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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Support 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

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). 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.

Adolescents detained in adult facilities (such as Hunter) — today numbering around 5,500 in U.S. prisons and jails — are a highly vulnerable group and struggle particularly to satisfy the exhaustion requirement. 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. 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.” 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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8. This Note refers interchangeably to people under eighteen years old held in adult facilities as adolescents, juveniles, and minors.


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 \textit{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 \textit{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 \textit{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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\item \textit{See} Amy E. Webbinak, \textit{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, \textit{supra} note 6, at 141 (arguing juveniles cannot “follow the complex requirements imposed by the statute . . . [which] disrupts accountability and enforcement”).
\item \textit{See infra} note 84 and accompanying text (describing the proposal of several amendments to the PLRA).
\item 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. \textit{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. \textit{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. \textit{See Ind. DEPT. OF CORR. No. 03-02-15, YOUTH GRIEVANCE PROCESS} (2015), http://www.in.gov/doc/files/03-02-105__Youth_Grievance_Process_4-1-2015.pdf [https://perma.cc/8JMB-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. \textit{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.”).
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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).


\(^{19}\) 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,” 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.”

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. These filings eventually totaled approximately twelve percent of federal civil suits. 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-

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).
23. Eisenberg, supra note 18, at 415; 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.”

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.

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. 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. Second, critics pointed to the high rate of dismissals as evidence of largely


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/1996/01/02/opinion/no-more-myths-about-prisoner-lawsuits-01021996.ht [http://perma.cc/QLQ8-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. GOVT 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).


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. 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.

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. 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." Congress also applied the PLRA broadly to any incarcerated person’s prison conditions claim brought in federal court.

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28. U.S. DEPT 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. Dept 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).


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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35. 42 U.S.C. § 1997e(c)(1)–(2).
the filing fee in full. Furthermore, having three claims dismissed for the above-mentioned reasons means that she must pay the entire fee upfront to file another claim.

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. Second, one cannot seek money damages for a “mental or emotional injury suffered while in custody” unless accompanied by a physical injury. Finally, the PLRA narrows when courts can grant injunctive relief, an important tool for large-scale prison reform.

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.


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).
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. 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.

Though advocates argued the PLRA’s text was unclear and should be interpreted loosely, 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. 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.”

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.” Prison officials had rejected the plaintiff’s grievance because he failed to grieve within the facility’s deadline to grieve. 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).

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).

See Piehl & Schlanger, Determinants of Civil Rights Filings, supra note 23, at 81–82 (“The PLRA has provoked a literature of commentary.”).
fifteen-day deadline. The Court upheld this rejection, ruling that the incarcerated plaintiff had to abide by the facility’s rules.\textsuperscript{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.\textsuperscript{49}

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\item \textbf{a. Typical Elements in a Grievance Procedure}
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Adult facilities across the country impose similar requirements in their grievance procedures even though there are no federal standards.\textsuperscript{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.\textsuperscript{51}

\textsuperscript{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.

\textsuperscript{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”).


\textsuperscript{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,
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

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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).


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 compiled 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”).

receiving third-party assistance, such as from family, advocates, and even other detained individuals. 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.

v. Additional Procedural Rules

Most policies only permit one grievance per form and require just a general description. Other states require more detail, sometimes even the names of those involved and the date of the incident. 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; prohibiting officials from providing writing utensils unless she has no credit in her commissary account; requiring her to write in black or blue pen; and only permitting grievances with “one staple, no tears or tape.”

[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).


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”).


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 (“Exhaustion is not per se inadequate simply because an individual later sued was not named in the grievances.”).


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


70. Kaul et al., supra note 50, at 13 (describing West Virginia’s grievance policy).
b. \textit{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.”\footnote{42 U.S.C. § 1997e(a) (2012).} Therefore, prior to dismissing for failure to exhaust, courts ensure that a remedy was available to the incarcerated individual.\footnote{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 \textit{Ross}).} 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,”\footnote{Woodford v. Ngo, 548 U.S. 81, 93, 102 (2006).} 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.”\footnote{Id. at 102; see also Ross v. Blake, 136 S. Ct. 1850, 1860 (2016) (affirming the point the Court first made in \textit{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, \textit{supra} note 61, at *3; see \textit{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”); \textit{contra} John Boston, \textit{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, \textit{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, \textit{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).}

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.”\footnote{Schlanger & Shay, \textit{Preserving the Rule of Law, supra} note 6, at 139.} 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...
for this, particularly in light of Woodford’s “proper” exhaustion rule. 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. With this in mind, the Court’s unwillingness to review grievance procedures for fairness ignores “how difficult, futile, or dangerous such compliance might be.”

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. However, rather than curtailing frivolous litigation as intended, the PLRA has allowed “serious complaints . . . [to] be thwarted by the mechanics of the grievance process.” 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. . . .”
The exhaustion provision has been particularly constraining on prisons’ most vulnerable groups. 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. 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.”

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. 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”).


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).

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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93. Complaint, supra note 91, at 6.


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. 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. 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.

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


97. Complaint, supra note 91.


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.

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-

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”).
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.
scribed a remedy as available if the procedure was “capable of use for the accomplishment of a purpose” or “accessible.”

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.” 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.” 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. The Court then remanded the case, instructing the lower court to consider Blake’s situation in light of these three circumstances.

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. . . .” 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.\textsuperscript{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.”\textsuperscript{116} Though Justice Kagan’s explanation gave the available remedy exception substantial weight, lower courts have since failed to read \textit{Ross} in this way.

C. THE MISREADING OF \textit{ROSS}

Since \textit{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 \textit{Ross}.\textsuperscript{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:

\begin{quote}
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” . . . .\textsuperscript{118}
\end{quote}

Other courts have similarly restricted their use of the available remedy exception.\textsuperscript{119} Even the Fourth Circuit, which instigat-
ed the holding in Ross, noted the constraint: “This case does not implicate any of the scenarios envisaged by the Supreme Court in Ross.”

While no court has yet found a factual scenario requiring expansion of the three circumstances, a number of courts have critically held that the three special circumstances described in Ross were not “exhaustive.” 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


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) (McCulla, 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) (“The 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)).


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).
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. Fediorn*, No. 05-CV-00216, 2007 WL 1427425 (E.D. Ark. May 11, 2007) (holding the incarcerated elderly man could not use the policy, which included two levels of appeals).
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.


\(^{141}\) 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).

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


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 “eroded 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.
Specifically, judicial rulings have also played a significant role in recognizing the differences that age causes in the criminal justice system. 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,” 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. 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.adj.org/downloads/5986Youth%20on%20Trial.pdf [https://perma.cc/B8ZB-YAQ8] (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. But the statistics are even more striking among incarcerated youth: 85% are functionally illiterate, and the “baseline reading levels vary from grade 1 to grade 6.” About 70% of incarcerated juveniles have at least one learning disability.

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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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/JX57-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”).

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

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 on academic achievement tests, and lower levels for men who did not complete high school,” and that 68% of African American prisoners have an important impact on the achievements of youth after their release and have been shown to reduce recidivism.”

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”).


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)(JCP), 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. Dept of Justice, Bureau of Justice Statistics, Survey of Youth in Custody, 1987 1 (1987), https://www.bjs.gov/content/pub/pdf/syc87.pdf (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 (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. Thus, grievance procedures—often written in legal jargon and requiring the incarcerated population to understand minute, complex details—are problematic. On average, grievance procedures are written at a twelfth grade reading level, which does not correspond with incarcerated adolescents’ reported eighth grade reading level. Furthermore, the tight deadlines to grieve leave little time for them to understand the procedures. 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. 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-


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).

listing for the military, getting married, or entering into a contract. 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, and the Court has cited adolescents’ lack of maturity as a reason why they are not as culpable for their actions. 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....” 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) ...” 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.

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.”).
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. 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. 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. 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. 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. The rate of sexual

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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).


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...”

This risk of abuse, the nature of “overcrowding, violence, lack of privacy, lack of meaningful activities” in prisons, and a lack of support systems all contribute to the high rates of mental illness which plague adolescents in adult facilities. 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) (“The 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. POLY., & 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. CRIM. JUST. & 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).


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.treatmentadvocacypcenter.org/storage/documents/final_jails_v_hospitals_study.pdf [https://perma.co/5BP2-CJJQ].
ness.\footnote{180 United States' Proposed Complaint-in-Intervention, \textit{supra} note 175, at *5; see Sue Burrell et al., \textit{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).} Juveniles housed with adults are ten times more likely to suffer from psychosis\footnote{181 \textit{Seena Fazel et al., Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Meta-regression 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.} and have a “7.7 times higher” suicide rate than those in juvenile facilities.\footnote{182 \textit{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).} 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.\footnote{183 \textit{See James Austin et. al., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 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, \textit{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., \textit{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”).} 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.\footnote{184 \textit{See supra} notes 62–64 and accompanying text (noting difficulties incarcerated individuals have in getting assistance).} 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-
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

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

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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 under-value 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.\textsuperscript{195}

It also noted that these differences had long been acknowledged in other societal contexts because they “yield[ ] objective conclusions” that anyone can make.\textsuperscript{196}

The concerns discussed in \textit{J.D.B.} are applicable not just to young suspects but also to adolescents in prison who are attempting to exhaust. First, \textit{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.’”\textsuperscript{197} These problems are exacerbated in a correctional facility, replete with “negative psychological effects,”\textsuperscript{198} where correctional officers have total control.\textsuperscript{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 overwhel[m]ing” her.\textsuperscript{200} Thus, the “inherently compelling pressures” in a “coercive” setting that worried the \textit{J.D.B.} majority is very much present, if not more so, behind prison walls.\textsuperscript{201}

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

\begin{itemize}
\item[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”).
\item[196.] Id. at 274–75 (showing “history [is] ‘replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults” (citing Edings v. Oklahoma, 455 U.S. 104, 115–16 (1982))).
\item[197.] Id. at 272 (citing Haley v. Ohio, 332 U.S. 596, 599 (1948)).
\item[199.] \textit{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.”).
\item[200.] Id. at 272 (citing \textit{Haley}, 332 U.S. at 599).
\item[201.] Id. at 269.
\end{itemize}
speak out on her own behalf.\textsuperscript{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 . . . .”\textsuperscript{203} In \textit{J.D.B.}, the majority worried that this would make young suspects more prone to false confessions;\textsuperscript{204} for adolescents trying to exhaust, this may deter them from coming forward at all.

Lastly, the difficulties the young suspect in \textit{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.\textsuperscript{205} Just as the boy in \textit{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.\textsuperscript{206} \textit{J.D.B.}’s holding, requiring consideration of a suspect’s age in providing \textit{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 \textit{complete} bar to court access.\textsuperscript{207} Therefore, as in the sentencing and representation contexts, age-related differences should be properly accounted for when it comes to grieving.

2. \textbf{The Federal Government Tailored Correctional Policies to Adolescents}

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

\textsuperscript{202} See Elizabeth S. Scott et al., \textit{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.”).

\textsuperscript{203} Grisso et al., \textit{Juveniles’ Competence}, \textit{supra} note 160, at 357; see also Modecki, \textit{supra} note 170, at 80 (noting adolescents are more “influenced by social pressure, emotional experiences, and peer norms”).

\textsuperscript{204} \textit{J.D.B.}, 564 U.S. at 269.

\textsuperscript{205} See Graham \textit{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).

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

\textsuperscript{207} See Bounds \textit{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.”\textsuperscript{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.\textsuperscript{209} Other reforms include a 2016 executive order ending the use of solitary confinement for juveniles in federal prisons.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{209} 28 C.F.R. § 115.14; see infra note 240 and accompanying text (reporting on states’ compliance with PREA regulations).
\textsuperscript{210} U.S. DEPT 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.
\textsuperscript{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.” Litigation itself is important because it can “draw[ ] the attention of public officials and the public.” 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.” 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.

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. 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.”

Ensuring access to the courts for incarcerated adolescents is important because it can draw the attention of public officials and the public. 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 “failed to adequately protect the juveniles in its care from harm.” 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.

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— 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).

— Dale, supra note 32, at 732.

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

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

— 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).

— 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

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”).
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. 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.

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, 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.” 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.” 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.

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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”).


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)).


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.” Yet the typical grievance requirements in adult facilities do not consider the abilities of incarcerated adolescents.

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,” PREA’s minimum standards prohibit a facility from imposing a deadline to grieve or requiring informal resolution. A facility must also respond to the initial filing within 90 days. 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. Furthermore, staff is required to report any known or observed sexual misconduct.

Similar standards should be in place for incarcerated adolescents, a highly vulnerable subset of the prison population. 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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231. See supra notes 53–70 and accompanying text (describing the typical requirements in federal and state grievance procedures).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{240} One criticism may be the arbitrariness of creating standards based strictly on drawing a line at eighteen-years old.\textsuperscript{241} However, in addition to society’s long-standing practice of doing this, recent judicially-created rules suggest there is a need for this.\textsuperscript{242} A rule that is over-inclusive to protect more juveniles is better than a rule that allows some to slip through the cracks.\textsuperscript{243} As research and the holdings in \textit{Roper} and \textit{J.D.B.} suggest, juveniles should be “afford-

\textsuperscript{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.

\textsuperscript{239} \textit{See supra} notes 140–142 and accompanying text (explaining \textit{Minix}, where a mother’s claim on behalf of her son was dismissed); \textit{see also} Deborah Frisch, Note, \textit{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).

\textsuperscript{240} \textit{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).

\textsuperscript{241} \textit{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”); \textit{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. \textit{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.”).

\textsuperscript{242} \textit{See} Brief of the National Legal Aid and Defender Association, as Amicus Curiae in Support of Respondent, \textit{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).

\textsuperscript{243} \textit{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: “[W]e 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.

244. Sheehan, supra note 187, at 326.
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. DEPT 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://raisetheagency.com/get-the-facts [https://perma.cc/K6PM-CMU4]; 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).