

THE PRISON PLEADING TRAP

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INTRODUCTION 1147

I. THE SIGNIFICANCE OF A PRISON GRIEVANCE 1154

II. THE DESIGN AND FUNCTION OF PRISON GRIEVANCE PLEADING..... 1160

A. Setting the Trap..... 1161

B. The Trap in Action 1165

C. The Dangers of Prisons as Rule-Makers..... 1175

D. A Brief Meditation on Racial Subordination..... 1180

III. REFORMING (OR RE-FORMING) THE TRAP 1183

A. Existing Frameworks: Available Remedies and Critical Rules 1184

B. Notice Pleading Through Amendment..... 1187

C. Repealing the PLRA’s Exhaustion Requirement..... 1192

D. Symptom or Disease? The Decarceration Solution 1197

CONCLUSION 1201

THE PRISON PLEADING TRAP

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Abstract: The prison is an epicenter of dominance—it is where state-sanctioned abuses are most forcefully expressed and legitimized without being seen. Incarcerated people have increasingly turned to civil prisoners’ rights litigation to expose the injustices hidden behind prison walls. But rather than safeguarding incarcerated people’s access to courts, Congress enacted the Prison Litigation Reform Act (the “PLRA”) to obstruct their pathways to judicial relief. A centerpiece of this effort is the Act’s administrative exhaustion provision.

Prisons design demanding grievance pleading standards to make the PLRA’s exhaustion requirement more difficult for the people they confine. When a federal court disagrees with the prison’s interpretation of a pleading rule and permits an incarcerated plaintiff’s claim to move forward, the decision appears to be a victory that safeguards incarcerated people’s right to judicial redress. It is tempting to perceive the plaintiff’s success as the prison’s defeat. But when we peer behind the curtain and interrogate what follows, a dangerous manipulation of power emerges. Prisons have responded to litigation “defeats” by amending their grievance rules to impose a more onerous pleading standard that forecloses the short-lived victory. What appears at first glance to be a welcome exercise of judicial intervention functionally becomes an invitation—indeed, a blueprint—for the prison to raise its grievance pleading bar and immunize itself from future liability.

This reactive process—what I call the “prison pleading trap”—creates a perilous regime of perverse incentives. This Article investigates the trap’s operations and impacts and, upon considering a range of potential solutions, it recognizes the merits of transformative change. Congress created PLRA exhaustion to reduce the quantity of prison litigation, but this reform addressed a symptom (the volume of litigation) while ignoring the disease (mass incarceration). Discrete procedural solutions to prison grievance pleading may have meaningful impacts, but they are ultimately incomplete without a concurrent commitment to decarceration.

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INTRODUCTION

In April 2018, Jailhouse Lawyers Speak (“JLS”)—a collective of imprisoned organizers¹—announced a call for a nationwide prison strike.² Protesting the brutalization and devaluation of the lives of incarcerated people, JLS invited its allies to engage in work stoppages, sit-ins, commissary spending boycotts, and hunger strikes.³ One of the first issued demands was to repeal the Prison Litigation Reform Act (“PLRA” or the “Act”),⁴ a collection of procedural and remedial barriers that undermine an incarcerated person’s ability to bring civil rights lawsuits.⁵ The organizers of the strike explained that “imprisoned humans” deserve “a proper channel to address grievances and violations of their rights.”⁶ Their request was simple: “treat us like humans.”⁷

This demand reflects the gravity of civil prisoners’ rights litigation (what I call “prison litigation”). Whether or not confined to a prison,⁸ all people deserve human dignity.⁹ But incarceration is often characterized by “deplorable”¹⁰ and “degrading”¹¹ conditions that are “unfit for human habitation.”¹² And yet, despite the “inhumane” conditions that permeate our nation’s carceral

¹ *About*, JAILHOUSE LAWS. SPEAK, <https://www.jailhouselawyerspeak.com> [<https://perma.cc/DN8L-TRPQ>].

² Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (Apr. 24, 2018, 9:28 AM), <https://twitter.com/JailLawSpeak/status/988771668670799872> [<https://perma.cc/G45H-SLZU>].

³ *Id.*

⁴ *Id.*

⁵ Pub. L. No 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996). The PLRA was not passed on its own but rather included in an omnibus spending bill.

⁶ See Jailhouse Lawyers Speak, *supra* note 2.

⁷ Daniel A. Gross, *An Inside Account of the National Prisoners’ Strike*, NEW YORKER (Sept. 6, 2018), <https://www.newyorker.com/news/as-told-to/an-inside-account-of-the-national-prisoners-strike> [<https://perma.cc/ZL8G-SFFB>].

⁸ The reference to “prison” is intended to incorporate all the carceral institutions that are encompassed by the Prison Litigation Reform Act’s exhaustion provision, including state and federal prisons, jails, and juvenile detention facilities. See 42 U.S.C. § 1997e(a) (including within the statute’s purview litigation brought “by a prisoner confined in any jail, prison, or other correctional facility”). Solely for spatial efficiency, I use “prison” as a shorthand to refer to all such institutions.

⁹ See *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Prisoners retain the essence of human dignity inherent in all persons.”); Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1584–85 (2019) (arguing that from one moral philosophy perspective, “dignity is innate and universal among human beings” and therefore it cannot be taken away from anyone, including those who are incarcerated (first citing Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 10, 12 (Michael J. Meyer & William A. Parent eds., 1992); and then citing Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 199–203 (2011))).

¹⁰ *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

¹¹ *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893, 898 (E.D. Pa. 1978).

¹² *Pugh v. Locke*, 406 F. Supp. 318, 323–24 (M.D. Ala. 1976); see also *Hutto v. Finney*, 437 U.S. 678, 681 (1978) (describing prison conditions that are “completely alien to the free world” (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970))).

systems,¹³ prisons have become isolated institutions that control an increasing number of disempowered persons.¹⁴ As Ruth Wilson Gilmore has observed, incarcerated people are intentionally exiled to “forgotten places.”¹⁵ And while incarcerated, they are subjected to the “whim[s] or caprice[s]” of prison officials.¹⁶ Widespread public ignorance of the prison system’s dehumanizing conduct is not only convenient for prison administrators¹⁷—this exile and erasure is indeed by design.¹⁸

Seen through this lens, the prison is an epicenter of dominance. It is a space “where state power is perhaps most forcefully expressed and publicly legitimized without being seen.”¹⁹ Where abuses arise during incarceration, an imprisoned person’s ability to air grievances in court should accordingly receive heightened safeguards given that other means of transparency and accountability are functionally unavailable.²⁰ Of paramount concern should be the protection of incarcerated people’s pathways to judicial redress.

¹³ *Imprisoned Citizens Union*, 451 F. Supp. at 898.

¹⁴ Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139–40 (2008).

¹⁵ See DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 143 (2014) (quoting Ruth Wilson Gilmore, *Forgotten Places and the Seeds of Grassroots Planning*, in ENGAGING CONTRADICTIONS: THEORY, POLITICS, AND METHODS OF ACTIVIST SCHOLARSHIP 31, 31 (Charles R. Hale ed., 2008)). This exile can also be considered a form of “forced migration from home to prison” that “typically runs along an urban-to-rural axis . . .” *Id.* at 2, 15. As Berger points out, prison life is “animated by a fundamental contradiction” in that it limits mobility but is defined by movement—the initial forced migration to prison followed by internal movement between prisons. *Id.* at 2.

¹⁶ *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) (explaining that “an inmate’s right of unfettered access to the courts is as fundamental a right as any other he may hold” (first citing *Ex parte Hull*, 312 U.S. 546 (1941); then citing *Coleman v. Peyton*, 362 F.2d 905 (4th Cir. 1966); then citing *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965); and then citing *Spires v. Bottorff*, 317 F.2d 273 (7th Cir. 1963))).

¹⁷ Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1299 (1998).

¹⁸ Angela Davis asks why we are “willing to relegate ever larger numbers of people from racially oppressed communities to an isolated existence marked by authoritarian regimes, violence, disease, and technologies of seclusion that produce severe mental instability?” ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 10 (2003). She observes that although “[w]e take prisons for granted,” we are also “often afraid to face the realities they produce” and are “reluctan[t] to face the realities hidden within them . . .” *Id.* at 15. And she explains that prisons, by design, “function[] . . . as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.” *Id.* at 16.

¹⁹ BERGER, *supra* note 15, at 6.

²⁰ Schlanger & Shay, *supra* note 14, at 139–40.

But with the passage of the PLRA in 1996,²¹ Congress pushed prisons—and the abuses persisting within them—further beyond the reach of public accountability.²² Intended to stem the tide of prison litigation, the PLRA imposed various provisions that restricted incarcerated people’s ability to bring (and win) federal prison conditions claims.²³ A “centerpiece” of these efforts was the Act’s administrative exhaustion prescription,²⁴ which demands the completion of each level in the prison’s administrative grievance system before challenging any aspect of prison life in federal court.²⁵ An incarcerated person fails to properly exhaust the administrative remedy if they commit any procedural error during the grievance process.²⁶ Scholars have therefore described this exhaustion mandate as the Act’s “most damaging component.”²⁷

Much legal scholarship has considered the Act’s exhaustion provision in the twenty-six years since the PLRA’s enactment.²⁸ A key aspect of the admin-

²¹ It is important to note that various efforts to pass the PLRA as a standalone piece of legislation failed, and it was ultimately enacted as a rider to the 1996 omnibus appropriations bill. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996). It was approved without a Judiciary Committee Report and without any committee markups. Herman, *supra* note 17, at 1277. Commentators have noted the haste and even carelessness with which it was enacted. *See id.* (noting that the Act’s name included the wrong year, that “[k]ey terms were not defined, [and that] some provisions conflicted with preexisting law” (footnotes omitted)).

²² There has been much commentary about the PLRA. For a detailed discussion of the PLRA as well as empirical analyses of its impact on prison litigation, see generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015). For a sample of other significant contributions to this field, see *infra* note 28 and accompanying text (discussing scholarship on PLRA’s exhaustion provision); *infra* notes 30–32 and accompanying text (discussing scholarship on PLRA’s impact on prison grievance systems); *infra* note 53 and accompanying text (discussing scholarship on PLRA’s impact on injunctive practice); *infra* note 54 and accompanying text (discussing scholarship regarding the PLRA’s “three strikes” provision); *infra* note 56 and accompanying text (discussing scholarship on PLRA’s limitation on attorney’s fees); *infra* note 57 and accompanying text (discussing scholarship on the “physical injury” requirement). For a discussion that situates the PLRA’s procedural barriers within a “confluence of legal and situational factors” that make prison-conditions cases “virtually impossible to win,” see generally David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018). For a general discussion of administrative agencies as litigation “gatekeepers,” see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

²³ *See infra* notes 53–61 and accompanying text (detailing the statutory provisions of the PLRA).

²⁴ *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).

²⁵ *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

²⁶ *See Ngo*, 548 U.S. at 88, 93 (holding that the PLRA requires “proper exhaustion” of administrative remedies and accordingly imposing a procedural default sanction on those who make even the most trivial procedural errors).

²⁷ Schlanger, *Inmate Litigation*, *supra* note 22, at 1650.

²⁸ *See generally* Schlanger & Shay, *supra* note 14 (arguing that the PLRA’s exhaustion provision, among others, obstructs rather than promotes constitutional oversight of conditions of confinement); John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 429 (2001) (arguing that the PLRA’s procedural rules, including its exhaustion provision, invoke “the new face of court stripping”); Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA*

istrative remedy is that each prison system is empowered to define its own grievance process, which marries the prison's interest in immunizing itself from liability with the ability to do so.²⁹ Many commentators rightfully question the deference afforded to prison administrators given that they carry conflicting incentives as both the subjects of and the rule-makers governing prison grievances.³⁰ And many note how prison grievance systems have accordingly transformed into traps for the unwary.³¹ Commentators highlight the Kafkaesque rules regarding short deadlines,³² complicated and multi-layered pro-

Exhaustion Law, 21 GEO. MASON L. REV. 573, 577 (2014) (identifying the PLRA's "twin perils of bias blindness and capacity blindness" and offering solutions); Kristen D. Amond & Rebekka C. Veith, *PLRA Exhaustion in the COVID-19 Pandemic: A Simple Dead End*, 67 LOY. L. REV. 299, 301 (2021) (discussing "how the COVID-19 pandemic has rendered existing interpretations of the [PLRA's] exhaustion requirement's 'availability' untenable"); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003) (challenging the imposition of a procedural default into the PLRA's exhaustion regime); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 498–520 (2001) (exploring the applicability of the PLRA's exhaustion provision to prisoners who seek monetary relief but cannot obtain recompense through their grievance process). Much of the legal commentary around the PLRA's exhaustion requirement focuses on the Supreme Court's decision in 2006, in *Woodford v. Ngo*, which read the PLRA's exhaustion provision to demand "proper exhaustion" and to impose a procedural default sanction for technical noncompliance. 548 U.S. at 88, 93. See generally Elana M. Stern, Comment, *Completely Exhausted: Evaluating the Impact of Woodford v. Ngo on Prisoner Litigation in Federal Courts*, 166 U. PA. L. REV. 1511 (2018) (attempting to discern why prison litigation has increased post-*Woodford v. Ngo*); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 297 (2007) (arguing that the reasoning that the Supreme Court relied on in *Woodford v. Ngo* to impose a procedural default sanction in the PLRA's exhaustion provision was "misplaced").

²⁹ See *infra* notes 103–131 and accompanying text (introducing the incentive scheme of the prison pleading trap).

³⁰ See Roosevelt, *supra* note 28, at 1775–76 (cautioning that if courts impose a procedural default sanction into the PLRA's exhaustion provision, "we should expect grievance systems to become more complex and unforgiving, precisely as a means of preventing § 1983 suits"); Schlanger & Shay, *supra* note 14, at 141 (highlighting perverse incentives for prison authorities to create procedural hurdles in grievance systems); Shay & Kalb, *supra* note 28, at 319 (arguing that "the procedural default rule creates incentives for corrections officials to develop ever more complex procedures, to make it more difficult for prisoners to sue them successfully"); Shapiro & Hogle, *supra* note 22, at 2043 (arguing that it is "not altogether surprising" that, because correctional systems "get to craft their own rules for handling prisoners' grievances," these "internal . . . regimes are often multilayered and exceedingly complex") (citing Schlanger, *Inmate Litigation*, *supra* note 22, at 1650)).

³¹ See Roosevelt, *supra* note 28, at 1776.

³² See Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 324 & n.146 (2022) (discussing the "short filing deadlines of prison grievance procedures"), <https://harvardlawreview.org/wp-content/uploads/2022/04/135-Harv.-L.-Rev.-F.-302.pdf> [<https://perma.cc/9ZKV-ESU2>]; Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 488, 494 & n.136 (2012) (discussing the "very strict time requirements"); Boston, *supra* note 28, at 431 n.6 (giving examples of three-day and forty-eight-hour dead-

cesses,³³ and other arbitrary procedural rules that can characterize the prison grievance system.³⁴

One under-studied topic³⁵ is the level of detail required in a prison grievance for an incarcerated person to properly exhaust their claims (what I refer to as “grievance pleading standards”).³⁶ Grievance pleading obligations are dy-

lines); *Ngo*, 548 U.S. at 118 (Stevens, J., dissenting) (recognizing that prisons impose strict time requirements that can be as short as two days).

³³ See Roosevelt, *supra* note 28, at 1775 (describing prison grievance procedures as “byzantine”); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 552 (2021) (detailing the “byzantine” nature of the grievance process); Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1862 n.273 (2020) (describing prison grievance procedures as “often byzantine”); Shapiro & Hogle, *supra* note 22, at 2043 (describing prison grievance systems as “often multi-layered and exceedingly complex”); Schlanger, *Inmate Litigation*, *supra* note 22, at 1650 (explaining that prison grievance systems can have “many layers of review” and noting that “the sky’s the limit for the procedural complexity or difficulty of the exhaustion regime”); Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOK. L. REV. 115, 156 (2018) (arguing that “the complexity of prison grievance policies[,]” which “impose complicated and burdensome procedural requirements[,]” render the systems “ineffective at attacking prison problems”). Judges have also remarked on the byzantine processes that characterize prison grievances. See, e.g., *Does 8–10 v. Snyder*, 945 F.3d 951, 963 (6th Cir. 2019) (describing the Michigan Department of Correction’s grievance system as “a classic case of Orwellian doublethink” (citing GEORGE ORWELL, 1984, at 214 (1949))). This commentary contradicts the Supreme Court’s belief that prison grievance processes are largely characterized by “informality and relative simplicity” See *Ngo*, 548 U.S. at 102–03 (describing California’s prison grievance system).

³⁴ See Shapiro & Hogle, *supra* note 22, at 2044–45 (identifying examples of “fatal” trivial mistakes, such as: “submitting handwritten copies, rather than photocopies, of required documents . . . (even where the prison’s photocopier was broken) . . . sending a required form to the ‘Inmate Appeals Branch’ instead of the ‘appeals coordinator,’ submitting a carbon copy of a document instead of the original, or placing multiple grievances in a single envelope instead of separately mailing each one” (footnotes omitted) (first citing *Mack v. Klopotoski*, 540 F. App’x 108, 112–13 (3d Cir. 2013); then citing *Chatman v. Johnson*, No. CIV S-06-0578, 2007 WL 2023544, at *6 (E.D. Cal. July 11, 2007); then citing *Hamilton v. Lara*, No. 1:08-cv-10967, 2011 WL 2457934, at *3 (E.D. Cal. June 16, 2011); then citing *Fischer v. Smith*, No. 10-C-870, 2011 WL 3876944, at *2 (E.D. Wis. Aug. 31, 2011); and then citing *Freeland v. Ballard*, No. 2:14-cv-29445, 2017 WL 337997, at *6–7 (S.D. W. Va. Jan. 23, 2017)); Borchardt, *supra* note 32, at 493 (identifying examples of mistakes that could lead to dismissal, including “using the wrong form, [or] using the wrong color ink”); see also *Pavao v. Sims*, 679 F. App’x 819, 925 (11th Cir. 2017) (dismissing a claim for failing to properly exhaust where the plaintiff wrote on the back of the grievance form, which was non-compliant with the relevant grievance policy).

³⁵ A notable exception is Antonieta Pimienta, Note, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the “Object Intelligibly” Standard*, 114 COLUM. L. REV. 1209 (2014). But Pimienta’s commentary is focused on an examination of pleading standards where prison handbooks are otherwise *silent*. This Article, by contrast, focuses on a different aspect of the pleading regime: how federal courts interpret the pleading standards articulated in a prison’s grievance rules, and how prisons amend their prison grievance policies in response to litigation defeats.

³⁶ When I refer to prison grievance pleading requirements (or grievance pleading standards), I refer to the level of factual or legal specificity required in a prison grievance. I am not the first to use the phrase “grievance pleading standard” in this context—both courts and other commentators have previously done so. See, e.g., *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006) (noting that pro se inmates should be afforded “a liberal grievance pleading standard” that is equivalent to “notice plead-

namic across prisons and range from simple notice-pleading to heightened levels of factual and legal specificity.³⁷ This variation reflects the near-complete control that prison officials hold over this process. And that control results in the perverse opportunity to circumnavigate judicial limitations imposed on the process.

When a prison defendant raises a non-exhaustion defense by arguing that the incarcerated plaintiff's grievance failed to provide the requisite level of detail in the prison's administrative process, it is the federal court that compares the grievance's content with the governing pleading rule.³⁸ When the court disagrees with the prison's interpretation of the pleading rule and concludes that the grievance's factual allegations were sufficient, such a decision may appear, at first glance, to reflect a judicial intervention that protects an incarcerated plaintiff's access to the federal courts. It is certainly tempting to view the plaintiff's success as the prison's defeat. But in practice, this intervention invites the prison to raise its grievance pleading bar.³⁹ Because prison officials oversee the grievance process, they can respond to an incarcerated plaintiff's litigation success by amending the grievance policy to impose a more onerous pleading standard. In so doing, the prison can foreclose the plaintiff's short-lived victory for future litigants.

The Supreme Court has disregarded warnings that the PLRA's exhaustion requirement will encourage prison officials to "trap unwary prisoners" by in-

ing"); Pimentá, *supra* note 35, at 1212. This Article does not focus on the pleading requirements of a federal complaint once an incarcerated plaintiff seeks to avail herself of judicial review. For a discussion of the federal courts' growing use of standardized complaint forms for pro se prisoners, see Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899 (2017). For a discussion of the federal courts' reliance on staff attorney adjudication of prisoner claims, see generally Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97 (2016).

³⁷ Compare R.I. DEP'T OF CORR., POL'Y NO. 13.10-4 DOC, INMATE GRIEVANCES 10 (2019), <https://doc.ri.gov/news-info/inmate-life.php> [<https://perma.cc/BT4D-8Q75>] (refusing to process grievances that relate to non-grievable issues or that "fail[] to state the reasonable relief being requested as a solution to any complaint, grievance or appeal"), with KY. CORR., POL'Y NO. 14.6, INMATE GRIEVANCE PROCEDURE 8 (2021), <https://corrections.ky.gov/About/cpp/Documents/14/CPP%2014.6%20-%20Grievance%20-%20Effective%207-20-2021.pdf> [<https://perma.cc/ZFY5-VCNA>] (requiring the grievance to "include all aspects of the issue and identify all individuals in the 'Brief Statement of the Problem' section"), and DEP'T OF CORR., COMMONWEALTH OF PA., POL'Y NO. DC-ADM 804, INMATE GRIEVANCE SYSTEM 1-2 (2015), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/804%20Inmate%20Grievances.pdf> [<https://perma.cc/9USG-JNZR>] (requiring the grievance to "specifically state any claims he/she wishes to make concerning violations of Department directives, regulations, court orders, or other laws" and stating that "[i]f the inmate desires compensation or other legal relief normally available from a court, the inmate must request the specific relief sought").

³⁸ See *Jones v. Bock*, 549 U.S. 199, 205, 218–19 (2007) (holding that Michigan Department of Corrections' procedures do not require the plaintiff to name particular defendants for proper exhaustion and "leav[ing] it to the court below . . . to determine the sufficiency of the exhaustion" in this particular case).

³⁹ See *infra* notes 132–199 and accompanying text (detailing the prison pleading trap in action).

roducing procedural roadblocks intending to disqualify claims.⁴⁰ But this reactive process demonstrates that the Court was wrong to dismiss this clairvoyant concern. Prison administrators have devised pleading barriers to defeat even the *successful* claims of incarcerated people.⁴¹ And I argue that this process traps unwary prisoners by converting an incarcerated person's litigation success into figurative bait for a concealed pitfall. Rather than safeguarding a right to judicial redress for the people confined in the prison, one person's litigation victory can transform into the further constriction—or even the outright barricade—of the incarcerated population's prospective access to the federal courts.

I call this reactive process the “prison pleading trap.”⁴² Other commentators have identified individual, isolated instances where a prison amended its grievance policy to make federal litigation more difficult.⁴³ My Article builds on this scholarship by identifying this pleading trap as a reactive practice that can be emulated and compounded. I engage in a descriptive project that outlines the mechanisms of its operation, and I offer proposed solutions by engaging in a normative approach that situates the trap's role and impacts within the broader abuses of prison grievance systems.

This Article proceeds in three parts. Part I outlines the PLRA exhaustion requirement and defines the role and significance of a prison grievance.⁴⁴ Incarcerated people's lived experiences (and suffered abuses) in prison stand at the center of this discussion.

Part II directs our attention to prison grievance pleading.⁴⁵ It begins by outlining and questioning the judicial rationales for permitting prison officials to control grievance pleading standards. It then offers various examples of the “prison pleading trap” in action and explains why this regime is untenable. It ends by pausing on the question of consequence: it outlines the trap's potential impacts and interrogates who will suffer the most harm. In considering the latter, I argue that this pleading trap—an anti-prisoner and anti-litigation struc-

⁴⁰ *Woodford v. Ngo*, 548 U.S. 81, 102–03 (2006).

⁴¹ See *infra* notes 134–149 and accompanying text (discussing an example of one prison's responses to litigation defeats).

⁴² See *Trap*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a trap as a “device or contrivance by which one may be caught unawares; stratagem; snare” as well as “[a]n ultrahazardous hidden peril of which the property owner or occupier, but not a licensee, has knowledge”). The latter definition observes that “[a] trap can exist even if it was not designed or intended to catch or entrap anything.” *Id.*

⁴³ See, e.g., Shay & Kalb, *supra* note 28, at 319 (identifying one example where the Illinois Department of Corrections amended its grievance policy in response to a Seventh Circuit opinion); Borchart, *supra* note 32, at 498–518 (identifying examples of prisons that imposed increasingly onerous procedural and pleading standards over time); Mikkor, *supra* note 28, at 583–84 (identifying examples of updated grievance procedures that are clear attempts to hinder future lawsuits).

⁴⁴ See *infra* notes 48–91 and accompanying text.

⁴⁵ See *infra* notes 92–237 and accompanying text.

ture—can also be understood as having a disproportionate impact on people of color.

Part III then shifts our focus to solutions that could address or help disarm the prison pleading trap.⁴⁶ I begin by identifying legal theories situated within existing frameworks that could mitigate the worst-case scenarios. I then consider approaches to amending the exhaustion provision itself. These suggested interventions could make a meaningful difference for incarcerated people seeking the protections of the federal courts. But I recognize that discrete procedural reforms may not resolve the broader injustices inflicted by the PLRA and its exhaustion mandate. Uncritically focusing on superficial repairs may re-form an issue in need of transformative reform.

I therefore identify an expansive solution often demanded by incarcerated organizers, practitioners, and legal scholars in analogous contexts: repealing the PLRA's exhaustion mandate. I explain why the primary defense of this exhaustion requirement (the purported need to relieve the courts of a so-called "flood of frivolous [prison] lawsuits")⁴⁷ tells an incomplete story and may not justify the mandate's continued existence. Punishing incarcerated people with restricted access to judicial redress is a poor and damaging substitute for a more essential solution: decarceration. The Article concludes with a discussion of why procedural reforms can—and should—incorporate the consideration of non-procedural solutions where necessary to address a procedural issue's root causes.

I. THE SIGNIFICANCE OF A PRISON GRIEVANCE

The PLRA was a response to the seismic shifts in prison litigation from the 1970s through the early 1990s.⁴⁸ As prison populations surged, so did the quantity of individual prison litigation.⁴⁹ And federal courts responded to institutional prison litigation with unprecedented judicial oversight—by 1984, court orders supervised nearly a quarter of the nation's 903 state prisons (consisting of prisons in all but seven states), which collectively confined over forty percent of the population incarcerated in the nation's state prisons.⁵⁰

⁴⁶ See *infra* notes 239–328 and accompanying text.

⁴⁷ 141 CONG. REC. S27042 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch).

⁴⁸ *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).

⁴⁹ The number of federal prison civil rights suits almost tripled between 1980 and 1996 while the prison population grew by more than three times over that same period. Herman, *supra* note 17, at 1294. In 1995, incarcerated people "filed nearly 40,000 new federal civil lawsuits [representing] nineteen percent of the federal civil docket." Schlanger, *Inmate Litigation*, *supra* note 22, at 1558 (footnotes omitted).

⁵⁰ Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 994, 2004 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998)).

Advocates of the PLRA argued that prison litigation should be contained.⁵¹ Its advocates justified the Act's enactment by contending that legislative reform was needed both to end the federal judiciary's supposed encroachment into prison administration and to limit the volume of purportedly frivolous prison litigation.⁵² To achieve the former, the PLRA constrained the scope of prison injunctive settlements and remedies.⁵³ To achieve the latter, the PLRA imposed filing fees for largely indigent and pro se incarcerated people,⁵⁴ increased the cost of those fees,⁵⁵ disincentivized legal assistance by restricting the award of attorney's fees,⁵⁶ and limited the availability of damages.⁵⁷ And

⁵¹ *Ngo*, 548 U.S. at 84. As I explain below, the belief that prison litigation needed to be brought “under control” rests on unstable ground. See *infra* notes 290–312 and accompanying text (discussing misleading media accounts of prison litigation and legislative rationale for introducing the PLRA).

⁵² Branham, *supra* note 28, at 487–89.

⁵³ See 18 U.S.C. § 3626(a)(1)(A) (limiting relief in a prison conditions civil suit to only the “least intrusive means” required “to correct the violation of the Federal right of a particular plaintiff”); see also *id.* § 3626(a)(3) (setting out procedural and substantive hurdles for obtaining a “prisoner release order”). For a discussion of the PLRA’s impact on injunctive practice, see generally Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It’s Not Enough*, 32 STAN. L. & POL’Y REV. 317 (2021); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 590–95, 602 (2006).

⁵⁴ The PLRA imposed a new “three strikes” provision that disallows *in forma pauperis* status for anyone with three previously dismissed actions. This “three strikes” provision applies if the prior actions were dismissed as “frivolous, malicious, or [for] fail[ing] to state a claim upon which relief may be granted” 28 U.S.C. § 1915(g). The only exception to the application of this “three strikes” condition is if the plaintiff credibly faces “imminent danger of serious physical injury.” *Id.* For more legal commentary on the “three strikes” provision of the PLRA, see generally Samuel B. Reilly, Comment, *Where Is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act’s “Three Strikes” Rule*, 70 EMORY L.J. 755 (2021); Walker Newell, Note, *An Irrational Oversight: Applying the PLRA’s Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53 (2011); Michael Zachary, *Dismissal of Federal Actions and Appeals Under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)*, 42 U.S.C. § 1997e(c) and the Inherent Authority of the Federal Courts: (A) Procedures for Screening and Dismissing Cases; (B) Special Problems Posed by the “Delusional” or “Wholly Incredible” Complaint, 43 N.Y. L. SCH. L. REV. 975 (1999).

⁵⁵ Among the PLRA’s provisions is the imposition of filing fees for any indigent plaintiffs that have money in their prison accounts (even where they qualify for *in forma pauperis* status). Incarcerated plaintiffs can still proceed *in forma pauperis*, but that status no longer exempts them from the obligation to pay the filing fee. See 28 U.S.C. § 1915(b)(1) (no filing fee exemption for inmates); *id.* § 1914(a) (filing fee is \$350). Instead, it allows them to pay the filing fee in installments. See *id.* § 1915(b)(2) (installment payment plan measured at the rate of 20% of income to their prison accounts each month).

⁵⁶ See 42 U.S.C. § 1997e(d)(2)–(3) (limiting fees in money damages cases to 150% of the total judgment and limiting hourly pay to 150% of the rates authorized for court-appointed criminal counsel). For legal commentary on the PLRA’s limitations on attorney’s fees, see generally Eleanor Umphres, Note, *150% Wrong: The Prison Litigation Reform Act and Attorney’s Fees*, 56 AM. CRIM. L. REV. 261 (2019); Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorney’s Fees*, 89 CALIF. L. REV. 999 (2001).

⁵⁷ The PLRA prohibits the provision of monetary damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury” 42 U.S.C. § 1997e(e);

most relevant to this Article, the PLRA imposed an “invigorated” administrative exhaustion prescription that requires proper completion of all levels of a prison grievance system before an incarcerated person can challenge any condition of prison life in federal court.⁵⁸ The provision demands that “[n]o 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.”⁵⁹

The impacts of this provision are far-reaching. It governs the population of close to two million people confined in this nation’s jails, prisons, and juvenile incarceration facilities.⁶⁰ And it affects all suits regarding prison conditions and prison life.⁶¹ For those unfamiliar with prison life, there is often a (mis)perception that prison litigation largely addresses trivial issues.⁶² But as the Supreme Court has recognized, prison officials and staff oversee all facets of existence during confinement.⁶³ For incarcerated people, the prison’s control over their life is ubiquitous. It is perpetual. And it is absolute—prisons can deny basic freedoms and violate even the most fundamental of rights.

Consider just a few illustrative examples. Prison litigation has confronted the excessive force of prison staff who beat incarcerated people so harshly that staff paralyze⁶⁴ or even kill the people in their custody.⁶⁵ It has shined a light

28 U.S.C. § 1346(b)(2). For legal commentary on the “physical injury” requirement of the PLRA, see generally Maggie Filler & Daniel Greenfield, *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act’s Physical Injury Requirement in Solitary Confinement Cases*, 115 NW. U. L. REV. 257 (2020); Boston, *supra* note 28, at 434–43.

⁵⁸ Porter v. Nussle, 534 U.S. 516, 524 (2002).

⁵⁹ 42 U.S.C. § 1997e(a).

⁶⁰ Press Release, Wendy Sawyer & Peter Wagner, Prison Pol’y Initiative, Mass Incarceration: The Whole Pie 2023 (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/H675-4A2H>]; see also 42 U.S.C. § 1997e(a) (encompassing people confined to any “correctional facility,” not just those in state prisons).

⁶¹ See *Nussle*, 534 U.S. at 532 (holding “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong” (citing *Wilson v. Seiter*, 501 U.S. 294, 299 n.1 (1991))).

⁶² Schlanger, *Inmate Litigation*, *supra* note 22, at 1577.

⁶³ See *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973) (“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.”).

⁶⁴ See, e.g., Julian Mark, *Man Was Paralyzed by Officer and Left in a Cell for 20 Hours, Lawsuit Says*, WASH. POST (July 18, 2022), <https://www.washingtonpost.com/nation/2022/07/18/christopher-shaw-lawsuit-beaumont/> [<https://perma.cc/FEE4-UGV6>] (adding that prison staff left the incarcerated person “in a cell for some 20 hours before receiving proper medical attention”).

⁶⁵ See, e.g., *Florida Prison Guards Charged with Murder in “Back Alley Justice” Beating of 60-Year-Old Inmate*, CBS NEWS, <https://www.cbsnews.com/news/christopher-rolon-kirk-walton-ronald-connor-prison-guards-charged-murder-beating-inmate-ronald-ingram/> [<https://perma.cc/KPB6-KSFM>]

on prisons that refuse medical attention to people suffering debilitating strokes, advanced-stage cancer, or other serious conditions.⁶⁶ It has challenged solitary confinement cells infested with cockroaches and replete with feces due to the accumulated human waste in toilets that prison staff, who control the toilets' operational mechanisms, refuse to flush.⁶⁷ And it has protested prisons that feed people rotting food containing rodent droppings and brown drinking water resulting in violent illness.⁶⁸ The PLRA impacts all claims of deprivations or violations regarding the conditions of a person's life in prison—including their ability to move, sleep, eat, access the bathroom, or reach outside air; their physical safety; the conditions of their housing or workplace; the prison's control or misuse of their monetary funds; and their access to mental health treatment, disability accommodations, religious exercise, or education, among other aspects of prison life.⁶⁹

For any such claim, the PLRA requires an incarcerated person to properly exhaust the prison's administrative remedy before accessing the federal courts.⁷⁰ This means they must write and file a prison grievance detailing the experienced abuse (the internal complaint), which is often due mere days after an incident has occurred.⁷¹ The prison can deny a grievance on the merits or for an alleged error, such as the failure to comply with the prison's pleading or other procedural grievance rules.⁷² Upon receiving a denial, the incarcerated person must then timely file an administrative appeal—and properly complete every stage of review demanded by the prison system—before they can file a complaint in federal court.⁷³ They must exhaust all stages of the remedy even when confronting repeated summary denials. And importantly, any procedural

(Apr. 29, 2022) (charging four Florida prison guards with murder in the fatal beating of an incarcerated person).

⁶⁶ See, e.g., Complaint at 3, 6–15, *Lewis v. Cain*, No. 3:15-cv-00318 (M.D. La. May 20, 2015) (challenging the medical care provided at the Louisiana State Penitentiary at Angola).

⁶⁷ See, e.g., Complaint at 20–22, *Middleton v. Ward*, No. 5:21-cv-00334 (M.D. Ga. Sept. 10, 2021) (alleging that people forced into solitary confinement at Georgia State Prison are held in inhumane conditions).

⁶⁸ See, e.g., Consolidated Amended Class Action Complaint at 21–26, *Butler v. Suffolk County*, No. 11-cv-02602 (E.D.N.Y. Apr. 5, 2012) (challenging conditions at the Suffolk County Correctional Facilities).

⁶⁹ See *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (finding that “PLRA’s exhaustion requirement applies to all inmate suits about prison life”).

⁷⁰ *Woodford v. Ngo*, 548 U.S. 81, 83–84, 88 (2006).

⁷¹ See *Dolovich*, *supra* note 32, at 324 nn.145–46 (explaining that deadlines to comply with a prison’s grievance procedures can be as short as three days following the incident).

⁷² See, e.g., *KY. CORR.*, *supra* note 37, at 9 (declaring that “[t]he Grievance Coordinator may reject a grievance that does not comply with the [enumerated] grievance process requirements”).

⁷³ See *Ngo*, 548 U.S. at 83–84 (holding that “proper exhaustion” requires the filing of a timely and procedurally correct grievance).

error committed by the incarcerated person during this process will lead to a finding of improper exhaustion that precludes federal judicial review.⁷⁴

If the incarcerated person nonetheless attempts to seek judicial review of a denied grievance, the prison-defendant can argue that the litigant's procedural error during the grievance process resulted in their failure to properly exhaust their claim prior to filing suit.⁷⁵ The court's finding of a failure to exhaust will lead to the claim's dismissal. The incarcerated person may then, in theory, attempt to remedy their non-compliance by beginning the exhaustion process anew, but they are unlikely to be successful. Many prison grievance systems are characterized by short deadlines—as short as forty-eight hours after the incident's occurrence—by which incarcerated people must file their grievance.⁷⁶ By the time a federal lawsuit is filed and dismissed, the deadline for filing a new grievance (independent of the federal claim's statute of limitations) will be long over. Any newly filed grievance concerning the original incident will be denied by the prison as untimely, and the claim will have met a dead-end.

This structure lays bare the risks of onerous procedural rules, including demanding grievance pleading standards that require heightened legal and factual specificity. It places a burden on incarcerated people not only to learn the unique procedural contours that govern a prison's grievance system, but also to comply perfectly with each technical rule or standard that applies to the process. This is a difficult undertaking. The rules governing pleading, form, deadlines, and other aspects of the grievance process will be contained in prison regulations or prison handbooks that are often not easily accessible for incarcerated people.⁷⁷ And an incarcerated person must restart this learning process with each forced migration to a new prison.⁷⁸ Throughout the course of a person's penal sentence, they have little to no control over their place of confine-

⁷⁴ See *id.* (holding that the PLRA requires “proper exhaustion” of administrative remedies and accordingly imposing a procedural default sanction on those who make trivial procedural errors).

⁷⁵ See *Ngo v. Woodford*, 539 F.3d 1108, 1110–11 (9th Cir. 2008) (dismissing the case on remand from the Supreme Court because the plaintiff failed to comply with the prison's timing requirements for grievance procedures).

⁷⁶ See *Ngo*, 548 U.S. at 118 (Stevens, J., dissenting) (noting that prisons impose strict time requirements that can be as short as two days); Dolovich, *supra* note 32, at 324 n.146 (identifying deadlines as short as three, five, and seven days); Boston, *supra* note 28, at 431 n.6 (giving examples of three-day and forty-eight-hour deadlines).

⁷⁷ See Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37, 97 (2011) (finding that “prison handbooks are not particularly accessible for a substantial portion of their intended audiences” notwithstanding “their pivotal role” at the institution).

⁷⁸ See Kaufman, *supra* note 33, at 1831 n.87 (discussing the split in authority regarding which states' prison procedures apply to an incarcerated person transferred from one state to another).

ment—they may be repeatedly transferred to different prisons, or even to different state prison systems, without their consent.⁷⁹

The practical impact of PLRA's exhaustion requirement is often devastating. Indeed, the two most frequent categories of prison litigation include allegations of excessive force (including physical violence inflicted by prison guards) and claims of inadequate medical care.⁸⁰ Consider an incarcerated person who suffered a barrage of chemical weapons, assault with steel batons, and the subsequent denial of needed medical attention by prison staff—his federal claim was dismissed because he failed to properly exhaust the prison grievance system before arriving at federal court.⁸¹ The litigant had mistakenly listed the three issues together on one grievance form rather than submitting three separate grievances, as required by the prison's rules.⁸² Similarly, consider an incarcerated person who alleged that his prison medical doctor's egregious mistreatment of his diabetes led to gangrene and the amputation of his leg.⁸³ At the administrative level, his prison grievance identified his unanswered "requests to medical" (the colloquial way of referring to requests for medical attention at a prison) as well as the "denial of medical care" that "led to the amputation of [his] left leg below the knee"⁸⁴ The prison's medical records identified the relevant wrongdoer, and the grievance gave notice of the underlying issue. But because the prison grievance failed to identify the specific name of the prison medical services provider who took the plaintiff off his insulin despite noting that his "blood-sugar levels were out of control," the court dismissed the claim against her.⁸⁵

Erecting arbitrary procedural barriers to the judicial review of such claims should raise significant concern. Yet, PLRA's exhaustion requirement induces inadvertent, nominal mistakes that will bar incarcerated persons from seeking resolution in federal court even for the most grievous prison abuses.⁸⁶ In other words, PLRA exhaustion subjects an especially vulnerable group of people to an extraordinarily severe and unforgiving regime.⁸⁷

⁷⁹ See *id.* at 1838–47 (providing a comprehensive account of "the prisoner trade," or prison officials' ability to "trade prisoners" across state lines).

⁸⁰ Schlanger, *Inmate Litigation*, *supra* note 22, at 1571 n.48 (identifying the most frequent categories of prison litigation).

⁸¹ See *Brockington v. Duncan*, No. 5:14-cv-00163, 2014 U.S. Dist. LEXIS 181918, at *1–2, *8 (M.D. Ga. Nov. 3, 2014), *adopted by* 2015 U.S. Dist. LEXIS 15532 (M.D. Ga. Feb. 10, 2015) (granting defendant's motion to dismiss because the "[p]laintiff failed to exhaust available remedies").

⁸² *Id.* at *7.

⁸³ *Richardson v. Stock*, No. 13-cv-00606, 2015 WL 160949, at *3–5, *7 (D. Colo. Jan. 13, 2015).

⁸⁴ *Id.* at *7.

⁸⁵ *Id.* at *4, *7–8.

⁸⁶ Boston, *supra* note 28, at 431.

⁸⁷ Roosevelt, *supra* note 28, at 1813.

Notably, PLRA exhaustion is unique. Non-incarcerated people need not exhaust any administrative remedies before challenging deprivations to their rights under 42 U.S.C. § 1983.⁸⁸ The Supreme Court has observed that the federal courts must remain accessible to fulfill their role “as guardians of the people’s federal rights,”⁸⁹ but incarcerated people seeking analogous protections are singularly burdened with exhaustion. One scholar observed that the PLRA’s exhaustion requirement has succeeded in transforming incarcerated people into a group of “second-class litigants” and their grievances into “second-class constitutional claims.”⁹⁰ Such a regime questions the Supreme Court’s assurance that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”⁹¹ An examination of prison grievance pleading (and the prison pleading trap) casts further doubt on the Court’s assertion.

II. THE DESIGN AND FUNCTION OF PRISON GRIEVANCE PLEADING

Because each prison system can define its own internal grievance procedure, courts confronting questions of exhaustion must assess and apply the rules of each unique process where the relevant grievance arose.⁹² The law of PLRA exhaustion has therefore become “a highly technical growth area.”⁹³ One under-studied aspect of this growth area is the interaction between exhaustion and grievance pleading standards. How much factual and legal detail is needed in the initial prison grievance? What is the purpose of a grievance pleading standard? Who is empowered to define these standards, and are there any limits to the pleading requirements that apply to prison grievances?

Discussions of civil procedure often focus on the “liberal ethos,” a dedication to promoting judicial access and merits-based resolution of disputes.⁹⁴ But not everyone agrees that pleading rules “must always yield” to ensure the

⁸⁸ One exception to this general rule is that, at least in some circuits, plaintiffs “asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983.” See *Raymond v. Bd. of Regents*, 847 F.3d 585, 589 (8th Cir. 2017) (quoting *Hopkins v. City of Bloomington*, 774 F.3d 490, 492 (8th Cir. 2014)).

⁸⁹ See *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

⁹⁰ Boston, *supra* note 28, at 453–54.

⁹¹ *Turner v. Safley*, 482 U.S. 78, 84 (1987); see also *Brown v. Plata*, 563 U.S. 493, 511 (2011) (“Courts nevertheless must not shrink from their obligation to ‘enforce the constitutional rights of all ‘persons,’ including prisoners.’”) (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1979) (per curiam)).

⁹² See *Jones v. Bock*, 549 U.S. 199, 218 (2007) (holding that the requirements of a specific prison’s own grievance system, rather than the PLRA, “define the boundaries of proper exhaustion”).

⁹³ Schlanger, *Inmate Litigation*, *supra* note 22, at 1653.

⁹⁴ A. Benjamin Spencer, Essay, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54, 369 (2010).

vindication of claims on the merits.⁹⁵ As one scholar observed, a restrictive counter-value—the “threshold skepticism” that filters out certain claims — often overshadows the liberal ethos.⁹⁶ This “restrictive ethos” intentionally excludes disfavored claims brought by disfavored members of society.⁹⁷ Which ethos characterizes prison grievance pleading? The answers to the above questions have meaningful consequences for an incarcerated person’s access to both agency resolution and judicial redress.

The Supreme Court’s opinion in *Jones v. Bock* provided instructions to federal courts on how to assess the level of specificity required by a prison grievance system.⁹⁸ Section A of this Part identifies *Jones*’s holding and reasoning and questions why federal courts have deferred to prison officials to dictate the factual boundaries of alleging a prison grievance.⁹⁹ Section B then provides examples of the prison pleading trap in action and discusses the harms inflicted by this procedural trap.¹⁰⁰ Section C argues that prison grievance pleading, like other aspects of PLRA exhaustion, invites both courts and prison officials to “find[] ways for [incarcerated people] to lose.”¹⁰¹ Finally, Section D offers a brief meditation on the pleading trap’s disparate impacts, which effectuate and exacerbate racial subordination.¹⁰²

A. Setting the Trap

At issue in *Jones* was the Sixth Circuit’s judicially crafted rule regarding prison grievance pleading.¹⁰³ When enforcing the PLRA’s exhaustion requirement, the Sixth Circuit required a grievance to identify each individual later named in the lawsuit as a defendant to achieve proper exhaustion of the administrative remedy, even where a prison grievance policy included no such obli-

⁹⁵ See A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1712–14 (2013) (describing a group of *Twiqbal* supporters who view the Supreme Court’s decisions as a necessary means for making the judicial system more efficient (quoting CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 60 (2d ed. 1947))); see also Spencer, *supra* note 94, at 359 (“The open-access approach of the Federal Rules was not a welcome development in the eyes of all observers.” (citing Lauren Walker, *The Other Federal Rules of Civil Procedure*, 25. REV. LITIG. 79, 85 (2006))).

⁹⁶ Spencer, *supra* note 94, at 359.

⁹⁷ *Id.* at 369–70.

⁹⁸ See *Jones v. Bock*, 549 U.S. 199, 217–19 (2007) (contrasting the Sixth Circuit’s judicially crafted rule from the prison’s actual policy, which the court held was the relevant benchmark for determining whether the PLRA’s exhaustion requirement is met).

⁹⁹ See *infra* notes 103–131 and accompanying text.

¹⁰⁰ See *infra* notes 132–199 and accompanying text.

¹⁰¹ Schlanger, *Inmate Litigation*, *supra* note 22, at 1653; see *infra* notes 200–224 and accompanying text.

¹⁰² See *infra* notes 226–237 and accompanying text.

¹⁰³ *Jones*, 549 U.S. at 205.

gation.¹⁰⁴ The Supreme Court held that the Sixth Circuit had gone too far in imposing such demands.¹⁰⁵ The Court reasoned that the prison grievance process governs the relevant procedural rules of the prison system's administrative review.¹⁰⁶ It then concluded that the prison's idiosyncratic requirements—not the PLRA—must establish the boundaries of exhaustion.¹⁰⁷ The Court thus instructed lower courts to look to the text of each prison's procedures to discern the level of detail that is necessary in the grievance process, a requirement that would necessarily differ among various institutions or types of claims.¹⁰⁸

The Court followed its own instruction and looked to the relevant grievance policy at issue in the underlying matter.¹⁰⁹ The incarcerated plaintiff in *Jones* was confined by the Michigan Department of Corrections ("MDOC"), which required both that grievances "be as specific as possible" while simultaneously demanding that they be "brief and concise."¹¹⁰ Because MDOC's procedures did not require the naming of specific prison officials in a grievance, the Court concluded that the Sixth Circuit's rule—which judicially imposed this prerequisite—was unwarranted.¹¹¹

Buttressing the Court's decision in *Jones* was the recognition that a grievance serves a different purpose than a summon or complaint: it exists to inform prison officials of a problem to be solved, not to provide early notice of a lawsuit to a potential defendant.¹¹² The Court ultimately refused to find exhaustion inadequate "per se" based on the plaintiff's failure to name certain defendants in the grievance; nevertheless, the Court declined to decide what level of factual specificity was actually required to properly exhaust a grievance in Michigan state prisons, choosing instead to leave it to the court below to consider the matter in the first instance.¹¹³ Finally, the Court cautioned that if prison officials sought to impose more stringent grievance pleading requirements, the prison must make such changes through conventional rulemaking procedures rather than through the courts.¹¹⁴

¹⁰⁴ *Id.* at 205, 217–18.

¹⁰⁵ *Id.* at 218–19.

¹⁰⁶ *Id.* at 218.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (stating that lower courts must assess "[t]he level of detail necessary" in the grievance process of the specific institution involved, and cautioning that the required level of specificity would therefore "vary from system to system and claim to claim").

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.* at 219 (emphasizing that a grievance "is not a summons and complaint that initiates adversarial litigation" (quoting *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004))).

¹¹³ *Id.* (concluding that "exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances").

¹¹⁴ *Id.* at 224.

The lower courts responded to *Jones* by instituting a two-step analytical process for assessing the degree of factual specificity required in a prison grievance.¹¹⁵ First, the court reviews the relevant prison grievance procedure and if the text prescribes the requisite degree of factual particularity, the inquiry ends there.¹¹⁶ If the grievance rulebook is silent on particularity, the majority of courts will move to the second step and apply a notice-pleading standard that demands only that the grievance “object intelligibly” to an issue.¹¹⁷ The grievance must simply “provide enough information about the [complained-of] conduct . . . to allow prison officials to take appropriate responsive measures.”¹¹⁸ Importantly, this notice-pleading standard is irrelevant if the prison grievance system articulates a more burdensome one. What governs is the text of the grievance policy, which is often defined unilaterally by prison administrators or the state.¹¹⁹

¹¹⁵ See, e.g., *Strong v. David*, 297 F.3d 646, 649–50 (7th Cir. 2002) (articulating a two-step framework for reviewing the specificity requirement).

¹¹⁶ *Jones*, 549 U.S. at 218; see also *Spruill v. Gillis*, 372 F.3d 218, 233 (3d Cir. 2004) (stopping the inquiry where the governing rules identified the level of specificity required in a grievance’s contents).

¹¹⁷ See *Strong*, 297 F.3d at 650 (holding that a grievance “need not lay out the facts, articulate legal theories or demand particular relief” if the prison’s policies are silent on a pleading standard). The standard articulated in *Strong* requires only that the grievance “alerts the prison to the nature of the wrong for which redress is sought” and thus “object[s] intelligibly to some asserted shortcoming.” *Id.* This standard has been explicitly adopted by the Second, Ninth, and Tenth Circuits. *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004); *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009); *Kikumura v. Osagie*, 461 F.3d 1269, 1283–85 (10th Cir. 2006). The *Strong* standard has been quoted or cited with approval by the Third, Fourth, Fifth, and Sixth Circuits. *Fennell v. Cambria Cnty. Prison*, 607 F. App’x 145, 149 (3d Cir. 2015) (per curiam); *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017); *Johnson*, 385 F.3d at 517–518; *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003), *abrogated on other grounds*, *Jones v. Bock*, 549 U.S. 199 (2007). In contrast, the Eleventh Circuit has articulated a more stringent requirement that the prisoner’s grievance should “provide as much relevant information as he reasonably can” obtain. *Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000).

¹¹⁸ *Testman*, 380 F.3d at 697. *But see* *Pimienta*, *supra* note 35, at 1236–40 (identifying decisions where courts, even while citing the “object intelligibly” standard, deem certain grievances inadequate when they fail to plead legal theories).

¹¹⁹ For some state prisons (such as those in New York, California, and Florida), grievance rules are subject to notice-and-comment or other rulemaking requirements. Borchardt, *supra* note 32, at 491. The Bureau of Prisons, which is responsible for federal prisons, also engages in notice-and-comment rulemaking for amendments to its Administrative Remedy Program. See, e.g., Administrative Remedy Program: Excluded Matters, 65 Fed. Reg. 39768 (proposed June 27, 2000) (requesting public comment on a proposed rule change to “allow [prison] staff to process any request or appeal that pertains directly or indirectly to an inmate’s conditions of confinement”). But in the majority of states, grievance procedures are issued or revised without notice or public comment. Borchardt, *supra* note 32, at 491. Federal courts have largely been unwilling to interrogate the form or process of a rule’s promulgation. See, e.g., *Concepcion v. Morton*, 306 F.3d 1347, 1354 (3d Cir. 2002) (explaining that it is “justified to assume from the PLRA amendments that Congress did not intend for courts to expend scarce judicial resources examining how and by whom a prison’s grievance procedure was implemented”).

What warrants this deference to prison administrators? Prison administrators occupy incompatible roles as both the subject of grievances as well as the rule-makers controlling the grievance process. Given these conflicting incentives, why are they afforded such authority? The Supreme Court's inchoate treatment of PLRA exhaustion is revealing. The Court has reasoned that a prison's desire to maintain order sufficiently motivates it to develop equitable systems that provide a legitimate opportunity to raise grievances.¹²⁰ In other words, the Court speculated that prisons are driven by inherent "incentives to maintain functioning remedial processes," and assumes that this motivation will result in fair grievance regimes.¹²¹

Although not alone in making this assumption,¹²² the Court offers no justifications for this reasoning. Other commentators—particularly those with experience in prison grievance systems—recognize the dubious grounds for the Court's presumption that the PLRA itself incentivizes prison administrators to create fair grievance processes.¹²³ After all, the exhaustion requirement places the resolution of prison civil rights matters directly into the hands of prison authorities who have a vested interest in avoiding subsequent litigation.¹²⁴ This interest can motivate prison administrators to enact prohibitive procedural barriers to immunize themselves from liability.¹²⁵ As other scholars have opined, "Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances?"¹²⁶ Viewed through this lens, it may be true that the PLRA encourages prison administrators to create "functioning" and efficient processes¹²⁷—that is, processes that

¹²⁰ *Woodford v. Ngo*, 548 U.S. 81, 102–03 (2006).

¹²¹ *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).

¹²² *See, e.g.*, NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, CORRECTIONS 57 (1973) ("Peaceful avenues for redress of grievances are a prerequisite if violent means are to be avoided. Thus all correctional agencies have not only a responsibility but an institutional interest in maintaining procedures that are, and appear to offenders to be, designed to resolve their complaints fairly."); Pimentá, *supra* note 35, at 1247 ("Abandonment of the grievance system by prisoners is worrisome considering the potential of a prison's internal grievance process to serve as a useful management tool." (citing J. MICHAEL KEATING, PRISON GRIEVANCE MECHANISMS MANUAL 16, 18 (1977))).

¹²³ Schlanger, *Inmate Litigation*, *supra* note 22, at 1653.

¹²⁴ Schlanger & Shay, *supra* note 14, at 141.

¹²⁵ *Id.*

¹²⁶ *Id.* at 150. Also absent in the Supreme Court's consideration of incentives is a recognition of its own potential for bias. As multiple commentators have opined, judicial "impatience with *pro se* prisoner cases [may] make[] some judges eager to relinquish review—so eager that they lose sight of the need to safeguard the judiciary's authority." Shay & Kalb, *supra* note 28, at 323; *see also* Herman, *supra* note 17, at 1245 (recognizing "federal courts' own concerns about caseload" as a consideration when imposing new requirements for cases about prison conditions).

¹²⁷ *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).

function to the benefit of prison officials, and that efficiently dispose of incarcerated people's opportunity to seek redress in the federal courts.

The Supreme Court's unwillingness to acknowledge this conflicting incentive is surprising given it has already done so in analogous contexts. For example, when assessing the procedural fairness of prison disciplinary hearings, the Court observed that hearing officers—who are themselves both employed by the prison and subordinates of the warden—are far from independent.¹²⁸ The Court remarked that pretending otherwise would “ignore reality.”¹²⁹ The Court accordingly reasoned that hearing officers are clearly incentivized to rule on the side of the institution, and that such a “relationship between the keeper and the kept” does not produce a reasonable forum for adjudicating matters.¹³⁰ The reality of self-interest is equally apparent in the prison grievance system and yet this conflicting incentive is somehow absent in the Supreme Court's prison grievance jurisprudence.

One scholar has described this oversight as judicial “naivety” and bias “blindness,” and cautioned that the Court's unsupported presumption of a prison's “pure motives” creates an exhaustion regime that “lacks legitimacy.”¹³¹ I agree, and would even go one step further to argue that this judicial presumption expressly enables prison officials to actively manipulate grievance pleading processes.

B. The Trap in Action

The Supreme Court's decision in *Jones* created a system that is designed to fail the very people it should protect.¹³² Even where incarcerated plaintiffs succeed in overcoming a pleading exhaustion argument, these victories can be short-lived and double-edged. And if prison officials desire to optimize their opportunities to reject grievances for non-compliance or to dismiss lawsuits for non-exhaustion, they can do so.¹³³ The existing structure empowers prisons to respond to a litigation defeat—what should act as a constraint on pleading restrictions—by imposing a more difficult pleading standard to further immunize themselves from future liability.

¹²⁸ *Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985).

¹²⁹ *Id.*

¹³⁰ *Id.* at 204.

¹³¹ Mikkor, *supra* note 28, at 574, 579–85.

¹³² See *Jones v. Bock*, 549 U.S. 199, 219 (2007) (identifying the purpose of the exhaustion requirement to be to “alert prison officials to a problem” (quoting *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004))).

¹³³ See *id.* at 218 (holding that the “prison's requirements, and not the PLRA . . . define the boundaries of proper exhaustion”).

Consider, for example, the Pennsylvania state prison grievance system. When plaintiff Robert Spruill filed a § 1983 civil rights complaint against prison staff for failing to treat his serious back condition (resulting in excruciating pain throughout his body), the defendants argued that his claim was unexhausted because he had failed to include a specific request for damages in his prison grievance.¹³⁴ The U.S. Court of Appeals for the Third Circuit disagreed.¹³⁵ The court observed that the relevant prison grievance process “suppl[ies] the yardstick for measuring procedural default,”¹³⁶ and noted that the state prison’s policy did not require the identification of any specific type of relief sought.¹³⁷ Rather, the relevant pleading rule stated that the incarcerated person “*may* include a request for compensation or other legal relief normally available from a court.”¹³⁸ The court concluded that “[n]othing in the [rules] would have put [Mr.] Spruill on notice that he had to ask for money damages—or any particular form of relief at all.”¹³⁹ The court highlighted the difference between the pleading rule at issue and one that expressly contains a requirement to identify a particular form of relief.¹⁴⁰ The Third Circuit offered a hypothetical example of the latter: “If the inmate desires compensation or other legal relief normally available from a court, the inmate shall request the relief with specificity in his/her initial grievance.”¹⁴¹

Because Mr. Spruill had otherwise satisfied the notice-pleading standard that applied to his administrative grievance, the court rejected the defendants’ exhaustion argument.¹⁴² But the court made plain the mechanisms of the prison

¹³⁴ *Spruill v. Gillis*, 372 F.3d 218, 223–26 (3d Cir. 2004). Section 1983 permits monetary damages for the injured party when a government official causes the deprivation of rights, privileges, or immunities guaranteed by the Constitution or laws of the United States. 42 U.S.C. § 1983.

¹³⁵ *Spruill*, 372 F.3d at 233–34.

¹³⁶ *Id.* at 231.

¹³⁷ *Id.* at 233–34. The portion of the grievance system procedure detailing the information that must or may be included in a grievance provides:

The inmate shall include a statement of the facts relevant to the claim. The text of the grievance shall be legible, presented in a courteous manner, and the statement of facts shall not exceed two (2) pages. The inmate should identify any persons who may have information that could be helpful in resolving the grievance. The inmate should also include information on attempts to resolve the matter informally. The inmate may also specifically state any claims he/she wishes to make concerning violations of Department directives, regulations, court orders, or other law. The inmate may include a request for compensation or other legal relief normally available from a court.

Id. at 233 (emphasis omitted) (quoting DEP’T OF CORR., COMMONWEALTH OF PA., POL’Y NO. DC-ADM 804, Part VI(A)(1)(d) (2004)).

¹³⁸ *Id.* (emphasis added).

¹³⁹ *Id.* at 234.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

pleading trap. It added that—to the extent the defendants were dissatisfied with the ruling—the prison was welcome to amend its grievance system to require more information from those submitting grievances.¹⁴³ Despite this explicit encouragement, the Third Circuit also expressed caution and “hopeful[ness]” that its holdings “will not engender a prison grievance review culture marked by technicalities”¹⁴⁴

Following this decision, the Pennsylvania Department of Corrections (“PDC”) accepted the Third Circuit’s invitation and amended its policy.¹⁴⁵ Indeed, it adopted the very language that the Third Circuit offered as an example of a rule that would have defeated Mr. Spruill’s claim.¹⁴⁶ Now present in PDC’s grievance policy is the requirement that, “[i]f the inmate desires compensation or other legal relief normally available from a court, the inmate must request the specific relief sought in his/her initial grievance.”¹⁴⁷ In a subsequent opinion, the Third Circuit in *Wright v. Sauers* observed that the identification of specific remedies is “now mandatory” and that incarcerated people are “procedurally defaulted” from pursuing claims for monetary damages where they fail to explicitly request such relief in their prison grievances.¹⁴⁸ This is so even where such monetary relief is unavailable through the administrative grievance process and the incarcerated plaintiff otherwise “[gives] a detailed account of the underlying incident” in their initial prison grievance.¹⁴⁹

From the viewpoint of an incarcerated person, it defies logic to ask specifically for monetary damages in an internal administrative process that expressly cannot and will not result in any monetary relief. And yet, if a person confined to a Pennsylvania state prison hopes to preserve the ability to pursue any specific type of relief in federal court, they must identify each such legal remedy in their initial prison grievance. It is difficult to see this amended pleading standard as anything but an attempt to further immunize the prison and its staff from liability. The specific legal remedies that are later requested from a federal court have no substantive bearing on internally investigating or potentially resolving the complained-of issue, and yet the identification of each remedy is now a grievance pleading requirement in Pennsylvania state prisons.

¹⁴³ *Id.* at 235.

¹⁴⁴ *Id.*

¹⁴⁵ See *Wright v. Sauers*, 729 F. App’x 225, 226 (3d Cir. 2018) (referring to the PDC’s inmate grievance policy).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (alteration in original) (emphasis omitted) (quoting DEP’T OF CORR., *supra* note 37, at 1-2).

¹⁴⁸ *Id.* at 227.

¹⁴⁹ *Id.* at 226; see also *Booth v. Churner*, 206 F.3d 289, 291 (3d Cir. 2000) (explaining that the PDC’s grievance process could not provide a grieving incarcerated person any monetary relief).

The Pennsylvania Department of Corrections is not alone in engaging in this pleading trap.¹⁵⁰ Prison systems have set these pleading traps in a variety of flavors including requiring prison grievances to identify precise legal claims or the specific regulations or laws that were violated in the complained-of encounter.¹⁵¹ Prison systems have also responded to litigation defeats by amending their rules to require heightened factual details regarding an incident, including the time that an encounter occurred as well as the specific names of each alleged wrongdoer.¹⁵²

This latter pleading standard is colloquially known as the “name all defendants” rule, and it provides a powerful illustration of the pleading trap in action. As the Supreme Court explained in *Jones*, the “name all defendants” rule—a requirement that a prison grievance must identify and name each person that is later sued as a defendant in federal court—is not required to achieve the purposes of PLRA exhaustion.¹⁵³ The Court rejected the Sixth Circuit’s attempt to impose this pleading requirement judicially where the prison’s grievance policy was otherwise silent, but it left open the possibility that prison systems could adopt this rule into their own grievance procedures.¹⁵⁴ Various prison systems have done exactly that, often as a response to litigation defeats.

The Arkansas Department of Corrections (“ADC”) provides one cautionary tale.¹⁵⁵ Prior to 2004, ADC had a policy that required prison grievances to “state[] [the issue . . .] as briefly and clearly as possible” on the provided form, which itself instructed the grievant to only “describe the problem.”¹⁵⁶ In response to a litigation defeat, ADC transformed its simple rule into a more onerous standard.¹⁵⁷ Its new rule required grievances to provide “a brief statement that is specific as to the substance of the complaint to include the date,

¹⁵⁰ See *infra* notes 156–195 and accompanying text (detailing similar practices in Arkansas, Illinois, California, and Michigan).

¹⁵¹ See, e.g., *Stone v. Johnson*, 713 F. App’x 103, 105 (3d Cir. 2017) (“The inmate must also . . . ‘specifically state any claims he/she wishes to make concerning violations of Department directive, regulations, court order, or other law.’” (emphasis omitted) (quoting DEP’T OF CORR., *supra* note 37, at 1-2)).

¹⁵² See *infra* notes 194–195 and accompanying text. The Sixth Circuit has cautioned that requiring incarcerated people to state the time of the complained-of misconduct “may raise constitutional concerns” by infringing on the incarcerated person’s “right to petition the government for the redress of grievances” where they are unable to know this information. *Maxwell v. Corr. Med. Servs., Inc.*, 538 F. App’x 682, 688–89 (6th Cir. 2013) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

¹⁵³ *Jones v. Bock*, 549 U.S. 199, 217 (2007).

¹⁵⁴ *Id.* at 217–18.

¹⁵⁵ This analysis builds upon Dereck Borchardt’s study on the evolution of the Arkansas Department of Corrections’ grievance policies. See generally Borchardt, *supra* note 32, at 502–10.

¹⁵⁶ *Id.* at 502–03 (first two alterations in original) (first quoting DEP’T OF CORR., STATE OF ARK., ADMINISTRATIVE DIRECTIVE 97-08, § V(E)(1) (1997); and then quoting *Marshall v. Hubbard*, No. 5:06CV00300, 2007 WL 1627534, at *4 (E.D. Ark. June 4, 2007)).

¹⁵⁷ *Id.* at 503–04.

place, personnel involved or witnesses, and how the policy or incident affected the inmate.”¹⁵⁸ Accordingly, when applying this rule, district courts generally dismissed claims against defendants who were not specifically named in the initial prison grievance.¹⁵⁹

But on (at least) one occasion the court pushed back. A federal district court in Arkansas rejected the prison defendants’ naming argument and permitted the claim to go forward.¹⁶⁰ The incarcerated plaintiff alleged that the prison’s medical staff and other employees had consistently refused to provide crucial dental treatment, causing excruciating pain and requiring oral surgery.¹⁶¹ The prison defendants argued that because the plaintiff had neglected to identify the defendants by name in his grievances, he had failed to exhaust his claims against them.¹⁶² The district court disagreed. It determined that the references to job titles or positions that the plaintiff included in the grievance—namely, references to “dental staff,” “infirmary supervisors,” and “infirmary staff,”—reasonably placed the prison on notice of the relevant wrongdoers and thus sufficiently identified the individual defendants.¹⁶³

That same year, ADC again updated its grievance procedures.¹⁶⁴ The amended rule now requires grievances to “*specifically name* each individual involved for a proper investigation and response to be completed by ADC.”¹⁶⁵ Complementing this requirement is an instruction that “[i]nmates who fail to name all parties during the grievance process may have their lawsuit . . . dismissed by the court . . . for failure to exhaust against all parties.”¹⁶⁶

At first glance, ADC’s “name all defendants” pleading trap may seem unexceptional, perhaps even expected. This rule undoubtedly infuses prison grievances with more detail, which could arguably aid in the informal investigations conducted by the prison.¹⁶⁷ But this assessment must recognize the severe limita-

¹⁵⁸ *Flemons v. Corr. Med. Servs.*, No. 5:05CV00050, 2007 WL 3197337, at *3 (E.D. Ark. Oct. 26, 2007) (quoting ADC inmate grievance procedures).

¹⁵⁹ *See, e.g., Erickson v. Maples*, No. 1:07cv00016, 2008 WL 280895, at *3 (E.D. Ark. Jan. 31, 2008) (dismissing for failure to specifically name a defendant); *Cristee v. Norris*, No. 2:07CV00045, 2008 WL 905616, at *3 (E.D. Ark. Mar. 28, 2008) (same); *Belt v. Womack*, No. 1:07cv00055, 2008 WL 2857572, at *3 (E.D. Ark. July 22, 2008) (same).

¹⁶⁰ *Flemons*, 2007 WL 3197337, at *3–4.

¹⁶¹ *Id.* at *2.

¹⁶² *Id.* at *3–4.

¹⁶³ *Id.*

¹⁶⁴ Borchardt, *supra* note 32, at 505.

¹⁶⁵ *Id.* (quoting ARK. DEP’T OF CORR., ADMINISTRATIVE DIRECTIVE 07-03 § IV(C)(4) (2007)).

¹⁶⁶ *Id.* (alterations in original) (quoting ARK. DEP’T OF CORR., *supra* note 165, § IV(C)(4)).

¹⁶⁷ Practice and experience suggest that grievance processes do not produce a record that is ultimately helpful for litigation. As incarcerated people and prisoners’ rights practitioners can attest, “[a] complete grievance proceeding often consists of little more than a series of forms that a prisoner submits, which are returned with the corrections officials’ responses at the bottom.” Shay & Kalb, *supra* note 28, at 317. And it can be rare that the prison provides a substantive response in this process. For

tions on a person's daily life in prison and the concomitant constraints on their ability to exhaust. The first such limitation is imposed by the prison grievance process itself. Incarcerated people confront extremely abbreviated deadlines to submit a prison grievance (sometimes as short as forty-eight hours after the incident occurs), independent of the statute of limitations that governs their legal claims.¹⁶⁸ The second limitation is information asymmetry. Prison officials, rather than the people confined to their custody, possess much of the relevant information needed to satisfy heightened factual pleading standards. The third limitation is capacity. Commentators and jurists alike have recognized that incarcerated people are unable to conduct even informal investigations prior to filing a grievance.¹⁶⁹ Incarcerated people must overcome high rates of illiteracy,¹⁷⁰ lack of language access,¹⁷¹ and physical and mental disabilities.¹⁷² Further, incarcer-

example, in response to grievances of specific instances of inadequate mental health treatment, a Connecticut prison rejected the grievance with a conclusory one-line reply that "[a]dequate mental health care is provided to all inmates at [the prison]." *Id.* (quoting Brief for the A.C.L.U. et al. as Amici Curiae Supporting Petitioners, *Jones v. Bock*, 549 U.S. 199 (2007) (Nos. 05-7085 and 05-7142), at *16 n.19).

¹⁶⁸ See *supra* note 76 and accompanying text (discussing the short deadlines to submit a grievance in some prisons).

¹⁶⁹ See Schlanger, *Inmate Litigation*, *supra* note 22, at 1611 (explaining why incarcerated people are unable to conduct their own investigations prior to filing a grievance); *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995) (recognizing that "it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit").

¹⁷⁰ Rates of education and literacy are lower in prison than in the general population. One study found that only 22% of incarcerated people reached some level of post-secondary education compared to the 51% of the general population who had. See J.M. Kirby, Note, Graham, Miller & the *Right to Hope*, 15 CUNY L. REV. 149, 162–63 (2011) (citing ELIZABETH GREENBERG, ERIC DUNLEAVY, MARK KUTNER & SHEIDA WHITE, NAT'L CTR. FOR EDUC. STAT., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 27 (2007)); see also BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, at tbl.1 (2021), <https://bjs.ojp.gov/content/pub/pdf/fpscfsa21.pdf> [<https://perma.cc/H288-BLPL>] (finding that in 2020, 28.3% of federal prisoners did not have a high school diploma, general equivalency degree, or other equivalent certificate). The percentage of persons with diagnosed learning disabilities is 17% of the prison population compared to 6% of the general population. See Kirby *supra*, at 163 (citing a 2003 study). A different study "estimate[d] that 70% of federal and state prisoners are functionally illiterate or read below an eighth[-]grade level." *Id.* (citing ARK. LITERACY COUNCIL, ADULT ILLITERACY: ITS COST TO US ALL 2 (2005)).

¹⁷¹ See, e.g., BUREAU OF JUST. STAT., *supra* note 170, at tbl.1 (reporting that in 2020, 11.4% of federal prisoners reported English as a second language). Prisons have responded poorly to the needs for language access in their prisons. Take, for example, the Michigan prisons that banned non-English language dictionaries, including Spanish and Swahili dictionaries, due to an expressed fear that expanded language access would permit incarcerated people to "speak freely" in front of staff without the staff's knowledge. Michelle Jokisch Polo, *Michigan Prisons Ban Spanish and Swahili Dictionaries to Prevent Inmate Disruptions*, NPR, <https://www.npr.org/2022/06/02/1102164439/michigan-prisons-ban-spanish-and-swahili-dictionaries-to-prevent-inmate-disrupti> [<https://perma.cc/7DET-FMNK>] (June 2, 2022).

ated people are highly likely to proceed through the grievance process pro se.¹⁷³ Some grievance systems even expressly forbid the assistance of counsel.¹⁷⁴

Specific to the “name all defendants” rule, these capacity concerns are made more concrete by considering the types of prison abuses that give rise to prison grievances. Incarcerated people who hope to challenge an unjust prison policy or procedure generally lack access to the identities of the policymakers.¹⁷⁵ Those challenging the abuses or indifference of prison staff have had to overcome staff who refuse to provide their names, do not wear name badges, or hide their identification under their clothes.¹⁷⁶ And where incarcerated people suffer violence or force, it is difficult to overcome the trauma of a concussion or loss of consciousness, or to be aware of every participant involved in the incident.¹⁷⁷

¹⁷² Studies have found that people incarcerated in prisons “are nearly three times as likely to report having a disability as the nonincarcerated population” REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS* 1 (2016). People incarcerated in prisons are four times more likely and people detained in jails are more than six times as likely to have a cognitive disability than someone in the general population. *Id.* at 2. One in five prisoners suffers a serious mental condition. *Id.*

¹⁷³ This is true even after completing the administrative process and proceeding to federal court. *See Schlanger, Inmate Litigation*, *supra* note 22, at 1609 (determining that “[n]early all the cases in the inmate federal civil rights docket are filed and litigated pro se—far more than in any non-prisoner part of the docket”).

¹⁷⁴ For example, the Colorado Department of Corrections requires incarcerated people to pursue prison grievances “without the assistance, involvement, or intervention of an agent or attorney.” *See Borchardt, supra* note 32, at 510 (emphasis omitted) (quoting COLO. DEP’T OF CORR., ADMINISTRATIVE REGULATION 850-04 § IV(B)(2) (2010)) (describing this “pernicious[.]” rule). The Florida Department of Corrections allows legal assistance in filing a grievance only when alleging sexual abuse. FLA. ADMIN. CODE ANN. r. 33-103.006(3)(j)(1)(c) (2023). Many grievance systems also forbid the filing of a group grievance on behalf of an impacted class, or from filing a grievance on behalf of another incarcerated person. *See, e.g.,* WYO. DEP’T OF CORR., POLICY AND PROCEDURE #3.100, at 11 (2013), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Wyoming%20Grievance%20Policy.pdf> [<https://perma.cc/6GR6-UTAB>] (“An inmate may not submit a group grievance that represents other inmates, or act as a spokesperson for other inmate(s).”); ARK. DEP’T OF CORR., ADMINISTRATIVE DIRECTIVE NO. 12-16, at 2 (2012), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Arkansas%20-%20Administrative%20Directive%20No.%2012-16.pdf> [<https://perma.cc/9UTW-79VU>] (“[A]n inmate cannot grieve on behalf of another inmate.”); N.H. DEP’T OF CORR., GRIEVANCES AND COMPLAINTS BY PERSONS UNDER DOC SUPERVISION 2 (2012), <https://www.law.umich.edu/special/policyclearinghouse/Documents/New%20Hampshire%20Grievance%20Pol’y.pdf> [<https://perma.cc/E5MT-UPMR>] (“An inmate/resident shall not use this process to submit a request or appeal on behalf of another inmate/resident.”).

¹⁷⁵ *Robinson v. Johnson*, 343 F. App’x 778, 781 (3d Cir. 2009).

¹⁷⁶ *See, e.g., Hall v. Raja*, No. 09-10933, 2009 WL 6315346, at *5 (E.D. Mich. Aug. 28, 2009) (finding that the incarcerated plaintiff, who declared an inability to discover the defendants’ names because medical staff refused to share names or hid their name tags, properly exhausted his administrative remedies when he broadly identified “medical staff” in his prison grievance).

¹⁷⁷ *See, e.g., Jackson v. Catanzariti*, No. CV 612-113, 2017 WL 2786476, at *1–2, *4 (S.D. Ga. June 27, 2017) (refusing to apply a “name all defendants” requirement at the grievance pleading stage

Accordingly, there are many instances where an incarcerated person will not reasonably know the specific names or identities of prison staff wrongdoers at the time their grievance is due. And yet, where this identification is a grievance pleading requirement, their grievances can be denied at the administrative level—and the federal claims later dismissed—for failing to include this information in the initial administrative charge.

How have courts reacted to ADC's latest iteration of the "name all defendants" rule? Do they intervene to undermine unreasonable enforcement of the rule, or do they continue to defer to the text of the prison's grievance policy? To a large degree, federal courts have strictly enforced the rule.¹⁷⁸ Such strict applications can have damaging consequences for incarcerated people who reasonably could not have known their wrongdoers' identities when they filed their grievance. Consider the incarcerated plaintiff who filed an action against ADC alleging that for twelve hours, he had been forcibly confined in a shower stall—infested with insects and hotter than 100 degrees Fahrenheit—and deprived of access to water, use of a toilet, and his diabetic meals.¹⁷⁹ Though the factual assertions in his grievances sufficiently placed the prison defendants on notice of the subject matter of his complaint, he had not named all the defendants in his initial grievances because—as he explained—he did not know each wrongdoer's identity at the time the grievances were due.¹⁸⁰ The court strictly construed the pleading rule and dismissed his claims against all the defendants unnamed in his grievances.¹⁸¹

Additionally, consider another incarcerated plaintiff who alleged that the prison and its staff had failed to provide him with constitutionally adequate medical care for chronic colitis, a severe digestive and colon disease.¹⁸² The

because "it would be very difficult for an aggressively beaten inmate in such tumultuous circumstances to remember or be aware of every officer who was present").

¹⁷⁸ There is one notable exception to this broad consensus. In 2012, in *Bower v. Kelley*, the Eighth Circuit rejected the defendants' argument that the claims against them were rightly dismissed because the plaintiff had failed to name them specifically in any exhausted grievances. 494 F. App'x 718, 718 (8th Cir. 2012). But that opinion failed to include any substantive analysis, made no mention of the number of other conflicting opinions, and cited only one opinion in support that was ultimately not relevant to the issue at hand. *Id.* The cited opinion held that defendants cannot rely on a failure-to-exhaust affirmative defense if the prison nonetheless considered the grievance on the merits during the administrative process. *Hammett v. Cofield*, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam). In light of these gaps, courts in this circuit have concluded that *Bower* is an outlier that does not reflect the consensus of opinions. *See, e.g., Smith v. Corizon, Inc.*, No. 3:11-cv-06036, 2014 WL 4678801, at *6 (W.D. Ark. July 10, 2014).

¹⁷⁹ *Robinson v. Andrews*, No. 2:11-cv-00164, 2012 WL 4086934 at *1–2, *4 (E.D. Ark. Aug. 29, 2012), *adopted*, 2012 WL 4086858 (E.D. Ark. Sept. 17, 2012).

¹⁸⁰ *Id.* at *3.

¹⁸¹ *Id.*

¹⁸² *Boyd v. Rechcigl*, No. 4:20-cv-129, 2021 WL 2449085, at *1, *8 (E.D. Ark. Apr. 14, 2021), *adopted in relevant part*, 2021 WL 2446374 (E.D. Ark. June 15, 2021).

plaintiff explained that his initial grievances identified various unspecified “medical staff” without names or titles because they “refused to wear name badges or tell him their names.”¹⁸³ The plaintiff later specifically named those individuals as defendants in his federal complaint.¹⁸⁴ Nevertheless, a federal district court in Arkansas applied the text of ADC’s pleading rule and dismissed plaintiff’s claims against all the defendants unnamed in his grievances.¹⁸⁵

The general enforcement of the “name all defendants” rule reveals the practical dangers of the prison pleading trap. Federal courts have demonstrated a willingness to apply heightened pleading standards designed by prison officials—even where they go far beyond the notice-pleading that is otherwise sufficient to satisfy the purpose of administrative exhaustion—solely because the Supreme Court has held that the prison’s grievance policy defines the boundaries of factual specificity.¹⁸⁶ And courts do so even while noting their understanding of the plaintiff’s reasonable frustration that possibly legitimate claims are stymied by a prison’s heightened grievance procedure requirements.¹⁸⁷ In other words, courts often do not (and perhaps believe they cannot) intervene when confronted by unnecessarily elevated pleading standards.¹⁸⁸ And because federal courts provide the only practical backstop to this pleading trap, the courts’ inaction facilitates the trap’s success.¹⁸⁹

¹⁸³ *Rechcigl*, WL 2449085, at *8.

¹⁸⁴ *Id.* at *1, *4–5.

¹⁸⁵ *See id.* at *7–8 (rejecting the plaintiff’s unavailability argument).

¹⁸⁶ *Jones v. Bock*, 549 U.S. 199, 218 (2007).

¹⁸⁷ *See Rechcigl*, 2021 WL 2449085, at *8 (noting that the court is “not unsympathetic” to the plaintiff’s reasonable frustration and acknowledging the fact that “the ADC has a very specific and exacting grievance procedure”).

¹⁸⁸ *See id.* (holding that the law does not provide the court with “discretion to allow [the plaintiff] to proceed” if the plaintiff has not properly exhausted his claims).

¹⁸⁹ One exception to the general enforcement of ADC’s “name all defendants” rule appears when the ADC, despite an incarcerated person’s non-compliance with the pleading standard, nonetheless addresses the grievance on the merits. *See Hammett v. Cofield*, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam) (holding that defendants cannot rely on a failure-to-exhaust affirmative defense where it nonetheless considered the grievance on the merits during the administrative process). In such situations, district courts are willing to consider whether prison officials were on notice of an unnamed defendant’s identity through specific descriptive information included in the grievance, namely a precise job title that could refer only to the unnamed defendant—and the courts will look to the prison’s responses to the grievance to confirm this understanding. *See, e.g., Carter v. Huddleston*, No. 1:18-cv-00076, 2019 WL 3243765, at *4–5 (E.D. Ark. July 18, 2019) (noting that ADC officials reached the plaintiff’s grievance on the merits and that the responses demonstrated that the officials understood the identified job title “food production managers,” which could refer only to two prison employees: the two unnamed defendants); *Robertson v. Payne*, No. 4:20-CV-1171, 2021 WL 3914311, at *3 (E.D. Ark. May 10, 2021) (noting that ADC officials reached the plaintiff’s grievance on the merits and that they “had to know who the members of the Classification Committee were when [the plaintiff] filed [his] grievance”); *Everett v. Ward*, No. 3:20-cv-00228, 2020 WL 7483442, at *4 (E.D. Ark. Dec. 11, 2020) (noting that ADC officials reached the plaintiff’s grievance on the merits and that the plaintiff’s reference to “the ‘director’—of which there was only one—was suffi-

These concerns are not limited to ADC. Prisons across the United States have laid the same trap to impose a “name all defendants” rule, following the blueprint offered by judicial decisions to avoid scrutiny. After the Seventh Circuit held that incarcerated people were not required to specifically name defendants in their grievances where the prison grievance “rulebook is silent,”¹⁹⁰ the Illinois Department of Corrections amended its grievance procedure to include a particularity requirement that demands “factual details . . . including what happened, when, where, and the name of each person” involved in the complaint.¹⁹¹ After the Ninth Circuit reaffirmed the notice-pleading standard for California prison grievances and held that the incarcerated plaintiff “was not required to identify [the defendant] by name to exhaust the grievance against him,”¹⁹² the California Department of Corrections and Rehabilitation amended its policy to require a “list [of] all staff member(s) involved” in the complaint.¹⁹³ And after the Sixth Circuit determined that “fair notice of the alleged mistreatment” was all that was required with an initial grievance in Michigan state prisons,¹⁹⁴ the Michigan Department of Corrections amended its grievance procedure to require “[d]ates, times, places and names of all those involved in the issue”¹⁹⁵

It is important to acknowledge that some courts appear more willing than others to intervene. For example, the federal district courts in Michigan have had mixed reactions to MDOC’s “name all defendants” rule. Many of these courts do apply the rule categorically, as the federal district courts in Arkansas have done.¹⁹⁶ Some federal district courts in Michigan have applied their own

ciently specific”). This may appear at first glance like a meaningful constraint, but it is inherently limited. It will not apply in circumstances, like the ones noted above, where a plaintiff credibly explains why they do not know the individual’s identity when the initial grievance is due. And it also raises the same conflict of interest that pervades the prison grievance process. It places the threshold lever—whether to address the grievance on the merits despite procedural non-compliance—in the hands of prison officials who benefit by immunizing themselves from liability. The existence of the prison pleading trap suggests that this risk is also a reasonable concern.

¹⁹⁰ *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).

¹⁹¹ *Santiago v. Anderson*, 496 F. App’x 630, 637 (7th Cir. 2012) (quoting ILL. ADMIN. CODE tit. 20, § 504.810(b) (2012)).

¹⁹² *Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010).

¹⁹³ *Ingram v. Hamkar*, No. 2:11-cv-2507, 2013 WL 3786715, at *4 (E.D. Cal. July 18, 2013) (quoting CAL. CODE REGS. tit. 15, § 3084.2(a)(3) (2011)).

¹⁹⁴ *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003), *abrogated by Jones v. Bock*, 549 U.S. 199 (2007).

¹⁹⁵ *Vandiver v. Corr. Med. Servs., Inc.*, 326 F. App’x 885, 888 (6th Cir. 2009) (quoting MICH. DEP’T OF CORR., POL’Y NO. 03.02.130, PRISONER/PAROLEE GRIEVANCES (2003)).

¹⁹⁶ *See, e.g., Kaufman v. Wolfenbarger*, No. 08-13762, 2010 WL 148668, at *2 (E.D. Mich. Jan. 13, 2010) (dismissing one of the plaintiff’s claims because the defendant was not named in the grievance form); *Tullos v. Hutchinson*, No. 1:12-cv-144, 2013 WL 1625412, at *7 (W.D. Mich. Mar. 15, 2013) (same); *Atkins v. Vadlamudi*, No. 07-10547, 2008 WL 1795023, at *7 (E.D. Mich. Mar. 18, 2008) (same); *Cadogan v. Vittitow*, No. 06-CV-15235, 2007 WL 2875464, at *3 (E.D. Mich. Sept. 30,

exception where the grievance's description of the unnamed defendant was sufficiently "obvious" to put the defendant on notice.¹⁹⁷ And the Sixth Circuit has contemplated (but not yet carved out) an exception to MDOC's "name all defendants" rule where the prison affirmatively conceals the name of the relevant official, such that the incarcerated person is forcibly unable to reference the official in the grievance.¹⁹⁸

But even where courts have been willing to take on the task of imposing a reasonable constraint, the unfortunate reality is that an incarcerated person submitting a grievance in a Michigan state prison will be rolling the dice when they later file a complaint in federal court. The lack of uniformity creates obvious discrepancies in the enforcement and interpretation of this rule: although some legitimate grievances are unhindered by this onerous pleading rule, others will be procedurally barred from reaching judicial review. And of course, incarcerated people have no control over the prison systems in which they will be confined.¹⁹⁹ With each forced transfer to a new prison or prison system (and their unique pleading rules), incarcerated people will be forced to roll the dice yet again.

C. The Dangers of Prisons as Rule-Makers

Rather than filtering out frivolous claims, the prison pleading trap enables prisons to establish increasingly more demanding pleading barriers that will bar litigation at random, irrespective of the claim's underlying merit. The analysis of various examples in Section B of Part II demonstrates how this structure harms incarcerated litigants seeking judicial relief.²⁰⁰ But the consequenc-

2007) (same); *Edwards v. Burnett*, No. 05-73790, 2007 WL 1768770, at *2 (E.D. Mich. June 15, 2007) (denying the plaintiff's motion for reinstatement of pleading because the defendant was not named in the grievance).

¹⁹⁷ See, e.g., *Calhoun v. Hill*, No. 07-11613, 2008 WL 4277171, at *3 (E.D. Mich. Sept. 17, 2008) (contemplating an exception to MDOC's name requirement where "it is obvious from the facts alleged in the [plaintiff's] grievance" that the unnamed prison official was involved in the grieved incident (citing *Binion v. Glover*, No. 07-13443, 2008 WL 4097407, at *4 (E.D. Mich. Aug. 29, 2008)); *Langton v. Combalecer*, No. 06-11987, 2008 WL 896062, at *3 (E.D. Mich. Mar. 31, 2008) (holding that "sufficient notice" of claims from an Internal Affairs investigation was adequate for exhaustion); *Contor v. Caruso*, No. 1:07-cv-303, 2008 WL 878665, at *3 (W.D. Mich. Mar. 28, 2008) ("Plaintiff had properly exhausted his claim against Defendant Ivens even though he did not specifically name him in the grievance because his grievance sufficiently put prison officials on notice of his claim against a Correctional Medical Services' employee."); *Stevenson v. Mich. Dep't of Corr.*, No. 1:07-CV-213, 2008 WL 623783, at *2 (W.D. Mich. Mar. 4, 2008) (holding that Plaintiff's grievance was exhausted against all medical defendants when it listed several health care staff by name and then included the phrase "all those equally involved" to capture unnamed defendants).

¹⁹⁸ *Vandiver*, 326 F. App'x at 889–90.

¹⁹⁹ See *supra* notes 78–79 and accompanying text (discussing forced prison transfers).

²⁰⁰ See *supra* notes 132–199 and accompanying text (discussing examples of the prison pleading trap in action in Pennsylvania and Arkansas, among other states).

es of the trap also extend far beyond the merits of an individual lawsuit. Incarcerated people are already marginalized by the judicial system and society, such that narrowing the opportunities for judicial redress through heightened pleading standards carries broader ramifications on prison transparency and accountability.²⁰¹

Incarcerated people are almost invariably without political power given the various restrictions (including disenfranchisement) that are imposed on this “social out-group[.]”²⁰² The physical isolation of prisons, as well as the prison’s internal rules restricting access, render incarcerated persons largely inaccessible by either loved ones or the press.²⁰³ Incarcerated people are largely unable to organize without the threat—and infliction—of retaliation.²⁰⁴ And where they are nonetheless able to maintain channels of communication with the public, they often face severe reprimand.²⁰⁵ In other words, prison lawsuits provide a critical lifeline to exposing abuses and holding these institutions of state and federal power accountable. Erecting barriers to prison litigation accordingly restricts the public accountability function of judicial review. As scholars have observed, obstacles to prison litigation will ultimately “grant[] the government near-impunity to violate the rights of prisoners without fear of consequences.”²⁰⁶

²⁰¹ See Spencer, *supra* note 94, at 370 (arguing that civil procedure is prone to defending against “those at the system’s and society’s margins” (quoting Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 345 (1990))).

²⁰² See *id.* at 369–70 (arguing that such “out-groups” are “outside the political . . . mainstream”).

²⁰³ See Bill Keller, Commentary, *Let the Press In: Society Won’t Fix a Prison System It Can’t See*, MARSHALL PROJECT (Oct. 5, 2015), <https://www.themarshallproject.org/2015/10/05/let-the-press-in> [https://perma.cc/UV7K-QPDD] (observing difficulties in press access to prisons).

²⁰⁴ See, e.g., Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, THE GUARDIAN (Aug. 31, 2018), <https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation> [https://perma.cc/JRW2-DLTF] (reporting that organizers of the prison strike “have been subject to solitary confinement, revocation of communication privileges and long-distance transfers, in attempts to weaken the effect of [the strike]”); Tarpley Hitt, *Prisons Are Already Retaliating Against Inmates Protesting ‘Modern Slavery’*, DAILY BEAST, <https://www.thebeast.com/prisons-are-already-retaliating-against-inmates-protesting-modern-slavery> [https://perma.cc/M7KF-XAZG] (Aug. 27, 2018) (reporting that prison officials have responded to the prison strike by putting strike organizers into solitary confinement).

²⁰⁵ See Karina Piser & Marcia Brown, *How Prison Officials Block Access to the Media*, AM. PROSPECT (Aug. 31, 2020), <https://prospect.org/justice/how-prison-officials-block-access-to-the-media/> [https://perma.cc/C5WQ-NERB] (reporting on an incarcerated individual who was facing repercussions from the prison after discussing the Legionnaires’ (a type of pneumonia) outbreak with the press); Alice Speri, *A Prison Strike Organizer Suffers Retaliation for Speaking with Journalists*, THE INTERCEPT (Oct. 6, 2016), <https://theintercept.com/2016/10/06/a-prison-strike-organizer-suffers-retaliation-for-speaking-with-journalists/> [https://perma.cc/WT4R-TH6L] (reporting on an incarcerated individual in Ohio who faced reprimand after engaging in an interview with NPR).

²⁰⁶ Schlanger & Shay, *supra* note 14, at 140.

The dangers of the prison pleading trap are therefore significant. And the purported justifications for heightened pleading standards in other circumstances are absent in the prison grievance context. For example, proponents of *Twiqbal*'s plausibility pleading standard often point to the need to "balance justice more fairly between providing plaintiffs with court access and protecting defendants from undue burdens," including the costs of modern discovery.²⁰⁷ But such concerns are extraneous in the prison grievance process, which is ostensibly intended to *enable* informal investigations (and the resolution of administrative complaints) by the entity in control of the relevant information.²⁰⁸ Indeed, by permitting increasingly byzantine pleading rules to foreclose future litigation defeats, the prison pleading trap risks subverting this very purpose.

Consider the "name all defendants" rule, which again provides a lens for assessing this reality. Such a rule would force incarcerated people to provide lengthy, over-inclusive lists of potential perpetrators to properly exhaust their claims before prison officials are given a chance to investigate: an inefficient and distracting consequence that would confound an expeditious investigation process.²⁰⁹ Moreover, it would transform the grievance process into an anticipatory "summons . . . that initiates adversarial litigation"—a preliminary step in litigation that the Supreme Court expressly repudiated²¹⁰—which would further discourage prison officials from conducting diligent investigations to avoid exposing wrongdoing and increasing the prison's legal liability.²¹¹

The need for reform is further highlighted by the fact that the prison pleading trap is unique to PLRA exhaustion. Comparing prison grievance systems with other administrative exhaustion processes provides helpful context for this analysis. Title VII of the Civil Rights Act, for example, requires exhaustion by filing a charge with the U.S. Equal Employment Opportunity

²⁰⁷ Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lesson and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1148–49 (2010). But see Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 120 (2011) (demonstrating empirically that "pleadings that survive a notice pleading standard but not a heightened pleading standard . . . are just as likely to be successful as those cases that would survive heightened pleading").

²⁰⁸ See *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002) (explaining that this purpose carries the concurrent benefits of permitting "corrective action" prior to litigation, "filter[ing] out" purportedly frivolous claims, and developing an administrative record that could "clarif[y] the controversy's contours" (quoting *Booth v. Churner*, 532 U.S. 731, 737 (2001))).

²⁰⁹ See Shay & Kalb, *supra* note 28, at 319 (arguing that heightened pleading requirements in a prison's grievance system are "less likely to lead to the quick resolution of prisoners' complaints").

²¹⁰ *Jones v. Bock*, 549 U.S. 199, 219 (2007) (quoting *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004)).

²¹¹ Shay & Kalb, *supra* note 28, at 319.

Commission (“EEOC”).²¹² But the EEOC is an investigative agency independent from the subjects of Title VII charges (employers), and it requires a charge—which must be filed within 180 days,²¹³ rather than just a couple of days—to only “describe generally the action or practices complained of.”²¹⁴ Federal courts will then conclude that a claim is exhausted so long as the judicial complaint is “reasonably related” to the EEOC charge.²¹⁵ The EEOC system balances employer notice, agency administration, and fairness to (often pro se) EEOC claimants, and it attempts to avoid erecting “tripwire[s] for hapless plaintiffs.”²¹⁶ If Title VII had the same barriers as the prison pleading trap, it would require administrative charges be filed with the complained-of employer, who is concurrently empowered to control the pleading requirements of the administrative process in their individual workplace. And it would allow a reactionary employer to respond to each litigation defeat by imposing a more onerous pleading standard that narrows the opportunity for judicial redress.

The Federal Tort Claims Act (“FTCA”) provides another comparison. The FTCA requires a litigant to file an administrative claim with the relevant federal agency before filing a tort suit against the federal government.²¹⁷ The administrative claim must provide “a written statement [that] sufficiently describ[es] the injury to enable the agency to begin its own investigation,” and it must include “a sum certain” amount of damages.²¹⁸ The level of specificity required in this administrative claim is one that many federal courts have described as “eminently pragmatic.”²¹⁹ Like prison grievances, an FTCA administrative claim goes not to an independent agency, but to the complained-of

²¹² 42 U.S.C. § 2000e-5(e); see *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1004 (7th Cir. 2019) (“Before bringing a Title VII claim, a plaintiff must first exhaust his administrative remedies by filing charges with the EEOC and receiving a right to sue letter.” (citing *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992))).

²¹³ The 180-day default deadline can be extended to 300 days if the charge is also covered by a state or local anti-discrimination law. 29 U.S.C. § 626(d); 42 U.S.C. § 2000e-5(e)(1).

²¹⁴ 29 C.F.R. § 1601.12(b) (2023).

²¹⁵ See, e.g., *Chaidez*, 937 F.3d at 1004; *Sydnor v. Fairfax County*, 681 F.3d 591, 594 (4th Cir. 2012).

²¹⁶ *Sydnor*, 681 F.3d at 593–94.

²¹⁷ 28 U.S.C. § 2675(a).

²¹⁸ *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005) (quoting *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991)).

²¹⁹ See *id.* at 852–53 (discussing other federal courts with similar outlooks (quoting *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 40 (1st Cir. 2000))). In 2000, the First Circuit, in *Dynamic Image Technologies, Inc. v. United States*, held that “as long as the language of an administrative claim serves due notice that the agency should investigate the possibility of particular (potentially tortious) conduct and includes a specification of the damages sought, it fulfills the notice-of-claim requirement.” 221 F.3d at 40 (citing *Santiago-Ramirez v. Sec’y of the Dep’t of Def.*, 984 F.2d 16, 20 (1st Cir. 1993)).

federal institution.²²⁰ But unlike prison grievances, the federal agencies have no power to define unique pleading rules for the specific claims they will be responsible for investigating, nor will they be able to manipulate pleading rules in response to litigation defeats.²²¹

In addition to these administrative comparisons, it is also worth noting an aspect of federal civil procedure that underlines the unfairness of the prison pleading trap. Where a federal complaint provides insufficient allegations to support a claim, it is initially dismissed without prejudice to provide the litigant an opportunity to remedy the deficiencies.²²² And where further investigation or discovery yields additional information to support a claim (or even to add defendants), Rule 15 of the Federal Rules of Civil Procedure provides a mechanism to seek amendment of the complaint.²²³ But there is no universal right to amend a prison grievance—there is no Rule 15 analogue that applies across grievance systems. It is instead the discretion of each prison system to determine if (and how) amendments are permitted. Grievance pleading rules govern the information that must be included in the *initial* written grievance, and many prison grievance systems do not provide any process for incarcerated people to amend these initial charges.²²⁴ And the failure to include infor-

²²⁰ See 28 U.S.C. § 2675(a) (requiring that an administrative claim first be submitted “to the appropriate Federal agency” that is alleged to have engaged in the tortious conduct).

²²¹ The PLRA’s exhaustion provision is often compared to the law of habeas corpus, which “generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court.” See *Woodford v. Ngo*, 548 U.S. 81, 92–93 (2006) (citing 28 U.S.C. § 2254(b)(1), (c)) (using an analysis of exhaustion under the habeas corpus statute to interpret the PLRA). The Supreme Court’s holding in *Woodford v. Ngo* that PLRA exhaustion requires “proper exhaustion” was influenced by habeas exhaustion, wherein a prisoner is barred from asserting claims in a federal habeas proceeding if he procedurally defaults on those claims when seeking state-court review. *Id.* It is true that in habeas, contrary to the above examples regarding FTCA or EEOC administrative exhaustion, each state system is entitled to devise the procedural rules that will define the state-court remedy. But even so, exhaustion of state court proceedings (where judges are held to constitutional and other procedural standards) provide a much more protected forum than the prison grievance system.

²²² See FED. R. CIV. P. 41 (permitting the court to dismiss a case “without prejudice”).

²²³ See *id.* R. 15(a)–(b) (providing for one amendment “as a matter of course” within a defined time period and, in all other cases, instructing the court to “freely give leave when justice so requires”).

²²⁴ For example (as an illustrative rather than exhaustive list), the grievance policies for Alaska, Arizona, Arkansas, Colorado, Kentucky, Indiana, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Texas, and Wyoming state prisons do not provide a pathway to amending a grievance. Where amendments are permitted, they can be limited in scope. Hawaii state prisons, for example, allow an incarcerated person to resubmit a grievance or appeal within approximately five days if a “correctable” defect were the reason for denying the grievance. HAW. DEP’T OF PUB. SAFETY, POL’Y NO. COR.12.02, INMATE GRIEVANCE PROGRAM 7 (2015), <https://dps.hawaii.gov/wp-content/uploads/2015/07/COR-12-03-INMATE-GRIEVANCE-PROGRAM-EFF-7-1-15.pdf> [<https://perma.cc/DCZ6-GKVR>]. But examples of “correctable” defects include nominal mistakes of form, such as failing to sign the submission or failing to enclose the required copies of lower-level submissions. *Id.* Notably,

mation in the grievance often cannot be remedied by including new information in a subsequent step of the grievance process, i.e., appealing the prison's decision to deny the initial grievance.²²⁵

These comparisons reveal the unique inequities of the prison pleading trap and emphasize the need for reform.

D. A Brief Meditation on Racial Subordination

Before assessing possible solutions, it is important to interrogate who is most impacted by the prison pleading trap. The straightforward answer is, of course, "incarcerated people" as a general population. But I wonder if this universal response offers the most precise reply.

In considering the history of the PLRA more broadly, legal scholars have argued that this reform was animated by "something that could fairly be described as animus"²²⁶ Scholars have theorized that the identity of those impacted by the PLRA—in particular, the stigma and marginalization of incarcerated people as a disfavored group—played an important role in the Act's creation.²²⁷ But it is possible to dive deeper and measure who, beyond the

this amendment process would not provide a meaningful opportunity for those seeking an amendment to provide the required level of factual specificity.

²²⁵ See, e.g., ALASKA DEP'T OF CORR., PRISONER GRIEVANCES 5 (2006), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Alaska%20-%2020808.03.pdf> [<https://perma.cc/AQ99-LFVC>] ("This statement must only address the subject and relief sought in the initial grievance. No additional information may be submitted."); Tate v. Kelley, No. 2:17-CV-95, 2017 U.S. Dist. LEXIS 199687, at *4–7 (E.D. Ark. Nov. 1, 2017) (finding a failure to exhaust because the Arkansas Department of Corrections grievance policy expressly prohibits the addition of new issues, requests, or names when appealing the denial of a written grievance); COLO. DEP'T OF CORR., REGUL. NO. 850-04, GRIEVANCE PROCEDURE 5 (2014), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Colorado%20-%20Grievance%20Reg%20850-04.pdf> [<https://perma.cc/YHC7-VVPA>] ("A substantive issue or remedy may not be added at a later step if it has not been contained in each previous step of that particular grievance.").

²²⁶ Herman, *supra* note 17, at 1231. Not all commentators agree. One commentator cautioned that if the PLRA was intended "simply to make things harder for inmates, irrespective of the merits of their claims, [then] that intent was well hidden." Roosevelt, *supra* note 28, at 1813–14. It is true that legislators advocating for the passage of the PLRA explicitly noted they "do not want to prevent [incarcerated people] from raising legitimate claims," and that the PLRA "will not prevent those claims from being raised." 141 CONG. REC. S27042 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch). Based on such statements, the Supreme Court has even remarked that a "competing value[]" of the PLRA was "*preserving* prisoners' capacity to file meritorious claims." *Ngo*, 548 U.S. at 117 (Stevens, J., dissenting) (emphasis added).

²²⁷ Susan Herman theorizes that identity played an important role in erecting these barriers in the first instance—that incarcerated people were precluded as a population "because of who they are," because they were people deemed "[un]worthy of [the courts'] attention." Herman, *supra* note 17, at 1231. John Boston asserts that the PLRA was "explicitly dedicated to creating unequal justice under law . . . by establishing a code of special restrictive rules for one unpopular group of litigants." Boston, *supra* note 28, at 429. And David Fathi states that with the passage of the PLRA, "the United States became the only country in the world in which national legislation singles out prisoners for a

monolith of incarcerated people, is most impacted by the prison pleading trap. I want to pause briefly on this question and offer a consideration. It is possible that this pleading trap implicates more than “anti-inmate” consequences.²²⁸ Since the PLRA’s enactment, the prison population has continued to grow.²²⁹ And with this growth, racial disparities persist throughout the criminal punishment system in incarceration rates²³⁰ and the length of sentences²³¹ for both adults and children,²³² including post-incarceration surveillance and arrest.²³³

That observation is certainly not novel. But it is also critical to consider that these racial disparities are not limited to the possible means of *entry* into a prison—disparities also exist in the rate and risk of prison abuses experienced while incarcerated. For example, studies show that Black people receive a dis-

unique set of barriers to vindicating their legal rights in court.” David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454–55 (2010) (citing HUM. RTS. WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 1–2 (2009)).

²²⁸ See Schlanger, *Inmate Litigation*, *supra* note 22, at 1694 (emphasis added) (arguing that Congress’ focus was on “anti-inmate symbolic politics”).

²²⁹ See E. ANN CARSON & RICH KLUCKOW, U.S. DEP’T OF JUST., NO. NCJ 305542, CORRECTIONAL POPULATION IN THE UNITED STATES, 2021—STATISTICAL TABLES, at tbl.1 (2023) (reporting that 1,775,300 persons were incarcerated in 2021); CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP’T OF JUST., NO. NCJ 164619, PRISONERS IN 1996 tbl.1 (1997) (reporting that 1,585,589 persons were incarcerated in 1995).

²³⁰ ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/TNV3-43U7>] (explaining that Black people are imprisoned at a rate that is roughly five times higher than the rate of white Americans and that in seven states, the Black/white disparity is larger than nine-to-one). This is not to suggest that Black people are the only racial minority population that is disproportionately incarcerated. See, e.g., Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL’Y INITIATIVE (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/> [<https://perma.cc/H73L-B4BJ>] (reporting on the disproportionate rates of incarceration in indigenous communities).

²³¹ U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [<https://perma.cc/8XTK-47R8>] (“Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders . . .”).

²³² THE SENT’G PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/Black-Disparities-in-Youth-Incarceration.pdf> [<https://perma.cc/5WMH-ASD2>] (“Black youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers . . .”).

²³³ KENDRA BRADNER & VINCENT SCHIRALDI, COLUM. UNIV. JUST. LAB, RACIAL INEQUITIES IN NEW YORK PAROLE SUPERVISION 1 (2020), <https://justicelab.columbia.edu/sites/default/files/content/NY%20Parole%20Racial%20Inequities.pdf> [<https://perma.cc/7XUJ-KPBZ>] (“Black and Latinx people are significantly more likely than white people to be under [parole] supervision, to be jailed pending a [parole] violation hearing, and to be incarcerated in New York State prisons for a parole violation.”).

proportionate share of disciplinary write-ups in prison,²³⁴ are twice as likely than white people to suffer excessive force and solitary confinement in prison,²³⁵ and are three times more likely to die by homicide, suicide, or drug overdose while in prison.²³⁶

In other words, mass criminalization and incarceration systems disproportionately place people of color into confinement, where the prison pleading trap may increasingly restrict the ability of incarcerated people to challenge the inhumane housing conditions, medical indifference, and exploitative working conditions that often define life in prison. And critically, while held captive in prison, it is again people of color—who will suffer disproportionate rates of misconduct, and will therefore be more likely to rely more on grievances and litigation alike to seek protections against prison abuses—that will be the most affected by the increasingly onerous standards that percolate from this procedural trap.

This disparate impact presents an important examination, one that has largely been overlooked in literature regarding prison grievances. As one scholar explains, a greater understanding of how facially unbiased rules are deployed to “reinforce existing hierarchies” is essential to prevent procedural doctrines “from reinforcing, or continuing to reinforce, racial subjugation”²³⁷ And it is important to note that this same critical lens can (and should) be applied to other disparities that unfortunately persist throughout our carceral institutions.²³⁸

²³⁴ See Katie Michaela Becker, *Race and Prison Discipline: A Study of North Carolina State Prisons*, 43 N.C. CENT. L. REV. 175, 176 (2021) (analyzing more than 82,000 disciplinary write-ups made to nearly 23,000 incarcerated people in the North Carolina state prison system in 2020 and determining that both Black and Indigenous people received a disproportionate share of disciplinary write-ups in prison).

²³⁵ Nicola Slawson, *Black and Muslim Prisoners Suffer Worse Treatment, Study Finds*, THE GUARDIAN (Oct. 18, 2017), <https://www.theguardian.com/society/2017/oct/19/black-and-muslim-prisoners-suffer-worse-treatment-study-finds> [<https://perma.cc/K2RP-VZL8>].

²³⁶ HANNAH KRAWCZYK WITH CARLA CROWDER & DANA SWEENEY, ALA. APPLESEED CTR. FOR L. & JUST., DEATH TRAPS: AN EXAMINATION OF THE ROUTINE, VIOLENT DEATHS OF PEOPLE IN THE CUSTODY OF THE STATE OF ALABAMA; 2014–2020, at 1 (2020), <https://www.alabamaappleseed.org/wp-content/uploads/2020/11/Death-Traps-Report-2020-FINAL.pdf> [<https://perma.cc/P379-E93L>].

²³⁷ Portia Pedro, Essay, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 154 (2021), <https://virginialawreview.org/articles/a-prelude-to-a-critical-race-theoretical-account-of-civil-procedure/> [<https://perma.cc/Z8EV-3DCJ>].

²³⁸ The focus of this section, which highlights racial disparities in prison abuses, is not intended to exclude other marginalized communities that also suffer disproportionate rates of abuse while incarcerated. For example, it is important to recognize that LGBTQ and HIV-positive people experience severe mistreatment in prisons. See, e.g., LAMBDA LEGAL, PROTECTED AND SERVED? 7 (2015), https://legacy.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf [<https://perma.cc/MNK3-ELJM>] (observing that of the survey respondents who had been incarcerated in the last five years, 57% reported verbal assault or harassment from prison officials, 27% reported sexual harassment from prison officials, and 12% reported physical assault from prison officials). Many who identify as transgender or gender non-conforming are placed in single-sex prisons that do not match their gender identity. *Id.*; Jaclyn Diaz, *Minnesota Recognizes She’s a Woman. She’s Locked in a Men’s Prison Anyway*, NPR, <https://www.npr.org/2022/10/04/1126801351/trans-rights-transgender->

These considerations demonstrate that addressing the prison pleading trap, a facially neutral operation, will nonetheless concern significant inequities. And it adds another layer of interest in examining and addressing prison officials' power to define the pleading boundaries of prison grievance exhaustion.

III. REFORMING (OR RE-FORMING) THE TRAP

The above examinations of the prison pleading trap form a foundation for considering three categories of potential solutions. Section A of this Part discusses specific reforms—legal theories to mitigate the worst case scenarios that are situated within existing frameworks.²³⁹ Section B considers intermediate reforms—two approaches to amending the exhaustion provision and articulating a notice-pleading standard.²⁴⁰ Finally, Section C provides an expansive proposal: a repeal of the PLRA's exhaustion mandate.²⁴¹ Throughout these sections is a discussion on the balance of each solution, including the probability of achieving the reform as well as the potential costs of doing so.

In discussing the proposal to repeal the PLRA's exhaustion requirement, I observe that a diverse coalition of incarcerated organizers, legislators, practitioners, and legal scholars have recommended this solution in other analogous contexts. But these efforts have been stymied by the belief that PLRA exhaustion is a necessary measure to counteract the "flood of frivolous lawsuits" that characterizes prison litigation. Finally, I explain why this defense tells an incomplete story. The growth of prison litigation is a symptom of this nation's commitment to mass incarceration, and maintaining the PLRA's exhaustion regime punishes incarcerated people with judicial exile while carceral systems continue to grow. If courts and legislators are serious about reducing the quantity of prison litigation without infringing on incarcerated people's constitutional right to seek judicial redress, then it would be sensible to attack the problem at its root. This examination reveals a fourth proposal, discussed in Section D, that should accompany any discrete procedural reform: decarceration.²⁴²

inmates [https://perma.cc/HH77-BG89] (Oct. 13, 2022). And prisons often refuse gender-affirming care to transgender people in their custody. *See, e.g.,* Jaclyn Diaz, *Trans Inmates Need Access to Gender-Affirming Care. Often They Have to Sue to Get It*, NPR (Oct. 25, 2022), <https://www.npr.org/2022/10/25/1130146647/transgender-inmates-gender-affirming-health-care-lawsuits-prison> [https://perma.cc/UU96-BVFZ]. Of course, these disparities can exist across multiple axes and can be intersectional. A "shocking 47% of Black transgender people" are incarcerated at least once in their life. Chinyere Ezie & Richard Saenz, *Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer's Perspective*, LAMBDA LEGAL (Nov. 25, 2020), https://legacy.lambdalegal.org/blog/20201125_transgender-people-prisons-jails [https://perma.cc/WV7Y-Q67G].

²³⁹ See *infra* notes 243–258 and accompanying text.

²⁴⁰ See *infra* notes 259–283 and accompanying text.

²⁴¹ See *infra* notes 284–314 and accompanying text.

²⁴² See *infra* notes 315–328 and accompanying text.

A. Existing Frameworks: Available Remedies and Critical Rules

There are two possible theories grounded in existing legal frameworks that could help disarm the prison pleading trap. The first would more formally recognize the “unavailability” exception articulated in the statute. As the U.S. Supreme Court recognized in *Ross v. Blake*, the PLRA contains a single “textual exception to mandatory exhaustion”: an incarcerated person “must exhaust available remedies, but need not exhaust unavailable ones.”²⁴³ In other words, a failure to exhaust does not result in dismissal if the court determines that the grievance procedure at issue is not actually available to the plaintiff or capable of offering redress.²⁴⁴

As some federal courts have implicitly recognized, a pleading requirement that demands factual assertions unavailable to the incarcerated person arguably renders the grievance process itself unavailable.²⁴⁵ Many courts have adopted this explanation through the lens of “sufficient notice”: recognizing that incarcerated plaintiffs should not be held to a pleading standard that demands more than they can give, courts refuse to apply an onerous standard where the grievance allegations otherwise satisfy the minimum requirement of notice-pleading.²⁴⁶ But this approach risks conflicting with an inflexible reading of *Jones v. Bock*, which demands that the text of the prison grievance policy—not the PLRA, and not the federal courts—dictates the boundaries of proper exhaustion.²⁴⁷ If incarcerated plaintiffs, litigators, and courts instead recrafted this explanation through the formal “unavailability” framework, it would conceivably comply with the holdings of both *Jones* and *Ross*.

²⁴³ *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016).

²⁴⁴ *Id.* (stating that the procedure must be “‘capable of use’ to obtain ‘some relief for the action complained of’” (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001))).

²⁴⁵ See, e.g., *Cook v. Moore*, No. 5:14-cv-00402, 2015 WL 5179412, at *3 (E.D. Ark. Aug. 19, 2015) (finding that the “Plaintiff has raised a plausible question as to whether procedurally compliant administrative remedies were available to him” where it was unclear how the plaintiff “could have ascertained the names of the relevant staff” to comply with the “name all defendants” pleading rule (citing 42 U.S.C. § 1997e(a))); *Hall v. Raja*, No. 09-10933, 2009 WL 6315346, at *5 (E.D. Mich. Aug. 28, 2009) (reasoning that strict application of the “name all defendants” rule would be untenable where medical staff do not wear name badges, hide them under their clothing, and refuse to provide their names); *Jackson v. Catanzariti*, No. CV 612-113, 2017 WL 2786476, at *4–5 (S.D. Ga. June 27, 2017) (refusing to strictly apply the “name all defendants” rule where it would be “very difficult for an aggressively beaten inmate” to be aware of the name of every officer involved in the alleged beatings). This argument has unfortunately had limited traction, however.

²⁴⁶ See *supra* note 197 and accompanying text (providing examples of cases where the court did not strictly apply the “name all defendants” rule where the defendant was otherwise sufficiently on notice).

²⁴⁷ *Jones v. Bock*, 549 U.S. 199, 218 (2007).

Ross identified three specific circumstances where an administrative remedy, “although officially on the books,” is nonetheless unavailable.²⁴⁸ An administrative procedure is unavailable where (a) “it operates as a simple dead end” with administrators “unable or consistently unwilling to provide any relief”; (b) it is “so opaque that it becomes, practically speaking, incapable of use”; and (c) where “prison administrators thwart” incarcerated people from accessing the grievance process “through machination, misrepresentation, or intimidation.”²⁴⁹ Although many courts consider this list illustrative,²⁵⁰ courts are often unwilling to opine on other circumstances that would render the remedy unavailable.²⁵¹ It may be possible to argue that the remedy operates “as a simple dead end” where the pleading rule requires information that an incarcerated person simply does not, or likely cannot, have. Or prison staff who affirmatively withhold information that the incarcerated person would need to satisfy the pleading standard (like their names) could be seen as “thwart[ing]” access to the grievance process through machination. But it is important to consider that federal courts have interpreted these circumstances narrowly, and it may be difficult to fold an onerous—but technically possible to overcome—pleading standard within these articulated categories.²⁵²

²⁴⁸ *Ross*, 136 S. Ct. at 1859.

²⁴⁹ *Id.* at 1859–60 (first citing *Booth*, 532 U.S. at 736; and then citing *Woodford v. Ngo*, 548 U.S. 81, 102 (2006)).

²⁵⁰ *See, e.g.*, *West v. Emig*, 787 F. App’x 812, 815 (3d Cir. 2019) (“[N]either the Supreme Court nor this Circuit has held that those three circumstances [listed in *Ross*] are comprehensive, as opposed to exemplary.” (citing *Rinaldi v. United States*, 904 F.3d 257, 267 n.9 (3d Cir. 2018))); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) (describing the three circumstances as a “non-exhaustive list”); *Williams v. Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016) (noting that “the three circumstances discussed in *Ross* do not appear to be exhaustive”); *Muhammad v. Mayfield*, 933 F.3d 993, 1000 (8th Cir. 2019) (identifying the examples in *Ross* as “at least three” of the circumstances where the administrative process may be “unavailable” (emphasis added)).

²⁵¹ One commentator observed that to her knowledge as of 2017, no federal court has expanded the number of possible categories beyond the three articulated by the Supreme Court in *Ross*. *See, e.g.*, Nicola A. Cohen, Note, *Why Ross v. Blake Opens a Door to Federal Courts for Incarcerated Adolescents*, 51 COLUM. J.L. & SOC. PROBS. 177, 201 n.121 (2017). But there have been a few developments of note toward expansion. One exception is the Second Circuit, which has established another circumstance in which grievance procedures are unavailable: when an incarcerated person’s failure to timely submit a grievance results from her medical condition (such as an injury or significant medical treatment) and the grievance system “does not accommodate the condition by allowing a reasonable opportunity to file for administrative relief.” *Rucker v. Giffen*, 997 F.3d 88, 93–94 (2d Cir. 2021) (adopting a pre-*Ross* standard from the Fifth Circuit). *But see Geter v. Baldwin State Prison*, 974 F.3d 1348, 1355–56 (11th Cir. 2020) (declining to “address whether the list in *Ross* is exhaustive”); *Valentine v. Collier*, 956 F.3d 797, 804–05 (5th Cir. 2020) (per curiam) (rejecting the district court’s reasoning that an administrative process without any process for expediently reviewing medically emergent grievances during the outbreak of the COVID-19 pandemic was incapable of use).

²⁵² Incarcerated people’s attempts to seek judicial review of prison conditions claims during the COVID-19 pandemic provides one illustrative example. In a statement regarding the Supreme Court’s denial of an application to vacate the stay of a district court injunction requiring a state geriatric prison

The second proposal stems from language of the Supreme Court's decision in *Woodford v. Ngo*.²⁵³ One possibility is to look to the Court's instruction that "[p]roper exhaustion demands compliance with an agency's deadlines and other *critical* procedural rules"²⁵⁴ By interpreting the word "critical" as substantive rather than merely descriptive, it could be possible to argue that courts should discard onerous pleading standards (like the "name all defendants" rules or the "identify the legal remedy" rule) that go beyond the purpose of PLRA exhaustion, which the Supreme Court has established is to only "alert prison officials to a problem"²⁵⁵ Arguably, those standards that are essential to satisfying the notice-pleading purpose of exhaustion are "critical," whereas those standards that go far beyond this baseline and are superfluous to notice-pleading compliance could be understood as "non-critical" to the project of PLRA exhaustion. In other words, this approach would entrust federal courts to evaluate the line between "critical" pleading standards and "non-critical" ones.

This approach suffers from a different disadvantage than the first: it does not reflect a legal theory that has been established by the Supreme Court or has been formally adopted by a broad consensus of federal courts. Though there has been limited success with this argument,²⁵⁶ it is unlikely that the Court's use of the adjective "critical" in only two places in *Ngo*'s majority opinion will reliably constrain the behemoth of PLRA exhaustion. And the Court's opinions following

to follow protocols to prevent the spread of the pandemic, Justice Sotomayor noted the textual exception to PLRA exhaustion. *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (Sotomayor, J., respecting the denial of application to vacate stay). She explained that "if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid-19, the procedures may be 'unavailable' to meet the plaintiff's purposes" *Id.* at 1600–01 (citing *Ross*, 136 S. Ct. at 1859). And she cautioned that "in these unprecedented circumstances . . . the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed." *Id.* at 1601. The lower courts largely did not take up this invitation. Even where the prison's grievance process was "lengthy and unlikely to provide necessary COVID-19 relief," federal courts nevertheless determined that the processes were technically "available" and denied federal claims for relief where the incarcerated plaintiff failed to avail themselves of the entire process before turning to the courts. *See Valentine v. Collier*, 978 F.3d 154, 161–62 (5th Cir.) (reasoning that "inadequate is not a synonym for unavailable"), *denying app. to vacate stay*, 140 S. Ct. 1598 (2020) (mem.).

²⁵³ *Ngo*, 548 U.S. at 90.

²⁵⁴ *Id.* (emphasis added). The Court also explained that a prison grievance system will not have the opportunity to consider a grievance "unless the grievant complies with the system's critical procedural rules." *Id.* at 95.

²⁵⁵ *See Jones v. Bock*, 549 U.S. 199, 219 (2007) (quoting *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004)).

²⁵⁶ *See, e.g., Burton v. Kakani*, No. 09-10893, 2009 WL 3101046, at *3 (E.D. Mich. Sept. 23, 2009) (declining to require strict compliance with the "name all defendants" rule because it was deemed "not 'critical'" (quoting *Ngo*, 548 U.S. at 90)).

Ngo have not included similar references to “critical” procedural rules, suggesting that the Court did not consider this adjective to have substantive value.²⁵⁷

But there are additional drawbacks to both of these approaches. First, these approaches would not promise any uniformity in application. Indeed, this proposal would not solve the dangers of a roulette-style approach to federal court intervention that relies on the discretion of each judge.²⁵⁸ The protections afforded by some individual federal judges should be afforded to all incarcerated litigants forced to navigate these processes. Second, and more importantly, these proposed solutions are also inherently limited as back-end constraints. They do not address the creation or persistence of the prison pleading trap itself, which would remain unencumbered in existence. Prison officials would remain empowered to respond to litigation defeats by imposing more onerous pleading standards, and each case would then go to the roulette of federal courts to determine which rules are enforced or suppressed. These concerns suggest that a front-end solution may ultimately be more effective. If there were a way to restrict prison officials from engaging in the trap in the first instance—a way to disincentivize prison officials from reactively amending prison grievance policies to immunize themselves from liability—then the trap’s very structure may well collapse.

B. Notice Pleading Through Amendment

One front-end solution could take the form of a statutory amendment. If the Supreme Court and federal courts agree that notice-pleading is all that is required to achieve the purposes of prison exhaustion,²⁵⁹ and if the goal is to limit prison officials’ incentives to elevate pleading standards beyond this baseline,²⁶⁰ then one way to encourage this restraint might be to impose a notice-pleading standard into the text of the statute itself. Imposing such statutory constraints to the PLRA has precedent: the Prison Rape Elimination Act pro-

²⁵⁷ See *Jones*, 549 U.S. at 217–19 (discussing and applying *Ngo* without mentioning the Court’s use of the word “critical” in *Ngo*); *Ross*, 136 S. Ct. at 1850 (same).

²⁵⁸ See *supra* notes 132–199 and accompanying text (discussing the varying approaches of different federal courts).

²⁵⁹ See *Strong v. David*, 297 F.3d 656, 650 (7th Cir. 2002) (subjecting a grievance to a notice-pleading standard when the prison system’s policies do not specify the required contents of a grievance); see also *Jones*, 549 U.S. at 219 (identifying “allowing a prison to address complaints” as a benefit of the exhaustion requirement (first citing *Ngo*, 548 U.S. at 88–91; and then citing *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002))); *Ngo*, 548 U.S. at 95 (explaining that “[t]he benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance”).

²⁶⁰ See *supra* notes 120–127 and accompany text (discussing the problems with having the prison system be both rule-maker and rule-beneficiary).

hibits carceral institutions from enforcing the prison's articulated filing-deadline limits to grievances that concern complaints of sexual abuse.²⁶¹

This approach has the benefit of uniformity. When assessing exhaustion, federal courts would look to a new, less onerous standard (rather than turning to the text of each prison's individual policies) to determine whether the prison grievance's factual assertions provided sufficient notice to the prison to constitute adequate exhaustion. And this new standard would satisfy the purported purpose of administrative exhaustion while also recognizing the limitations faced by pro se incarcerated people seeking redress from an internal grievance system. This process would strengthen the federal courts' role "as guardians of the people's federal rights"²⁶² and the judiciary would be empowered to rebuff prison pleading standards that deviate from a notice-pleading baseline.

When viewed through the narrow lens of the prison pleading trap, this proposal offers an attractive solution. It leaves in place the PLRA's exhaustion provision and creates a new prison pleading regime that acknowledges both the front-end and the back-end of the trap. A uniform notice-pleading standard would govern the back-end, which would effectively constrain the practical impacts of the trap regarding access to judicial relief. And this, in turn, would indirectly address the front-end by reducing the prison's incentives to create increasingly more onerous pleading standards in response to litigation defeats.

This proposed solution advances an incremental approach that leaves the PLRA intact and takes only minimal steps to disturb the status quo. Such incrementalism is often perceived to be a pragmatic choice. But there are also shortcomings to consider. This approach will not ultimately alter the prison's power to control its own prison grievance process, including the ability to impose other procedural hurdles beyond the requisite degree of factual specificity. Prison officials would remain empowered to impose byzantine rules regarding deadlines, other restrictions regarding form, and ever-increasing levels of internal review that other legal scholars have identified as severe limitations on an incarcerated person's access to judicial redress.²⁶³ And it would burden incarcerated people with navigating two independent standards when drafting an initial prison grievance: complying first with prison grievance procedures to ensure the prison will hear their grievances in the first instance, while staying

²⁶¹ 28 C.F.R. § 115.52(b)(1) (2023). But plaintiffs must still comply with the relevant statute of limitations that governs their claims. *See id.* § 115.52(b)(4).

²⁶² *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

²⁶³ *See supra* notes 28–34 and accompanying text (discussing short deadlines, multi-layered processes, and other arbitrary procedural rules that can characterize the prison grievance system).

mindful of the federal standard to ensure they will preserve their remedy in federal court down the line.²⁶⁴

A different front-end solution that addresses these concerns may be to amend the exhaustion provision so that only those prison systems with “fair” grievance processes can benefit from PLRA exhaustion. This would entail returning to the exhaustion system that existed before the PLRA’s enactment. Under the Civil Rights of Institutionalized Persons Act of 1980 (“CRIPA”), incarcerated adult state prisoners were required to exhaust administrative remedies before filing a § 1983 claim.²⁶⁵ But this obligation was limited. To trigger the exhaustion requirement, the state needed a prison grievance system that was “plain, speedy, and effective,” and the statute enumerated a handful of “minimum standards” to measure whether a grievance process satisfied this threshold requirement.²⁶⁶ Those standards included: an advisory role for incarcerated people and prison staff in designing and implementing the grievance system;²⁶⁷ time limits for the return of written decisions articulating reasons for granting or denying each grievance; the expedited processing of emergency grievances; safeguards to prevent retaliation for participating in the grievance process; and the independent review of grievances by those outside the prison.²⁶⁸ To benefit from the exhaustion requirement, the state was required to file for—and receive—certification by the Attorney General or determination by a court that the grievance system “substantial[ly] compli[ed]” with these promulgated standards.²⁶⁹

²⁶⁴ See *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004) (cautioning that creating federal common law to govern compliance with the exhaustion requirement would not be fair to incarcerated persons because it would be asking them to “comply with prison grievance procedures . . . while keeping an eye on a separate set of federal requirements”).

²⁶⁵ Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. § 1997). CRIPA applied only to adults who, convicted of an offense and confined to a state prison, sought to vindicate their federal civil rights under 42 U.S.C. § 1983. See 42 U.S.C. § 1997e (1982); *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992) (explaining that CRIPA “impose[d] a limited exhaustion requirement for a claim brought by a state prisoner” pursuant to § 1983). It therefore excluded juveniles, federal prisoners, pretrial detainees, and anyone seeking relief outside of § 1983. § 1997e (1982).

²⁶⁶ § 1997e (1982).

²⁶⁷ The Attorney General’s regulations for certifying a prison’s grievance system appear to have gone slightly beyond this statutory language. These regulations provided that “[a]t a minimum, some employees and inmates shall be permitted to participate in an advisory capacity in the disposition of grievances challenging general policy and practices and to review the effectiveness and credibility of the grievance procedure.” See FED. CTS. STUDY COMM., DEP’T OF JUST., REPORT OF THE SUBCOMMITTEE ON THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, PART III, at 390–91 (1990) (quoting 28 C.F.R. § 40.7(b) (1990)). And “[i]n any instance in which inmates and employees are afforded an advisory role in the disposition of an individual grievance, the opportunity for such participation shall occur before the initial adjudication of the grievance.” *Id.* (quoting § 40.7(b)).

²⁶⁸ 42 U.S.C. § 1997e (1982).

²⁶⁹ *Id.* § 1997e(a)(2) (1982).

CRIPA included two additional safeguards. First, even where a grievance process was properly certified, the invocation of § 1997e's exhaustion requirement remained "in large part discretionary."²⁷⁰ The court could choose to apply the provision only if its enforcement was deemed "appropriate and in the interests of justice" in each particular case.²⁷¹ Second, even where the a court applied the exhaustion requirement, an incarcerated plaintiff's failure to exhaust resulted only in a ninety-day stay²⁷² (rather than a dismissal)²⁷³ to permit the incarcerated person to exhaust any available administrative remedy. If the grievance system produced "an unfair result" or was nothing more than "a sham proceeding," the incarcerated plaintiff could still proceed to vindicate their civil rights in federal court.²⁷⁴

To address the prison pleading trap, one additional minimum standard could be the imposition of a notice-pleading standard for factual and legal specificity. This amendment would incentivize state prison systems to comply with minimum standards even at the administrative level. And this approach appears practical given that the "minimum standards" regime defined prison litigation exhaustion for more than a decade before the PLRA's enactment.

But the history of CRIPA recommends caution. Congress certainly intended for the certification requirement to motivate states to develop "plain, speedy, and effective" prison grievance systems, but state prison systems often resisted.²⁷⁵ Some states viewed CRIPA's exhaustion requirement as yet another attack on federalism²⁷⁶ and thus the certification process was seldom used.²⁷⁷ Five years after CRIPA's enactment, only three states and one county had certified grievance procedures.²⁷⁸ After an additional five years had passed, only a total of seven states and a few counties had received certification.²⁷⁹

²⁷⁰ See *Porter v. Nussle*, 534 U.S. 516, 523 (2002) (citing § 1997e(a)–(b) (1994)).

²⁷¹ *Id.* (quoting § 1997e(a) (1994)).

²⁷² § 1997e(a)(1) (1982). In 1994, Congress amended CRIPA's exhaustion requirement and doubled the maximum period of time that a case could be stayed pending exhaustion to 180 days. 42 U.S.C. § 1997e(a)(1) (1994). The 1994 amendments also permitted the Attorney General to certify a grievance process where it was "fair and effective," even if it did not meet the five minimum standards articulated in the statute. *Id.* § 1997e(c)(1) (1994). But there is some support that federal courts could nonetheless dismiss a case if a plaintiff willfully neglected to exhaust administrative remedies. See *Roosevelt*, *supra* note 28, at 1803–04 (pointing to *Rocky v. Vittorie*, 813 F.2d 734, 736 (5th Cir. 1987) and *Marsh v. Jones*, 53 F.3d 707, 710 (5th Cir. 1995)).

²⁷³ § 1997e(a) (1982).

²⁷⁴ Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 948 (1986).

²⁷⁵ See *id.* at 938, 941–42 (listing the few state prison systems that had applied for and/or had been certified by the Attorney General as of year-end 1985).

²⁷⁶ *Id.* at 942.

²⁷⁷ Schlanger, *Inmate Litigation*, *supra* note 22, at 1627–28.

²⁷⁸ Lay, *supra* note 274, at 941–42. The state grievance procedures of Iowa, Virginia, and Wyoming, as well as the local procedures in Portsmouth, Virginia were certified. *Id.* By the end of 1985,

One popular narrative about CRIPA, shared by legal scholars and judges alike, is that its exhaustion requirement was ineffective because its scope for establishing a certifiable grievance system was “too narrow,”²⁸⁰ its minimum standards were too limiting,²⁸¹ and its enforcement provisions were too “weak.”²⁸² But given state intransigence against adopting the minimal standards required for certification, CRIPA’s history suggests that what befell CRIPA was the states’ unwillingness to take even the most nominal steps toward holding their prison systems accountable. States’ and prisons’ resistance to complying with these basic standards should have raised concerns about their commitment to internal accountability. Instead, their resistance paved the way for the PLRA, a piece of legislative reform that ensured prison officials would maintain nearly wholesale control over prison grievance processes.

This analysis suggests that the PLRA’s prison pleading regime is operating precisely as intended. It offers the illusion of possible redress that allows us to ignore incarcerated people’s underlying powerlessness and lack of recourse. And it suggests that the incremental benefits of these approaches may be outweighed by the cost of maintaining PLRA exhaustion. Indeed, “legitimation costs” emerge when a legal innovation indirectly solidifies underlying “structural injustice,” thus preventing the deeper change necessary to address the root problem.²⁸³ There is a “legitimation cost” of the proposed solutions above: they will further maintain and legitimize the PLRA’s exhaustion provision,

“[t]he Attorney General ha[d] denied certification for three states (Colorado, Nebraska, and New Mexico), two counties (Washington County, Oregon and Roanoke County, Virginia), and one city (Las Vegas, Nevada)” for non-compliance with the minimum standards. *Id.* Further, “[a]pplications from Arizona, California, Florida, Kansas, New York, Ohio, Washington, and Wisconsin were also pending” as of the end of 1985. *Id.* at 942.

²⁷⁹ FED. CTS. STUDY COMM., *supra* note 267, at 391–92 (explaining that nearly ten years after Congress passed CRIPA, the Attorney General had certified the grievance procedures developed by Iowa, Missouri, Nebraska, Ohio, Tennessee, Virginia, Wyoming, and a number of local jails in Virginia and Maryland).

²⁸⁰ Schlanger, *Inmate Litigation*, *supra* note 22, at 1696.

²⁸¹ See *McCarthy v. Madigan*, 503 U.S. 140, 151 n.4 (1992) (concluding that where a requested relief, such as monetary damages, is unavailable through the prison grievance system, exhaustion was inapplicable to state prisoner suits under CRIPA).

²⁸² See *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (describing CRIPA’s exhaustion requirement as “weak”).

²⁸³ See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1406 (2009) [hereinafter West, *From Choice to Reproductive Justice*] (cautioning that “apparent gains in justice wrought through legal change are sometimes offset by what might be called the ‘legitimation costs’ of the same legal breakthrough”); Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1480 (2006) (defining a legitimation cost as “the patina of justice a successful reform paints over the deeper structural injustice, for which piecemeal reform efforts are ill-equipped to address”). West argues that such reforms will “legitimate a deeper or broader injustice,” which “further insulate[s] the underlying . . . legal institution from critique.” West, *From Choice to Reproductive Justice*, *supra*, at 1406.

which incentivizes prisons to manipulate procedural rules to immunize themselves from liability. Advancing reforms with this legitimization cost is perhaps analogous to the types of changes that superficially make prison systems more palatable (like euphemistically renaming prisons as “correctional centers”) without addressing the abuses or misconduct at the root of those systems. These concerns suggest that a more expansive solution may be needed.

C. Repealing the PLRA’s Exhaustion Requirement

Given the devastating impact of the PLRA’s exhaustion provision, a diverse chorus of people—including incarcerated people,²⁸⁴ legislators,²⁸⁵ practitioners,²⁸⁶ and legal scholars²⁸⁷—have recommended the repeal of this provision. Even scholars who initially expressed a belief that the PLRA’s exhaustion provision should be amended are now calling for its elimination.²⁸⁸ These demands offer a more expansive proposal to addressing the prison pleading trap. By eliminating the exhaustion provision entirely, prisons would be unable to defeat incarcerated people’s legal claims through Kafkaesque procedural requirements (including pleading standards). Such a proposal would be effective in its exhaustive elimination of the prison’s incentives regarding the grievance system as a whole, and may even encourage prisons to take their grievance processes more seriously. Without an exhaustion provision, the internal resolution of complaints on their merits, rather than the denial of grievances for non-compliance with technical procedural rules, would become one of the most effective ways to reduce subsequent litigation. And the repeal of an exhaustion

²⁸⁴ See *supra* notes 1–5 and accompanying text (discussing Jailhouse Lawyers Speak’s prison strike and demand for repealing the PLRA).

²⁸⁵ Congresswoman Ayana Pressley introduced a resolution into the House of Representatives calling for the repeal of the PLRA. H.R. Res. 702, 116th Cong. (2019). The Justice for Juveniles Act, legislation introduced by a bipartisan group of congresspeople, would exempt children from the requirements of the PLRA. Justice for Juveniles Act, H.R. 5053, 116th Cong. (2020).

²⁸⁶ See Brian Stull & Tammie Gregg, *The Unhappy 25th Birthday of Two Tough-on-Crime Era Laws That Have Deadly Consequences for Incarcerated People*, ACLU (Apr. 27, 2021), <https://www.aclu.org/news/capital-punishment/the-unhappy-25th-birthday-of-two-tough-on-crime-era-laws-that-have-deadly-consequences-for-incarcerated-people> [<https://perma.cc/YJX9-J73Z>] (highlighting the tragic consequences of the PLRA and calling for its repeal).

²⁸⁷ See Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL’Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [<https://perma.cc/QC8K-JSEQ>] (describing how PLRA’s exhaustion requirement makes it harder for incarcerated people to bring lawsuits and calling for the PLRA to be repealed).

²⁸⁸ Compare Schlanger & Shay, *supra* note 14, at 151–52 (stating that “allowing prison and jail authorities the first chance to solve their own problems” is a “legitimate goal” and that “[t]he exhaustion provision should not be eliminated, but rather amended”), with Fenster & Schlanger, *supra* note 287 (stating that the PLRA was “bad policy in the 1990s,” that “allowing it to continue today is [an] even worse policy,” and concluding that it “should be repealed”).

requirement would return prison civil rights matters to the same baseline on which all other § 1983 matters rest.²⁸⁹

But proposals to repeal PLRA exhaustion have met resistance. The strongest defense of PLRA exhaustion is the sheer volume of prison litigation, which also motivated the initial enactment of the exhaustion provision in 1996.²⁹⁰ In 2020, there were more than 26,000 prison litigation filings in federal district courts, over ninety percent of which were filed pro se.²⁹¹ And incarcerated plaintiffs succeeded in less than thirteen percent of the suits filed that year.²⁹²

But focusing on only the volume of prison litigation tells an incomplete story. Legal scholars have analyzed prison litigation within a broader context and concluded that mass incarceration, not a flood of purportedly “frivolous” prison lawsuits, is to blame for the large quantity of prison litigation.²⁹³ Using exhaustion to restrict incarcerated people’s access to judicial relief has proven to be an effective solution if the intended goal is to reduce the courts’ consideration of prison litigation. But it has not improved the quality of prison litigation, as the PLRA’s proponents initially promised.²⁹⁴ If it had, the decline in filings would be accompanied by an increase in success rates for those claims that survive.²⁹⁵ Yet the evidence reveals the complete opposite: even the “shrunk” prisoners’ rights docket that has survived the PLRA has resulted in more dismissals and fewer settlements than before the PLRA’s passage.²⁹⁶ This suggests that the PLRA’s exhaustion provision is not successfully filtering out illegitimate claims, but rather impeding claims regardless of merit, and perhaps barring more meritorious claims from reaching judicial review.

In the decades following the PLRA, legal scholars have unraveled many of the exaggerations that motivated its passage in 1996. Their work has credibly dismantled the three pillars on which the PLRA stood: the increase in prison litigation by incarcerated people, the dismissal rates of these suits, and the

²⁸⁹ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (introducing a “plausibility” standard into a plaintiff’s pleading requirement in a case deriving from a § 1983 claim).

²⁹⁰ See *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (explaining that Congress’s intent for enacting the PLRA was to bring the “sharp rise in prisoner litigation . . . under control” and explaining that PLRA’s enhanced exhaustion requirement was the primary tool used to achieve that goal (citation omitted)).

²⁹¹ Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970–2021* tbls.A & B (Univ. of Mich., Pub. L. Rsch. Paper No. 22-010, 2022), <https://incarceration.law.com/resources/data-update> [<https://perma.cc/2B7L-P7E8>].

²⁹² *Id.* tbl.C.

²⁹³ Roosevelt, *supra* note 28, at 1771; Schlanger, *Inmate Litigation*, *supra* note 22, at 1584–86.

²⁹⁴ See *Ngo*, 548 U.S. at 114 (Stevens, J., dissenting) (stating that the “majority correctly identifies” the principal purposes of the PLRA, which include “reducing the quantity, and *improving the quality*, of prison litigation” (emphasis added)).

²⁹⁵ Schlanger & Shay, *supra* note 14, at 142–43.

²⁹⁶ *Id.*

popular examples of so-called “frivolous” prison complaints.²⁹⁷ Indeed, a closer look at the cited data and referenced anecdotes paint a different portrait than the caricatures proffered in pursuit of prison litigation reform.

To start, it is true there was a “sharp” increase in federal prison litigation in the late 1980s and early 1990s.²⁹⁸ But these numbers must be viewed in context. On its own, the number of prison complaints filed in federal court says very little—much more relevant is the filing *rate* of federal prison litigation, which is achieved by comparing the number of filings to the then-existing incarcerated population.²⁹⁹ And as many legal scholars note, the rising tide of prison litigation in the 1980s and 1990s kept pace with the “soar[ing]” rate of incarceration.³⁰⁰

An analysis comparing federal prison filings with the relevant prison population numbers demonstrates that the filing rate actually peaked in 1981³⁰¹ and thereafter decreased by seventeen percent between 1980 and 1996.³⁰² After 1981, annual increases in federal prison civil rights filings correlated with increases in prison populations across almost all states.³⁰³ As one study observed, this result appears to show that higher levels of prisoner litigation are simply a symptom of an incarceration epidemic.³⁰⁴ Seen through this lens, the claim that

²⁹⁷ See *Ngo*, 548 U.S. at 84 (majority opinion) (explaining that PLRA was “designed to bring [the sharp rise in prisoner] litigation under control”); *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (explaining that Congress passed PLRA’s exhaustion requirement “to reduce the quantity and improve the quality of prisoner suits”); 141 CONG. REC. S27042 (daily ed. Sept. 29, 1995) (statement of Sen. Orrin Hatch) (advocating for the passage of the PLRA because it will “go far in preventing inmates from abusing the Federal judicial system” and pointing to “frivolous” lawsuits as evidence for the need for the Act’s passage).

²⁹⁸ Schlanger, *Inmate Litigation*, *supra* note 22, at 1584–85.

²⁹⁹ *Id.* at 1585.

³⁰⁰ Roosevelt, *supra* note 28, at 1771; see also Schlanger, *Inmate Litigation*, *supra* note 22, at 1584–86 (showing an overall decrease in filing rates between 1980 and 1995 despite the sharp increase in the absolute number of filings during those years). In 1970, there were approximately 196,000 people incarcerated in state and federal prisons. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 5 (2014). Just two decades later, the number of people in prison rose to more than 750,000. ROBYN L. COHEN, U.S. DEP’T OF JUST., *PRISONERS IN 1990*, at 1 (1991). By 2010, this number rose to more than 1.4 million. MURAKAWA, *supra*, at 5. It is important to contextualize this number as only those people confined to state or federal prisons. Counting a broader scope of people—all those who were supervised under probation or parole, confined to jails, or incarcerated in prisons—is “more astonishing still . . .” *Id.* By 2010, this latter number was as high as seven million. *Id.*

³⁰¹ Schlanger, *Inmate Litigation*, *supra* note 22, at 1585.

³⁰² Roosevelt, *supra* note 28, at 1776–77.

³⁰³ Schlanger, *Inmate Litigation*, *supra* note 22, at 1586–87.

³⁰⁴ Roosevelt, *supra* note 28, at 1777; see also Herman, *supra* note 17, at 1294–95 (noting that the increase in litigation levels corresponds to an increased, captive pool of incarcerated people). But cf. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 626 (1979) (arguing that “[t]he size of the prison population plainly

the court system was experiencing an overflow of prison litigation was “inappropriately censorious” of the broader context.³⁰⁵

In any event, focusing solely on *federal* filing rates raises another distortion. As one scholar reasoned, a narrow concentration on federal filings, when comparing litigation rates between incarcerated and non-incarcerated populations, leads to misleading results because non-incarcerated people air their analogous grievances primarily in state court rather than federal court.³⁰⁶ Once state and federal filings are combined, however, incarcerated and non-incarcerated people had “comparable per capita civil litigation rates.”³⁰⁷ If an incarcerated person in 1995 was considered hyper-litigious, then so was everyone in the United States.³⁰⁸ This research also concluded that the relatively high dismissal rate of federal prison civil rights litigation is, on its own, largely unable to say much about the litigation’s merit due to the high legal standards in such cases, which are brought largely by pro se litigants.³⁰⁹

bears some relation to the volume of prisoner lawsuits, both nationally and within a given jurisdiction, but it is by no means determinative”).

³⁰⁵ Schlanger, *Inmate Litigation*, *supra* note 22, at 1586–87. Commentators have also expressed doubt about the purported impact of prison civil rights cases on federal courts, even where they comprise a substantial portion of the court’s docket. *See, e.g.*, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 530 (1982) (“It is somewhat misleading even to speak of section 1983 cases filed by prisoners as burdening federal courts.”); Turner, *supra* note 304, at 637 (“The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate.”). These commentators reason that any resulting burden would be “relatively light” given the frequency of summary dismissals and the infrequency of court appearances and trials. Turner, *supra* note 304, at 637. *But cf. id.* (acknowledging that “pro se litigation is undoubtedly a problem for judicial administration”). The relevant question is not whether prison civil rights cases comprise a larger percentage of a federal docket—it is whether they consume a higher percentage of the court’s time, and the latter is not answered by the former. *See* Herman, *supra* note 17, at 1295 (arguing that it is misleading to use just the number of prison litigation cases as evidence that such cases burden federal courts).

³⁰⁶ Schlanger, *Inmate Litigation*, *supra* note 22, at 1576.

³⁰⁷ *Id.* at 1576, 1578.

³⁰⁸ *Id.* at 1578.

³⁰⁹ Margo Schlanger engaged in a robust analysis of the dismissal, settlement, and success rates of federal prison litigation before 1996, whereupon she confirmed that incarcerated plaintiffs succeeded “in only a small minority” of federal cases, “and even the successful cases usually garnered quite small damages.” *Id.* at 1593–605, 1626. Schlanger did note, however, that when incarcerated plaintiffs won compensatory damages at trial, they also won punitive damages “twenty-two percent of the time.” *Id.* at 1603. Twenty-two percent is an exceptionally high rate compared to the “general prevalence” rate of punitive damages at around four percent. *Id.* Schlanger reasoned that these data “demonstrate[] that juries were reluctant to award damages to [incarcerated plaintiffs] unless the conduct alleged was proven extremely egregious.” *Id.* at 1606. In other words, such data “help[] to establish just how hard it is for [incarcerated people] to establish liability at all.” *Id.* at 1607. But Schlanger’s findings went beyond looking at the success rate and damages numbers. Schlanger found that “[a] good deal of the low success rate” could be attributed to the high legal standards governing the cases they filed, which incarcerated people were unable to overcome, especially because they were largely indigent, pro se, and lacked legal skills. *Id.* at 1626–27. Schlanger also found that a “seriously

Moreover, as Judge Jon Newman (then-Chief Judge of the U.S. Court of Appeals for the Second Circuit) explained, some examples of the allegedly frivolous prison complaints offered in the popular press and in the congressional record were “highly misleading.”³¹⁰ For example, a lawsuit criticized for alleging that “there were no salad bars or brunches on weekends and holidays”³¹¹ was actually a twenty-seven page complaint filed by forty-three incarcerated people asserting critical “prison deficiencies including overcrowding, forced confinement of prisoners with contagious diseases, . . . and food contaminated by rodents.”³¹²

This legal commentary has collectively produced a powerful counter-narrative that undermines the PLRA’s foundations. And it provides a lens to assess the modern defense of PLRA exhaustion. The population of people confined in prisons and jails grew following the PLRA’s enactment, while federal prison litigation filing rates remained relatively steady over time.³¹³ Legal scholars have also explained why the PLRA’s procedural barriers—as well as the high legal standards placed upon largely pro se incarcerated people and their claims—result in high dismissal rates.³¹⁴ Here, too, it appears that the sheer volume of prison litigation is a symptom of a larger epidemic: mass incarceration. And that the dismissal rates of this litigation do not, on their own, prove frivolousness.

It is true that the sheer volume of prison litigation is an issue worth attention. But Congress’s response was to punish incarcerated people with restricted access to judicial protections rather than to question the systemic reasons for

flawed” adjudication system (due to the routine safeguards of “lawyer screening, discovery, and settlement [being] ineffective” with indigent incarcerated plaintiffs) resulted in “serious undercompensation” in monetary damages to such incarcerated plaintiffs. *Id.* Therefore, Schlanger concluded that “motions and trials [are] likely an unreliable method of determining appropriate case outcomes.” *Id.* at 1627.

³¹⁰ See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996). The characterization of these lawsuits came from state attorneys general, who engaged in an “aggressive media campaign” and sent “top ten” lists of so-called frivolous lawsuits to the press. Roosevelt, *supra* note 28, at 1776–77 (citing Newman, *supra*, at 520). This campaign painted the typical prison complaint as “trivial, laughable, and obviously undeserving of serious concern, much less accountability . . .” Schlanger, *Inmate Litigation*, *supra* note 22, at 1573.

³¹¹ Newman, *supra* note 310, at 520 (quoting 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).

³¹² *Id.* at 521 (citing Complaint, Tyler v. Carnahan, No. 4:94 CV 0017 (E.D. Mo. filed Dec. 17, 1993)). Another example was a lawsuit reportedly complaining that a person’s “prison towels are white instead of his preferred beige,” but the actual claim was that the prison had wrongfully confiscated the person’s towels and jacket—sent to him by his family to help him endure his incarceration—and that prison officials had unfairly disciplined him for being sent a care package. *Id.* at 520–21 (quoting Vacco et al., *supra* note 311).

³¹³ Schlanger, *supra* note 291, tbl.A.

³¹⁴ See *supra* note 309 and accompanying text (discussing the rates of dismissal).

the growth of prison litigation.³¹⁵ The volume of this litigation reflects the sheer number of people who are confined, and the abhorrent conditions they are forced to endure. At the same time, incarcerated people have become a politically palatable scapegoat without much recourse. This concern looms larger given the earlier observation that the prison pleading trap, and the PLRA's procedural barriers more broadly, likely have a disparate impact on people of color or those seeking the courts' protections against deprivations to their constitutional and other federal rights.

D. Symptom or Disease? The Decarceration Solution

The prison pleading trap is just one small aspect of the broader abuses of power resulting from the PLRA's exhaustion provision, and any assessment of possible solutions must consider the trap's practical minutiae as well as its role within a more expansive system. These observations suggest that the continued persistence of PLRA exhaustion may not present an ideal path forward. The approaches that maintain the PLRA's exhaustion requirement offer a solution to a symptom, not the disease—and they do so by sacrificing the people most vulnerable to institutional abuses on the mantle of efficiency. These considerations also suggest that repealing the PLRA's exhaustion provision could have far-reaching benefits, including the protection of an incarcerated person's access to the federal courts as well as the development of robust prison grievance systems that are incentivized to resolve (rather than reject) internal complaints.

At the very least, the above analysis cautions against resisting the repeal of PLRA exhaustion solely because of the large volume of prison litigation. And it suggests a concurrent solution. If the purpose of PLRA exhaustion is to reduce the quantity of prison litigation without harming its quality, both aims can be achieved through decarceration.³¹⁶ Though there is little agreement

³¹⁵ As Judge Robert L. Carter once observed, “[W]hen the protection of the courts is most needful, it is the disempowered who are sacrificed on the altar of a substantively biased notion of efficiency.” Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER J. 85, 112 (1994) (quoting Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2195 (1989)).

³¹⁶ By decarceration, I refer to the project of reducing the number of people confined or controlled by carceral institutions. There is a wealth of scholarship that critiques prison confinement (along with the broader prison industrial complex) as a sociocultural phenomenon and advocates for decarceration, not to find a purportedly “optimal” rate of criminalization or incarceration, but as one tool among many to address the marginalization and dehumanization inherent in the system. My invocation of decarceration is intended to adopt this latter approach, one that often incorporates abolitionist visions of a future world where prisons are rendered obsolete. Though not by any means an exhaustive list, a few significant contributions to that literature include DAVIS, *supra* note 18, at 107–08; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017); Paul Butler, *The System Is Working the Way It Is Supposed To: The*

about how to decarcerate, there is widespread condemnation of this nation's carceral footprint and a growing commitment to shrinking its systems of confinement.³¹⁷ Decarceration would decrease the number of people confined in carceral institutions, thereby cabining rather than expanding the volume of prison litigation. Sustained decarceration would likely improve the conditions of confinement that incarcerated people are forced to endure, which would organically resolve grievances before they develop.³¹⁸ Many decarceral proposals recognize and address the system's disparate impact on people of color and other already marginalized communities.³¹⁹ And critically, decarceration would achieve a reduction in prison litigation without punishing incarcerated people for a problem they did not cause.

The subject of decarceration may initially appear to be an unconventional or even misplaced topic when discussing solutions to a procedural issue. But I

Limits of Criminal Justice Reform, 104 GEO. L.J. 1419, 1474–78 (2016); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

³¹⁷ See, e.g., Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 260–61 (2018) (noting that “[a] growing chorus of criminal law scholars, judges, policy-makers, and activists increasingly agree that ‘too many Americans go to too many prisons for far too long’” (quoting Eric Holder, Att’y Gen., Address at the American Bar Association Annual Meeting (Aug. 12, 2013))); Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 681 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015)) (observing “the increasing public commitment to decarcerate at least in certain jurisdictions alongside the current lack of viable proposed means to achieve that end”); Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549 (2017) (“Today, mass incarceration rolls comfortably off the tongues of people of all ideological stripes.”); Dan Berger, *Social Movements and Mass Incarceration: What Is to Be Done?*, 15 SOULS 3, 10–16 (2013) (arguing that a new social movement toward decarceration is “on the [r]ise”).

³¹⁸ The federal judiciary and decarceral advocates alike have pointed to overcrowding in prison systems as a central reason for inhumane conditions. See, e.g., *Brown v. Plata*, 563 U.S. 493, 502 (2011) (explaining that prison overcrowding has “created unsanitary and unsafe conditions” and is the primary cause for “the severe and unlawful mistreatment of prisoners” in California’s prison system); RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, *VERA INST. OF JUST., REIMAGINING PRISON* 20–27 (2018), https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf [<https://perma.cc/7BES-LZLD>] (outlining the negative impacts of prison overcrowding). Pursuing decarceration would achieve complementary goals of reducing mass incarceration and improving conditions of confinement. And, notably, substantial reductions in prison populations can be achieved with no adverse effects on public safety. DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, *THE SENT’G PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS* 5 (2018), <https://www.sentencingproject.org/app/uploads/2022/08/Decarceration-Strategies.pdf> [<https://perma.cc/3V64-66MU>].

³¹⁹ See, e.g., SCHRANTZ ET AL., *supra* note 318, at 5–7 (outlining the successful decarceration strategies of Connecticut, Michigan, Mississippi, Rhode Island, and South Carolina, and explaining why “[i]t is critical to target specific goals such as reduction of racial disparity”).

agree with a fellow scholar that legal commentary “must substantially broaden [its] conception of what ‘procedural reform’ entail[s]”³²⁰ I would argue further, however, that the need to “broaden [the] conception” of procedural reform extends beyond an understanding of a reform’s origins or motivations. It is equally important to expand our vision of potential solutions to include expansive proposals that address the root causes of a procedural issue. Otherwise, procedural inquiries will remain cabined by procedural revisions that may not actually resolve the underlying systemic concern. Substantive reforms can obviate the need for procedural ones. Here, repealing the PLRA’s exhaustion requirement would address the prison pleading trap alongside the other abuses that persist in this exhaustion regime. And decarceration—which would help reduce the quantity of prison litigation without impairing its quality—should accompany any discrete procedural reform to PLRA exhaustion and the prison grievance system it sustains.

Ultimately, commentators have deprioritized (or even disregarded) the concerns of incarcerated people because of their confinement status.³²¹ Prisons are frequently seen as a site of retribution where incarcerated people are deserving not of rights, but of punishment. Even decarceration conversations often focus on subclasses of incarcerated people that purportedly most merit re-

³²⁰ Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2945 (2015). Amalia Kessler’s encouragement was situated in an examination of how the progressive lawyers driving the enactment of the Federal Arbitration Act (FAA) originally conceived of arbitration and its relationship to broader reform goals. *Id.* at 2945–46. Kessler engaged in an inquiry that looked beyond traditional sources “on which civil procedure scholars tend to fixate,” including the federal rules of civil procedure as well as the Act’s statutory language and legislative history. *Id.* Kessler first explored the “ideological commitments” and “status anxieties” that led elite progressive attorneys to seek procedural reform. *Id.* at 2947. Kessler then examined two institutional structures (new branches within municipal courts and the American Arbitration Association), which deployed conciliation courts’ procedural rules and the FAA’s procedural rules, respectively, to consider what the history and design of those structures revealed about the progressive lawyers’ reimagining of arbitration. *Id.* at 2947–48. Rather than fixating on the FAA’s procedural rules, the federal rules, or even the federal courts, Kessler engaged in a more expansive undertaking to “make meaningful sense of the FAA and of the Progressive conception of arbitration more generally” *Id.* at 2945–46.

³²¹ One example of this disregard is the response to incarcerated people fighting for workplace protections when engaging in (or forced to engage in) prison labor. Federal courts have dismissed these concerns by justifying the state’s profits from prison labor as “simply paying the costs of public goods—including the costs of incarceration” *Vanskike v. Peters*, 974 F.2d 806, 811–12 (7th Cir. 1992). And even judges have explicitly expressed an opinion that incarceration is equivalent to punishment, and should therefore be seen through that lens. *See, e.g., United States v. Bergman*, 416 F. Supp. 496, 498–99 (S.D.N.Y. 1976) (“Imprisonment is punishment.”). Another example of this disregard is manifested in the resolution of prison litigation, which turns on whether the plaintiff is incarcerated post-conviction or is detained pretrial. A pretrial detainee can satisfy a lower threshold to demonstrate a constitutional violation in their confinement because they are not yet “criminals whose conditions of confinement are designed to punish.” *Malam v. Adducci*, 469 F. Supp. 3d 767, 788–89 (E.D. Mich. 2020) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

lease. Left unsaid is the pervasive thought that *some* people deserve prison—and that they deserve the restrictions and abuses that frequently accompany life in confinement.

But who do we define as a “criminal”? What do we define as a “crime”? As many commentators have outlined, governments and legislators have shaped these definitions to uphold white supremacist structures.³²² And racism continues to influence the breadth and scope of the criminal legal system. Studies have found that public awareness of racial disparities in prisons actually increased support for harsher punishments that contribute to those disparities.³²³ For example, one study found that people become more supportive of the death penalty upon learning that this sentence disproportionately impacts Black defendants.³²⁴

Death in prison is not an abstraction—the threat of physical death is an unfortunate and concrete reality for many who are incarcerated.³²⁵ But there are multiple dimensions of death that permeate life in confinement. Incarcerated people suffer social death, the stigma and segregation that accompanies their conviction and sentence.³²⁶ They also endure spatial death, the forced migration

³²² See, e.g., Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1162 (2019) (“Race has historically been connected to which activities were defined as crimes and resulted in today’s hierarchy of black subjugation and white supremacy where those with a criminal record are locked into economic and social exile.” (citing Darren L. Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 74–85 (2015))); Tiffany Yang, *Public Profiteering of Prison Labor*, 101 N.C. L. REV. 313, 329–37, 344–45 (2023) (outlining the strategic use of criminalization as a means of racial subjugation); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1954–56 (1993) (explaining that the modern “War on Drugs,” similar to post-Emancipation subjugation, advanced a “racial construction of crime”).

³²³ Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1952 (2014). The greater a prison’s Black population, the less people were willing to “reduce the severity of a law they acknowledged to be overly harsh.” *Id.* at 1951.

³²⁴ Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1006 (2007).

³²⁵ See Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL’Y INITIATIVE (June 8, 2021), <https://www.prisonpolicy.org/blog/2021/06/08/prison-mortality/> [<https://perma.cc/W2DL-W9B6>] (explaining that state prisons reported a record number of deaths in 2018 and that “an increasing share of deaths are from discrete unnatural causes, like suicide, homicide, and drug and alcohol intoxication”); Dolovich, *supra* note 32, at 302–03 (explaining that “[i]t is hardly a secret that American carceral institutions routinely . . . fail to provide even minimally safe and healthy living conditions”).

³²⁶ My use of the term “social death” adopts Dan Berger’s use of the term, which recognizes the stigma and social harm of incarceration as a whole. BERGER, *supra* note 15, at 143. Alexander Reinert provides a different definition of “social death” to identify one of the traumatic consequences that solitary confinement has on people forced to experience it. Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 929 (2018) (quoting *United States v. D.W.*, 198 F. Supp. 3d 18, 94 (E.D.N.Y. 2016)). In that context, Reinert explains that solitary confinement can leave a person “emo-

away from their families and communities.³²⁷ And this social and physical exile exacerbates the civil death (the loss or severe limitations of rights) that incarcerated people suffer.³²⁸ The confluence of physical, social, spatial, and civil death in prison constitutes the intentional erasure and exile of incarcerated people. Preserving their access to judicial protections is accordingly paramount.

CONCLUSION

The PLRA took drastic steps to hinder incarcerated people's access to judicial protections. Congress passed this Act under the guise of a staggering wave of prison litigation that was, in reality, largely self-constructed by the unmanageable increases in America's incarcerated population. Primarily through the PLRA's exhaustion requirement, Congress has given prisons—the defendants in prison litigation—the ability immunize themselves from future liability. A litigation “defeat” becomes a perverse opportunity to design heightened procedural hurdles that can bar even the most meritorious claims from reaching the federal court. Prisons have unfortunately made effective use of this pleading trap. And the judiciary is bound by the plain language of the prison's amended grievance policies, no matter how self-serving. Solutions short of repealing the PLRA's exhaustion requirement and a simultaneous commitment to decarceration will do little to protect the already marginalized population that is incarcerated in this nation's prisons.

A legal remedy should not serve as an incarcerated person's only avenue to redress individual or systemic injustices. But as an important tool in the pursuit of justice, safeguarding access to judicial protections should rise as a critical undertaking of legal reform. It is especially crucial for incarcerated people, who are perhaps the most vulnerable to state-sanctioned abuses without political recourse. Resolving the prison pleading trap is a crucial part of this struggle to hold prisons accountable for their abuses. And with hope, preservation of judicial access will lay the groundwork for a strengthened recognition of the human dignity of incarcerated people, and for the expansion of their power alongside their rights to redress while confined.

tionally scarred and harmed,” and ultimately “unable to function effectively in social contexts moving forward.” *Id.* (citing *D.W.*, 198 F. Supp. 3d at 94).

³²⁷ BERGER, *supra* note 15, at 143.

³²⁸ Dan Berger's definition of “spatial” death (which he describes as “the invisibility and isolation of spatial distance to the open-ended exclusion of being denied access to society's institutions and rights”) encompasses both the physical isolation and legal invisibility rendered by incarceration. *Id.* To recognize the unique harms that come with “civil” death, I identify it as an independent category.

