffs' loss of opportunity to take discovery); *Rose v. Garbs*, 2003 WL 548384 at \*4 n.3 (N.D.Ill., Feb. 26, 2003) (holding exhaustion waived when raised only in a reply brief); *Handberry v. Thompson*, 2003 WL 194205 at \*4 (S.D.N.Y., Jan. 28, 2003) (holding defendants who pled exhaustion, disavowed the defense shortly thereafter, and tried to revive it after years of litigation, had waived); *Mayoral v. Illinois Dept. Of Corrections*, 2002 WL 31324070 at \*1 (N.D.Ill., Oct. 17, 2002); *Goodson v. Sedlack*, 212 F.Supp.2d 255, 256 n.1 (S.D.N.Y. 2002); *Rahim v. Sheahan*, 2001 WL 1263493 at \*6-7 and n.3 (N.D.Ill., Oct. 19, 2001); *Orange v. Strain*, 2000 WL 158328 (E.D.La., Feb. 10, 2000), *aff'd*, 252 F.3d 436 (5<sup>th</sup> Cir. 2001) (unpublished); *Williams v. Illinois Dept. of Corrections*, 1999 WL 1068669 at \*3-4 (N.D.Ill., Nov. 17, 1999).

<sup>66</sup> *Gates v. Cook*, 376 F.3d 323, 330-31 and n.6 (5<sup>th</sup> Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator but defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner as the rules specify); *see* cases cited in n. 262, below.

<sup>67</sup> *See Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C.Cir. 2001) (holding it was not an abuse of discretion to construe a "notice" by one party that it would rely on another party's exhaustion defense as an amended answer properly raising the defense); *Massey v. Helman*, 196 F.3d 727 (7<sup>th</sup> Cir. 1999) (holding that the filing of an amended complaint revives defendants' right to raise exhaustion and other defenses), *cert. denied*, 532 U.S. 1065 (2001).

<sup>68</sup> *See Stephenson v. Dunford*, 320 F.Supp.2d 44, 48-49 (W.D.N.Y. 2004) (allowing amendment of answer to assert exhaustion 22 months after Supreme Court decision showed the defense was available); *Stevens v. Goord*, 2003 WL 21396665 at \*4 (S.D.N.Y., June 16, 2003) (allowing revival of waived exhaustion defense), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003). *Contra*, *Thomas v. Keyser*, 2004 WL 1594865 at \*2 (S.D.N.Y., July 16, 2004) (declining to allow revival of defense); *Hightower v. Nassau County Sheriff's Dep't*, 325 F.Supp.2d 199, 205 (E.D.N.Y. 2004) (same).

<sup>69</sup> *Rivera v. Goord*, 2003 WL 1700518 at \*13 (S.D.N.Y., Mar. 28, 2003). *Rivera's* holding has been overtaken by the broader one in *Rodriguez v. Westchester County Jail Correctional Dep't*, 372 F.3d 485, 487 (2<sup>d</sup> Cir. 2004), which held that a prisoner had acted reasonably in failing to

Suppose a remedy will take so long that the prisoner will suffer irreparable harm waiting for its completion? The Second Circuit has suggested there may be an irreparable harm exception to the exhaustion requirement,<sup>70</sup> and several decisions have applied such a rationale<sup>71</sup> (though not within the Second Circuit<sup>72</sup>). Another appeals court has held that there is no irreparable harm exception, but that courts retain their traditional equitable discretion to grant temporary relief to maintain the status quo pending exhaustion,<sup>73</sup> which in practice amounts to the same thing. That view has been endorsed in a case that jail officials hastily mooted between magistrate judge's recommendation and district court's review.<sup>74</sup> In the terms of the statute, arguably a remedy that cannot be exhausted in time to prevent irreparable harm is not "available" for purposes of such a claim.

Underlying many of the technical questions about the PLRA exhaustion requirement is a basic question of attitude. One approach is reflected in some courts' assertion that prison officials are entitled to insist on "strict compliance" with prison procedures,<sup>75</sup> and thus to obtain dismissal when prisoners make technical mistakes in the grievance process. That attitude has now been rejected by the Second Circuit, which has held that prisoners may be "justified" in failing to pursue

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exhaust, and could therefore proceed without exhaustion if remedies were no longer available, because his actions were consistent with the erroneous legal position that the Second Circuit had adopted.

<sup>70</sup> *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001).

<sup>71</sup> *See* *Howard v. Ashcroft*, 248 F.Supp.2d 518, 533-34 (M.D.La. 2003) (holding that prisoner fighting transfer from community corrections to a prison need not exhaust where appeal would take months and prison officials wanted to transfer her despite any pending appeal); *Ferguson v. Ashcroft*, 248 F.Supp.2d 547, 563-64 (M.D.La. 2003) (same as *Howard*); *Borgetti v. Bureau of Prisons*, 2003 WL 743936 at \*2 n.2 (N.D.Ill., Feb. 14, 2003) (holding that "the court's jurisdiction is secure" to decide a case in which the prisoner sought immediate injunctive relief and exhaustion would almost certainly take longer than the remainder of his sentence). *But see* *Kane v. Winn*, 319 F.Supp.2d 162, 223 (D.Mass. 2004) (rejecting "grave harm" argument concerning a process that takes less than four months as applied to treatment for a slowly progressing case of Hepatitis C).

<sup>72</sup> *See* *Rivera v. Pataki*, 2003 WL 21511939 at \*6 (S.D.N.Y., July 1, 2003) (noting that no cases have relied on *Marvin*'s suggestion, questioning its consistency with *Booth* and *Porter*).

<sup>73</sup> *Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001).

<sup>74</sup> *See* *Tvelia v. Department of Corrections*, 2004 WL 298100 \*2 (D.N.H., Feb. 13, 2004) (citing *Jackson*).

<sup>75</sup> *See, e.g., Houze v. Segarra*, 217 F. Supp. 2d 394, 397 (S.D.N.Y. 2002). This issue is discussed further in § IV.E.7, below.

grievance procedures properly if they rely on a “reasonable belief” concerning those procedures.<sup>76</sup> A reasonable misunderstanding of the exhaustion requirement itself may also justify failure to exhaust.<sup>77</sup> In reaching those conclusions, the court has rejected the analogy made by some other courts to the habeas corpus procedural default rule,<sup>78</sup> stating: “What is justification in the PLRA context for not following procedural requirements . . . cannot be decided by borrowing from other areas of the law. It must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way.”<sup>79</sup>

The Second Circuit’s relatively lenient approach is consistent with the Supreme Court’s observation, in the context of the administrative exhaustion requirement of Title VII of the Civil Rights Act of 1964, that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.”<sup>80</sup> A number of courts have relied on the analogy to Title VII and other statutes using the same administrative remedy scheme in interpreting the PLRA exhaustion requirement.<sup>81</sup> The Second Circuit, however, has not relied on that analogy

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<sup>76</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6-7 (2d Cir., Aug. 18, 2004) (holding that a prisoner who failed to distinguish properly between “grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings” which had to be raised in a disciplinary appeal, was justified in filing an appeal but not a grievance); *accord*, *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*9 (2d Cir., Aug. 18, 2004) (remanding for consideration of prisoner’s claim that he wrote to the Superintendent, rather than filing a grievance, consistently with a reasonable interpretation of the grievance regulations). *But see* *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (holding exhaustion required “even if a prisoner ‘understood that the claims put forth in [his] complaint were “non-grievable”’ under prison policy.”), *pet. for cert. filed* (U.S., Apr. 26, 2004).

<sup>77</sup> *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004) (holding that a prisoner who thought he did not have to exhaust a use of force claim—a reasonable view since it was later adopted by the Second Circuit—was justified in failing to exhaust).

<sup>78</sup> The inappropriateness of analogies between habeas exhaustion and PLRA exhaustion is discussed below at nn. 217-223, 242-249, and 280, and accompanying text.

<sup>79</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6 (2d Cir., Aug. 18, 2004).

<sup>80</sup> *Love v. Pullman*, 404 U.S. 522, 526 (1972).

<sup>81</sup> The Title VII requirement is analogous to the PLRA’s because both involve individuals’ claims of civil rights violations, and both involve resort to state agencies with their varying practices. *See* *Thomas v. Woolum*, 337 F.3d 720, 727-28 (6<sup>th</sup> Cir. 2003). Both are designed to encourage resolution of disputes without litigation by requiring them to be presented first to the agency so that informal remedies may be pursued. *Compare* *Porter v. Nussle*, 534 U.S. at 524-25 (PLRA) *with* *Oscar Mayer v. Evans*, 441 U.S. 750, 755 (1979) (exhaustion requirements of Title VII and ADEA are “intended to give state agencies a limited opportunity to resolve problems . . . and thereby to

in its PLRA exhaustion decisions and has questioned its utility in the context of “total exhaustion.”<sup>82</sup>

## **B. What Cases Must Be Exhausted?**

The exhaustion requirement applies to prisoners’ “action[s] . . . brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner. . . .”<sup>83</sup> Its terms are not restricted to “civil actions” as are some other PLRA provisions.<sup>84</sup> However, the Second Circuit has stated in dictum, and other courts have held, that the PLRA exhaustion requirement does not apply to habeas corpus actions.<sup>85</sup> Such a proceeding would still be subject to the habeas corpus

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make unnecessary resort to federal relief”). The Title VII requirement, like the PLRA’s, is non-judicial. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). As in prisoner civil rights suits, judicial consideration under Title VII is *de novo* and (unlike many other administrative law schemes) is not limited to deferential review of a final agency decision based on an administrative record. *See Jones’El v. Berge*, 172 F.Supp.2d 1128, 1131-32 (W.D.Wis. 2001); *compare* *Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1979), *citing* 42 U.S.C. § 205(g) (emphasizing the limits of judicial review in Social Security administrative scheme). Federal courts have used Title VII law as an interpretive guide to the PLRA in a number of cases. *See, e.g.*, *Thomas v. Woolum*, *id.*; *Wyatt v. Terhune*, 315 F.3d 1108 (9<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 50 (2003); *Jackson v. District of Columbia*, 254 F.3d 262, 268 (D.C. Cir. 2001); *Massey v. Helman*, 196 F.3d 727, 735 (7<sup>th</sup> Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001); *Underwood v. Wilson*, 151 F.3d 292, 294-95 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *Lewis v. Washington*, 265 F.Supp.2d 939, 942 (N.D.Ill. 2003); *Jones’El v. Berge*, *id.* *Cf.* *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (stating “the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue”). The applicability of Title VII rules to the PLRA is discussed further in nn. 94, 182-187, 205-206, 240-241, 275-280, 433-35, below, and accompanying text.

<sup>82</sup> *Ortiz v. McBride*, \_\_\_ F.3d \_\_\_, 2004 WL 1842644 at \*10 n.10 (2d Cir., Aug. 18, 2004). In *Ortiz* the court said: “The goals of the anti-discrimination laws to provide and implement a broad, remedial scheme preventing such discrimination, . . . and the goals of the PLRA are so radically different, however, that we gain no insight from the analogy.” *Id.* This appears to be the wrong comparison; the right one would be between the anti-discrimination laws’ system of administrative charge-filing and the PLRA exhaustion requirement, or between the “broad, remedial scheme of the anti-discrimination laws” and the remedial scheme of 42 U.S.C. § 1983 as modified by the PLRA.

<sup>83</sup> 42 U.S.C. § 1997e(a). The meaning of the term “prisoner” is discussed in § I, above.

<sup>84</sup> *See, e.g.*, 42 U.S.C. § 1997e(e) (restricting civil actions for mental or emotional injury); 28 U.S.C. § 1915(a) (requiring filing fees of indigent prisoners in civil cases).

<sup>85</sup> *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632-34 (2d Cir. 2001); *accord*, *Monahan v. Winn*, 276 F.Supp.2d 196, 204 (D.Mass. 2003).

exhaustion requirement, which is arguably more rigorous.<sup>86</sup> The exhaustion requirement applies to persons held in private prisons and jails.<sup>87</sup>

The phrase “under section 1983 . . . or any other Federal law” would appear to encompass all federal question cases,<sup>88</sup> but not cases removed to federal court under those courts’ diversity jurisdiction. The meaning of “prison conditions” is discussed below.<sup>89</sup>

### C. What Happens If the Plaintiff Has Failed To Exhaust?

The statute says that “No action shall be brought . . . until such administrative remedies as are available are exhausted.”<sup>90</sup> It does not say what courts should do if the plaintiff has not exhausted.

The Second Circuit, consistently with most others, has held that exhaustion must be completed *before* suit is brought,<sup>91</sup> and non-complying claims must be dismissed, even if exhaustion has been completed by the time the court reaches the exhaustion question.<sup>92</sup> (One circuit has said

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<sup>86</sup> See *Carmona*, 243 F.3d at 633-34.

<sup>87</sup> See n. 6, above.

<sup>88</sup> See *Alexander v. Walker*, 2003 WL 297536 at \*2 (N.D.Cal., Feb. 10, 2003) (applying exhaustion requirement in § 1983 action removed from state court based on federal question).

<sup>89</sup> See § IV.I, below.

<sup>90</sup> 42 U.S.C. § 1997e(a).

<sup>91</sup> Courts have differed over whether suit is “brought” for this purpose when the complaint is first tendered to the clerk’s office, see *Ford v. Johnson*, 362 F.3d 395, 399-400 (7<sup>th</sup> Cir. 2004) (holding the prisoner must await the administrative decision before acting), or when the formalities of filing are completed, which may take some time in a *pro se* case where the plaintiff seeks to proceed *in forma pauperis*. See *Ellis v. Guarino*, 2004 WL 1879834 at \*6 (S.D.N.Y. Aug. 24, 2004) (holding the case was not deemed filed until completion of processing 11 months after arrival in the *pro se* office; citing contrary cases).

<sup>92</sup> See *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001); *accord*, *Johnson v. Jones*, 340 F.3d 624, 627-28 (8<sup>th</sup> Cir. 2003) (citing cases, overruling prior authority); see *Cox v. Mayer*, 332 F.3d 422, 428 (6<sup>th</sup> Cir. 2003) (holding failure to exhaust cannot be cured by a supplemental complaint recounting post-filing exhaustion). If prison officials do not render a final decision within the time limit set by the grievance process, the prisoner has completed exhaustion. See § IV.E.1, below. If the prisoner has waited the proper time, the issuance of an untimely grievance decision after suit will not require dismissal for non-exhaustion. *Dimick v. Baruffo*, 2003 WL 660826 at \*4 (S.D.N.Y., Feb. 28, 2003)

that courts have discretion on the point because the statute is not jurisdictional,<sup>93</sup> as is also the case in Title VII suits.<sup>94</sup>)

The Second Circuit has recently identified an exception to the dismissal rule. It held that a prisoner may be justified in failing to exhaust based on, *inter alia*, a reasonable interpretation of the grievance rule or actions by prison officials. In such a case, if remedies are still available, the case should be dismissed without prejudice; but if they are no longer available, the case should go forward; if they appear to be available but prove not to be, the case should be reinstated<sup>95</sup> (*i.e.*, a new complaint need not be filed). The court has held similarly where the prisoner did not exhaust

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Courts have disagreed whether they must dismiss the case of a plaintiff who has failed to exhaust but has been released and is no longer subject to the exhaustion requirement. *Compare* *Morris v. Eversley*, 205 F.Supp.2d 234, 241 (S.D.N.Y. 2002) (holding that considerations of judicial efficiency and economy weigh against dismissal); *Stevens v. Goord*, 2003 WL 21396665 at \* 4 (S.D.N.Y., June 16, 2003) (following *Morris*, citing other cases), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *Dennison v. Prison Health Services*, 2001 WL 761218 at \*2-3 (D.Me., July 10, 2001) (holding that exhaustion issue was moot as to released prisoner) *with* *Becker v. Vargo*, 2004 WL 1068779 at \*3 (D.Or., Feb. 17, 2004) (citing cases), *report and recommendation adopted*, 2004 WL 1071067 (D.Or., Mar. 12, 2004) *and* 2004 WL 1179332 (D.Or., May 27, 2004); *Cox v. Mayer*, 332 F.3d at 425-27 (holding that allowing a claim that was filed unexhausted to go forward because the plaintiff had been released would undermine the statutory policy); *Richardson v. Romano*, 2003 WL 1877955 at \*2 (N.D.N.Y., Mar. 31, 2003).

<sup>93</sup> *Curry v. Scott*, 249 F.3d 493, 502 (6th Cir. 2001) (stating that pre-filing exhaustion is “the preferred practice,” but allowing exhaustion prior to filing an *amended* complaint because the suit was filed shortly after the PLRA’s enactment and involved some pre-PLRA conduct, and the plaintiff filed a grievance early in the proceedings).

<sup>94</sup> The failure to obtain a right-to-sue letter (the conclusion of the EEOC administrative process) “is curable at any point during the duration of the action.” *Anjelino v. New York Times Co.*, 200 F.3d 73, 96 (3d Cir. 1999), *citing* *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 357-59 (3d Cir. 1984) (eschewing “highly technical pleading rules, which only serve to trap the unwary practitioner”); *accord*, *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412, 1418 n. 12 (D.C.Cir. 1983) and cases cited; *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1525 (11<sup>th</sup> Cir. 1983). *See generally* nn. 81, 182-187, 205-206, 240-241, 275-280, 433-435, below, and accompanying text, concerning Title VII.

<sup>95</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*8 (2d Cir., Aug. 18, 2004); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*10 (2d Cir., Aug. 18, 2004). This last proposition has considerable potential for confusion and delay. In my view it would be appropriate as a matter of case management for the court to ask defendants for a representation as to the continued availability of remedies before finalizing a disposition.

because of a reasonable misunderstanding of the exhaustion requirement itself.<sup>96</sup> One would think that under those decisions, a litigant who was justified in failing to exhaust before suit, but remedied or sought to remedy that failure later (e.g., by filing a grievance that was dismissed as untimely), would be allowed to go forward.

The Second Circuit has said that dismissal for non-exhaustion generally does not constitute dismissal for failure to state a cause of action.<sup>97</sup> This view has two significant consequences. First is that a dismissal for non-exhaustion cannot be a “strike” potentially disqualifying a prisoner from *in forma pauperis* status under 28 U.S.C. § 1915(g).<sup>98</sup> The other is that exhaustion is not subject to the provisions of 42 U.S.C. § 1997e(c) or 28 U.S.C. § 1915(e)(2)(B) providing for *sua sponte* dismissal at initial screening, before service of process.<sup>99</sup> Other decisions have taken or assumed the opposite view, relying in my view on strained reasoning,<sup>100</sup> since the detailed statutory scheme at issue clearly treats administrative exhaustion as a separate subject from screening and dismissal of complaints that are frivolous or do not state a claim, and since most courts agree that exhaustion is an affirmative defense and not an element of the plaintiff’s cause of action.<sup>101</sup>

Dismissal for non-exhaustion is without prejudice, unless it is clear that remedies are no

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<sup>96</sup> *Rodriguez v. Westchester County Jail Correctional Dep’t*, 372 F.3d 485, 487 (2d Cir. 2004) (holding that a prisoner who misunderstood the exhaustion requirement in the same way the Second Circuit did was justified in failing to exhaust).

<sup>97</sup> *Snider v. Melindez*, 199 F.3d 108, 111-12 (2d Cir. 1999) (dictum); *accord*, *Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553, 555-56 (M.D.Pa. 2001).

<sup>98</sup> *Snider, id.*

<sup>99</sup> *Ray v. Kertes*, 285 F.3d 287, 297(3d Cir. 2002); *Neal v. Goord*, 267 F.3d 116, 124 (2d Cir. 2001); *Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553, 555-56 (M.D.Pa., Apr. 26, 2001).

<sup>100</sup> *See Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (stating in dictum that dismissal for non-exhaustion is “tantamount to” dismissal for failure to state a claim), *cert. dismissed*, 524 U.S. 978 (1998). Similarly, one circuit has affirmed the dismissal with prejudice of a prisoner’s *in forma pauperis* application for non-exhaustion, stating: “By choosing to file and pursue his suit prior to exhausting administrative remedies as required, Underwood sought relief to which he was not entitled—that is, federal court intervention in prison affairs prior to the prison having had the opportunity to address the complaint within its grievance procedures.” *Underwood v. Wilson*, 151 F.3d 292, 296 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). A number of courts have devised creative rationales for labelling dismissal for non-exhaustion a “strike” for purposes of 28 U.S.C. § 1915(g).

<sup>101</sup> *See* § IV.D.1, below.

longer available.<sup>102</sup> Dismissal without prejudice is appealable under Second Circuit law.<sup>103</sup> In other circuits where the rule is different, dismissal for non-exhaustion may still be appealable as a practical matter when the reason for dismissal cannot be cured, as when the time for filing a grievance has expired,<sup>104</sup> the prisoner has been released and can no longer pursue prison grievances,<sup>105</sup> or the statute of limitations has expired on the claim.<sup>106</sup> The refusal to dismiss for non-exhaustion may not be appealed interlocutorily.<sup>107</sup> A prisoner whose case is dismissed for non-exhaustion, but who is released before the limitations period has expired, can file a new complaint which will not be subject to the exhaustion requirement since the plaintiff is at that point no longer a prisoner.<sup>108</sup> Other issues involving cases that are dismissed for non-exhaustion after the limitations period has expired are addressed below.<sup>109</sup>

#### **D. How Is Exhaustion Addressed Procedurally?**

When exhaustion is raised, the court should address it before it reaches the merits of the case,<sup>110</sup> except that plainly meritless claims can be dismissed on the merits without exhaustion.<sup>111</sup>

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<sup>102</sup> *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004). One court has recently held that *all* dismissals for non-exhaustion should be without prejudice, since, *inter alia*, “[s]tates may allow cure of failure to exhaust” or litigation in state court, and defenses to a new suit should be addressed directly in that suit. *Ford v. Johnson*, 362 F.3d 395, 401 (7<sup>th</sup> Cir. 2004).

<sup>103</sup> *Salim Oleochemicals v. M/V SHROPSHIRE*, 278 F.3d 90, 93 (2d Cir. 2002), *cert. denied*, 537 U.S. 1088 (2002).

<sup>104</sup> *Mitchell v. Horn*, 318 F.3d 523, 528-29 (3d Cir. 2003).

<sup>105</sup> *Dixon v. Page*, 291 F.3d 485, 488 (7<sup>th</sup> Cir. 2002).

<sup>106</sup> *Ahmed v. Dragovich*, 297 F.3d 201, 207 (3d Cir. 2002); *Larkin v. Galloway*, 266 F.3d 718, 721 (7<sup>th</sup> Cir. 2001), *cert. denied*, 535 U.S. 992 (2002).

<sup>107</sup> *Davis v. Streekstra*, 227 F.3d 759, 762-63 (7<sup>th</sup> Cir. 2000).

<sup>108</sup> *Dixon v. Page*, 291 F.3d at 488 n.1; *Ahmed v. Dragovich*, 297 F.3d at 210. Whether the prisoner *must* file a new complaint—i.e., whether the old complaint must be dismissed for non-exhaustion after the plaintiff’s release—is the subject of disagreement in the courts. *See* n.92, above.

Even if the limitations period has expired, state tolling rules may preserve the right to refile for cases dismissed for failure to exhaust. *See* § IV.H, below.

<sup>109</sup> *See* §§ IV.E.8.b, IV.H, below.

<sup>110</sup> *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 534 (7<sup>th</sup> Cir. 1999); *see McCoy v. Goord*, 255 F.Supp.2d 233, 248-49 (S.D.N.Y. 2003) (stating that exhaustion questions should be resolved as early as possible); *Torrence v. Pesanti*, 239 F.Supp.2d 230, 234 (D.Conn. 2003) (stating

## 1. Burden of Pleading and Proof

The Second Circuit and most other circuits have held that exhaustion is an affirmative defense as to which defendants bear the burden of pleading and proof.<sup>112</sup> As an affirmative defense, exhaustion may be waived by failure to raise it timely.<sup>113</sup> Since failure to exhaust is not a failure to state a claim,<sup>114</sup> the PLRA's provisions for *sua sponte* dismissal of cases failing to state a claim are inapplicable.<sup>115</sup> While courts have authority, even without statutory authorization, to dismiss on their own motion for non-exhaustion where the failure to exhaust is apparent on the face of the complaint or attached documents,<sup>116</sup> the Second Circuit has stated that plaintiffs are "entitled to notice and an

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that exhaustion should be dealt with quickly so plaintiffs' claims are less likely to be time-barred if it is necessary to re-file after exhaustion).

<sup>111</sup> 42 U.S.C. § 1997e(c)(2).

<sup>112</sup> See n. 63, above; see also *Moore v. Baca*, 2002 WL 31870541 at \*2 (C.D.Cal. 2002) (holding that defendants seeking dismissal for non-exhaustion must show that plaintiffs were prisoners when they filed suit); *Raines v. Pickman*, 103 F.Supp.2d 552, 555 (N.D.N.Y. 2000) (holding "it is [defendants'] burden to come forward to show that an administrative remedy exists for plaintiff to pursue in reference to his claims of excessive force").

Two circuits hold to the contrary that exhaustion must be pled with specificity and supported with documentation when available, and courts should dismiss *sua sponte* for noncompliance with that requirement. *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1210 (10<sup>th</sup> Cir. 2003), *pet. for cert. filed* (U.S., Apr. 26, 2004); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 1040 (2000); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6<sup>th</sup> Cir.), *cert. denied*, 525 U.S. 833 (1998); see *Boyd v. Corrections Corporation of America*, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 (6<sup>th</sup> Cir., Sept. 8, 2004) (applying "pleading with specificity" requirement to various fact patterns). The Sixth Circuit has also held that a prisoner may not amend his or her complaint to cure the failure to plead exhaustion. *Baxter v. Rose*, 305 F.3d 486, 488 (6<sup>th</sup> Cir. 2002). *But see Casarez v. Mars*, 2003 WL 21369255 at \*5 (E.D.Mich., June 11, 2003) (holding that a plaintiff who alleged exhaustion rather than evading the issue in his complaint, and submitted proof in response to a motion to dismiss, had exhausted notwithstanding the lack of "particularized averments" in the complaint).

<sup>113</sup> See § IV.A., nn. 59, 64-65, above.

<sup>114</sup> See § C, n. 97, above.

<sup>115</sup> *Snider v. Melindez*, 199 F.3d 108, 111-12 (2d Cir. 1999).

<sup>116</sup> *Snider, id.* at 112; see *Ray v. Kertes*, 285 F.3d 287, 297(3d Cir. 2002) ("As a general proposition, sua sponte dismissal is inappropriate unless the basis is apparent from the face of the complaint.")

opportunity to be heard” before such dismissal.<sup>117</sup>

The Second Circuit has also appropriately held that a court may not dismiss for non-exhaustion without “establish[ing] the availability of an administrative remedy from a legally sufficient source.”<sup>118</sup> In that case, the district court had assumed that a remedy was available solely because the prisoner had answered “Yes” to a question on a *pro se* complaint form asking whether there was a grievance process in his prison.<sup>119</sup> Such an answer does not establish that the process was available for the particular problem at issue or to the particular prisoner, as illustrated in a more recent case in which the court, on nearly identical facts, strongly reiterated the need to establish “that an administrative remedy is applicable and that the particular complaint does not fall within an exception. . . . Courts should be careful to look at the applicable set of grievance procedures, whether city, state or federal.”<sup>120</sup> In that case, the district court had dismissed a New York City jail excessive force claim apparently without reviewing the grievance policy, which made all claims of alleged assaults “non-grievable.” Other decisions have dismissed the claims of New York City prisoners based on the existence of a remedy set out in state regulations that is available only to state prisoners and that has a different scope of grievable issues from the New York City grievance system.<sup>121</sup>

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<sup>117</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*4 (2d Cir., Aug. 18, 2004), *citing* *Snider v. Melindez*, 199 F.3d 108 (2d Cir.1999). In *Snider*, the court stated: “Unless it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective, we believe it is bad practice for a district court to dismiss without affording a plaintiff the opportunity to be heard in opposition.” 199 F.3d at 113. In a later decision, the court stated that “the better practice in a given case may be to afford notice and an opportunity to respond before dismissal when exhaustion is the basis for that action. . . . In future cases we leave it to the district court to determine . . . which procedural practice is most appropriate.” *Neal v. Goord*, 267 F.3d 116, 123-34 (2d Cir. 2001). However, the court subsequently stated: “We now reiterate that notice and an opportunity to respond are *necessary* in cases such as these. . . .” *Mojias v. Johnson*, 351 F.3d 606, 611 (2d Cir. 2003) (emphasis supplied). *Giano* restates this stronger position.

<sup>118</sup> *Snider v. Melindez*, 199 F.3d at 114; *accord*, *Bafford v. Simmons*, 2001 WL 1677574 at \*4 (D.Kan., Nov. 7, 2001) (holding that defendants moving for summary judgment “must identify the specific remedies and provide evidence that they were not exhausted”).

<sup>119</sup> *Snider*, 199 F.3d at 113.

<sup>120</sup> *Mojias v. Johnson*, 351 F.3d 606, 610 (2d Cir. 2003). The pernicious practice of relying on check marks and questionnaire answers to determine exhaustion persists in other jurisdictions. *See Williams v. Uy*, 2004 WL 937598 at \*1 (N.D.Tex., Apr. 30, 2004).

<sup>121</sup> *See Kearsy v. Williams*, 2002 WL 1268014 (S.D.N.Y., June 6, 2002); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 624-25 (S.D.N.Y. 2002); *Harris v. N.Y.C. Dept. of Corrections*, 2001 WL 845448 at \*2-3 (S.D.N.Y., July 25, 2001).

Defendants must also reliably establish the failure to exhaust. Several courts have found prison officials' affidavits and documentation asserting that a prisoner failed to exhaust to be inadequate or outright inadmissible because they were completely conclusory, failed to set out how records were searched, rested on hearsay, etc.<sup>122</sup>

## 2. Procedural Vehicles for Raising Exhaustion

There is some disagreement over the proper procedural vehicle for raising exhaustion questions. Some courts have entertained motions under Rule 12(b)(1), Fed.R.Civ.P., which addresses dismissal for lack of subject matter jurisdiction and permits consideration of matters outside the pleadings and resolution of disputed facts; however, such a motion is inappropriate if failure to exhaust is not jurisdictional, as most courts have held.<sup>123</sup> Nor is dismissal under Rule 12(b)(6) for failure to state a claim appropriate in most cases, since in most jurisdictions non-exhaustion is not failure to state a claim except in cases where non-exhaustion is apparent from the face of the complaint.<sup>124</sup> Moreover, when factual disputes arise on a Rule 12(b)(6) motion, the motion must be converted to one for summary judgment if extrinsic matter is to be considered.<sup>125</sup> The Ninth Circuit has held that failure to exhaust is "a matter in abatement, which is subject to an

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<sup>122</sup> See *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9<sup>th</sup> Cir.) (noting that defendants' affidavit does not state whether he exhausted his appeals; their "Appeal Record" lacks a foundation and is not shown to be complete), *cert. denied*, 124 S.Ct. 50 (2003); *Lodato v. Ortiz*, 314 F.Supp.2d 379, 385 (D.N.J. 2004) (denying summary judgment where defendants said they had no record of plaintiff's grievance, but they also had no record of other grievances which were undisputably filed); *Laws v. Walsh*, 2003 WL 21730714 at \*3 n.3 (W.D.N.Y., June 27, 2003) (holding conclusory affidavit about records search and lack of appeals inadmissible); *Donahue v. Bennett*, 2003 WL 21730698 at \*4 (W.D.N.Y., June 23, 2003) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion); *Livingston v. Piskor*, 215 F.R.D. 84, 85-86 (W.D.N.Y. 2003) (holding that defendants' affidavits that they had no record of grievances and appeals by the plaintiff were inadequate where they did not respond to his allegations that his grievances were not processed as policy required, and where they gave no detail as to "the nature of the searches . . . , their offices' record retention policies, or other facts indicating just how reliable or conclusive the results of those searches are"); *Thomas v. New York State Dept. Of Correctional Services*, 2002 WL 31164546 (S.D.N.Y., Sept. 30, 2003) (similar to *Livingston*).

<sup>123</sup> *Rodney v. Goord*, 2003 WL 21108353 at \*2 (S.D.N.Y., May 15, 2003); *McCoy v. Goord*, 255 F.Supp.2d 233, 249 (S.D.N.Y. 2003); *see n. 58, above*, for cases holding PLRA exhaustion is not jurisdictional.

<sup>124</sup> *McCoy v. Goord*, *id.*

<sup>125</sup> *Foreman v. Commissioner Goord*, 2004 WL 385114 at \*6 (S.D.N.Y., March 2, 2004) (citing cases); *Kaiser v. Bailey*, 2003 WL 21500339 at \*4 (D.N.J., July 1, 2003); *McCoy v. Goord*, *id.*

unenumerated Rule 12(b) motion, rather than a motion for summary judgment,” since “summary judgment is on the merits, whereas dismissal for failure to exhaust” is not.<sup>126</sup>

The Second Circuit has not addressed the question, and the most thorough district court discussion of the matter rejects the Ninth Circuit’s analysis. Instead it states that non-exhaustion that is clear from the face of the complaint and any documents the complaint incorporates should be addressed via a Rule 12(b)(6) motion, but where it is not clear from the face of the complaint, the motion to dismiss should be converted to a motion for summary judgment “limited to the narrow issue of exhaustion and the relatively straightforward questions about the plaintiff’s efforts to exhaust, whether remedies were available, or whether exhaustion might be, in very limited circumstances, excused. . . .”<sup>127</sup> Why it is not preferable for defendants simply to move for summary judgment on the “narrow issue of exhaustion” in the first instance is not clear from this analysis. District courts have demonstrated some tendencies to push the envelope in order to dispose of exhaustion disputes on motions to dismiss.<sup>128</sup>

A number of courts have held that disputed facts concerning exhaustion cannot be resolved on motion.<sup>129</sup> Indeed, some courts have assumed without discussion that they present jury issues.<sup>130</sup>

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<sup>126</sup> Wyatt v. Terhune, 315 F.3d 1108, 1119 (9<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 50 (2003).

<sup>127</sup> McCoy v. Goord, 255 F.Supp.2d at 251.

<sup>128</sup> See, e.g., Mingues v. Nelson, 2004 WL 324898 at \*2 (S.D.N.Y., Feb. 20, 2004) (stating the court may consider documents “either in plaintiff’s possession or of which he has knowledge and relied on in bringing the action” on a motion to dismiss); Johnson v. Ingum, 2004 WL 253347 at \*1 (W.D.Wis., Feb. 4, 2004) (“I can consider the parties’ documents without converting the motion to dismiss into a motion for summary judgment because the documents of a prisoner’s use of the inmate complaint review system is a matter of public record.”); Nicholson v. Murphy, 2003 WL 22909876 (D.Conn., Sept. 19, 2003) (considering exhaustion on a motion to dismiss where the plaintiff received notice of the defendants’ argument, argued that the copies of grievance forms attached to the complaint showed exhaustion, and made no other relevant allegations).

<sup>129</sup> Dale v. Lappin, 376 F.3d 652, 654-56 (7<sup>th</sup> Cir. 2004) (per curiam) (denying summary judgment based on plaintiff’s specific allegations that he could not get necessary forms); Crosswell v. McCoy, 2003 WL 962534 (N.D.N.Y., Mar. 11, 2003) (denying summary judgment based on factual dispute about exhaustion); Evans v. Nassau County, 184 F.Supp.2d 238, 245 (E.D.N.Y. 2002); Williams v. Joliet Correctional Medical Unit, 2000 WL 152134 (N.D.Ill., Feb. 4, 2000); Orange v. Strain, 2000 WL 158328 (E.D.La., Feb. 10, 2000), *aff’d*, 252 F.3d 436 (5<sup>th</sup> Cir. 2001) (unpublished); Howard v. Goord, 1999 WL 1288679 at \*3 (S.D.N.Y., Dec. 28, 1999); Johnson v. Garraghty, 57 F.Supp.2d 321, 329 (E.D.Va. 1999) (holding that disputed claim that defendants obstructed exhaustion merits an evidentiary hearing); see Carroll v. Yates, 362 F.3d 984, 985 (7<sup>th</sup> Cir. 2004) (reversing dismissal where plaintiff submitted an affidavit disputing the allegation that he had refused to cooperate with the grievance process); Foulk v. Charrier, 262 F.3d 687, 697-98 (8<sup>th</sup> Cir.

However, the Ninth Circuit has held that exhaustion, as a “matter in abatement,” is not subject to the same rules as matters going to the merits, and that courts may decide factual disputes concerning it on motion, subject only to the “clearly erroneous” standard of appellate review.<sup>131</sup>

### E. What Is Exhaustion?

Exhaustion generally means appealing an adverse decision to the highest level of the grievance system,<sup>132</sup> and waiting to sue until the time for prison officials to render a decision has expired.<sup>133</sup> The lack of a response cannot mean that the prisoner has failed to exhaust; otherwise

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2001) (discussing exhaustion claim resolved on trial record).

<sup>130</sup> See, e.g., *Donahue v. Bennett*, 2004 WL 1875019 at \*6 (W.D.N.Y., Aug. 17, 2004); *Kendall v. Kittles*, 2004 WL 1752818 at \*5 (S.D.N.Y. Aug 04, 2004) (holding credibility issues about access to grievance forms and whether the plaintiff was told his claim was nongrievable “are properly for a jury.”); *Branch v. Brown*, 2003 WL 21730709 at \*12 (S.D.N.Y., July 25, 2003) (holding that “defendants must show that no reasonable jury could fail to find in their favor on this issue” to obtain dismissal for non-exhaustion), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *Williams v. MacNamara*, 2002 WL 654096 at \*4 (N.D.Cal., Apr. 17, 2002).

<sup>131</sup> *Ritz v. Int’l Longshoremen’s and Warehousemen’s Union*, 837 F.2d 365, 369 (9<sup>th</sup> Cir. 1988) (per curiam), *cited in* *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 50 (2003).

<sup>132</sup> “It is well established that to exhaust—literally, to draw out, to use up completely, see Oxford English Dictionary (2d ed. 1989)—‘a prisoner must grieve his complaint about prison conditions up through the highest level of administrative review’ before filing suit.” *McCoy v Goord*, 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003); *accord*, *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5<sup>th</sup> Cir. 2001); *White v. McGinnis*, 131 F.3d 593, 595 (6<sup>th</sup> Cir. 1997); *Smith v. Stubblefield*, 30 F.Supp.2d 1168, 1174 (E.D.Mo. 1998) and cases cited.

<sup>133</sup> *Powe v. Ennis*, 177 F.3d 393, 394 (5<sup>th</sup> Cir. 1999) (“A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired.”); *Underwood v. Wilson*, 151 F.3d 292, 295 (5<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *Malanez v. Stalder*, 2003 WL 1733536 (E.D.La., Mar. 31, 2003) (dismissing where prisoner filed suit before time for a grievance response had expired); *Jones v. Detella*, 12 F.Supp.2d 824, 826 (N.D.Ill. 1998); *Barry v. Ratelle*, 985 F.Supp.1235, 1238 (S.D.Cal. 1997). See § IV.C, nn. 92-93, above, concerning the proper disposition of a case in which exhaustion was completed after filing suit. If a prisoner files suit after the time limit for decision has passed, and then grievance authorities issue a late decision, the prisoner has exhausted. *Dimick v. Baruffo*, 2003 WL 660826 at \*4 (S.D.N.Y., Feb. 28, 2003). *But see* *Sergeant v. Norris*, 330 F.3d 1084, 1085-86 (8<sup>th</sup> Cir. 2003) (affirming dismissal for non-exhaustion where time for response had passed before suit was filed, but prisoner had not made that clear to the district court).

prison officials could keep prisoners out of court by simply ignoring their grievances.<sup>134</sup> Courts have not determined how long a prisoner must wait in a system with no deadline for the final appeal.<sup>135</sup>

Some courts have held that if the grievance system allows prisoners to treat non-response as a denial of the grievance, their failure to appeal the non-response is a failure to exhaust.<sup>136</sup> Other

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<sup>134</sup> See *Brown v. Koenigsmann*, 2003 WL 22232884 at \*4 (S.D.N.Y., Sept. 29, 2003); *accord*, *Casarez v. Mars*, 2003 WL 21369255 at \*6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision). A recent decision holding a prisoner had failed to exhaust because he did not show that he had received a decision, *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002), is obviously wrong, since the prisoner had followed the necessary steps to exhaust. Similarly, a decision dismissing for non-exhaustion where a prisoner's grievance appeal had not been initially processed as a result of "administrative oversight" is probably erroneous, depending on how long the appeal was lost. See *Mendez v. Artuz*, 2002 WL 313796 at \*2 (S.D.N.Y., Feb. 27, 2002).

<sup>135</sup> See *McNeal v. Cook County Sheriff's Dep't*, 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not). However, the Seventh Circuit has held, in connection with a grievance system that called for appeal decisions within 60 days "whenever possible," that the remedy did not become "unavailable" because decision took six months. "Even six months is prompt compared with the time often required to exhaust appellate remedies from a conviction." *Ford v. Johnson*, 362 F.3d 395, 400 (7<sup>th</sup> Cir. 2004). (There is a certain irony in the fact that the court is prepared to grant that sort of latitude to grievance systems while the same court insists on strict compliance by prisoners with short time limits, see *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 949 (2002), and that it analogizes to judicial proceedings in connection with a grievance process in which the prisoner has none of the normal safeguards of the judicial process.)

<sup>136</sup> *Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6<sup>th</sup> Cir. 2003); *Donahue v. Bennett*, 2004 WL 1875019 at \*6 n.12 (W.D.N.Y. Aug 17, 2004) *Bailey v. Sheahan*, 2003 WL 21479068 at \*3 (N.D.Ill., June 20, 2003); *Sims v. Blot*, 2003 WL 21738766 at \* 3 (S.D.N.Y., July 25, 2003); *Larry v. Byno*, 2003 WL 1797843 at \*2 n.3 (N.D.N.Y., Apr. 4, 2003) ("This Court's decision should not be seen as condoning" the failure to follow procedure by not rendering a decision); *Harvey v. City of Philadelphia*, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); *Croswell v. McCoy*, 2003 WL 962534 at \*4 (N.D.N.Y., Mar. 11, 2003); *Mendoza v. Goord*, 2002 WL 31654855 at \*3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff "tried many avenues to seek relief from prison authorities"); *Petty v. Goord*, 2002 WL 31458240 at \*4 (S.D.N.Y., Nov. 4, 2002); *Graham v. Cochran*, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); *Martinez v. Dr. Williams R.*, 186 F.Supp.2d 353, 357

courts have simply held that prisoners who grieve but do not get a response have satisfied the exhaustion requirement, usually without inquiring whether they were technically entitled to appeal the lack of response.<sup>137</sup>

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(S.D.N.Y. 2002); *Saunders v. Goord*, 2002 WL 1751341 at \*3 (S.D.N.Y., July 29, 2002); *Jorss v. Vanknocker*, 2001 WL 823771 at \*2 (N.D.Cal., July 19, 2001), *aff'd*, 44 Fed.Appx. 273, 2002 WL 1891412 (9<sup>th</sup> Cir. 2002); *Smith v. Stubblefield*, 30 F.Supp.2d at 1174; *Morgan v. Arizona Dept. of Corrections*, 976 F.Supp. 892, 895 (D.Ariz. 1997).

Conversely, if the prisoner cannot appeal absent a decision, and is denied a decision, the prisoner has sufficiently exhausted “available” remedies. *Foulk v. Charrier*, 262 F.3d 687, 698 (8<sup>th</sup> Cir. 2001); *Woulard v. Food Service*, 294 F.Supp.2d 596, 602 (D.Del. 2003); *Smith v. Boyle*, 2003 WL 174189 at \*3 (N.D.Ill., Jan. 27, 2003); *Taylor v. Dr. Barnett*, 105 F.Supp.2d 483, 486 (E.D.Va. 2000); *see Reyes v. McGinnis*, 2003 WL 23101781 (W.D.N.Y., Apr. 10, 2003) (holding that plaintiff who alleged that he never received any response to his grievances, but appealed anyway, did not exhaust untimely because the time deadlines only started to run as of the response he didn’t receive).

<sup>137</sup> *Boyd v. Corrections Corporation of America*, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 at \*6 (6<sup>th</sup> Cir., Sept. 8, 2004) (holding that “administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance,” though distinguishing a case where the prisoner could proceed without a decision); *Lewis v. Washington*, 300 F.3d 829, 833 (7<sup>th</sup> Cir. 2002) (holding failure to respond makes remedy unavailable); *Holland v. Correctional Medical Systems*, 2004 WL 322905 at \*3 (D.Del., Feb. 11, 2004); *Lane v. Doan*, 287 F.Supp.2d 210, 212-13 (W.D.N.Y. 2003) (holding a prisoner who made “reasonable attempts” to file and prosecute grievances, but had many of his grievances and inquiries ignored, had exhausted); *Barrera v. Acting Executive Director of Cook County Dep’t of Corrections*, 2003 WL 21976753 at \*2-3 (N.D.Ill., Aug. 18, 2003) (holding that prisoner who received no response for 28 months had exhausted, notwithstanding claim that it was still under investigation after 28 months); *Sweet v. Wende Correctional Facility*, 253 F.Supp.2d 492, 495 (W.D.N.Y. 2003) (holding that prisoner’s allegation that he commenced the grievance process but prison officials did not act on his complaints was sufficient to avoid summary judgment for non-exhaustion); *Smith v. Boyle*, 2003 WL 174189 at \*3 (N.D.Ill., Jan. 27, 2003) (holding that a plaintiff who waited seven months for a decision in a system that required a decision in order to appeal had no available remedy); *Rose v. Garbs*, 2003 WL 548384 at \*4 n.3 (N.D.Ill., Feb. 26, 2003); *Dennis v. Johnson*, 2003 WL 102399 (N.D.Tex., Jan. 7, 2003) (holding that plaintiff who filed a step two grievance and did not receive a timely response had exhausted); *Martin v. Snyder*, 2002 WL 484911 at \*3 (N.D.Ill., Mar. 28, 2002) (rejecting claim that plaintiff “should have filed even more grievances about defendants’ failure to respond”); *Armstrong v. Drahos*, 2002 WL 187502 at \*1 (N.D.Ill., Feb. 6, 2002) (“If [plaintiff] received no response, there was nothing to appeal.”); *Harmon v. Aroostook County Sheriff’s Dept.*, 2001 WL 1165406 at \*3 (D.Me., Oct. 2, 2001); *Long v. Lafko*, 2001 WL 863422 at \*2 n. 1 (S.D.N.Y., July 31, 2001); *Bowers v. Mounet*, 2001 WL 826556 at \*2 (D.Del., July 18, 2001); *Nitz v. French*, 2001 WL 747445 at \*3 (N.D.Ill., July 2, 2001); *Reeder v. Department of Correction*, 2001 WL 652021 at \*2 (D.Del., Feb. 22, 2001); *see Abney v. County of Nassau*, 237 F.Supp.2d 278, 282-83 (E.D.N.Y. 2002) (holding that plaintiff was not obliged to appeal a non-response where the grievance policy did not provide for such an

In cases where prisoners have failed to appeal because the grievance system or its personnel gave misleading or confusing responses, courts have held that the prisoners exhausted.<sup>138</sup> The Second Circuit has not addressed this question directly, but these decisions are consistent with its recent holdings that prisoners may be justified in failing to exhaust if they act on a reasonable, even if incorrect, interpretation of the rules,<sup>139</sup> and that the actions of prison personnel that inhibit exhaustion may estop them from raising the defense.<sup>140</sup> The Second Circuit has held that a prisoner who did not appeal because he repeatedly received favorable grievance decisions that were not implemented, a failure which did not become apparent until after the appeal deadline had passed, had no further available remedies.<sup>141</sup>

### **1. What If the Prisoner Wins the Grievance?**

Common sense and a growing body of case law hold that if the prisoner *wins* the grievance at an early stage, it's over and the prisoner has exhausted.<sup>142</sup> Similarly, if a prisoner grieves and

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appeal). *But see* Allen v. Tobia, 2003 WL 260708 at \*4 (N.D.Ill., Jan. 29, 2003) (holding that a month's delay in responding to a non-emergency grievance did not entitle the plaintiff to go directly to federal court where the rules allowed six months for a decision).

<sup>138</sup> Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed); Lee v. Walker, 2002 WL 980764 at \*2 (D.Kan., May 6, 2002) (holding that prisoner who sent his grievance appeal to the wrong place would be entitled to reconsideration of dismissal if he showed that the prison handbook said it was the right place); Goodman v. Carter, 2001 WL 755137 at \*2-3 (N.D.Ill., July 2, 2001) (holding that a prisoner who got no response to his grievance, and complained to the Administrative Review Board, which told him to file another grievance, had sufficiently exhausted); Feliz v. Taylor, 2000 WL 1923506 at \*2-3 (E.D.Mich., Dec. 29, 2000) (holding that a plaintiff who was told his grievance was being investigated, then when he tried to appeal later was told it was untimely, had exhausted, since he had no reason to believe he had to appeal initially) .

<sup>139</sup> Giano v. Goord, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6-7 (2d Cir., Aug. 18, 2004); Hemphill v. New York, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*9 (2d Cir., Aug. 18, 2004).

<sup>140</sup> Hemphill v. New York, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 \*5 (2d Cir., Aug 18, 2004).

<sup>141</sup> Abney v. McGinnis, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*5-6 (2d Cir., Aug. 18, 2004).

<sup>142</sup> Ross v. County of Bernalillo, 365 F.3d 1181, 1186-87 (10<sup>th</sup> Cir. 2004) (holding a prisoner who fell in the shower and then filed a Pre-Grievance Request Form asking that a mat be placed in the shower had exhausted when the prison put a mat in the shower, since no further relief was available); Branch v. Brown, 2003 WL 21730709 at \*6, 12 (S.D.N.Y., July 25, 2003) (holding a prisoner who was told he would see a doctor soon and his medical status would be reviewed “arguably had nothing to appeal” and at least raised a factual question barring summary judgment concerning exhaustion), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct.

receives a favorable decision, but prison staff then ignore or fail to carry out the decision, the prisoner need not grieve the noncompliance—otherwise “prison officials could keep prisoners out of court indefinitely by saying ‘yes’ to their grievances and ‘no’ in practice.”<sup>143</sup> The Second Circuit has recently adopted this position, rejecting as “impracticable” and “counter-intuitive” the State’s argument that prisoners should file appeals of favorable decisions in case they are not implemented.<sup>144</sup>

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28, 2003); *Fogell v. Ryan*, 2003 WL 21756096 at \*5 (D.Del., July 30, 2003) (holding grievance was “resolved informally” where plaintiff initiated the process and was then told by a prison official that “they had fired the doctor” and she should seek legal representation); *Sulton v. Wright*, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); *Dixon v. Goord*, 224 F.Supp.2d 739, 749 (S.D.N.Y. 2002) (“The exhaustion requirement is satisfied by resolution of the matter, i.e., an inmate is not required to continue to complain after his grievances have been addressed.”); *Gomez v. Winslow*, 177 F.Supp.2d 977, 984-85 (N.D.Cal. 2001) (allowing damage claim to go forward where the prisoner had stopped pursuing the grievance system when he received all the relief it could give him); *Brady v. Attygala*, 196 F.Supp.2d 1016, 1020 (C.D.Cal. 2002) (holding plaintiff had exhausted where he grieved to see an ophthalmologist and was taken to see an ophthalmologist before the grievance process was completed); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002); *see Marvin v. Goord*, 255 F.3d 40, 43 n.3 (2d Cir. 2001) (holding that succeeding through informal channels without a grievance met the exhaustion requirement, since grievance procedure states that it is “intended to supplement, not replace, existing formal or informal channels of problem resolution.”); *Stevens v. Goord*, 2003 WL 21396665 at \*4 (S.D.N.Y., June 16, 2003) (following *Marvin*), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003). *Contra*, *Feliz v. Taylor*, 2000 WL 1923506 at \*2 (E.D.Mich., Dec. 29, 2000).

One court reached the same result where the prisoner had initiated a grievance and received relief (being separated from an assailant and transferred to another prison), but never received a decision at all. *Nitz v. French*, 2001 WL 747445 at \*3 (N.D.Ill., July 2, 2001) (“It would be a strange rule that an inmate who has received all he expects or reasonably can expect must nevertheless continue to appeal, even when there is nothing to appeal.”)

<sup>143</sup> *Sulton v. Wright*, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); *accord*, *Kaplan v. New York State Dept. of Correctional Services*, 2000 WL 959728 at \*3 (S.D.N.Y., July 10, 2000); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002). *But see* *Dixon v. Page*, 291 F.3d 485, 490 (7<sup>th</sup> Cir. 2002) (observing that “[r]equiring a prisoner who has won his grievance in principle to file another grievance to win in fact,” risking the prospect of a “never-ending cycle of grievances,” “could not be tolerated”; but accepting prison officials’ claim that the prisoner could have taken a further appeal to the Director if the situation had not been resolved after 30 days).

<sup>144</sup> *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*5 (2d Cir., Aug. 18, 2004) (“Once Abney received a favorable ruling from the Superintendent on his IGP grievances, no further administrative proceedings were available to propel him out of stasis.”)

Some courts have held that a decision does not obviate the need for an appeal unless it is so completely favorable that no further relief is possible.<sup>145</sup> *Abney*, however, rejects that view; the plaintiff's grievance decisions, which the court held sufficiently favorable to complete the plaintiff's grievance obligations concerning inadequate medical care, said only that he would receive further attention from medical practitioners, and then that he should receive "appropriate footwear," without guaranteeing he would receive any particular quality of care.<sup>146</sup>

One court has held that if a grievance is resolved favorably, the only judicial relief that is available is damages for injuries pre-dating the resolution.<sup>147</sup> That categorical holding goes too far. For example, a prisoner seeking to end a prison policy or practice prospectively might win a grievance relieving him or her on narrow grounds from the policy's immediate application, but leaving the policy generally in place and the prisoner at risk of future application of it. Under those circumstances, the proper inquiry with respect to injunctive relief would be whether there was sufficient risk of recurrence to confer standing on the prisoner.<sup>148</sup>

## 2. Exhausting All Issues

Courts have held that all claims raised in the suit must have been exhausted in order to be heard.<sup>149</sup> That is the case whether the claims are raised initially or added by subsequent

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<sup>145</sup> See *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186-87 (10<sup>th</sup> Cir. 2004) ("When there is *no possibility of any further relief*, the prisoner's duty to exhaust available administrative remedies is complete.") (emphasis supplied); *Green v. Cahal*, 2004 WL 1078988 at \*2-3 (D.Or., May 11, 2004) (holding that a prisoner whose complaint of medical care delay resulted in a decision that treatment was forthcoming should nonetheless have appealed); *Rivera v. Pataki*, 2003 WL 21511939 at \*7 (S.D.N.Y., July 1, 2003) (noting it "made sense" for a prisoner to appeal where an intermediate decision granted him some relief but did not change the challenged policy).

<sup>146</sup> *Abney*, 2004 WL 1842647 at \*1, 5-6.

<sup>147</sup> *Dixon v. Goord*, 224 F.Supp.2d 739, 750-51 (S.D.N.Y. 2002).

<sup>148</sup> See, e.g., *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979) (holding that plaintiff has standing to challenge a criminal statute if the fear of prosecution is "not imaginary or wholly speculative").

<sup>149</sup> *Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*6 (5<sup>th</sup> Cir., Sept. 8, 2004) (holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim); *Murray v. Artz*, 2002 WL 31906464 (N.D.Ill., Dec. 31, 2002) (holding that grievances about disciplinary conviction and excessive force, and later grievance about continuing medical problems, did not exhaust as to medical care at the time of the use of force); *Petty v. Goord*, 2002 WL 31458240 at \*4 (S.D.N.Y., Nov. 4, 2002) (holding that grievance could not exhaust as to actions subsequent to the filing of the grievance); *Young v. Goord*, 2002 WL

amendment.<sup>150</sup> Some courts have pushed this idea so far as to treat as separate claims, for exhaustion purposes, closely related issues that arise from the same transaction or occurrence.<sup>151</sup> Often these decisions, in effect, require uncounselled prisoners to make fine distinctions that many lawyers would miss.<sup>152</sup> As one court has pointed out, these decisions' logic would also permit prison officials to "obstruct legal remedies to unconstitutional actions by subdividing the grievances, arguing, *e.g.*, that the Christians, Muslims, and Jews must each grieve denial of access to their own communal services."<sup>153</sup> The Second Circuit has not ruled on this precise question, but arguably its

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31102670 at \* 4 (E.D.N.Y., Sept. 3, 2002) (holding that a prisoner who alleged in his grievance only that he had been disciplined for conduct that did not violate the rules could not litigate an equal protection claim that he was disciplined for discriminatory reasons), *aff'd in part, vacated in part on other grounds*, 67 Fed.Appx. 638, 2003 WL 21243302 (2d Cir. 2003); *Bey v. Pennsylvania Dept. of Corrections*, 98 F.Supp.2d 650, 660 (E.D.Pa. 2000) (holding that appeal of disciplinary conviction did not exhaust as to medical care claim or administrative custody status claim even if they "flowed proximately" from the alleged misconduct incident); *Cooper v. Garcia*, 55 F.Supp.2d 1090, 1094-95 (S.D.Cal. 1999); *Payton v. Horn*, 49 F.Supp.2d 791, 796 (E.D.Pa. 1999) (exhaustion of disciplinary appeal did not exhaust as to separate decision to keep plaintiff in administrative segregation after the completion of the disciplinary penalty, or the unauthorized withdrawal of funds from his inmate account); *Jenkins v. Toombs*, 32 F.Supp.2d 955, 959 (W.D.Mich. 1999). *But see Aiello v. Litscher*, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000) (holding prisoners who had exhausted concerning a regulation need not also exhaust with respect to each application of the regulation).

<sup>150</sup> *See Cline v. Fox*, 266 F.Supp.2d 489, 493 (N.D.W.Va. 2003) (holding that where a prisoner exhausted and sued about censorship of a book and then added a claim about subsequent removal of books from the library without exhausting, the library claim had to be dismissed); *Carter v. Wright*, 211 F.R.D. 549, 551 (E.D.Mich. 2003). In *Carter*, the court rejected defendants' argument that new claims could not be added by amendment even if they had been exhausted.

<sup>151</sup> *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8<sup>th</sup> Cir. 2003) (holding that a prisoner who grieved about the officers who abused him, but did not raise in his grievance claims that their supervisor refused to take action against the officers, failed to train them, and retaliated against him for his complaints, had not exhausted his claim against the supervisor).

<sup>152</sup> *See, e.g., Monsalve v. Parks*, 2001 WL 823871 (S.D.N.Y., July 19, 2001) (holding that even if the plaintiff exhausted concerning his 45-day disciplinary detention, he has to exhaust again with respect to his retention in administrative detention for the same alleged misconduct).

<sup>153</sup> *Lewis v. Washington*, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (construing grievances about placement in "unapproved protective custody" status as encompassing complaints about conditions in that unit); *see Branch v. Brown*, 2003 WL 21730709 at \*12 (S.D.N.Y., July 25, 2003) (holding that although some aspects of plaintiff's complaint might technically fall outside his grievance, dismissal for non-exhaustion was improper because the gravamen of his complaint is that defendants failed and continued to fail to acknowledge his medical restriction), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *Sulton v. Wright*, 265 F.Supp.2d 292, 298

recent holding that prisoners need only “object intelligibly to some asserted shortcoming” and meet a notice pleading standard is inconsistent with a requirement of rigorous delineation of separate issues.<sup>154</sup>

A related question is whether a prisoner who has grieved a particular type or course of conduct must separately grieve all new incidents of that conduct. The Second Circuit has held, in a case involving persistent failure to provide adequate medical care, that once the prisoner had received a favorable grievance decision on the subject, he had exhausted even though the denial of treatment continued: “A prisoner who has not received promised relief is not required to file a new grievance where doing so may result in a never-ending cycle of exhaustion.”<sup>155</sup> This narrow ruling does not address the situation where the prisoner does not receive a favorable decision. However, its logic would seem equally applicable to cases where the prisoner has exhausted unsuccessfully. Other decisions persuasively hold that once a prisoner has grieved a prison policy, he can amend his complaint to add new applications of the policy without further exhaustion.<sup>156</sup> This holding may not extend to more discrete incidents. However, it would seem applicable to ongoing problems such as a course of inadequate medical care for a single disease or injury, such that every new default or consequence of the lack of care need not be the subject of a new grievance.<sup>157</sup> The Fifth Circuit has

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(S.D.N.Y. 2003) (“Rigid ‘issue exhaustion’ appears inappropriate when the fundamental issue is one of medical care from the same injury”); *Gomez v. Winslow*, 177 F.Supp.2d 977, 981-82 (N.D.Cal. 2001) (refusing to break down complaint of inadequate medical treatment into separate claims of failure to timely diagnose, failure to timely treat, and failure to inform); *Torrence v. Pelkey*, 164 F.Supp.2d 264, 278-79 (D.Conn. 2001) (declining to require exhaustion of new issues disclosed in discovery that arose from the “same series of events” concerning his medical care that he had exhausted). *But see* *English v. Redding*, 2003 WL 881000 at \*4 (N.D.Ill., Mar. 6, 2003) (refusing to apply *Lewis v. Washington* holding where prisoner had grieved being removed from protective custody at a different prison, and the discipline he received for the fight in which he was injured, but not the injury he was suing about).

<sup>154</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004).

<sup>155</sup> *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*6 (2d Cir., Aug. 18, 2004).

<sup>156</sup> *Freeman v. Berge*, 2004 WL 1774737 at \*5 (W.D.Wis. Jul 28, 2004) (“Enforcement of the rule would make it impossible for prisoners to obtain full relief in cases involving ongoing constitutional violations without filing additional lawsuits each time a new violation occurred because § 1997e(a) requires prisoners to seek an administrative remedy before they file a complaint in federal court. . . . Such a result that would be both wasteful and contrary to the policy behind § 1983 and § 1997e(a).”); *Aiello v. Litscher*, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000) (holding prisoners who had exhausted concerning a regulation need not also exhaust with respect to each application of the regulation).

<sup>157</sup> *But see* *Kane v. Winn*, 319 F.Supp.2d 162, 223 (D.Mass. 2004) (holding prisoner with ongoing medical complaints had exhausted only up to the date of his grievance).

so held in a recent decision in which the plaintiff alleged an ongoing course of failure to protect him from sexual assault. The court held he had not exhausted as to any incidents that occurred more than 15 days before his first grievance (15 days being the grievance time limit), but once he had alerted prison officials to the repeated assaults, he had exhausted as long as they continued.<sup>158</sup> But, the court cautioned, a grievance would not exhaust as to future incidents of a more discrete nature (*e.g.*, a month apart).<sup>159</sup>

Many of the cases that engage in close issue-parsing involve disciplinary appeals that are separate from the prison grievance procedure.<sup>160</sup> A suit that attacks the conduct of the disciplinary hearing itself is clearly exhausted by a disciplinary appeal.<sup>161</sup> The next question is whether raising issues that are directly related to the subject of the disciplinary hearing, but do not challenge the

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<sup>158</sup> *Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*8 (5<sup>th</sup> Cir., Sept. 8, 2004) (“As a practical matter, Johnson could not have been expected to file a new grievance every fifteen days, or each time he was assaulted. . . . Further, the TCDJ rules specifically direct prisoners *not* to file repetitive grievances about the same issue and hold out the threat of sanctions for excessive use of the grievance process.”)

<sup>159</sup> *Johnson v. Johnson*, 2004 WL 1985441 at \*21 n.13.

<sup>160</sup> *See Rodney v. Goord*, 2003 WL 21108353 at \*6 (S.D.N.Y., May 15, 2003) (holding an allegation of false disciplinary charges had to be grieved in addition to appealing the disciplinary conviction); *Tookes v. Artuz*, 2002 WL 1484391 at \*4 (S.D.N.Y., July 11, 2002) (holding that appeal of disciplinary conviction did not exhaust as to claim against officer who allegedly wrote a false disciplinary report); *Cherry v. Selsky*, 2000 WL 943436 at \*7 (S.D.N.Y., July 7, 2000) (same as *Tookes*); *Hattie v. Hallock*, 8 F.Supp.2d 685, 689 (N.D. Ohio 1998) (holding that in order to challenge a prison rule, the prisoner must not only appeal from the disciplinary conviction for breaking it, but must also grieve the validity of the rule), *judgment amended*, 16 F.Supp.2d 834 (N.D. Ohio 1998). *Contra*, *Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003) (holding that a prisoner who claimed retaliatory discipline exhausted by appealing the disciplinary decision to the highest level); *Samuels v. Selsky*, 2002 WL 31040370 at \*8 (S.D.N.Y., Sept. 12, 2002) (holding that propriety of confiscation of religious materials had been exhausted via a disciplinary appeal from the resulting contraband and “demonstration” charges; “issues directly tied to the disciplinary hearing which have been directly appealed need not be appealed again collaterally through the Inmate Grievance Program”).

<sup>161</sup> *Jenkins v. Haubert*, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that disciplinary appeals exhausted as to challenge to disciplinary sanctions); *Rivera v. Goord*, 2003 WL 1700518 at \*10 (S.D.N.Y., Mar. 28, 2003) (holding that a claim of hearing officer misconduct was exhausted by a disciplinary appeal); *Muhammad v. Pico*, 2003 WL 21792158 at \*8 n.22 (S.D.N.Y., Aug. 5, 2003) (holding due process claims exhausted by disciplinary appeal); *Sweet v. Wende Correctional Facility*, 253 F.Supp.2d 492, 496 (W.D.N.Y. 2003) (holding an appeal from a disciplinary hearing may exhaust if it raises the same issues as the subsequent federal complaint).

conduct of the hearing itself, can be exhausted by a disciplinary appeal. The Supreme Court has stated that the exhaustion requirement is designed to give prison officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.”<sup>162</sup> Raising an issue in a disciplinary appeal certainly creates that opportunity, whether prison officials choose to take advantage of it or not. Moreover, cases that have held that disciplinary appeals do not exhaust as to issues ancillary to the conduct of the disciplinary hearing have generally done so without closely examining the scope of review of disciplinary appeals.<sup>163</sup> If a disciplinary appeal can in fact trigger review of circumstances underlying or related to the disciplinary proceeding, as well as the conduct of the hearing itself, it would seem that the appeal is a proper remedy and that pursuing it should be deemed to exhaust all issues within the appeal process’s scope of review.

The Second Circuit has taken a different approach both to disciplinary appeals and to the more general question of prisoners’ selecting the right remedy, holding that a prisoner was justified in filing only a disciplinary appeal, and not a grievance, based on a reasonable belief that his complaint about the retaliatory fabrication of evidence against him could only be pursued through an appeal.<sup>164</sup> In such a case, the prisoner is not deemed to have exhausted, but must seek to exhaust remedies if they remain available; if not, the prisoner may proceed with the litigation.<sup>165</sup>

In any case, a rigorous “issue exhaustion” requirement may be invalid under Supreme Court administrative law jurisprudence. In *Sims v. Apfel*,<sup>166</sup> the Court considered the Social Security Act’s requirement that claimants resort to the Social Security Appeals Council, and observed that the

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<sup>162</sup> *Porter v. Nussle*, 534 U.S. at 525.

<sup>163</sup> *See, e.g., Benjamin v. Goord*, 2002 WL 1586880 at \*2 (S.D.N.Y., July 17, 2002), *reconsideration denied*, 2002 WL 31202708 (S.D.N.Y., Oct. 1, 2002); *Cherry v. Selsky*, 2000 WL 943436 at \*7 (S.D.N.Y., July 7, 2000).

<sup>164</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*7 (2d Cir., Aug 18, 2004) (stating that even if the plaintiff was wrong, “his interpretation was hardly unreasonable”; the regulations “do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings.”); *accord, Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*4-5 (2d Cir., Aug. 18, 2004) (remanding claim that “because under BOP regulations the appellate process for disciplinary rulings and for grievances was one and the same, [plaintiff] reasonably believed that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies,” since it “cannot be dismissed out of hand, especially since the district court has not had the opportunity to examine it.”); *see Parish v. Lee*, 2004 WL 877103 at \*4 (E.D.La., Apr 22, 2004) (“The inmates must be given the benefit of the doubt based on what appears to be the written policy to which they are bound.”)

<sup>165</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*8 (2d Cir., Aug. 18, 2004); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*10 (2d Cir., Aug. 18, 2004).

<sup>166</sup> 530 U.S. 103 (2000).

statute does not explicitly require issue exhaustion and that the arguments for issue exhaustion are weakest when administrative proceedings are not adversarial in character.<sup>167</sup> Four Justices then observed that Social Security proceedings are inquisitorial rather than adversarial, with the ALJ responsible for developing the issues, and with no separate representative advocating the Commissioner's position before the ALJ; that the regulations characterize review as done in an “informal, nonadversary manner”; and that many Social Security claimants are unrepresented or represented by non-attorneys. For these reasons, they said, issue exhaustion is not required.<sup>168</sup> Justice O'Connor joined the plurality on narrower grounds.<sup>169</sup> Prison grievance systems generally operate in an informal, nonadversarial manner<sup>170</sup> without representation by counsel, and the *Sims* plurality analysis would seem applicable to them.<sup>171</sup>

### 3. Specificity of Grievances

How specific and detailed must a grievance be to meet the exhaustion requirement? The Second Circuit has recently ruled on this question, noting that the requirement is designed to provide “time and opportunity to address complaints internally” before suit is filed.<sup>172</sup> The court continued: “As such, it is not dissimilar to the rules of notice pleading, which prescribe that a complaint ‘must contain allegations sufficient to alert the defendants to the nature of the claim and to allow them to defend against it.’”<sup>173</sup> Accordingly, the court adopted the Seventh Circuit’s formulation that, if prison

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<sup>167</sup> 530 U.S. at 109-10 (majority opinion).

<sup>168</sup> *Id.* at 110-12.

<sup>169</sup> *Id.* at 112-14.

<sup>170</sup> For example, the New York State prison grievance procedure states that it is “not intended to support an adversary process, but is designed to promote mediation and conflict resolution.” New York State Dep’t of Correctional Services Directive No. 4040, Part I, *quoted in* Branch v. Brown, 2003 WL 21730709 at \*10 (S.D.N.Y., July 25, 2003) (holding that the quoted language “appears to favor a liberal reading of the scope of grievances”), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *accord*, Sedney v. Hasse, 2003 WL 21939702 at \*4 (S.D.N.Y., Aug. 12, 2003).

<sup>171</sup> The court endorsed this view in dictum in *Thomas v. Woolum*, 337 F.3d 720, 734-35 (6<sup>th</sup> Cir. 2003), though it acknowledged that circuit precedent bound it to a contrary holding.

<sup>172</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004), *citing* *Porter v. Nussle*, 534 U.S. at 524-25.

<sup>173</sup> *Johnson v. Testman, id.*, *quoting* *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 234 (2d Cir.2004).

The federal court notice pleading standard requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a), Fed.R.Civ.P. Under that standard,

regulations do not prescribe any particular content for inmate grievances, “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.”<sup>174</sup> The court added:

We believe that this formulation is a sound one. Uncounseled inmates navigating prison administrative procedures without assistance cannot be expected to satisfy a standard more stringent than that of notice pleading. Still, the PLRA's exhaustion requirement does require that prison officials be “afford[ed] . . . time and opportunity to address complaints internally.” *Porter*, 534 U.S. at 524-25. In order to exhaust, therefore, inmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures.<sup>175</sup>

The leniency of this standard is shown by the Seventh Circuit's most recent application of it, which holds that a prisoner sufficiently exhausted a claim against prison staff that he was sexually assaulted through their deliberate indifference with a grievance that said: “[T]he administration don't [sic] do there [sic] job. [A sexual assault] should've never [sic] happen again,” and asked that the assailant be criminally prosecuted.<sup>176</sup>

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a claim should not be dismissed unless it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *pro se* plaintiffs are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

<sup>174</sup> *Johnson, id.*, quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir.2002). The Seventh Circuit asserted this standard as a default rule to be used in the absence of a different requirement in the grievance policy. The Second Circuit does not appear to have adopted this aspect of the Seventh Circuit's rationale. *See nn.* 191-193, below.

<sup>175</sup> *Johnson, id.* The Sixth Circuit has also relied on the Seventh Circuit's formulation in requiring a grievance only to give “fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim” made in litigation, since that standard “does not disturb the policies advanced by amended § 1997e. . . . A fair notice standard continues to give state prison officials first opportunity to respond to a prisoner's allegations of mistreatment or misconduct.” *Burton v. Jones*, 321 F.3d 569, 575 (6<sup>th</sup> Cir. 2003); *see Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*4-5 (5<sup>th</sup> Cir., Sept. 8, 2004) (adopting *Burton v. Jones* holding, but stating that “the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining” and that “the specificity requirement should be interpreted in light of the grievance rules of the particular prison system”).

<sup>176</sup> *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004) (describing grievance as “at the border of intelligibility”); *see also Freeman v. Berge*, 2004 WL 1774737 at \*3 (W.D.Wis., Jul 28,

The Second Circuit's adoption of this holding is consistent with other decisions that have observed, *e.g.*, that “[i]t would be illogical to impose a higher technical pleading standard in informal prison grievance proceedings than would be required in federal court,”<sup>177</sup> on pain of having constitutional claims forever barred—especially since prisoners may have only a few days to prepare and submit their grievances.<sup>178</sup> Courts have acknowledged the policy of liberal construction of *pro se* pleadings in holding, *e.g.*, that grievances that presented the facts giving rise to the claim, requested the identities of the responsible officials, and requested officials to investigate “were sufficient under the circumstances to put the prison on notice of the potential claims and to fulfill the basic purposes of the exhaustion requirement. As long as the basic purposes of exhaustion are fulfilled, there does not appear to be any reason to require a prisoner plaintiff to present fully developed legal and factual claims at the administrative level.”<sup>179</sup> Other courts have taken a similar

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2004) (holding standard met by statement that plaintiff was “denied food because I did not have my light on, etc. This is using food as punishment. I have never refused my meals.”). *But see* Ball v. McCaughtry, 2004 WL 1013362 at \*2 (W.D.Wis., May 6, 2004) (holding that a prisoner who complained about seized papers that he identified only as “gay materials,” even when asked for more information, was insufficiently specific to satisfy a grievance policy calling for sufficient facts to allow an examiner to investigate the complaint).

<sup>177</sup> Sulton v. Wright, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003).

<sup>178</sup> Some jail and prison systems have extraordinarily short deadlines for filing grievances, *e.g.*: Tennessee, 7 calendar days; Utah, 7 calendar days; Kentucky, 5 working days; Georgia, 5 working days; Metro Dade (Florida), 3 working days; Rhode Island, 3 days; New York City, 3 days; Oklahoma, “informal resolution” effort within 3 days. Booth v. Churner, No. 99-1964, Brief of the American Civil Liberties Union *et al.* as *Amici Curiae* at 12 (December 2000) (citing regulations and policies).

<sup>179</sup> Irvin v. Zamora, 161 F.Supp.2d 1125, 1135 (S.D.Cal. 2001); *accord*, Johnson v. Johnson, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*6 (5<sup>th</sup> Cir., Sept. 8, 2004) (agreeing that legal theories need not be presented in grievances; holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, and said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim); Burton v. Jones, 321 F.3d 569, 575 (6<sup>th</sup> 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”); Williams v. Wilkinson, 122 F.Supp.2d 894, 899 (S.D. Ohio 2000) (rejecting an argument by defendants that “each claim at each stage [of the grievance process] must parallel each and every claim in the federal complaint.”); *see* Baskerville v. Blot, 224 F.Supp.2d 723, 730 (S.D.N.Y. 2002) (holding that a grievance that mentioned a staff assault, but asked for no relief for it, and focused chiefly on a medical care issue, sufficed to exhaust as to the assault); Thomas v. Zinkel, 155 F.Supp.2d 408, 413 (E.D.Pa. 2001) (holding that it was enough for the prisoner to mention all of his complaints at every stage of the proceeding, even if he was “more specific” about one claim than the others); Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (holding that prisoners’ grievances about their placement in a

approach without much theoretical discussion.<sup>180</sup> Of course if the grievance process actually results

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particular housing status encompassed their complaints about allegedly unconstitutional conditions found there).

With respect to legal theories, the courts are divided over whether claims asserted under the Religious Land Use and Institutionalized Persons Act that were exhausted before that statute was enacted must be exhausted again. *Compare* *Orafan v. Goord*, 2003 WL 21972735 at \*5 (N.D.N.Y., Aug. 11, 2003) (“In light of the relative informality of the inmate grievance system and the short limitations period, inmates cannot be prohibited from bringing a suit in federal court based on causes of action that became available only after the inmates pursued administrative remedies.”) *with* *Wilson v. Moore*, 2002 WL 950062 at \*6 (N.D.Fla., Feb. 28, 2002) (“While a prisoner is not required to identify a formal legal theory in his grievance, the administrative resolution of the ‘problem’ cannot occur if the law governing the problem has yet to take effect.”) The Second Circuit’s adoption of the “object intelligibly” standard, discussed above, would seem to be consistent with the holding of *Orafan* and not *Moore*.

<sup>180</sup> See *McAlphin v. Toney*, 375 F.3d 753, 755 (8th Cir. 2004) (per curiam) (treating claim that two defendants failed to treat plaintiff’s dental grievances as emergency matters and others refused to escort him to the infirmary for emergency treatment were both part of a single exhausted claim of denial of emergency dental treatment); *Kikumura v. Hurley*, 242 F.3d 950, 956 (10th Cir. 2001) (holding complaint sufficient to meet the exhaustion requirement where the plaintiff complained that he was denied Christian pastoral visits, though the defendants said his claim should be dismissed because he had not stated in the grievance process that his religious beliefs include elements of both the Buddhist and Christian religions); *Skundor v. Coleman*, 2003 WL 22088342 at \*8 (S.D.W.Va., July 31, 2003) (holding that a grievance complaining that strip searches observed “by other prisoners and passersby” violated his privacy sufficiently exhausted a claim that opposite sex staff members observed the searches), *report and recommendation adopted*, 280 F.Supp.2d 524 (S.D.W.Va. 2003), *aff’d*, 98 Fed.Appx. 257, 2004 WL 1205718 (4<sup>th</sup> Cir. 2004); *Casarez v. Mars*, 2003 WL 21369255 at \*6 (E.D.Mich., June 11, 2003) (holding that discrepancies in dates between grievance and complaint did not mean a failure to exhaust, since it was clear that they referred to the same events); *Sulton v. Wright*, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003) (adopting holding of *Irvin v. Zamora*, *supra*, that it is sufficient to present the “relevant factual circumstances giving rise to a potential claim”; noting that this rule “has particular application to the complex issues involved in medical care cases”); *Baskerville v. Blot*, 224 F.Supp.2d 723, 730 (S.D.N.Y. 2002) (holding that a grievance that mentioned an alleged assault by staff but asked for no relief for it, while focusing on alleged deprivation of medical care, sufficed to exhaust as to the alleged assault); *Gomez v. Winslow*, 177 F.Supp.2d 977, 982 (N.D.Cal. 2001) (holding that allegations that defendants failed to notify the plaintiff that he had tested positive for hepatitis C antibodies, to begin his treatment timely, or to provide him with adequate information were “encompassed within Gomez’s claim of inadequate medical care”); *Thomas v. Zinkel*, 155 F.Supp.2d 408, 413 (E.D.Pa. 2001) (holding it was enough for the prisoner to mention all of his complaints at every stage of the proceeding, even if he was “more specific” about one claim than the others); *Williams v. Wilkinson*, 122 F.Supp.2d 894, 899 (S.D. Ohio 2000) (rejecting defendants’ argument that “each claim at each stage [of the

in an investigation of an issue, it should be deemed exhausted no matter how well or badly the prisoner set it out, since the purpose of exhaustion will clearly have been served.<sup>181</sup>

The more liberal approach is also consistent with exhaustion law under Title VII of the Civil Rights Act of 1964, which seems to me and to many courts, if not the Second Circuit, to present a particularly apt analogy to the PLRA.<sup>182</sup> Suits under Title VII need only assert claims that are “like or reasonably relate to” the allegations of the administrative charge,<sup>183</sup> with some courts looking beyond the charge to the scope of the investigation by the E.E.O.C. that could “reasonably be expected to grow out of” the charge.<sup>184</sup> (Prison grievance systems commonly conduct investigations in response to grievances.<sup>185</sup>) The stringency with which even this requirement is applied depends on whether the complainant had the assistance of counsel in preparing the administrative charge.<sup>186</sup> New acts which occur during the pendency of an E.E.O.C. investigation may be included in the suit.<sup>187</sup> The nature of prison grievance systems, too, supports such an approach. One court has stated of the New York state prison grievance system: “By its own terms, DOCS policy appears to favor a liberal reading of the scope of grievances, as the [grievance program] itself is ‘not intended to

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grievance process] must parallel each and every claim in the federal complaint”).

<sup>181</sup> *Baskerville v. Blot*, 224 F.Supp.2d 723, 730 (S.D.N.Y. 2002) (applying “time and opportunity” rationale to hold that plaintiff exhausted as to issues that were actually investigated as a result of his grievance).

<sup>182</sup> *See* nn. 81, 182-187, 205-206, 240-241, 275-280, 433-35, concerning Title VII.

<sup>183</sup> *Cheek v. Western & Southern Ins. Co.*, 31 F.3d 497, 500 (7<sup>th</sup> Cir. 1994).

<sup>184</sup> *E.E.O.C. v. Farmer Bros.*, 31 F.3d 891, 899 and n. 5 (9<sup>th</sup> Cir. 1994) and cases cited. *But see* *Saunders v. Goord*, 2002 WL 31159109 at \*4 (S.D.N.Y., Sept. 27, 2002) (holding that a prison grievance should itself provide “enough detail regarding the alleged incidents so that it could evaluate the merit of his grievances and take the appropriate course of action,” apparently without resort to any further investigation).

<sup>185</sup> *See, e.g.*, New York State Dep’t of Correctional Services, Directive 4040, Inmate Grievance Program (Aug. 22, 2003), at § VI.D-E (discussing staff interviews and other investigative procedures);

<sup>186</sup> *Duggins v. Steak ‘N Shake, Inc.*, 195 F.3d 828, 832 (6<sup>th</sup> Cir. 1999); *Hicks v. ABT Assoc., Inc.*, 572 F.2d 960, 965 (3d Cir. 1978), *cited in* *Anjelino v. New York Times Co.*, 200 F.3d 73, 94 (3d Cir. 1999); *see also* *Love v. Pullman*, 404 U.S. 522, 526 (1972) (stating that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.”).

<sup>187</sup> *Anjelino v. New York Times Co.*, 200 F.3d at 94, 96.

support an adversary process, but is designed to promote mediation and conflict resolution.”<sup>188</sup>

The “object intelligibly” standard, which the Second Circuit adopted in *Johnson v. Testman*, was originally framed as a default rule by the Seventh Circuit. The question, says that court, is one of choice of law. Since state law governs state prisons and federal administrative law governs federal prisons; “the grievances must contain the sort of information that the administrative system requires.”<sup>189</sup> So if state law calls for “code-pleading,” requiring identification of “each ‘element’ of a ‘cause of action,’” prisoners must meet that standard.<sup>190</sup>

It does not appear that the Second Circuit in *Johnson v. Testman* intended to adopt this choice of law analysis, since in adopting the Seventh Circuit’s bottom line it cited only the competing concerns for “[u]ncounseled inmates navigating prison administrative procedures without assistance” and prison officials’ need for enough information “to take appropriate responsive measures.”<sup>191</sup> It did not canvass the Bureau of Prisons administrative remedy policy to ensure it contained no contrary pleading requirement. In any case, the Seventh Circuit choice of law approach is highly questionable, since the PLRA is a federal statute implementing federal policies. Indeed, the Seventh Circuit states: “The only constraint is that no prison system may establish a requirement inconsistent with the federal policy.”<sup>192</sup> But, as noted, the relevant federal policies, which the Seventh Circuit does not mention, would seem to be the federal courts’ liberal pleading policies and the PLRA’s purpose to give prison officials a chance to resolve disputes before they get to court. It is difficult to believe that Congress intended for prisoners with meritorious claims to be barred for failure to conform to technical requirements that they may not be literate or educated enough to meet,<sup>193</sup> in documents that they must generally file within a matter of days.

#### 4. Exhausting Each Defendant

Is it necessary for a prisoner to name every defendant in the grievance to preserve the right to sue them? One federal appeals court has said “no,” holding that it is enough to “provide as much

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<sup>188</sup> *Branch v. Brown*, 2003 WL 21730709 at \*10 (S.D.N.Y., July 25, 2003), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003), *quoting* New York State Department of Correctional Services Directive 4040, Part I.

<sup>189</sup> *Strong v. David*, 297 F.3d 646, 649 (7<sup>th</sup> Cir.2002). This court’s view of the extent of prisoners’ obligation to conform to all the technical requirements of prison grievance systems is questionable. *See* §§ IV.E.7, n. 242-53; IV.E.8, nn. 275-80.

<sup>190</sup> *Strong v. David*, *id.*

<sup>191</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004).

<sup>192</sup> *Id.*

<sup>193</sup> *See* § IV.E.7, n. 225, below.

relevant information as he reasonably can in the administrative grievance process.”<sup>194</sup> But another circuit has held the opposite, requiring that all defendants a prisoner wishes to sue must be named in a grievance<sup>195</sup>—despite the notorious difficulties *pro se* prisoners have in identifying and naming all the proper defendants even within the statute of limitations for judicial proceedings.<sup>196</sup> Similarly, the Eighth Circuit has recently held without much discussion that a prisoner who filed a grievance alleging that officers abused him, but did not raise their supervisor’s failure to supervise and to take action against the officers, and his retaliation against the prisoner for complaining, had not exhausted as to his supervisory claims.<sup>197</sup>

The Second Circuit has not ruled explicitly on this issue, but its holding that the grievance “need not lay out the facts, articulate legal theories, or demand particular relief,” but must only

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<sup>194</sup> *Brown v. Sikes*, 212 F.3d 1205, 1207-08 (11th Cir. 2000); *accord*, *Sulton v. Wright*, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003).

<sup>195</sup> *Curry v. Scott*, 249 F.3d 493, 504 (6th Cir. 2001); *accord*, *Ellison v. California Dep’t of Corrections*, 2003 WL 21209659 at \*2 (N.D.Cal., May 19, 2003) (dismissing argument that plaintiff need not exhaust with respect to each defendant). *But see* *Smeltzer v. Hook*, 235 F.Supp.2d 736, 741-42 (W.D.Mich. 2002) (declining to apply *Curry* holding where the plaintiff did not allege that unauthorized conduct violated the Eighth Amendment, but challenged a prison policy; under those circumstances, failure to name individuals did not hamper the defendants’ investigation); *see also* *Blackshear v. Messer*, 2003 WL 21508190 at \*2 (N.D.Ill., June 30, 2003) (holding that prisoner who failed to identify the nurse he was complaining about had exhausted, since that person could be identified from other information in his grievance “with a little follow-up investigation by the Jail”). A particularly absurd example of the exhaust-by-defendant rule is *Vandiver v. Martin*, 304 F.Supp.2d 934, 943-44 (E.D.Mich. 2004), in which the plaintiff was held not to have exhausted against the corporate medical provider because his grievance said only that the provider would be liable if his foot was amputated—though he named individual medical practitioners).

In *Spruill v. Gillis*, 372 F.3d 218, 234 (3rd Cir. 2004), the court held that failure to name a particular defendant was a procedural default since the grievance policy required it, but that the default was excused because the grievance process itself identified the staff member involved. The court noted in particular that the accusation against that defendant did not involve specific incidents of conduct, but of his involvement in a larger-scale denial of adequate medical care.

<sup>196</sup> *See, e.g.*, *Sulton v. Wright*, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003), *citing* *Valentin v. Dinkins*, 121 F.3d 72, 74 (2d Cir. 1997) (noting *pro se* prisoners’ difficulty in identifying defendants); *Lira v. Director of Corrections of State of California*, 2002 WL 1034043 at \*4 (N.D.Cal., May 17, 2002) (“... [D]efendants’ argument that Lira must exhaust by filing a grievance naming the specific persons he ultimately seeks to sue goes too far, as an inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants’ reasoning.”)

<sup>197</sup> *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003).

“object intelligibly to an asserted shortcoming,”<sup>198</sup> appears inconsistent with such a demanding approach.<sup>199</sup> Requiring prisoners not only to tell prison officials what happened to them, but also to develop their complete theories of liability and remedy, places a burden on lay persons acting under the short deadlines of prison grievance systems and without the assistance of counsel that will be impossible for most of them to meet and will guarantee forfeiture of meritorious claims.<sup>200</sup> Moreover, the purpose of the exhaustion requirement is to give “corrections *officials*”—the people in charge—“time and opportunity to address complaints internally” before suit is filed,<sup>201</sup> not to give notice to individual prison employees that they will be sued.<sup>202</sup> Though there is some district court authority supporting the “exhaust each defendant” rule,<sup>203</sup> it is dubious in light of the Second Circuit’s adoption of an “object intelligibly” standard.<sup>204</sup>

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<sup>198</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004).

<sup>199</sup> Certainly the Seventh Circuit, originator of the “object intelligibly” standard, would agree, having just held barely sufficient a grievance about sexual assault that alleged only: “[T]he administration don’t [sic] do there [job].” *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004).

<sup>200</sup> *Freeman v. Berge*, 2004 WL 1774737 at \*3-4 (W.D.Wis. Jul 28, 2004). *Freeman* notes that under the federal court notice pleading standard, litigants are allowed to amend their complaints to identify the proper defendants; that the prisoner plaintiff was not in a position to identify them in his grievance because he did not have “personal knowledge of the decision making structure within the prison”; and that in order to have an “exhaust per defendant” rule, prison officials would have to have a discovery-like system so inmates could obtain the correct names within the deadline for filing. Otherwise the requirement would likely be invalid as in conflict with the federal policy underlying § 1983.

<sup>201</sup> *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

<sup>202</sup> *Freeman v. Berge*, 2004 WL 1774737 at \*3 (W.D.Wis. Jul 28, 2004) (“In the context of the inmate complaint review system, it is not notice to individual actors that is important but notice to the prison administration. The purpose of administrative exhaustion is not to protect the rights of officers, but to give prison officials a chance to resolve the complaint without judicial intervention.”); *see Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*9 (5<sup>th</sup> Cir., Sept. 8, 2004) (acknowledging that “the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued,” but stating that fair notice may require identification of individuals in some cases).

<sup>203</sup> *See Foreman v. Goord*, 2004 WL 1886928 at \*3 (S.D.N.Y. Aug. 23, 2004); *Connor v. Hurley*, 2004 WL 885828 at \*3 (S.D.N.Y., Apr. 26, 2004); *Moulier v. Forte*, 2003 WL 21468612 at \*1 (S.D.N.Y., June 25, 2003) (dismissing for failing to name defendants in grievance, failing to explain why).

<sup>204</sup> As this tract was being completed, the Fifth Circuit adopted what appears to be an intermediate position under the rubric of “‘fair notice’ of the problem that will form the basis of the

One aspect of Title VII exhaustion law that is not analogous to the PLRA is the rule that defendants in litigation must have been named in the administrative charge. That rule is inappropriate for importation into the PLRA context in part because the statute itself limits Title VII civil actions to respondents “named in the charge.”<sup>205</sup> There is no such restriction in the PLRA exhaustion requirement. More importantly—and the reason why the restriction makes sense for Title VII but for the PLRA—is that Title VII liability is entity liability; the plaintiff need not (indeed, cannot) name the particular individuals responsible for the alleged discrimination.<sup>206</sup> By contrast, of course, most prisoner suits are brought under 42 U.S.C. § 1983, which provides for liability of “persons,” and which is governed by a stringent requirement to demonstrate defendants’ personal responsibility for the wrong.<sup>207</sup> As noted above,<sup>208</sup> tracing the lines of personal responsibility within the confines of the prison grievance process is an impossible burden.

## 5. Exhausting Items of Relief

Prisoners need not “demand particular relief” to exhaust administrative remedies.<sup>209</sup> That conclusion follows from the Supreme Court’s holding in *Booth v. Churner* that the applicability of the exhaustion requirement turns on whether the grievance system will address the prisoner’s

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prisoner’s suit.” It stated that “the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining”—e.g., a claim of staff misconduct might require more details concerning who was involved and when it occurred, while a claim that a cell is habitually infested with vermin or commissary prices were too high might not be required to name anyone. *Johnson v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 1985441 at \*4-5 (5<sup>th</sup> Cir., Sept. 8, 2004). For this purpose, defendants can be identified by functional descriptions. *Id.* at \*10 (holding identification of Unit Classification Committees was sufficient to exhaust as to their members). Whether, e.g., a claim of staff misconduct that was arguably attributable to deliberately indifferent supervision or policy would require the prisoner to have named the supervisors or policymakers (or identified the policy) in the grievance is not stated—and if there were such a requirement, it is unlikely that many prisoners could meet it.

<sup>205</sup> 42 U.S.C. § 2000e-5(f)(1).

<sup>206</sup> *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314-17 (2d Cir. 1995).

<sup>207</sup> *See, e.g., Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998), *citing Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986).

<sup>208</sup> *See nn.* 196, 200, above.

<sup>209</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004), *quoting Strong v. David*, 297 F.3d 646, 650 (7<sup>th</sup> Cir. 2002).

complaint, not whether it provides the remedy that the prisoner prefers.<sup>210</sup> Once a prisoner's claim is exhausted, "[a]ny claim for relief that is within the scope of the pleadings" may be litigated without further exhaustion.<sup>211</sup>

## 6. "Total Exhaustion"

The Second Circuit has rejected the rule adopted by some courts that the presence of any unexhausted issues in the complaint will require the dismissal of exhausted issues as well ("total exhaustion").<sup>212</sup> Though it acknowledged that a complaint containing any unexhausted claims is not properly "brought" under the exhaustion requirement, the court observed that the statute does not direct courts to "kill it rather than to cure it,"<sup>213</sup> and the other PLRA section that governs dismissals of prisoner actions is also silent on that point.<sup>214</sup> There is no indication in the legislative history that Congress considered or had any intention concerning the subject.<sup>215</sup> Nor is there any reason to believe that a total exhaustion rule will serve the purpose to "reduce the quantity and improve the

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<sup>210</sup> *Booth*, 532 U.S. at 740-41; see *Strong v. David*, 297 F.3d at 649 (stating that "no administrative system may demand that the prisoner specify each remedy later sought in litigation—for *Booth v. Churner* . . . holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy."); *Lira v. Director of Corrections of State of California*, 2002 WL 1034043 at \*4 (N.D.Cal., May 17, 2002). The suggestion to the contrary in *Luckerson v. Goord*, 2002 WL 1628550 at \*2 (S.D.N.Y., July 22, 2002), is therefore erroneous. In that case, where the plaintiff initially grieved and requested that asbestos tests be conducted, and then sued complaining of asbestos-related problems and seeking damages, medical monitoring, etc., the real issue is not the plaintiff's failure to ask for particular remedies in the grievance system, but his failure to grieve a claim of actual exposure to asbestos as opposed to a request that the presence of asbestos be determined. Similarly, the holding in *Saunders v. Goord*, 2002 WL 31159109 at \*4 (S.D.N.Y., Sept. 27, 2002), that the prisoner failed to exhaust in part because he failed to specify the action he wished taken, is erroneous under *Booth*.

<sup>211</sup> *Jones'El v. Berge*, 172 F.Supp.2d 1128, 1134 (W.D.Wis. 2001).

<sup>212</sup> *Ortiz v. McBride*, \_\_\_ F.3d \_\_\_, 2004 WL 1842644 (2d Cir., Aug. 18, 2004). *Contra*, *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10<sup>th</sup> Cir. 2004) (relying on analogy to habeas corpus total exhaustion rule); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1142 (8<sup>th</sup> Cir. 2003) (stating that the rule is required by the "plain language" of the exhaustion statute, and that it was "guided" by the habeas corpus total exhaustion rule).

<sup>213</sup> *Ortiz*, 2004 WL 1842644 at \*7.

<sup>214</sup> *Id.*, citing 42 U.S.C. § 1997e(c).

<sup>215</sup> *Accord*, *Alexander v. Davis*, 282 F.Supp.2d 609, 610 (W.D.Mich. 2003) (noting that the argument from the statutory use of "claim" and "action" is a "thin reed upon which to hang" a total exhaustion rule, absent evidence that Congress focused on the issue).

quality of prisoner suits” any better than dismissal only of unexhausted claims. Such a rule would result in the refile of exhausted claims after dismissal of the whole action, and the difficulty of many exhaustion questions means that the court would have to familiarize itself with the whole case and the parties’ positions initially to address exhaustion, then again when the exhausted claims were refiled.<sup>216</sup>

The court rejected as inapposite one circuit’s reliance on the habeas corpus total exhaustion rule,<sup>217</sup> since the habeas exhaustion requirements “arise out of fundamental principles of sovereignty,”<sup>218</sup> but there is “no comity issue of equal gravity” at stake in prisoners’ civil rights actions, since those claims need not be pursued in state courts, and state prison administrators reviewing grievances generally restrict their review to whether prison policy has been violated.<sup>219</sup> In addition, state grievance proceedings—unlike the state judicial proceedings to which federal courts defer in habeas cases—are generally not governed by rules of evidence or other safeguards to ensure accurate fact-finding, so they are much less likely than state court proceedings to create a more complete factual record that will assist federal court review.<sup>220</sup> Moreover, the court said, requiring exhaustion on a claim-by-claim basis serves comity interests just as well as total exhaustion, since in either case, federal courts will not hear prisoners’ claims unless they are exhausted.<sup>221</sup>

Prisoners’ civil rights actions are also different from habeas challenges to criminal convictions, since in the latter, all issues raised are likely to be challenges to “a singular event—the petitioner’s conviction in state court,” while civil rights actions routinely seek to address multiple grievances which may or may not be interrelated. Unexhausted habeas claims are more likely to be capable of exhaustion and subsequent re-filing than are civil rights claims, since prison grievance systems have short deadlines and claims dismissed for non-exhaustion therefore “are usually forever gone.”<sup>222</sup> For these reasons the likelihood that a court will have to revisit the same interconnected series of facts under a claim-by-claim exhaustion rule is lower for civil rights actions than for habeas

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<sup>216</sup> *Id.* at \*8.

<sup>217</sup> *Compare* *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10<sup>th</sup> Cir. 2004).

<sup>218</sup> *Id.* at \*9, *citing* *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

<sup>219</sup> *Ortiz* at \*10. The court was equally unimpressed with the analogy to Title VII, which has a total exhaustion rule, stating: “The goals of the anti-discrimination laws to provide and implement a broad, remedial scheme preventing such discrimination, . . . and the goals of the PLRA are so radically different, however, that we gain no insight from the analogy.” *Id.* at \*10 n.10. In my view this comparison is mistaken. *See* § IV.A, n.82, above.

<sup>220</sup> *Ortiz, id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 10-11.

proceedings, and the benefits of a total exhaustion rule correspondingly less. The court added that ordinarily, it expected that district courts that had dismissed unexhausted claims would proceed to decide the exhausted ones rather than wait for the plaintiff to attempt to exhaust and refile the dismissed claims.<sup>223</sup>

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<sup>223</sup> *Id.* at 12. This treatment of unexhausted claims in some tension with the more agnostic attitude about availability of remedies expressed in the court's simultaneous holding that a claim that was not exhausted, but with justification, should be dismissed unless it appears that remedies are no longer available; if remedies appear to be available but prove not to be so in practice, the case should be reinstated. *Giano v. Goord*, \_\_\_ U.S. \_\_\_, 2004 WL 1842652 at \*7-8 (2d Cir., Aug. 18, 2004).

## 7. Mistakes in Exhausting: Strict or Substantial Compliance?

Courts have disagreed whether prisoners who try to exhaust, but make mistakes,<sup>224</sup> should be forever barred from pursuing otherwise meritorious federal constitutional claims. The question is of enormous importance because of the propensity of prisoners (predominantly legally unsophisticated and poorly educated, and frequently mentally ill or of limited literacy,<sup>225</sup> in general or in English) to make procedural mistakes, and because the short deadlines in many prison grievance systems do not leave enough time for prisoners to prepare their grievances carefully and seek out others' assistance as necessary.<sup>226</sup> In addition, allowing prison conditions suits to be barred by the violation of technical rules in a grievance system in which prison personnel both design the rules and decide what is a default would go a long way towards permitting prison systems to create a regime of impunity for themselves and their employees. As one court put it: "While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights."<sup>227</sup>

Some courts have suggested that the exhaustion requirement will be satisfied by "substantial compliance" with grievance rules<sup>228</sup> or by reasonable efforts to comply.<sup>229</sup> Others have held or stated

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<sup>224</sup> Prisoners may also be obstructed by staff or circumstances from pursuing grievances timely and properly. Such cases raise questions of whether a remedy is "available" within the meaning of the statute, whether the defendants are estopped from raising non-exhaustion, or whether the prisoner was justified in failing to exhaust. These issues are discussed in § G, nn. 201-207, below.

<sup>225</sup> The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii*, 17- 19 (1994) (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>).

<sup>226</sup> See *Love v. Pullman*, 404 U.S. 522, 526 (1972) (stating, in connection with Title VII exhaustion, that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process").

<sup>227</sup> *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at \*5 (S.D.N.Y., June 6, 2002); see *Dimick v. Barufu*, 2003 WL 660826 at \*5 (S.D.N.Y., Feb. 28, 2003) ("Congress did not intend the PLRA to be a minefield, in which one misstep causes the dismissal of a possibly valid claim."); *O'Connor v. Featherston*, 2002 WL 818085 at \*2 (S.D.N.Y., Apr 29, 2002), quoting *Holloway v. Gunnell*, 685 F.2d 150, 154 (5<sup>th</sup> Cir. 1982) (disapproving dismissal "by a technical reading of the available administrative procedures when plaintiff has made detailed allegations showing a substantial effort to obtain an administrative remedy").

<sup>228</sup> See *Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3d Cir. 2000); compare *Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002) ("Whatever the parameters of 'substantial compliance' referred to

that strict compliance is required, either by analogy with the habeas corpus procedural default

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[in *Nyhuis*], it does not encompass a second-step appeal five months late nor the filing of a suit before administrative exhaustion, however late, has been completed.”); *see* *Wolff v. Moore*, 199 F.3d 324, 327 (6th Cir. 1999) (holding that substantial compliance suffices only in cases where the claim arose before PLRA's enactment).

<sup>229</sup> *See* *Palmer v. Goss*, 2003 WL 22327110 at \*4 (S.D.N.Y., Oct. 10, 2003) (holding prisoner made reasonable efforts to exhaust where he filed a grievance but did not appeal because he had learned that key evidence had been destroyed), *reconsideration denied*, 2003 WL 22519446 (S.D.N.Y., Nov. 5, 2003); *Croswell v. McCoy*, 2003 WL 962534 at \*4 (N.D.N.Y., Mar. 11, 2003) (holding “reasonable attempt” to exhaust may be sufficient, especially where it is alleged that prison staff impeded efforts); *O'Connor v. Featherston*, 2003 WL 554752 at \*3 (S.D.N.Y., Feb. 27, 2003) (holding that a plaintiff who complained to the Inspector General rather than grieving, in reliance on the prison Superintendent’s misinformation, and then tried for months to get a response, had made “reasonable attempts” that met the exhaustion requirement); *Thomas v. New York State Dept. of Correctional Services*, 2002 WL 31164546 at \*3 (S.D.N.Y., Sept. 30, 2002) (applying “reasonable attempt” standard); *O'Connor v. Featherston*, 2002 WL 818085 (S.D.N.Y., Apr. 29, 2002) (“While O'Connor may have failed to exhaust the technical requirements of DOCS’ grievance procedures, it cannot be said that his efforts to comply, which included a FOIA request, an appeal of the denial of that request, several inquiries to various divisions within DOCS, were not substantial or reasonable.”); *Zolicoffer v. Scott*, 55 F.Supp.2d 1372, 1375 (N.D.Ga. 1999) (requiring “good faith, bona fide effort to comply”), *aff’d*, 252 F.3d 440 (11<sup>th</sup> Cir. 2001); *see* *Lewis v. Gagne*, 281 F.Supp.2d 429, 433-35 (N.D.N.Y. 2003) (holding that juvenile detainee’s mother, who had complained to facility staff and contacted an attorney, family court, and the state Child Abuse and Maltreatment Register, and whose complaints were known to the facility director and agency counsel, had made sufficient “reasonable efforts” to exhaust).

doctrine<sup>230</sup> or simply by assertion.<sup>231</sup> (Ironically, even prisoners who *do* comply strictly with grievance rules may be attacked for it by prison officials' lawyers.<sup>232</sup>)

The Second Circuit has recently answered parts of this question, holding that “special circumstances” may excuse a prisoner's failure to exhaust;<sup>233</sup> that the plaintiff's reasonable though mistaken understanding of the PLRA, leading the prisoner to fail to exhaust, can comprise such

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<sup>230</sup> *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002) (adopting habeas corpus procedural default rule); *accord*, *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185-86 (10<sup>th</sup> Cir. 2004) (adopting *Pozo* analysis); *see* *Ford v. Johnson*, 362 F.3d 395, 397-98 (7<sup>th</sup> Cir. 2004) (holding that procedural default bars a federal suit only if the state tribunal has relied on the default).

Another circuit has recently adopted a procedural default rule, but in such a manner as to leave the bottom line unintelligible. In *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004), the court held that the PLRA exhaustion requirement should have a “procedural default component,” though it conceded that the habeas analogy is not “entirely satisfactory.” *Id.*, 372 F.3d at 228-30. Like the Seventh Circuit, it stated that the question is one of choice of law. *Id.* at 230. However, the court then stated that imposition of procedural requirements “must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a),” and said it had “made the same observation (albeit in somewhat different terms)” in stating that compliance with grievance rules need only be “substantial.” *Id.* at 232. *Spruill* is discussed in more detail below.

<sup>231</sup> *See* *Days v. Johnson*, 322 F.3d 863, 866 (5<sup>th</sup> Cir. 2003) (citing circuit’s “strict approach”); *Harris v. Le Roy Baca*, 2003 WL 21384306 at \*3 (C.D.Cal., June 11, 2003) (rejecting plaintiff’s attorney’s allegation that he had exhausted for his client by sending the Sheriff a grievance, since doing so was inconsistent with jail procedure).

A number of district courts have similarly stated, without any substantial explanation, that “strict compliance” is required. *See, e.g., McCoy v. Goord*, 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003). The court in *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at \*5 (S.D.N.Y. June 6, 2002), rhetorically acknowledged that strict compliance was important “to avoid the possibility that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures,” but it then applied a standard more like substantial compliance, noting that the prisoner, who had erred in following the grievance procedure, had submitted grievance forms and made “persistent complaints.” It warned of the risk that prison procedures could become “a snare of forfeiture for a prisoner seeking redress.”

<sup>232</sup> In *Manley v. Mazzuca*, 2004 WL 253314 at \*2 (S.D.N.Y., Feb. 10, 2004), defense counsel complained that the plaintiff had filed a grievance about his medical care, arguing that he should have complained to the doctor instead, and that his claim should be dismissed for his “manipulative and duplicitous behavior.”

<sup>233</sup> *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir.2004).

justification;<sup>234</sup> and most recently, that a reasonable understanding of the grievance rules themselves can justify failure to exhaust or to exhaust correctly.<sup>235</sup> The court has further held that threats or other intimidating conduct may make administrative remedies in general, or the usual grievance remedy in particular, unavailable to a prisoner; may estop the defendants from asserting the exhaustion defense; or may constitute justification for not exhausting or not exhausting consistently with the grievance rules.<sup>236</sup> It has rejected any analogy to the habeas corpus procedural default rule, holding that what constitutes justification under the PLRA for failing to follow procedural rules “must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.”<sup>237</sup>

These Second Circuit decisions do not address the significance of noncompliance with procedural rules in the absence of justifications such as reasonable if mistaken understandings of the rules or intimidation by correction staff. What if the prisoner simply blunders, or does not learn his rights sufficiently quickly or thoroughly? The Sixth Circuit has adopted what is potentially a more

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<sup>234</sup> *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004). In *Rodriguez*, the court held that the plaintiff’s belief that he did not have to exhaust an excessive force claim was reasonable, since the court had adopted the same view until reversed by the Supreme Court in *Porter v. Nussle*, 534 U.S. 516 (2002).

<sup>235</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6-7 (2d Cir., Aug. 18, 2004) (holding that a prisoner who pursued his complaint of retaliatory disciplinary charges and falsified evidence through a disciplinary appeal rather than a grievance acted reasonably; noting that a learned district judge had adopted the same interpretation); *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004) (holding that a federal prisoner’s argument that he adequately raised his inmate-inmate assault claim through an appeal of the disciplinary proceeding that arose from the incident should be considered by the district court); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*9 (2d Cir., Aug. 18, 2004) (holding that plaintiff’s arguments that lack of clarity in grievance regulations supported the reasonableness of his belief that he could exhaust by writing directly to the Superintendent).

<sup>236</sup> *Hemphill v. New York*, 2004 WL 1842658 at \*6-10. In *Hemphill*, the plaintiff, who alleged he was threatened and physically assaulted to prevent him from complaining, wrote a letter to the Superintendent rather than filing a grievance. The court observed that threats or other intimidation might deter prisoners from filing an internal grievance but not from appealing directly to persons in higher authority in the prison system or to external authority such as state or federal courts. Consequently the grievance remedy might be unavailable, or failure to use it justifiable, on a particular set of facts. *Id.* at \*7, 9-10; *see Ziemba v. Wezner*, 366 F.3d 161, 164 (2d Cir. 2003) (directing district court to consider whether a complaint to the FBI and subsequent investigation could amount to exhaustion by a plaintiff subjected within the prison to threats, beatings, and denial of writing implements and grievance forms).

<sup>237</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6 (2d Cir., Aug. 18, 2004).

sweeping view, holding in *Thomas v. Woolum* that a prisoner whose grievance was dismissed as untimely nevertheless had exhausted.<sup>238</sup> Like the Second Circuit, it rejected the analogy to habeas corpus and its procedural default rule.<sup>239</sup> Rather, it noted that the Supreme Court has squarely held that violation of state administrative time limits cannot bar a Title VII or Age Discrimination in Education Act plaintiff from suing in federal court notwithstanding those statutes' requirement of resort to state remedies.<sup>240</sup> It cited the reasoning of those cases that "state procedural rules should not be able to prevent a federal court from remedying a harm that Congress sought to prevent" and that "the prison grievant is generally the epitome of the lay person, unassisted by a trained lawyer, seeking to invoke the legal process."<sup>241</sup> Whether the *Woolum* holding will apply to all procedural errors by prisoners in the administrative process, as its reasoning would suggest, remains to be decided.

The Seventh Circuit relied for its strict compliance approach on law interpreting the federal habeas corpus exhaustion requirement,<sup>242</sup> an analogy that the Second Circuit has rejected<sup>243</sup> and that is invalid for numerous reasons. The PLRA exhaustion requirement refers to "action[s] . . . with respect to prison conditions."<sup>244</sup> The Supreme Court and lower courts have been at pains for decades to distinguish between challenges to conditions of confinement, pursued via § 1983, and challenges affecting a prisoner's custody, which must be pursued via federal habeas corpus before a § 1983 action even accrues.<sup>245</sup> There is no indication in the PLRA's text of any intent to blur the distinction

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<sup>238</sup> 337 F.3d 720 (6<sup>th</sup> Cir. 2003).

<sup>239</sup> *Id.*, 337 F.3d at 725-26; *see Giano*, 2004 WL 1842652 at \*6.

<sup>240</sup> *Thomas*, 337 F.3d at 727-29.

<sup>241</sup> *Id.* at 728-29.

<sup>242</sup> 286 F.3d at 1024, *citing* O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

<sup>243</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6 (2d Cir., Aug. 18, 2004) ("Nor is it appropriate to analogize the PLRA's exhaustion requirement to the procedural default rule applicable in the habeas context. . . . [T]he differences between habeas cases and prison litigation under § 1983 are legion.")

<sup>244</sup> 42 U.S.C. § 1997e(a).

<sup>245</sup> *See Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). As the Seventh Circuit itself put it: "[P]ostconviction relief and prisoner civil rights relief are analytically very different." *Martin v. U.S.*, 96 F.3d 853, 855 (7th Cir.1996). As one recent decision pointed out, *Cain-El v. Burt*, 2003 WL 21648721 at \*4 (E.D.Mich., Mar. 31, 2003), *report and recommendation adopted*, 2003 WL 21653129 (E.D. Mich., June 3, 2003), in a habeas proceeding, a federal court may stay proceedings pending exhaustion of state remedies, an option most courts have held is not permitted under the PLRA. *See* § IV.C, above.

between conditions cases and habeas corpus. Moreover, almost simultaneously with passage of the PLRA, which was designed to remedy the purported abuses of prisoner civil litigation, Congress separately enacted a major overhaul of federal habeas corpus law designed to remedy the purported abuses of habeas corpus.<sup>246</sup> When Congress separately and contemporaneously rewrites two statutory schemes, it makes no sense to assume that rules are intended to be borrowed between the two schemes.<sup>247</sup> The habeas exhaustion requirement—unlike the PLRA’s—calls for exhaustion of state *judicial* remedies, and thus invokes the highest degree of concern for state-federal comity.<sup>248</sup> Moreover, habeas corpus review is a deferential review of the validity of a state court judgment,<sup>249</sup> rather than *de novo* review of the conduct of prison personnel. In that respect it is similar to administrative exhaustion in Social Security cases, where review is of the validity of a final agency decision, and which has been held not at all analogous to PLRA exhaustion.<sup>250</sup>

The Seventh Circuit also articulated a policy justification for its strict compliance view, stating that

unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to “exhaust” state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison

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<sup>246</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996).

<sup>247</sup> Courts have cited these near-simultaneous enactments as reasons not to subject habeas petitions to the PLRA filing fee requirements, *Carson v. Johnson*, 112 F.3d 818, 820 (5<sup>th</sup> Cir. 1997), or the PLRA “three strikes” provision. *Martin v. U.S.*, 96 F.3d at 855-56.

<sup>248</sup> *Ortiz v. McBride*, \_\_\_ F.3d \_\_\_, 2004 WL 1842644 at \*10 (2d Cir., Aug. 18, 2004); *see O’Shea v. Littleton*, 414 U.S. 488, 502 (1974) (affirming dismissal of challenge to allegedly discriminatory judicial practices on the ground it might require an “ongoing federal audit” of the state judicial system). The high degree of deference to state judicial systems is based in part on the view that they are as competent as federal courts to resolve constitutional questions and that they provide all the procedural safeguards of formal judicial proceedings, including the constitutionally mandated protections of criminal defendants, neither of which is true of prison grievance systems. *See Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (describing non-judicial nature of prison disciplinary proceedings).

<sup>249</sup> *See* 28 U.S.C. § 2254(d)(1) (requiring a habeas petitioner to show that the challenged action “(1) resulted in a *decision* that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a *decision* that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”)

<sup>250</sup> *Jones’El v. Berge*, 172 F.Supp.2d 1128, 1131-32 (W.D.Wis. 2001).

administration an opportunity to fix the problem. . . .<sup>251</sup>

These concerns are grossly exaggerated. There is considerable territory between “spurning” administrative remedies<sup>252</sup> and making procedural mistakes, especially in a grievance system that may allow only days to prepare and file a grievance, and especially when the grievant is poorly educated and without counsel. (In *Pozo*, the plaintiff had ten days to appeal the denial of his

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<sup>251</sup> *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002); *accord*, *Spruill v. Gillis*, \_\_\_ F.3d \_\_\_, 2004 WL 1366974 at \*6-7 (3rd Cir. 2004) (adopting procedural default rule that appears to fall short of insistence upon strict compliance).

<sup>252</sup> It is not disputed that a prisoner who intentionally and without justification disregards the rules of the grievance system or instructions by grievance personnel as to how to proceed fails to exhaust. *See Carroll v. Yates*, 362 F.3d 984, 985 (7th Cir. 2004); *Ford v. Johnson*, 362 F.3d 395, 397 (7th Cir. 2004) (“Just as courts may dismiss suits for failure to cooperate, so administrative bodies may dismiss grievances for lack of cooperation; in either case this procedural default blocks later attempts to litigate the merits.”); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032-33 (10<sup>th</sup> Cir. 2002) (holding that a prisoner who received no response to a grievance and refused the appeals body’s direction to try to get one had failed to exhaust); *Chase v. Peay*, 286 F.Supp.2d 523, 529 (D.Md. 2003) (holding a prisoner who neither followed directions to resubmit a separate grievance for each issue, nor appealed that direction, failed to exhaust), *aff’d*, 98 Fed.Appx. 253 (4<sup>th</sup> Cir. 2004); *Jones v. H.H.C., Inc.*, 2003 WL 1960045 at \*4 (S.D.N.Y., Apr. 8, 2003) (prisoner who made an “end-run around the grievance system” by going directly to “Inmate Counsel” and Warden did not exhaust); *Kaiser v. Bailey*, 2003 WL 21500339 at \*5-6 (D.N.J., July 1, 2003) (holding that a prisoner who failed to follow explicit instructions as to how to comply with complaint procedures failed to exhaust even under the “substantial compliance” standard); *Wallace v. Burbury*, 2003 WL 21302947 at \*4 (N.D. Ohio, June 5, 2003) (“. . . where a prisoner is notified that a document relating to his grievance has been lost or misfiled, failure to refile constitutes a failure to exhaust. . . .”); *Jeanes v. U.S. Dept. of Justice*, 231 F.Supp.2d 48, 50-51 (D.D.C. 2002) (holding that a prisoner who bypassed the initial steps of the process, and then ignored instructions to use them because his grievance did not meet the standards for bypassing them, failed to exhaust); *Ford v. Page*, 2002 WL 31818996 at \*3 (N.D. Ill., Dec. 13, 2002) (holding that a plaintiff who refused directions to grieve one issue at a time failed to exhaust); *Saunders v. Goord*, 2002 WL 31159109 at \*4 (S.D.N.Y., Sept. 27, 2002) (holding that a prisoner who refused to put his commitment name on the grievance failed to exhaust); *Barkley v. Brown*, 2002 WL 1677709 at \*3 (N.D. Cal., July 2002) (holding that prisoner who withheld cooperation with grievance system by refusing to be interviewed and to sign necessary documents had not exhausted); *Newell v. Angelone*, 2002 WL 378438 at \*6 (W.D. Va., Mar. 7, 2002) (holding that failure to follow instructions and file a separate grievance for each issue was a failure to exhaust), *aff’d*, 2003 WL 22039201 (4<sup>th</sup> Cir. 2003) (unpublished).

The Second Circuit has noted that there may be circumstances (e.g., threats from staff of violence or other retaliation) where prisoners have good reason not to follow the usual prison grievance process. *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 (2d Cir., Aug 18, 2004).

grievance and waited a year. Other, less serious defaults cannot be characterized as “spurning” the system.<sup>253</sup>)

A different justification for a strict compliance rule has been simply stated by one federal appeals court: “Nothing in the Prison Litigation Reform Act . . . prescribes appropriate grievance procedures or enables judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems.”<sup>254</sup> The short answer is that tolerance of procedural error by federal courts does not “prescribe or oversee prison grievance systems”; rather, it determines under what circumstances a federal lawsuit will go forward, and prison officials may run their grievance systems as they like.

The Third Circuit has presented a more elaborate case for procedural default, but on examination its holding appears to be a kinder, gentler rule than the Seventh Circuit’s strict compliance version. Although it accepted the Seventh Circuit’s view that the question is one of choice of law and that there should be a “procedural default component” to PLRA exhaustion, it found the habeas corpus analogy not “entirely satisfactory.”<sup>255</sup> Therefore it canvassed Congress’s goals in the exhaustion requirement. The court names these as “(1) to return control of the inmate grievance process to prison administrators; (2) to encourage development of an administrative record, and perhaps settlements, within the inmate grievance process; and (3) to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits,” and says that all of them are better served by a “procedural default component” than by interpreting the statute “merely to require termination of all administrative grievance proceedings.”<sup>256</sup> The notion of “return[ing] control” of the grievance process is based on the elimination in the PLRA of the federal standard-setting and certification process of prior law. The court said: “It would be anomalous, to say the least, to refuse to give effect to the very rules that the PLRA encourages state prison authorities to enact.”<sup>257</sup> But elimination of that federal machinery is not inconsistent with a rule such as the Second Circuit’s that excuses non-exhaustion (though it requires subsequent exhaustion if remedies remain available) based on a prisoner’s reasonable, even if mistaken, understanding of the prison system’s own rules, and acknowledges the possibility that circumstances may make the prescribed means of exhaustion unavailable or may estop the defendants from relying on them. Moreover, the court’s notion, that the absence of a procedural default rule will mean that there will be separate sets of state and federal rules that prisoners must comply with both to get their grievances heard and to pursue federal

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<sup>253</sup> See, e.g., *Gauntt v. Miracle*, 2002 WL 1465763 at \*2 (N.D. Ohio, June 10, 2002) (barring prisoner’s claim for missing a five-day deadline).

<sup>254</sup> *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001).

<sup>255</sup> *Spruill v. Gillis*, 372 F.3d 218, 228-30 (7th Cir. 2004).

<sup>256</sup> *Spruill v. Gillis*, 372 F.3d at 230.

<sup>257</sup> *Spruill, id.* at 231 (footnote omitted).

litigation, is considerably exaggerated.<sup>258</sup> Exhaustion rules such as the Second Circuit’s do not propose a parallel set of procedural rules; they define circumstances in which the consequences of failing to follow the state’s rules do not extend to barring otherwise meritorious federal claims.

It is indisputable that the exhaustion requirement was intended to help unburden the courts from frivolous prisoner litigation. However, dismissal for procedural default has only a coincidental relationship to frivolousness and can be expected to affect meritorious cases at least as much as frivolous ones. Indeed, *Spruill* states: “Finally, Congress wanted to erect *any barrier it could* to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so).”<sup>259</sup> But in fact there is no evidence at all that Congress wished to keep meritorious cases out of court, and considerable evidence to the contrary.<sup>260</sup>

Having made these arguments, *Spruill* backs away from them, stating that grievance systems’ procedural requirements “must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a). We made the same observation (albeit in somewhat different terms) in *Nyhuis*, . . . where we explained that the policy of § 1997e(a) is that ‘compliance with the administrative remedy scheme will be satisfactory if it is substantial.’”<sup>261</sup> This appears to be a far cry from the strict compliance rule that the Seventh Circuit derived from procedural default, though exactly how far remains to be seen.

Even under a strict compliance or procedural default rule, if prison officials decide the merits of a grievance rather than rejecting it for noncompliance, they cannot rely on that noncompliance to seek dismissal of subsequent litigation for non-exhaustion.<sup>262</sup>

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<sup>258</sup> *Spruill, id.*

<sup>259</sup> *Spruill, id.* at 230.

<sup>260</sup> For example, sponsors and proponents of the PLRA said: “These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.” 141 Cong Rec H 1472, \*H1480 (Rep. Canady) (discussing exhaustion, screening, and filing fee provisions of PLRA. “If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.” 141 Cong Rec S 7523, \*S7526 (Sen. Kyl) (discussing exhaustion requirement *inter alia*). “Indeed, I do not want to prevent inmates from raising legitimate claims.” 141 Cong Rec S 14611, \*H14626 (Sen. Hatch, introducing an amendment “virtually identical” to the PLRA). “This amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.” 141 Cong Rec S 14611, \*S14628 (Sen. Thurmond) (discussing amendment identical to entire PLRA; *see* 141 Cong Rec S 14611, \*H14626).

<sup>261</sup> *Spruill, id.* at 232.

<sup>262</sup> *Gates v. Cook*, 376 F.3d 323, 331 n.6 (5th Cir. 2004); *Spruill v. Gillis*, 372 F.3d 218, 234 (3rd Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10<sup>th</sup> Cir. 2004); *Pozo v.*

## 8. Compliance with Time Limits

Time limits present a particularly important issue of compliance with prison procedural rules, chiefly because they are so extraordinarily short--as little as three days in some cases (e.g., New York City), and very often considerably less than a month (e.g., 14 days in New York).<sup>263</sup>

### a. Initial Compliance

Many courts have assumed without much discussion that the PLRA requires prisoners to comply with grievance system time limits in order to exhaust.<sup>264</sup> Those courts that have presented rationales for dismissing complaints that were not timely exhausted have said that exhaustion presents a question of state law or federal prison administrative law, making the system's rules binding on federal courts,<sup>265</sup> and that a contrary rule would "allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available."<sup>266</sup> Even under a rule of strict compliance, however, a late filing that the system accepts and resolves on the merits satisfies the exhaustion requirement,<sup>267</sup> and circumstances that prevent a prisoner from filing timely make the grievance system unavailable for purposes of the exhaustion rule.<sup>268</sup>

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McCaughtry, 286 F.3d 1022, 1025 (7<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 949 (2002);

<sup>263</sup> See n. 282, below.

<sup>264</sup> See, e.g., Richardson v. Boland, 2003 WL 21664569 at \*2 (N.D.Tex., July 15, 2003), *report and recommendation adopted*, 2003 WL 21977078 (N.D.Tex., Aug. 19, 2003), *aff'd*, 83 Fed.Appx. 608, 2003 WL 22965237 (5<sup>th</sup> Cir. 2003); Wallace v. Burbury, 2003 WL 21302947 at \*5 (N.D. Ohio, June 5, 2003) (declining to extend a 14-day deadline to reflect the five days of Passover when the grievant was religiously prohibited from working; declining to treat religious infringement as a continuing violation extending through Passover); Long v. Lafko, 254 F.Supp.2d 444, 448 (S.D.N.Y. 2003); Patterson v. Goord, 2002 WL 31640585 at \*1 (S.D.N.Y., Nov. 21, 2002).

<sup>265</sup> Pozo v. McCaughtry, 286 F.3d 1022, 1023-24 (7<sup>th</sup> Cir. 2002), *cert. denied*, 537 U.S. 949 (2002); Days v. Johnson, 322 F.3d 863, 866 (5<sup>th</sup> Cir. 2003) (citing circuit's "strict approach").

<sup>266</sup> Wright v. Morris, 111 F.3d 414, 417 n. 3 (6<sup>th</sup> Cir.), *cert. denied*, 522 U.S. 906 (1997); *accord*, Pozo v. McCaughtry, *id.* ("Any other approach would allow a prisoner to 'exhaust' state remedies by spurning them. . . ."); Days v. Johnson, 322 F.3d at 867-68.

<sup>267</sup> Riccardo v. Rausch, 375 F.3d 521, 524 (7<sup>th</sup> Cir. 2004); Ross v. County of Bernalillo, 365 F.3d 1181, 1186 (10<sup>th</sup> Cir. 2004); Pozo v. McCaughtry, 286 F.3d at 1025; Griswold v. Morgan, 317 F.Supp.2d 226, 229-30 (W.D.N.Y. 2004).

<sup>268</sup> Days v. Johnson, 322 F.3d at 867-68; *see* § IV.G.2, below.

The Second Circuit has not directly addressed time limits, but under its approach to compliance with procedural rules in general, a prisoner who failed to grieve timely as a result of a reasonable if mistaken understanding of the rules or the exhaustion requirement would be justified in having failed to exhaust, and would be entitled either to exhaust late if prison officials would entertain the late grievance, or to proceed with the federal action if they would not entertain it.<sup>269</sup> A prisoner who was deterred from exhausting timely by threats or other coercion by prison staff might also be justified in having failed to exhaust, or the court might find that remedies were unavailable to that prisoner, depending on the severity of the circumstances.<sup>270</sup>

These Second Circuit decisions do not address the situation of the prisoner who simply does not move quickly enough to file a grievance (or to find out what the grievance system requires) to comply with the very short time limits typical of prison grievance systems. A Sixth Circuit decision, *Thomas v. Woolum*,<sup>271</sup> holds more broadly that non-compliance with grievance system time limits does not require dismissal for non-exhaustion. It points out that the statute's purpose is not "to defeat valid constitutional claims" and that it contains no language regarding the timeliness of administrative filings or procedural default.<sup>272</sup> Since the purpose of the exhaustion requirement is to give prison authorities an *opportunity* to resolve controversies,<sup>273</sup> they can scarcely complain if they decline that opportunity.<sup>274</sup> Moreover, in the analogous context of Title VII<sup>275</sup> and the Age Discrimination in Employment Act, which uses the Title VII administrative complaint scheme, "the Supreme Court has specifically held that a plaintiff's failure to comply with state statutes of limitations cannot prevent the plaintiff from proceeding to federal court,"<sup>276</sup> for several reasons: the absence of any reference to timeliness under state law in the statutory text, the fact that "laymen, unassisted by trained lawyers, initiate the [administrative] process"; and that state procedural rules

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<sup>269</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*4-5, 8 (2d Cir., Aug. 18, 2004)

<sup>270</sup> *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*10 (2d Cir., Aug 18, 2004).

<sup>271</sup> 337 F.3d 720 (6<sup>th</sup> Cir. 2003).

<sup>272</sup> *Id.*, 337 F.3d at 726.

<sup>273</sup> *Porter v. Nussle*, 534 U.S. at 525.

<sup>274</sup> *Thomas v. Woolum*, 337 F.3d at 726; *see Cline v. Fox*, 282 F.Supp.2d 490, 494 (N.D.W.Va. 2003) (declining to dismiss where prisoner's grievance was dismissed as untimely, since prison officials had had an opportunity to address the complaint).

<sup>275</sup> The Second Circuit has not relied on the Title VII analogy in its PLRA exhaustion decisions, and in the context of rejecting the "total exhaustion" rule, *see* § IV.E.6 below, it dismissed the utility of that analogy. *Ortiz v. McBride*, \_\_\_ F.3d \_\_\_, 2004 WL 1842644 at \*10 n.10 (2d Cir., Aug. 18, 2004).

<sup>276</sup> *Thomas, id.* at 727.

should not prevent a court from remedying a harm that Congress sought to prevent.<sup>277</sup>

The latter two arguments unquestionably apply with equal force in the context of the PLRA. First, the prison grievant is generally the epitome of the lay person, unassisted by a trained lawyer, seeking to invoke the legal process. Further, if states may not use administrative time limits to defeat an ADEA or a Title VII claim, they should not be able to defeat a claim under the Civil Rights Act of 1871, Congress's preeminent declaration that state officials may not undermine federal law.<sup>278</sup>

*Thomas* rejects the concern that prisoners will purposefully file grievances late in order to defeat the grievance system, since there is no reason it is to the prisoner's advantage to do so, and since that argument was explicitly rejected by the Supreme Court in the Title VII/ADEA context.<sup>279</sup> The court also rejects the analogy of *Pozo v. McCaughtry* with the habeas corpus procedural default rule, noting that the analogy to Title VII and the ADEA is more apt.<sup>280</sup>

One of the *Woolum* court's concerns was the possibility that prison officials would set

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<sup>277</sup> *Id.* at 728, quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979) (internal quotation marks omitted). The quoted language originated in *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). See generally nn. 81, 182-187, 205-206, 240-241, 433-435, concerning the Title VII analogy.

<sup>278</sup> *Thomas, id.* at 729; accord, *Pogue v. Calvo*, 2004 WL 443517 at \*3 (N.D.Cal., Feb. 24, 2004).

<sup>279</sup> *Thomas, id.* at 732, citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764 (1979).

<sup>280</sup> As the court stated:

There are key distinctions between the administrative grievance process and the habeas process that warrant disparate applications of a procedural default requirement. The notions of comity that prevent federal courts from unduly interfering with the state criminal judicial process in the habeas context do not have precisely the same resonance and intensity when federal courts are analyzing the outcome of a non-criminal state administrative process and when § 1983 interposes the federal courts as a vindicator of federal rights.

*Id.* at 727 n.2. See generally nn. 217-223 and 242-249, above, concerning the inappropriateness of analogies to habeas corpus.

As noted above, see nn. 82, 219, above, the Second Circuit has found the Title VII analogy unhelpful in the context of "total exhaustion." It seems more apposite here, since the relevant Title VII/ADEA authority deals explicitly with the question presented here of time limits facing a lay complainant required to resort to a state administrative process as a precondition of pursuing a federal court action.

extremely short deadlines for grievances in order to limit their liability.<sup>281</sup> That concern is well taken, since very short deadlines are already common in prison grievance systems.<sup>282</sup> (Indeed, courts have questioned whether New York’s 14-day time limit is simply too short to be enforced in all cases.)<sup>283</sup>

For perspective, it is worth noting that the Supreme Court has held that a six-month statute of limitations is simply too short to be borrowed for cases brought under 42 U.S.C. § 1983; though it might be appropriate for the administrative proceedings for which it was designed, the Court held it inconsistent with the goals of § 1983.<sup>284</sup> It is also worth noting that the state administrative time limit the Supreme Court refused to enforce in a federal ADEA proceeding was 120 days, though its length did not play a part in the Court’s analysis.<sup>285</sup> Although some courts have expressed misgivings in dicta,<sup>286</sup> the question whether a prison grievance time limit can simply be too short to be enforced consistently with the federal civil rights statutes seems not to have been directly posed by any court.

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<sup>281</sup> *Thomas v. Woolum*, *id.* at 729 n.3 (citing Kentucky’s five-day grievance deadline and three-day appeal deadline).

<sup>282</sup> In *Booth v. Churner*, No. 99-1964, *amici* including the instant plaintiff’s counsel lodged with the Court the grievance procedures of some 21 states, cities, and institutions and referred to them in their brief. Brief of the American Civil Liberties Union, The Legal Aid Society of the City of New York, and the Prison Reform Advocacy Center as *Amici Curiae* in Support of Petitioner, 2000 WL 1868111 at \*11 n.9, \*12 n.13 (Dec. 14, 2000). Examples of the short deadlines include Tennessee (7 calendar days); Utah (7 calendar days); Kentucky (5 working days); Georgia (5 calendar days); Metro Dade (Florida) (3 working days); Rhode Island (3 days); City of New York, Inmate Grievance Form #7101-5 (3 days); Oklahoma, § IV.A. (must attempt “informal resolution” within 3 days). *Id.* Similarly short deadlines apply to appeals of grievances. *Id.* at \*12 n.13.

<sup>283</sup> See *Nelson v. Rodas*, 2002 WL 31075804 at \*4 n.10 (S.D.N.Y., Sept. 17, 2002) (“The Court reiterates its concern, however, that while DOCS’ requirement that grievances be brought within fourteen days may serve valid institutional purposes, it may be too short a ‘statute of limitations’ period to the extent exhaustion of grievance procedures is a PLRA prerequisite to a § 1983 lawsuit.”); *Vasquez v. Artuz*, 1999 WL 440631 at \*8 (S.D.N.Y., June 28, 1999) (questioning whether 14 days provides adequate time to file a grievance).

<sup>284</sup> *Burnett v. Grattan*, 468 U.S. 42 (1984).

<sup>285</sup> *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979).

<sup>286</sup> See cases cited in n. 283, above; see also *Johnson v. True*, 125 F.Supp.2d 186, 189 and n.4 (W.D.Va. 2000) (holding it inappropriate to dismiss for non-exhaustion if a subsequent grievance would be time-barred), *appeal dismissed*, 32 Fed.Appx. 692, 2002 WL 596403 (4<sup>th</sup> Cir. 2002); *Hattie v. Hallock*, 16 F.Supp.2d 834, 837 (N.D. Ohio 1998) (suggesting in dictum that federal claims should not be barred because of prisoners’ untimely filing of grievances).

Some grievance systems, including New York's, build in discretion to waive time limits; in those systems, several courts have held that a prisoner who misses a grievance time deadline must pursue such a waiver,<sup>287</sup> though these holdings are open to question in light of the Second Circuit's recent decisions concerning availability, estoppel, and justification.<sup>288</sup> The New York State grievance system permits late grievances for "mitigating circumstances,"<sup>289</sup> which include "e.g., attempts to resolve informally by the inmate." etc."<sup>290</sup> One New York district court has tried to spell out the relationship between that provision and the PLRA exhaustion requirement, holding that the prisoner must seek permission to file an untimely grievance and offer an explanation for its untimeliness. If permission is denied, upon refile, the plaintiff must explain his failure to file timely, describe his subsequent efforts to file a late grievance, and state the alleged mitigating circumstances justifying the failure of timeliness. Since exhaustion is not jurisdictional, the court said, it will be required to decide whether exhaustion should be waived based on mitigating circumstances, such as transfer to another facility or the unavailability of grievance representatives to prisoners in a segregated unit.<sup>291</sup>

#### **b. Time Limits after Dismissal for Non-Exhaustion**

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<sup>287</sup> *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that a prisoner whose grievance was dismissed as untimely was obliged to appeal, since the system provided for waiver of time limits for "good cause"); *Kaiser v. Bailey*, 2003 WL 21500339 at \*6 (D.N.J., July 1, 2003) (holding that a prisoner who did not follow instructions to obtain verification that untimeliness was not his fault failed to exhaust); *Roa v. Fowler*, 2003 WL 21383264 (W.D.N.Y., Apr. 16, 2003); *Steele v. New York State Dept. of Correctional Services*, 2000 WL 777931 (S.D.N.Y., June 19, 2000), *motion to vacate denied*, 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000).

<sup>288</sup> *See* nn. 95, 139-41, 164-65, above.

<sup>289</sup> *Graham v. Perez*, 121 F.Supp.2d 317, 322 (S.D.N.Y. 2000), *quoting* 7 N.Y.C.R.R. § 701.7(a)(1).

<sup>290</sup> 7 N.Y.C.R.R. § 701.7(a)(1).

<sup>291</sup> *Graham, id.* at 322 and n. 9; *see Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 at \*4 (E.D.La., Aug. 5, 2002) (declining to enforce 30-day time limit; declaring 30-day delay in filing complaint "not unreasonable" given that the plaintiff was a juvenile in state custody); *O'Connor v. Featherston*, 2002 WL 818085 at \*2 (S.D.N.Y., Apr. 29, 2002) (refusing to be bound by rejection of request to file a late grievance where the plaintiff had been kept in medical restriction for the 14 days in which he was required to file a timely grievance); *Cardona v. Winn*, 170 F.Supp.2d 131 (D.Mass. 2001) (holding that the grievance appeal deadline should be extended because the prisoner may have missed it out of "excusable confusion"). *But see Patterson v. Goord*, 2002 WL 31640585 at \*1 (S.D.N.Y., Nov. 21, 2002) (refusing to disturb finding of no mitigating circumstances where prisoner had waited six months after dismissal for non-exhaustion before filing a grievance).

A plaintiff whose claims are dismissed for non-exhaustion—whether for simple failure to exhaust at all, an error in using the procedures, or reliance on law that has subsequently changed—will almost always have missed the deadline for administrative proceedings. The Second Circuit, however, has held that where a failure to exhaust or to exhaust correctly was justified by special circumstances, the claim should be dismissed without prejudice if remedies remain available, but if not, the case should go forward (and if the case is dismissed and then remedies prove unavailable, it should be reinstated). That is, if the system will not entertain the plaintiff’s late grievance, the plaintiff need not exhaust. This rule has been applied to a plaintiff who mistakenly but reasonably believed he did not have to exhaust his use of force claim before the Supreme Court ruled otherwise;<sup>292</sup> a plaintiff who reasonably, though possibly erroneously, believed that his complaint about falsified evidence used for retaliatory reasons at a disciplinary hearing was properly exhausted through a disciplinary appeal rather than a grievance;<sup>293</sup> and a plaintiff who said that he had failed to exhaust properly because of physical threats and intimidation by prison staff.<sup>294</sup>

Plaintiffs whose cases do not fit the special circumstances rule will have to rely on the broader holding of *Thomas v. Woolum*<sup>295</sup> that state administrative time limits cannot bar assertion of federal claims, or on the narrower argument that the rule of equitable tolling applies to the administrative proceedings as well as to reinstatement of the lawsuit. Though I am not aware of a decision explicitly applying equitable tolling to prison administrative deadlines, a similar equitable approach has been applied by one court to cases in which the defendants initially did not raise exhaustion in light of the case law at that time, then raised it after the Supreme Court decision in *Porter v. Nussle*. The court held that relieving the defendants of their procedural waiver of the exhaustion defense was conditioned on defendants’ permitting the plaintiff to exhaust late.<sup>296</sup> The central point is that whether remedies have been exhausted is a ultimately a question of interpretation of the PLRA, a federal statute, and therefore a matter of federal law and not one of rubber-stamping

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<sup>292</sup> *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004). The court said that Mr. Rodriguez’s belief was reasonable because a panel of the Second Circuit entertained the same belief, even though the plaintiff did not actually rely on the Second Circuit decision in question; his failure to exhaust antedated it. *Rodriguez* overrules district court decisions that have denied relief to prisoners who did not actually rely on the overruled Second Circuit law, such as *Thomas v. Cassleberry*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 905856 at \*2 (W.D.N.Y., Apr. 13, 2004) and cases cited.

<sup>293</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*7 (2d Cir., Aug. 18, 2004).

<sup>294</sup> *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*6-10 (2d Cir., Aug 18, 2004).

<sup>295</sup> 337 F.3d 720 (6<sup>th</sup> Cir. 2003); *see nn.* 238-241, above.

<sup>296</sup> *Rivera v. Goord*, 2003 WL 1700518 at \*13 (S.D.N.Y., Mar. 28, 2003) (“In other words, DOCS cannot have it both ways.”).

the actions of prison grievance personnel.<sup>297</sup>

Plaintiffs may also seek to take advantage of the system's own exceptions to its time limits, if any, though it is unclear how likely it is that prison officials will entertain grievances after litigation has been filed and dismissed. The "mitigating circumstances" acknowledged by New York's grievance system include "e.g., attempts to resolve informally by the inmate, etc."<sup>298</sup> The regulation used to specify "referrals back to the IGP from the courts," but that language was removed in the 2003 amendment to the regulation.<sup>299</sup> (One court had attempted to refer a case back to the IGP under this section, only to be told by the prison system that it would not hear the case because it was time-barred. During the 14-day filing period, the plaintiff had been rendered unconscious and hospitalized as a result of allegedly deficient medical care. The court then held that administrative remedies were not available for that plaintiff.<sup>300</sup>) Some more recent decisions, however, have simply directed that grievance officials consider re-filed grievances on their merits.<sup>301</sup>

## **F. What Procedures Must Be Exhausted?**

The Supreme Court has said that the purpose of the PLRA exhaustion requirement is "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

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<sup>297</sup> See *Graham v. Perez*, 121 F.Supp.2d 317, 322 and n. 9 (S.D.N.Y. 2000) (holding that if prison officials reject late grievance claiming mitigating circumstances, court must determine for itself whether mitigating circumstances exist).

<sup>298</sup> 7 N.Y.C.R.R. § 701.7(a)(1).

<sup>299</sup> 7 N.Y.C.R.R. § 701.7(a)(1); see *Rivera v. Goord*, 253 F.Supp.2d 735, 753 n.12 (S.D.N.Y. 2003) (quoting prior version of regulation).

<sup>300</sup> *Cruz v. Jordan*, 80 F.Supp.2d 109 (S.D.N.Y. 1999); see also *Steele v. New York State Dept. of Correctional Services*, 2000 WL 777931 (S.D.N.Y., June 19, 2000) (holding that a prisoner who was out of the institution during the entire period for filing a grievance was nonetheless obliged to file a grievance because the deadline was discretionary in "extreme circumstances"; failure to do so was characterized as "deliberate bypass"), *motion to vacate denied*, 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000); *Coronado v. Goord*, 2000 WL 52488 (S.D.N.Y., Jan. 24, 2000) (dismissing case, suggesting that a time extension for the grievance should be granted).

<sup>301</sup> *Burgess v. Morse*, 259 F.Supp.2d 240, 247 (W.D.N.Y. 2003) (directing "that the IGRC Supervisor consider referral from this Court as a mitigating circumstance" for the plaintiff's untimely filing); *Rivera v. Goord*, 253 F.Supp.2d 735, 753-54 (S.D.N.Y. 2003) (dismissing for non-exhaustion, based on change in exhaustion law, only on condition that new grievances be considered, since plaintiff had relied on prior law).

initiation of a federal case.”<sup>302</sup> Courts have generally assumed that the PLRA requires exhaustion of administrative remedies *within prison systems*. Thus, the Seventh Circuit has stated that “if a prison has an *internal administrative grievance system* through which a prisoner can seek to correct a problem, the prisoner must utilize that administrative system before filing a claim. . . . [C]ourts merely need to ask whether the institution has an *internal grievance procedure*. . . .”<sup>303</sup>

The most thorough explication of this point is in the Ninth Circuit’s holding (with which no other circuit has disagreed) that administrative tort claims procedures need not be exhausted, and that nothing in the PLRA’s legislative history showed any intent by Congress to displace the prior understanding to that effect.<sup>304</sup> It said:

The language of the PLRA, as well as the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust state tort claim procedures.<sup>305</sup>

The court then cited the PLRA subsection immediately following the exhaustion requirement, noting that 42 U.S.C. § 1997e(b) “tellingly provides that ‘the failure of a State to adopt or adhere to an *administrative grievance procedure* shall not constitute the basis for an action’ (emphasis added). ‘It thus appears that throughout § 1997e Congress is referring to institutional grievance processes and not state tort claims procedures.’”<sup>306</sup> The decision continues:

Legislative history also suggests that the statutory phrase “administrative remedies” refers exclusively to prison grievance procedures. Senator Kyl, one of the co-sponsors of the PLRA, testified:

Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits. . . . Section 7 will make the exhaustion of administrative remedies mandatory.

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<sup>302</sup> Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (emphasis supplied).

<sup>303</sup> Massey v. Helman, 196 F.3d 727, 733-34 (7<sup>th</sup> Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001) (emphasis supplied); *accord*, Alexander v. Hawk, 159 F.3d 1321, 1326 (11<sup>th</sup> Cir. 1998) (holding that “available” remedies under the PLRA refers to prison administrative remedy programs).

<sup>304</sup> Rumbles v. Hill, 182 F.3d 1064 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000).

<sup>305</sup> *Id.* at 1069.

<sup>306</sup> *Id.* at 1069-70, *quoting* Lacey, 990 F.Supp. 1199, 1206 (E.D.Cal. 1997); *accord*, Blas v. Endicott, 31 F.Supp.2d 1131, 1132 (E.D.Wis. 1999).

Many prisoner cases seek relief for matters that are relatively minor and for which *the prison grievance system* would provide an adequate remedy.<sup>307</sup>

One court in dictum has adopted the same reasoning concerning the impartial hearing requirement of the Individuals with Disabilities Act, stating: “In *Porter*, the Court noted that Congress wished to afford *corrections officials* the opportunity to address complaints internally. . . . This observation is inconsistent with a rule requiring exhaustion of a remedy which is outside of the prison and which does not involve prison authorities.”<sup>308</sup>

This argument is further supported by the fact that the term “administrative remedies” clearly referred to internal prison remedies in the Civil Rights of Institutionalized Persons Act (CRIPA),<sup>309</sup> predecessor to the PLRA,<sup>310</sup> as shown by legislative history<sup>311</sup> and judicial interpretation.<sup>312</sup> When

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<sup>307</sup> 141 Cong. Rec. S7526-7527 (May 25, 1995) (emphasis added); *see also* Aiello v. Litscher, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000) (holding that a prisoner who had exhausted the internal prison grievance system need not also pursue a statutory procedure for seeking a declaratory judgment from a state agency).

<sup>308</sup> Handberry v. Thompson, 2003 WL 194205 at \*11 (S.D.N.Y., Jan. 28, 2003), *appeal docketed*, No. 02-251 (2d Cir.).

<sup>309</sup> Under CRIPA, prisoners could be required to exhaust “administrative remedies” that were “plain, speedy, and effective” before proceeding with a § 1983 suit. 42 U.S.C. § 1997e(a)(1)(1990).

<sup>310</sup> Intent and usage in predecessor statutes is highly relevant in construing contemporary statutes. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169-83 (1963); U.S. v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003), *pet. for cert. filed* (June 1, 2004); Moretti v. C.I.R., 77 F.3d 637, 643 (2d Cir. 1996) (relying on judicial interpretation of term in predecessor statute where current statute used that same term).

<sup>311</sup> *See* Report on the Activities of the Committee on the Judiciary, H.R. Rep. 104-879, at 183 (emphasis added) (stating that CRIPA’s exhaustion provision “requires prisoners to exhaust the administrative remedies *established by the corrections system* before they may file a lawsuit in federal court”) (emphasis supplied); H.R. Conf. Rep. No. 897, 96<sup>th</sup> Cong. 2d Sess. 9 (1980) (purpose of bill is to “stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities”); *id.* at 15-17 (discussing exhaustion of remedies in context of “correctional grievance resolution systems”); 125 Cong. Rec. 11976(1978) (statement of Rep. Railsback) (discussing “grievance procedure” in prisons); *id.* at 15441 (statement of Rep. Kastenmeier) (effect of exhaustion provision will be to divert complaints to the State and their local institutions); 125 Cong. Rec. 12491-92 (1979) (statement of Rep. Drinan) (detailing studies of “prison grievance mechanisms”); *id.* at 12492 (statement of Rep. Drinan) ( § 1997 intended to encourage “the establishment of grievance mechanisms in State correctional systems”); *id.* at 12493 (statement of Rep. Mitchell) (same); *id.* at 12494 (statement of Rep. Rodino) (referring to development of “correctional grievance mechanisms”); 126 Cong. Rec. 10780 (1980) (statement of

enacting the PLRA, Congress must have been aware that courts had equated the term “administrative remedies” with internal prison grievance procedures and still gave no indication that the judicial interpretation was contrary to its current intent.<sup>313</sup>

Nonetheless, two recent decisions hold, contrary to earlier decisions,<sup>314</sup> that prisoners with complaints under Title II of the Americans with Disabilities Act must exhaust not only the prison grievance system but also the Department of Justice disability complaint procedure, on the ground

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Rep. Kastenmeier) (CRIPA “would encourage, but not require, States and political subdivisions to establish correctional grievance mechanisms”); 124 Cong. Rec. 23179 (1978) (statement of Rep. Butler) (“If we had the grievance machinery, and if they were required to go through that grievance machinery, we believe that many of these cases . . . would be quickly resolved, and resolved at the level where they should be resolved and that is where the grievance arises, and that is in the penal institution [or] the local jail.”)

<sup>312</sup> Farmer v. Brennan, 511 U.S. 825, 847 (1994)(referring, under CRIPA, to availability of “adequate prison procedures” and “internal prison procedures”) (emphasis added); McCarthy v. Madigan, 503 U.S. 140, 150 (1992) (stating that CRIPA “imposes a limited exhaustion requirement . . . provided that the underlying *state prison administrative remedy* meets specified standards”) (emphasis added) Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 509 (1982) (noting intent of Congress to “divert[] certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures”).

<sup>313</sup> See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”) That presumption is strengthened where Congress shows a “willingness to depart” from other aspects of the earlier statute, *id* at 581, as it the case with CRIPA and the PLRA.

<sup>314</sup> Shariff v. Artuz, 2000 WL 1219381 (S.D.N.Y., Aug. 28, 2000); *accord*, Singleton v. Perilli, 2004 WL 74238 at \*4 (S.D.N.Y., Jan 16, 2004) (dictum); see *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that resort to the ADA procedures did not suffice to exhaust, stating: “Congress intended the exhaustion requirement to apply to the *prison’s* grievance procedures, regardless of what other administrative remedies might also be available.”).

In *Sharif*, the court first addressed the PLRA exhaustion requirement and noted that the plaintiff had exhausted the prison grievance procedure, then rejected the argument that the plaintiff failed to exhaust remedies with respect to his ADA and Rehabilitation Act claims, holding that neither statute requires exhaustion of DOJ remedies. *Id.* at \*3. Thus, *Sharif* holds, in substance, that the PLRA exhaustion requirement is satisfied by exhaustion of the internal prison grievance system, and that whether ADA and Rehabilitation Act remedies must be exhausted is determined by those statutory schemes and not by the PLRA.

that the statute's plain language requires resort to "such administrative remedies as are available."<sup>315</sup> These courts rejected the argument that that remedy need not be exhausted because it does not result in action but only in findings or advice,<sup>316</sup> and that it does not even investigate most individual complaints submitted to it.<sup>317</sup> However, one of the decisions holds that the state prison system did not meet its burden of showing that the Department of Justice procedure was an "available remedy" in the absence of evidence that the procedure had been made known to prisoners.<sup>318</sup>

Prison systems often create separate internal complaint or appeal systems for particular problems and exclude those matters from the main grievance system. In such cases, the specialized system, rather than the inapplicable grievance system, must be exhausted.<sup>319</sup> For example, the New

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<sup>315</sup> *Burgess v. Garvin*, 2003 WL 21983006 at \*3 (S.D.N.Y., Aug. 19, 2003), *on reconsideration*, 2004 WL 527053 (S.D.N.Y., March 16, 2004); *accord*, *Rosario v. N.Y. State Dept. of Correctional Services*, 2003 WL 22429271 \*3 (S.D.N.Y., Sept. 24, 2003), *appeal docketed*, No. 03-289 (2d Cir.).

My colleague Betsy Ginsberg and I are counsel in *Burgess* and *Rosario* and much of this and the preceding discussion is adapted from our briefs in those cases.

<sup>316</sup> *Burgess*, 2004 WL 527053 at \*2; *Rosario*, 2003 WL 22429271 at \*4. *Compare* *In re Bayside Prison Litigation*, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (holding that a process with no authority except to "make recommendations for change" to administrative officials" need not be exhausted because it fails to provide for the "responsive action" envisioned in *Booth*); *Freeman v. Snyder*, 2001 WL 515258 at \*7 (D.Del., Apr. 10, 2001) (holding that the "vague, informal process" described by defendants is "hardly a grievance procedure").

<sup>317</sup> *Burgess, id.* at \*4. Plaintiff submitted letters to other prisoners from DOJ stating that because of limited resources and numerous complaints, it does not investigate individual prisoner complaints except as part of a review of the entire state prison system.

<sup>318</sup> *Burgess, id.* at \*5.

<sup>319</sup> *See* *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (holding that filing an "administrative" appeal rather than the required "disciplinary" appeal did not exhaust); *Jenkins v. Haubert*, 179 F.3d 19, 23 n. 1 (2d Cir. 1999) (holding that appeal of disciplinary conviction satisfied the exhaustion requirement); *Wallace v. Burbury*, 2003 WL 21302947 at \*3-4 (N.D. Ohio, June 5, 2003) (holding that filing a "general" grievance rather than the required Request for Accommodation of Religious Beliefs did not exhaust); *Mack v. Artuz*, 2002 WL 31845087 at \*6 (S.D.N.Y., Dec. 19, 2002) (holding complaint about "Central Monitoring Case" status was exhausted through separate CMC appeal process); *Timley v. Nelson*, 2001 WL 309120 at \*1 (D.Kan., Feb. 16, 2001) (holding that a plaintiff with a religious claim who "pursued *some* avenues of administrative relief" but did not follow the Request for Religious Accommodation procedure had not exhausted); *see also* *Alvarez v. U.S.*, 2000 WL 679009 (S.D.N.Y., May 24, 2000) (holding that since federal Bureau of Prison regulations for administrative remedy excluded tort claims, following the tort claims procedure met the exhaustion requirement).

York State prison grievance directive states that:

*the individual decisions or dispositions* of the following are not grievable: Temporary Release Committee, Central Monitoring Case status, Time Allowance Committee, Family Reunion Program, Media Review, disciplinary proceedings, inmate property claims (of any amount) and records review (Freedom of Information Requests, expunction). However, the *policies, rules, and procedures* of any of these programs or procedures may be the subject of a grievance.<sup>320</sup>

These distinctions are not always clear in a particular case, and the Second Circuit has held that a prisoner complaining of a retaliatory disciplinary charge based on falsified evidence was justified in filing a disciplinary appeal but not a grievance, since his interpretation of the rules was reasonable even if wrong.<sup>321</sup>

There is no particular degree of formality required of a grievance system; if it's there and will address the prisoner's problem, it must be exhausted.<sup>322</sup>

Several courts have held that other forms of complaint besides filing a grievance—most often, writing a letter to the prison superintendent or other highly placed official—will generally not meet the PLRA exhaustion requirement.<sup>323</sup> Other decisions have held that complaints that were in fact

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<sup>320</sup> DOCS Directive 4040 at § III.E (emphasis added). The state regulations say the same thing but do not give the list of non-grievable programs. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3.

<sup>321</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6-7 (2d Cir., Aug. 18, 2004) (noting that a “learned” district judge had adopted the same interpretation).

<sup>322</sup> *Concepcion v. Morton*, 306 F.3d 1347, 1353-54 (3d Cir. 2002) (holding that a grievance procedure described in an inmate handbook but not formally adopted by a state agency was an available remedy to be exhausted); *see* *Ferrington v. Louisiana Dept. of Corrections*, 315 F.3d 529, 531-32 (5<sup>th</sup> Cir. 2002) (holding grievance system that had been held unconstitutional under state constitution insofar as it vested the state courts of original jurisdiction over tort cases, but continued in operation, remained “available” for purposes of PLRA exhaustion), *cert. denied*, 124 S.Ct. 206 (2003). *But see* *Freeman v. Snyder*, 2001 WL 515258 at \*7 (D.Del., Apr. 10, 2001) (holding that the “vague, informal process described by the defendants is ‘hardly a grievance procedure’”).

<sup>323</sup> *See* *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10<sup>th</sup> Cir. 2001) (holding that a letter to the Attorney General was insufficient to exhaust as to actions that had been authorized by the Attorney General, despite the government's lack of clarity as to what authority the administrative remedy procedure might have over the Attorney General's decisions); *Chelette v. Harris*, 229 F.3d 684, 688 (8<sup>th</sup> Cir. 2000) (dismissing case of a prisoner who was told by the warden that he would “take care” of a medical problem, and therefore did not grieve it; the prisoner's subjective belief that he had done all he could did not meet the exhaustion requirement), *cert. denied*, 531 U.S. 1156 (2001); *Freeman v. Francis*, 196 F.3d 641, 644 (6<sup>th</sup> Cir. 1999) (holding that investigations by prison Use of Force

reviewed at the highest levels of the agency satisfy the exhaustion requirement even if they were not processed through the grievance system.<sup>324</sup> That view is supported by the Supreme Court's statement

Committee and Ohio State Highway Patrol did not substitute for grievance exhaustion even though criminal charges were brought against the officer); *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that Americans with Disability Act procedures did not meet PLRA exhaustion requirement); *Roach v. Bandera County*, 2004 WL 1304952 at \*4 (W.D.Tex., June 9, 2004) (holding that independent investigations by Sheriff and FBI did not exhaust); *Bokin v. Davis*, 2003 WL 21920922 at \*3 (N.D.Cal., Aug. 7, 2003) (holding that internal affairs investigations are not administrative remedies); *Muhammad v. Pico*, 2003 WL 21792158 at \*23 (S.D.N.Y., Aug. 5, 2003) (holding that letters to Commissioner or Superintendent do not exhaust); *Croswell v. McCoy*, 2003 WL 962534 at \*4 (N.D.N.Y., Mar. 11, 2003) (holding that a letter to the Superintendent did not exhaust); *Moore v. Baca*, 2002 WL 31870541 at \*2 (C.D.Cal., Dec. 11, 2002) (holding that a letter from counsel to the Sheriff does not exhaust in a jail with a grievance procedure); *Sunn v. Cattell*, 2002 WL 31455482 (D.N.H., Oct. 31, 2002) (holding that a letter to the Governor forwarded to the prison warden did not exhaust); *McNair v. Sgt. Jones*, 2002 WL 31082948 at \*7 (S.D.N.Y., Sept. 18, 2002) (holding that verbal complaints, complaints to the Legal Aid Society, and letters to the Superintendent do not exhaust), *report and recommendation adopted*, 2003 WL 22097730 (S.D.N.Y., Sept. 10, 2003); *Saunders v. Goord*, 2002 WL 1751341 at \*3 (S.D.N.Y., July 29, 2002) (holding that writing letters to superintendent does not substitute for filing grievances); *Nunez v. Goord*, 2002 WL 1162905 (S.D.N.Y., June 3, 2002); *Skinner v. Cunningham*, 2002 WL 337446 at \*2 (D.N.H., Feb. 28, 2002).

<sup>324</sup> *Camp v. Brennan*, 219 F.3d 279 (3rd Cir. 2000) (holding that use of force allegation that was investigated and rejected by Secretary of Correction's office need not be further exhausted); *Lewis v. Gagne*, 281 F.Supp.2d 429, 434-35 (N.D.N.Y. 2003) (holding that juvenile detainee's mother's complaints to institutional officials and contacts with an attorney, family court, and the state Child Abuse and Maltreatment Register, which were known to the facility director and agency counsel, sufficed to exhaust; "Noting that an investigation into the incident did ensue, it is reasonable that plaintiffs believed that at least one effort they took accomplished the same result that filing through the formal process would have produced."); *O'Connor v. Featherston*, 2003 WL 554752 at \*3 (S.D.N.Y., Feb. 27, 2003) ("An inmate should not be required to additionally complain through collateral administrative proceedings after his grievances have been apparently addressed and, by all appearance, rebuffed."); *Heath v. Saddlemire*, 2002 WL 31242204 at \*4-5 (N.D.N.Y., Oct. 7, 2002) (following *Perez v. Blot*); *Perez v. Blot*, 195 F.Supp.2d 539, 542-46 (S.D.N.Y. 2002) (holding requirement might be satisfied where plaintiff alleged he complained to various prison officials and to Inspector General, whose investigation resulted in referral of officer for criminal prosecution); *Noguera v. Hasty*, 2000 WL 1011563 at \*11 (S.D.N.Y., July 21, 2000) (holding requirement satisfied where prisoner's informal complaint of rape resulted in Internal Affairs investigation), *report and recommendation adopted in part*, 2001 WL 243535 (S.D.N.Y., Mar. 12, 2001); *see Prendergast v. Janecka*, 2001 WL 793251 at \*1 (E.D.Pa., July 10, 2001) ("Moreover, exhaustion may have occurred. Plaintiff claims to have notified several prison officials, including the warden, of his alleged lack of dental treatment.") *Contra*, *Hock v. Thipedeau*, 245 F.Supp.2d 451, 454-55 (D.Conn. 2003) (holding that direct, voluntary cooperation with a prison-initiated investigation does not satisfy

that Congress in the PLRA “afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”<sup>325</sup> When prison officials not only had the opportunity to address a complaint, but did so, it is difficult to see why further administrative wheel-spinning should be required *after* the matter has been decided at the highest levels of the agency.

One of the recent Second Circuit decisions partially addresses this issue. In *Hemphill v. New York*,<sup>326</sup> the plaintiff wrote to the Superintendent rather than filing a grievance concerning an alleged assault by staff. He said that he had been assaulted again and threatened if he complained in any fashion. The court held that the threats against him may have made the grievance procedure unavailable to him, but not the informal alternative of a letter to the Superintendent:

The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would “a similarly situated individual of ordinary firmness” have deemed them available. *Cf. Davis v. Goord*, 320 F.3d 346, 353 (2d Cir.2003) (articulating the “individual of ordinary firmness” standard in the context of a prisoner retaliation claim). Moreover it should be pointed out that threats or other intimidation by prison officials may well deter a prisoner of “ordinary firmness” from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts. This may be so, if for no other reason, because seeking a criminal investigation or filing a civil rights complaint may enable an inmate to draw outside attention to his complaints, thereby neutralizing threatened retaliatory conduct from prison employees.<sup>327</sup>

The *Hemphill* court also held that the plaintiff’s fear of retaliation might constitute justification for having written to the Superintendent rather than having filed a grievance, a question also governed by the standard “whether ‘a similarly situated individual of ordinary firmness’ . . . would have been deterred from following regular procedures.”<sup>328</sup> Since justification for failure to exhaust does not

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the exhaustion requirement), *reconsideration denied*, 2003 WL 21003431 (D.Conn. Apr. 28, 2003).

In *Lewis v. Gagne*, the court gave great weight to the fact that the facility’s own orientation handbook presented the grievance system as only one of several ways residents could assert their rights, and the facility’s own actions showed that it addressed and investigated problems that were not presented through the grievance system. 281 F.Supp.2d at 434.

<sup>325</sup> *Porter v. Nussle*, 534 U.S. at 525.

<sup>326</sup> \_\_\_ F.3d \_\_\_, 2004 WL 1842658 (2d Cir., Aug. 18, 2004).

<sup>327</sup> *Hemphill*, *id.* at \*7.

<sup>328</sup> *Id.* at \*9 (citation omitted). “Given [an officer’s] alleged warning of retaliation, it is arguable that Hemphill may have reasonably concluded that writing directly to the Superintendent

automatically excuse exhaustion, but requires the plaintiff to exhaust if remedies are available, the court added in dictum: “It seems likely, therefore, that facts sufficient to support a conclusion that an inmate was ‘justified’ in not following ordinary procedures will be less powerful than those which would lead to a holding that those procedures were not available. Because we need not decide that question at this time, however, we do not do so.”<sup>329</sup>

*Hemphill* also bears on another ongoing dispute in the New York state prisons over whether letters to the Superintendent or other supervisory officials can meet the exhaustion requirement. The issue is complicated by a recent change in state regulations. Until August 2003, the grievance policy provided two mechanisms: ordinary grievances, which must be filed with the Inmate Grievance Resolution Committee within 14 days of the relevant occurrence, and “harassment” grievances, designed to address “[e]mployee misconduct meant to annoy, intimidate, or harm an inmate.” The latter “expedited procedure” required the prisoner to report the alleged misconduct to the staff member’s supervisor, after which the Superintendent determined whether the matter was properly a harassment grievance. If so, the grievance remained on an expedited track; if not, it was referred to the Inmate Grievance Resolution Committee; if the Superintendent did not act, the prisoner “may”—not “must”—appeal directly to the highest level of the grievance system, the Central Office Review Committee.<sup>330</sup> (Notwithstanding that “may” language, subsequent decisions have held that if the prisoner does not obtain a favorable resolution for the prisoner, the prisoner must appeal in order to exhaust.<sup>331</sup>)

This expedited procedure occasioned much controversy. In at least one case, prison authorities took the position that following their own harassment grievance procedure did not constitute exhaustion.<sup>332</sup> District court decisions to date rejected this view.<sup>333</sup> However, some courts

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involved an acceptable level of risk, whereas filing a level 1 grievance or notifying the immediate supervisors of his purported attackers was too fraught with danger.” *Id.* at \*10.

<sup>329</sup> *Id.* n.8.

<sup>330</sup> This discussion is summarized from *Morris v. Eversley*, 205 F.Supp.2d 234, 239-40 (S.D.N.Y. 2002), which cites the relevant state regulations then in effect, and still applicable to many pending cases.

<sup>331</sup> *Stephenson v. Dunford*, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004); *Connor v. Hurley*, 2004 WL 885828 at \*2 (S.D.N.Y., Apr. 26, 2004); *Rivera v. Goord*, 2003 WL 1700518 at \*12 (S.D.N.Y., Mar. 28, 2003).

<sup>332</sup> In *Houze v. Segarra*, 217 F.Supp.2d 394 (S.D.N.Y. 2002), a DOCS official submitted an affidavit stating that harassment complaints were not filed as grievances, given grievance numbers, or otherwise processed as grievances, and could not be appealed to the Central Office Review Committee. “Such a matter becomes a grievance, and therefore is appealable to CORC, only if the inmate files a grievance complaint in accordance with [the ordinary grievance procedures].” *Id.* at 398. These claims appear to directly contradict the rules governing the harassment grievance

held that harassment complaints did not sufficiently exhaust if they are sent to the Superintendent rather than to the employee's immediate supervisor.<sup>334</sup> In my view, poorly educated prisoners should not be penalized for not understanding the term of art "immediate supervisor" or not knowing who a particular staff member's immediate supervisor is; it cannot be burdensome for a prison superintendent simply to forward such complaints to the proper staff member. In some cases, it appears, complaints to the Superintendent have indeed been treated as harassment grievances.<sup>335</sup>

The harassment grievance controversy took a new turn in *Hemphill*, in which the plaintiff alleged that writing directly to the Superintendent "comported with DOCS procedural rules, or, at a minimum, reflected a reasonable interpretation of those regulations."<sup>336</sup> In August 2003, while *Hemphill* and its companion cases were being briefed, the Department of Correctional Services amended its grievance rules to provide, as the prior version had not, that a prisoner who files a harassment grievance must, in addition, file a regular grievance. The amendment allegedly

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procedure set forth in DOCS' own policy and described in *Morris v. Eversley, supra*, as well as testimony from the DOCS grievance director in other proceedings. *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*9 n.7 (2d Cir., Aug 18, 2004); *see also* *Larry v. Byno*, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that letter to Superintendent was treated as a harassment grievance, assigned a grievance number, and investigated; claim dismissed because the prisoner did not appeal the failure to render a decision).

<sup>333</sup> *Morris v. Eversley*, 205 F.Supp.2d at 240-41; *Perez v. Blot*, 195 F.Supp.2d 539, 544-46 (S.D.N.Y. 2002); *Gadson v. Goord*, 2002 WL 982393 at \*3 (N.D.N.Y., May 10, 2002).

In *Gadson*, prison officials did not record and treat the plaintiff's harassment complaint according to the harassment grievance procedures, leading the court to observe: "Prison officials cannot have it both ways—they cannot obstruct an inmate's pursuit of administrative remedies exhaustion by failing to comply with statutory procedure on the one hand, and then claim that the inmate did not properly exhaust these remedies on the other." 2002 WL 982393 at \*3; *accord*, *Evans v. Jonathan*, 253 F.Supp.2d 505, 509 (W.D.N.Y. 2003).

<sup>334</sup> *Houze v. Segarra*, 217 F.Supp.2d at 395-96; *McNair v. Sgt. Jones*, 2002 WL 31082948 at \*7 n.3 (S.D.N.Y., Sept. 18, 2002); *Byas v. State of New York*, 2002 WL 1586963 at \*2 (S.D.N.Y., July 17, 2002). *Contra*, *Rivera v. Goord*, 2003 WL 1700518 at \*12 (S.D.N.Y., Mar. 28, 2003) ("Although Rivera did not comply with the technical requirements of the expedited procedure [by writing the Superintendent], this failure does not automatically amount to a failure to exhaust.")

Some decisions simply assert that letters to the Superintendent do not exhaust, without discussing the harassment grievance procedure. *See, e.g.*, *Harris v. Totten*, 244 F.Supp.2d 229, 233 (S.D.N.Y. 2003).

<sup>335</sup> *See* *Larry v. Byno*, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that a letter to the Superintendent was treated as a harassment grievance and given a grievance number); *see generally* § IV.E.7, above, concerning the effect of procedural errors in the grievance process.

<sup>336</sup> *Hemphill*, 2004 WL 1842658 at \*9.

“clarified” the regulation, which the plaintiff argued demonstrated the lack of clarity of the previous version. The court held his argument about lack of clarity “not manifestly meritless” and remanded for a determination whether the plaintiff was justified on that ground in not following normal grievance procedures.<sup>337</sup> The same issue will be presented in any case in which the prisoner complained by letter to supervisory officials before the August 2003 revision of the grievance rules—and the operative date of the amendment, for purposes of what prisoners can be expected to understand, will depend on when and how prison officials gave notice to the prison population of the change.

The PLRA does not require exhaustion of judicial remedies, including appeals from the agency to a court.<sup>338</sup> Other legal rules unrelated to the PLRA may require exhaustion of judicial remedies in certain cases.<sup>339</sup>

The PLRA generally does not require exhaustion of notice of claim procedures in tort claims systems.<sup>340</sup> However, if a particular grievance system refers prisoners to a tort claims system, exhaustion of that procedure and not the grievance procedure may be required.<sup>341</sup>

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<sup>337</sup> *Id.*

<sup>338</sup> *Jenkins v. Morton*, 148 F.3d 257, 259-60 (3d Cir. 1998); *Mullins v. Smith*, 14 F.Supp.2d 1009, 1012 (E.D.Mich. 1998). Consistently with these decisions, the Second Circuit has held that a prisoner who was justified in failing to exhaust or to exhaust properly was obliged to exhaust if administrative remedies remained directly available, but not if he would have to file a court action to be allowed to file an untimely grievance. *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*8 (2d Cir., Aug. 18, 2004).

<sup>339</sup> *See, e.g., Edwards v. Balisok*, 520 U.S. 641 (1997).

<sup>340</sup> *Rumbles v. Hill*, 182 F.3d 1064, 1069-70 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1998) (holding that Federal Tort Claims Act is not “available” to prisoner pursuing *Bivens* claim against individual prison staff); *Gaughan v. U.S. Bureau of Prisons*, 2003 WL 1626674 at \*2 (N.D.Ill., Mar. 25, 2003) (stating that Federal Tort Claims Act administrative claim requirement is intended to give the government agency notice so it can investigate and prepare for settlement negotiations; the PLRA requirement is intended to curtail suits by giving prison officials an opportunity to solve the problem first); *Blas v. Endicott*, 31 F.Supp.2d 1131, 1132-34 (E.D.Wis. 1999).

<sup>341</sup> *Alvarez v. U.S.*, 2000 WL 679009 (S.D.N.Y., May 24, 2000) (noting that federal grievance procedures exclude tort claims and refer prisoners to the Federal Tort Claims Act administrative claim procedure). *Contra, Gaughan v. U.S. Bureau of Prisons*, 2003 WL 1626674 at \*2 (N.D.Ill., Mar. 25, 2003). The court in *Gaughan* does not seem to have considered the rationale of *Alvarez* with respect to the notice given prisoners in the regulations. *Gaughan* is unusual. Most cases involving FTCA claims hold or assume, consistently with *Alvarez*, that those claims require only the exhaustion of the FTCA claim procedure and not the Administrative Remedy Procedure,

Another variation of the “which remedy” problem involves prisoners who don’t file a grievance because they get their problem straightened out without needing to do so. The Second Circuit has held that a prisoner who succeeded in resolving his complaint informally had exhausted, since the grievance policy says that the formal process was intended to supplement, not replace, informal methods;<sup>342</sup> in effect, informal resolution had been adopted as part of the grievance system. However, courts have held that a prisoner must succeed in the informal process in order to have exhausted through it.<sup>343</sup>

### G. “Available” Remedies

The statute requires exhaustion of remedies that are “available,” and under *Booth v. Churner* a remedy is presumptively available unless it “lacks authority to provide *any* relief or to take *any* action whatsoever in response to a complaint.”<sup>344</sup> No particular structure or degree of formality is

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without much discussion. *See* *Baez v. Bureau of Prisons, Warden*, 2004 WL 1777583 at \*7 (S.D.N.Y. May 11, 2004) (assuming that FTCA requires only submission of tort claim); *Baez v. Parks*, 2004 WL 1052779 at \*7 (S.D.N.Y., May 11, 2004) (same); *Williams v. U.S.*, 2004 WL 906221 (S.D.N.Y. Apr 28, 2004) (treating FTCA exhaustion as requiring tort claim and *Bivens* exhaustion as requiring Administrative Remedy Procedure filing); *Hylton v. Federal Bureau of Prisons*, 2002 WL 720605 at \*2 (E.D.N.Y., March 11, 2002) (holding that the plaintiff could exhaust for Federal Tort Claims Act purposes without exhausting under the PLRA as required for a *Bivens* claim).

<sup>342</sup> *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001); *accord*, *Branch v. Brown*, 2003 WL 21730709 at \*10 (S.D.N.Y., July 25, 2003), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *Fogell v. Ryan*, 2003 WL 21756096 at \*5 (D.Del., July 30, 2003); *Stevens v. Goord*, 2003 WL 21396665 at \*4 (S.D.N.Y., June 16, 2003), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002).

<sup>343</sup> *See* *Stephenson v. Dunford*, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004); *Thomas v. Cassleberry*, 315 F.Supp.2d 301, 304 (W.D.N.Y. 2004) (holding a complaint to the Inspector General exhausts informally only if the resolution is favorable); *Curry v. Fischer*, 2004 WL 766433 at \*6 (S.D.N.Y., Apr. 12, 2004); *Rivera v. Goord*, 2003 WL 1700518 at \*11 (S.D.N.Y., Mar. 28, 2003) (holding that a prisoner who initiated an investigation of his claim, but did not show that he obtained a favorable resolution informally or that he sought administrative review of an unfavorable resolution, had not exhausted informally).

<sup>344</sup> 532 U.S. at 736 (emphasis supplied); *accord*, *Snider v. Melindez*, 199 F.3d 108, 133 n.2 (2d Cir. 1999) (stating “the provision clearly does not require a prisoner to exhaust administrative remedies that do not address the subject matter of his complaint.”)

required of a grievance system for exhaustion purposes.<sup>345</sup>

The Second Circuit has suggested that in considering a prisoner's claim that his or her case should proceed despite a failure to exhaust or to exhaust correctly, any issue of availability of remedies should be considered first.<sup>346</sup> That makes sense because it potentially leads to the simplest resolution. If remedies are unavailable, the prisoner is simply not required to exhaust. If there is an estoppel issue, its resolution may differ according to the conduct of different defendants, and if there is an issue of justification for failure to exhaust, the disposition will depend on whether remedies remain available.<sup>347</sup>

## 1. Grievable and Non-Grievable Issues

The first question about the "availability" of an administrative remedy is whether it has authority to provide "some redress" for the kind of complaint that is at issue.<sup>348</sup> It is common for some issues not to be "grievable" in a particular grievance system because the system explicitly excludes them from coverage,<sup>349</sup> or because the informal practices of staff have the same effect.<sup>350</sup>

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<sup>345</sup> *Concepcion v. Morton*, 306 F.3d 1347, 1353-54 (3d Cir. 2002) (holding that a grievance procedure described in an inmate handbook but not formally adopted by a state agency was an available remedy to be exhausted); *see Ferrington v. Louisiana Dept. of Corrections*, 315 F.3d 529, 531-32 (5<sup>th</sup> Cir. 2002) (grievance system that had been held unconstitutional under state constitution insofar as it vested the state courts of original jurisdiction over tort cases but continued in operation remained "available" for purposes of PLRA exhaustion), *cert. denied*, 124 S.Ct. 206 (2003).

One court has held that a process that has no authority over anything except to "make recommendations for change" to administrative officials" need not be exhausted because that is not the type of "responsive action" envisioned in *Booth*. It further held that a process that prison officials assert is optional and not mandatory and is not intended to modify or restrict access to the judicial process need not be exhausted. *In re Bayside Prison Litigation*, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (ruling on prison complaint and Ombudsman procedures).

<sup>346</sup> *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*3 (2d Cir., Aug. 18, 2004).

<sup>347</sup> *See nn. 61-62, above.*

<sup>348</sup> *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001).

<sup>349</sup> *See Figel v. Bochart*, 2004 WL 326231 at \*1 (6<sup>th</sup> Cir., Feb. 18, 2004) (unpublished) (noting that Michigan system makes non-grievable issues that "involve a significant number of prisoners"); *Murphy v. Martin*, 2004 WL 1658489 at \*3 (E.D.Mich., May 28, 2004) (noting that Michigan system makes non-grievable "the content of policy or procedure"); *Stevens v. Goord*, 2003 WL 21396665 at \*5 (S.D.N.Y., June 16, 2003) (holding that private prison medical provider failed to meet its burden of showing that claims against it were grievable), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *Borges v. Administrator for Strong Memorial Hosp.*, 2002 WL 31194558 at \*3 (W.D.N.Y., Sept. 30, 2002) (holding defendants did not show that grievance

For example, the New York City jail grievance directive lists the following “non-grievable issues”:

1. matters under investigation by the Inspector General;
2. complaints pertaining to an alleged assault or verbal harassment;
3. complaints pertaining to matters in litigation;
4. complaints where there is already an existing appeal mechanism within the Department of Correction (that is, determinations of disciplinary hearings and classification);

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procedure was available to prisoners injured by dentists at an outside hospital, given their policy making non-grievable any action taken by an “outside agency”); *Baldwin v. Armstrong*, 2002 WL 31433288 at \*1 (D.Conn., Sept. 12, 2002) (holding that a claim about calculation or application of good time credit need not be exhausted where the grievance policy, which lists grievable matters, does not include good time); *Nicholson v. Snyder*, 2001 WL 935535 at \*3 (D.Del., Aug. 10, 2001) (holding that classification decisions excluded from the grievance procedure need not be exhausted); *Anderson v. Goord*, 2001 WL 561227 at \*4 (S.D.N.Y., May 24, 2001) (holding exhaustion requirement inapplicable because individual decisions of Temporary Release Committee are not grievable), *aff’d in part, vacated in part*, 317 F.3d 194 (2d Cir. 2003); *Freeman v. Snyder*, 2001 WL 515258 at \*6 (D.Del., Apr. 10, 2001) (holding that defendants’ admission that an issue was not grievable excused exhaustion; their claim that a grievance would have been “redirected” was not persuasive absent any explanation of what happens to non-grievable, redirected grievances); *McGrath v. Johnson*, 67 F.Supp.2d 499, 511 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002); *Davis v. Frazier*, 1999 WL 395414 at \* 3 (S.D.N.Y., June 15, 1999).

<sup>350</sup> See *Kendall v. Kittles*, 2004 WL 1752818 at \*2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator’s affidavit said that plaintiff needed a physician’s authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Scott v. Gardner*, 287 F.Supp.2d 477, 491 (S.D.N.Y.2003) (holding that allegations that grievance staff refused to process and file grievances about occurrences at other prisons, claiming they were not grievable, sufficiently alleged lack of an available remedy); *Casanova v. Dubois*, 2002 WL 1613715 at \*6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was “to treat complaints of alleged civil rights abuses by staff as ‘not grievable’”), *remanded on other grounds*, 304 F.3d 75 (1<sup>st</sup> Cir. 2002); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (holding that evidence that grievance personnel refused to process grievances where a disciplinary report had been filed covering the same events created a factual issue precluding summary judgment). Similarly, in *Davis v. Frazier*, 1999 WL 395414 at \*4 (S.D.N.Y., June 15, 1999), the court noted plaintiff’s allegation that New York City prisoners are told at orientation that “a grievance cannot be brought against Officers or Staff” (an exception that does not appear in the written policy, quoted in the text below). It held that this allegation supported an estoppel defense to a claim of failure to exhaust). As I write this, I have on my desk a City grievance in which the disposition is that the grievance committee “does not investigate complaints against staff.” *But see Berry v. City of New York*, 2002 WL 31045943 at \*8 (S.D.N.Y., June 11, 2002) (holding that despite “no grievance against Officers or Staff” announcement, prisoner’s subsequent filing of several grievances defeated estoppel claim).

5. matters outside the jurisdiction of the Department of Correction; and
6. complaints which do not directly affect the inmate.<sup>351</sup>

Unfortunately some district courts have failed to examine the actual City policy and have dismissed non-grievable claims for failure to grieve, an error recently condemned by the Second Circuit.<sup>352</sup> Several other courts have dismissed New York City cases while erroneously citing the New York State prison grievance procedure.<sup>353</sup> As to New York City medical care claims, matters remain in some confusion because of the City's inconsistent positions. In one recent case, the City conceded that claims against employees of the jails' private medical contractor were "outside the jurisdiction of the Department of Correction" and hence non-grievable, since jail health care is committed to the City Department of Health rather than Correction. However, it claimed without elaboration that there was a separate Health and Hospitals Corporation complaint procedure that prisoners should exhaust, an assertion not yet tested on remand.<sup>354</sup> In another recent case, it simply asserted that medical care claims are grievable, without addressing the "outside the jurisdiction" language in the grievance directive.<sup>355</sup> In a third case, decided by the same judge on the same day, the jail Grievance Coordinator submitted an affidavit stating that he told the plaintiff that to grieve medical concerns "he would need written physician authorization for each request."<sup>356</sup>

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<sup>351</sup> DOC Directive 3375R at § II.B; *see Rizzuto v. City of New York*, 2003 WL 1212758 at \*4 (S.D.N.Y., Mar. 17, 2003) (noting that claims of assault, verbal harassment, or matters under Inspector General investigation are non-grievable); *Handberry v. Thompson*, 2003 WL 194205 at \*8-10 (S.D.N.Y., Jan. 28, 2003) (holding issues concerning education in jail non-grievable based on defendants' prior statements that they were non-grievable because not under the sole control of the Department of Correction). *But see Berry v. Kerik*, 237 F.Supp.2d 450, 451 (S.D.N.Y. 2002) (stating—incorrectly in my view—that under *Porter v. Nussle*, a matter under investigation by the Inspector General had to be exhausted notwithstanding the policy); *Jones v. Jones*, 2002 WL 31548721 at \*1 (S.D.N.Y., Nov. 21, 2002) (dismissing for non-exhaustion on the ground that there was no evidence the matter was being investigated by the Inspector General, despite the plaintiff's conversation with an investigator who said he would look into it).

<sup>352</sup> *See Mojias v. Johnson*, 351 F.3d 606, 608-10 (2d Cir. 2003) (reversing dismissal of assault claim for non-exhaustion in a system that does not hear assault claims); *see also Timmons v. Pereiro*, 2004 WL 322702 at \*(2d Cir., Feb.18, 2004) (unpublished) (same).

<sup>353</sup> *See Kearsy v. Williams*, 2002 WL 1268014 (S.D.N.Y., June 6, 2002); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 624-25 (S.D.N.Y. 2002); *Harris v. N.Y.C. Dept. of Corrections*, 2001 WL 845448 at \*2-3 (S.D.N.Y., July 25, 2001).

<sup>354</sup> *Timmons v. Pereiro*, 2004 WL 322702 at \*(2d Cir., Feb.18, 2004) (unpublished).

<sup>355</sup> *Oates v. City of New York*, 2004 WL 1752832 at \*3 (S.D.N.Y., Aug. 4, 2004).

<sup>356</sup> *Kendall v. Kittles*, 2004 WL 1752818 at \*2 (S.D.N.Y., Aug. 4, 2004).

The fact that grievance systems may vary in the issues for which they provide redress underscores the wisdom of the Second Circuit’s holding that courts must “establish the availability of an administrative remedy from a legally sufficient source.”<sup>357</sup> Courts should require substantiation that an administrative procedure in fact affords relief for a particular type of complaint before dismissing a prisoner’s claim for non-exhaustion. In some cases the face of the grievance policy may suffice. In others, some further demonstration, by affidavit from grievance personnel or by exemplary grievances and their resolutions, may be necessary, as when the grievance policy is not explicit, or when there is an allegation that the actual administration of the grievance system diverges from the written policy.<sup>358</sup>

In some instances, issues are not grievable because the prison system has relegated them to a different administrative remedy. In such cases, it is that remedy that must be exhausted; the grievance process is not available for that issue.<sup>359</sup> An issue that is not explicitly non-grievable, but over which the grievance process has no actual authority, should not require grievance exhaustion under *Booth*.<sup>360</sup>

## 2. Unavailability Based on the Facts

A remedy may also be unavailable for reasons peculiar to a particular case. For example, one

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<sup>357</sup> *Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999).

<sup>358</sup> *See* n. 350, above.

<sup>359</sup> *See* § IV.F, n. 213, above. In some cases, it is difficult to tell from the prison rules whether a particular complaint should be raised by grievance or some other procedure. A prisoner who relies on a reasonable interpretation of prison regulations that proves to be mistaken is justified in having failed to exhaust properly; if remedies remain available, the case should be dismissed so the prisoner may exhaust them. If remedies are no longer available, the suit may proceed. If the case is dismissed so the plaintiff can exhaust but remedies prove to be unavailable in fact, the suit can be reinstated. *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \* 7-8 (2d Cir., Aug. 18, 2004).

<sup>360</sup> *See* *Stevens v. Goord*, 2003 WL 21396665 at \*5 (S.D.N.Y., June 16, 2003) (holding that private prison medical provider failed to meet its burden of showing that the prison grievance procedure would actually have authority over claims against it), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *Handberry v. Thompson*, 92 F.Supp.2d 244, 247 (S.D.N.Y. 2000) (holding that prisoners need not grieve failure to deliver educational services because the issues were out of Department of Correction’s control).

In *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir.), *cert. denied*, 534 U.S. 1062 (7<sup>th</sup> Cir. 2001), the court reached the opposite result, stating: “The plaintiffs say they have no such remedies against exorbitant phone bills, but the cases we have cited reject a ‘futility’ exception to the requirement of exhaustion.” The *Arsberry* court unaccountably overlooked the distinction between an allegedly futile remedy and one that is not available, and in any case did not have the benefit of *Booth*’s holding, with which it appears inconsistent.

prisoner was held not to have had an available remedy because his hand was broken and he could not prepare a timely grievance, and was not allowed to file an untimely one when he was again able to write.<sup>361</sup> Interestingly, no court appears even to have asked the question whether administrative remedies are “available” to prisoners who may lack the capacity to use them, by reason of mental illness, developmental disability, impaired literacy, language barrier, or youth.<sup>362</sup>

Prisoners may also be unable to use a grievance system because they have been transferred or were otherwise absent from the institution or prison system when they should have filed a grievance.<sup>363</sup> However, transfer or absence will not automatically excuse exhaustion; courts have held exhaustion required if the grievance system makes provision for grievances to be filed and

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<sup>361</sup> *Days v. Johnson*, 322 F.3d 863, 867 (5<sup>th</sup> Cir. 2003) (noting that “one’s personal ability to access the grievance system could render the system unavailable”). Compare *Ferrington v. Louisiana Dept. of Corrections*, 315 F.3d 529, 532 (5<sup>th</sup> Cir. 2002) (holding plaintiff’s near blindness did not exempt him from exhausting; after all, he managed to file this suit), *cert. denied*, 124 S.Ct. 206 (2003).

<sup>362</sup> The nearest approach appears to be the Sixth Circuit’s recent decision in *Brock v. Kenyon County, Ky.*, 2004 WL 603929 (6<sup>th</sup> Cir., Mar. 23, 2004), rejecting the argument that a juvenile jail inmate complaining of excessive force should be excused from failure to use the grievance process in part because he was a juvenile. *Id.* at \*4; see also *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff’s argument that his medication doses were so high they “prohibited him from being of sound mind to draft a grievance”; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period).

<sup>363</sup> *Miller v. Norris*, 247 F.3d 736, 740 (8<sup>th</sup> Cir. 2001) (holding allegation that transferred prisoner could not get grievance forms for transferring prison system sufficiently alleged exhaustion of available remedies); *Barnard v. District of Columbia*, 223 F.Supp.2d 211, 214 (D.D.C. 2002) (holding that a prisoner who was first hospitalized, then involved in hearings, then transferred during the 15 days he had to file a grievance, may not have been able to use the grievance system); *Lindsay v. Dunleavy*, 177 F.Supp.2d 398, 401-02 (E.D.Pa. 2001) (declining to dismiss claim of transferred plaintiff where defendants provided no information on remedies available after his transfer); *Flowers v. Velasco*, 2000 WL 1644362 at \*2 (N.D.Ill., Oct. 19, 2000) (holding that a jail grievance system was not available to a prisoner held there for three weeks before transfer to state custody; his grievance would have been aborted by his transfer); *Muller v. Stinson*, 2000 WL 1466095 at \*2 (N.D.N.Y., Sept. 25, 2000) (excusing exhaustion by prisoner who had been transferred before the expiration of the time for filing a grievance about events at the sending prison); *Watkins v. Khamu*, 2000 WL 556614 at \*1 (N.D.Ill., May 3, 2000) (holding that an allegation that the jail grievance procedure is no longer available because plaintiff is in state prison system, and that he reported the incident to staff and had been “told they would handle the situation,” “suffices to allow him into the federal courthouse door as a threshold matter”); *Mitchell v. Angelone*, 82 F.Supp.2d 485, 490 (E.D.Va. 1999) (excusing exhaustion by prisoner who had been transferred so frequently he had never had time to exhaust).

processed under such circumstances.<sup>364</sup> In some cases courts have simply assumed that the grievance system was available to the absent prisoner without inquiring whether that was actually the case,<sup>365</sup> rather than “establish[ing its] availability . . . from a legally sufficient source.”<sup>366</sup> Thus, New York City has represented to the federal courts that its grievance system cannot be used by persons out of City custody,<sup>367</sup> but in at least one case a federal court has simply declared without support that the prisoner should have exhausted by mail.<sup>368</sup>

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<sup>364</sup> *Delio v. Morgan*, 2003 WL 21373168 at \*3 (S.D.N.Y., June 13, 2003) (holding transfer did not excuse exhaustion since regulations permit grievances after transfer); *Timmons v. Pereiro*, 2003 WL 179769 at \*2 (S.D.N.Y., Jan. 27, 2003) (holding that transfer out of state did not excuse failure to exhaust where there was time to file before the plaintiff was moved and in any case the system permits grievances to be pursued after transfer), *aff’d in part, vacated in part, and remanded*, 88 Fed.Appx. 447, 2004 WL 322702 (2d Cir. 2004); *Steele v. New York State Dept. of Correctional Services*, 2000 WL 777931 (S.D.N.Y., June 19, 2000) (holding that a prisoner who was out of the institution during the entire time for filing a grievance was nonetheless obliged to file a grievance because the deadline could be waived in “extreme circumstances”; prisoner’s conduct characterized as “deliberate bypass”), *motion to vacate denied*, 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000).

<sup>365</sup> *See Paulino v. Amicucci*, Warden Westchester County Jail, 2003 WL 174303 (S.D.N.Y., Jan. 27, 2003) (holding that transfer soon after the incident “does not relieve plaintiff of the obligation to exhaust his administrative remedies in the facility where the incident occurred”); *Rodriguez v. Senkowski*, 103 F.Supp.2d 131, 134 (N.D.N.Y. 2000) (holding that transferred inmate was obliged to exhaust about incident at prior facility).

In one recent decision, the court dismissed for non-exhaustion because the plaintiff’s grievance had been rejected as untimely as a result of his having been out of the prison when the decision he had to appeal was issued. The court said that “being moved from one facility to another is not an uncommon aspect of prison life. This circumstance does not by itself automatically toll applicable regulatory filing deadlines, nor relieve the inmate of his obligation to keep informed of the status of any administrative proceeding he may have pending prior to transfer and to make diligent efforts to protect and preserve his rights from the new location to which he is moved or from the original facility promptly upon his return there.” *Long v. Lafko*, 254 F.Supp.2d 444, 448 (S.D.N.Y. 2003). The court does not explain (and there is no indication that it considered) exactly how a prisoner is supposed to keep informed of these matters when the means of giving the prisoner notice is to send a decision to a place where he is no longer held.

<sup>366</sup> *Snider v. Melindez*, 199 F.3d at 114.

<sup>367</sup> *Burns v. Moore*, 2002 WL 91607 at \*6 (S.D.N.Y., Jan. 24, 2002).

<sup>368</sup> *Thomas v. Henry*, 2002 WL 922388 at \*2 (S.D.N.Y., May 7, 2002). This decision appears to have been overruled by a more recent decision, which stated: “As long as [the prisoner] was *within the custody of the agency against which he had grievances, the NYCDOC*, he was required to use available grievance procedures.” *Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2004) (emphasis supplied). The court added: “We have no occasion to consider the exhaustion requirement in

A remedy may be made unavailable by the acts or omissions of prison personnel. There is a recurrent pattern in American prisons of prisoners' being threatened with retaliation for filing grievances and complaints.<sup>369</sup> The Second Circuit, consistently with other courts to consider the question,<sup>370</sup> has held that threats or assaults directed at preventing prisoners from complaining may make remedies unavailable in fact, even if they are nominally available. The governing standard is the same as that applied to allegations of retaliation for First Amendment-protected activity: "would

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situations where only a brief interval elapses between the episode giving rise to the prisoner's complaint and the prisoner's transfer to the custody of another jurisdiction." *Id.* at n.3.

<sup>369</sup> *See, e.g.*, Walker v. Bain, 257 F.3d 660, 663-64 (6<sup>th</sup> Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), *cert. denied*, 535 U.S. 1095 (2002); Gomez v. Vernon, 255 F.3d 1118 (9<sup>th</sup> Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); Trobaugh v. Hall, 176 F.3d 1087 (8<sup>th</sup> Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); Hines v. Gomez, 108 F.3d 265 (9<sup>th</sup> Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), *cert. denied*, 524 U.S. 936 (1998); Atkinson v. Way, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); Tate v. Dragovich, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); Hunter v. Heath, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers), *rev'd on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9<sup>th</sup> Cir. 2002); Maurer v. Patterson, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); Gaston v. Coughlin, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), *on reconsideration*, 102 F.Supp.2d 81 (N.D.N.Y. 2000); Alnutt v. Cleary, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

<sup>370</sup> *See* Ealey v. Schriro, 208 F.3d 217, 2000 WL 235048 at \*1 (8<sup>th</sup> Cir., Mar. 2, 2000) (unpublished) (allegation that authorities threatened prisoner with retaliation "may" support claim remedies are unavailable), *cert. denied*, 531 U.S. 901 (2000). *But see* Patterson v. Goord, 2002 WL 31640585 at \*1 (S.D.N.Y., Nov. 21, 2002) (holding allegations of staff threats insufficient to justify late grievance where prisoner failed to submit grievance promptly upon transfer from prison where he was being threatened).

The Sixth Circuit, which requires plaintiffs to plead exhaustion, has recently declined to decide whether fear of retaliation can excuse exhaustion, holding that the plaintiff's failure to "describe with specificity" the factual basis for his fear required dismissal of his claim. Boyd v. Corrections Corporation of America, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 at \*3 (6<sup>th</sup> Cir., Sept. 8, 2004).

‘a similarly situated individual of ordinary firmness’ have deemed [the remedy] available.’<sup>371</sup>

Remedies may be made unavailable by other forms of obstruction by prison staff,

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<sup>371</sup> *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*7 (2d Cir., Aug. 18, 2004). *Hemphill* noted that threats or intimidation “may well deter a prisoner of ‘ordinary firmness’ from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts.” *Id.* Thus the fact that a prisoner has, *e.g.*, written a letter of complaint to the Superintendent (as in *Hemphill*) does not establish that he or she was not deterred from filing an ordinary grievance.

purposeful<sup>372</sup> or otherwise.<sup>373</sup> The failure to inform prisoners about remedies' existence,<sup>374</sup> or

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<sup>372</sup> Dale v. Lappin, 376 F.3d 652, 654-56 (7th Cir. 2004) (per curiam) (holding denial of necessary forms would make remedies unavailable); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (noting defendants' concession that denial of grievance forms, in a system that required using the form, made the remedy unavailable to the plaintiff); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (holding that prisoner who could not get grievance forms from prison officials had sufficiently alleged exhaustion. "We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a), and that Mr. Miller's allegations raise an inference that he was prevented from utilizing the prison's administrative remedies."); Kendall v. Kittles, 2003 WL 22127135 at \*4 (S.D.N.Y., Sept. 15, 2003) (declining to dismiss where prisoner said he could not get grievance forms; fact that he filed grievances other times just showed that forms were available other times); Dudgeon v. Frank, 2004 WL 1196820 at \*1 (W.D.Wis., May 18, 2004) (holding claim of denial of grievance forms sufficiently alleged that remedies were not available); Arreola v. Choudry, 2004 WL 868374 at \*3 (N.D.Ill., Apr. 22, 2004) (same); Labounty v. Johnson, 253 F.Supp.2d 496, 502-04 (W.D.N.Y., 2003) (holding that grievance supervisor's alleged failure to follow procedures, preventing plaintiff's appeal, barred summary judgment for non-exhaustion); Abney v. County of Nassau, 237 F.Supp.2d 278, 282 (E.D.N.Y. 2002) (holding that prisoner who could not get grievance forms, wrote grievance on plain paper, but never got a response had exhausted); Liggins v. Barnett, 2001 WL 737551 \*14-\*15 (S.D.Iowa, May 15, 2001) (allegation that plaintiff filed grievances and prison staff destroyed them supported claim of substantial compliance; though "the question is close," allegation that grievances were destroyed and grievance committee given a false report by staff member raised an inference that filing a grievance was an unavailable remedy); Johnson v. True, 125 F.Supp.2d 186, 188-89 (W.D.Va. 2000) (holding allegation that efforts to exhaust were frustrated by prison officials raised an issue of material fact whether plaintiff exhausted "available" remedies), *appeal dismissed*, 32 Fed.Appx. 692, 2002 WL 596403 (4<sup>th</sup> Cir. 2002); Bullock v. Horn, 2000 WL 1839171 at \*2 (M.D.Pa., Oct. 31, 2000) (holding allegation that prison officials returned grievances unprocessed, without grievance numbers, making appeal impossible was sufficient to defeat a motion to dismiss); Johnson v. Garraghty, 57 F.Supp.2d 321 (E.D.Va. 1999) (holding that factual conflict over whether the plaintiff had been prevented from exhausting "merits an evidentiary hearing."); *see* Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (citing with approval pre-PLRA cases excusing exhaustion where irregularities in the process prevented it or prison officials ignore or interfere with the prisoner's efforts), *cert. denied*, 526 U.S. 1133 (1999).

<sup>373</sup> Frost v. McCaughtry, 215 F.3d 1329, 2000 WL 767841 at \*1 (7th Cir., June 12, 2000) (unpublished) (holding allegation that no grievance appeal was available to plaintiff because of ongoing administrative changes during the relevant time period raised a factual question as to availability); Labounty v. Johnson, 253 F.Supp.2d 496, 504-06 (W.D.N.Y. 2003) (holding that prisoner's factually supported claim that his grievance was consolidated with another prisoner's, and the decision did not mention the issue he was concerned about, presented a factual issue whether it was "reasonable for plaintiff to be confused under such circumstances").

misinforming prisoners about their availability or operation, may make them unavailable.<sup>375</sup>

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<sup>374</sup> *Burgess v. Garvin*, 2004 WL 527053 at \*5 (S.D.N.Y., Mar. 16, 2004) (holding that “procedural channels . . . not made known to prisoners . . . are not an ‘available’ remedy in any meaningful sense. . . . [Congress] cannot have meant that prisoners would be expected to exhaust remedies of which they were kept entirely ignorant.”); *Arnold v. Goetz*, 2003 WL 256777 at \*6-7 (S.D.N.Y., Feb. 4, 2003) (holding defendants required to make a “reasonable, good faith effort to make the grievance procedure available to inmates”); *Hall v. Sheahan*, 2001 WL 111019 at \*2 (N.D.Ill., Feb 2, 2001) (“An institution cannot keep inmates in ignorance of the grievance procedure and then fault them for not using it. A grievance procedure that is not made known to inmates is not an ‘available’ administrative remedy.”); *Alvarez v. U.S.*, 2000 WL 557328 at \*2 (S.D.N.Y., May 8, 2000) (stating that a showing that prisoner was not “meaningfully informed” about administrative remedies could establish that they were not available), *on reconsideration*, 2000 WL 679009 (S.D.N.Y., May 24, 2000). *But see* *Rizzuto v. City of New York*, 2003 WL 1212758 at \*5 (S.D.N.Y., Mar. 17, 2003) (refusing to credit prisoner’s claim that he never received information about the grievance system in light of signed receipt for rule book); *Carter v. Woodbury County Jail*, 2003 WL 1342934 (N.D.Iowa, Mar. 18, 2003) (similar to *Rizzuto*).

In *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 975-76 (E.D.Wis. 2002), the court held that the plaintiff had been denied access to courts by defendants’ hindering his ability to exhaust, *inter alia*, by failing to make available materials concerning the grievance procedure.

<sup>375</sup> *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informing him of its completion, the grievance system was unavailable to him); *Miller v. Tanner*, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed); *Lane v. Doan*, 287 F.Supp.2d 210, 212 (W.D.N.Y. 2003) (holding that exhaustion is excused where the plaintiff is led to believe the complaint is not a grievance matter or would otherwise be investigated, or that administrative remedies are unavailable); *Croswell v. McCoy*, 2003 WL 962534 at \*4 (N.D.N.Y., Mar. 11, 2003) (holding that a prisoner who relies on prison officials’ representations as to correct procedure has exhausted); *O’Connor v. Featherston*, 2003 WL 554752 at \*2-3 (S.D.N.Y., Feb. 27, 2003) (holding allegation that prison Superintendent told a prisoner to complain via the Inspector General rather than the grievance procedure presented triable factual issues); *Boomer v. Lanigan*, 2002 WL 31413804 at \*8 (S.D.N.Y., Oct. 25, 2002) (holding that an allegation that prison staff returned his grievance and told him the matter was not handled by the grievance process raised a factual issue barring summary judgment); *Heath v. Saddlemire*, 2002 WL 31242204 at \*5 (N.D.N.Y., Oct. 7, 2002) (holding that a prisoner who was told by the Commission of Correction that notifying the Inspector General was the correct procedure was entitled to rely on that statement); *Thomas v. New York State Dept. of Correctional Services*, 2002 WL 31164546 at \*3 (S.D.N.Y., Sept. 30, 2002) (holding that a prisoner’s allegation that an officer told him he didn’t need to grieve because other prisoners had done so was sufficient to defeat summary judgment for non-exhaustion); *Simpson v. Gallant*, 231 F.Supp.2d 341, 350 (D.Me. 2002) (holding a prisoner who had been told the issue was not grievable had sufficiently exhausted); *Lee v. Walker*, 2002 WL 980764 at \*2 (D.Kan., May 6, 2002) (holding that prisoner who sent his grievance appeal to the wrong place would be entitled to reconsideration of dismissal if he showed

However, prisoners' ignorance of the remedy does not excuse them from using it if it has been made known, *e.g.*, in an inmate orientation handbook.<sup>376</sup>

There is an open question whether a remedy that is too slow to prevent irreparable harm is

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that the prison handbook said it was the right place); *Simpson v. Gallant*, 2002 WL 1380049 (D.Me., June 26, 2002) (holding that an allegation that the plaintiff filed a grievance but grievance staff told the plaintiff that his grievance was not in proper form and his complaint was not grievable sufficiently alleged exhaustion); *Boomer v. Lanigan*, 2001 WL 1646725 (S.D.N.Y., Dec. 17, 2000) (holding that a prisoner who was told by grievance staff that his grievance could not be handled sufficiently alleged exhaustion); *Freeman v. Snyder*, 2001 WL 515258 at \*7-8 (D.Del., Apr. 10, 2001) (holding prisoner not obliged to exhaust where prison staff told him he could not grieve the issue and he should take other steps instead); *Hall v. Sheahan*, 2001 WL 111019 at \*2 (N.D.Ill., Feb 2, 2001) (holding that a prison officials' statement to the plaintiff that she would have the toilet fixed, and he should stop asking her about it, might estop defendants from claiming non-exhaustion; it "raises the question whether Baker effectively represented (or misrepresented) to Hall that he had done all he needed to do, or that the grievance procedure was useless, *i.e.*, 'available,' but not a 'remedy.'"); *Feliz v. Taylor*, 2000 WL 1923506 at \*2-3 (E.D.Mich., Dec. 29, 2000) (holding that a plaintiff who was told his grievance was being investigated, then when he tried to appeal later was told it was untimely, had exhausted, since he had no reason to believe he had to appeal initially). *But see* *Lyon v. Vande Krol*, 305 F.3d 806, 809 (8<sup>th</sup> Cir. 2002) (holding that warden's statement that a decision about religious matters rested in the hands of "Jewish experts" did not excuse non-exhaustion, but was at most a prediction that the plaintiff would lose; courts will not consider inmates' subjective beliefs in determining whether procedures are "available"); *Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10<sup>th</sup> Cir. 2001) (holding that plaintiff who was confused by prison officials' erroneous representations about the powers of the grievance system was still required to exhaust); *Chelette v. Harris*, 229 F.3d 684, 688 (8<sup>th</sup> Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), *cert. denied*, 531 U.S. 1156 (2001); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at \*3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

In *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 976 (E.D.Wis. 2002), the court held that the plaintiff had been denied access to courts by defendants' hindering his ability to exhaust, *inter alia*, by telling him that his complaint was "not a grievable situation."

<sup>376</sup> *Boyd v. Corrections Corporation of America*, \_\_\_ F.3d \_\_\_, 2004 WL 1982517 at \*9 (6<sup>th</sup> Cir., Sept. 8, 2004); *Edwards v. Alabama Dep't of Corrections*, 81 F.Supp.2d 1242, 1256-57 (M.D.Ala. 2000).

“available” for PLRA purposes.<sup>377</sup>

### 3. Estoppel

Defendants may be estopped from raising a defense of non-exhaustion based on the same kinds of facts that support an argument of unavailability: obstruction or intimidation by prison staff,<sup>378</sup> or misleading of prisoners about the availability of remedies.<sup>379</sup> The Second Circuit has suggested that it is better to consider unavailability first,<sup>380</sup> which makes sense because it is simpler and the effect of an estoppel argument in this context remains a bit murky. Initially, the Second Circuit held that defendants' actions “may . . . estop[ ] *the State* from asserting the exhaustion defense.”<sup>381</sup> However, it has also said that where several defendants played different roles in the acts

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<sup>377</sup> See § IV.A, nn. 70-74, above.

<sup>378</sup> *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*8 (2d Cir., Aug. 18, 2004) (remanding for consideration of estoppel argument of prisoner who alleged he was assaulted and threatened to keep him from complaining); *Ziembra v. Wezner*, 366 F.3d 161, 163-64 (2d Cir. 2003).

<sup>379</sup> See *Rivera v. Goord*, 2003 WL 1700518 at \*7 (S.D.N.Y., Mar. 28, 2003) (stating that prison officials may be estopped from asserting non-exhaustion where a prisoner has been told by officials that his complaint is not a “grievance matter” and is being otherwise investigated, or has been led to believe that administrative remedies are unavailable); *Heath v. Saddlemire*, 2002 WL 31242204 at \*5 (N.D.N.Y., Oct. 7, 2002) (holding that reliance on officials’ representations as to proper procedure estops prison officials from claiming non-exhaustion as to prisoner who followed the representations); *Simpson v. Gallant*, 223 F.Supp.2d 286, 292 (D.Me. 2002) (holding prison officials who said the plaintiff’s problem was not grievable were estopped from claiming non-exhaustion), *aff’d*, 62 Fed.Appx. 368, 2003 WL 21026723 (1<sup>st</sup> Cir. 2003); *Hall v. Sheahan*, 2001 WL 111019 at \*2 (N.D.Ill., Feb 2, 2001) (holding that a prison official’s statement to the plaintiff that she would have the toilet fixed, and he should stop asking her about it, might estop defendants from claiming non-exhaustion); *Davis v. Frazier*, 1999 WL 395414 at \* 4 (S.D.N.Y., June 15, 1999) (holding that an allegation that prisoners were told at orientation that “a grievance cannot be brought against Officers or Staff” supports an estoppel defense to non-exhaustion). *But see* *Lewis v. Washington*, 300 F.3d 829, 834-35 (7<sup>th</sup> Cir. 2002) (declining to apply equitable estoppel where the defendants did not affirmatively mislead the plaintiff but merely failed to respond to grievances); *Berry v. City of New York*, 2002 WL 31045943 at \*8 (S.D.N.Y., June 11, 2002) (declining to credit estoppel claim where the plaintiff had used the grievance system successfully on other occasions).

<sup>380</sup> *Abney v. McGinnis*, \_\_\_ F.3d \_\_\_, 2004 WL 1842647 at \*3 (2d Cir., Aug. 18, 2004).

<sup>381</sup> *Ziembra v. Wezner*, 366 F.3d 161, 163 (2d Cir.2004) (emphasis supplied); see *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*4 (2d Cir., Aug. 18, 2004) (stating *Hemphill v. State of New York* reads *Ziembra* to mean that threats may “estop *the government* from asserting the affirmative defense of non-exhaustion”) (emphasis supplied).

giving rise to estoppel, “it is possible that some individual defendants may be estopped, while others may not be.”<sup>382</sup>

## H. Statutes of Limitations

Decisions to date indicate that the statute of limitations is tolled during exhaustion, though it is not certain whether that conclusion holds independent of state tolling rules.<sup>383</sup> One court has held that the limitations period begins to run again when the prisoner is released, since the exhaustion requirement no longer applies, and is not tolled again upon reincarceration since the exhaustion requirement presumably is not reinstated for issues from previous periods of incarceration.<sup>384</sup>

In cases that are dismissed for non-exhaustion, the claim will often be presumptively time-

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<sup>382</sup> *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*8 (2d Cir., Aug 18, 2004).

<sup>383</sup> In *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000), the court simply stated that the limitations period was tolled during exhaustion because the plaintiff was unable to bring suit until exhaustion was completed. However, *Brown* relied in part on *Harris v. Hegmann*, 198 F.3d 153, 157-58 (5th Cir. 1999), which relied explicitly on state tolling law, as did *Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001); *see also* *Leal v. Georgia Dep’t of Corrections*, 254 F.3d 1276, 1280 (11th Cir. 2001) (assuming that state law provides the tolling rule); *Howard v. Mendez*, 304 F.Supp.2d 632, 636 (M.D.Pa. 2004) (applying state tolling rules to a case involving a federal prisoner); *McCoy v. Goord*, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (noting in dictum that time spent exhausting appears to be tolled under New York law); *see generally* *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980) (holding that state tolling rules are applicable in § 1983 actions). *But see* *Wright v. O’Hara*, 2004 WL 1793018 at \*6 (E.D.Pa., Aug. 11, 2004) (holding exhaustion time tolled based on the PLRA itself). *Cf.* *Johnson v. Rivera*, 2002 WL 31012161 at \*4 (N.D.Ill., Sept. 6, 2002) (holding that even if limitations on federal claims are tolled pending exhaustion, they are not tolled on state claims that could have been brought in state court without delay).

One contrary case, *Thomas v. Henry*, 2002 WL 922388 at \*2 (S.D.N.Y., May 7, 2002), relies on a statement in a Supreme Court case that “the pendency of a grievance . . . does not toll the running of the limitations periods.” *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980). But the employment grievance at issue in *Ricks* was not one which had to be exhausted before suit could be brought, so *Ricks* is not relevant to the question of tolling during exhaustion under the PLRA.

One court has stated that tolling should be applied to protect defendants against stale claims, and therefore that the limitations period should be deemed to run again starting at the deadline (if any) for prison officials to resolve a grievance—i.e, at the time the prisoner is entitled to bring suit. *Juresic v. Cook County Medical Services Director*, 2002 WL 1424564 (N.D.Ill., June 28, 2002).

<sup>384</sup> *Pettiford v. Sheahan*, 2002 WL 1433503 at \*2 and n.3 (N.D.Ill., July 2, 2002).

barred because of the delay in litigating exhaustion.<sup>385</sup> These cases do not necessarily involve prisoners' neglect of their legal duty. Some of them may involve prisoners' technical mistakes or misunderstandings in exhaustion, failure to exhaust because of threats or intimidation, or changes in the governing law of exhaustion after the prisoner has filed.<sup>386</sup>

There are several possible ways to save meritorious claims dismissed for non-exhaustion after the limitations period has run. Some states have tolling provisions, which are applicable in federal court § 1983 actions, that give a litigant whose case is timely filed, but is then dismissed for reasons other than the merits, a certain period of time to re-file.<sup>387</sup> That is the case in New York, where the State has represented to the Second Circuit (unfortunately in an unreported case) that under state law, claims dismissed for non-exhaustion can be reinstated within six months of dismissal,<sup>388</sup> and state law may further toll that six-month period during the pendency of administrative proceedings.<sup>389</sup>

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<sup>385</sup> See, e.g., *Long v. Simmons*, 77 F.3d 878, 880 (5<sup>th</sup> Cir. 1996) (noting that dismissal without prejudice after the limitations period operates as dismissal with prejudice).

<sup>386</sup> The most significant of these is the Supreme Court's decision in *Porter v. Nussle*, 534 U.S. 516 (2002), which overruled the Second Circuit's line of cases holding that exhaustion is only required in challenges to "conduct which was either clearly mandated by a prison policy or undertaken pursuant to a systematic practice." See *Marvin v. Goord*, 255 F.3d 40, 42-43 (2d Cir. 2001). Instead, *Porter* held that exhaustion is required in "all inmate suits about prison life." 534 U.S. at 532.

<sup>387</sup> See *Miller v. Norris*, 247 F.3d 736, 740 (8<sup>th</sup> Cir. 2001) (holding action timely because a state statute provides that a litigant who timely files and is dismissed has a year to commence a new action). The same result may follow from the application of equitable tolling. *McCoy v. Goord*, 255 F.Supp.2d at 253; see § IV.A., n.59, above; nn. 392, 398, below, concerning equitable tolling.

<sup>388</sup> This assertion appears in *Villante v. Vandyke*, 2004 WL 605290 at \*2 (2d Cir., Mar. 29, 2004); some district courts have made similar observations. See *Rivera v. Pataki*, 2003 WL 21511939 at \*9 and n.13 (S.D.N.Y., July 1, 2003); *Richardson v. Romano*, 2003 WL 1877955 at \*2 n.1 (N.D.N.Y., Mar. 31, 2003). The state statute, N.Y.C.P.L.R. § 205(a), provides that if an action timely commenced "is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits," a new action may be filed within six months on the same transaction or occurrence or series of them. However, this statute also requires that service be completed within the six-month period, which may limit its utility for *pro se* prisoner litigants given their difficulties in arranging for service.

<sup>389</sup> The relevant statute provides: "Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." N.Y.C.P.L.R. § 204(a). The *Villante* defendants' argument, then—which appears correct—is that the PLRA exhaustion requirement is a "statutory prohibition" for purposes of § 204(a).

A second approach is to hold the statute of limitations equitably tolled during the pendency of the dismissed action and any subsequent state administrative proceedings, as one appeals court has done.<sup>390</sup> That holding was made in a case where the plaintiff had been victimized by a change in law overruling several circuits' holdings that damage claims need not be exhausted where grievance systems did not provide for damages.<sup>391</sup> The court did not say whether equitable tolling was limited to such cases or otherwise state criteria for the application of equitable tolling, and other courts have not addressed the question with specificity.<sup>392</sup> The Second Circuit, however, has held that a prisoner who was justified by special circumstances (*e.g.*, a reasonable misunderstanding of the law or the prison's administrative system, or actions by prison personnel) in failing to exhaust before suit should be required to exhaust, but should be allowed to proceed if administrative remedies have become unavailable.<sup>393</sup> It would seem logical that equitable tolling as well should be applied in those circumstances.

An alternative approach is for the court to decline to dismiss a case that would be time-barred and instead to grant a stay pending exhaustion. That option may be foreclosed by case law holding that stays are no longer permitted under the PLRA and that unexhausted claims must be dismissed.<sup>394</sup> However, the courts have not explicitly addressed the question whether there may be an exception to the dismissal rule in order to save the meritorious claim of a plaintiff who has been victimized by a change in the law.<sup>395</sup> Since a stay pending exhaustion is not much different in practical effect from dismissal without prejudice and subsequent reinstatement of suit, a limited exception to the dismissal rule will not do serious harm to the PLRA's policies, unless one assumes that Congress intended to

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<sup>390</sup> *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001); *accord*, *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002); *see* § IV.A, n. 59, above; nn. 387, above, and 392, 398, below, concerning equitable tolling.

<sup>391</sup> *See Booth v. Churner*, 532 U.S. 731 (2001).

<sup>392</sup> *See McCoy v. Goord*, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (“Courts may combine a dismissal without prejudice with equitable tolling, when a judicial stay is not available, to extend the statute of limitations ‘as a matter of fairness where a plaintiff has . . . asserted his rights in the wrong forum.’”; suggesting in dictum that time spent in federal court may also be tolled) (citation omitted).

<sup>393</sup> *Giano v. Goord*, \_\_\_ F.3d \_\_\_, 2004 WL 1842652 at \*6-7 (2d Cir., Aug. 18, 2004); *Hemphill v. New York*, \_\_\_ F.3d \_\_\_, 2004 WL 1842658 at \*9 (2d Cir., Aug. 18, 2004).

<sup>394</sup> *See Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001).

<sup>395</sup> *See Cruz v. Jordan*, 80 F.Supp.2d 109, 124 (S.D.N.Y. 1999) (“There is simply no evidence that Congress intended by section 1997e(a) to remove every aspect of the district court's traditional equity jurisdiction” to grant stays). *But see McCoy v. Goord*, 255 F.Supp.2d 233, 254 (S.D.N.Y. 2003) (holding that the PLRA removed courts' authority to grant stays even to avoid limitations problems).

foster forfeitures of meritorious cases by manufacturing a new source of statute of limitations problems.<sup>396</sup>

A fourth approach is for the plaintiff, after dismissal and subsequent exhaustion, to file a motion for relief from the judgment of dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, rather than to file a new complaint. That Rule permits relief based *inter alia* upon “mistake, inadvertence, surprise, or excusable neglect,” an argument that it “is no longer equitable that the judgment should have prospective application,” or “any other reason justifying relief from the operation of the judgment.”<sup>397</sup> It has been used as a procedural vehicle in a variety of circumstances to permit litigants who timely filed and diligently pursued their cases to revive suits that had become time-barred after dismissal. These circumstances include cases in which the plaintiff was victimized by a change or ambiguity in the law<sup>398</sup> as well as cases where the plaintiff made an error of law.<sup>399</sup> The fact that a case has not yet been heard on the merits weighs heavily in

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<sup>396</sup> *Compare* Spruill v. Gillis, 372 F.3d 218, 230 (3rd Cir. 2004) (“Congress wanted to erect *any barrier it could* to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so.)” *with* Kane v. Winn, 319 F.Supp.2d 162, 220-21 (D.Mass. 2004) (“There is nothing in the PLRA’s legislative history to suggest that Congress intended to keep meritorious claims out of court. . . . Courts cannot lightly presume that Congress has an intent hostile to our legal system’s firmly embedded commitments to providing access to the courts to vindicate valid human rights claims, and interpreting the PLRA as a deliberate attempt to thwart such claims would obviously raise serious constitutional questions.”)

<sup>397</sup> Rule 60(b)(1),(5),(6), Fed.R.Civ.P.

<sup>398</sup> *See* North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transportation, 104 F.Supp.2d 599, 605-06 (M.D.N.C. 2000) (granting relief from judgment under Rule 60(b)(6) “catchall” provision so a plaintiff could file a timely attorneys’ fees motion after being misled by local rules about the time limit; in the alternative, equitably tolling the statutory limitations period); Allen v. Shalala, 835 F.Supp. 462, 464-65 (N.D.Ill. 1993) (granting relief from judgment under Rule 60(b)(6) to permit timely filing of fees motion rendered untimely by a change in the law); *see also* Bridgeway Corp. v. Citibank, N.A., 132 F.Supp.2d 297, 300-01, 303 (S.D.N.Y. 2001) (granting relief under Rule 60(b)(6) to reinstate claims of litigant whose foreign judgment on the same subject matter was ruled unenforceable; equitable tolling applied; “Equitable tolling permits a party to sue after the passing of the statute of limitations if the party has acted with reasonable care and diligence.”)

<sup>399</sup> *See* Scott v. U.S. Environmental Protection Agency, 185 F.R.D. 202, 204-06 (E.D.Pa. 1999) (relieving plaintiff from voluntary dismissal based on erroneous belief that she could pursue her Federal Tort Claims Act claim with other claims in state court; citing excusable neglect provision of rule), *reconsideration denied*, 1999 WL 358918 (E.D.Pa., June 2, 1999); Balik v. Apfel, 37 F.Supp.2d 1009, 1010 (S.D. Ohio 1999) (granting relief under excusable neglect and “catchall” provisions to re-enter judgment so mentally impaired plaintiff could appeal timely), *aff’d*, 210 F.3d 371 (6<sup>th</sup> Cir. 2000) (unpublished).

favor of granting such relief.<sup>400</sup> A prisoner who has relied on exhaustion law that was overruled in *Booth v. Churner* or *Porter v. Nussle*, or who did not anticipate them in a circuit where the question had not been decided when his or her complaint was filed, and whose claim may never be tried without relief, would seem to have a persuasive case under this body of law, as would a prisoner whose failure to exhaust was otherwise justified under the Second Circuit’s decisions.

In addition to statute of limitations problems, the deadline for filing an administrative complaint will invariably have passed by the time of a dismissal for non-exhaustion. This problem is dealt with elsewhere.<sup>401</sup>

## I. “Prison Conditions”

Prisoners are required to exhaust cases if they involve “prison conditions.” That phrase applies “to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>402</sup> So prior decisions holding that use of force cases are not about “prison conditions” and need not be exhausted are no longer good law. This is a non-issue in use of force cases arising in the New York City jails, since prisoners cannot bring “complaints pertaining to an alleged assault” under that system’s grievance procedure, and therefore that system is not “available” to persons suing about assaults.<sup>403</sup> The line of cases in the Second Circuit holding that the phrase “prison conditions” encompasses only conduct “clearly mandated by a prison policy or undertaken pursuant to a systemic practice”<sup>404</sup> is

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<sup>400</sup> See *Bridgeway Corp. v. Citibank, N.A.*, 132 F.Supp.2d at 301; *Scott v. U.S. Environmental Protection Agency*, 185 F.R.D. at 206.

<sup>401</sup> See § IV.E.8.b, above.

<sup>402</sup> *Porter v. Nussle*, 534 U.S. 516, 532 (2002); see, e.g., *Krilich v. Federal Bureau of Prisons*, 346 F.3d 157, 159 (6<sup>th</sup> Cir. 2003) (holding that intrusions on attorney-client correspondence and telephone conversations are prison conditions notwithstanding argument that attorney-client relationship “transcends the conditions of time and place”); *U.S. v. Carmichael*, 343 F.3d 756, 761 (5<sup>th</sup> Cir. 2003) (holding that statutorily required collection of DNA is a prison condition), *cert. denied*, 124 S.Ct. 1116 (2004); *Castano v. Nebraska Dept. of Corrections*, 201 F.3d 1023, 1024 (8<sup>th</sup> Cir. 2000) (holding the failure to provide interpreters for Spanish-speaking prisoners is a prison condition), *cert. denied*, 531 U.S. 913 (2000); *Salaam v. Consovoy*, 2000 WL 33679670 at \*4 (D.N.J., Apr. 14, 2000) (holding that failure to provide proper parole hearing is a prison condition); *Cruz v. Jordan*, 80 F. Supp. 2d 109, 116-17 (S.D.N.Y. 1999) (applying provision to medical care claim).

<sup>403</sup> DOC Directive 3375R at § II.B; see *Mojias v. Johnson*, 351 F.3d 606, 608-10 (2d Cir. 2003).

<sup>404</sup> *Marvin v. Goord*, 255 F.3d 40, 42-43 (2d Cir. 2001), *overruled in pertinent part*, *Porter v. Nussle*, 534 U.S. 516 (2002).

now overruled.

A probationer required to reside in an “intensive drug rehabilitation halfway house” was “confined,” if not in a “jail [or] prison,” then in an “other correctional facility,” in the terms of 42 U.S.C. § 1997e(a), and his complaint about his medical treatment there was therefore about “prison conditions.”<sup>405</sup> One court has held that an arrestee who alleged he was beaten in the hall of the jail and as he was being placed in a cell was not complaining about prison conditions because, under that Circuit’s law, the line between arrest and detention or incarceration is drawn after arrest, processing, and significant periods of time in detention.<sup>406</sup>

Cases involving agencies outside the prison system may not be “prison conditions” cases even if the plaintiff is a prisoner. For example, one court held that a prisoner’s claim that prosecutors and investigators conspired to harm him in jail because he had information about official corruption was not a prison conditions claim even though it had an impact on prison conditions, and the exhaustion requirement did not apply to it.<sup>407</sup> This outcome makes sense because if the people responsible are not prison employees, the prison grievance system cannot do anything about the problem. Similarly, a court expressed doubt that a claim that prisoners were injured by dentists at an outside hospital involved “prison conditions,” again citing the unlikelihood that the prison grievance system had any authority to take action on the complaint.<sup>408</sup>

Cases involving other aspects of the criminal justice system and the implementation of criminal sentences are not about prison conditions.<sup>409</sup> Challenges to the fact or duration of

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<sup>405</sup> *Witzke v. Femal*, 376 F.3d 744, 752-53 (7<sup>th</sup> Cir. 2004).

<sup>406</sup> *Roach v. Bandera County*, 2004 WL 1304952 at \*5 (W.D.Tex., June 9, 2004). It is questionable whether this holding is responsive to the language of 42 U.S.C. § 1997e(a), which is applicable to any prisoner “confined in any jail, prison, or other correctional facility,” and 18 U.S.C. § 3626(g), which defines “prisoner” as anyone subject to “incarceration, detention, or admission to any facility who is accused of . . . violations of criminal law.”

<sup>407</sup> *Johnson v. Quinn*, 1999 WL 116222, at \*3 (N.D. Ill. Feb. 26, 1999).

<sup>408</sup> *Borges v. Administrator for Strong Memorial Hosp.*, 2002 WL 31194558 at \*3 (W.D.N.Y., Sept. 30, 2002).

<sup>409</sup> *See Wishorn v. Hill*, 2004 WL 303571 at \*11 (D.Kan., Feb. 13, 2004) (holding detention without probable cause is not a prison condition); *Monahan v. Winn*, 276 F.Supp.2d 196, 204 (D.Mass. 2003) (holding that a Bureau of Prisons rule revision that abolished its discretion to designate certain offenders to community confinement facilities did not involve prison conditions); *see also Valdivia v. Davis*, 206 F.Supp.2d 1068, 1074 n.12 (E.D.Cal. 2002) (holding that a challenge to parole revocation procedures was not a “civil action with respect to prison conditions” under 18 U.S.C. § 3626(g)(2)). *But see Morgan v. Messenger*, 2003 WL 22023108 (D.N.H., Aug. 27, 2003) (holding that sex offender treatment director’s disclosure of private information from plaintiff’s

confinement are probably not about prison conditions, though in most cases such claims will have to be pursued via habeas corpus and will be subject to the habeas exhaustion requirement and not the PLRA exhaustion requirement.<sup>410</sup>

## **J. Retroactivity of the Statute<sup>411</sup>**

The PLRA exhaustion requirement does not apply to actions or appeals filed before its enactment.<sup>412</sup> It does apply to suits filed after enactment even if the events complained about occurred before enactment.<sup>413</sup> However, if the time limit on the administrative remedy had passed when the exhaustion requirement was enacted, so the prisoner never had a chance to comply with

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treatment file to parole authorities and prosecutor involved prison conditions, since the director was a prison employee and the action affected the duration of his prison confinement); *Salaam v. Consovoy*, 2000 WL 33679670 at \*4 (holding that the failure to provide proper parole hearings is a prison condition). *Salaam* may be distinguishable from *Valdivia* on the ground that parole hearings involve a process commenced in prison, while parole revocation proceedings are commenced and are based on events that took place outside prison.

<sup>410</sup> *See, e.g., Zapata v. Scibana*, 2004 WL 1563239 (W.D. Wis., July 9, 2004) (holding PLRA exhaustion requirement inapplicable to habeas challenge to good time calculation); *Neal v. Fleming*, 2004 WL 792729 at \*2 (N.D. Tex., Apr. 14, 2004) (holding complaint of improper denial of early release was not about prison conditions and habeas proceeding was not subject to PLRA exhaustion requirement), *report and recommendation adopted*, 2004 WL 1175736 (N.D. Tex., May 26, 2004).

One court has recently held that a motion by criminal defendants challenging their placement in isolated confinement after capital charges were lodged against them was appropriately treated as a habeas petition, thereby avoiding the question whether they were challenging prison conditions. *U.S. v. Catalan-Roman*, 2004 WL 1773453 at \*8 (D.P.R., July 1, 2004), *report adopted*, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 1773453 (D.P.R., Aug. 6, 2004). Other decisions, however, have held that proceedings addressing prison conditions should be treated as separate civil actions even if they are filed under the caption of a criminal case. *See U.S. v. Antonelli*, 371 F.3d 360, 361 (7<sup>th</sup> Cir. 2004) (holding a motion challenging prison policy forbidding inmates from retaining possession of pre-sentence reports should have been exhausted).

<sup>411</sup> Consequences of the retroactive application of Supreme Court decisions interpreting the PLRA are addressed in §§ IV.E.8.b and IV.H, above.

<sup>412</sup> *Scott v. Coughlin*, 344 F.3d 282, 290 (2d Cir. 2003); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999).

<sup>413</sup> *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1998); *Polite v. Barbarin*, 1998 WL 146687 at \*2 (S.D.N.Y., Mar. 25, 1998).

it, exhaustion is not required.<sup>414</sup>

## **K. Exhaustion and class actions**

In class actions,<sup>415</sup> most decisions to date state that the PLRA requires only the named plaintiffs (and often a single named plaintiff) to exhaust.<sup>416</sup> That is the general practice in class

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<sup>414</sup> Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999), *citing* Bibbs v. Zummer, 173 F.3d 428, 1999 WL 68573 (6th Cir., Jan. 21, 1999) (unpublished) (holding that the opposite result would have an impermissible retroactive effect); Hitchcock v. Nelson, 1997 WL 433668 at \*2 (N.D.Ill., July 28, 1997) (same).

<sup>415</sup> One court, finding administrative remedies unavailable in a class action, stated that it “need not address the broader issue of whether the PLRA's exhaustion requirement applies to bona fide class actions in general.” Handberry v. Thompson, 92 F.Supp.2d 244, 248 (S.D.N.Y. 2000). There does not seem to be any room for a class action exception in the statutory mandate to exhaust in all actions brought by prisoners about prison conditions. *See* 42 U.S.C. § 1997e(a).

<sup>416</sup> *See* Chandler v. Crosby, \_\_\_ F.3d \_\_\_, 2004 WL 1764123 at \*3 (11<sup>th</sup> Cir., August 6, 2004) (holding exhaustion by one class member is sufficient); Gates v. Cook, 376 F.3d 323, 329 (5th Cir. 2004) (same); Jackson v. District of Columbia, 254 F.3d 262, 268-69 (D.C.Cir. 2001), *quoting* Foster v. Gueory, 655 F.2d 1319, 1321-22 (D.C.Cir. 1981) (stating that exhaustion by a single class member is sufficient); Orafan v. Goord, 2003 WL 21972735 at \*5 n.7 (N.D.N.Y., Aug. 11, 2003) (stating in dictum that a single class member can exhaust for the class); Lewis v. Washington, 265 F.Supp.2d 939, 942 (N.D.Ill. 2003) (holding that exhaustion by one class member is sufficient); Rahim v. Sheahan, 2001 WL 1263493 at \*7-8 (N.D.Ill., Oct. 19, 2001) (holding that defendants’ waiver of exhaustion with respect to named plaintiffs extended to absent class members); Jones’El v. Berge, 172 F.Supp.2d 1128, 1131-33 (W.D.Wis. 2001) (rejecting the argument that all class members must exhaust); *see* Hattie v. Hallock, 8 F.Supp.2d 685, 689 (N.D.Ohio), *amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998) (acknowledging in dicta that “vicarious exhaustion” is available in class actions under Rule 23(b)(2)). These cases all cite Title VII exhaustion doctrine; *see* nn. 81, 94, 182-187, 205-206, 240-241, 275-280, above, and 433-435, below, concerning reliance on Title VII exhaustion rules in PLRA cases.

Other courts have simply certified classes without inquiring into exhaustion by anyone but the named plaintiffs, without commenting on the theoretical issue. *See, e.g.,* Aiello v. Litscher, 104 F.Supp.2d 1068, 1073 (W.D.Wis. 2000); Edwards v. Alabama Dept. of Corrections, 81 F.Supp.2d 1242 (M.D.Ala. 2000); Gomez v. Spalding, No. Civ 91-0299-S-LMB, Order at 2 (D.Idaho, Feb. 5, 1998); Clark v. California, 1998 WL 242688 at \*3 (N.D.Cal., May 11, 1998). *Cf.* Hattie v. Hallock, 8 F.Supp.2d 685, 689 (N.D.Ohio 1998) (stating that prisoners must personally exhaust and that there is no “vicarious” exhaustion *except* in class actions), *judgment amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998).

actions,<sup>417</sup> which the PLRA does not purport to displace.<sup>418</sup> There may be exceptions for exhaustion requirements that are jurisdictional,<sup>419</sup> or are found in statutory schemes that emphasize the need for maintaining case-by-case agency adjudication and in which the court's role is limited to deferential review of an agency decision, but these concerns are inapplicable under the PLRA, since judicial review of prisoners' civil rights complaints is *de novo* and not restricted to an administrative record or determination.<sup>420</sup>

One recent decision points out that prior authority involves Rule 23(b)(2) class actions, and declines to apply the "vicarious" exhaustion approach of Title VII law relied on in those cases in a Rule 23(b)(3) class action seeking damages for all class members.<sup>421</sup> The court does not explain why the Title VII approach is not equally appropriate under the PLRA, perhaps because neither party argued that it was appropriate. The court avoids dealing directly with the exhaustion requirement by defining the class narrowly to include only persons who were no longer incarcerated at the time the suit was brought, and who were therefore not subject to the exhaustion requirement.<sup>422</sup>

Once administrative remedies have been exhausted with respect to class claims, "[a]ny claim for relief that is within the scope of the pleadings may be litigated without further exhaustion."<sup>423</sup> That holding remains applicable when plaintiffs in a class action seek preliminary relief benefiting

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<sup>417</sup> A leading treatise states: "When exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiffs normally avoids the necessity for each class member to satisfy this requirement independently." 5 Newberg on Class Actions at § 24.66 (3d ed., Supp. 2001).

<sup>418</sup> *Cf.* Anderson v. Garner, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997) (stating that the PLRA does not "in any way affect[]" the consideration of class certification, leaving courts to apply "existing law governing class certification"). One recent decision that denied class certification in a challenge to jail mental health care, on the ground that "the limitations on remedy established by the PLRA would preclude this court from replicating" earlier prison injunctive litigation, *Shook v. Board of County Comm'rs*, 216 F.R.D. 644, 648 (D.Colo. 2003), lacks support in the text of the statute, legislative history, or case law; appeal is pending.

<sup>419</sup> See § IV.A, n.58, above.

<sup>420</sup> Jones'El v. Berge, 172 F.Supp.2d at 1132.

<sup>421</sup> Sanchez v. Becher, 2003 WL 1563941 at \*4 (S.D.Ind., Jan. 31, 2003); see *see* nn. 81, 94, 182-187, 205-206, 240-241, 275-280, above, and 433-435, below, for further discussion of Title VII.

<sup>422</sup> Sanchez, *id.* at \*3-4.

<sup>423</sup> Jones'El v. Berge, 172 F.Supp.2d at 1132.

individual unnamed class members.<sup>424</sup> The PLRA does not disturb pre-existing principles of notice pleading and liberal construction, especially of *pro se* pleadings,<sup>425</sup> and those principles are equally applicable in class actions.<sup>426</sup>

For these same reasons, it should be sufficient for prisoners to exhaust with respect to their individual experiences (“Officer Doe beat me up”), rather than the kinds of structural or systemic issues (inadequate or unlawful policies, deficient staff training and supervision, lack of investigation of complaints and discipline of staff who use excessive force) that are often raised in injunctive class litigation, especially as matters of remedy. This conclusion is also compelled by the logic of *Booth v. Churner*, which holds that a prisoner’s obligation to exhaust does not depend on the relief sought and the relief available in the administrative system, but on whether that system can take any action concerning the prisoner’s complaint.<sup>427</sup> Any doubt on that score has been dispelled by the Second Circuit’s adoption of the view that the grievant need not “demand particular relief.”<sup>428</sup> Once the complaint has been exhausted, then, the court should be free to consider any remedy that appears necessary to cure whatever violation of law the record shows.<sup>429</sup>

Common sense as well supports this conclusion. Grievances are brought by prisoners on their own, under short deadlines, without the assistance of counsel. Prisoners as a class are relatively poorly educated and many of them are wholly or partially illiterate. Moreover, they are rarely in a position to investigate their keepers’ hiring, training, and supervision practices, or to assess policies

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<sup>424</sup> *Id.* It does not, however, authorize prisoners to bring separate suits for damages without exhaustion merely because they are members of the class. *Pozo v. Hompe*, 2003 WL 23185882 (W.D.Wis., Apr. 8, 2003), *amendment denied*, 2003 WL 23142268 (W.D.Wis., Apr. 17, 2003); *Piscitello v. Berge*, 2002 WL 32345410 at \*2 (W.D.Wis., Nov. 4, 2002), *aff’d*, 94 Fed.Appx. 350, 2004 WL 635263 (7<sup>th</sup> Cir. 2004).

<sup>425</sup> *See* § IV.E.3, above.

<sup>426</sup> *See* *Lewis v. Washington*, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (construing grievances about placement in “unapproved PC” status as encompassing complaints about conditions in that unit).

<sup>427</sup> *See* §§ IV.G, IV.G.1, above.

<sup>428</sup> *Johnson v. Testman*, \_\_\_ F.3d \_\_\_, 2004 WL 1842669 at \*5 (2d Cir., Aug. 18, 2004), *quoting* *Strong v. David*, 297 F.3d 646, 650 (7<sup>th</sup> Cir. 2002); *see* § IV.E.5, above.

<sup>429</sup> Any other rule would come into conflict with 18 U.S.C. § 3626(a), which requires adoption of the narrowest and least intrusive remedy necessary to cure the federal law violation, and does not make an exception if such remedy was not anticipated by the prisoner in his or her grievance.

that they may not even have access to.<sup>430</sup> It makes no sense to apply what is, in effect, an exacting pleading standard to complaints filed at this informal administrative level, and then use it as a constraint on the remedies that may be sought and the bases for liability that may be alleged in a subsequent judicial challenge, after counsel has been obtained,<sup>431</sup> to the underlying conduct that was grieved.<sup>432</sup>

Title VII law takes a slightly different approach to this problem, holding that class claims need not be explicitly pled in an administrative complaint, and that courts will look to factors such as whether several instances of discrimination were pursued in the EEOC charge, or multiple similar EEOC charges were filed within a short period of time.<sup>433</sup> In this instance, the Title VII rule appears to be too restrictive to be borrowed for the PLRA in light of the greater disadvantages experienced by prisoners with respect to their levels of education and literacy, their lack of freedom to investigate general practices at their institutions, the much shorter time limits for filing grievances than for

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<sup>430</sup> For example, in the New York prison system, departmental policies and procedures are categorized as A distribution, provided to staff but not to inmate libraries; A&B distribution, to staff and to inmate libraries; and D distribution, to supervisory staff and other security personnel who must be familiar with them; otherwise they “shall be handled as confidential material and restricted from unauthorized access.” New York State Department of Correctional Services, Directive 0001: Introduction to the Policy and Procedure Manual at 3 (April 7, 2000). “D” directives include items such as Use of Chemical Agents and Emergency Control Plans; “A” directives include Unusual Incident Report and Security Classification Guidelines. *Id.*, Directive 0000: Table of Contents.

<sup>431</sup> *Pro se* prisoners are not considered adequate class representatives and cannot obtain class certification unless they obtain counsel. *See, e.g.,* Craig v. Cohn, 80 F.Supp.2d 944, 946 (N.D.Ind. 2000); Caputo v. Fauver, 800 F.Supp. 168, 170 (D.N.J. 1992) (“Every court that has considered the issue has held that a prisoner proceeding *pro se* is inadequate to represent the interests of his fellow inmates in a class action.”), *aff’d*, 995 F.2d 216 (3rd Cir. 1993).

<sup>432</sup> *See* Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (applying principle of liberal construction of *pro se* pleadings to plaintiffs’ grievances, holding that grievances about placement in “unapproved PC” status encompassed complaints about allegedly unconstitutional conditions in that status).

<sup>433</sup> *See* Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 128 (7<sup>th</sup> Cir. 1989); Miller v. Baltimore Gas & Elec. Co., 202 F.R.D. 195, 206 (D.Md. 2001); *see nn.* 94, 182-187, 205-206, 240-241, 275-280, above, concerning Title VII.

Claims against federal agencies are an exception to this principle because of the explicit requirements of current federal regulations, which prescribe that class claims against federal entities must be pled in the administrative charge essentially as they would be pled in court, Gulley v. Orr, 905 F.2d 1383, 1385 (10<sup>th</sup> Cir. 1990); the “like or related to” standard is not applicable. Wade v. Secretary of the Army, 796 F.2d 1369, 1373 (11<sup>th</sup> Cir. 1986).

EEOC complaints,<sup>434</sup> and the fact that some prison grievance systems actively discourage the framing of grievances in class action terms and the citation of other prisoners' experience.<sup>435</sup>

In cases filed before the PLRA, the post-PLRA joinder of new plaintiffs relates back to the filing of the original complaint, so exhaustion is not required,<sup>436</sup> even if class certification was not sought until after enactment.<sup>437</sup>

When prison officials move to terminate a judgment under the PLRA,<sup>438</sup> prisoners need not exhaust to contest the motion. One court observed: “[The intervening] Plaintiff did not ‘bring’ this action; he is defending it. Requiring the representative prisoner to exhaust his administrative remedies prior to defending a 3626(b) motion would produce an absurd result that is not contemplated by the statute.”<sup>439</sup>

## V. Mental or Emotional Injury

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<sup>434</sup> See §IV. E.8.a, n. 282, above.

<sup>435</sup> For example, the Michigan grievance system makes non-grievable issues that “involve a significant number of prisoners.” *Figel v. Bochard*, 2004 WL 326231 at \*1 (6<sup>th</sup> Cir., Feb. 18, 2004) (unpublished). The New York State grievance regulations, though less extreme, provide:

       *B. Grievances Must Be Personal* - An inmate must be personally affected by the policy or issue he/she is grieving, or must show that he/she will be personally affected by that policy or issue unless some relief is granted or changes made. All grievances must be filed in an individual capacity.

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       *D. Class Actions Not Accepted* - Although there are issues which affect a class of people, they are not grievable as class actions. Class actions are not to be instituted through the grievance procedure. Grievances which are raised in terms of class actions should be referred to the Inmate Liaison Committee. However, individuals personally affected by a matter which affects a class of inmates may file a grievance on their own behalf to effect a change with regard to the written or unwritten policy, regulation, procedure or rule.

Since class action allegations are explicitly disapproved, a prisoner should not be disqualified from representing a class based on their absence from his or her grievance.

<sup>436</sup> *Gomez v. Spalding*, No. Civ 91-0299-S-LMB, Order at 2-3; *Clark v. California*, 1998 WL 242688 at \*3.

<sup>437</sup> *Jones v. Goord*, 2000 WL 290290 at \*3 (S.D.N.Y., Mar. 20, 2000).

<sup>438</sup> See 18 U.S.C. § 3626(b).

<sup>439</sup> *Green v. Peters*, 2000 WL 1230246 at \*5 (N.D.Ill., Aug. 24, 2000).

The PLRA says that “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>440</sup> There is a similar provision amending the Federal Tort Claims Act.<sup>441</sup>

There is probably more confusion about this badly written statute than about any other part of the PLRA. For starters, consider the statutory phrase “*prior* showing of physical injury.” Prior to what? The only grammatically sensible construction is “prior to the action’s being ‘brought,’” but obviously there is no provision or practice for pre-filing proceedings to determine the extent of a potential litigant’s injury. The courts have generally ignored this issue since there is nothing that can be done with it.

A person who has been released from prison is no longer a prisoner, so a suit filed after release is not “brought by a prisoner,” though a few courts have held that § 1997e(e) applies to them notwithstanding its language.<sup>442</sup>

One appeals court has adopted an expansive view of the phrase “in custody,” holding that the statute applies to a claim of arrest without probable cause based on an incident that occurred before, and was unrelated to, the plaintiff’s present incarceration.<sup>443</sup> The same appeals court has held that in a case removed from state court, § 1997e(e) does not apply to claims based solely on state law—implying, but not holding, that federal claims filed in state court are governed by the statute.<sup>444</sup> However, the statute says that “no Federal civil action *may be brought*”<sup>445</sup> for mental or emotional injury without physical injury. In determining whether the statute is retroactive, courts have held that the phrase “may be brought” ties the statute’s applicability to the time when the case is filed.<sup>446</sup> If that is the case, a suit filed in state court is not a “Federal civil action” when brought, so § 1997e(e) should not be applicable to it under any circumstances—and certainly not when the case’s presence in federal court is procured by the adverse party.

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<sup>440</sup> 42 U.S.C. § 1997e(e).

<sup>441</sup> 28 U.S.C. § 1346(b)(2).

<sup>442</sup> See § II, n. 12, above.

<sup>443</sup> *Napier v. Preslicka*, 314 F.3d 528, 532-34 (11<sup>th</sup> Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11<sup>th</sup> Cir. 2003), *cert. denied*, 124 S.Ct. 1038 (2004). This interpretation sharply divided both the panel and the court as a whole. *Id.*, 314 F.3d at 534-37; 331 F.3d at 1190-96.

<sup>444</sup> *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315 (11<sup>th</sup> Cir. 2002).

<sup>445</sup> 42 U.S.C. § 1997e(e) (emphasis supplied).

<sup>446</sup> See *Craig v. Eberly*, 164 F.3d 490, 494-95 (10<sup>th</sup> Cir. 1998); *Swan v. Banks*, 160 F.3d 1258, 1259 (9<sup>th</sup> Cir. 1998).

## 1. What Does the Statute Do?

The most obvious question on the face of § 1997e(e) is what is an “action . . . for mental or emotional injury” and what does a court do when it gets one? The Second Circuit has made matters look simple by construing the statute in a manner that tortures its language and leaves fundamental questions open—though, as it emphasizes, most other circuits have done the same. In *Thompson v. Carter*,<sup>447</sup> the court held:

We agree with the majority of our sister circuits that Section 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury. Because the words “[f]ederal civil action” are not qualified, they include federal civil actions brought to vindicate constitutional rights.<sup>448</sup>

However, the provision

does not prevent a prisoner from obtaining injunctive or declaratory relief. . . . By its terms, it does not limit the prisoner’s right to request injunctive or declaratory relief. Nor should it be read as a general preclusion of all relief if the only injury the prisoner can claim—other than the intangible harm presumed to flow from constitutional injuries—is emotional or mental. Although by reading the statutory language in a distorted fashion, one could conclude that an inmate who can allege only emotional injury cannot bring a federal civil action, the more logical reading of the statute does not preclude injunctive and declaratory relief. Moreover, any ambiguity in the statutory language is cured by its section heading, “Limitation on recovery.” See *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (indicating that although title of statute cannot limit the statute’s plain meaning, it can shed light on otherwise ambiguous language). Both in its text and in its caption, Section 1997e(e) purports only to limit recovery for emotional and mental injury, not entire lawsuits.<sup>449</sup>

The court goes on to adopt the so far unanimous view that § 1997e(e) does not bar injunctive or declaratory relief,<sup>450</sup> and the “majority position” that § 1997e(e) does not limit the availability of

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<sup>447</sup> 284 F.3d 411 (2d Cir. 2002).

<sup>448</sup> *Id.*, 284 F.3d at 417.

<sup>449</sup> *Id.* at 418.

<sup>450</sup> *Id.* at 418. One circuit has held that the statute would be an unconstitutional limitation on judicial remedies for constitutional violations if it did not allow for injunctive relief and contempt sanctions. *Zehner v. Trigg*, 133 F.3d 459, 461-63 (7<sup>th</sup> Cir. 1997). Other courts have held that injunctive and declaratory relief remain available without addressing the constitutional question so

nominal or punitive damages, but only compensatory damages: “Because Section 1997e(e) refers only to claims for mental or emotional suffering, we agree with the majority position.”<sup>451</sup> The court later reiterates that “compensatory damages for actual injury, nominal, and punitive damages remain available,” and for that reason, it need not decide whether it is unconstitutional to deny all damages against defendants against whom injunctive claims are no longer available.<sup>452</sup>

This construction is nonsense, since the statute explicitly says “[n]o . . . action may be brought” and not “no compensatory damages may be recovered”; the court does exactly what *Yeskey* forbade by using the statute’s title to limit its plain meaning. However, it is now established law and must be applied.<sup>453</sup>

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explicitly. *See Harris v. Garner*, 190 F.3d 1279, 1288-89 (11<sup>th</sup> Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970, 972 (11<sup>th</sup> Cir. 2000) (en banc), *cert. denied*, 532 U.S. 1065 (2001); *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C.Cir. 1998).

<sup>451</sup> *Thompson*, 284 F.3d at 418 (citing cases); *accord*, *Royal v. Kautzky*, 375 F.3d 720, 723 (8<sup>th</sup> Cir. 2004); *see Calhoun v. DeTella*, 319 F.3d 936, 943 (7<sup>th</sup> Cir. 2003) (noting that nominal damages “are awarded to vindicate rights, not to compensate for resulting injuries,” and that punitive damages “are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation ‘for’ emotional and mental injury”). Some courts have held that punitive damages are subject to the mental or emotional injury prohibition. *See Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998); *Page v. Kirby*, 314 F.Supp.2d 619, 622 (N.D.W.Va. 2004).

An important corollary of these holdings is that in cases where compensatory damages are restricted by 42 U.S.C. § 1997e(e), notions of proportionality between compensatory and punitive awards cease to be applicable. *Tate v. Dragovich*, 2003 WL 21978141 at \*9 (E.D.Pa., Aug. 14, 2003); *see Williams v. Kaufman County*, 352 F.3d 994, 1012 (5<sup>th</sup> Cir. 2003) (holding that ratios between compensatory and punitive damages are less applicable in § 1983 suits than in other litigation because of the greater frequency of nominal awards under § 1983).

<sup>452</sup> *Id.* at 419.

<sup>453</sup> For what it is worth, in my view the correct analysis of the statute—one which gives effect to the statutory word “action”—would limit its application to cases in which mental or emotional injury is central to or an element of the claim and not merely a potential element of damages. *See Shaheed-Muhammad v. Dipaolo*, 138 F.Supp.2d 99, 107 (D.Mass. 2001) (“Where the harm that is constitutionally actionable *is* physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—§ 1997e(e) does not govern.”); *Seaver v. Manduco*, 178 F.Supp.2d 30, 37-38 (D. Mass. 2002) (applying *Shaheed-Muhammad* to a body cavity search case); *Waters v. Andrews*, 2000 WL 1611126 at \*4 (W.D.N.Y., Oct. 16, 2000) (holding that female prisoner’s Fourth Amendment and Eighth Amendment claims of being placed in a filthy punishment cell, kept in a soiled and bloody paper gown, denied a shower and other personal hygiene measures, and exposed to the view of male correctional staff and construction

## 2. What Is Mental or Emotional Injury?

Aside from its analytical shortcomings, *Thompson v. Carter* fails to resolve a central problem presented by § 1997e(e): what *is* mental or emotional injury? Some courts have made it sound simple, e.g.: “The term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts.”<sup>454</sup> Courts have also recognized a variety of constitutional injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute.<sup>455</sup> However, there remains in my view a deep confusion about the term and its application to intangible constitutional rights, with some courts seeming to categorize the violation of such rights as mental or emotional injury without any actual inquiry into

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workers, were not subject to § 1997e(e) because mental or emotional distress is not an element of either claim).

<sup>454</sup> *Amaker v. Haponik*, 1999 WL 76798 at \*7 (S.D.N.Y., Feb. 17, 1999) (also noting that requiring physical injury in all cases would make the term “mental or emotional injury” superfluous); *accord*, *Robinson v. Page*, 170 F.3d 747, 748 (7<sup>th</sup> Cir. 1999) (“The domain of the statute is limited to suits in which mental or emotional injury is claimed.”)

<sup>455</sup> *Thompson* itself recognizes this point, acknowledging that § 1997e(e) does not bar compensatory damages for the plaintiff’s claim of loss of property. 284 F.3d at 418; *accord*, *Robinson v. Page*, 170 F.3d 747, 748 (7<sup>th</sup> Cir. 1999). Other such interests that courts have acknowledged are neither physical nor emotional in nature include First Amendment rights, *see n.* 322, *below*; a claim of exclusion from an alcohol treatment program in violation of the disability statutes, *Parker v. Michigan Dept. of Corrections*, 2001 WL 1736637 at \*2 (W.D.Mich., Nov. 9, 2001); Fourth Amendment bodily privacy claim and Eighth Amendment conditions of confinement and medical care claims, *see Waters v. Andrews*, 2000 WL 1611126 at \*4 (W.D.N.Y., Oct. 16, 2000); freedom from racial discrimination, *see Mason v. Schriro*, 45 F.Supp.2d 709, 716-20 (W.D.Mo. 1999); access to courts, *see Lewis v. Sheahan*, 35 F.Supp.2d 633, 637 n. 3 (N.D.Ill.1999); freedom from arrest and incarceration without probable cause, *see Friedland v. Fauver*, 6 F.Supp.2d 292, 310 (D.N.J. 1998). In *Armstrong v. Drahos*, 2002 WL 187502 at \*2 (N.D.Ill., Feb. 6, 2002), the court acknowledged that persons alleging Eighth Amendment violations “need show no injury other than the violation itself,” though in such a case, only nominal damages may be recovered.

the nature of the right or the injury.<sup>456</sup> For example, in *Allah v. Al-Hafeez*,<sup>457</sup> cited with apparent approval in *Thompson v. Carter*,<sup>458</sup> the prisoner complained that prison policies prevented him from attending services of his religion, and the court, in the course of holding that he couldn't pursue a compensatory damage claim, simply assumed that the injury for which he sought compensation must be a mental or emotional one.<sup>459</sup> Is not being able to go to church a mental or emotional injury? On its face it is a concrete deprivation that occurs in the real world and not in someone's head, and characterizing it as a mental or emotional injury seems to miss the point of the constitutional protection, which is to protect people's ability to act in the world in particular ways—i.e., their liberty—and not just to protect them from feeling bad. Several courts have recognized that deprivations of First Amendment rights may be cognizable and compensable independent of any mental or emotional effects that they may have; however, they have not done much to explain why.<sup>460</sup>

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<sup>456</sup> Worse, there is a persistent tendency in some courts simply to declare, *e.g.*: “Pursuant to 42 U.S.C. § 1997e(e), there must be a physical injury in order for a prisoner to obtain monetary damages under 42 U.S.C. § 1983.” *Dingler v. Bowles*, 2003 WL 22964269 (N.D.Tex., Dec 12, 2003), *appeal dismissed*, 101 Fed.Appx. 441, 2004 WL 1386303 (5<sup>th</sup> Cir. 2004) (unpublished); *accord, e.g.*, *Rodriguez v. Basse*, 2004 WL 893586 (N.D.Tex., Apr. 27, 2004). In other cases, courts seem to use § 1997e(e) as a handy means of disposing of cases whose allegations they consider insubstantial. *See, e.g.*, *Taylor v. Howards*, 2001 WL 34368927 (N.D.Tex., Jan. 29, 2001), *appeal dismissed*, 268 F.3d 1063 (5<sup>th</sup> Cir.) (unpublished), *cert. denied*, 534 U.S. 1061 (2001).

<sup>457</sup> 226 F.3d 247 (3d Cir. 2000).

<sup>458</sup> 284 F.3d at 417.

<sup>459</sup> *Allah*, 226 F.3d at 250 (“Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”); *see Ashann Ra v. Com. of Va.*, 112 F.Supp.2d 559, 566 (E.D.Va. 2000) (holding that a complaint that a prisoner was routinely viewed in the nude by opposite-sex staff stated a constitutional claim sufficiently clearly established to defeat qualified immunity, but was not actionable because of the mental/emotional injury provision).

<sup>460</sup> *See Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”); *Lipton v. County of Orange, NY*, 315 F.Supp.2d 434, 457 (S.D.N.Y. 2004) (“Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA ‘does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.’”), *quoting Ford v. McGinnis*, 198 F.Supp.2d 363, 366 (S.D.N.Y.2001); *Cancel v. Mazzuca*, 205 F.Supp.2d 128, 138 (S.D.N.Y. 2002) (noting that plaintiff “brought this action, *inter alia*, for alleged violations of his First Amendment rights, rather than ‘for mental or emotional injury.’”).

Demonstrating the same sort of confusion, some courts have held that complaints of exposure to unconstitutional prison living conditions—those that deny the “minimal civilized measure of life’s necessities”<sup>461</sup>—are barred by § 1997e(e) absent allegations of physical injury.<sup>462</sup> Such holdings appear inconsistent with Eighth Amendment doctrine set forth by the Supreme Court, under which it is the objective seriousness of the conditions, and not their effect on the prisoner, that determines their lawfulness.<sup>463</sup> It is questionable whether a claim alleging conditions that are *objectively* intolerable is an “action for mental or emotional injury,” even if such injury (not surprisingly) results from them. In my view, conditions sufficiently bad to violate the Eighth Amendment, and restrictions sufficiently

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<sup>461</sup> Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

<sup>462</sup> See, e.g., Harper v. Showers, 174 F.3d 716, 719-20 (5<sup>th</sup> Cir. 1999) (barring damage claims for placement in filthy cells formerly occupied by psychiatric patients and exposure to deranged behavior of those patients); Stames v. Gillespie, 2004 WL 1003358 at \*9 (D.Kan., Mar. 29, 2004) (holding allegation that segregated prisoner was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with lawyer and family barred by § 1997e(e)); Gibson v. Ramsey, 2004 WL 407025 (N.D.Ill., Jan. 29, 2004) (holding allegations of crowding, noise, bad water and lack of ventilation, unsupported by evidence of physical injury, not to meet the requirements of the mental/emotional injury provision); Hammond v. Briley, 2004 WL 413293 at \*5 (N.D.Ill., Jan. 29, 2004) (holding that lack of a working light in plaintiff’s cell required proof of physical injury to be actionable); Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464 at \*3 (N.D.Cal., Aug. 15, 2002) (holding that prisoner who complained that he was kept in solitary confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week could not seek compensatory damages because he did not allege physical injury); Lynch v. Robinson, 2002 WL 1949731 at \*2 (N.D.Ill., Aug. 22, 2002) (holding restrictions of segregated confinement not actionable without allegation of physical injury). Cf. Jackson v. Carey, 353 F.3d 750, 758 (9<sup>th</sup> Cir. 2003) (holding that an allegation of placement in segregation without due process might be saved from the mental/emotional injury bar by allegations of inadequate medical care in the segregation unit).

A shining exception is *Nelson v. CA Dept of Corrections*, 2004 WL 569529 (N.D.Cal., Mar. 18, 2004), in which the plaintiff complained of being provided only boxer shorts and a T-shirt for outdoor exercise in cold weather. The court said: “Even if Nelson’s complaint does include a request for damages for mental and emotional injury, it also includes a claim for an Eighth Amendment violation as to which the § 1997e(e) requirement does not apply. In other words, damages would be available for a violation of his Eighth Amendment rights without regard to his ability to show physical injury.” *Id.* at \*7.

<sup>463</sup> Wilson v. Seiter, 501 U.S. 294, 303 (1991); see *Helling v. McKinney*, 509 U.S. 25, 35-37 (1993) (instructing as to objective assessment of environmental tobacco smoke exposure); see also *Armstrong v. Drahos*, 2002 WL 187502 at \*2 (N.D.Ill., Feb. 6, 2002) (“Because the Eighth Amendment is understood to protect not only the individual, but the standards of society, the Eighth Amendment can be violated even when no pain is inflicted, if the punishment offends basic standards of human dignity.”)

severe to violate the Due Process Clause or other constitutional rights, should be viewed in terms of their “disamenity” relative to normal or acceptable prison conditions, independent of any mental or emotional injury inflicted.<sup>464</sup>

*Thompson v. Carter* sheds little light on these questions. The alleged deprivation in that case was confiscation of prescribed medication, and the court simply remanded to allow the plaintiff to amend his complaint and clarify what he was asking for. In doing so, it noted that the district court did not know whether the plaintiff sought “actual damages for his loss of property, nominal or punitive damages, damages for a physical injury, or damages solely for an emotional injury without any claim of physical injury.”<sup>465</sup> That comment cannot be construed as even suggesting a position on the deprivation of intangible rights, either deprivations of liberty such as alleged in *Allah v. al-Hafeez* or other First Amendment cases, or conditions cases involving “loss of amenity.” That is because the Eighth Amendment right to medical care is primarily concerned with protecting prisoners from the infliction of needless physical pain and injury.<sup>466</sup>

It follows from the foregoing discussion that *Thompson*’s statement that “Section 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury,”<sup>467</sup> does not answer the question whether prisoners can recover compensatory damages in cases of intangible but real-world injury such as deprivation of religious or other First Amendment rights, or cases involving the “disamenity” of placement in particularly restrictive or inhumane prison conditions. While *Thompson* explicitly rejects any holding that § 1997e(e) is completely inapplicable to any category of constitutional tort, it does not say what the consequences of its application are for those injuries that are not readily categorizable as physical or

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<sup>464</sup> See *Ustrak v. Fairman*, 781 F.2d 573 (7<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 824 (1986). In *Ustrak*, which involved a prisoner wrongfully transferred to a higher-security prison, the court held that “[t]he loss of amenities within prison is a recoverable item of damages,” provable by testimony concerning differences in physical conditions, daily routine, etc.; the court does not mention mental or emotional injury as part of the analysis. 781 F.2d at 578. The court took a similar approach in *Soto v. Lord*, 693 F.Supp. 8 (S.D.N.Y. 1988); it found that the plaintiff had been unconstitutionally placed in punitive segregation, and awarded damages of \$50 a day for the confinement. It treated “distress flowing from the fact of punitive segregation” as a separate item of damages, and awarded only \$1.00 in the absence of record proof of such distress. 693 F.Supp. at 22-23. *But see* *Royal v. Kautzky*, 375 F.3d 720, 724 (8<sup>th</sup> Cir. 2004) (declining to award a prisoner who spent 60 days in segregation “some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights”).

<sup>465</sup> 284 F.3d at 419.

<sup>466</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>467</sup> 284 F.3d at 417.

as mental or emotional.<sup>468</sup> Subsequent case law has not advanced the state of judicial understanding on this point.<sup>469</sup>

One likely factor in the courts' inadequate analysis of the mental/emotional injury analysis question is how little attention they have paid to the general background of tort law—surprisingly, since it is the basis of the law of damages under 42 U.S.C. § 1983,<sup>470</sup> under which most federal court prisoner litigation is brought. Tort principles support a narrow construction of the phrase “mental or emotional injury,” one which does not encompass intangible deprivations of liberty and personal rights.<sup>471</sup> The leading nineteenth-century damages treatise divided damages into six classes: injuries to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation.<sup>472</sup> Following this categorization, in defamation law, mental or emotional injury does not encompass other forms of intangible injury such as damage to reputation or alienation of associates, which are separately cognizable.<sup>473</sup> Similarly, in false imprisonment cases, damages

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<sup>468</sup> In this context, *Thompson's* treatment of *Canell v. Lightner*, 143 F.3d 1210 (9<sup>th</sup> Cir. 1998), is interesting. *Thompson* rejects *Canell's* statement that the statute “does not apply to First Amendment Claims regardless of the form of relief sought.” 284 F.3d at 417 (quoting *Canell*, citation omitted). However, that statement in *Canell* is preceded by the statement that the plaintiff “is not asserting a claim for ‘mental or emotional injury.’ He is asserting a claim for violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.” 143 F.3d at 1213. *Thompson's* holding that § 1997e(e) does apply to First Amendment claims insofar as they seek recovery for mental or emotional injury is not incompatible with a holding that First Amendment violations inflict injury that is neither physical nor mental or emotional.

<sup>469</sup> In *Calhoun v. DeTella*, 319 F.3d 936 (7<sup>th</sup> Cir. 2003), the plaintiff complained of a strip search conducted in the presence of staff members of the opposite sex. The court characterized the claim as one “for an Eighth Amendment violation involving no physical injury,” 319 F.3d at 941, but did not explain its apparent assumption that the injury involved was mental or emotional, even though it acknowledged that some injuries, such as First Amendment violations, are non-physical but not necessarily mental or emotional. *Id.* at 940-41.

<sup>470</sup> *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978).

<sup>471</sup> The following discussion is based on research by Prof. Margo Schlanger of Washington University Law School.

<sup>472</sup> Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 *Sedgwick's Treatise on Damages* 50-51 (8<sup>th</sup> ed. 1891).

<sup>473</sup> *See, e.g.*, Charles T. McCormick, *Handbook on the Law of Damages* 422 (1935) (separating out three components of “general” damages in defamation cases, “injury to reputation,” “loss of business,” and “wounded feelings and bodily suffering resulting therefrom.”); *see also* Linn

are awarded for the loss of liberty wholly apart from any mental or emotional distress, physical injury, or any other category of injury.<sup>474</sup> The Second Circuit has acknowledged this distinction in a recent decision in which the plaintiff prevailed both on his Fourth Amendment claims for unlawful seizure and his state law claims for false imprisonment.<sup>475</sup> The court treated mental and emotional injury as a completely separate category of injury from loss of liberty, stating: “The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours’ loss of liberty.”<sup>476</sup>

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v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 65 (1966) (describing interests in libel cases as covering several categories of damages, “which may include general injury to reputation, consequent mental suffering, alienation of associates, [and] specific items of pecuniary loss”); *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 302 (1977) (distinguishing between state interests in “protection from emotional distress caused by outrageous conduct,” interests in “protection from physical injury, . . . or damage to reputation . . .”).

<sup>474</sup> See *Sedgewick on Damages, supra*, at 70-71 (“For an illegal restraint of the plaintiff’s personal liberty compensation may be recovered. This is something different from either the loss of time or the physical injury or mental suffering caused by the imprisonment.”); *McCormick on Damages, supra*, at 375 (“though only the wrongful detention be pleaded, without any specification of injurious results, the plaintiff can recover for any harm of a sort usually inseparable from such restraint as ‘general’ damage.”); Dan B. Dobbs, *Handbook on the Law of Remedies: Damages, Equity, Restitution* 529 (1st ed. 1973) (“The general damages recoverable . . . do not require specific proof of emotional harm to the plaintiff . . . Thus general damages for assault or false imprisonment and like torts are not dependent upon actual proof of such harm.”); see also, e.g., *Hamilton v. Smith*, 39 Mich. 222 (1878) (distinguishing between available types of damages in a false imprisonment case, which include “the expense of, the plaintiff, if any, in and about the prosecution complained of to protect himself; his loss of time; his deprivation of liberty and the loss of the society of his family; the injury to his fame; personal mortification and the smart and injury of the malicious arts and acts and oppression of the parties”); accord, *Beckwith v. Bean*, 98 U.S. 266, 276 (U.S.1878) (adducing similar list).

<sup>475</sup> *Kerman v. City of New York*, 374 F.3d 93, 121 (2d Cir. 2004).

<sup>476</sup> *Kerman*, 374 F.3d at 125. The court relied on an earlier case in which it had held that, although juries are properly instructed not to award “speculative damages,” the trial court “should have made it clear to the jury that it could award monetary damages—the amount necessarily arbitrary and unprovable—for the intangibles which we have referred to above.” *Id.*, quoting *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027 (1986). *Kerman* also relied extensively on tort cases and did not distinguish between the federal Fourth Amendment claim and the state law false arrest claim in its discussion of damages.

Applying this approach to the impact of 42 U.S.C. § 1997e(e) on prisoners' claims of deprivation of First Amendment or other intangible rights, confinement without due process in settings that drastically restrict the limited liberty of ordinary prison life, or placement under conditions which deprive them of the "minimal civilized measure of life's necessities,"<sup>477</sup> supports the conclusion that most such cases should be viewed in the first instance as claims of deprivation of personal liberty and not primarily as inflictions of mental or emotional injury. To the extent a particular plaintiff asserts mental or emotional injury resulting from such deprivation (*e.g.*, claustrophobia or a stress disorder), damages for that additional injury are not recoverable without a showing of physical injury. There will also be a limited number of cases in which the deprivation consists entirely of the infliction of mental or emotional injury, *e.g.*, the deprivation of psychiatric treatment not resulting in suicide or self-mutilation.<sup>478</sup>

These conclusions are buttressed by another tort analogy. Section 1997e(e) essentially codifies the common law "physical impact" rule, under which negligence plaintiffs may recover for emotional distress only if it is accompanied the negligent infliction of a physical impact.<sup>479</sup> The concerns behind this rule include the view that mental suffering is relatively trivial in most cases, and that evidence of it is "easy to fabricate, hard to controvert."<sup>480</sup> Courts have recognized similar concerns underlying § 1997e(e).<sup>481</sup> At common law, and in cases where the PLRA's physical injury provision applies, the physical injury "in essence, vouch[es] for the asserted emotional injury."<sup>482</sup> But

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<sup>477</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

<sup>478</sup> *See, e.g., Hunnicutt v. Armstrong*, 305 F.Supp.2d 175, 186 (D.Conn. 2004).

<sup>479</sup> *See, e.g., Metro-North Commuter R.Co. v. Buckley*, 521 U.S. 424, 430 (1997) (allowing recovery only if the impact "caused, or might have caused, immediate traumatic harm"); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546-547 (1994); *Lee v. State Farm Mutual Insurance Co.*, 272 Ga. 583, 533 S.E.2d 82, 84 (2000) ("In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.").

<sup>480</sup> Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 Am. L. Reg. 141, 142, 143, 146 (1902).

<sup>481</sup> *See, e.g., Dawes v. Walker* 239 F.3d 489, 496 (2nd Cir. 2001) (Walker, J., special statement) (in structuring § 1997e(e) to preclude prisoners from "recovery" "for mental and emotional injury suffered while in custody without a prior showing of physical injury," Congress looked to the common law of torts); *Zehner v. Trigg*, 952 F.Supp. 1318, 1325 (S.D.Ind.) ("[B]y enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury."), *aff'd*, 133 F.3d 459 (7th Cir. 1997); *Cain v. Virginia*, 982 F.Supp. 1132, 1135 (E.D.Va. 1997); *Kerr v. Puckett*, 967 F.Supp. 354 (E.D.Wis.1997), *aff'd*, 138 F.3d 321 (7th Cir. 1998).

<sup>482</sup> *Dawes v. Walker* 239 F.3d at 496 (Walker, J., special statement).

where a plaintiff has proven, and seeks damages for, a deprivation of liberty or subjection to intolerable conditions of constitutional magnitude, that injury requires no further vouching. In such a case, § 1997e(e) should have no application except to the extent the plaintiff explicitly seeks recovery for psychological injury caused by the constitutional deprivation.<sup>483</sup>

One source of confusion in the application of § 1997e(e) is that intangible constitutional rights are so hard to value, often resulting in awards of nominal damages,<sup>484</sup> and the Supreme Court has cautioned that damage awards cannot be based on the “abstract ‘importance’ of a constitutional right.”<sup>485</sup> Some courts may assume that the only basis for damages in such cases is mental or emotional injury. However, courts have made compensatory awards for violations of First Amendment and other intangible rights based on their particular circumstances and without reference to mental or emotional injury.<sup>486</sup>

### 3. What Is Physical Injury?

The Second Circuit has adopted the view that physical injury, to meet the PLRA threshold, “must be more than *de minimis*, but need not be significant”<sup>487</sup> to overcome the bar of § 1997e(e), and

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<sup>483</sup> This approach is illustrated by the decision in *Soto v. Lord*, discussed in n. 464, above, in which a prisoner unlawfully placed in segregation was compensated for the fact of his confinement but was denied further damages for “distress” in the absence of evidence supporting such an award. Under § 1997e(e), the plaintiff could not have received “distress” damages without evidence of physical injury, but his entitlement to damages for the confinement itself would not have been affected. *See also* *Nelson v. CA Department of Corrections*, cited in n. 462, above.

<sup>484</sup> *Williams v. Kaufman County*, 352 F.3d 994, 1012 (5<sup>th</sup> Cir. 2003) (noting the frequency of nominal awards under § 1983); *see, e.g., Carlo v. City of Chino*, 105 F.3d 493 (9<sup>th</sup> Cir. 1997) (noting nominal award for denial of telephone access to overnight detainee), *cert. denied*, 523 U.S. 1036 (1998); *Sockwell v. Phelps*, 20 F.3d 187 (5<sup>th</sup> Cir. 1994) (noting nominal award for racial segregation).

<sup>485</sup> *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 312-13 (1986).

<sup>486</sup> *See, e.g., Sallier v. Brooks*, 343 F.3d 868, 880 (6<sup>th</sup> Cir. 2003) (affirming jury award of \$750 in compensatory damages for each instance of unlawful opening of legal mail); *Goff v. Burton*, 91 F.3d 1188, 1192 (8<sup>th</sup> Cir. 1996) (affirming \$2250 award at \$10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); *Lowrance v. Coughlin*, 862 F.Supp. 1090, 1120 (S.D.N.Y. 1994) (awarding significant damages for repeated retaliatory prison transfers, segregation, cell searches); *Vanscoy v. Hicks*, 691 F.Supp. 1336 (M.D.Ala. 1988) (awarding \$50 for pretextual exclusion from religious service, without evidence of mental anguish or suffering).

<sup>487</sup> Although a *de minimis* standard has been widely adopted, courts don’t entirely agree on its meaning. One circuit purported to derive it from the Eighth Amendment analysis of use of force in *Hudson v. McMillian*, 503 U.S. 1 (1992); others have said tht this approach misreads *Hudson*.

has held that “alleged sexual assaults,” also described as “intrusive body searches,” “qualify as physical injuries as a matter of common sense” and “would constitute more than de minimis injury.”<sup>488</sup> While the line is far from clear, a variety of injuries short of traumatic tissue damage have been held to meet that standard.<sup>489</sup> On the other hand, some identifiable traumatic injuries have been

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*See* Oliver v. Keller, 289 F.3d 623, 628 (9<sup>th</sup> Cir. 2002) (summarizing controversy). The difference appears mainly relevant to interpretation of the Eighth Amendment rather than § 1997e(e).

<sup>488</sup> Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); *accord*, Kemner v. Hemphill, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002) (holding that sexual assault, “even if considered to be de minimis from a purely physical perspective, is plainly ‘repugnant to the conscience of mankind.’ Surely Congress intended the concept of ‘physical injury’ in § 1997e(e) to cover such a repugnant use of physical force.”); Nunn v. Michigan Dept. of Corrections, 1997 WL 33559323 at \*4 (E.D.Mich. 1997); *see also* Ogden v. Chesney, 2003 WL 22225763 (E.D.Pa., Sept. 17, 2003) (holding plaintiff’s allegation that “prison officials allowed a drug dog to sniff and lick his genitals during a strip search” was sufficient to withstand summary judgment).

<sup>489</sup> *See* Calhoun v. Hargrove, 312 F.3d 730, 735 (5<sup>th</sup> Cir. 2002) (reversing district court’s dismissal without a hearing of allegation that being forced to perform medically contraindicated work caused high blood pressure at near-stroke levels; court should have determined factually whether physical injury had occurred); Perkins v. Kansas Dept. of Corrections, 2004 WL 825299 at \*4 n.2 (D.Kan., Mar. 29, 2004) (holding allegation of progression of HIV infection met physical injury standard); Ziemba v. Armstrong, 2004 WL 78063 at \*3 (D.Conn., Jan. 14, 2004) (holding that allegation of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, met the physical injury requirement); Rinehart v. Alford, 2003 WL 23473098 at \*2 (N.D.Tex., Mar. 3, 2003) (holding that severe headaches and back pain, attributed by the jail nurse to bright 24-hour illumination and sleeping on a narrow bench, sufficiently alleged physical injury); Mansoori v. Shaw, 2002 WL 1400300 at \*3 (N.D.Ill., June 28, 2002) (holding alleged “tenderness and soreness,” for which plaintiff was taken to a hospital for treatment and received a diagnosis of “chest wall injury,” met the standard); Caldwell v. District of Columbia, 201 F.Supp.2d 27, 34 (D.D.C. 2001) (holding that evidence of heat exhaustion, skin rash, and bronchial irritation from smoke inhalation met the PLRA standard; injury need not be serious or lasting); Romaine v. Rawson, 140 F.Supp.2d 204, 214 (N.D.N.Y. 2001) (holding “minor” injuries—three slaps in the face—met the PLRA standard); Wolfe v. Horn, 2001 WL 76332 at \*10 (E.D.Pa., Jan. 29, 2001) (holding physical consequences of withdrawal of hormone treatment to a pre-operative transsexual met physical injury requirement); Williams v. Goord, 2000 WL 1051874 at \*8 n.4 (S.D.N.Y., July 28, 2000) (holding allegation of 28-day denial of exercise sufficiently alleged physical injury). *But see* Davis v. Bowles, 2004 WL 1205182 at \*2 (N.D.Tex., June 1, 2004) (holding an increase in blood pressure to 180/108 and headaches resulting from withholding of prescribed medication did not meet the physical injury threshold), *report and recommendation adopted*, 2004 WL 1381045 (N.D.Tex., June 18, 2004).

dismissed as *de minimis*.<sup>490</sup> One appeals court has said that injury need not be observable, diagnosable, or requiring treatment by a medical care professional to meet the § 1997e(e) standard.<sup>491</sup> One district court has cited dictionary definitions of “physical” as “of or relating to the body,” and “injury” as “an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong,” and has held that a reasonable jury could find that the statute satisfied by exposure to noxious odors, including those of human wastes, and “dreadful” conditions of confinement (including inability to keep clean while menstruating, denial of clothing except for a paper gown, and exposure to prurient ogling by male prison staff and construction workers).<sup>492</sup>

Injury need not be shown by objective evidence.<sup>493</sup> However, the physical manifestations of emotional distress have been held not to be physical injury for purposes of this provision.<sup>494</sup>

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<sup>490</sup> See, e.g., *McDonald v. Smith*, 2003 WL 22208554 (N.D.Tex., Sept. 25, 2003) (holding “large amount of muscle spasm across lumbar sacral area of back” after a use of force did not meet the physical injury requirement); *Luong v. Hatt*, 979 F.Supp. 481, 485-86 (N.D.Tex. 1997) (“A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional”; holding abrasion of arm and chest, contusion and swelling of jaw did not meet that standard.)

<sup>491</sup> *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002).

<sup>492</sup> *Waters v. Andrews*, 2000 WL 1611126 at \*7 (W.D.N.Y., Oct. 16, 2000). *But see Alexander v. Tippah County, Miss.*, 351 F.3d 626, 631 (5th Cir. 2003) (holding that prisoner who vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage suffered only a *de minimis* injury, if any), *cert. denied*, 124 S.Ct. 2071 (2004); *Jarrell v. Seal*, 2004 WL 241712 (E.D.La., Feb. 10, 2004) (holding that a prisoner who alleged he soiled himself after not being allowed to use a toilet was complaining of humiliation and had suffered no physical injury). *Cf. Glaspy v. Malicoat*, 134 F.Supp.2d 890, 894-95 (W.D.Mich. 2001) (treating denial of toilet access to a non-prisoner, with predictable results, as a deprivation of liberty).

<sup>493</sup> *Mansoori v. Shaw*, 2002 WL 1400300 at \*4 (N.D.Ill., June 28, 2002).

<sup>494</sup> *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C.Cir. 1998); *Minifield v. Butikofer*, 298 F.Supp.2d 900, 905 (N.D.Cal., Jan. 7, 2004) (“Physical symptoms that are not sufficiently distinct from a plaintiff’s allegations of emotional distress do not qualify as a prior showing of physical injury.”); *Todd v. Graves*, 217 F.Supp.2d 958, 960 (S.D.Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable); *Cannon v. Burkybile*, 2002 WL 448988 at \*4 (N.D.Ill., Mar. 22, 2002); *McGrath v. Johnson*, 67 F.Supp.2d 499, 508 (E.D.Pa. 1999). *But see Perkins v. Arkansas Dept. of Corrections*, 165 F.3d 803, 807-08 (8th Cir. 1999) (remanding question whether an allegation of mental anguish so severe that it caused physical deterioration and would shorten plaintiff’s life was sufficient under § 1997e(e).)

Decisions are split on the question whether the risk of future injury meets the § 1997e(e) standard.<sup>495</sup>

Courts have disagreed over how closely physical injury must be connected to mental or emotional injury for the latter to be actionable.<sup>496</sup>

## VI. Attorneys' Fees

In actions brought by prisoners,<sup>497</sup> the PLRA restricts fees awarded pursuant to 42 U.S.C. § 1988 to 150% of the Criminal Justice Act rates.<sup>498</sup> Courts have disagreed whether the relevant rate is the rate actually paid (i.e., as limited by available funding) under the CJA or the rate authorized by the Judicial Conference based on inflation.<sup>499</sup> The restrictions do not apply to fees sought on any basis other than 42 U.S.C. § 1988.<sup>500</sup> One court has held that the PLRA rate may be enhanced for excellent

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<sup>495</sup> Compare *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997) (holding exposure to asbestos without claim of damages for physical injury is not actionable) with *Crawford v. Artuz*, 1999 WL 435155 (S.D.N.Y., June 24, 1999) (holding that a claim for asbestos exposure without present physical injury was not barred by the statute because it did not assert mental or emotional injury); see *Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999) (leaving open question whether required physical injury “must be a palpable, current injury (such as lead poisoning) or a present condition not injurious in itself but likely to ripen eventually into a palpable physical injury.”).

<sup>496</sup> Compare *Noguera v. Hasty*, 2001 WL 243535 (S.D.N.Y., Mar. 12, 2001) (holding that allegations of retaliation for reporting a rape by an officer were closely enough related to the rape that a separate physical injury need not be shown) with *Purvis v. Johnson*, 2003 WL 22391226 (5th Cir., Oct. 21, 2003) (unpublished) (holding that a prisoner alleging assault by a staff member could not also pursue a claim for obstruction of the post-assault investigation).

<sup>497</sup> The attorneys' fees restrictions are not limited to cases involving prison conditions. 42 U.S.C. § 1997e(d)(1); see *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 794-95 (11<sup>th</sup> Cir.) (applying PLRA restrictions to prisoner who won a challenge to a new policy concerning parole eligibility hearings), *cert. denied*, 124 S.Ct. 319 (2003). They apply to cases about juvenile institutions. *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 994 (8<sup>th</sup> Cir. 2003).

<sup>498</sup> 42 U.S.C. § 1997e(d)(3); 18 U.S.C. § 3006A; see *Reynolds v. Goord*, 2001 WL 118564 at \*2 (S.D.N.Y., Feb. 13, 2001) (holding less experienced counsel need not be paid less than the statutory rate).

<sup>499</sup> The difference is described in *Johnson v. Daley*, 339 F.3d 582, 584 and n.‡ (7<sup>th</sup> Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 1654 (2004).

<sup>500</sup> See, e.g., *Armstrong v. Davis*, 318 F.3d 965, 973-74 (9<sup>th</sup> Cir. 2003) (holding that fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988); *Edwin G. v. Washington*, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as discovery sanctions were not

results.<sup>501</sup>

Fees must be “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights” to be awarded under the PLRA.<sup>502</sup> This apparently includes all hours spent in the course of litigation where an actual violation is shown as long as they are reasonable.<sup>503</sup> The question of how this provision affects cases that are settled has not been answered by the court; it may be necessary for an attorney seeking fees to establish an “actual violation” in the course of litigating the fee

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subject to PLRA); *Beckford v. Irvin*, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (holding that Americans with Disabilities Act fee provisions are not limited by PLRA).

In cases where fees are generally authorized by 42 U.S.C. § 1988, courts have disagreed whether fees awarded on other bases within the action are limited by the PLRA. *Compare Webb v. Ada County*, 285 F.3d 829, 835 (9<sup>th</sup> Cir.) (holding contempt and discovery motions governed by PLRA limitations, even though they were authorized by separate statute and rule, because they were “directly related” to the underlying § 1983 claims; Congress’s purpose was to reduce the cost to taxpayers of prisoner litigation), *cert. denied*, 537 U.S. 948 (2002) *with* *Edwin G. v. Washington*, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as discovery sanctions were not subject to PLRA). Courts have also taken different approaches in cases where different claims are governed by different fee statutes. *Compare LaPlante v. Superintendent Pepe*, 307 F.Supp.2d 219, 225 (D.Mass. 2004) (holding that where a settlement agreement provided for fees for enforcement under § 1988 (i.e., at market rates), and an enforcement motion also raised an independent § 1983 claim, fees for the “intertwined” claims would be awarded at the higher rate) *with* *Beckford v. Irvin*, 60 F.Supp.2d 85, 88 (W.D.N.Y. 1999) (holding that 50% of fees should be limited to PLRA rates in case where ADA and § 1983 claims were “inextricably intertwined” and counsel estimated they spent half their time on each claim). *See also* *Armstrong v. Davis*, 318 F.3d 965, 974-75 (9<sup>th</sup> Cir. 2003) (holding that district court had discretion to award all fees at market rates in ADA case where a due process § 1983 claim had been added belatedly, comprised a small part of the case, and heavily overlapped the ADA claim).

<sup>501</sup> *Skinner v. Uphoff*, 324 F.Supp.2d 1278, 1287 (D.Wyo. 2004).

<sup>502</sup> 42 U.S.C. § 1997e(d)(1)(A).

<sup>503</sup> *Riley v. Kurtz*, 361 F.3d 906, 916 (6<sup>th</sup> Cir. 2004) (holding fees for defending a judgment are compensable as part of “proving or making certain an actual violation of the prisoner’s rights”); *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 798-99 (11<sup>th</sup> Cir.) (holding “fees on fees” available in case governed by PLRA), *cert. denied*, 124 S.Ct. 319 (2003); *Volk v. Gonzalez*, 262 F.3d 528, 536 (5<sup>th</sup> Cir. 2001) (holding “fees on fees” available under PLRA); *Hernandez v. Kalinowski*, 146 F.3d 196, 199-201 (3d Cir. 1998) (same); *Sallier v. Scott*, 151 F.Supp.2d 836 (E.D.Mich. 2001) (holding time spent on postjudgment motions compensable); *Morrison v. Davis*, 88 F.Supp.2d 799, 810 (S.D. Ohio 2000) (including all in-court and out-of-court time), *amended in part on other grounds*, 195 F.Supp.2d 1019 (S.D. Ohio 2001).

application.<sup>504</sup> Fees are probably not recoverable in cases that are favorably resolved but do not result in an enforceable judgment for the plaintiff.<sup>505</sup>

Fees awarded under this provision must be “proportionately related to the court ordered relief for the violation.”<sup>506</sup> Alternatively, fees may be awarded if they are “directly and reasonably incurred in enforcing the relief ordered for the violation.”<sup>507</sup>

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<sup>504</sup> See *Lozeau v. Lake County, Mont.*, 98 F.Supp.2d 1157, 1168 n.1 and 1170 (D.Mont. 2000) (“Defendants cannot settle a case, promise reform or continued compliance, admit the previous existence of illegal conditions, admit that Plaintiffs’ legal action actually brought the illegal conditions to the attention of those in a position to change them and subsequently allege a failure of proof.”); *Ilick v. Miller*, 68 F.Supp.2d 1169, 1173 n. 1 (D.Nev. 1999).

<sup>505</sup> See *Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that where a case was resolved by a stipulation that did not require the court’s approval and disclaimed defendants’ liability, “it cannot be said that [plaintiff’s] attorneys’ fees were directly and reasonably incurred in proving an actual violation. . . .”); *Siripongs v. Davis*, 282 F.3d 755, 758 (9<sup>th</sup> Cir. 2002) (denying fees where district court had issued a temporary restraining order, found “serious questions” and a reasonable likelihood of success on the merits, but no finding or concession of liability was ever made and the court said the record didn’t support an independent conclusion to that effect). *But see Weaver v. Clarke*, 933 F.Supp. 831, 836 (D.Neb. 1996), *aff’d*, 120 F.3d 852 (8th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998) (finding fees incurred in “proving an actual violation” where the plaintiff obtained a finding of likelihood of success on the merits but no actual preliminary injunction, and defendants then ended the challenged practice).

<sup>506</sup> 42 U.S.C. § 1997e(d)(1)(B)(i); see *Dannenbergh v. Valadez*, 338 F.3d 1070, 1075-76 (9th Cir. 2003) (stating that this standard is equivalent to the analysis of degree of success governing non-prison attorneys’ fees proceedings). Courts have not held anything less than 150% of damages awarded to be disproportionate to the relief. See *Farella v. Hockaday*, 304 F.Supp.2d 1076, 1079 (C.D.Ill. 2004) (awarding \$1500 in fees on a \$1000 judgment; noting that “proportionately related” does not mean fees less than the judgment, and that the PLRA contemplates awards of up to 150% of the damages); *Cole v. Lomax*, 2001 WL 1906275 at \*2 (W.D.Tenn., Sept. 26, 2001) (awarding \$38,000 in fees as proportionate to a \$25,364 judgment, noting (erroneously) that it is within the 150% limit of the PLRA); *Sutton v. Smith*, 2001 WL 743201 (D.Md., June 26, 2001) (holding \$9400 in fees proportionate to a \$19,000 judgment in a use of force case); *Morrison v. Davis*, 88 F.Supp.2d 799, 810 (S.D. Ohio 2000) (holding \$54,000 in fees was not disproportionate to a \$15,000 jury award, though noting that the fee award was reduced under the 150% limit).

“Court-ordered relief” may be broadly defined; in one unreported case, the Ninth Circuit held that actions taken by prison officials that were not directly ordered, but were “ultimately required by the district court’s finding” on plaintiff’s legal claim, the attorneys’ fee award should reflect those actions. *Bruce v. Mueller*, 2003 WL 21259784 at \*1 (9<sup>th</sup> Cir., May 30, 2003) (unreported).

<sup>507</sup> 42 U.S.C. § 1997e(d)(1)(B)(ii); see *Cody v. Hillard*, 304 F.3d 767, 776 (8th Cir. 2002); *Webb v. Ada County*, 285 F.3d 829, 834-35 (9<sup>th</sup> Cir. 2002) (holding that postjudgment monitoring

Up to 25% of money judgments must be used to satisfy attorneys' fees claims.<sup>508</sup> Defendants cannot be made to pay fees greater than 150% of a money judgment,<sup>509</sup> even if their actions cause the fees to increase.<sup>510</sup> When the plaintiff obtains injunctive relief as well as damages, the 150% limit is either inapplicable or applicable only to those hours expended solely for the purpose of obtaining damages.<sup>511</sup>

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and enforcement are compensable without necessity of proving a new constitutional violation).

<sup>508</sup> 42 U.S.C. § 1997e(d)(2); *see* *Farella v. Hockaday*, 304 F.Supp.2d 1076, 1081 (C.D.Ill. 2004) (“The section’s plain language sets forth 25% as the maximum, not the mandatory amount.”). The court in *Farella* explained that the 10% contribution it required was high enough to reflect the jury’s failure to award punitive damages but low enough to reflect the plaintiff’s *pro se* status, the fact that *pro bono* counsel was appointed, the seriousness of the constitutional violation, and the plaintiff’s significant injury. *Accord*, *Surprenant v. Rivas*, 2004 WL 1858316 at \*5 (D.N.H., Aug. 17, 2004) (requiring plaintiff to pay much less than 25%); *Hutchinson v. McCabe*, 2001 WL 930842 at \*8 n.11 (S.D.N.Y., Aug. 15, 2001) (holding that the court has discretion to apply less than 25% of plaintiff’s recovery); *Morrison v. Davis*, 88 F.Supp.2d 799, 811-13 (S.D. Ohio 2000) (applying only \$1.00 of plaintiff’s judgment against recovery). *Contra*, *Johnson v. Daley*, 339 F.3d 582, 584-85 (7<sup>th</sup> Cir. 2003) (en banc) (holding that the first 25% of the recovery must be applied to attorneys’ fees, and only if that sum is inadequate to cover the fees do the defendants pay anything) (dictum), *cert. denied*, 124 S.Ct. 1654 (2004); *Jackson v. Austin*, 267 F.Supp.2d 1059, 1071 (D.Kan. 2003) (holding that 25% of the plaintiff’s recovery must be applied to fees). *But see* *Johnson v. Daley*, 2003 WL 23274532 at \*1 (W.D.Wis., Sept. 26, 2003) (requiring plaintiff to pay only \$200 of a \$40,000 jury award).

<sup>509</sup> 42 U.S.C. § 1997e(d)(2); *see* *Boivin v. Black*, 225 F.3d 36 (1<sup>st</sup> Cir. 2000) (holding fees limited to \$1.50 where plaintiff recovered only \$1.00 in nominal damages). *But see* *Torres v. Walker*, 356 F.3d 238, 243 (2<sup>d</sup> Cir. 2004) (holding that the 150% cap does not apply to a case resolved by a “so ordered” stipulation, since there is no “monetary judgment”); *accord*, *Romaine v. Rawson*, 2004 WL 1013316 at \*3 (N.D.N.Y., May 6, 2004).

<sup>510</sup> *Riley v. Kurtz*, 361 F.3d 906, 917 (6<sup>th</sup> Cir. 2004) (holding that plaintiff was not entitled to attorneys’ fees beyond the 150% cap for defending against an unsuccessful appeal).

<sup>511</sup> In *Dannenberg v. Valadez*, 338 F.3d 1070, 1074-75 (9<sup>th</sup> Cir. 2003), the most extensive discussion of this subject, the court convincingly harmonized the 150% limit with the provision that fees must be “proportionately related to the court ordered relief” by holding that the 150% limit applies only to the portion of total fees that was incurred solely in order to obtain money damages; fees incurred to obtain injunctive relief are compensable even if the plaintiff also obtained monetary relief. *See also* *Walker v. Bain*, 257 F.3d 660, 667 n.2 (6<sup>th</sup> Cir. 2001) (noting that 150% limit is inapplicable to cases involving injunctions), *cert. denied*, 535 U.S. 1095 (2002); *Boivin v. Black*, 225 F.3d 36, 41 n.4 (1<sup>st</sup> Cir. 2000) (same); *Carbonell v. Acrish*, 154 F.Supp.2d 552, 566 (S.D.N.Y. 2001) (same).

Courts have rejected arguments that the attorneys' fees restrictions deny equal protection.<sup>512</sup>

## VII. Filing Fees and Costs

Prisoners proceeding *in forma pauperis* are now required to pay filing fees in installments according to a statutory formula.<sup>513</sup> This requirement has been upheld as constitutional; courts have relied on the "savings clause" of 28 U.S.C. § 1915(b)(4), which says that prisoners shall not be prevented from filing or appealing because of lack of funds.<sup>514</sup> Courts have disagreed about the apportionment of the fee obligation among multiple plaintiffs.<sup>515</sup> Prisoners proceeding *in forma pauperis* who are released after filing are treated like other litigants and are not required to continue

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<sup>512</sup> *Johnson v. Daley*, 339 F.3d 582 (7<sup>th</sup> Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 1654 (2004); *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 796-98 (11<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 319 (2003); *Foulk v. Charrier*, 262 F.3d 687, 704 (8<sup>th</sup> Cir. 2001) (upholding cap of 150% of damages); *Walker v. Bain*, 257 F.3d 660 (6<sup>th</sup> Cir. 2001) (same as *Foulk*), *cert. denied*, 535 U.S. 1095 (2002); *Hadix v. Johnson*, 230 F.3d 840 (6<sup>th</sup> Cir. 2000) (upholding limit on hourly rates); *Boivin v. Black*, 225 F.3d 36 (1<sup>st</sup> Cir. 2000) (same as *Foulk*); *Carbonell v. Acrish*, 154 F.Supp.2d 552, 562-64 (S.D.N.Y. 2001) (upholding 150% limit).

<sup>513</sup> 28 U.S.C. § 1915(b)(1-2); *see Lebron v. Russo*, 263 F.3d 38, 42 (2d Cir. 2001) (holding that prisoners must pay separately for each appeal and cannot obtain refunds for appeals made necessary by district court errors); *Goins v. Decaro*, 241 F.3d 264 (2d Cir. 2001) (holding fees may not be refunded or cancelled when a notice of appeal is withdrawn).

<sup>514</sup> *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997), *cert. denied*, 523 U.S. 1126 (1998); *see Taylor v. Delatoor*, 281 F.3d 844, 850 (9<sup>th</sup> Cir. 2002) (holding that dismissal was improper where the plaintiff failed to pay the initial filing fee because he didn't have the money).

<sup>515</sup> One court has held that "each prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court . . . may impose shall be equally divided among all the prisoners." *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1137-38 (6<sup>th</sup> Cir.1997). Another recent decision holds that "the filing fee obligation is joint and several. If the parties pay the entire fee, they may divide it up between them as they see fit and it is of no concern to the court. When the parties don't pay the entire fee, all are obligated for the entire amount of the filing fee until it has been paid in full, even if the burden falls on a few of them unequally." *Alcala v. Woodford*, 2002 WL 1034080 at \*1 (N.D.Cal., May 21, 2002). A third recent decision holds that prisoners joining similar claims in a single suit not only must each pay a filing fee, but must each file a separate complaint. *Hubbard v. Haley*, 262 F.3d 1194, 1197 (11<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002); *accord*, *Clay v. Rice*, 2001 WL 1380526 (N.D.Ill., Nov. 5, 2001) (following *Hubbard*). This extraordinary holding that the PLRA overturns the federal joinder rules is unsupported by statutory language or history or, in my view, by any discernible logic. *See Burke v. Helman*, 208 F.R.D. 246, 247 (C.D.Ill. 2002) (rejecting *Hubbard* holding). *But see Boriboune v. Berge*, 2004 WL 502033 at \*4 (W.D.Wis., Mar. 8, 2004) (giving some credence to *Hubbard*).

paying fees.<sup>516</sup>

Prisoners are required to provide certified statements of their prison accounts.<sup>517</sup> A complaint should not be dismissed for prison officials' failure to provide the necessary information,<sup>518</sup> or without determining whether the prisoner has done what he or she can to follow the procedures.<sup>519</sup> Refusal by prison officials to provide the required information would violate the right of access to courts.<sup>520</sup> Prisoners may not be prohibited from bringing an action because they owe fees on a prior action.<sup>521</sup> The Second Circuit has held that no more than one fee, plus one award of costs, may actually be collected at one time.<sup>522</sup>

Assessed costs must be paid in full in the same manner as filing fees.<sup>523</sup> However, courts retain their pre-PLRA discretion to assess or refrain from assessing costs against indigent prisoners.<sup>524</sup>

### **VIII. Three Strikes Provision**

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<sup>516</sup> DeBlasio v. Eggleston, 315 F.3d 396, 399 (4th Cir. 2003) (citing cases); McGann v. Comm'r, Soc. Sec. Admin., 96 F.3d 28, 29-30 (2d Cir.1996).

<sup>517</sup> Spaight v. Makowki, 252 F.3d 78 (2d Cir. 2001) (holding that account information should be produced for the six months preceding the notice of appeal, not the *in forma pauperis* motion).

<sup>518</sup> McGore v. Wigglesworth, 114 F.3d 601, 607-08 (6<sup>th</sup> Cir. 1997).

<sup>519</sup> Hatchett v. Nettles, 201 F.3d 651 (5<sup>th</sup> Cir. 2000); *accord*, Redmond v. Gill, 352 F.3d 801,803-04 (3rd Cir. 2003) (vacating dismissal where prisoner failed to meet a 20-day deadline for authorizing deduction of fees from his prison account; it was not clear whether he received the order, or received it in time to comply); Cosby v. Meadors, 351 F.3d 1324, 1331-32 (10th Cir. 2003) (agreeing that courts must ascertain whether prisoners sought to comply with orders to authorize fee payments before dismissing, rejecting plaintiff's claim on the merits), *cert. denied*, 124 S.Ct. 2109 (2004).

<sup>520</sup> Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464 at \*12 (N.D.Cal., Aug. 15, 2002).

<sup>521</sup> Walp v. Scott, 115 F.3d 308 (5<sup>th</sup> Cir. 1997).

<sup>522</sup> Whitfield v. Scully, 241 F.3d 264, 275-78 (2d Cir. 2001). *Contra*, Atchison v. Collins, 288 F.3d 177, 180-81 (5<sup>th</sup> Cir. 2002).

<sup>523</sup> 28 U.S.C. § 1915(f)(2); *see* Whitfield v. Scully, 241 F.3d at 278 (holding that only one award of costs may be collected at one time).

<sup>524</sup> Whitfield v. Scully, 241 F.3d at 273; Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000).

A prisoner who has had three cases dismissed as frivolous, malicious, or failing to state a claim for relief may not proceed *in forma pauperis* in a civil action unless the prisoner is under imminent danger of serious physical injury.<sup>525</sup> That means if they can't pay the whole fee up front, they're out of court<sup>526</sup>—though some courts have held that, having filed the action or appeal, they have to pay the filing fee in installments even if they don't get anything for their fee.<sup>527</sup>

“Strikes” comprise only actions dismissed for the reasons stated in the statute. Failure to exhaust administrative remedies is not one of them,<sup>528</sup> though a number of courts outside the Second Circuit have engaged in strained reasoning to label such dismissals as strikes.<sup>529</sup> Partial dismissal on

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<sup>525</sup> 28 U.S.C. § 1915(g).

<sup>526</sup> One recent decision says, notwithstanding the statutory language, that district courts have the discretion to allow a litigant with three strikes to pay fees over time. *Dudley v. U.S.*, \_\_\_ Fed.Cl. \_\_\_, 2004 WL 1918707 at \*3 (Fed.Cl., Aug 12, 2004). It is also the case that a timely notice of appeal confers appellate jurisdiction even if the filing fee is not tendered timely. *Daly v. U.S.*, 2004 WL 1701062 at \*2 (10<sup>th</sup> Cir., July 30, 2004) (unpublished), and cases cited. To what extent this may allow litigants with three strikes to make arrangements to pay the filing fee when they have the money has not been explored.

<sup>527</sup> *See Simmons v. Frank*, 2003 WL 23144925 at \*1 (W.D.Wis., Aug. 18, 2003); *McSwain v. Wallintin*, 2003 WL 23138750 (W.D.Wis., Apr. 4, 2003) (holding that the order to that effect can be appealed without prepaying the *appellate* filing fee); *see also Tibbs v. Cockrell*, 2004 WL 57382 (5<sup>th</sup> Cir., Jan. 13, 2004) (holding appeal of prisoner with three strikes frivolous on merits even though the prisoner had three strikes; he moved for IFP status in the appeals court, was granted it despite having three strikes, and then the court examined the merits).

<sup>528</sup> *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (stating that dismissal for failure to exhaust is not a strike); *Smith v. Duke*, 296 F.Supp.2d 965 (E.D.Ark. 2003) (same).

<sup>529</sup> *But see Rivera v. Allin*, 144 F.3d 719, 731 (11<sup>th</sup> Cir. 1998) (stating in dictum that dismissal for non-exhaustion is “tantamount to” dismissal for failure to state a claim), *cert. dismissed*, 524 U.S. 978 (1998); *Ostrander v. Dennis*, 2004 WL 1047642 at \*1 (N.D.Tex., May 10, 2004) (“ . . . [T]he Court finds persuasive the reasoning . . . in *Rivera v. Allin*, . . . . By filing claims on which administrative remedies had not been exhausted, plaintiff asserted claims that were ‘premature as a matter of law’ and, therefore, subject to being counted as ‘strikes’ under the PLRA.”); *Wallmark v. Johnson*, 2003 WL 21488141 at \*1 (N.D.Tex., Apr. 28, 2003) (holding that a prisoner who failed to exhaust sought relief to which he was not entitled and his claim was therefore frivolous); *Cook v. Supt. Hosity*, 2001 WL 293142 (N.D.Ill., Mar. 23, 2001) (directing prisoner to submit documentation of exhaustion on pain of dismissal of unexhausted claims and assessment of a strike); *see also Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10<sup>th</sup> Cir. 2003) (stating in dictum that a dismissal for non-exhaustion may constitute a strike, without explaining why or when), *pet. for cert. filed* (U.S., Apr. 26, 2004); *Millsap v. Jefferson County*, 2003 WL 23021406 at \*1 (8<sup>th</sup> Cir., Dec. 23, 2003) (unreported) (holding that a failure to allege exhaustion

the enumerated grounds is not a strike.<sup>530</sup> Appeals count as strikes only if they are “dismissed . . . [as] frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted.”<sup>531</sup> Mere affirmance of the district court is not a strike.<sup>532</sup> Strikes include dismissals that antedate the PLRA.<sup>533</sup>

The Second Circuit has held persuasively that whether a dismissal is a strike should be determined at the point when it makes a difference, i.e., when the court must decide whether a prisoner is barred from proceeding *in forma pauperis*.<sup>534</sup> The practice in some courts has been to the contrary, without any apparent serious consideration of the question.<sup>535</sup>

“A dismissal should not count against a petitioner until he has exhausted or waived his appeals.”<sup>536</sup> If a finding of frivolousness is reversed on appeal, the strike is of course eliminated.<sup>537</sup> Of course, a prisoner who has three strikes cannot proceed *in forma pauperis* on appeal under the statute’s literal language, leading some courts to hold that IFP status should be available for an appeal

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should count as a strike because it is a failure to state a claim, while actual failure to exhaust contrary to the complaint’s allegations should not).

<sup>530</sup> See *Boriboune v. Litscher*, 2003 WL 23208940 (W.D.Wis., Feb. 24, 2003) (holding that dismissal was not a strike; though federal claim was dismissed for failure to state a claim, state law claim was not dismissed on the merits), *aff’d*, 2003 WL 23105329 (7th Cir., Dec. 29, 2003); *Barela v. Variz*, 36 F.Supp.2d 1254, 1259 (S.D.Cal. 1999) (partial dismissal is not a strike).

<sup>531</sup> See *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998), *overruled in part on other grounds*, *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000), *cert. denied*, 531 U.S. 1029 (2000).

<sup>532</sup> *Jennings v. Natrona County Detention Center*, 175 F.3d 775, 780 (10th Cir. 1999); *Patton v. Jefferson Correctional Center*, 136 F.3d 458, 464 (5th Cir. 1998).

<sup>533</sup> *Welch v. Galie*, 207 F.3d 130 (2d Cir. 2000).

<sup>534</sup> *Deleon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004).

<sup>535</sup> See, e.g., *Hill v. Cockrell*, 71 Fed.Appx. 390, 2003 WL 21976270 (5<sup>th</sup> Cir. 2003) (declaring two strikes); *Rainey v. Bruce*, 74 Fed.Appx. 8, 2003 WL 21907609 (10<sup>th</sup> Cir. 2003) (declaring two strikes). Sometimes a court’s practice and its prior statements of law are in conflict. Compare *De La Garza v. De La Garza*, 2004 WL 363353 (7th Cir., Feb. 19, 2004) (declaring dismissal not a strike) with *Lucien v. Jockisch*, 133 F.3d 464, 469 n. 8 (7th Cir.1998) (“The time to tally up Lucien's previous strikes is when Lucien has an action before the court to which § 1915(g) might apply.”)

<sup>536</sup> *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996); *accord*, *Jennings v. Natrona County Detention Center*, 175 F.3d at 780 n. 3.

<sup>537</sup> *Jennings*, 175 F.3d at 780; *Adepegba*, 103 F.3d at 387.

of a third strike determination.<sup>538</sup> The Seventh Circuit has disagreed on a technical and procedural basis, holding that district courts should not grant IFP because prisoners have “a perfectly good remedy” for this problem in the appeals court itself: seek IFP status from the appeals court, which in the course of deciding whether the prisoner actually does have three strikes will review the correctness of the district court’s determination, at least to the extent of determining whether the appeal should be allowed to go forward.<sup>539</sup> This hyper-technical rule, while satisfying the court’s concern with formal compliance with the statute, will create a technical trap for uncounselled and unsophisticated litigants while serving no actual useful purpose for the judicial system.

The three strikes provision cannot be applied to revoke *in forma pauperis* status in a case filed before the plaintiff had three strikes, since the statute is a limit on prisoners’ ability to “bring” suit, not on their ability to maintain suits previously brought.<sup>540</sup>

A prisoner who is in “imminent danger of serious physical injury” may proceed *in forma pauperis* notwithstanding the three strikes provision.<sup>541</sup> A credible allegation of imminent danger of serious physical injury meets the statutory requirement.<sup>542</sup> If the allegations are disputed, the court may hold a hearing or rely on affidavits and depositions to resolve the question.<sup>543</sup> The danger must exist at the time the complaint is filed.<sup>544</sup> If a plaintiff’s allegations meet the statutory

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<sup>538</sup> Jennings, 175 F.3d at 779-80; Adepegba v. Hammons, 103 F.3d at 387.

<sup>539</sup> Robinson v. Powell, 297 F.3d 540, 541 (7<sup>th</sup> Cir. 2002).

<sup>540</sup> Cruz v. Marcial, 2002 WL 655520 (D.Conn., Apr. 18, 2002). *Contra*, Nichols v. Rich, 2004 WL 743938 at \*2 (N.D.Tex., Apr. 7, 2004) (citing goals of the statute but not addressing its actual language), *report and recommendation adopted*, 2004 WL 1119689 (N.D.Tex., May 18, 2004).

<sup>541</sup> 28 U.S.C. § 1915(g).

<sup>542</sup> Ciarpiaglini v. Saini, 352 F.3d 328, 330-31 (7<sup>th</sup> Cir. 2003) (holding allegations of panic attacks leading to heart palpitations, chest pains, labored breathing, choking sensations, and paralysis meet the imminent danger standard; describing standard as “amorphous,” disapproving extensive inquiry into seriousness of allegations at pleading stage).

<sup>543</sup> Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997); *accord*, White v. State of Colorado, 157 F.3d 1226, 1232 (10<sup>th</sup> Cir. 1998), *cert. denied*, 526 U.S. 1008 (1999).

<sup>544</sup> *See* Heimermann v. Litscher, 337 F.3d 781, 782 (7<sup>th</sup> Cir. 2003); Martin v. Shelton, 319 F.3d 1048, 1050 (8<sup>th</sup> Cir. 2003); Malik v. McGinnis, 293 F.3d 559, 562-63 (2<sup>d</sup> Cir. 2002); Abdul-Akbar v. McKelvie, 239 F.3d 307, 313-16 (3<sup>d</sup> Cir. 2000), *cert. denied*, 533 U.S. 953 (2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11<sup>th</sup> Cir. 1999) and cases cited. *But see* Lewis v. Sullivan, 279 F.3d 526, 531 (7<sup>th</sup> Cir. 2002) (holding exception available “[w]hen a threat or prison condition is real and proximate, and when the potential consequence is ‘serious physical injury’”);

standard, the relevant claim should be allowed to go forward without being restricted to the precise defendants and allegations currently responsible for the danger.<sup>545</sup>

To meet the “serious physical injury” requirement, injury need not be so serious as to violate the Eighth Amendment in itself.<sup>546</sup> The risk of future injury is sufficient to invoke the imminent danger exception.<sup>547</sup> Actions exposing a prisoner to the risk of assault from other prisoners invoke the imminent danger exception.<sup>548</sup> One court has held that self-inflicted injury cannot meet this standard because “[e]very prisoner would then avoid the three strikes provision by threatening suicide.”<sup>549</sup> This statement is extreme and unwarranted. Many prison suicides and attempted suicides result directly from serious mental illness,<sup>550</sup> and barring from court mentally ill prisoners seeking treatment for their mental illness or other measures to ameliorate its risks would be callous and life-threatening.

Challenges to the constitutionality of the three strikes provision have generally been

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U.S. v. Tokash, 282 F.3d 962, 971 (7<sup>th</sup> Cir.) (holding that “imminence” under the PLRA may not be as narrowly defined as in the context of a justification defense to criminal charges), *cert. denied*, 535 U.S. 1119 (2002).

<sup>545</sup> *Ciarpiaglini v. Saini*, 352 F.3d 328, 330 (7<sup>th</sup> Cir. 2003) (holding damages claim could go forward even though injunctive claim on which “imminent danger” allegation was based was moot); *Bond v. Aguinaldo*, 228 F.Supp.2d 918, 919 (N.D.Ill. 2002) (allowing prisoner’s medical care claim to go forward, including allegations against defendants responsible for medical care at prisons from which he had been transferred). *But see* *McAlphin v. Toney*, 375 F.3d 753 (8<sup>th</sup> Cir. 2004) (holding that a complaint that satisfies the imminent danger exception cannot be amended to include claims that don’t involve imminent danger).

<sup>546</sup> *Gibbs v. Cross*, 160 F.3d 962, 966-67 (3<sup>rd</sup> Cir. 1998).

<sup>547</sup> *Id.* (relying on alleged environmental hazards in prison); *see* *McAlphin v. Toney*, 281 F.3d 709, 711 (8<sup>th</sup> Cir. 2002) (holding that a prisoner who alleged that he was transferred to a prison without adequate dental facilities while in the midst of a course of dental treatment, and dental infection was spreading in his mouth, sufficiently pled imminent danger of serious physical injury).

<sup>548</sup> *Gibbs v. Roman*, 116 F.3d at 85-86; *Ashley v. Dilworth*, 147 F.3d 715, 717 (8<sup>th</sup> Cir. 1998) (alleging prison officials placed plaintiff in proximity with known enemies).

<sup>549</sup> *Wallace v. Cockrell*, 2003 WL 21418639 at \*3 (N.D.Tex., Mar 10, 2003), *approved as supplemented*, 2003 WL 21447831 N.D.Tex., Mar. 27, 2003).

<sup>550</sup> *See, e.g.,* *Sanville v. McCaughtry*, 266 F.3d 724 (7<sup>th</sup> Cir. 2001); *Eng v. Smith*, 849 F.2d 80 (2<sup>d</sup> Cir. 1988).

unsuccessful.<sup>551</sup> Some district courts have held the provision unconstitutional.<sup>552</sup>

In my view the statute is unconstitutional. The appellate cases have ignored prior authority striking down overbroad restrictions on filing lawsuits, including denial of access to *in forma pauperis* procedures, as violating the right of access to courts.<sup>553</sup>

The courts have also failed to address the statute's constitutionality in light of standard First Amendment doctrine. The right of court access "is part of the right of petition protected by the First Amendment."<sup>554</sup> As such, it is "generally subject to the same constitutional analysis" as is the right to free speech.<sup>555</sup> Because the three strikes provision addresses the conduct of litigation in court and not the internal operations of prisons, it is governed by the same First Amendment standards as other "free world" free speech claims.<sup>556</sup> This body of law includes a principle of narrow tailoring.<sup>557</sup>

Applying that narrow tailoring principle, the Supreme Court said that public officials could not recover damages for defamation unless the statements they sued about were knowingly false or made with reckless disregard for their truth; the First Amendment requires "breathing space," and a

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<sup>551</sup> See, e.g., *Lewis v. Sullivan*, 279 F.3d at 528-31 (7<sup>th</sup> Cir. 2002); *Higgins v. Carpenter*, 258 F.3d 797, 801 (8<sup>th</sup> Cir. 2001), *cert. denied*, 535 U.S. 1040 (2002); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9<sup>th</sup> Cir. 1999).

<sup>552</sup> See *Lewis v. Sullivan*, 135 F.Supp.2d 954 (W.D.Wis. 2001), *rev'd*, 279 F.3d 526 (7<sup>th</sup> Cir. 2002); *Ayers v. Norris*, 43 F.Supp.2d 1039, 1050-51 (E.D.Ark. 1999) (applying equal protection strict scrutiny where prisoner would be barred from court on a claim asserting a fundamental right), *overruled*, *Higgins v. Carpenter*, *supra*; *Lyon v. Krol*, 940 F.Supp. 1433 (S.D.Iowa 1996) (similar rationale), *appeal dismissed and remanded*, 127 F.3d 763, 765 (8<sup>th</sup> Cir. 1997) (finding lack of standing).

<sup>553</sup> See *DeLong v. Hennessey*, 912 F.2d 1144, 1148 (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1001 (1990); *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3<sup>d</sup> Cir. 1990); *Matter of Davis*, 878 F.2d 211, 212-13 (7<sup>th</sup> Cir. 1989); *In re Powell*, 851 F.2d 427, 431-34 (D.C.Cir. 1988); *Abdullah v. Gatto*, 773 F.2d 487, 488 (2<sup>d</sup> Cir. 1988).

<sup>554</sup> *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

<sup>555</sup> *Wayte v. U.S.*, 470 U.S. 598, 610 n. 11 (1985). Indeed, the Supreme Court has stated the matter more directly and acknowledged that advocacy in litigation *is* speech. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542-43 (2001).

<sup>556</sup> *Cf. Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989).

<sup>557</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

margin for error is required for inadvertently false speech, or true speech will be deterred.<sup>558</sup> This principle has also been applied in antitrust and labor law enforcement; sanctions may not be imposed under the relevant statutes against persons who bring litigation unless the litigation is both objectively and subjectively baseless.<sup>559</sup>

Applied to the three strikes provision, the “breathing space” principle means that prisoners can only be sanctioned for knowing falsehood or intentional abuse of the judicial system—a category far narrower than the scope of § 1915(g). A sanction that penalizes lay persons proceeding *pro se*—and in some cases results in barring them from court—for honest mistakes of law will have the same inhibiting effect on meritorious claims that an overbroad law of defamation would have on true speech about public officials.

### **IX. Screening and Dismissal**

Three overlapping provisions of the PLRA, taken together, extend the courts’ powers of summary dismissal by requiring the early screening of prisoner cases and extending the courts’ authority to dismiss cases *sua sponte* to include cases that do not state a claim or that seek damages from an immune defendant, as well as those that are frivolous or malicious,<sup>560</sup> regardless of whether they are *in forma pauperis* or fee paid.<sup>561</sup>

The Second Circuit has rejected the view, accepted by some courts, that the PLRA ends the former practice of allowing *pro se* litigants to amend their complaints to avoid dismissal.<sup>562</sup> The PLRA also does not affect the rule that a court reviewing a complaint must accept as true all allegations of material fact and construe them in the light most favorable to the plaintiff, or the rule that courts must construe *pro se* pleadings liberally.<sup>563</sup>

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<sup>558</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>559</sup> *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

<sup>560</sup> 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1); *see Vanderberg v. Donaldson*, 259 F.3d 1321 (11<sup>th</sup> Cir. 2001), *cert. denied*, 535 U.S. 976 (2002).

<sup>561</sup> *Plunk v. Givens*, 234 F.3d 1128 (10<sup>th</sup> Cir. 2000).

<sup>562</sup> *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794, 795-96 (2d Cir. 1999); *accord*, *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (3d Cir. 2002) (addressing 28 U.S.C. § 1915(e)(2)); *Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000).

<sup>563</sup> *See Resnick v. Hayes*, 213 F.3d 443, 446 (9<sup>th</sup> Cir. 2000); *Gomez v. USAA Federal Savings Bank*, 171 F.3d at 795-96.

The standard of appellate review under the PLRA screening provisions has not been decided in the Second Circuit.<sup>564</sup>

## **X. Waiver of Reply**

The PLRA allows defendants in prisoner cases to “waive the right to reply.” “No relief shall be granted to the plaintiff unless a reply has been filed.” The court may require a reply “if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.”<sup>565</sup>

“Reasonable opportunity to prevail” seems to mean that the case has survived a motion to dismiss.<sup>566</sup> The question what if any effect this provision may have on default judgment practice has not been addressed by the courts.

## **XI. Hearings by Telecommunication and at Prisons**

The PLRA encourages the use of telecommunications to hold pre-trial proceedings without removing the prisoner from the prison, and authorizes arrangements to hold hearings in the same manner.<sup>567</sup> This statute seems mainly to ratify pre-existing practice.<sup>568</sup>

It is not clear whether this PLRA provision extends to trials or other evidentiary proceedings. A recent decision authorizing psychiatric commitment hearings by video emphasized that (unlike trials) such decisions are generally based on expert testimony and do not depend much on either the witnesses’ demeanor or the “impression” made by the person being committed, and that the proceeding does not involve factfinding in the usual sense.<sup>569</sup> This reasoning suggests the statute

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<sup>564</sup> *Fitzgerald v. First East Seventh Street Tenants Corp.*, 221 F.3d 362, 364 n. 2 (2d Cir.2000); *Cruz v. Gomez*, 202 F.3d 593, 596 n. 4 (2d Cir. 2000) (noting most circuits use *de novo* standard). *But see* *Bilal v. Driver*, 251 F.3d 1346, 1348-49 (11<sup>th</sup> Cir.) (endorsing *de novo* standard for dismissals that do not state a claim and abuse of discretion standard for dismissals as frivolous), *cert. denied*, 534 U.S. 1044 (2001).

<sup>565</sup> 42 U.S.C. § 1997e(g).

<sup>566</sup> *See* *Sims v. Kernan*, 29 F.Supp.2d 952, 961 (N.D.Ind. 1998).

<sup>567</sup> 42 U.S.C. § 1997e(f).

<sup>568</sup> *See, e.g.*, *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10<sup>th</sup> Cir. 1991) (noting telephone evidentiary hearing to assess frivolousness of claim); *James v. Alfred*, 835 F.2d 605, 606 (5<sup>th</sup> Cir.) (describing “*Spears* hearing” held in prison), *cert. denied*, 485 U.S. 1036 (1988).

<sup>569</sup> *U.S. v. Baker*, 45 F.3d 837 (4<sup>th</sup> Cir. 1994), *cert. denied*, 516 U.S. 872 (1995).

should not be viewed as extending to trials.<sup>570</sup> Before the PLRA, courts had expressed a strong preference for having prisoner plaintiffs present in court for trial.<sup>571</sup>

## **XII. Revocation of Earned Release Credit**

The PLRA authorizes courts to deprive federal prisoners of all of their good time if they find that a prisoner has filed a claim for a malicious purpose or solely to harass the defendant, or that the prisoner has testified falsely or otherwise knowingly presented false evidence or information to the court.<sup>572</sup> There is not a word in the statute about the procedural protections due the prisoner if this statute is invoked. In my view it is analogous to criminal contempt, and the prisoner should be entitled to the protections of the criminal process for the reasons stated in *International Union, United Mine Workers of America v. Bagwell*.<sup>573</sup> I am unaware of any judicial constructions of this statute; the only reported applications of it appear to be in several cases in the District of South Carolina.<sup>574</sup>

## **XIII. Diversion of Damage Awards**

Compensatory damages awarded to prisoners in civil actions against correctional personnel are to be paid directly to satisfy outstanding restitution orders.<sup>575</sup> Reasonable efforts are to be made to notify the victims of the crime for which the prisoner was convicted and incarcerated of any pending payment of compensatory damages.<sup>576</sup> The statute does not say who is responsible for making the “reasonable efforts to notify the victims.” There has been almost no judicial construction

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<sup>570</sup> *But see* Williams v. Forcade, 2004 WL 1698671 at \*1-2 (E.D.La., July 28, 2004) (directing that plaintiff participate in trial by telephone).

<sup>571</sup> Hernandez v. Whiting, 881 F.2d 768, 770-72 (9<sup>th</sup> Cir. 1989); Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 113 (4<sup>th</sup> Cir. 1988); Poole v. Lambert, 819 F.2d 1025, 1029 (11<sup>th</sup> Cir. 1987).

<sup>572</sup> 28 U.S.C. § 1932.

<sup>573</sup> 512 U.S. 821, 828-34 (1994).

<sup>574</sup> Rice v. National Security Council, 244 F.Supp.2d 594, 597, 605 (D.S.C. 2001) (citing cases), *aff'd*, 46 Fed.Appx. 212 (4<sup>th</sup> Cir. 2002), *cert. denied*, 123 S.Ct. 1637 (2003).

<sup>575</sup> Pub.L.No. 104-134, Stat. 1321 § 807 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

<sup>576</sup> Pub.L.No. 104-134, Stat. 1321 § 808 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

of these statutes.<sup>577</sup> One very significant question is whether the phrase “compensatory damages awarded,” which appears in both, includes settlement of a damages claim. As a matter of plain English, it presumably does not, and so, apparently, holds the only relevant decision I am aware of.<sup>578</sup> In addition, as plaintiff’s counsel in that case argued, the statute applies only to compensatory damages, and settlements are not generally characterized as compensatory or punitive, so it cannot be determined what part, if any, of a settlement represents compensatory damages.

Some states, including New York, have passed statutes governing the disposition of damage awards received by prisoners. It is arguable that the PLRA provisions pre-empt such statutes insofar as they affect awards made in federal court in cases brought under federal law.<sup>579</sup>

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<sup>577</sup> In *Loucony v. Kupec*, 2000 WL 1050905 (D.Conn., Feb. 17, 2000), defendants sought early in the litigation to require the plaintiff to provide the name of the victim of his crime so he or she could be compensated from any award. However, the court ruled that since the plaintiff did not file suit until he was out of prison, he was not a “prisoner” subject to the statute.

<sup>578</sup> In *Dodd v. Robinson*, Civil Action No. 03-F-571-N, Order at \*1 (M.D.Ala., Mar. 26, 2004), in which a district attorney sought to satisfy a restitution order by moving in the court in which a case had been settled, the district court held that the PLRA provision concerning restitution orders “is not applicable in this case because the parties have reached a private settlement agreement.” The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. *Cf. Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a “so ordered” stipulation settling a damage claim was not a money judgment).

<sup>579</sup> *Cf. Felder v. Casey*, 487 U.S. 131 (1988) (holding that a state notice of claim requirement was pre-empted by federal law eschewing such a requirement in § 1983 cases, even when brought in state court); *Hankins v. Finnel*, 964 F.2d 853, 861 (8<sup>th</sup> Cir.) (holding that § 1983 pre-empted a state Incarceration Reimbursement Act and makes it unenforceable against a § 1983 damage judgment), *cert. denied*, 964 F.2d 853 (1992).

## APPENDIX

### The Prison Litigation Reform Act, as Codified

#### I. SCOPE AND APPLICABILITY OF THE STATUTE

##### *From the prospective relief provisions:*

###### **18 U.S.C. § 3626(h). Definitions.**

\* \* \*

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

\* \* \*

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

##### *From the prisoner litigation provisions:*

###### **42 U.S.C. § 1997e(h). Definition.**

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

**28 U.S.C. § 1915A(c). Definition.**--As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

#### II. PROSPECTIVE RELIEF RESTRICTIONS

##### **18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions**

###### **(a) Requirements for relief.--**

**(1) Prospective relief.**--(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

- (i) Federal law requires such relief to be ordered in violation of State or local law;
- (ii) the relief is necessary to correct the violation of a Federal right; and
- (iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

**(2) Preliminary injunctive relief.**--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

**(3) Prisoner release order.**--(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge

court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

**(b) Termination of relief.--**

**(1) Termination of prospective relief.--**(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

**(2) Immediate termination of prospective relief.--**In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

**(3) Limitation.--**Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

**(4) Termination or modification of relief.--**Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

**(c) Settlements.--**

**(1) Consent decrees.--**In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

**(2) Private settlement agreements.--**(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

**(d) State law remedies.--**The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

**(e) Procedure for motions affecting prospective relief.--**

**(1) Generally.--**The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

**(2) Automatic stay.--**Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

**(3) Postponement of automatic stay.--**The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

**(4) Order blocking the automatic stay.--**Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

**(f) Special masters.--**

**(1) In general.--**(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

**(2) Appointment.--**(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

**(3) Interlocutory appeal.**--Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

**(4) Compensation.**--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

**(5) Regular review of appointment.**--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

**(6) Limitations on powers and duties.**--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

**(g) Definitions.**--As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or

detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

**Amendment: Special Masters Appointed Prior to Apr. 26, 1996; Prohibition on Use of Funds**

Pub.L. 104-208, Div. A, Title I, § 101(a) [Title III, § 306], Sept. 30, 1996, 110 Stat. 3009-45, provided that: "None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134 [enacting this section], for costs related to the appointment of Special Masters prior to April 26, 1996."

**III. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

**42 U.S.C. § 1997e(a). Applicability of administrative remedies.**

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

**(b) Failure of State to adopt or adhere to administrative grievance procedure**

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

**IV. MENTAL OR EMOTIONAL INJURY**

**42 U.S.C. § 1997e(e). Limitation on recovery.**

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

**28 U.S.C. § 1346 (b). [from Federal Tort Claims Act]**

\* \* \*

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

## V. ATTORNEYS' FEES

### **42 U.S.C. § 1997e(d). Attorney's fees.**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

## VI. FILING FEES AND COSTS/SCREENING AND DISMISSAL

### 28 U.S.C. § 1915. Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under

section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

## **28 U.S.C. § 1915A. Screening**

**(a) Screening.**--The court shall review, before docketing, if feasible or, in any event,

as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

**(b) Grounds for dismissal.**--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted;

or

(2) seeks monetary relief from a defendant who is immune from such relief.

**(c) Definition.**--As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

#### **42 U.S.C. § 1997e(c). Dismissal.**

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

## **VII. THREE STRIKES PROVISION**

#### **28 U.S.C. § 1915(g).**

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

#### **18 U.S.C. § 983(h)(3) (from the Civil Asset Forfeiture Reform Act of 2000)**

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

## **IX. WAIVER OF REPLY**

**42 U.S.C. § 1997e(g).**

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

**X. HEARINGS BY TELECOMMUNICATION AND AT PRISONS**

**42 U.S.C. §1997e(f). Hearings.**

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

**XI. REVOCATION OF EARNED RELEASE CREDIT**

**28 U.S.C. § 1932.**

In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that--

- (1) the claim was filed for a malicious purpose;
- (2) the claim was filed solely to harass the party against which it was filed; or
- (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.

**Note: There are two statutes numbered 28 U.S.C. § 1932. The other has nothing to do with prisoners or prison litigation.**

**XII. DIVERSION OF DAMAGE AWARDS (not codified)**

#### **A. Notice to Crime Victims of Pending Damage Award**

**Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327**

Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending amount of any such compensatory damages.

#### **B. Payment of Damage Award in Satisfaction of Pending Restitution Orders**

**Pub.L. 104-134, § 101[(a)][Title VIII, § 807], Apr. 26, 1996, 110 Stat. 1321-75; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327**

Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

### **XIII. BANKRUPTCY**

#### **11 U.S.C. § 523. Exceptions to discharge**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

\* \* \*

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; . . .