Why *Ross v. Blake* Opens a Door to Federal Courts for Incarcerated Adolescents

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The Prison Litigation Reform Act (PLRA), particularly through its exhaustion provision, imposes significant obstacles on whether an incarcerated person may raise claims about conditions of confinement in court. The PLRA, as interpreted, demands proper compliance with a correctional facility's grievance procedures, no matter how complex those procedures are. Though many struggle to comply, certain groups of the incarcerated population have been unduly prevented from litigating abuses. One such group is incarcerated adolescents, who — despite recent recognition that they should be differentiated from adults in the criminal justice system — remain subject to the same difficult exhaustion standard as incarcerated adults.

This Note argues that the Supreme Court's most recent interpretation of the PLRA's exhaustion provision demands a different analysis of attempts by nonordinary incarcerated groups to exhaust. In Ross v. Blake, *issued in 2016, the Court clarified that grievance procedures must be "capable of use" or "accessible" for a person to be required to exhaust them; otherwise, there is no available remedy and the claim should not be dismissed for failure to exhaust. This Note uses adolescents incarcerated in adult facilities as an example of a nonordinary group to explain why they lack an available remedy under* Ross. *In light of recent research establishing that adolescents have significant cognitive and developmental differences from adults and are at a higher risk of victimization, courts should account for their increased difficulty in understanding and complying with adult facilities' grievances procedures. Without an "accessible" means of obtaining relief, adolescents incarcerated in adult facilities should not be barred from the courts for their failure to exhaust.*

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> [S]upport for the PLRA was based on arguments that demonized prisoners and trivialized their concerns. However, the men, women and children, who are incarcerated in this country are not members of a faceless, undifferentiated mass unworthy of the protection of the law.[1]

I. INTRODUCTION

In 2001, sixteen-year old Marcus Hunter was charged with armed robbery; upon turning seventeen, he was transferred from a juvenile detention center to an adult correctional facility.[2] There, he was sexually assaulted by another incarcerated person as two others watched. Hunter reported the assault days later and sued under 42 U.S.C. § 1983, a vehicle allowing individuals to seek redress in federal courts for the violation of their federally protected rights. However, his case was dismissed for his failure to exhaust the facility's administrative grievance procedure prior to seeking judicial relief.[3] Ignoring the serious nature of Hunter's claim, the court suggested he should have performed "a simple internet search" to learn what the grievance procedure required prior to suing.[4]

Hunter's situation is not unique. There are numerous examples of federal courts dismissing — without analysis of the merits — complaints about prison conditions brought by incarcerated individuals for failure to exhaust grievance procedures.[5] Spurred

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1. *Prison Abuse Remedies Act of 2007: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 19 (2007) (statement of Stephen Bright, President, Southern Center for Human Rights).

2. Hunter v. Corr. Corp., 441 F. Supp. 2d 78, 80 (D.D.C. 2006).

3. *Id.* at 82.

4. *Id.* People in prison do not usually have access to the Internet, and when they do, use is often restricted to correspondence or job searches. *See, e.g.*, Ben Branstetter, *The case for Internet access in prisons,* WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/02/09/the-case-for-internet-access-in-prisons/?utm_term=.3b0e0711266a [http://perma.cc/2FR9-9ZU5]; Max Kutner, *With No Google, the Incarcerated Wait for the Mail*, NEWSWEEK (Jan. 25, 2015, 2:12 PM), http://www.newsweek.com/people-behind-bars-google-answers-arrive-mail-301836 [http://perma.cc/A6HD-WRN9].

5. *See* Garcia v. Glover, 197 F. App'x 866, 867 (11th Cir. 2006) (dismissing the incarcerated plaintiff's claim for failure to exhaust even though he was physically assaulted by five guards and did not grieve for fear of being "killed or shipped out"); Blake v. Maynard, No. 8:09-cv-02367-AW, 2012 WL 1664107, at *7 (D. Md. May 10, 2012) (dismissing an excessive force claim for failure to exhaust despite the prison's own finding that staff acted improperly); Benfield v. Rushton, No. 8:06-2609-JFA-BHH, 2007 WL 30287, at *1 (D. S.C. Jan. 4, 2007) (dismissing for failure to exhaust an incarcerated person's claim that he was raped twice and then denied protective custody and mental health treatment).

by concern with the rising rate of filings by people in prison in the early 1990s, the exhaustion requirement was developed in 1996 as part of the Prison Litigation Reform Act (PLRA).[6] A decade later, the Supreme Court interpreted the statute to require "proper" exhaustion, a significant barrier to access to the courts for the incarcerated population.[7]

Adolescents detained[8] in adult facilities (such as Hunter) — today numbering around 5,500 in U.S. prisons and jails[9] — are a highly vulnerable group and struggle particularly to satisfy the exhaustion requirement.[10] The Supreme Court has begun to acknowledge the differences between adults and minors in the criminal justice system, creating rules that treat minors differently due to variances in competency, judgment, and culpability.[11] As the Court explained in 2011: "[W]here a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults."[12] Despite this, incarcerated adolescents in adult facilities remain subject to the same PLRA exhaustion standard as incarcerated adults. Held to the

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6. *See infra* notes 22–32 and accompanying text (explaining what instigated the PLRA's passage); *see also* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140 (2008) [hereinafter Schlanger & Shay, *Preserving the Rule of Law*] (describing the PLRA's passage as doing "damage to the rule of law").

7. Woodford v. Ngo, 548 U.S. 81, 83–84, 90 (2006).

8. This Note refers interchangeably to people under eighteen years old held in adult facilities as adolescents, juveniles, and minors.

9. *See* CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 4 (2016), http://www.campaignforyouthjustice.org/images/factsheets/KeyYouthCrimeFacts June72016final.pdf[http://perma.cc/4GMK-FMWL].

10. *See infra* Part III.A (discussing characteristics that make adolescents particularly vulnerable); *see also infra* note 13. Advocates also used the media to bring the issue of adolescent vulnerability in prisons into the public consciousness. *See* Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ [http://perma.cc/AA7X-79DL] (discussing the costs, both economic and social, of incarcerating youth inmates as adults); *Children in adult jails*, THE ECONOMIST (May 28, 2015), http://www.economist.com/news/united-states/21647347-treating-young-offenders-grown-ups-makes-little-sense-children-adult-jails [http://perma.cc/RH69-TLEM]. For example, the story of Kalief Browder, a sixteen-year-old held in Rikers Island for three years (two spent in solitary confinement) for stealing a backpack and who later committed suicide, received extensive coverage. *See, e.g.*, Ta-Nehisi Coates, *The Brief and Tragic Life of Kalief Browder,* THE ATLANTIC (June 8, 2015), http://www.theatlantic.com/politics/archive/2015/06/the-brief-and-tragic-life-of-kalief-browder/395156/ [http://perma.cc/2P95-KQ3M].

11. *See* Miller v. Alabama, 567 U.S. 460 (2012) (holding that convicted minors cannot receive life without parole); Roper v. Simmons, 543 U.S. 551 (2005) (ruling that convicted minors cannot be sentenced to death).

12. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011).

adult standard, minors are unduly prevented from litigating their abuses and thus deprived of a critical tool for improving their conditions of incarceration.[13]

Previous attempts to amend the PLRA to exempt juveniles have failed.[14] However, in *Ross v. Blake*, the Court provided a critical explanation of the sole remaining exception to PLRA exhaustion — the available remedy exception. Describing the available remedy exception as one with "real content," the Court encouraged lower courts to consider each case's facts to determine whether a detained individual was capable of using the grievance procedure to "obtain relief."[15] This Note argues that *Ross*, by leaving a gap in the available remedy doctrine for nonordinary incarcerated people, provides an opportunity to differentiate juveniles housed in adult facilities for exhaustion purposes.[16] Part II describes the PLRA's history and requirements, focusing on the statute's exhaustion provision, and Part III considers *Ross*' holding and how lower courts have misinterpreted it. Finally, Part IV applies scientific and sociological research to show why adolescents detained in adult facilities lack an available remedy and

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13. *See* Amy E. Webbinak, *Access Denied: Incarcerated Juveniles and Their Right of Access to Courts*, 7 WM. & MARY BILL RTS. J. 613, 632–37 (1999) (noting that incarcerated juveniles struggle to challenge prison conditions because they "lack the . . . requisite skill" to satisfy the PLRA's exhaustion requirement); Schlanger & Shay, *supra* note 6, at 141 (arguing juveniles cannot "follow the complex requirements imposed by the statute . . . [which] disrupts accountability and enforcement").

14. *See infra* note 84 and accompanying text (describing the proposal of several amendments to the PLRA).

15. Ross v. Blake, 136 S. Ct. 1850, 1858–59 (2016).

16. This Note focuses on those under the age of eighteen housed with adults, and advocates for reform of adult facilities' grievance procedures. Though procedures in juvenile facilities are generally less uniform, they tend to provide fairer requirements as compared to adult procedures. *See infra* notes 50–70 (describing grievance procedures in adult facilities). For instance, juvenile facilities' grievance procedures often do not require an attempt at informal resolution. *See* LA. YOUTH SERVS. B.5.3, ADMINISTRATIVE REMEDY PROCEDURE 4 (2017), https://ojj.la.gov/wp-content/uploads/2017/09/B.5.3.pdf [https://perma.cc/5DP6-47VW] (encouraging but not requiring informal resolution). Also, they usually do not summarily dismiss a formal grievance including for incorrect information. *See* IND. DEP'T OF CORR. No. 03-02-15, YOUTH GRIEVANCE PROCESS (2015), http://www.in.gov/idoc/files/03-02-105__Youth_Grievance_Process_4-1-2015.pdf [https://perma.cc/8BMB-VLUK] (stating that a "grievance shall not be summarily rejected" and a grievance specialist will meet with the juvenile to fix any errors). In addition, third parties often can assist youth in grieving and even file on their behalf. Some facilities go so far as to provide parents with information on how to file grievances for their child. *See* Or. Youth Auth. B: Intake-4.0, Youth Rights, Responsibilities and Grievances (2015), http://arcweb.sos.state.or.us/pages/rules/oars_400/oar_416/416_020.html [https://perma.cc/8XK5-AM9G] ("Staff must send each youth's parent/guardian information about the grievance process during initial intake.").

should receive different treatment under the PLRA's exhaustion provision.

II. AN OVERVIEW OF THE PLRA AND ITS EXHAUSTION REQUIREMENT

The PLRA, passed in 1996 amid growing concern about the number of prison suits filed in federal district courts, imposed barriers on people in correctional facilities hoping to secure a legal remedy.[17] This Part examines the PLRA's purpose and effect in curtailing this litigation. Section A describes the statutory framework prior to the PLRA and why Congress revised it. Section B explores the PLRA's provisions, focusing on its most litigated requirement: exhaustion. Finally, Section C addresses the "special circumstances" exception to failure to exhaust.

A. PRE-PLRA FRAMEWORK

1. *The Civil Rights of Institutionalized Persons Act*

Beginning in the 1960s, the Court broadened the scope of § 1983 claims — today the most common way for incarcerated people to raise civil rights violations in federal court.[18] In part because these suits highlighted appalling and unconstitutional prison conditions, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA) in 1980 to grant the Attorney General power to sue correctional facilities and intervene in pending litigation.[19] But it also included a "limited exhaustion

17. Suits by Prisoners, 42 U.S.C. § 1997e (2012); *see infra* notes 22–23 and accompanying text (noting the increase in filings leading up to the PLRA's passage).

18. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2012). Section 1983 permits suits against city or state officials, even if those officials acted against policy and without the authority of "state law," and against municipalities. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978); Monroe v. Pape, 365 U.S. 167, 187 (1961). In 1972, state prisoners filed 3,000 § 1983 actions, but that number grew "eight fold" by 1991. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 435 (1993). This increase correlated with the period's rising incarceration rate and worsening conditions inside prisons. *See infra* notes 26–27 and accompanying text.

19. Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997a(a), 1997c(a)(1) (1980); *see* S. REP. 96-416, at 18–19 (1979) (explaining the Act is to assist the many incarcerated people "subjected to conditions and practices flagrantly violative of their most basic human rights").

requirement,"[20] which constrained access to courts by requiring people in prison or jail to first grieve — a process by which they had to submit their complaints and appeals to the correctional staff, if their facility provided a means to do so. The requirement was discretionary, however: A court could only demand exhaustion from someone who was detained if it "would be appropriate and in the interests of justice" and the grievance process was "plain, speedy, and effective."[21]

2. *Concerns with Litigation Trends under CRIPA*

Despite CRIPA's limited exhaustion framework, the number of filings in federal district courts made by people in prison or jail continued to grow, increasing from 42,000 in 1990 to 68,000 in 1996.[22] These filings eventually totaled approximately twelve percent of federal civil suits.[23] This drew a good deal of attention, as the *New York Times* noted: "After three decades of startling growth, civil rights lawsuits brought by inmates protesting prison conditions in New York and elsewhere across the nation have be-

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20. McCarthy v. Madigan, 503 U.S. 140, 150 (1992).

21. 42 U.S.C. § 1997e(a)(1); *see* Porter v. Nussle, 534 U.S. 516, 523 (2002) (explaining exhaustion "could be ordered only if the State's prison grievance system met specified federal standards, and even then, only if, in the particular case, the court believed the requirement 'appropriate and in the interests of justice'"); *see generally* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officers Can Learn from It*, 86 CORNELL L. REV. 483, 493–96 (2001) (detailing CRIPA's framework). Then, a judge was permitted to stay a case to allow the incarcerated individual to exhaust. *See* 42 U.S.C. § 1997e(a)(1) (permitting a stay of up to 90 days). There were also promulgated minimum standards in place for grievance procedures, including limits on the time the facility had to reply, safeguards to avoid retaliatory action against those bringing claims, and the existence of an advisory board that included incarcerated individuals. *See id.* § 1997e(b)(2) (detailing the minimum standards for a correctional facility's grievance procedure). CRIPA's exhaustion requirement was rare for civil rights claims. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 508–12 (1982) (noting only Congress, not the judiciary, can impose an exhaustion requirement on § 1983 claims).

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

23. Eisenberg, *supra* note 18, at 419; *accord* Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79, 80 (2004) [hereinafter Piehl & Schlanger, *Determinants of Civil Rights Filings*] (noting nearly one-fifth of the federal civil docket in 1995 was prison civil suits); Roosevelt, *supra* note 22, at 1771 (finding that, between 1990 and 1996, "the number of suits filed in federal court by inmates increased from 42,263 to 68,235"). Despite the number of filings, only 3% of filings avoided dismissal prior to trial. Eisenberg, *supra* note 18, at 419.

come one of the largest categories of all Federal civil filings."[24] Much of this attention was critical, frequently referring to the claims of incarcerated individuals as frivolous and overlooking meritorious claims in favor of a focus on cases protesting melted ice cream, demanding dinners of lamb, veal, and oysters, and, most notably, complaining about an order of creamy peanut butter.[25]

This allowed critics to ignore valid reasons for why filings increased. One important contributor was the rapidly growing incarcerated population, which went from 330,000 in 1980 to over a million in 1994.[26] With no equivalent increase in facilities' capacity, the increase in the prison population led to a significant worsening of conditions, in turn prompting more suits.[27] Second, critics pointed to the high rate of dismissals as evidence of largely

24. Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (Mar. 21, 1994), http://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html [http://perma.cc/362G-9GWJ].

25. *Id.* These cases were often described uncharitably. For example, in the peanut butter case, the plaintiff did not sue over peanut butter but because, as Judge Jon Newman explained, he received the wrong order, his account was never credited, and he "remained unjustly debited $2.50." Judge Jon O. Newman, Letter to the Editor, *No More Myths About Prisoner Lawsuits*, N.Y. TIMES (Jan. 2, 1996), http://www.nytimes.com/1996/01/03/opinion/l-no-more-myths-about-prisoner-lawsuits-041220.html [http://perma.cc/KLQ8-TDZ8]; *see also* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 522 (1996) (describing this case as the "canard of those who wish to ridicule prisoner litigation"). For those who are incarcerated, who rarely receive the minimum wage or are even paid at all, $2.50 is not a small amount of money. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-93-98, PRISONER LABOR: PERSPECTIVE ON PAYING THE FEDERAL MINIMUM WAGE 4 (1993) (reporting "inmates in the five prison systems we visited either were not paid or were paid at rates that are substantially less than the federal minimum wage of $4.25 an hour"); *see also* Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006) ("Compelling an inmate to work without pay does not violate the Constitution."); Piatt v. MacDougall, 773 F.2d 1032, 1035 (9th Cir. 1985) (same).

26. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. NCJ-151654, PRISONERS IN 1994 1 (1995); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. NCJ-164615, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96 at 1, 5 tbl. 4 (1997) ("The growth in the Federal and State prison population over the last 16 years has been accompanied by an increase in prison litigation in the Federal courts . . . ."); Christine D. Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 797 (2007) (noting a 208% rise in adolescents incarcerated in the 1990s). A key contributor was the passage of the largest crime bill in U.S. history, which created new criminal offenses and imposed longer sentences. *See* Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 13701 (1994).

27. Dunn, *supra* note 24 (explaining prisons hold more people than capacity permits). Overcrowding was, and remains, problematic. *See* Brown v. Plata, 563 U.S. 493, 502 (2011) (finding California prisons "operated at around 200% of design capacity for at least 11 years"). Studies also show that people detained in jail, who tend to have shorter periods of confinement, file nearly 50% less claims. Piehl & Schlanger, *Determinants of Civil Rights Filings*, *supra* note 23, at 90.

frivolous claims. However, this did not necessarily correlate because 90% of incarcerated people file pro se.[28] Many struggle to present a coherent legal claim, and few are capable on their own of using the legal resources provided in the correctional facilities.[29]

Citing the number and nature of the prison filings, Congress passed the PLRA in 1996 to curtail frivolous lawsuits and improve the judiciary's efficiency.[30] Senator Robert Dole, one of the Act's sponsors, explained the statute's benefit as preventing claims about "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party . . . [and] being served chunky peanut butter instead of the creamy variety."[31] Congress also applied the PLRA broadly to *any* incarcerated person's prison conditions claim brought in federal court.[32]

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28. U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, *supra* note 26, at 2; *see* Eisenberg, *supra* note 18, at 420 (arguing pro se filings was the most significant factor for high dismissal rates). People held in correctional facilities lack the right to counsel when filing civil cases. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) (limiting the right to counsel to litigants threatened with loss of physical liberty).

29. In 1977, the Court guaranteed the incarcerated population access to prison law libraries (or comparable legal resources) in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), but in 1996 it effectively repudiated this holding in *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Even prior to *Lewis*, the Court questioned whether people in prison were able to effectively utilize law libraries. *See Bounds*, 430 U.S. at 836 (Stewart, J., dissenting) (deeming this would result only "in the filing of pleadings heavily larded with irrelevant legalisms possessing the veneer but lacking the substance of professional competence"); *see also* John L. v. Adams, 969 F.2d 228, 233–35 (6th Cir. 1992) (finding law libraries do not "assure meaningful [court] access" to juveniles).

30. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Dole) ("[T]he Prison Litigation Reform Act proposes several important reforms that would dramatically reduce the number of meritless prisoner lawsuits."). First introduced in 1994, the PLRA was part of the Republican Contract with America, which included tort litigation reform. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 4 DET. C. L. REV. 1207, 1224–36 (1995) (describing how the Act fit into Republican efforts to solve the "litigation crisis"); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1566–67 (2003) [hereinafter Schlanger, *Inmate Litigation*]. The Court has since relied heavily on the PLRA's legislative history to interpret its text. *E.g.,* Porter v. Nussle, 534 U.S. 516, 524 (2002) ("Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits . . . .").

31. 141 CONG. REC. 26,548 (1995).

32. 42 U.S.C. § 1997e(a) (2012) ("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 . . . ."). How the statute defines "prisoner" also illustrates its breadth: "[A]ny 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." *Id.* § 1997e(h). Courts interpreted the Act to apply to juveniles, leading to significant scholarly criticism. *See* Christina A. v. Bloomberg, 315 F.3d 990, 994 (8th Cir. 2003);

B. THE PLRA'S REQUIREMENTS

The PLRA imposes limitations on whether an incarcerated person may access the courts, as well as what remedies a court can grant.[33] The Act's goal of severely curtailing prison litigation was quickly realized: "Like many get-tough measures, this law ignored important issues of individual constitutional rights, and it sought to reduce the legitimate role of the courts."[34] Over the next decade, the Supreme Court's interpretation of the PLRA imposed further restrictions on the rights of people who are detained.

1. *Overview of the PLRA's Provisions*

a. *Limits on Getting into Court*

In addition to exhaustion, the PLRA creates several obstacles that a person detained in a correctional facility must overcome to get into court. First, § 1997e(c) grants courts initial screening power to dismiss her claim *sua sponte* if it is deemed "frivolous, malicious, [or] fails to state a claim upon which relief can be granted . . . ."[35] Second, an incarcerated person is excluded from proceeding *in forma pauperis*, meaning she must eventually pay

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Alexander S. v. Boyd, 113 F.3d 1373, 1380 (4th Cir. 1997); Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions of Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 679–80 (1998) (showing the PLRA's purpose is not applicable to juveniles who rarely bring claims); Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 265 (2006) (arguing the "PLRA's frivolous litigation rationale does not apply" to juveniles); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 646 n.22 (1993) (finding juveniles less likely than adults to file complaints); Schlanger & Shay, *Preserving the Rule of Law, supra* note 6, at 154 ("Those under eighteen do not file many lawsuits, and are not the source of any problem the PLRA is trying to solve."). The PLRA does not apply to habeas petitions under 28 U.S.C. § 2241, which have their own exhaustion provision. *See, e.g.*, Walker v. O'Brien, 216 F.3d 626, 637 (7th Cir. 2000) (ruling habeas' history and AEDPA suggest the PLRA does not apply); Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996) (same).

33. *See* 42 U.S.C. § 1997e; *see generally* John Boston, The Prison Litigation Reform Act (Mar. 31, 2014) (unpublished pro bono training packet for Legal Aid Society) (on file with the author) (providing an in-depth description of the PLRA and its exhaustion provision).

34. Opinion, *A Good Outcome From a Bad Law*, N.Y. TIMES (Aug. 4, 1996), http://www.nytimes.com/1996/08/04/opinion/a-good-outcome-from-a-bad-law.html [http://perma.cc/T979-WS6R].

35. 42 U.S.C. § 1997e(c)(1)–(2).

the filing fee in full.[36] Furthermore, having three claims dismissed for the above-mentioned reasons means that she must pay the entire fee upfront to file another claim.[37]

b. *Limits on Relief if the Suit is Won*

Even if an incarcerated person wins her case, courts are restricted in what relief they can grant. First, the PLRA imposes a limit on awarding attorney's fees.[38] Second, one cannot seek money damages for a "mental or emotional injury suffered while in custody" unless accompanied by a physical injury.[39] Finally, the PLRA narrows when courts can grant injunctive relief, an important tool for large-scale prison reform.[40]

2. *The PLRA's Exhaustion Provision*

Advocates have criticized the PLRA as a whole, but the exhaustion requirement remains the most litigated and discussed

36. 28 U.S.C. § 1915(b)(1)–(2) (2012) (requiring, after the partial initial filing fee, payment of the rest in "monthly payments of 20 percent of the preceding month's income credited to the prisoner's account"). Indigent litigants typically use *in forma pauperis* arrangement to avoid paying litigation-associated fees. *See id.* § 1914(a) (requiring a $350 filing fee to initiate a civil action in federal district court).

37. 28 U.S.C. § 1915(g) (providing courts with this screening power but creating an exception for a person "under imminent danger of serious physical injury"). Dismissals for failure to exhaust are not typically considered a strike. *See* Millhouse v. Sage, 639 F. App'x 792, 794 (3d Cir. 2016).

38. 42 U.S.C. § 1997e(d) (providing attorney's fees only if "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and requiring incarcerated individuals to apply up to 25% of their monetary damages to satisfying the attorney's fees). The fees are also restricted to 150% of the hourly rate for court-appointed counsel in criminal actions established in 18 U.S.C. § 3006(A)(d)(1). *Id.* Therefore, most people in prison proceed pro se because lawyers are less inclined to take on these cases.

39. 42 U.S.C. § 1997e(e). Courts have not uniformly interpreted this; some do not even find sexual assault a sufficient physical injury. *See* Hancock v. Payne, No. 103-CV-671, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006) (deeming "the bare allegation of sexual assault" not a physical injury).

40. *See* 18 U.S.C. § 3626(a)(1) (2012) (requiring injunctive relief be "narrowly drawn, extend[ ] no further than necessary . . . and [be] the least intrusive means necessary to correct the violation"). To grant injunctive relief, courts must find a violation of the law, which makes defendants less likely to settle. *Id.*; *see* Brown v. Plata, 563 U.S. 493, 511 (2011) ("[T]he PLRA restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'"). Parties can file to terminate the injunction within two years, and a court must find a "current and ongoing" violation to uphold it. 18 U.S.C. § 3626(b). Additional procedural requirements govern preliminary injunctions and prisoner release orders. *See id.* § 3626(a)(2) (terminating a preliminary injunction automatically "90 days after its entry"); *id.* § 3626(a)(3)(B) (requiring a three-judge panel to find clear and convincing evidence that overcrowding is the cause of the violation to issue prisoner release orders).

provision.[41] Simply stated, § 1997e(a) requires an incarcerated person planning to sue over "prison conditions" in federal court to exhaust a correctional facility's available administrative procedures.[42] If a defendant asserts failure to exhaust as an affirmative defense, the court must determine if the plaintiff exhausted and, if she has not, must dismiss regardless of the complaint's merits.[43]

Though advocates argued the PLRA's text was unclear and should be interpreted loosely,[44] the Supreme Court strictly interpreted the statute in a series of rulings. In 2001, the Court found exhaustion necessary even if a facility could not provide the incarcerated person's requested relief.[45] Next, the Court interpreted the Act's reference to "prison conditions" to apply 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."[46]

In *Woodford v. Ngo*, the most significant ruling on the PLRA, the Court read the statute to demand "proper" exhaustion, meaning "compliance with an agency's deadlines and other critical procedural rules."[47] Prison officials had rejected the plaintiff's grievance as untimely because he failed to grieve within the facility's

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41. *See* Piehl & Schlanger, *Determinants of Civil Rights Filings*, *supra* note 23, at 81–82 ("The PLRA has provoked a literature of commentary.").

42. 42 U.S.C. § 1997e(a).

43. Exhaustion is an affirmative defense — not a pleading requirement — that must be timely raised. Therefore, if the government does not raise it, a court can look at the claim's merits without considering exhaustion. If raised, a court should not dismiss unless it is clear that exhaustion was not satisfied. *See* Jones v. Bock, 549 U.S. 199, 216 (2007). Though dismissing for failure to exhaust is usually done without prejudice, a facility's deadline to grieve will have typically passed and, therefore, the plaintiff has no ability to cure the error. *See* Thompson v. Jones, No. 11-C-1288, 2012 WL 3686749, at *6 (N.D. Ill. Aug. 24, 2012) (noting the "Plaintiff has no further recourse in federal court" despite dismissal without prejudice).

44. *See, e.g.*, Branham, *supra* note 21, at 498-500 (explaining the various ways that one could read the PLRA's exhaustion provision).

45. Booth v. Churner, 532 U.S. 731, 735–37, 741 (2001) (dismissing the plaintiff's claim for monetary damages after being assaulted by a correctional officer and denied medical care, and ignoring his argument that exhaustion benefitted neither party when he still had to access the courts for relief).

46. Porter v. Nussle, 534 U.S. 516, 532 (2002). The Court considered whether excessive force claims were "prison conditions" requiring exhaustion and found the statute's subsection title — "Suits by Prisoners" — evidence that Congress intended the PLRA to govern *any* conditions claim. *Id.* at 524. But facilities can choose to exempt some issues from the grievance system. *See infra* note 50.

47. Woodford v. Ngo, 548 U.S. 81, 90, 93 (2006) (finding proper exhaustion "fits with the general scheme of the PLRA" and ruling otherwise would make exhaustion a "largely useless appendage").

fifteen-day deadline. The Court upheld this rejection, ruling that the incarcerated plaintiff had to abide by the facility's rules.[48] Today, *Woodford* means that any detained person must not only use the correctional facility's grievance procedure as provided, but also must do so *correctly* in accordance with any facility instructions.[49]

a. *Typical Elements in a Grievance Procedure*

Adult facilities across the country impose similar requirements in their grievance procedures even though there are no federal standards.[50] These policies, usually written far above the cognitive abilities of the incarcerated population, are often difficult for those held in these facilities to comply with.[51] Below is a

48. *Id.* at 86–87. The plaintiff had been improperly restricted from prison programming but filed the grievance six months after the problem began. Though the Ninth Circuit permitted the claim because the plaintiff lacked any other remedies, the Court found this contrary to the PLRA's purpose. *Id.* at 94–95.

49. *See* Jones v. Bock, 549 U.S. 199, 218 (2007) (explaining that how to grieve varies, "but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion").

50. Unlike CRIPA, which provided some minimum federal standards, the PLRA does not impose any minimum standards for what grievance processes facilities adopt. For a discussion of the minimum standards promulgated by CRIPA, *see supra* note 21. Facilities decide what issues the incarcerated population must grieve and typically provide only vague descriptions. *See* ARIZ. DEP'T OF CORR. NO. 802, INMATE GRIEVANCE PROCEDURE 1 (2013), https://corrections.az.gov/sites/default/files/policies/800/0802u.pdf [https://perma.cc/J7GW-PK8E] (describing a grievable issue as "related to any aspect of institutional life or conditions of confinement which personally affects the inmate grievant"); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. 1330.18, ADMINISTRATIVE REMEDY PROGRAM § 541.10(a)(b) (2014), https://www.bop.gov/policy/progstat/1330_018.pdf [https://perma.cc/5W8F-UNHD] (making "any aspect of his/her own confinement" grievable); PRIYAH KAUL ET AL., MICHIGAN LAW PRISON INFORMATION PROJECT, PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 5 (2015) https://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf [https://perma.cc/PZ4Y-F34W] (showing Louisiana requires grieving "any and all claims seeking monetary, injunctive, declaratory, or any other form of relief authorized by law"); *but see* N.Y. DEP'T OF CORR., DIRECTIVE NO. 3376, INMATE GRIEVANCE AND REQUEST PROGRAM 5 (2012), http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf [https://perma.cc/3AR2-2LKT] (exempting physical assault from the grievance procedure). Since 2012, most facilities exempt sexual abuse claims to comply with the National Prison Rape Elimination Commission's minimum standards. *See* 28 C.F.R. § 115.11–93 (2012); *infra* notes 233–236 and accompanying text (describing PREA's standards). The Prison Rape Elimination Act created the Commission to develop national standards to address the growing problem of prison sexual assault. *See* 34 U.S.C. § 30306 (2012).

51. *See infra* Part III.A.1 (discussing juveniles' cognitive abilities and explaining how the grievance procedures, written to a twelfth grade level, do not match their reading abilities); *see also* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate In-*

brief description of elements that appear in most grievance procedures, using the Federal Bureau of Prisons (BOP) as an example.[52]

i. *Informal Resolution*

Before filing a formal grievance, the detained individual must attempt informal resolution to satisfy BOP's requirements.[53] This procedure can put that person in a vulnerable position or cause her to fear retaliation by demanding that she, for instance, discuss an excessive force incident with a prison official or why she seeks a cell change with her cellmate.[54]

ii. *Short and Strict Deadlines*

Arguably the most burdensome element is the strict deadline to file a grievance. Facilities' deadlines differ greatly, ranging from two to twenty days.[55] Meeting these deadlines is particularly difficult for those who are more vulnerable, including younger or newly incarcerated people, because they may fear retaliation or need to learn how to grieve.[56] If the deadline is missed, a facility can reject the grievance as untimely, and, under *Woodford*,

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mate Civil Rights, 62 UCLA L. REV. 175, 226–34 (2015) (advocating for a system of federally funded lawyers to assist inmates with grievance procedures); Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 151 (showing officials create grievance systems "not to solve problems, but to immunize themselves from future liability").

52. The author chose BOP's grievance procedure because it requires many elements that other facilities across the nation require, and it is the grievance procedure that any person incarcerated in a federal prison must follow. The author supplemented this description with states' grievance procedures.

53. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.13 (requiring informal resolution, though a person with a valid reason can request to skip this step). BOP's policy is not clear about how quickly someone must attempt informal resolution. No specific timeline is provided, and yet she must file a formal grievance within twenty days of the incident. *Id.* § 542.14.

54. KAUL ET AL., *supra* note 50, at 11 (noting informal resolution "raises serious concerns about retaliation").

55. Four states provide two to three days from the time of the incident; six states permit five to seven; ten states provide eight to fourteen; and the BOP provides twenty. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.14; KAUL ET AL., *supra* note 50, at 22; *see also* Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 at *28 (providing a chart with deadlines across the country).

56. *See* Brief for the Jerome N. Frank Legal Services Organization, *supra* note 55, at *16–22.

that person cannot then successfully litigate the issue in court if the defendant raises exhaustion as an affirmative defense.[57]

iii. *Level of Appeals*

To fully exhaust, most prison systems require the incarcerated person to appeal an adverse decision twice to officials in different ranks of the prison administration.[58] For example, someone in BOP custody must, after filing initially with the warden, appeal to the Regional Director, and then to the General Counsel.[59] Similar to initial grievances, an appeal must be done within a short period of time.[60] If no response is received, the person is expected to consider her request denied and should move on to the grievance procedure's next step.[61]

iv. *Assistance in Grieving*

Most facilities permit individuals to request assistance from a staff member.[62] But one-third of facilities prohibit someone from

57. *See supra* notes 47–48 and accompanying text (explaining *Woodford*'s holding and impact). Courts usually do not forgive a missed deadline, even if the incarcerated plaintiff attempted to meet it. *See* Crane v. DeLuna, No. 03-cv-06339, 2009 WL 3126279, at *3 (E.D. Cal. Sept. 23, 2009) (approving the grievance's dismissal as untimely, even though it was filed in time but submitted to the wrong place).

58. Brief for the Jerome N. Frank Legal Services Organization, *supra* note 55, at *10–11; *see also* KAUL ET AL., *supra* note 50, at 18 (reflecting on possible bias when the prison administration handles the appeals).

59. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.15.

60. *See id.* (requiring those in BOP custody to submit the first appeal within twenty days of the Warden's response and the second appeal within thirty days of the Regional Director's response).

61. *Id.* § 542.18 (requiring those in BOP's custody "to consider the absence of a response" within the time allotted to the correction administration to respond "to be a denial at that level"); *see* Brief of Amici Curiae State of West Virginia & 38 Other States in Support of Petitioner, Ross v. Blake, 136 S. Ct. 1850 (2016) (No. 15-339), 2016 WL 520080, at *8 (explaining West Virginia's policy, which states "if relevant prison officials miss their deadlines for responding to the grievance or an appeal, an inmate is permitted to 'treat the non-response as a denial of his/her grievance'"). Facilities cannot, however, thwart exhaustion by simply not responding. *See* Peoples v. Fischer, No. 11-CV-2694, 2012 WL 1575302, at *6 (S.D.N.Y. May 3, 2012) (holding an incarcerated person who has otherwise complied does not lose "the opportunity to pursue his grievance in federal court simply because the final administrative decision maker has . . . neglected . . . to issue a final administrative determination").

62. *See* ARK. DEP'T OF CORR., ADMINISTRATIVE DIRECTIVE NO. 04-01, INMATE GRIEVANCE PROCEDURE 3 (2004) https://www.law.umich.edu/special/policyclearinghouse/Documents/Arkansas_Policy.pdf [https://perma.cc/RRW2-YHBY] (limiting assistance to people with a disability affecting comprehension or who do not speak English); ILL. DEP'T OF CORRECTIONS 504, GRIEVANCE PROCEDURES 46 (2003), https://www.law.umich.edu/

receiving third-party assistance, such as from family, advocates, and even other detained individuals.[63] Forcing an incarcerated individual to rely on staff for assistance is problematic because she may not trust officials enough to request help, or officials may even thwart her from exhausting.[64]

v. *Additional Procedural Rules*

Most policies only permit one grievance per form and require just a general description.[65] Other states require more detail, sometimes even the names of those involved and the date of the incident.[66] Additional minor procedural rules that can lead to a grievance's dismissal include requiring the detained individual to use only 8 1/2 x 11 inch paper if she needs more space than the grievance form;[67] prohibiting officials from providing writing utensils unless she has no credit in her commissary account;[68] requiring her to write in black or blue pen;[69] and only permitting grievances with "one staple, no tears or tape."[70]

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special/policyclearinghouse/Documents/Illinois%20Grievance%20Procedures.pdf [https://perma.cc/QW32-V4AR] (requiring staff to help those "who cannot prepare their grievances unaided, as determined by institutional staff"); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.16(a)–(b) (requiring the warden to "ensure assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English" but not specifying how the prison identifies those people).

63. *See* KAUL ET AL., *supra* note 50, at 16; *see also* GA. DEP'T OF CORR., STATE OFFENDER ORIENTATION HANDBOOK 22–23, http://www.dcor.state.ga.us/sites/all/files/pdf/GDC_Inmate_Handbook.pdf [https://perma.cc/TZX7-BH9H] (permitting an incarcerated individual to assist another only if the claim involves a medical emergency).

64. *See* Ross v. Blake, 136 S. Ct. 1850, 1860 (2016) (admitting that "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation").

65. *E.g.,* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.14(c)(2); *see also* Jones v. Bock, 549 U.S. 199, 207 (2007) (noting Michigan's policy only "advises inmates to be 'brief and concise in describing your grievance issue'").

66. *See* N.Y. STATE CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4040, INMATE GRIEVANCE PROGRAM § 701.5(a)(2) (2016), http://www.doccs.ny.gov/Directives/4040.pdf [https://perma.cc/3KGE-47H9] (requiring a "concise, specific description of the problem and action requested and . . . what actions the grievant has taken to resolve the complaint, i.e., specific persons/areas contacted and responses received"). For judicial relief, an incarcerated individual only must name a defendant in her initial grievance if the facility requires it. *See Jones*, 549 U.S. at 218 ("[E]xhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances.").

67. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, *supra* note 50, § 542.14(c)(3).

68. Brief of Amici Curiae State of West Virginia and 38 Other States, *supra* note 61, at *15 (describing Florida's grievance policy).

69. ARK. DEP'T OF CORR., *supra* note 62, at 4.

70. KAUL ET AL., *supra* note 50, at 13 (describing West Virginia's grievance policy).

b. *Limited (if Any) Review over Grievance Procedures*

Though correctional facilities decide on their own what satisfies exhaustion, the PLRA only requires exhaustion of the "administrative remedies as are available."[71] Therefore, prior to dismissing for failure to exhaust, courts ensure that a remedy was available to the incarcerated individual.[72] Otherwise, the Supreme Court has refused to evaluate grievance procedures for fairness, focusing only on whether the person complied with the requirements. Citing the Act's purpose of "eliminat[ing] unwarranted federal-court interference with the administration of prisons,"[73] the Court defers to prison officials, assuming they do not "create procedural requirements for the purpose of tripping up all but the most skillful prisoners."[74]

There is, therefore, little holding prisons accountable for how they handle complaints from the incarcerated population inside their walls: "[F]or prisons — closed institutions holding an ever-growing disempowered population — most of the methods by which we, as a polity, foster government accountability and equality among citizens are unavailable or at least not currently in practice."[75] While both those who are incarcerated and those who run the facility may benefit from resolving complaints internally, it is doubtful that the facilities' current procedures allow

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71. 42 U.S.C. § 1997e(a) (2012).

72. Until June 2016, the Court defined "available" broadly, only requiring a "possibility of some relief for the action complained of. . . ." Booth v. Churner, 532 U.S. 731, 738 (2001). But during the summer of 2017, it provided a more detailed and, in the author's view, more expansive view of the available remedy exception. *See infra* Part III.B (explaining the holding in *Ross*).

73. Woodford v. Ngo, 548 U.S. 81, 93, 102 (2006).

74. *Id.* at 102; *see also* Ross v. Blake, 136 S. Ct. 1850, 1860 (2016) (affirming the point the Court first made in *Woodford*). The majority of states recently defended their policies as "designed to be simple and accessible for inmates." Brief of Amici Curiae State of West Virginia and 38 Other States, *supra* note 61, at *3; *see Woodford*, 548 U.S. at 103 (finding it dubious that someone who is pro se had trouble grieving considering the procedure's "informality and relative simplicity"); *contra* John Boston, *PLRA Exhaustion Redux: First Thoughts on* Ross v. Blake, in 32 Nat'l Lawyers Guild, Civil Rights Litigation and Attorney Fees Annual Handbook 233, 266 n.89 (2016) (arguing "however simple the rules on paper may appear to be, grievance procedures are often made complicated by the failure of prison personnel to follow their own procedures"); Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 498–518 (2012) (citing examples of states amending their procedures to be "increasingly onerous"); Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 149 (arguing facilities create complicated policies to prevent exhaustion and keep incarcerated plaintiffs out of court).

75. Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 139.

for this, particularly in light of *Woodford*'s "proper" exhaustion rule.[76] When reflecting on the incarcerated population — which suffers from staggeringly low levels of education and high rates of mental illness and cognitive disabilities — the chances of successful exhaustion and *then* internal resolution are even more dubious.[77] With this in mind, the Court's unwillingness to review grievance procedures for fairness ignores "how difficult, futile, or dangerous such compliance might be."[78]

3. *Consequences of the PLRA's Exhaustion Provision*

The PLRA's exhaustion requirement led to a significant decline — approximately 60% — in the number of prison civil rights suits filed.[79] However, rather than curtailing frivolous litigation as intended, the PLRA has allowed "serious complaints . . . [to] be thwarted by the mechanics of the grievance process."[80] In 2009, a congressionally-created committee stated that the Act "compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice. . . ."[81]

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76. Handling grievances internally has the benefit of swifter resolution, reduced judicial dockets, and a record for review. *See* Brief of Amici Curiae State of West Virginia and 38 Other States, *supra* note 61, at *3. Judge Myron Thompson recently reflected on Alabama's grievance procedure: "[It is] enough to confound even the most intelligent and diligent of prisoners. . . . If a prisoner were able to determine how to file a grievance properly, it would be sheer lucky guesswork." Dunn v. Dunn, No. 2:14-cv-601, 2016 WL 6949598, at *8–9 (M.D. Al. Nov. 25, 2016).

77. See *infra* Part IV.A (describing high rates of illiteracy, cognitive disabilities, and mental illness among the incarcerated population).

78. Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 141.

79. *Id.* at 141–42. Just one year after the Act's passage, filings by incarcerated individuals dropped to 26,000 from 68,000. Roosevelt, *supra* note 22, at 1771; *accord* Piehl & Schlanger, *Determinants of Civil Rights Filings*, *supra* note 23, at 80–81.

80. Brief of National Police Accountability Project & Human Rights Defense Center as Amici Curiae in Support of Respondent, Ross v. Blake, 136 S. Ct. 1850 (2016) (No. 15-339), 2016 WL 1042961, at *5; *see* Schlanger, *Inmate Litigation*, *supra* note 30, at 1663–64 (showing the PLRA targets nonfrivolous litigation as well because plaintiffs' chances of winning PLRA-related claims have not increased since passage of the Act); *see also* Piehl & Schlanger, *Determinants of Civil Rights Filings*, *supra* note 23, at 83 (arguing the number of filings instead correlates with the proportion of people incarcerated per state). For an example of how the PLRA thwarts meritorious claims, *see infra* Part III.A–B (describing the facts and holding in *Ross*).

81. Nat'l Prison Rape Elimination Comm'n, *National Prison Rape Elimination Commission Report* 10 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf [https://perma.cc/7BU5-H77T].

The exhaustion provision has been particularly constraining on prisons' most vulnerable groups.[82] In 2003, responding to high rates of unreported sexual abuse inside prisons, Congress removed difficult exhaustion requirements to encourage sexual abuse victims to come forward.[83] In addition, members of Congress proposed several amendments to exempt adolescents from the PLRA, recognizing the Act's "devastating effect on the conditions in which juvenile offenders . . . are held."[84]

C. THE "SPECIAL CIRCUMSTANCES" EXCEPTION

One judicial response to the exhaustion requirement was the "special circumstances" exception, developed by the Second Circuit in 2004. If the incarcerated plaintiff had not exhausted and was not thwarted from doing so, the court asked whether any special circumstances justified her failure to exhaust.[85] This ex-

82. *See* Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 83–84 (2016) (arguing the "detailed and often technical procedural requirements fall on the members of our society least able to comply with them — prisoners who are typically unrepresented by counsel and who may be mentally ill, underage, illiterate, and/or unable to speak English").

83. Prison Rape Elimination Act, 34 U.S.C. § 30301 (Supp. V 2017) (originally codified as 42 U.S.C. § 15602 (2012)) (explaining Congress' findings); *see id.* § 30307 (initiating the process to adopt national standards); *see also* Brent Staples, Opinion, *The Federal Government Gets Real About Sex Behind Bars*, N.Y. TIMES (Nov. 27, 2004), http://www.nytimes.com/2004/11/27/opinion/the-federal-government-gets-real-about-sex-behind-bars.html [https://perma.cc/H6TR-XSZ4] (explaining that the Prison Rape Elimination Act stemmed from reports put before Congress that showed how serious the issue of rape is in prisons).

84. 145 Cong. Rec. 3062 (1999) (statement of Sen. Wellstone) (proposing an exemption for incarcerated individuals under sixteen-years old from the PLRA). For examples of proposed amendments, *see* Prison Abuse Remedies Act, H.R. 4335, 111th Cong. § 4 (2009) (exempting "child prisoners," defined as a "prisoner who has not attained the age of 18 years"); Leave No Child Behind Act, S. 940, 107th Cong. (2001); Mental Health Juvenile Justice Act, S. 465 § 8, 106th Cong. (1999). These amendments, seen as incongruous with the PLRA's purpose, met strong resistance and failed early on. *See* Rapa, *supra* note 32, at 274–76. Though these failed, they received substantial support from legal organizations, scholars, and the media. *See* Editorial, *Combating Prisoner Abuse*, N.Y. TIMES (Dec. 20, 2009), http://www.nytimes.com/2009/12/21/opinion/21mon3.html [https://perma.cc/JVT7-S2P3] (praising the amendment for addressing an important problem "that is less well-known, but no less real"); *House Introduces Crucial Prison Litigation Reform Legislation*, ACLU (Dec. 16, 2009), https://www.aclu.org/news/house-introduces-crucial-prison-litigation-reform-legislation [https://perma.cc/W9DB-CHAM]; *Prison Abuse Remedies Act*, Statement of Stephen Bright, *supra* note 1, at 23 ("All of the [PLRA's] problems are magnified when it is applied to children.").

85. Hemphill v. New York, 380 F.3d 680, 690–91 (2d Cir. 2004). In addition to the special circumstances exception, advocates have tried to apply administrative law exceptions to the PLRA. Justice Breyer hinted at this possibility, providing advocates with hope (and confusion). *See* Woodford v. Ngo, 548 U.S. 81, 103 (2006) (Breyer, J., concurring)

ception was applied to assist the incarcerated plaintiff who had incorrectly, though reasonably, failed to comply with the existing grievance procedures, not to assist the incarcerated plaintiff who had purposefully failed to exhaust.[86]

For nearly a decade, the Second Circuit was the only circuit that embraced the "special circumstances" exception. Particularly after *Woodford*, courts disagreed about whether the "proper" exhaustion rule effectively nullified use of the "special circumstances" exception.[87] But even though the exception's use remained limited post-*Woodford*, several courts still refused to directly reject the possibility of one day applying it.[88] In 2015, the Fourth Circuit adopted it.[89] In light of this circuit split, the Supreme Court granted certiorari in *Ross* to clarify the viability of the "special circumstances" exception and the scope of the PLRA's exhaustion requirement.[90]

(agreeing with the majority on "proper exhaustion" but finding Congress intended "the term 'exhaustion' to 'mean what the term means in administrative law' . . . [which] contains well-established exceptions to exhaustion"); *see also* Ross v. Blake, 136 S. Ct. 1850, 1862–63 (2016) (Breyer, J., concurring). *Cf. Ross*, 136 S. Ct. at 1858 n.2 (dismissing this suggestion because only an "exhaustion provision with a different text and history from § 1997e(a)" might permit use of "standard administrative-law exceptions").

86. *See* Giano v. Goord, 380 F.3d 670, 677-78 (2d Cir. 2004) (requiring an inquiry before applying the "special circumstances" exception into the "circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way").

87. *See* Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (equating the special circumstances exception to improper judicial activism); Robin L. Dull, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures,* 92 IOWA L. REV. 1929, 1947 (2007) ("*Ngo*'s rule of proper exhaustion, stated broadly, seems to prevent all claims except those that comply strictly with the prison's grievance procedures."); *contra Woodford*, 548 U.S. at 83 (referring to the rule only as an "'invigorated' exhaustion provision," not an absolute requirement); Dull, *supra* note 87, at 1948–49.

88. *See* Tuckel v. Grover, 660 F.3d 1249, 1253 n.3 (10th Cir. 2011) ("Confronted with the [special circumstances exception] once more, we again conclude it is unnecessary to decide the issue."); Sapp v. Kimbrell, 623 F.3d 813, 827 (9th Cir. 2010) (acknowledging the "special circumstances" exception but choosing not to decide its validity); Macias v. Zenk, 495 F.3d 37, 43 n.1 (2d Cir. 2007) (noting the Second Circuit "need not decide what effect *Woodford* has on *Hemphill*'s holding").

89. *See* Blake v. Ross, 787 F.3d 693, 698 (4th Cir. 2015) (becoming the only circuit court since *Woodford* to directly apply the exception).

90. Ross v. Blake, 136 S. Ct. 614 (2015) (mem.) (granting certiorari).

III. *ROSS V. BLAKE*: ITS EFFECT ON THE PLRA'S EXHAUSTION REQUIREMENT

In June 2016, the Court rejected the "special circumstances" exception in *Ross*. Though that was the question presented, the Court went further to explain what might otherwise suffice to excuse an incarcerated person's failure to exhaust. Sections A–B briefly describe *Ross*' facts, procedural background, and holding. Section C then considers how lower courts have misunderstood *Ross*' holding when presented with this exhaustion question.

A. *ROSS V. BLAKE*: THE FACTS AND PROCEDURAL HISTORY

In September 2009, Shaidon Blake, incarcerated in a Maryland state prison, filed a pro se complaint under § 1983 in federal district court against several correctional officers, alleging excessive force and failure to take protective action.[91] The incident's occurrence is undisputed, though there is disagreement about the severity of the assault.[92] On June 21, 2007, correctional officers James Madigan and Michael Ross were escorting Blake, his hands cuffed behind his back, to the segregation unit when Madigan pushed Blake down some stairs and punched Blake in the face "about seven times."[93] Blake suffered facial nerve damage and headaches after the incident.[94] No one argued that Madigan's use of force or Ross' failure to intervene was justified.[95]

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91. Complaint, Blake v. Maynard, No. 8:09-cv-02367 (D. Md. Sept. 8, 2009) (Bloomberg, Court Docket). Blake also named the facility, the Department of Corrections, and Maryland as defendants. *Id.* Those claims were quickly dismissed. Order, Blake v. Maynard, No. AW-09-2367 (D. Md. Sept. 22, 2009) (Bloomberg, Court Docket). A year later, the court granted summary judgment for all officers except Ross and Madigan. Blake v. Maynard, No. AW-09-2367, 2010 WL 3547999, at *5 (D. Md. Sept. 9, 2010).

92. Blake alleged that Madigan punched him with a "circle key ring gripped in his hands," threw him head first onto the floor, and asked a third officer to mace him. Complaint, *supra* note 91, at 6. Another officer, who witnessed the incident, supported Blake's allegations: "Lt. Madigan with keyset #241 in a closed fist struck inmate Blake . . . repeatedly on the right side of his jaw with his right hand." Blake v. Maynard, No. AW-09-2367, 2010 WL 3547999, at *1 (D. Md. Sept. 9, 2010). Madigan's answer denied Blake "suffered the damages" and asserted that any actions were in response to Blake's "continued resistance." Answer to Complaint at 1–2, Blake v. Maynard, No. 8:09-cv-02367-AW (D. Md. Mar. 14, 2011) (Bloomberg, Court Docket).

93. Complaint, *supra* note 91, at 6.

94. *See* Blake v. Maynard, No. AW-09-2367, 2010 WL 3547999, at *4 (D. Md. Sept. 9, 2010).

95. *See id.* at *1–3. Ross denied the allegations and asserted qualified immunity. Two years later in an amended answer, he included an exhaustion defense. Amended

The next day Blake reported the incident to a correctional officer, who referred it to the Internal Investigation Unit (IIU), which is charged with investigating employee misconduct.[96] After a yearlong investigation, the IIU issued a report finding Madigan at fault, and Madigan resigned. Following the investigation's completion and without using Maryland's Administrative Remedy Procedure (ARP), Blake sued in federal district court.[97] Ross asserted the PLRA's exhaustion requirement as an affirmative defense, but Blake, who admitted that he did not grieve, argued that the internal investigation satisfied exhaustion.[98]

The question before the district court was whether Blake had to exhaust through the ARP if the internal investigation was already in process.[99] Neither the Inmate Handbook nor the ARP directive mentioned the IIU or how such an investigation might affect grieving.[100] Yet the district court found no ambiguity and dismissed Blake's case against Ross for failure to exhaust.[101]

Answer at 1–3, Blake v. Maynard, No. 8:09-cv-02367 (D. Md. Aug. 2, 2011) (Bloomberg, Court Docket).

96. *See* Code of Md. Regs., Dep't of Pub. Safety & Corr. Servs. 12.11.01.05(A)(3) (requiring an employee to notify the Director immediately of an excessive force incident).

97. Complaint, *supra* note 91.

98. *See* Blake v. Maynard, No. 8:09-cv-02367, 2012 WL1664107, at *6 (D. Md. May 10, 2012). If Blake had grieved, the ARP encouraged him to first attempt informal resolution, then file a formal grievance with the Warden, and, assuming he received an adverse decision, appeal to the Commissioner and then to the Inmate Grievance Office. *See* DIV. OF CORR., MD. DEP'T OF PUB. SAFETY AND CORR. SERVS., INMATE HANDBOOK 30 (2007), https://www.dpscs.state.md.us/publicinfo/publications/pdfs/2007_Inmate_Handbook.pdf [https://perma.cc/3XEC-2Z2]. Madigan did not assert exhaustion as a defense. His case went to trial, and the jury awarded Blake $50,000 in damages. *See* Blake v. Maynard, No. 09-cv-2367, 2013 WL 3659421, at *1 (D. Md. July 11, 2013).

99. Blake v. Maynard, No. 8:09-cv-02367, 2012 WL 1664107, at * 5–7 (D. Md. May 10, 2012).

100. The Inmate Handbook only told people to "pay attention to the directions and filing deadlines on the forms" and to find "full descriptions of the requirements of the ARP in the library." MD. DIV. OF CORR., INMATE HANDBOOK, *supra* note 98, at 30. In 2008, with litigation still pending, Maryland revised its directive to clarify this issue by requiring "final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigation Unit (IIU)." Brief for Respondent, Ross v. Blake, 136 S. Ct. 1850 (2016) (No. 15-00339), 2016 WL 860556, at *18.

101. Blake v. Maynard, No. 8:09-cv-02367-AW, 2012 WL 1664107, at *6–7 (D. Md. May 10, 2012), *aff'g* No. 8:09-cv-02367-AW, 2012 WL 5568940, at *5 (D. Md. Nov. 14, 2012) ("[C]ommencement of an internal investigation does not relieve prisoners from the [PLRA's] exhaustion requirement."). The district court ignored earlier cases, which found the IIU investigation sufficient. Instead, it cited the Sixth, Seventh, and Ninth Circuits, which had each deemed internal investigations insufficient to fulfill exhaustion. Blake v. Maynard, No. 8:09-cv-02367-AW, 2012 WL 1664107, at *5 (D. Md. May 10, 2012).

On appeal before the Fourth Circuit, the panel found it "murky" whether Blake had to exhaust in light of the IIU investigation.[102] Adopting the Second Circuit's "special circumstances" exception, a divided panel ruled that the PLRA's exhaustion requirement was not absolute.[103] Two judges found Blake's argument "objectively reasonable" and that "the IIU investigation . . . provided the Department with ample notice and opportunity to address internally the issues raised."[104] To resolve whether courts could consider a plaintiff's special circumstances when determining if she had exhausted, the Supreme Court granted certiorari.[105]

B. THE COURT'S HOLDING IN *ROSS V. BLAKE*

From the outset of the opinion, the Court — in an 8–0 ruling — rejected and foreclosed any application of the "special circumstances" exception. It deemed the exception without basis in the PLRA's "statutory text or history," and an improper return to CRIPA's discretionary exhaustion framework.[106] Though it quickly resolved this question, the Court went on to determine whether the PLRA nonetheless permits a court to hear a claim even if the incarcerated plaintiff had not exhausted.[107] Based on the statutory text, one situation remained: If there is no available remedy through a correctional facility's grievance procedure, then the detained person is not required to exhaust.[108] The Court de-

102. Blake v. Ross, 787 F.3d 693, 701 (4th Cir. 2015).

103. *Id.* at 698.

104. *Id.* at 699 n.4, 698 (narrowing the exception's application to cases where the facility had notice and a chance to address the issue internally); *contra id.* at 703 (Agee, J., dissenting) (referring to the exception as "judge-made" and not "appropriate where, as here, we are dealing with Congressional text").

105. Ross v. Blake, 136 S. Ct. 614 (2015) (mem.) (granting certiorari).

106. Ross v. Blake, 136 S. Ct. 1850, 1856–58 (2016).

107. The Court ruled on the scope of exhaustion because Blake and his lawyers showed that Maryland's representations to the Court were inconsistent with its prior practices. Earlier cases found that Maryland Corrections "does not permit prisoners to pursue ARP claims for matters referred to the Internal Investigation Unit." Thomas v. Bell, Nos. AW-08-2156, AW-08-3487, AW-09-1984, AW-09-2051, 2010 WL 2779308, at *4 n.2 (D. Md. 2010); *see supra* note 101 (noting the district court's refusal to consider these cases). This precedent, plus the directive's recent revision, "confirms that the IIU is — and always has been — the proper administrative mechanism to investigate excessive force claims." Brief in Opposition, Ross v. Blake, 136 S. Ct. 1850 (2016) (No. 15-339), 2015 WL 6748881, at *17–18.

108. 42 U.S.C. § 1997e(a) (2012).

scribed a remedy as available if the procedure was "capable of use for the accomplishment of a purpose" or "accessible."[109]

At first glance, *Ross* further limits incarcerated individuals' access to the courts by finding there to be just one exception to exhaustion. However, the Court's explanation to lower courts on how to apply this available remedy exception gave it significant weight, referring to it as having "real content."[110] First, the Court noted "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief": (i) when the administrative procedure "operates as a simple dead end — with officers unable or consistently unwilling to provide any relief," (ii) when "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use . . . [so] no ordinary prisoner can discern or navigate it," or (iii) if "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[111] In describing these three potential circumstances, the Court referred to them "*as relevant here*" because they could be applicable to the specific facts of Blake's case.[112] The Court then remanded the case, instructing the lower court to consider Blake's situation in light of these three circumstances.[113]

Second, Justice Elena Kagan's unanimous opinion described "availability" more expansively than "capable of use," explaining that "to state that standard, of course, is just to begin. . . ."[114] She first noted that the exception was not limited to the three circumstances discussed — a reasonable move since Blake's case could not present every circumstance without an available remedy. The majority then instructed lower courts on how to apply this exception: They are to consider each plaintiff's facts and "apply it to the real-world workings of prison grievance systems" before

109. *Ross*, 136 S. Ct. at 1859 (quoting how "availability" was defined in past cases and citing *Booth v. Churner*, 532 U.S. 731, 737–38 (2001)).

110. *Id.* at 1858.

111. *Id.* at 1858–60.

112. *Id.* at 1859 (emphasis added).

113. *Id.* at 1862; Blake v. Ross, F. App'x, 2016 WL 4011152 (4th Cir. July 27, 2016) (mem.) (remanding the case to the district court). Though the district court has yet to rule, the Court suggested that Blake lacked an available remedy because of Maryland's confusing policy. *Ross*, 136 S. Ct. at 1861 (noting "Ross does not identify a single case in which a warden considered the merits of an ARP grievance while an IIU inquiry was underway").

114. *Ross,* 136 S. Ct. at 1859.

determining whether a remedy is available.[115] This phrasing suggests that applying blanket exemptions is inappropriate; instead, analysis of the detained plaintiff's ability to use the grievance procedure might be required. It also indicated that courts should not be hesitant to apply this exception, as it has "real content."[116] Though Justice Kagan's explanation gave the available remedy exception substantial weight, lower courts have since failed to read *Ross* in this way.

C. THE MISREADING OF *ROSS*

Since *Ross*' explanation of the available remedy exception, lower courts have largely misinterpreted the Court's intentions and instructions. Overwhelmingly, lower courts consider themselves constrained to the three circumstances excusing a detained person's failure to exhaust discussed in *Ross*.[117] They fail to understand that the three circumstances were explicitly explained as relevant to Blake's case and ignore the Court's instruction to engage with facts rather than apply blanket situational exceptions. One federal district court's opinion demonstrated this error:

> The Supreme Court has clarified that there are only "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." . . . Other than these three circumstances demonstrating the unavailability of an administrative remedy, the mandatory language of 42 U.S.C. § 1997e(a) "foreclose[es] judicial discretion" . . . .[118]

Other courts have similarly restricted their use of the available remedy exception.[119] Even the Fourth Circuit, which instigat-

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115. *Id.* at 1859.

116. *Id.*

117. *See infra* note 119 (citing cases where courts limit themselves to the three circumstances discussed in *Ross*).

118. Woods v. Roddrick, No. 2:14-cv-2458, 2016 WL 4061319, at *1–3 (E.D. Cal. July 29, 2016) (dismissing the case despite the pro se plaintiff's "potentially cognizable claims" of excessive force against staff).

119. *See* Pearson v. Taylor, 665 F. App'x 858, 868 (11th Cir. Dec. 20, 2016) (ruling the plaintiff's arguments about availability did not fit one of the three "'exceptions' to exhaustion"); Romero v. Ahsan, No. 13-cv-7695, 2016 WL 7424486, at * 7 (D. N.J. Dec. 22, 2016) (arguing the Court "recently collected and clarified the law governing 'availability'" and

ed the holding in *Ross*, noted the constraint: "This case does not implicate any of the scenarios envisaged by the Supreme Court in *Ross*."[120]

While no court has yet found a factual scenario requiring expansion of the three circumstances,[121] a number of courts have critically held that the three special circumstances described in *Ross* were not "exhaustive."[122] Two courts even stated that it remains an open question whether an incarcerated person's intellectual disability or mental health, which inhibits her ability to grieve, might be a special circumstance warranting application of

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found only three circumstances of an unavailable remedy); Seina v. Center-Honolulu, No. 16-cv-00051, 2016 WL 6775633, at * 6 (D. Haw. Nov. 15, 2016) (finding it the plaintiff's burden "to show that something particular to his case 'made the existing and generally available administrative remedies effectively unavailable'" within *Ross'* three circumstances); Tinsley v. Fox, No. 2:16-cv-1647, 2016 WL 6582588, at *2 (E.D. Cal. Nov. 7, 2016) (same); Savage v. Acquino, 13-CV-6376, 2016 WL 5793422, at *5 (W.D.N.Y. Sept. 30, 2016) (same); Garcia v. Heath, No. 2:13-cv-1952, 2016 WL 4382684, at *2 (E.D. Cal. Aug. 17, 2016) (same); Harrington v. Vadlamudi, Civ. No. 9:13-CV-0795, 2016 WL 4570441, at *11 (N.D.N.Y. Aug. 9, 2016) (same); Winfield v. Derosso, 07-cv-4570, 2016 WL 5793195, at *4 (E.D.N.Y. July 8, 2016) (finding "strict adherence to the PLRA exhaustion requirement" and the three circumstances necessary).

120. Germain v. Shearin, 653 F. App'x 231, 234 (4th Cir. 2016).

121. As of January 11, 2017, the author has not discovered a case where a court found a new circumstance presenting an unavailable remedy. This is primarily because, in the author's view, courts have misinterpreted *Ross*. However, another issue might be that incarcerated individuals who proceed pro se struggle to properly present their facts or legal claims. These complaints, though, should be construed more "liberally" and "to a less stringent standard." *See* Williams v. Wilkinson, 659 F. App'x 512, 518 (10th Cir. Sept. 14, 2016); *see also supra* note 28 and accompanying text (showing 90% of plaintiffs are pro se).

122. Williams v. Priatno, 829 F.3d 118, 125 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear exhaustive, given the Court's focus on three kids of circumstances that were 'relevant' to the facts of that case."); *see also* Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) ("By way of a non-exhaustive list, the Court recognized three circumstances in which an administrative remedy was not capable of use to obtain relief. . . ."); Jackson v. Fong, 870 F.3d 928, 938 (9th Cir. 2017) (McCalla, J., concurring) (noting that the *Ross* Court only provided "three examples of circumstances in which an administrative remedy was not capable of use to obtain relief"); Gonzalez v. Coburn, No. 16-cv-06174, 2017 WL 6512859, at *5 (W.D.N.Y. Dec. 20, 2017) ("The Second Circuit noted that *Ross* did not appear to suggest that these three circumstances are exhaustive."); Spradlin v. Rodes, No. 16-cv-06986, 2017 WL 4277150, at *2 (S.D.W.V. Aug. 31, 2017) (explaining that in *Ross* "[t]he Court provided examples of unavailable remedies"); Doe v. Cty. of Milwaukee, No. 14-CV-200, 2017 WL 1843262, at *7 (E.D. Wis. May 5, 2017) ("However, *Ross* held that the circumstances it discussed were 'as relevant' to Blake's suit; it did not say that those three were the *only* circumstances wherein 'unavailability' could be found." (emphasis in original) (citing *Ross*, 136 S. Ct. at 1859)); Turner v. Clelland, 15-cv-947, 2016 WL 6997500, at *9 (M.D.N.C. Nov. 30, 2016) (finding *Ross* "recognized three potential situations" but did not limit the exception to those situations); Drew v. City of New York, No. 16-cv-0594, 2016 WL 4533660, at *6 (S.D.N.Y. Aug. 29, 2016); Mena v. City of New York, No. 13-cv-2430 (RJS), 2016 WL 3948100, at *4 (S.D.N.Y. July 19, 2016) (finding *Ross* presented a nonexhaustive list of "three scenarios").

the exception.[123] This suggests that some courts may be correctly willing to consider new circumstances and expand the available remedy exception. But whether courts will eventually give the available remedy exception "real content" may require more time to determine,[124] and the possibility of lower courts continuing to apply it differently than the Court intended has the critical consequence of unduly limiting access to the courts for the incarcerated population.[125]

This trend is particularly concerning because *Ross* focused only on the available remedy exception in the context of the "ordinary prisoner" rather than nonordinary incarcerated groups.[126] By all accounts, Blake was average in terms of age, IQ, and mental health.[127] Even when positing questions for remand, the Court focused solely on the "ordinary prisoner," asking the lower court to determine whether "procedures [were] knowable by an ordinary prisoner in Blake's situation?"[128] Therefore, accepting the Court's statement in *Ross* that it focused only on circumstances "relevant here,"[129] the available remedy exception has not yet been broadly construed in regard to a nonordinary incarcerated plaintiff.[130]

Since the PLRA's adoption, some courts have acknowledged that certain groups of the incarcerated population may have traits — such as youth, mental illness, or low IQ — that leave them without an available remedy through the grievance process. Judges noted how the procedures were not "accessible for use" for

123. *See* Blandon v. Capra, No. 17-CV-65, 2017 WL 5624276, at *6 (S.D.N.Y. Nov. 20, 2017) ("[T]he Court need not consider Plaintiff's alternative argument — an open question in this Circuit — that the IGP procedures were not 'available' to him because of his intellectual disability, therefore excusing his failure to exhaust."); Galberth v. Washington, 14. Civ. 691, 2017 WL 3278921, at *8 (S.D.N.Y. July 31, 2017) (noting that *Ross* "did not opine on the specific question at the heart of this case: whether an inmate's mental health condition can cause administrative-remedy unavailability" and no other court "has considered this precise question in light of *Ross*'s clarification of PLRA availability"); *id.* at *11 ("To be clear: The Court does not here hold that mental illness, and treatment occasioned as a result thereof, could *never* render an otherwise available grievance procedure unavailable for purposes of PLRA exhaustion under *Ross*." (emphasis in original)).

124. Ross v. Blake, 136 S. Ct. 1850, 1858 (2016).

125. *See id.* at 1859 (explaining how courts should apply the exception).

126. *Id.* at 1862.

127. Nothing in the district court, Fourth Circuit, or Supreme Court's opinions suggest that Blake was inhibited from grieving because of a non-ordinary trait.

128. *Ross*, 136 S. Ct. at 1862.

129. *Id.* at 1859.

130. *See supra* note 123 and accompanying text (noting only two cases since *Ross* that briefly considered, but left it an open question, whether people with intellectual disabilities or mental health conditions might not have an available remedy).

this group of people because they struggled to comprehend what was required of them; in some cases, judges even refused to dismiss for failure to exhaust.[131]

In *Lewis v. Mollette*, for example, the court refused to dismiss a juvenile's excessive force claim primarily because of the plaintiff's age (15 years old).[132] The juvenile, who had reported the incident to his counselor, insisted that he was not made aware of a grievance procedure, let alone how to use it.[133] The court found he was without an available remedy due to his age: "Lewis' age at the time and his contention that he was never informed of the grievance procedure at Highland also weigh in favor of concluding that grievance processes were 'unavailable' to plaintiff."[134] Similarly, an Arkansas district court concluded that a grievance procedure was not accessible to an eighty-year old plaintiff because of old age and deteriorating health and refused to dismiss.[135] Other courts found grievance procedures too demanding — and thus not "capable of use"[136] — for incarcerated individuals who are deaf,[137] have an IQ of 71,[138] and had a recent psychosis diagnosis.[139]

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131. *See infra* notes 132–139 (providing examples where courts refused to dismiss because the incarcerated plaintiff had a nonordinary characteristic inhibiting her from grieving and thus lacked an available remedy).

132. Lewis v. Mollette, 752 F. Supp. 2d 233 (N.D.N.Y. 2010).

133. The facility's grievance policy required a person to grieve within fourteen days of the incident and had an appeals process. A person could also contact the ombudsman. *Id.* at 240.

134. *Id.* at 241 (emphasizing the boy made the facility aware of the incident).

135. Langford v. Ifediora, No. 05-CV-00216, 2007 WL 1427423 (E.D. Ark. May 11, 2007) (holding the incarcerated elderly man could not use the policy, which included two levels of appeals).

136. Ross v. Blake, 136 S. Ct. 1850, 1859 (2016) (citing Booth v. Churner, 532 U.S. 731, 738 (2001)).

137. *See* Williams v. Hayman, 657 F. Supp. 2d 488, 496–97 (D. N.J. 2008) (finding a deaf individual had no available remedy because he could not "communicate effectively"); *contra* Thomas v. Holder, No. 10-cv-246, 2010 WL 3260029, at *3 (D. Md. Aug. 18, 2010) (dismissing a blind prisoner's claim).

138. *See* Hale v. Rao, 768 F. Supp. 2d 367, 377 (N.D.N.Y. 2011) (finding an incarcerated person with a documented IQ of 71 without an available remedy because of "illiteracy and poor understanding").

139. *See* Michalek v. Lunsford, No. 4:11-CV-00685, 2012 WL 1454162, at *4 (E.D. Ark. Apr. 5, 2012) (noting a "genuine dispute" about whether the plaintiff, diagnosed with a psychotic disorder, was "mentally capable" of using the grievance procedure). *Cf.* Ball v. SCI Muncy, 385 F. App'x 211, 213–14 (3d Cir. 2010) (dismissing an incarcerated individual's claim despite her mental disability); *contra id.* at 216 (Weis, J., dissenting) (arguing that the PLRA should not "bar judicial review when the inmate is incapable, because of mental disability, to understand and complete the prison grievance system").

Admittedly, exhaustion has not often been excused for reasons such as age (or other inherent characteristics). Most courts have adhered to the PLRA's strict exhaustion requirement, finding that the plaintiff has an available remedy as long as a grievance process is in place and others are able to use it. Frequently cited to illustrate this strict adherence to exhaustion is *Minix v. Pazera*, in which a mother, after raising the issue first with prison officials, brought suit on behalf of her son, who was raped and physically assaulted by other adolescents in a juvenile detention facility.[140] The facility permitted only forty-eight hours to grieve, but the juvenile had been too fearful of retaliation to do so within this short period.[141] Still, the Indiana district court dismissed the case because of the boy's failure to exhaust, refusing to take into account how his age affected his compliance with the grievance policy.[142]

Therefore, *Ross*' description of the available remedy exception is highly relevant to nonordinary people who are incarcerated and have meritorious claims but are unable to use the "real-world workings of the grievance procedures."[143] Otherwise, this segment of the incarcerated population, unable to overcome the obstacles to exhaustion, are restricted from accessing the courts. Part IV examines adolescents housed in adult correctional facilities — a vulnerable, nonordinary group — to show how they lack a means for relief through the grievance procedures. This Note then explains why lower courts should expand the available remedy exception, as *Ross* encouraged, and in turn incentivize facilities to develop more accessible grievance procedures for this subset.

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140. Minix v. Pazera, No. 3:06-CV-398, 2007 WL 4233455, at *1 (N.D. Ind. Nov. 28, 2007); *see also* Hunter v. Corr. Corp., 441 F. Supp. 2d 78 (D.D.C. 2006). Justice Stevens even cited *Minix* in his *Woodford* dissent to highlight his concern with how the "proper" exhaustion rule would bar meritorious claims from the courts. Woodford v. Ngo, 548 U.S. 81, 121 (2006) (Breyer, J., dissenting).

141. *Minix*, 2007 WL 4233455, at *1.

142. *See also* Brock v. Kenton Cty., 93 F. App'x 793, 797 (6th Cir. 2004) (unwilling to believe juveniles were "not aware of [the grievance procedure's] existence" even though "it had never been used by any juvenile offender"); M.C. *ex rel.* Crider v. Whitcomb, No. 1:05-cv-0162, 2007 WL 854019, at *4 (S.D. Ind. Mar. 2, 2007) (refusing to find the juvenile barred from grieving the five-step procedure because of his age).

143. Ross v. Blake, 136 S. Ct. 1850, 1859 (2016).

IV. ADOLESCENTS HOUSED IN ADULT CORRECTIONAL FACILITIES LACK AN AVAILABLE REMEDY

Legal and political authorities have recently recognized that juveniles in the criminal justice system should not be equated with adults, citing their differing cognitive and developmental abilities and chances of victimization while incarcerated.[144] Increasingly, the very fact that members of this group are tried and sentenced as adults — a trend that state lawmakers initiated in the late 1980s and led to 68% more juveniles in adult court — has been questioned.[145] But the average number of adolescents housed in adult jails and prisons continues to decline, dropping a staggering 48% between 1997 and 2013.[146] By 2016, there were approximately 5,500 adolescents in adult jails and prisons across the country.[147]

A number of factors, including evolving societal views, contributed to the growing backlash against treating youth as

144. *See* J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) ("Like this Court's own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal."); Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions*, Miranda*, and the Right to Counsel*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 106 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]hese policies characterize young people as autonomous and responsible even though many youths do not possess the capacity of adults to exercise or relinquish their constitutional rights in a 'knowing and intelligent' manner."); BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf [https://perma.cc/6YGH-YECE] (showing the dangers and costs of detaining youth as adults).

145. *See* Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL, *supra* note 144, at 139 (explaining how statutory changes affected youth in the legal system); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 805 (2005) (referring to statutory changes from the 1980s as "punitive reforms" that increased the stakes for young offenders and "erod[ed] the boundary between the adult and juvenile systems"); Ely, *supra* note 26, at 798–99 (explaining fear "led to changes in many state laws, making it easier for youth to be charged, tried, and convicted as adults"). There are several ways today to prosecute youth as adults: (i) age of jurisdiction laws (typically set at seventeen), (ii) statutory removal based on the charged offense, (iii) judicial waiver, (iv) prosecutorial discretion (fifteen states, including DC, allow this), (v) a blended sentence, or (vi) "once an adult always an adult" laws. *See* U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., *You're An Adult Now* 3–4 (2011), http://static.nicic.gov/Library/025555.pdf [https://perma.cc/ZLL6-DRL4].

146. *See* CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS, *supra* note 9, at 1, 3-4 (noting that 200,000 youth were tried, sentenced, or incarcerated as adults in 2016 for primarily nonviolent offenses).

147. *See id.* at 4.

adults.[148] Specifically, judicial rulings have also played a significant role in recognizing the differences that age causes in the criminal justice system.[149] Though the Court has developed some categorical rules to separate minors from adults, it has yet to acknowledge that these differences warrant new policies to protect incarcerated adolescents trying to grieve.

Section A uses scientific and sociological research to illustrate how incarcerated people younger than eighteen differ from adults and why they lack an available remedy when attempting to use adult facilities' grievance procedures. Section B considers how recent jurisprudence and federal government policies referenced this research to revise legal doctrine and policies. Section C briefly reminds the reader why juveniles must have a grievance system "capable of use,"[150] and, lastly, Section D proposes that courts initiate this necessary change by properly interpreting *Ross*.

A. HOW INCARCERATED JUVENILES DIFFER FROM THE ADULT POPULATION

Within the past decade, legal authorities have cited scientific and sociological research as evidence that existing doctrine must be modified to adequately protect adolescents (either in the general or incarcerated population). This research shows that adolescents suffer more than adults from (i) higher rates of cognitive disabilities and illiteracy, (ii) immaturity due to developmental differences, and (iii) increased likelihood of victimization during incarceration.[151]

148. *See Public Opinion on Juvenile Justice in America*, PEW CHARITABLE TRS. (Nov. 2014), http://www.pewtrusts.org/~/media/assets/2014/12/pspp_juvenile_poll_web.pdf?la=en [https://perma.cc/NP6Y-5XXB] (showing that support for juvenile justice reform is "across political parties, regions, age, gender, and racial-ethnic groups").

149. *See* Miller v. Alabama, 567 U.S. 460 (2012) (ruling that convicted minors cannot receive life without parole); Roper v. Simmons, 543 U.S. 551 (2005) (ruling that convicted minors cannot be sentenced to death).

150. Ross v. Blake, 136 S. Ct. 1850, 1859 (2016).

151. These studies primarily focus on an adolescent's ability to understand and participate in the legal system through criminal trials but make findings applicable to an incarcerated adolescent's ability to grieve. *See, e.g.*, *Executive Summary*, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 1 (Thomas Grisso & Robert G. Schwartz, eds.), http://www.adjj.org/downloads/5986Youth%20on%20Trial.pdf [https://perma.cc/B8ZB-YAQB] (examining the abilities of youth through "developmental psychology, a science that challenges the current presumption that children somehow stop being children when they commit crimes").

1. *High Rates of Illiteracy and Cognitive Disabilities*

The U.S. prison population as a whole suffers from astonishingly high rates of illiteracy and cognitive disabilities. Almost three-fourths have not completed high school and read at or below an eighth-grade level; the average IQ is approximately 80.[152] But the statistics are even more striking among incarcerated youth: 85% are functionally illiterate,[153] and the "baseline reading levels var[y] from grade 1 to grade 6."[154] About 70% of incarcerated juveniles have at least one learning disability.[155]

Several factors explain the higher rates among youth. First, adolescents sent to correctional facilities are less likely to have completed high school, and a lack of education is closely tied to

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152. Eisenberg, *supra* note 18, at 442; *see also* JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 249151, DISABILITY AMONG PRISON AND JAIL INMATES, 2011-12 1 (2015) (reporting that 32% of incarcerated people have at least one disability); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUB. NO. NCES 1994-102, LITERACY BEHIND WALLS xxi (1994), http://nces.ed.gov/pubs94/94102.pdf [https://perma.cc/G9AA-72WX] (finding "[s]lightly over half the inmates reported that they read or write English very well"); N.Y. DEP'T OF CORR. & COMM. SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION AS OF JANUARY 1, 2014 24 (2014), http://www.doccs.ny.gov/Research/Reports/2014/UnderCustody_Report_2014.pdf [https://perma.cc/YVD6-X8NH] (finding 28% percent of New York's prison population has an eighth grade or below reading level); BRUCE WESTERN ET AL., IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 1–7 (2004) (explaining who is incarcerated is "so strongly stratified by education" that "nearly all prisoners lack any education beyond high school").

153. BETSY PARTIN VINSON, LANGUAGE DISORDERS ACROSS THE LIFESPAN 310 tbl. 8-1 (3d ed. 2012).

154. Mindee O'Cummings et al., *Importance of Literacy for Youth Involved in the Juvenile Justice System*, NAT'L EVALUATION & TECHNICAL ASSISTANCE CTR. FOR THE EDUC. OF CHILD. & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT RISK (2010), http://www.neglected-delinquent.org/sites/default/files/docs/literacy_brief_20100120.pdf [https://perma.cc/JX5T-QQBE] (studying the link between literacy and juvenile justice); *see* Margaret E. Shippen et al., *An Examination of the Basic Reading Skills of Incarcerated Males*, 21 ADULT LEARNING 4, 9 (2010) (showing that incarcerated people under the age of 24 have the reading abilities of someone "at the beginning to middle of fifth grade in all reading subareas").

155. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005) (finding up to 70% of incarcerated juveniles have a disability). Studies that have looked at the prevalence of learning disabilities among the general U.S. population have found a broad range of numbers. *See, e.g.*, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., DIAGNOSED ATTENTION DEFICIT AND HYPERACTIVITY DISORDER AND LEARNING DISABILITY: UNITED STATES, 2004-2006 3 (2008), https://www.cdc.gov/nchs/data/series/sr_10/Sr10_237.pdf [https://perma.cc/5YN6-A5HW] (noting a study that found 4.9% of children from six to seventeen years old in the U.S. have a learning disability); Maja Altarac & Ekta Saroha, *Lifetime Prevalence of Learning Disability Among US Children*, 119 PEDIATRICS S77, S77 (2007) ("The lifetime prevalence of learning disability in US children is 9.7%.").

illiteracy.[156] Second, the legal system is more likely to treat youth of color from low-income areas as adults.[157] This group generally has lower than average educational levels because of the poor-quality schools in their neighborhoods[158] and the effect of not having a "stable home."[159]

Deficient education and literacy affect adolescents' comprehension of legal processes and, more specifically, grievance procedures. Thomas Grisso, whose study found that young defendants receiving a *Miranda* warning were more likely to miscomprehend its meaning and function than adults, explained: "Poorer comprehension of legal information and concepts has been found for delinquent youths with lower intelligence test scores, lower scores

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156. *See* BRUCE WESTERN, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 64–68 (2014) (showing the lifetime risk of imprisonment has increased for men "with no college education and to extraordinary absolute levels for men who did not complete high school," and that 68% of African American men who do not finish high school will serve time in state or federal prison); O'Cummings et al., *supra* note 154 (showing kids with less education "are more likely to be delinquent" because "literacy represents a key determinant of academic, social and economic success").

157. *See* NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH IN COLOR IN THE JUSTICE SYSTEM 3 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf [https://perma.cc/48F3-EXYK] (finding youth of color make up 75% of adolescents sentenced as adults). Compared to the U.S. general population, African Americans and Hispanics are disproportionately represented in prison. *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/ZAJ6-CB8P] (estimating African Americans and Hispanics — 25% of the U.S. population — make up more than half the prison population).

158. *See* Quinn et al., *supra* note 155, at 340. Educational offerings in prisons are also slim despite strong evidence they play a significant role in lowering recidivism rates. *See* O'Cummings et al., *supra* note 154 ("Academic outcomes achieved during incarceration have an important impact on the achievements of youth after their release and have been shown to reduce recidivism."); *see also* Handberry v. Thompson, No. 96 Civ. 6161(GBD)(JCF), 2014 WL 4470535, at *1 (S.D.N.Y. Sept. 8, 2014) (upholding an injunction to mandate the NYC Department of Correction to provide "a wide range of educational services to inmates between the ages of 16 and 21"); *supra* note 29 (discussing judicial doubt that people who are incarcerated could use legal resources provided in correctional facilities).

159. *See* WESTERN ET AL., IMPRISONING AMERICA, *supra* note 152, at 120–25 (discussing the effect on children of having incarcerated parents); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF YOUTH IN CUSTODY, 1987 1 (1987), https://www.bjs.gov/content/pub/pdf/syc87.pdf [https://perma.cc/Y5MR-C4ZH] (reporting that 70% of incarcerated juveniles and young adults did not grow up with both parents); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 384–85 (2004) (finding "repeated disruptions" and an absent father in an adolescent's family to be strong indicators of future incarceration); Sandra Villalobos Agudelo, *The Impact of Family Visitation on Incarcerated Youth's Behavior and School Performance*, VERA INST. OF JUST. 3 fig.3 (Apr. 2013), http://archive.vera.org/sites/default/files/resources/downloads/family-visitation-and-youth-behavior-brief.pdf [https://perma.cc/NNS5-DHHB] (showing an adolescent's likelihood of misbehaving while incarcerated rises when family does not visit).

on verbal-ability tests, remedial or problematic educational histories, and learning disabilities."[160] Thus, grievance procedures — often written in legal jargon and requiring the incarcerated population to understand minute, complex details — are problematic.[161] On average, grievance procedures are written at a twelfth grade reading level, which does not correspond with incarcerated adolescents' reported eighth grade reading level.[162] Furthermore, the tight deadlines to grieve leave little time for them to understand the procedures.[163]

Thus, any concerns that *adolescent defendants* cannot understand the "legal jargon, abstract language, and complex terminology" are equally applicable to *adolescents* who are sent to prison and are attempting to grieve.[164] Complex grievance procedures ignore adolescents' low literacy levels and overall difficulty comprehending legal information.

2. *Maturity Disparities Due to Developmental Differences*

Society has long cited perceptible maturity differences between adults and adolescents as a reason to restrict minors from participating in certain activities, such as jury duty, voting, en-

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160. Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL, *supra* note 144, at 151; *see* Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 356 (2003) [hereinafter Grisso et al., *Juveniles' Competence*] (affirming the 1980 study's findings); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1151–60 (1980).

161. *See supra* notes 53–70 and accompanying text (describing grievance procedures' requirements).

162. The author used Microsoft Word to determine grievance procedures' readability levels. This tool, also used by *Columbia Human Rights Review* to ensure that *A Jailhouse Lawyer's Manual* is written to an eighth grade level, tracks a document's readability level using Flesch-Kincaid readability tests based on the length of words and sentences. A Flesch Reading Ease score of 30 or below (out of 100) means the document was very difficult to read and targeted for college graduates. *See* RUDOLF FLESCH, THE ART OF READABLE WRITING (1949); Scott A. Crossley et al., *Text Readability and Intuitive Simplification: A Comparison of Readability Formulas*, 23 READING IN A FOREIGN LANGUAGE 84, 84–85 (2011). Here are the results for several state grievance procedures: Alaska (Flesch-Kincaid Grade Level: 12.0; Flesch Reading Ease: 27.0); Connecticut (12.0; 29.6); Florida (12.0; 22.2); Illinois (12.0; 27.9); New York (12.0; 31.1); Texas (12.0; 29.1). But Michigan's grievance form scored a higher readability level (8.7; 47.2).

163. *See supra* notes 53–70 and accompanying text (explaining grievance procedures include strict deadlines and offer limited assistance to inmates, who usually proceed without counsel).

164. NAT'L JUV. DEFENDER CTR., *Using Developmentally Appropriate Language to Communicate with Court-Involved Youth* 1 (2014), http://njdc.info/wp-content/uploads/2014/10/Language-HR-10.8.14.pdf [https://perma.cc/8YVJ-NHKD].

listing for the military, getting married, or entering into a contract.[165] More recently, scholars raised doubts that adolescents have the decision-making abilities to be judged in the criminal justice system under the same standard as adults,[166] and the Court has cited adolescents' lack of maturity as a reason why they are not as culpable for their actions.[167] These concerns with maturity disparities should likewise apply to adolescents making grievance-related decisions in adult facilities.

Lack of maturity affects adolescents in several ways. They are less likely to understand a situation's legal consequences, and thus "less likely, or perhaps less able, than others to recognize the risks inherent in various choices they face. . . ."[168] They also focus more on present rather than long-term implications: "[M]ore recent studies have suggested that adolescents . . . differ from adults on measures of time perspective (less future orientation) . . . ."[169] The causes for these decision-making differences include lack of experience and incomplete brain development: Mature judgment is established only when the brain fully develops in one's early twenties.[170]

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165. *See* J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011) (noting types of "legal disqualifications placed on children as a class" in society include "limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent").

166. *See, e.g.*, Grisso et al., *Juveniles' Competence*, *supra* note 160, at 359 (arguing for "a more relaxed competence standard in juvenile court").

167. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 741 (2016) ("In the past decade, the Supreme Court decided a series of criminal cases involving minor offenders that expressly took account of their immaturity.").

168. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 160, at 357; *see also* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL, *supra* note 144, at 87–89; Jeffrey Arnett, Review*, Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992) (finding "adolescence bears a heightened potential for recklessness compared to other developmental periods" because of poor decision-making); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. ASS'N 1009, 1012 (2003).

169. Grisso, *What We Know About Youths' Capacities*, *in* YOUTH ON TRIAL, *supra* note 144, at 161.

170. *See* Brief of the American Medical Ass'n et al., *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549, at *1 ("Cutting-edge brain imaging technology reveals that regions of the adolescent brain do not reach fully mature state until after the age of 18."); Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79 (2008) (citing research indicating the "brain may not mature to adult capacity until the early twenties").

Therefore, in the grievance context, juveniles may be more focused on getting immediate relief from the facility rather than thinking ahead to a possible suit.[171] In an already stressful prison environment, incarcerated youth may not give proper weight to compliance with the strict grievance deadlines, and so may lose the possibility of judicial relief.[172] Unlike people of this age in the criminal justice system who have a lawyer to assist them in the process, adolescents in prison are largely on their own to learn how to grieve and to understand the long-term implications of grieving.[173] For these reasons, the consequential effects of lack of maturity on adolescents' decision-making are a significant reason why this group should not be held as culpable for failing to exhaust.

3. *Juveniles' Increased Likelihood of Victimization when Housed with Adults*

Adolescents incarcerated with adults are also more prone to abuse (physical and sexual) and mental illness, and thus are more in need of help from prison officials and the courts.[174] Yet this very victimization makes them more hesitant to grieve. Adolescents housed with adults are 50% more likely to be physically assaulted than those in juvenile facilities.[175] The rate of sexual

171. *See supra* note 76 (explaining there are benefits to prioritizing internal resolution). But for these benefits to be realized, incarcerated adolescents must be capable of using the system for internal resolution.

172. *See supra* notes 55–57 and accompanying text (explaining the deadlines imposed on the incarcerated population).

173. *See* Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, in YOUTH ON TRIAL, *supra* note 144, at 182–85 (explaining how lawyers help ameliorate "very stressful and emotion-laden experience . . . [which are] shown [to] impair decision making functions").

174. *See, e.g.*, Dana Liebelson, *Cruel and All-Too-Usual: A Terrifying Glimpse into Life in Prison — As a Kid*, HUFFINGTON POST, http://highline.huffingtonpost.com/articles/en/cruel-and-all-too-usual/ [https://perma.cc/5Y9G-VMLX].

175. Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989) (making findings which today remain widely cited today by scholars and even the Department of Justice); *accord* MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 55 (2009), https://law.utexas.edu/faculty/publications/2009-From-Time-Out-to-Hard-Time-Young-Children-in-the-Adult-Criminal-Justice-System/download [https://perma.cc/9DW3-DJDN] (citing statistics from the Forst et al. article); *see also* United States' Proposed Complaint-in-Intervention, Nunez v. City of New York (S.D.N.Y.) (No. 11 Civ. 5845 (LTS)(JCF)), at *5, 8, https://www.justice.gov/file/188656/download [https://perma.cc/M2QL-BY65] (recognizing adolescents at Rikers suffer from use of excessive force at "a staggering rate"); Karen F. Lahm, *Inmate-on-Inmate*

assault is also higher for adolescents in adult facilities: "Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities. . . ."[176]

This risk of abuse, the nature of "overcrowding, violence, lack of privacy, lack of meaningful activities" in prisons,[177] and a lack of support systems[178] all contribute to the high rates of mental illness which plague adolescents in adult facilities.[179] Nearly 50% of incarcerated sixteen- to eighteen-year-olds have a mental ill-

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Assault: A Multilevel Examination of Prison Violence, 35 CRIM. JUST. & BEHAV. 120, 135 (2008) ("[T]he importance of the relationship between age and assaults cannot be ignored . . . ."). The rate of physical abuse is also high in juvenile facilities. *See* Carly B. Dierkhising et al., *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCH., PUB. POL'Y, & L. 181, 185–86 (2014) (reporting 96.8% of formerly incarcerated youth in juvenile facilities suffered some type of abuse, usually physical). In addition to the high risk of abuse *while* incarcerated, more than 75% of youth suffer some form of victimization *prior* to entering the correctional facility. Christine Bella, *Shining a Light: The Need for Independent Oversight in Juvenile Justice Facilities and Reform of the Prison Litigation Reform Act*, 27 J. CIV. RTS. & ECO. DEV. 655, 661 n.41 (2015); *see* Dierkhising et al., *supra* note 175, at 181 (finding "history of child maltreatment" a "robust predictor" of future criminal involvement).

176. 34 U.S.C. § 30301 (Supp. V 2017) (noting, in the Act's preamble, the pervasiveness of this problem and concerns about unreported assaults). Six years later, the committee tracking PREA's results found the issue unimproved: "[M]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse." PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 18 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf [https://perma.cc/DM8U-384W].

177. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R-C.L. L. REV. 391, 391 (2006).

178. Agudelo, *supra* note 159, at 2 (showing youth who rarely receive visits from family members are more likely to misbehave compared to those who receive regular visits).

179. *See* Bella, *supra* note 175, at 660. Overall, the prison population suffers from high rates of mental health issues: 56% of people in state prisons, 45% of people in federal prisons, and 64% of people in jail have mental health problems. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 8 (2006) (showing how those with mental health problems tend to receive longer sentences); *see* Prison Rape Elimination Act, 34 U.S.C. § 30301(3) (Supp. V 2017) (estimating that 16% percent of people in state correctional facilities suffer from a mental illness); Brief of National Police Accountability Project & Human Rights Defense Center, *supra* note 80, at *10 (finding 11-19% percent of the prison population, compared to 5% in the general population, has a mental illness). Today, many lament that prisons have effectively become mental institutions as a result of deinstitutionalization in the 1980s. *See, e.g.,* Anasseril E. Daniel, *Care of the Mentally Ill in Prisons: Challenges and Solutions*, 35 J. AM. ACAD. PSYCHIATRY LAW 406, 406 (2007) ("Correctional institutions have become the *de facto* state hospitals . . . ."); E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States*, TREATMENT ADVOC. CTR. (May 2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf [https://perma.cc/5BF2-CJJQ].

ness.[180] Juveniles housed with adults are ten times more likely to suffer from psychosis[181] and have a "7.7 times higher" suicide rate than those in juvenile facilities.[182]

These conditions illustrate how important it is for youth to have a grievance system, yet the high risk of victimization also deters them from using that system for fear of retaliation. Adolescents' distrust of the correctional system is often heightened when prison officials themselves inflict the abuse or are unwilling to prevent it.[183] Without being able to turn to those they trust, such as family and friends, youth may be less inclined to ask for help, which makes it more likely that their grievance will be dismissed for a technical error.[184]

The combination of poor legal comprehension and decision-making, as well as increased victimization, explains why adolescents in prison struggle to use grievance procedures. If the "real-

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180. United States' Proposed Complaint-in-Intervention, *supra* note 175, at *5; *see* Sue Burrell et al., *Incompetent Youth in California Juvenile Justice*, 19 STAN. L. & POL'Y REV. 198, 204 (finding 50-90% of youth in California corrections have a mental illness compared to 10% in the general population).

181. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 1010, 1016 (finding mental disorders "substantially more common in adolescents in detention than among-age equivalent individuals in the general population"). The study is unclear about whether the risk of psychoses contributes to being incarcerated or is caused by incarceration.

182. VINCENT SCHIRALDI & JASON ZEIDENBERG, JUST. POL'Y INST., THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS 2 (1997), http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf [https://perma.cc/66EM-3RLQ]; *see also* Andrea Wood, *Cruel and Unusual Punishment: Housing Juveniles with Adults after* Graham *and* Miller, 61 EMORY L.J. 1445, 1454 (2012) (explaining how juveniles housed in adult facilities are "eight times more likely" to commit suicide than those in juvenile facilities).

183. *See* JAMES AUSTIN ET. AL, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 26, 66 (2000) (explaining staff brutality and excessive force are problems for adolescents' safety in adult facilities and recommending "adult facilities that house youthful offenders be staffed with people experienced in working in juvenile facilities"); *see also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005) (reporting 12% of its investigations into claims of sexual abuse in BOP custody involved staff and 185 investigations from 2000 to 2004 led to "criminal or administrative outcomes"); Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 1, 3 (2009) (finding 25% of incarcerated African Americans, 30% of incarcerated Hispanics, and 20% of incarcerated non-Hispanic whites were victims of physical assault at the hands of staff); Dierkhising et al., *supra* note 175, at 182 (noting that studies of conditions in juvenile facilities found that approximately 10% of "youth reported sexual misconduct by a staff member" and that 22% of youth "were fearful of attack from staff").

184. *See supra* notes 62–64 and accompanying text (noting difficulties incarcerated individuals have in getting assistance).

world workings of grievance systems"[185] are designed at the twelfth grade level, how can courts expect these adolescents — 85% of whom are functionally illiterate — to exhaust?[186] Instead, their youth and ongoing development pose a serious obstacle to satisfying grievance requirements and thus leave them without access to the courts.

B. RECENT JURISPRUDENCE AND FEDERAL POLICIES REFLECT THESE AGE-RELATED DIFFERENCES

1. *Recent Jurisprudence Takes Age into Account for Criminal Justice Issues*

Relying on research and "common sense," the Court acknowledged that youth generally lack the cognitive abilities and maturity to find them as culpable as adults.[187] Notably, the Court shifted its rhetoric, referring to juveniles as "children" rather than "defendants."[188] This evolving legal analysis is essential for why lower courts should also treat adolescents in adult correctional facilities as "children" in the grievance context.[189]

a. *Sentencing*

The Supreme Court's first admission that youth in the criminal justice system warrant a different analysis came in the sentencing context. In *Roper*, evaluating a seventeen-year-old defendant's death sentence for first-degree murder, the Court created a bright-line rule that prohibited individuals under eighteen from receiving the death penalty. Finding the death penalty to

185. Ross v. Blake, 136 S. Ct. 1850, 1859 (2016).

186. *See supra* notes 153-155, 161-162 and accompanying text (describing the literacy problems that this segment of the incarcerated population face).

187. J.D.B. v. North Carolina, 564 U.S. 261, 280 (2011) ("[O]fficers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age."); *see* Hanna Marie Sheehan, J.D.B. v. North Carolina: *An Appropriate Expansion of* Miranda *to Account for Age in Juvenile Interrogations*, 72 MD. L. REV. 296, 296 (2012) ("The Supreme Court appropriately developed a rule that comports with a progressive trend of establishing separate, categorical rules for juveniles.").

188. Miller v. Alabama, 567 U.S. 460, 470 (2012) ("Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without a possibility of parole for a child who committed a nonhomicide offense.").

189. *Id.*

be disproportional punishment for an adolescent's crime (however heinous), it noted three characteristics that "render suspect any conclusion that a juvenile falls among the worst offenders": (i) "lack of maturity," (ii) increased vulnerability to "negative influences and outside pressures," and (iii) a less "well formed" character.[190]

Roper is important for initiating a "movement toward setting aside juveniles as a discrete class."[191] By citing several amicus briefs that focused on behavioral and neuroscientific research, the Court also showed its willingness to use such studies to develop or revise doctrine.[192] Courts considering adolescents' failure to exhaust should expand upon this movement toward analyzing juveniles' actions differently from those of adults. They should take into account the research explaining why adolescents struggle to grieve to warrant distinct analysis and to find this group less culpable for failing to exhaust.[193]

b. *Representation*

In 2011, building on the finding in *Roper* and *Miller* that adolescence lessened one's culpability, the Court turned to how age might affect one's understanding of the legal process.[194] It was tasked with determining the validity of a thirteen-year-old boy's confession after thirty minutes of questioning at school without a *Miranda* warning. Finding it required only "common sense" to

190. Roper v. Simmons, 543 U.S. 551, 569–70 (2005); *see* Buss, *supra* note 167, at 741 (describing the "emergence of the developmental approach" in *Roper*).

191. Sheehan, *supra* note 187, at 315. Several years later, the Court relied on *Roper*, noting children are different because of their "distinctive and (transitory) mental traits and environmental vulnerabilities" to prohibit sentencing convicted minors to life without parole. *Miller*, 567 U.S. at 473; *see* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (making *Miller* retroactive because of the Court's statement that "children are constitutionally different from adults in their level of culpability").

192. *See* Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447, at *6, *12 (citing "behavioral studies indicat[ing] that adolescents often undervalue the true consequences of their actions" and brain imaging technology showing adolescents' brains are not fully matured); *contra Roper*, 543 U.S. at 617-18 (Scalia, J., dissenting) (criticizing how scientific evidence is used by highlighting the APA's changing stance on youth decision-making (citing Hodgson v. Minnesota, 497 U.S. 417 (1990)).

193. *See supra* Part IV.A (showing differences in literacy, developmental abilities, and victimization).

194. J.D.B. v. North Carolina, 564 U.S. 261, 264-65 (2011) ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.").

determine how the boy's young age would leave him unaware that the questioning was voluntary, the majority wrote:

> In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.[195]

It also noted that these differences had long been acknowledged in other societal contexts because they "yield[ ] objective conclusions" that anyone can make.[196]

The concerns discussed in *J.D.B.* are applicable not just to young suspects but also to adolescents in prison who are attempting to exhaust. First, *J.D.B.* emphasized how custodial settings and authority figures can negatively affect adolescents: "[W]e have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"[197] These problems are exacerbated in a correctional facility, replete with "negative psychological effects,"[198] where correctional officers have total control.[199] Grievance procedures that require a young person in prison to attempt informal resolution, speaking with an officer or another incarcerated person who may be more powerful or older, risks "overaw[ing] and overwhelm[ing]" her.[200] Thus, the "inherently compelling pressures" in a "coercive" setting that worried the *J.D.B.* majority is very much present, if not more so, behind prison walls.[201]

A second concern is that adolescence presents the high point of social conformity, which may affect a person's willingness to

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195. *Id.* at 279–80; *see id.* at 273 n.5 (relying on research is "unnecessary to establish these commonsense propositions, [though] the literature confirms what experiences bears out").

196. *Id.* at 274–75 (showing "history [is] 'replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults" (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

197. *Id.* at 272 (citing Haley v. Ohio, 332 U.S. 596, 599 (1948)).

198. Michelle Parilo, *Protecting Prisoners During Custodial Interrogations: The Road Forward after* Howes v. Fields, 33 B.C.J.L. & SOC. JUST. 217, 234 (2013).

199. *J.D.B.*, 564 U.S. at 276 ("[T]he effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned.").

200. *Id.* at 272 (citing *Haley*, 332 U.S. at 599).

201. *Id.* at 269.

speak out on her own behalf.[202] Research shows that adolescents are more inclined than adults to consider what those around them think when making important decisions: "Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures . . . ."[203] In *J.D.B.*, the majority worried that this would make young suspects more prone to false confessions;[204] for adolescents trying to exhaust, this may deter them from coming forward at all.

Lastly, the difficulties the young suspect in *J.D.B.* had because of immaturity and inexperience are applicable to a young detained person: They are both, because of age, less aware of their legal rights.[205] Just as the boy in *J.D.B.* was unaware that the questioning was voluntary, a young person in prison may not know how to exhaust, if she is even aware that there is a grievance mechanism.[206]

J.D.B.'s holding, requiring consideration of a suspect's age in providing *Miranda* warnings, is further evidence that youth in the criminal justice system warrant different analysis and reflects why grievance procedures should be tailored for age. An inability to exhaust poses serious consequences — usually resulting in a *complete* bar to court access.[207] Therefore, as in the sentencing and representation contexts, age-related differences should be properly accounted for when it comes to grieving.

2. *The Federal Government Tailored Correctional Policies to Adolescents*

The federal government has recently implemented policies increasing protection — particularly from sexual assault and the

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202. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 230 (1995) ("[A]dolescent desire for peer approval may affect decision making without any explicit coercion.").

203. Grisso et al., *Juveniles' Competence*, *supra* note 160, at 357; *see also* Modecki, *supra* note 170, at 80 (noting adolescents are more "influenced by social pressure, emotional experiences, and peer norms").

204. *J.D.B.*, 564 U.S. at 269.

205. *See* Graham v. Florida, 560 U.S. 48, 78 (2010) (noting how juveniles have "limited understandings of the criminal justice system and the roles of the institutional actors within it," "difficulty in weighing long-term consequences," and "impulsiveness," and therefore a reduced chance of success in the legal system).

206. *See supra* notes 132–134 and accompanying text (describing *Lewis v. Mollette*, where the juvenile was unaware of any grievance procedure at all).

207. *See* Bounds v. Smith, 430 U.S. 817, 821 (1977) (finding access to the courts a constitutional right).

effects of isolation — for people younger than eighteen housed in adult correctional facilities. Passed in 2012, a national standard governs how correctional facilities should house adolescents, defined as "any person under age 18."[208] The regulation, known as "sight and sound," requires facilities to house this group away from the adult population and to provide direct staff supervision if there is contact between the two groups.[209] Other reforms include a 2016 executive order ending the use of solitary confinement for juveniles in federal prisons.[210] These policies reflect the government's increasing awareness that incarcerated youth require policymaking tailored to them based on age. However, these policies are revocable, though to different degrees, and do not guarantee lasting change.

C. WHY JUVENILES MUST HAVE A USABLE GRIEVANCE MECHANISM

Prison litigation is a valuable vehicle for documenting the abuses and conditions that people face when detained behind prison walls. It ideally leads to individual or large-scale remedies, or a change in the public discourse.[211] Barring adolescents from litigating their prison claims because of failure to exhaust means the abuse or conditions they face may go undiscovered.

While courts, though maybe reluctantly, have overseen what goes on inside prisons and "traditionally been the last refuge for

208. PREA National Standards, 28 C.F.R. § 115.5 (2012) (defining "youthful inmate" as "any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail" and preventing states from determining on their own what age qualifies as youth).

209. 28 C.F.R. § 115.14; *see infra* note 240 and accompanying text (reporting on states' compliance with PREA regulations).

210. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 59–62 (2016), https://www.justice.gov/dag/file/815551/download [https://perma.cc/9A5W-SRN6] (citing evidence that shows solitary confinement has particularly negative effects on young inmates because "the prefrontal cortex region that regulates impulse control and reasoning, continues to develop well into a person's 20s"). The order also created programs targeted to stop this age group, disproportionately represented in solitary confinement, from actions resulting in this discipline. *See id.* at 60. In 2014, New York was the largest state to ban the use of solitary confinement for juveniles in all prisons. Stipulation for a Stay with Conditions, Peoples v. Fischer, 11-CV-2694 (S.D.N.Y. Feb. 19, 2014), ECF No. 124.

211. *See* Dierkhising et al., *supra* note 175, at 183 ("Litigation-based reform efforts have been essential for juvenile justice reform."); Webbinak, *supra* note 13, at 633 (noting that prison litigation is a means for "asserting and guaranteeing the rights of the prison population"); *cf.* Dale, *supra* note 32, at 732 (showing prison litigation is "long and arduous").

prisoners,"[212] litigation itself is important because it can "draw[ ] the attention of public officials and the public."[213] Even if a claim is ultimately unsuccessful, access to the courts is a valuable way to inform the public about abuse that is unknown outside prison walls. For instance, even though the court dismissed the claim for failure to exhaust in *Minix*, the Department of Justice learned through this litigation about the conditions within Indiana state facilities and intervened, finding the prison administration had "'fail[ed] to adequately protect the juveniles in its care from harm.'"[214] Courts, therefore, provide a critical tool to ensure that facilities are not closed off from society, and easing access to the courts can only provide for more transparency.[215]

Revising existing grievance procedures to be usable will not only help secure adolescents their day in court. Providing this group with a means to voice their grievances also offers "therapeutic value," which in turn may lower their high recidivism rates.[216] Advocates have, for instance, argued that one means to lowering recidivism rates is to improve the incarcerated population's faith in and respect for the criminal justice system by treating them properly and giving them a voice: "Additionally, prisoners who perceive that they have been treated fairly — because they understand the grievance process and were able to surmount procedural roadblocks — are less likely to take issue with the outcome, and so less likely to pursue judicial relief."[217] Ensuring

212. Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236, 236-39 (2012) (documenting how courts have traditionally overseen prisons); *see* Sturm, *supra* note 32, at 641 ("Courts continue to serve as reluctant but active participants in the task of policing and reforming our nation's correctional institutions."); *see also* Brown v. Plata, 563 U.S. 493 (2011) (providing an example of a court stepping in to remedy violations in the California prison system).

213. Dale, *supra* note 32, at 732.

214. Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 154.

215. *See id.* at 139–40 (arguing litigation is largely the only remaining way to hold prisons accountable).

216. Eisenberg, *supra* note 18, at 440; *see* AM. CORR. ASS'N, RIOTS AND DISTURBANCES IN CORRECTIONAL INSTITUTIONS: A DISCUSSION OF CAUSES, PREVENTIVE MEASURES AND METHODS OF CONTROL 11–12 (1981) (arguing "prompt and positive handling of inmates' complaints and grievances is essential in maintaining good morale"); CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS, *supra* note 9, at 3 (showing adolescents suffer high recidivism rates and prosecuting them as adults results in a 34–77% chance of rearrest).

217. Brief of National Police Accountability Project & Human Rights Defense Center, *supra* note 80, at *8; *see* Robinson v. Superintendent Rockview SCI, 831 F.3d 148, 155 (3d Cir. 2016) (noting "prisoners will feel disrespected and come to believe that internal grievance procedures are ineffective" if their grievances are ignored); Nyhuis v. Reno, 204 F.3d 65, 77 (3d Cir. 2000) (explaining the best grievance procedures "afford an inmate with a sense of respect"); Grisso, *What We Know About Youths' Capacities*, in YOUTH ON TRIAL,

recognition of injustices internally or in the courts, and not dismissing them for failing to comply with minor procedural rules, can therefore benefit both this group as well as society.[218]

D. HOW TO SECURE JUVENILES' ACCESS TO THE COURTS

Having identified why detained adolescents struggle to exhaust and how courts have solved similar age-related issues, what is the solution to ensure they are not barred from litigating their prison conditions claims? Abiding by *Ross*, lower courts should engage in an available remedy analysis that gives the exception "real content" as the Supreme Court intended.[219] Courts should evaluate the difficulty of "real-world workings of prison grievance systems" based on adolescents' abilities and find those systems practically inaccessible.[220] While ideally the solution is legislative action exempting all adolescents in correctional facilities from the PLRA's strict exhaustion framework, this proposal has failed before and likely would fail again today.[221] Thus, it is necessary to rely on the courts.[222]

1. *Today's Solution Is Exacting Judicial Oversight*

Because amending the PLRA is unlikely, courts must engage in a more demanding analysis of whether the adolescent plaintiff

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supra note 144, at 70 (arguing what youth "see and experience as defendants subtly shapes their perceptions of the relationship between individuals and society"); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61. B.U. L. REV. 885, 886 (1981) (arguing the "effects of process on participants . . . must be considered in judging the legitimacy" of processes).

218. *See* Eisenberg, *supra* note 18, at 440–41 (permitting incarcerated individuals to access courts has a "therapeutic value to the plaintiff even if no relief of any kind is obtained").

219. Ross v. Blake, 136 S. Ct. 1850, 1858 (2016).

220. *Id.* at 1859.

221. *See supra* note 84 and accompanying text (explaining the amendments proposed to exempt juveniles). Yet advocates continue to push for an amendment, even though political gridlock makes success unlikely. *See* Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 154 ("The PLRA must be amended."); Rapa, *supra* note 32, at 274–76 (arguing juveniles should not be subject to the PLRA).

222. Some critics of this approach might suggest that congressional inaction has meaning and courts should not look to act in the face of congressional inaction. However, the Court has explained that congressional inaction itself is not persuasive for whether the judiciary should act or not. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction . . . ." (citing United States v. Wise, 370 U.S. 405, 511 (1962)).

is capable of using the grievance system.[223] *Ross* told "courts in . . . other cases . . . [to] apply [this consideration] to the real-world workings of prison grievance systems."[224] Therefore, prior to dismissing a claim for failure to exhaust, a court is responsible for inquiring whether the grievance system was "accessible" to the particular plaintiff to secure a remedy.[225]

When a court is considering dismissal based on an adolescent's failure to exhaust an adult grievance procedure, it should reflect on how age inhibited the plaintiff from using the complicated procedures. It must take into account the differences between adolescents and adults,[226] in addition to the Supreme Court's previous findings that adolescents are less culpable and more in need of protection. Finding that this group lacks an available remedy would permit courts, and the public, to hear their claims.

Giving the available remedy exception "real content" would also hold prisons accountable for designing their policies "to trip up all but the most skillful prisoners."[227] More stringent analysis "creates incentives to improve grievance systems by placing the risk of confusing procedures on those who are best able to fix them: the institutions that devise those procedures."[228] If prison officials can no longer expect courts to summarily dismiss the claims of adolescents housed in their facilities for lack of exhaustion, they will be incentivized — out of concern for depletion of their own fiscal and administrative resources by litigation — to take youth into account and design policies that satisfy the new judicial level of scrutiny.[229]

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223. *See* Deitch, *supra* note 212, at 236–43 (arguing the judiciary must be the enforcer of rights "to prevent the statute from pulling an iron curtain across the bars of our nations' correctional institutions").

224. *Ross*, 136 S. Ct. at 1859.

225. *See supra* Part III.B (explaining *Ross'* holding and instructions to lower courts).

226. *See supra* Part IV.A (discussing how adolescents and adults differ and why this affects grieving).

227. *Ross*, 136 S. Ct. at 1858, 1860 (citing Ngo v. Woodford, 548 U.S. 81, 102 (2006)).

228. Brief of National Police Accountability Project & Human Rights Defense Center, *supra* note 80, at *7; *see* Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625, 1642–43 (2010) [hereinafter Fellner, *Ensuring Progress*] (discussing how facilities purposefully make policies technical and difficult on the incarcerated population).

229. *See* MALCOLM M. FEELY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1999) (documenting the judiciary's historic role in reforming prisons); Tamar R. Brickhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL'Y 15, 21–36 (2011) (explaining the pros and cons of "institutional reform litigation" which affects the "procedural and substantive rules according to which social and political institutions operate").

2. *Grievance Procedures Should be Tailored to Incarcerated Adolescents' Needs*

An effective grievance policy must have a "complete understanding of the many factors — psychosocial as well as cognitive — that affect the evolution of judgment over the course of adolescence and into adulthood."[230] Yet the typical grievance requirements in adult facilities do not consider the abilities of incarcerated adolescents.[231]

When revising their grievance procedures, prison officials should look to the Prison Rape Elimination Act's (PREA) minimum standards, promulgated in 2012, which modified the exhaustion requirement for people in correctional facilities with sexual abuse claims. Recognizing that the "PLRA requirements block access to the courts for many victims of sexual abuse,"[232] PREA's minimum standards prohibit a facility from imposing a deadline to grieve or requiring informal resolution.[233] A facility must also respond to the initial filing within 90 days.[234] Those bringing the claims may seek assistance from third parties, "including fellow residents, staff members, family members, attorneys, and outside advocates," and these third parties can even submit a grievance on their behalf.[235] Furthermore, staff is required to report any known or observed sexual misconduct.[236]

Similar standards should be in place for incarcerated adolescents, a highly vulnerable subset of the prison population.[237] These standards would eliminate many of the issues this group faces when trying to grieve. Without short deadlines, they can learn how to comply with the procedures and make better decisions, hopefully with long-term implications in mind. To not require informal resolution would remove a significant obstacle to

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230. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 BEHAV. SCI. L. 741, 741 (2000).

231. *See supra* notes 53–70 and accompanying text (describing the typical requirements in federal and state grievance procedures).

232. Fellner, *Ensuring Progress*, *supra* note 228, at 1642.

233. 28 C.F.R. § 115.52(b)(2)(3) (2012).

234. *Id.* § 115.52(d) (permitting facilities though to receive an automatic 70-day extension to respond).

235. *Id.* § 115.52(e).

236. *Id.* § 115.61(a).

237. *See supra* notes 174–186 and accompanying text (explaining that incarcerated youth face an increased risk of physical and sexual victimization).

exhaustion. Adolescents could then begin the process of exhausting their claims without having to directly face, for instance, the very perpetrators of the abuse or poor conditions.[238] In addition, permitting third parties to assist juveniles and file on their behalf is most important so adolescents are no longer reliant on staff and retain a voice despite any cognitive or developmental barriers.[239]

Revising prison regulations to meet this group's characteristics is not demanding, and many facilities already have or plan to revise their policies based on the PREA standards.[240] One criticism may be the arbitrariness of creating standards based strictly on drawing a line at eighteen-years old.[241] However, in addition to society's long-standing practice of doing this, recent judicially-created rules suggest there is a need for this.[242] A rule that is over-inclusive to protect more juveniles is better than a rule that allows some to slip through the cracks.[243] As research and the holdings in *Roper* and *J.D.B.* suggest, juveniles should be "afford-

238. While trying to informally resolve a grievance could also potentially raise concerns of retaliation, a formal grievance process, at minimum, will be documented, is likely to reach higher levels of the prison administration, and would not require face-to-face confrontation.

239. *See supra* notes 140–142 and accompanying text (explaining *Minix*, where a mother's claim on behalf of her son was dismissed); *see also* Deborah Frisch, Note, *Not Behind Bars, Not a Prisoner: An Analysis of Guardians, Conservators, and Protection & Advocacy Organizations Under the Prison Litigation Reform Act*, 36 CARDOZO L. REV. 731 (2014) (arguing the PLRA permits third parties to file for incarcerated individuals).

240. *See* Press Release, U.S. Dep't of Justice, Department of Justice Announces 50 States and Territories Have Committed to Ending Prison Rape (June 11, 2015), https://www.justice.gov/opa/pr/department-justice-announces-50-states-and-territories-have-committed-ending-prison-rape [https://perma.cc/RG39-X6QJ] (reporting ten states were in full compliance and most other states have submitted assurances that they are in the process of complying).

241. *See* Roper v. Simmons, 543 U.S. 551, 601 (2005) (Scalia, J., dissenting) (arguing a 17-year old does not differ enough from a young adult "to justify a bright-line prophylactic rule"); *contra id.* at 574 (explaining this is "where society draws the line for many purposes between childhood and adulthood"). Costs are another concern with tailoring procedures to a small group, but the PREA Commission found these costs negligible. *See* U.S. DEP'T OF JUSTICE, REGULATORY IMPACT ASSESSMENT: NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE UNDER THE PRISON RAPE ELIMINATION ACT 138 (2012), https://ojp.gov/programs/pdfs/prea_ria.pdf [https://perma.cc/QR49-MWUU] ("The great majority of agencies who commented on this standard averred that the costs of complying would be negligible to zero.").

242. *See* Brief of the National Legal Aid and Defender Association, as Amicus Curiae in Support of Respondent, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1633550, at *19–20 (explaining how the legal system has accepted a distinction between those eighteen-years old and younger).

243. *See Roper*, 543 U.S. at 572–74 (noting but dismissing objections to creating a categorical rule).

ed differential treatment within the criminal justice system," and that should extend to adolescents behind prison walls.[244]

V. CONCLUSION

When the PLRA was enacted, a prominent senator said: "[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."[245] Time, however, has proven this statement false, and particularly so for incarcerated adolescents.[246] Because legislative action to amend the PLRA remains unlikely, courts must initiate reform to ensure that this group gets relief for the abuse and conditions inflicted on them in adult correctional facilities.[247] The Supreme Court created an opening for this in *Ross*, guiding lower courts to scrutinize the "real-world workings of grievance systems" to protect those who are incarcerated.[248] Thus, exhaustion should no longer bar adolescents incarcerated in adult facilities, who lack an available remedy for age-related reasons, from the courts.

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244. Sheehan, *supra* note 187, at 326.

245. 141 Cong. Rec. 27,042 (Sept. 29, 1995) (statement of Sen. Hatch).

246. In writing this Note, the author noticed a dearth of research on patterns of juvenile litigation. Most scholars cite Dale's article, *see supra* note 32. Future advocacy would benefit from updated research.

247. *See* Fellner, *Ensuring Progress*, *supra* note 228, at 1641-44 (arguing courts should secure "prisoners' rights to be free of 'cruel and unusual punishment'"); Schlanger & Shay, *Preserving the Rule of Law*, *supra* note 6, at 150 ("cutting off judicial review based on an inmate's failure to comply" leaves nothing to hold facilities accountable). Hopefully showing how juveniles' incarcerated experience differs from that of adults lends further support for revising state laws permitting youth to be prosecuted as adults. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JURISDICTIONAL BOUNDARIES (2015), https://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp [https://perma.cc/GHP7-NA7Z] (finding forty-two states today set the age of jurisdiction at 17-years old; seven at 16; and two at 15); Raise the Age NY, *Get the Facts* (last visited Jan. 11, 2018), http://raisetheageny.com/get-the-facts [https://perma.cc/K6PM-CMUA]; *see generally* Wood, *supra* note 182 (arguing that housing juveniles with adults is unconstitutional in light of recent precedent).

248. Ross v. Blake, 136 S. Ct. 1850, 1859 (2016). Age is not the *only* factor that prevents people who are incarcerated from exhausting. People with very low IQs, mental health issues, and physical disabilities also struggle at high rates to properly grieve. *See supra* note 123 and accompanying text (listing two cases where courts have more recently considered this in terms of intellectual disability and mental health); *supra* notes 132-139 and accompanying text (citing cases where courts refused to dismiss because of plaintiffs' nonordinary traits). This Note's argument can hopefully help craft arguments for these other groups. However, unlike age that "yields objective conclusions," drawing a line for groups with mental health or IQ-related issues may be more difficult. J.D.B. v. North Carolina, 564 U.S. 261, 275 (2011).