WE'RE TIRED: THE EXHAUSTION REQUIREMENT OF THE PRISON LITIGATION REFORM ACT

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Introduction

James Stackhouse was sitting in the Covington County Jail,[1] awaiting trial, with a growth on his eye and abscessed teeth; they caused him excruciating pain.[2] The jail refused to provide adequate medical treatment, so he sued. The only relief he sought was to be given proper healthcare or a "pass to get proper medical attention."[3] His case was automatically dismissed. Another man, Yusef Amin Thrash sued that same jail because

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1. The Covington County Jail is located in Andalusia, AL. Covington County has a population of 37,524 people. U.S. CENSUS, QUICKFACTS: COVINGTON COUNTY, ALABAMA https://www.census.gov/quickfacts/fact/table/covingtoncountyalabama/PST045221[https://perma.cc/Q6JJ-2R52]. The current sheriff is Blake Turman. COVINGTON COUNTY, ALABAMA, SHERIFF http://www.covcounty.com/sheriff [https://perma.cc/FZ4Y-GCYF].
2. Stackhouse v. Meeks, No. 2:18-CV-01074-ALB, 2019 WL 3183556 (M.D. Ala. June 12, 2019); Complaint, Stackhouse v. Meeks, No. 2:18-CV-01074-ALB-CSC (M.D. Ala. June 12, 2019).
3. *Id.*

he was denied medical treatment after being assaulted by other inmates.[4] His case was automatically dismissed. Jonathan Bedsole sued that same jail.[5] It was so overcrowded that inmates had to sleep on the floor and on laundry days, inmates were forced to go naked or not have their uniforms washed.[6] His case, too, was automatically dismissed. These cases will never be heard on their merits, and these men have no other means of redress. This phenomenon is not unique.[7] Across the country, cases for violation of the civil rights of incarcerated people are being dismissed as a matter of law.[8]

Prisons and jails are abusing a statutory loophole by creating labyrinthian administrative grievance procedures to guard themselves against liability and discourage prisoners from protecting their civil rights. This loophole is the Exhaustion Requirement of the Prison Litigation Reform Act (PLRA). The PLRA states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted*.[9]

In other words, an incarcerated person cannot file a section 1983 lawsuit until they have completely gone through their facility's administrative grievance process, including any appeals. Common section 1983 claims in the prison context include: officer-on-inmate violence, sexual assault, deliberate indifference to serious medical needs, cases regarding conditions of confinement, Americans with Disability Act claims, and most cruel and unusual punishment claims. Throughout this Note, I use the word "prison" for simplicity's sake—but the PLRA applies to all prisons, jails, correctional facilities, detention centers, and secure mental health facilities.

4. Thrash v. Meeks, No. 2:17-CV-005-WHA, 2017 WL 2264487 (M.D. Ala. May 3, 2017).
5. Bedsole v. Meeks, No. 2:13-CV-613-TMH, 2014 WL 905432 (M.D. Ala. Mar. 7, 2014).
6. *Id.*; Complaint, Bedsole v. Meeks, No. 2:13-CV-613-TMH [WO], (M.D. Ala. Mar. 7, 2014). These were not Mr. Bedsole's only complaints. He also complained about rampant staph infections due to unsanitary conditions, black mold growing in the showers and the kitchen, and the lack of dietary accommodations for people with serious medical conditions or allergies.
7. Foster v. Southern Health Partners, No. 2:17-CV-835-WHA, 2021 WL 1233467 (M.D. Ala. Mar. 5, 2021) (suing Covington County Jail for deliberate indifference to serious medical needs); Howard v. McWhorter, No. 2:12-CV-692-TMH [WO], 2014 LEXIS 75494 (M.D. Ala. May 7, 2014) (suing Covington County Jail for failure to treat a serious medical condition); Downes v. Hughes, No. 2:13-CV-00938 (M.D. Ala. Dec. 20, 2013) (suing Covington County Jail because he was kept in a feces-covered cell as retaliation by guards because of a familial connection). *See also* Priyah Kaul et al., Michigan Law Prison Information Project, Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey (2015).
8. Kaul et al., *supra* note 7.
9. 42 U.S.C § 1997e (2018) (emphasis added).

Prisons are using the Exhaustion Requirement to protect themselves. For example, the Covington County Jail in Andalusia, AL—where Stackhouse, Thrash, and Bedsole were incarcerated - details the following process for administrative grievances in their inmate handbook:

> I. The first action you should take is to try to resolve the problem through the use of an Inmate Request Form on the kiosk. If you are not able to resolve the problem informally using the Inmate Request Form you should:
>
> a. You should access the Inmate Grievance Form on the kiosk.
>
> b. Describe your problem and your desired solution to your POD Officer.
>
> II. If you have a grievance, you must report it on an Inmate Grievance Form within 48 hours of the incident. . . .[10]

At first glance, this grievance process might seem innocuous, but a closer look reveals otherwise. An inmate is told to first resolve their problem with an "Inmate Request Form" or by talking to a prison guard.[11] But the inmate is also required to fill out an Inmate Grievance Form within 48 hours of the incident.[12] Yet, there is no required timeframe for a correctional officer to respond to an Inmate Request Form. Nor is there a timeframe for an officer to respond to an inmate's concern if the inmate chooses to report their grievance to an officer. If an officer does not respond to the Inmate Request Form until two weeks later, even someone who was trying to follow the rules will still be barred from filing a grievance because they did not submit the Inmate Grievance Form within 48 hours. It is common for correctional officers to both intentionally and unintentionally ignore formal inmate requests or respond months later. This 48-hour time limit is not extended by an officer's delay in responding to an inmate's concern. The time limit is also not extended if an officer attempts to respond to an incident, but fails to resolve the issue. Even when inmates and officers attempt to follow the rules in good faith, this time limit still deprives the inmate of their right to sue.

Purposefully misleading grievance procedures, like those in Covington County Jail, are rampant across the country.[13] Time limits for filing grievances, like Covington County's 48-hour time limit, create new statutes of limitations for even the most heinous violations of an incarcerated person's civil rights. Prisons also employ other tactics such as refusing to let incarcerated people request assistance in filling out grievance forms, denying forms to people in solitary confinement, throwing out grievances for minor procedural errors then not extending the time limits accordingly, among other tactics.[14]

Many scholars have accused prisons of intentionally creating strict or complex grievance procedures to get away with unconstitutional

10. Ex. A, *Stackhouse v. Meeks*, No. 2:18-CV-1074-ALB (M.D. Ala. June 12, 2019).
11. *Id.*
12. *Id.*
13. *See* KAUL ET AL., *supra* note 7.
14. *Id.*

treatment of incarcerated people.[15] The Department of Justice's National Institute of Law Enforcement and Criminal Justice plainly admits that an administrative grievance procedure is an effective tool to avoid costly litigation.[16] The American Correctional Association specifically states that the purpose of inmate grievance procedures is to avoid litigation.[17] Lawyers defend unconstitutional prison conditions all the time.[18] With the rise of for-profit prisons, there is good money in it.[19] It only makes sense that a prison's lawyer would advise their client to create strict rules for their grievance procedures to minimize liability.

Stripped of their right to vote, lobby, organize, and communicate freely, an incarcerated person's right to sue is especially sacred. The PLRA silences prisoners who have no other political power and already come from communities with very little of it. In this Note, I argue that there is a Procedural Due Process minimum to what a prison grievance procedure must look like and prisons across this country are violating it. Part I discusses the congressionally intended purpose of the PLRA and its history. Part II details the current law regarding the Exhaustion Requirement of the PLRA. Part III discusses the concept of "availability" in terms of the Exhaustion Requirement. Part IV discusses the Procedural Due Process implications of the Exhaustion Requirement. Part briefly argues why an administrative law standard is inappropriate for prisons without more guidance from the legislature.

15. Alison M. Mikkor, *Correcting For Bias And Blind Spots In PLRA Exhaustion Law*, 21 Geo. Mason L. Rev. 573 (2014); Derek Borchardt, *The Iron Curtain Redrawn between Prisoners and the Constitution*, 43 Colum. Hum. Rts. L. Rev. 469 (2012); Joseph Alvarado, *Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the Fourteenth Amendment*, 8 Seattle J. for Soc. Just. 323 (2009).
16. Michael Keating, Jr. et al., Nat'l. Inst. of L. Enforcement and Crim. Just., Prison Grievance Mechanisms 1 (1975).
17. Amer. Correctional Ass'n., Standards for Administration of Correctional Agencies (2d ed. 1993).
18. *See, e.g.*, Beth Shelburne, *Brutality and Runaway Spending Rule Alabama's Department of Corrections*, Montgomery Advertiser (Jul. 29, 2020), https://www.montgomeryadvertiser.com/story/opinion/2020/07/29/brutality-and-runaway-spending-rule-alabamas-department-corrections/5537645002 [https://perma.cc/M882-XPDJ] (attorney for the Alabama Department of Corrections Bill Lunsford was paid $897,000 by the state of Alabama in 2019).
19. *Id.*

I. The Purpose & History of the Prison Litigation Reform Act

Passed under the Clinton Administration, various provisions of the PLRA have been well-litigated.[20] The 2018 Nationwide Incarcerated Workers Strike demanded the repeal of the PLRA.[21]

The PLRA specifically applies to section 1983 claims. Passed in 1871, section 1983 is the primary statute by which civil rights are enforced against public entities.[22] Rising to prominence in the 1960s,[23] section 1983 has brought us landmark civil rights cases, including *Farmer v. Brennan* in which the Court held that it was cruel and unusual punishment to hold a transgender woman in a general population at a male prison where the prison knew she was in danger[24] and *Monell v. Dep't of Soc. Serv. of the City of New York* in which the Court held that local municipalities are not immune from civil liability.[25]

In the 1990s, Congress was appalled by the epidemic of "frivolous" lawsuits filed by people who are incarcerated.[26] Incarcerated people were suing in unprecedented numbers—but not unprecedented rates.[27] The rise in lawsuits filed by incarcerated people largely coincided with the rise in prison populations resulting from mass incarceration, a fact that is not acknowledged by the Congressional Record.[28] Congress felt that these lawsuits were overburdening the federal court system.[29] Thus, Senator Orrin Hatch introduced a bipartisan act—the PLRA. The express purpose of the PLRA was to "preven[t] inmates from abusing the Federal judicial system."[30] Senator Hatch specifically stated, "I do not want to prevent inmates from raising legitimate claims."[31] Now-President, then-Senator Joe Biden was one of the few senators to oppose the Act, stating that the PLRA "places too many roadblocks to meritorious prison lawsuits."[32]

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20. *See, e.g.*, Shepherd v. Goord, 662 F.3d 603 (2nd Cir. 2011) (regarding the attorney fees cap built into the PLRA); Lomax v. Ortiz-Marquex, 590 U.S. 1723 (2020) (regarding the three-strikes provision of the PLRA); Harper v. Showers, 174 F.3d 716 (5th Cir. 1999) (regarding the physical injury requirement of the PLRA); Miller v. French, 530 U.S. 327 (2000) (regarding the automatic stay requirement).
21. *2018 Nationwide Incarcerated Workers Strike*, Incarcerated Workers Organizing Committee, https://incarceratedworkers.org/campaigns/prison-strike-2018 [https://perma.cc/D384-JJKH] (demanding that the PLRA be repealed, among other demands).
22. 42 U.S.C § 1983 (1996).
23. Monroe v. Pape, 365 U.S. 167 (1961) (*overruled by* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 661 (1978)).
24. Farmer v. Brennan, 511 U.S. 825 (1994).
25. *Monell*, 436 U.S. at 658.
26. Eugene Novikov, *Stacking The Deck: Futility And The Exhaustion Provision Of The Prison Litigation Reform Act*, 156 U. Penn. L. Rev. 817 (2008).
27. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1585 (2003).
28. *Id.*
29. 141 Cong. Rec. S14627 (1995).
30. *Id.*
31. 141 Cong. Rec. S14611-01 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).
32. 141 Cong. Rec. S14611-01 (daily ed. Sept. 29, 1995) (statement of Sen. Biden).

As will be shown in this Note, President Biden's fears about the PLRA preventing prisoners from filing meritorious lawsuits have been realized and the effect of the PLRA is more sinister than any senator anticipated. As the oft-quoted section of *Preiser v. Rodriguez* goes:

> For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.[33]

II. The Exhaustion Requirement

The Exhaustion Requirement is the section of the PLRA that requires that administrative grievance procedures be completely exhausted before an incarcerated person files a section 1983 lawsuit.

The Supreme Court has strictly interpreted the Exhaustion Requirement.[34] Exhaustion is a concept borrowed from administrative law.[35] Under the PLRA, exhaustion must be "proper," as opposed to exhaustion "*simpliciter*."[36] Proper exhaustion means that administrative remedies must be followed exactly as determined by the prison.[37] The PLRA's predecessor, the Civil Rights Institutionalized Persons Act (CRIPA), only required exhaustion *simpliciter*.[38] Exhaustion *simpliciter* allows for an incarcerated person to still file suit after a grievance procedure was no longer available to the inmate, such as when a grievance procedure's time limit has passed. Proper exhaustion requires the court to dismiss the case if a grievance procedure was ever available, even if it no longer is. In *Woodford v. Ngo,* the Court explicitly rejected exhaustion *simpliciter*, in favor of the proper exhaustion requirement.[39]

Noting the potential barriers to exhausting administrative grievance procedures in certain circumstances, several circuits created a "special circumstances" exception to the PLRA.[40] This exception allowed incarcerated people to move forward with their lawsuits in cases of extreme abuse.[41] In *Ross v. Blake*, Justice Kagan, writing for the majority, shut down the "special circumstances" exception to the Exhaustion Requirement, criticizing it as judge-made law.[42] In *Porter v. Nussle*, the Court also

33. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).
34. Ross v. Blake, 578 U.S. 632, 648 (2016).
35. *See* Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. Rev. 5 1234, 1242 (2018).
36. Woodford v. Ngo, 548 U.S. 81, 88 (2006).
37. *Id.*
38. *Ross*, 578 U.S. at 640–41.
39. *Woodford*, 548 U.S. at 103.
40. Giano v. Goord, 380 F.3d 670, 675 (2d. Cir. 2004); Blake v. Ross, 787 F.3d 693, 698 (4th Cir. 2015).
41. *Blake*, 787 F.3d at 695 (4th Cir. 2015) (involving an officer violently assaulting an inmate).
42. *Ross*, 578 U.S. at 639–41.

rejected an argument that an exception should be made to the Exhaustion Requirement in cases involving the use of excessive force.[43] Now, there are no exceptions to exhaustion even in the most extreme circumstances or when a grievance procedure is no longer available.

III. What "Availability" Actually Looks Like

The sole safeguard against labyrinthian grievance procedures in the text of the PLRA is the word "available."[44] An incarcerated person must only exhaust grievance procedures if the procedures are "available."[45] Almost all of the Court's cases regarding the Exhaustion Requirement highlight the word "available" in the PLRA.[46]

The Court defines "available" as "'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'"[47] There are three recognized ways that a grievance procedure can be unavailable:

I. [The grievance procedure] operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.[48]

II. [W]hen rules are 'so confusing that . . . no reasonable prisoner can use them,' then they're no longer available.[49]

III. [W]hen prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.[50]

In *Woodford v. Ngo*, the majority took no issue with a fifteen-day time limit for filing an administrative grievance, regardless of the right violated.[51] The *Woodford* majority ignored the fifteen-day time limit, despite knowing that nine states' prisons had time limits of five days or fewer after an incident to file a grievance and twenty-nine states had time limits of fifteen days or fewer.[52]

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43. Porter v. Nussle, 534 U.S. 516, 522–23 (2002).
44. *Ross*, 578 U.S. at 641.
45. 42 U.S.C § 1997e (2013).
46. *Ross*, 578 U.S. at 648 (remanding with guidance to determine whether the grievance procedure was available to Blake); Woodford v. Ngo, 548 U.S. 81, 85 (2006); *Porter*, 534 U.S. at 524; Booth v. Churner, 532 U.S. 731, 737 (2001).
47. *Booth*, 532 U.S. at 737–738 (citing *Available*, Webster's Third New International Dictionary 150 (1993)); *Ross*, 578 U.S. at 642; *see also Available*, Random House Dictionary of the English Language 142 (2d ed. 1987) ("suitable or ready for use"); 1 *Available*, Oxford English Dictionary 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"); *Available*, Black's Law Dictionary 135 (6th ed. 1990) ("useable"; "present or ready for immediate use").
48. *Ross*, 578 U.S. at 643.
49. *Id.* at 644.
50. *Id.*
51. *Woodford*, 548 U.S. 81.
52. *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting) (citing Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents).

Several circuits have held that the "unavailability" of a grievance procedure must be both objective and subjective.[53] Objective unavailability is a major issue for certain groups of incarcerated people. Inmates who are mentally disabled, children, illiterate, lack traditional education, or do not speak English proficiently are at a significant disadvantage when it comes to navigating obtuse grievance procedures. This standard means that people who are already vulnerable are left more vulnerable.[54] The Exhaustion Requirement, plus the objective availability standard, has real-life effects in cases across the country:

Children: Incarcerated minors are still required to file timely administrative grievances.[55] Notably, parents may not file grievances on behalf of their children.[56] In *Minix v. Pazera*, an incarcerated child was beaten by a guard, and his mother was not allowed to sue because the child did not file an administrative grievance within two days.[57] Children in prison are especially vulnerable to exploitation.[58] It is unreasonable to expect children to comply with complicated grievance procedures while undergoing a particularly difficult time in their lives—especially after a prison official has just dramatically violated their rights. In an interview with the Human Rights Watch, the Former Corrections Director for California said that:

> She believes that children in custody have an especially difficult time with grievances: I think the rules are very complicated, and I think

53. Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020); Rinaldi v. United States, 904 F.3d 257, 268 (3d Cir. 2018); *see also* Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011).

54. This is also true when we look at the PLRA's requirements for filing fees. It is well documented that women significantly impacted by their loved ones' incarceration, particularly Black women, are the people who pay court fees. *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center for Human Rights (Sept. 2015), http://whopaysreport.org/executive-summary [https://perma.cc/L6XJ-NMZZ]; Stéphane Mechoulan, T*he External Effects of Black Male Incarceration on Black Females*, 29 J. of Labor Econ. 1 (2011).

55. *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. Const. J. 1 139, 141 (2008); M.C. *ex rel.* Crider v. Whitcomb, No. 1:05-cv-0162-SEB-TAB, 2007 WL 854019 (S.D. Ind. Mar. 2, 2007); Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005).

56. Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538, at *4-5 (N.D. Ind. July 27, 2005).

57. *Id.* at *1-2, *4.

58. Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. Times (Mar. 4, 2007), https://www.nytimes.com/2007/03/04/us/04youth.html [https://perma.cc/LNK7-N94T]; Ralph Blumenthal, *One Account of Abuse and Fear in Texas Youth Detention*, N.Y. Times (Mar. 8, 2007), https://www.nytimes.com/2007/03/08/us/08youth.html [https://perma.cc/LT2U-YQDW]; *see also Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*, Human Rights Watch (Sept. 24, 2006), https://www.hrw.org/report/2006/09/24/custody-and-control/conditions-confinement-new-yorks-juvenile-prisons-girls#) [https://perma.cc/QPD5-N5BT] (detailing abuse in the New York girls' juvenile prisons).

> the literacy among juveniles is usually pretty poor. The ability to find people to help you seems to have been more difficult in the juvenile system.[59]

This sentiment is supported by research showing that it is often difficult for children to understand the gravity of their situation while incarcerated.[60]

Illiteracy: Courts have held that illiteracy is not an excuse for failing to exhaust administrative remedies.[61] Incarcerated people in the U.S. are 13 percent to 24 percent more likely to have "basic" or "below basic" literacy levels compared to the general population.[62] Although, prisons are generally required to assist illiterate inmates with grievance procedures, if requested.[63] One can imagine many reasons why someone who is incarcerated might not trust a guard to write a faithful complaint against their colleague on their behalf or why it might be uncomfortable, or even dangerous, to ask for help with a grievance in the first place.

Inability to Read English: In *Benavidez v. Stransberry*, an Ohio district court held that a non-English speaking prisoner was still required to adhere to grievance procedures when the procedure was only ever provided to him in English.[64] As noted above, there is a non-negligible number of incarcerated people who are illiterate.[65] But there are others who are literate in languages other than English. One study estimated that there were 117,994 noncitizens incarcerated in the U.S. in 2014[66] who

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59. David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, Human Rights Watch(2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states#_ftnref112 [https://perma.cc/DE6D-3U7K] (quoting Human Rights Watch telephone interview with Jeanne Woodford, Oct. 29, 2008).
60. *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Annu. Rev. Clin. Psychol. 459 (2009).
61. Ramos v. Smith, 187 Fed. Appx. 152, 154 (3d Cir. 2006); Johnson v. District of Columbia, 869 F. Supp. 2d 34, 40 (D.D.C. 2012) (holding that mental disability and illiteracy are not an excuse for failure to exhaust administrative remedies); Didiano v. Balicki, No. 10-4483, 2011 WL 1466131 *5 (D. N.J. 2011); Howard v. Estrada, No. 16-cv-01826-MEH, 2017 WL 2452510 *7 (D. Colo. 2017) (holding that illiteracy was not an excuse for failing to exhaust administrative remedies in a Bivens claim).
62. Corey Michon, *Uncovering Mass Incarceration's Literacy Disparity*, Prison Policy Initiative (Apr. 1, 2016), https://www.prisonpolicy.org/blog/2016/04/01/literacy [https://perma.cc/U6HS-Q9BY].
63. Ramos v. Smith, 187 Fed. Appx. 152 , 2006 WL 1525517, at *2 (3d Cir. 2006).
64. Benavidez v. Stansberry, 2008 WL 4279559, at *4 (N.D. Ohio 2008); *See also,* Velarde v. McDonald, 2014 WL 12495280, at *3 (E.D. N.C. Feb. 24, 2014) (holding that a grievance procedure was available to a non-English speaking prisoner, in part, because people in the prison did speak Spanish and could assist him).
65. *See infra* note 70.
66. Michaelangelo Landgrave and Alex Nowrasteh, *Incarcerated Immigrants in 2016: Their Numbers, Demographics, and Countries of Origin,* Cato Inst. (June 4, 2018), https://www.cato.org/publications/immigration-research-policy-brief/their-numbers-demographics-countries-origin#incarcerations.

are statistically less likely to speak English as their primary language.[67] Some people are incarcerated in prisons where no one shares their language, adding an extra level of difficulty to accessing prison procedures.[68] It is particularly difficult for these people to navigate complex grievance procedures. Researcher Peter Jan Honigsberg calls this kind of "linguistic isolation" a "human rights violation constituting cruel, inhuman, and degrading treatment," comparable to physical isolation.[69]

Mental Disability and Capacity: Courts have similarly refused to find that grievance procedures were unavailable for incarcerated people with diminished mental capacities.[70] The Bureau of Justice Statistics reports that 20 percent of prisoners have a cognitive disability[71] and many disabilities are criminalized,[72] particularly for people of color.[73] In *Williams v. White*, the Sixth Circuit held that a grievance process only needs to be understandable to the reasonable prisoner, not to a specific prisoner who lacks the mental capacity to make sense of the grievance procedure.[74] In *Geter v. Baldwin State Prison*, the Eleventh Circuit stated that mentally disabled inmates have a duty to inform the prison that they are unable to properly file a grievance because of the disability.[75] Paradoxically, this duty extends to inmates who are so mentally disabled they cannot comprehend that they are even required to exhaust administrative grievances before defending their civil rights.

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67. *See* Jeanne Batalova, Mary Hanna, and Christopher Levesque, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (Feb. 11, 2021), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020 (45% of immigrants over age five in the U.S. have "limited English proficiency").]
68. David Berreby, *Desperately Alone in a Crowd*, The New Yorker (May 30, 2013), https://www.newyorker.com/tech/annals-of-technology/desperately-alone-in-a-crowd.
69. Peter Jan Honigsberg, *Linguistic Isolation: A New Human Rights Violation Constituting Torture, and Cruel, Inhuman And Degrading Treatment*, 12 Nw. J. Int'l Hum. Rts. 22 (2014).
70. Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020); Williams v. White, 724 Fed. Appx. 380, at *383 (6th Cir. 2018); Osborn v. Williams, 2017 WL 6731714, at *8 (D. Conn. Dec. 29, 2017); Faison v. Georgia Dep't of Corrections, 2019 WL 5088759, at *3 (M.D. Ga. Oct. 10, 2019); *But cf. c.f.* Johnson-Ester v. Eleya, 2009 WL 632250, at *8 (N.D. Illi. Mar. 9, 2009) (stating that mental incapacity might make a grievance procedure unavailable in some circumstances).
71. Chiara Eisner, *Prison Is Even Worse When You Have a Disability Like Autism*, The Marshall Project (Nov. 2, 2020), https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism.
72. Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 Columb. J. Race & L. 265, 270 (2019).
73. *Id.* at 272.
74. Williams v. White, 724 Fed. Appx. 380, 383 (6th Cir. 2018).
75. Geter v. Baldwin State Prison, 974 F.3d 1348, 1356 (11th Cir. 2020) (citing Brown v. Sikes, 212 F.3d 1205, 1207–08 (11th Cir. 2000) (holding that to properly exhaust an administrative remedy, a prisoner must grieve with "all the relevant information he has")).

Courts have further held that grievance procedures were still available when: the inmate was in a coma,[76] a prisoner was in solitary confinement and the guards refused to provide him with a grievance form,[77] a prisoner was on suicide watch and had no writing utensil,[78] and the prisoner was being hospitalized outside the prison with no access to the appropriate forms.[79] Legally, an administrative remedy is still "available" and must be exhausted even when the remedy is futile.[80] Exhaustion is also required even if a grievance procedure is inadequate to resolve the issue.[81]

IV. One Size Does Not Fit All: The Procedural Due Process Floor

The Fifth Amendment's Procedural Due Process Clause, as incorporated by the 14th Amendment, protects our fundamental right to not be deprived of life, liberty, or property without due process of law.[82] While certainly deprived of their full right to liberty, prisoners are not wholly stripped of constitutional protections because they are incarcerated.[83] In *Wolff v. McDonnell*, the Court confirmed that the Procedural Due Process Clause applies to prisoners, stating "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[84] When evaluating whether someone has been deprived of life, liberty, or property without due process, courts consider: the private interest affected, the public interest, and the probable value of additional procedures or different procedures.[85]

A. *The Private Interest*

The private interests potentially involved in an incarcerated person's section 1983 claim vary from grave to almost silly. Some incarcerated people - just like people who are not incarcerated - file seemingly frivolous lawsuits. When the PLRA passed, Congress entered two "Top Ten" lists of frivolous lawsuits into the congressional record.[86] The phrase "seemingly"

76. Parker v. Adjetey, 89 Fed. Appx. 886, 887–88 (5th Cir. 2004).
77. Latham v. Pate, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007).
78. Green v. McBride, 2007 WL 2815444, at *3 (S.D.W.Va. 2007).
79. Harris v. Walker, 2006 WL 2669050, at *3–4 (S.D. Miss. 2006).
80. Booth v. Churner, 532 U.S. 731, 732 (2001).
81. Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (citing McCarthy v. Madigan, 503 U.S. 140, 144, (1992)).
82. U.S. Const. amend. V; *Id.* amend XIV § 1; Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 236 (1897).
83. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).
84. *Id.* at 555–556.
85. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
86. 141 CONG. REC. S14,629 (daily ed. Sep. 29, 1995) (statement of Sen. Kyl). The following is the full list of "Top 10 Frivolous Inmate Lawsuits Nationally" as entered into the Congressional Record.
(10) Inmate claimed $1 million in damages for civil rights violation because his ice-cream had melted. The judge ruled that the "right to eat ice cream . . . was clearly not within the contemplation" of our Nation's forefathers. [NT—Clendenin v.

is important in that sentence because as free people we may not always understand the psychological realities of a situation from a court pleading. An oft cited example of a frivolous inmate lawsuit is the case in which an inmate sued after receiving one jar of creamy peanut butter and one jar of chunky peanut butter after he ordered two jars of chunky peanut butter.[87] When asked about the lawsuit, the man said, "It was just the idea of them taking something from me . . . . If I didn't file the suit, I would have felt like I was punked out. Like you could take anything from me and get away with it."[88] The lawsuit was clearly about more than the peanut butter.[89] But as Law Professor Margo Schlanger discussed in her piece *Inmate Litigation*, myths about hyperlitigious inmates are grossly overexaggerated, especially when comparing data from both state and federal lawsuits.[90]

In reality, the most common complaints from people who are incarcerated are serious and deserve to be taken seriously. The four most common allegations in prison-related, federal lawsuits are

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State]
(9) Inmate alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment. [OK—Watkins v. Sutton]
(8) Inmate sued because when he got his dinner tray, the piece of cake on it was "hacked up." [NV—Banks v. Hatcher]
(7) Inmate sued because he was served chunky instead of smooth peanut butter. [TX—Thomas v. State]
(6) Two prisoners sued to force taxpayers to pay for sex-change surgery while they were in prison. [PA—Brown v. Jeffes and Doe v. Vaughn]
(5) Inmate sued for $100 million alleging he was told that he would be making $29.40 within three months, but only made $21. [KS—Williams v. Dept. of Corrections]
(4) Inmate claimed that his rights were violated because he was forced to send packages via UPS rather than U.S. mail. [CA—Alcala v. Vanquez]
(3) Prisoner sued demanding L.A. Gear or Reebok "Pumps" instead of Converse. [UT—Winsness v. DeLand]
(2) Prisoner sued 66 defendants alleging that unidentified physicians implanted mind control devices in his head. [MI—Doran v. McGinnis]
(1) Death row inmate sued corrections officials for taking away his Gameboy electronic game. [AZ—Donald Edward Beaty v. Bury].
Notably, lawsuit number 6, the prisoners who sued for their rights to gender confirmation surgery, is particularly non-frivolous.

87. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1578 (2003), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2295&context=articles (citing Dennis C. Vacco, Frankie Sue del Papa, Pamela Fanning Carter & Christine O. Gregoire, *Letter to the Editor, Free the Courts from Frivolous Prisoner Suits*, N.Y. Times, Mar. 3, 1995, at A26 (letter from Attorneys General of New York, Nevada, Indiana, and Washington).
88. *Id.*
89. *See* Parratt v. Taylor, 451 U.S. 527 (1981). Though now overruled on grounds related to section 1983, the *Parratt* Court recognized that the deprivation of property is still a deprivation even when the property is of low monetary value. In *Parratt*, an inmate sued after the prison deprived him of $23.50 in hobby materials after he was released from solitary confinement. *Id.*
90. Schlanger, *supra* note 85.

physical assaults, inadequate medical care, due process violations in the disciplinary sanction procedures, and claims regarding conditions of confinement, such as food or sanitation.[91] In a Louisiana prison, a blind man was denied a cane for 16 years.[92] In an Alabama prison, a man repeatedly told staff that he was bleeding after a surgery. The medical staff only offered him an antacid. He later died from the bleeding.[93] Another inmate waited over ten years to get a surgery the doctors told him he needed within six months. He had to wear a catheter for those entire ten years, regularly contracting urinary infections.[94] In a California prison, inmates report maggots and mice regularly falling from the ceiling onto the tables in the dining halls.[95] Many legitimate, private interests at stake in lawsuits filed by people who are incarcerated.

As a barrier to filing section 1983 claims, a prison's grievance procedure is the process by which an incarcerated person can vindicate deprivations to their life, liberty, or property by prison officials. The Court has often stated "(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[96] Applying that concept to prison administrative grievance procedures, grievances of varying severity require different levels of due process. An inmate who was tortured by guards[97] is entitled to a different level of process than a prisoner who is unhappy with the television channel selection.[98] Yet, almost all prisons have a one-size-fits-all grievance

91. *Id.* at 1571.
92. Lewis v. Cain (Angola Medical), ACLU Louisiana, (last visited Mar. 24, 2021), https://www.laaclu.org/en/cases/lewis-v-cain.
93. S. Poverty L. Ctr., Cruel Confinement: Abuse, Discrimination and Death Within (June 2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/cruel_confinement.pdf [https://perma.cc/GU7C-AYVA].
94. *Id.*
95. Don Thompson, *Maggots, Mice Fall Into California Prison Dining Hall*, AP (Apr. 6, 2019), https://apnews.com/article/prisons-california-lawsuits-us-news-e8fe171679714f42985c54097beecb1f [https://perma.cc/UT27-6W66].
96. Cafeteria and Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961).
97. *See, e.g.*, Joanna Walters, *San Francisco Jail Inmates Allegedly Forced Into 'Gladiator-Style' Fights*, Guardian (Mar. 27, 2015), https://www.theguardian.com/us-news/2015/mar/27/san-francisco-prison-guards-forced-inmates-game-of-thrones-style-fights [https://perma.cc/4FWN-8XJ8]; Max Cherney, *When Prison Guards Force Inmates to Fight*, Vice (Apr. 3, 2015), https://www.vice.com/en/article/av45x5/when-prison-guards-force-inmates-to-fight-403 [https://perma.cc/J8LZ-5VHJ]; WEWS Staff, *Former Inmate Was 'Tortured' by Guards at Ohio Jail, Lawsuit Alleges*, KPAX (Nov. 27, 2019), https://www.kpax.com/news/national/former-inmate-was-tortured-by-guards-at-ohio-jail-lawsuit-alleges [https://perma.cc/PN25-XRUA]; Reuven Blau & James Fanelli, *Merciless Prison Guard Faces Investigation Over Waterboarding Inmates, Beating Their Genitals*, N.Y. Daily News (Feb 11, 2018), https://www.nydailynews.com/new-york/sadistic-prison-guard-accused-torturing-inmates-article-1.3814654 [https://perma.cc/BUJ4-FKTG].
98. Taylor v. Hughes, No. 2:13-CV-755-TMH, 2014 BL 396137 (M.D. Ala. June 24,

procedure. If a prison insists on a one-size-fits-all grievance procedure, then it should be constitutionally required to comply with the highest level of due process required for any reasonably foreseeable deprivation of rights.

B. *The Public Interest*

The public interest involved in the PLRA's Exhaustion Requirement has been discussed at length by Courts.[99] In *Alexander v. Hawk*, the Eleventh Circuit compiled seven justifications for the PLRA:

> (1) to avoid premature interruption of the administrative process;
> (2) to let the agency develop the necessary factual background upon which decisions should be based;
> (3) to permit the agency to exercise its discretion or apply its expertise;
> (4) to improve the efficiency of the administrative process;
> (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene;
> (6) to give the agency a chance to discover and correct its own errors; and
> (7) to avoid the possibility that "frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."[100]

Perhaps the two most common justifications for the Exhaustion Requirement are judicial efficiency and agency autonomy. The Exhaustion Requirement provides a prison "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court."[101] This requirement, theoretically, allows for prisons to handle grievances without costly litigation, which makes sense for minor and frivolous complaints. But it makes less sense in light of the Court's ruling that exhaustion is still required when an inmate proves that a prison's grievance procedure would have been futile.[102] How does a futile grievance procedure provide an opportunity for a prison to properly respond to a grievance? When complaints are serious, the Exhaustion Requirement only adds more ways for prisons to avoid liability through a fill-in-the-blank, pre-drafted motion to dismiss. The public interest in giving prisons an opportunity to respond to a complaint without the cost

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2014). Mr. Hughes complained that removing the B.E.T. (Black Entertainment Television) channel from the television options and keeping the G.A.C. (Great American Country) channel was intentional discrimination against him. Mr. Hughes also made several more serious complaints, such as being kept in prolonged solitary confinement with no information on when he will get out, being assaulted by another inmate, and challenging the basis on his incarceration.

99. Woodford v. Ngo, 548 U.S. 81 (2006); Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998).
100. *Alexander*, 159 F.3d at 1326.
101. *Woodford*, 548 U.S. at 89 (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992)).
102. *See* Booth v. Churner, 532 U.S. 731 (2001).

of litigation pales in comparison to the private interest involved in serious deprivations of life, liberty, or property.

Courts have made a major mistake when discussing another public interest consideration for the Exhaustion Requirement. In *Ross v. Blake*, the Court said "[g]iven prisons' own incentives to maintain functioning remedial processes, we expect that [circumstances involving unavailable grievance procedures] will not often arise."[103] In *Woodford v. Ngo*, the Court said that prison officials "have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances."[104] The Court said the idea that prison administrators will "devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims," had likely never occurred.[105] The Court said it was "speculative" that it ever would.[106] The Court stated: prison grievance procedures were informal and simple, especially when compared to the unforgiving procedural requirements and deadlines of lawsuits. The Court was gravely mistaken.

In many ways, prisons have designed grievance procedures harsher than civil procedure rules. Here are a few examples:

Statutes of Limitations: No jurisdiction in this country has a two-day statute of limitation. I n Michigan, Oklahoma, Nebraska, Rhode Island, and Indiana, the state prisons have an effective statute of limitation of three days or less.[107] Nine states' prisons had grievance filing timebars of five days or less.[108] Twenty-nine states' prisons have timebars of fifteen days or less.[109] More reasonable states, like North Carolina, allow for as long as a year to file a grievance.[110] While equitable tolling of statutes of limitation is allowed in cases against the government involving extraordinary circumstances,[111] only fourteen state departments of corrections afford the same courtesy to people who are incarcerated.[112]

Appeal Deadlines: In federal court, a plaintiff has thirty days to appeal a judgment, which extends to sixty days if one of the parties is the United States or its employees.[113] Appeals from grievance responses must be filed in three days or less in Alaska, Indiana, Delaware, Kansas, Kentucky, Montana, and Rhode Island state prisons.[114] Twenty-five

103. Ross v. Blake, 578 U.S. 632, 643 (2015).
104. *Woodford*, 548 U.S. at 102.
105. *Id.*
106. *Id.*
107. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 6 n.1, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416).
108. *Id.*
109. *Id.*
110. *Id.*
111. U.S. v. Wong, 575 U.S. 402 (2015).
112. Brief for American Civil Liberties Union et al., *supra* note 105.
113. Fed. R. A. P. 4(a)(1).
114. Brief for American Civil Liberties Union et al., *supra* note 105.

states require an appeal to an administrative grievance be filed in five days or less.[115]

Pro Se Complaints: Pro se complaints are given more deference and held to less stringent standards than complaints prepared by lawyers.[116] This deference is not guaranteed when prisons process inmate grievances. In Arkansas, a prisoner's grievance was thrown out because he submitted eight additional pages to fully explain the situation that led to him losing four toes.[117] In *Brownell v. Krom*, the Second Circuit ruled that a prisoner did not exhaust administrative remedies solely because his initial grievance did not allege intentionality, a required element for a successful section 1983 claim.[118] The *Brownell* holding effectively requires inmates to know that they are planning to file a lawsuit well in advance and have more knowledge of the elements of a section 1983 claim than the average first-year law student. At least, the Seventh Circuit uses a more reasonable "object intelligibility" standard when reviewing initial administrative grievances.[119]

While plaintiffs may allege any number of violations in a complaint, grievances that raise more than one complaint are immediately rejected in Florida and Montana state prisons.[120] A Michigan Law Prison Information Project report estimates that over 60 percent of jurisdictions have some type of single-subject rule for their prisons' administrative grievance policies.[121] When grievances are thrown out for procedural errors, time limits are not extended.

Hearings: In *Mathews v. Eldridge*, the Court held that deprivation of property rights almost always requires a hearing of some kind under the Procedural Due Process Clause.[122] Administrative agencies have strict guidelines for formal hearings.[123] Unsurprisingly, grievance procedures for most state departments of corrections do not have any hearing

115. *Id.*
116. Haines v. Kerner, 404 U.S. 519, 520 (1972).
117. Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 Geo. Mason L. Rev. 573 (2014) (citing Cummins v. Norris, No. 5:09CV00221 BSM/BD, 2010 WL 4510754, at *3 (E.D. Ark. Aug. 26, 2010), report and recommendation adopted by 2010 WL 4507984 (E.D. Ark. Nov. 2, 2010)).
118. Antonieta Pimienta, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the "Object Intelligibly" Standard*, 114 Colum. L. Rev. 1209, 1210 (2014) (citing Brownell v. Krom, 446 F.3d 305, 307 (2d Cir. 2006)). Brownell alleged in his initial complaint that his property was missing, and he did not know what happened to it. *Id.*
119. *Id.* at 1212 (citing Strong v. David, 297 F.3d, 646, 649 (7th Cir. 2002)).
120. Priyah Kaul et al., Michigan Law Prison Information Project, Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey 14 (Oct. 18, 2015).
121. *Id.* The report also notes that single-subject rules can be vague. *Id.* Do multiple rights violations from a single act count as different subjects? Does the same type of violation over several instances count as a single subject? The definition of "single-subject" is entirely up to an administrator's discretion.
122. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
123. Administrative Procedure Act, 5 U.S.C. § 556.

component at any stage.[124] The PLRA allows for people to be deprived of their property for any minor procedural error or missing a deadline.

Reviewable Discretion: When reviewing a decision by a lower court, standards of review range from *de novo* to abuse of discretion.[125] Even agency decisions are reviewable under an arbitrary and capricious standard.[126] But prisons officials act as agency judges without a check. Unlike judges, prison officials are under no duty to remain impartial when reviewing grievances from the people they incarcerate.[127] Discretionary decisions by prison officials include whether to accept grievances even when there are small procedural errors, such as failure to include the location of a violation, submitting a grievance on a piece of paper smaller than 8.5" by 11", and allowing someone to submit a new grievance when there was a procedural error with their original grievance.[128] These decisions are not reviewable.[129]

Conflicts of Interest. Some grievance procedures require people who are incarcerated to attempt to resolve their grievance with the officer they are complaining about.[130] There are no exceptions for cases involving sexual assault, abuse, or retaliation.[131] Imagine the psychological impact of showing up to court and discovering that the person you are accusing is also acting as the judge - or perhaps, the judge is the accused's best friend. In the prison context, the judge is almost certain to be a co-worker of the accused when a complaint is against a guard. If the same were true in any court in the country, the judge would automatically be recused.

Right to Counsel. While the Sixth Amendment ensures that criminal defendants have a right to counsel,[132] no portion of the Constitution disallows a party in a lawsuit from having counsel, if counsel is willing and able to represent them.[133] Some argue that the right to counsel should be extended to civil cases.[134] But in at least fifteen states, third parties are not allowed to assist inmates with grievances, including attorneys and parents of incarcerated children.[135] Almost all prisons do have a gen-

124. Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: The Supreme Court's Recent Prison Litigation Reform Act (PLRA) Cases*, 29 Cardozo L. Rev. 291, 316–317 (2007).
125. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469, 471 (1988).
126. *Id.*
127. *See* Howard Lesnick, *Grievance Procedures in Federal Prisons: Practices and Proposals*, 123 U. Pa. L. Rev. 1, 23 (1974).
128. Kaul et. al., *supra* note 7, at 13.
129. *Id.*
130. Kaul et. al., *supra* note 7, at 11.
131. *Id.*
132. U.S. Const. amend. VI.
133. *See id.*; *See* U.S. Const. amend. VII.
134. Alan J. Stein, *The Indigent's "Right" to Counsel in Civil Cases*, 43 Fordham L. Rev. 989, 989 (1975) (detailing the argument for a "Civil Gideon").
135. Kaul et. al., *supra* note 7, at 16.

eral policy allowing inmates who are illiterate, disabled, or who do not speak English to ask a prison official for assistance in filing a grievance.[136] But there are obvious reasons why an inmate might be uncomfortable asking a guard for help when the inmate's rights were recently violated. Disallowing third-party assistance does not help with prisons' supposed goal of "maintain[g] functioning remedial processes," as the court in *Ross* hoped.[137] Instead, it encourages good-faith procedural error that can deprive people of their right to enforce their civil liberties.

Dismissals: Often when a complaint contains a good-faith error, courts will dismiss it without prejudice or provide plaintiffs leave to amend their complaints. At prisons with strict time limits, every grievance procedure is functionally dismissed with prejudice. Small procedural errors are incurable and totally deprive people of their fundamental right to access the courts.[138] Even at prisons without strict time limits, dismissals for inconsequential procedural errors can cause a prisoner to lose faith in the grievance procedure and can discourage future use.

Misleading Phrasing. When statutes are ambiguous, courts must give *Chevron* deference to agency interpretations.[139] But an ambiguous or misleading grievance procedure does not excuse a prisoner from exhausting administrative remedies. Instead, grievance procedures must be "so confusing that . . . no reasonable prisoner can use them," to make them unavailable to inmates.[140] This is a notably higher standard than the common reasonable person standard. It is important to recognize that the "unavailability" defense to the Exhaustion Requirement is only really available to the particularly savvy inmates who are well-researched on the history of the PLRA, because this defense has to be specifically alleged in court. Predictably, the "unavailability" defense is not commonly presented by pro se litigants. In court when a statute is unintelligible, the Unintelligibility Canon requires that the statute is "inoperative and void."[141] But other than this single defense, there is no remedy for an unintelligible or misleading grievance procedure. This causes particular issues in smaller county jails, which may have so few lawsuits that incomprehensible grievance procedures go unnoticed by Court officials.

Prison grievance procedures are often harsher than civil procedure law. The mechanics of grievance procedures show that the Court's idealistic concept that prisons have a vested interest in creating easy-to-navigate, functioning grievance procedures is wrong. When prisons are underfunded, understaffed, and regularly violating the constitutional rights of the

136. *Id.*
137. *See* Ross v. Blake, 578 U.S. 632, 643 (2016).
138. Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory Law J. 1772, 1782 (2003).
139. *See* Chevron, U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 863–864 (1984).
140. *Ross*, 578 U.S. at 644.
141. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 120–121 (2012), https://jm919846758.files.wordpress.com/2020/09/rlilt.pdf [https://perma.cc/JU7Y-UKNF].

people incarcerated there, a prison's best interest is to avoid losing more money by escaping civil liability. But the U.S. constitution does not allow for the monetary interests of a prison to override an individual's right to access the courts when their rights have been violated.

Similarly, the need for judicial efficiency cannot justify labyrinthian grievance procedures. The reason the public has an interest in judicial efficiency is exactly so people can proceed with their meritorious lawsuits in federal court. The desire to have fewer lawsuits in federal courts cannot result in largely denying a class of people access to the courts.

Courts has been consistently mistaken about the public interests involved in the Procedural Due Process analysis of the Exhaustion Requirement of the PLRA, while simultaneously underselling the private interests involved. If prisons insist on one-size-fits-all grievance procedures, then each grievance procedure must necessarily be equipped to handle the due process demands of the most serious grievances that are reasonably foreseeable. Otherwise, the Exhaustion Requirement of the PLRA goes far beyond quieting frivolous lawsuits, to silencing meritorious lawsuits filed by incarcerated people and shielding prisons from civil liability.

V. Conclusion

The Exhaustion Requirement of the Prison Litigation Reform Act has strewn far from its intended purpose of mitigating frivolous litigation from people who are incarcerated to substantively disenfranchising people with meritorious claims. Prisons that insist on a one-size-fits-all approach to grievance procedures must design their grievance procedure to meet the procedural due process needs of the most serious, foreseeable grievances to comply with the U.S. Constitution.