NOTE

What Happens Behind Bars Should Not Stay Behind Bars: The Case for an Exhaustion Exception to the Prison Litigation Reform Act for Juveniles

*Samantha Bennett**

ABSTRACT

Congress enacted the Prison Litigation Reform Act ("PLRA") in an effort to reduce the number of frivolous lawsuits brought by prisoners. As a result of some of its provisions, however—in particular, the exhaustion provision—nonfrivolous suits are effectively blocked from reaching the courts, enabling grave injustices to persist in America's prison facilities without any accountability. Virtually unchecked, prison officials construct complex grievance procedures that make full compliance nearly impossible, thus barring many meritorious lawsuits from moving forward. Although children are particularly vulnerable to these abuses, the PLRA holds children to the same standard as adults in this context: exhaustion of administrative remedies is mandatory. Children—who are either detained or incarcerated in adult or juvenile facilities—now face danger when the government should otherwise act to protect them. But with recent Supreme Court precedent recognizing distinctions between children and adults that call for different treatment in the criminal justice context, the system is finally ripe for change for juveniles in

* J.D., expected May 2018, The George Washington University Law School; B.A., Political Science, 2013, Swarthmore College. I would like to extend my deepest appreciation to the members of *The George Washington Law Review* editorial staff, Brian Castello, and John Cavanagh for their hard work and invaluable suggestions throughout the note-writing and publication process. And thank you to my parents, brothers, and Rory for their unwavering love and support.

March 2018 Vol. 86 No. 2

custody. This Note proposes an amendment to the PLRA to allow for an exception to the exhaustion provision for juveniles, as well as formal recommendations to improve grievance procedures applicable to juveniles.

Table of Contents

Introduction 589
I. The Prison Litigation Reform Act: Background and Legislative Purpose 593
A. *Problems Associated with Mandatory Exhaustion* 597
1. Lack of Accountability 597
2. Inconsistent with Legislative Intent: Meritorious Claims Are Often Blocked from Receiving Fair Review by Judges 600
B. *Dismissals for Failure to Exhaust* 600
C. *An Exhaustion Exception* 601
II. How the Criminal Justice System Fails to Protect Children and Why Reform Is Necessary 602
A. *Evidence of Systemic Abuse in Juvenile Correctional Facilities* 603
1. Procedural Obstacles Make Children's Compliance with Grievance Procedures Difficult 605
2. An "Exception" to the Statute of Limitations in Grievance Procedures 606
III. Immaturity and Vulnerability: The Supreme Court's Reasons for Treating Children Differently in the Criminal Justice Context 608
A. *Supreme Court Opinions Reflecting the Differences Between Children and Adults* 608
B. *Why Supreme Court Precedent Demands Change in the Custody Context* 611
IV. Changing How Juveniles Are Treated in Custody 612
A. *Amending the Prison Litigation Reform Act to Exempt Juveniles from Exhaustion* 612
B. *Formal Recommendations for State and Local Officials to Improve Grievance Procedures for Minors* 614
C. *Alternative Options* 617
Conclusion 618

Introduction

From 2002 to 2003, Steven Zick was an inmate in the Juvenile Division of the Indiana Department of Corrections, spending time at four different correctional institutions.[1] Zick, who was only a child at the time, alleged that his fellow inmates repeatedly beat and sexually assaulted him.[2] His unsettling allegations included a physical assault with padlock-filled socks.[3] Perhaps most disturbing was Zick's accusation that staff members knew about the beatings and failed to do anything after witnessing them.[4] He claimed that the staff actively encouraged this behavior, even arranging for the children to fight.[5] Zick's claims went as far as alleging that staff members would handcuff one child so that others could beat him.[6]

Scared of retaliation and being labeled a "snitch" by others, Zick kept quiet, declining to report any incidents to prison officials.[7] Zick only told his mother about the abuse.[8] Zick's mother understandably became concerned, and reported the abuses to staff members, judges, the correctional facilities' superintendent, the Deputy Department of Corrections Commissioner, and even the Governor, to no avail.[9] Furthermore, not a single person explained to Zick's mother how to file a "grievance"—a necessary procedure which courts require inmates to exhaust before filing suit.[10]

In Indiana, juveniles who wish to file a grievance alleging violations of federal civil rights laws are required to follow specific and burdensome steps that are relatively standard among grievance procedures nationwide.[11] First, juveniles must file the initial complaint "within two business days after the event giving rise to the grievance."[12] Staff then addresses the complaint, and if the grievant is un-

---

1 Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538, at *1–2 (N.D. Ind. July 27, 2005).

2 *Id.*

3 *Id.* at *2.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *See id.*

9 *Id.* at *2, *4.

10 *See id.* at *4; *see also* Prison Litigation Reform Act, 42 U.S.C. § 1997e (2012).

11 *Minix*, 2005 WL 1799538, at *3; *see* Ind. Dep't of Corr., Youth Grievance Process 7, 11 (2015), http://www.in.gov/idoc/files/03-02-105__Youth_Grievance_Process_4-1-2015.pdf [https://perma.cc/JKK6-XW2G] (articulating the grievance procedure for Indiana juveniles as follows: filing a grievance form within ten days of the incident, accepting or rejecting facility's initial response, and having one opportunity for an appeal); *see also infra* Section II.A.1.

12 *Id.*

satisfied with their response, the grievant then files an appeal, which requires him to appear before a three-member committee.[13] Following the committee's response, there are two further levels of appeal for the grievant to traverse: (1) an appeal through the superintendent and (2) an appeal to the regional director.[14] If the grievant has proceeded through all required steps—and is still unsatisfied with the prison's response—then, at only this point may he file suit in court.[15]

Unfortunately, Mrs. Minix—Zick's mother—was unaware of these procedures.[16] After speaking with various officials and obtaining no internal remedies, Mrs. Minix sued in federal court on behalf of her son under 42 U.S.C. § 1983, seeking either punishment or sanctions against those who violated her son's constitutional rights.[17] As a result of failing to complete the grievance procedures outlined above, Chief Judge Miller ruled that Zick—and his mother—were barred from bringing suit.[18] Stating that "a prisoner must comply with the administrative process made available to prisoners as it exists, *not as it might have been written*," Judge Miller held that Mrs. Minix's efforts to exhaust administrative remedies on her son's behalf were insufficient.[19] In doing so, Judge Miller found that her efforts "were not directed to the proper people, did not contain the information needed," and were not filed within the proper time constraints.[20]

While Judge Miller did not necessarily hold that Mrs. Minix could not file the grievance procedures on her son's behalf, the judge stated that as a child, Zick "is the person upon whom the Prison Litigation Reform Act placed the obligation to exhaust administrative remedies."[21] Despite the measures Mrs. Minix took to protect her helpless child from the abuse, the court held that her efforts were insufficient.[22] While other children of similar age played sports and video games

---

13 *Id.*

14 *Id.*

15 *Id.*

16 *See id.* at *2.

17 *Id.* at *1. Section 1983 claims are the most common form of relief for prisoners, as the statute provides a private cause of action against one depriving another of his constitutional rights. 42 U.S.C. § 1983 (2012); *see also* DOROTHY SCHRADER, CONG. RESEARCH SERV., 96-513 A, PRISON LITIGATION REFORM ACT: AN OVERVIEW 2 (1996). Section 1983 violations fall under the exhaustion requirement of the PLRA. *See* 42 U.S.C. § 1997e(a) (2012). Thus, a prisoner alleging a violation of his constitutional rights under § 1983 must exhaust the administrative process before suing in federal court. *See id.*; *infra* notes 64–65 and accompanying text.

18 *See Minix*, 2005 WL 1799538, at *7.

19 *Id.* at *4 (emphasis added).

20 *Id.*

21 *Id.* at *5.

22 *Id.* at *7.

with friends, Zick suffered through grave abuses because of the system's failure to protect him, and he will never receive the justice he so desperately sought.

Perhaps this is an exceptional case. Reading this horrific tale, the hope is that other children do not face similar abuses inside correctional facilities. But the reported incidents suggest otherwise.[23] For example, in 2007, a report by the Texas Youth Commission's Office of the General Counsel concluded that staff at a Texas juvenile facility violated children's constitutional rights by failing to protect them "from abuse by staff and violence by other children."[24] Children in other Texas juvenile facilities also reported frequent "gang related" riots[25] and abuse by staff—including an incident in which "a staff member grabbed [a juvenile inmate] by the neck, threw him into the wall, and continued to hold him by the neck until other staff arrived."[26] In 2009, a federal investigation in New York "found that staff in state juvenile corrections facilities 'routinely used uncontrolled, unsafe applications of force' leading to 'an alarming number of serious injuries to youth.'"[27] Some studies even suggest that the problem is systemic. Among youth housed in secure correctional facilities or camp programs, "42 percent said they were somewhat or very afraid of being physically attacked" and "45 percent reported that staff 'use force when they don't really need to.'"[28] Disturbingly, a Bureau of Justice Statistics study in 2012 found that "[n]early 10 percent of youth incarcerated in state-operated or state-funded juvenile corrections facilities reported being victimized sexually by staff or other youth in their facilities."[29] Importantly, all of these examples constitute viola-

---

23 *See infra* notes 24–27 and accompanying text.

24 DAVID FATHI, HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 29–30 (2009), https://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf [https://perma.cc/CP8U-4B3F]. The Human Rights Watch report exposed the details of the investigation into the abuses at the Texas Youth Commission's Evins Regional Juvenile Center. *Id.*

25 Letter from Deborah Fowler, Legal Dir., Tex. Appleseed, Beth Mitchell, Managing Att'y, Advocacy, Inc., Pat Arthur, Senior Att'y, Nat'l Ctr. for Youth Law & Robert Fleischner, Assoc. Dir., Ctr. for Pub. Representation, to Judy Preston, Chief, Special Litig. Section, U.S. Dep't of Justice 7 (Aug. 24, 2010), http://alt.coxnewsweb.com/statesman/Letter%20to%20U.S.%20Department%20of%20Justice%20re%20TYC,%20August%202010.pdf [https://perma.cc/PH42-8ED8].

26 *Id.* at 5.

27 RICHARD A. MENDEL, MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE 6–7 (2015). These injuries included concussions, knocked-out teeth, and spinal fractures. *See id.* at 7.

28 *Id.* at 7.

29 *Id.* at 3; *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMI-

tions of constitutional rights covered under 42 U.S.C. § 1983.[30] Before bringing a complaint in federal court under this statute, however, the Prison Litigation Reform Act ("PLRA")[31] requires juveniles to exhaust the prison's internal grievance procedures.[32]

Most juvenile facilities should not impose such harsh measures. The criminal justice system should be more forgiving of some of the most vulnerable members of society. But the anecdotes and factual revelations expose serious problems inherent with the current system and suggest that PLRA reform is necessary to protect these children. Grievance procedures contain difficult procedural hurdles that make it virtually impossible for children to fully comply.[33]

Although the Supreme Court has not directly addressed grievance procedures for children, it has recently decided four important cases which collectively change the way U.S. law treats children in the criminal justice system.[34] Over the past twelve years, the Court has determined that differentiating characteristics in children—particularly juvenile immaturity and vulnerability—warrant different rules in the punishment and arrest contexts.[35] The Court's repeated acknowledgment of the differences between children and adults marks a shift necessitating a change in the custodial treatment of juveniles.[36]

Part I of this Note explains the background of the PLRA. It also describes the requirements of the exhaustion provision—one of the PLRA's most controversial provisions, and the focus of this Note—and presents the accountability problem associated with the exhaustion provision. Part II explains the systemic issues facing children in custody and demonstrates why reform is necessary. Part III explains

---

ZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012, at 9 (2012), https://www.bjs.gov/content/pub/pdf/svjfry12.pdf [https://perma.cc/7DUR-M3LF] (providing statistics for sexual victimization in juvenile facilities reported by youth in 2012).

30 *See infra* notes 63–65.

31 42 U.S.C. § 1997e (2012).

32 *Id.* § 1997e(a).

33 *See, e.g.*, 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, 147–48 (2008); *see also infra* Section II.A.1.

34 *See* Miller v. Alabama, 567 U.S. 460 (2012); J.D.B. v. North Carolina, 564 U.S. 261 (2011); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

35 *See Miller*, 567 U.S. at 489 (holding that juveniles cannot face life in prison without parole for any offense); *J.D.B.*, 564 U.S. at 281 (finding that a juvenile suspect's age must be taken into account when determining whether *Miranda* rights were violated); *Graham*, 560 U.S. at 82 (finding that juveniles cannot face life in prison without parole for a nonhomicide offense); *Roper*, 543 U.S. at 578–79 (ruling that minors cannot face the death penalty); *see also infra* Part III.

36 *See infra* Part III.

how the Supreme Court has recently determined that children should be treated differently in the criminal justice context and briefly discusses the psychological rationale behind these decisions, which also guides this Note's policy proposal. Finally, in Part IV, this Note presents a two-part solution: (1) Congress should amend the PLRA to exempt juveniles from the exhaustion provision, and (2) the DOJ should formally recommend changes to the current juvenile grievance procedures in place.

I. The Prison Litigation Reform Act: Background and Legislative Purpose

Congress enacted the PLRA in 1996, as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996.[37] While this legislation was passed with good intentions,[38] the history leading up to its enactment provides the most important basis for its reform. Before 1964, common law governed prisoner litigation[39]—where "a person imprisoned on a felony conviction could neither be a witness in, nor file, a lawsuit."[40]

This system of barring prisoners from filing suit changed entirely in the brief 1964 Supreme Court decision, *Cooper v. Pate*,[41] in which the Court reversed the lower court's dismissal of a complaint alleging deprivation of the right to practice Islam.[42] Specifically, the petitioner, a prisoner in the Illinois State Penitentiary, alleged that "he was denied permission to purchase certain religious publications and denied other privileges" because of his religious beliefs.[43] The *Cooper* Court found that "the complaint stated a cause of action" and that a prisoner could file a complaint in federal court.[44] This short per curiam opinion shaped the next thirty years of prison litigation.

As a result of the *Cooper* decision, a large wave of prisoner litigation in federal courts followed.[45] Two years after *Cooper*, prisoners

---

37 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; *see* Schrader, *supra* note 17, at 1.

38 *See* Schrader, *supra* note 17, at 1 (explaining that the impetus behind the PLRA was the explosion of prisoner civil rights litigation straining the federal judicial system and "diverting scarce resources from other fields of civil litigation").

39 *See id.* at 2.

40 *Id.* (citing Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 Geo. Mason L. Rev. 1, 5 (1988)).

41 378 U.S. 546 (1964) (per curiam).

42 *See* Schrader, *supra* note 17, at 2.

43 *Cooper*, 378 U.S. at 546.

44 *Id.*

45 *See* Schrader, *supra* note 17, at 1.

filed 218 federal civil rights cases.[46] This number continued to grow exponentially. In 1972, prisoners filed 3,500 suits; in 1982, they filed 16,000.[47] In 1995—the year before Congress enacted the PLRA—41,679 prisoner cases flooded the courts.[48] While some cases were frivolous and others meritorious, these suits constituted a major portion of litigation in the United States.[49]

During the pre-PLRA period, there were no regulations or restrictions on prisoners wishing to file suit regarding conditions inside prison facilities.[50] Prisoners' suits, like all other civil suits, could not "be dismissed for failure to state a claim unless it appear[ed] 'beyond doubt' that the plaintiff [could] prove no set of facts to support the claim."[51] This standard allowed much of the litigation to persist beyond the motion to dismiss stage.[52]

This history gave rise to two competing perceptions, one of which prevailed and led to the PLRA's harsh provisions. First, the minority argued that this exponential increase in prisoner litigation "reflect[ed] increased litigation within our society in general."[53] Advocates of this view insisted that restrictions upon prisoner litigation should be limited, believing that such litigation "is necessary to correct inhumane prison conditions" and "is responsive to serious violations of constitutional rights."[54] In contrast, the prevailing view, which directly led to the enactment of the PLRA, was that prisoner litigation unnecessarily floods and strains the federal judicial system, wasting judicial resources, when only a small percentage of the cases are actually meritorious.[55] This latter belief reflected the idea that expending judicial resources on prisoner lawsuits hindered the resolution of other cases, which were presumably more important and deserving than cases involving prisoners.[56]

---

46 *Id.* at 5.

47 *Id.*

48 *Id.*

49 *See* DOROTHY SCHRADER, CONG. RESEARCH SERV., NO. 97-999 A, PRISON LITIGATION REFORM ACT: SURVEY OF POST-REFORM ACT PRISONERS' CIVIL RIGHTS CASES 3 (1996). Prisoner civil rights litigation constituted the largest category of federal civil rights cases at the time Congress passed the PLRA: approximately seventeen percent of district court civil cases and twenty-two percent of federal civil appeals. *Id.*

50 *See* SCHRADER, *supra* note 17, at 4.

51 SCHRADER, *supra* note 17, at 5; *see also* Haines v. Kerner, 404 U.S. 519, 520–21 (1972).

52 *See* SCHRADER, *supra* note 17, at 5.

53 *Id.* at 1.

54 *Id.*

55 *Id.*

56 *Id.*

Congress embraced the latter view—that prisoner litigation unnecessarily floods the courts—and passed the PLRA in 1996 in an effort to decrease the number of ostensibly frivolous prisoner lawsuits.[57] Among other provisions, the PLRA includes an exhaustion provision, which bars prisoners from initiating lawsuits before completing the internal grievance procedures of the facility in which they are housed.[58] While many of the other provisions of the PLRA are problematic,[59] this Note focuses on the exhaustion provision and, in particular, its application to juveniles.[60]

The exhaustion provision states, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted*."[61] Congress clarified the meaning of the term "pris-

---

57 *Id.* As expected, the number of *total* prisoner lawsuits declined after passing the legislation. Research suggests that the number of prisoner lawsuits in federal district court in 2012 reached 22,662—approximately half of those filed in 1995—and has consistently remained around that number since 1997, the year after the PLRA's enactment. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 157 (2015); *see also* Schrader, *supra* note 17, at 5.

58 42 U.S.C. § 1997e(a) (2012).

59 The other provisions of the PLRA include allowing states to opt out of adhering to an administrative grievance procedure without penalty, allowing courts to dismiss frivolous claims outright, disallowing attorney's fees to be paid by defendants in many situations, requiring a showing of physical injury, permitting teleconference communication at court hearings if needed, and allowing a defendant to waive the right to reply without constituting an admission of the allegations. *Id.* § 1997e. For additional materials outlining the problems associated with the PLRA's other provisions, see 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, 1049–53 (2001) (outlining problems associated with the attorney's fees provision); *Know Your Rights: In Prison—The Prison Litigation Reform Act (PLRA)*, ACLU (Feb. 16, 2010), https://www.aclu.org/know-your-rights/prison-prison-litigation-reform-act-plra [https://perma.cc/6ZZ2-VECE] (describing issues with the filing fees, the three strikes provision, and the physical injury requirement). *See generally* Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 Temp. L. Rev. 759 (2000); Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant to?*, 49 UCLA L. Rev. 1655 (2002) (explaining the unfortunate consequences of the physical injury requirement of the PLRA).

60 The PLRA applies to children. Schlanger & Shay, *supra* note 33, at 152. This includes children who are housed in both adult facilities and juvenile facilities, whether detained or incarcerated. *See id.*; *see also* 42 U.S.C. § 1997e(h). Additionally, the PLRA applies to federal prisons, private prisons, and state prisons. *See* Schrader, *supra* note 49, at 2 ("Federal district courts have jurisdiction over cases by state prisoners under the 1871 Civil Rights Act, 42 U.S.C. § 1983."); *see also, e.g.*, Roles v. Maddox, 439 F.3d 1016, 1017–18 (9th Cir. 2006); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 994 (6th Cir. 2004).

61 42 U.S.C. § 1997e(a) (emphasis added).

oner" in § 1997e(h) of the statute: "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."[62] Furthermore, the PLRA is specifically tailored towards federal civil rights actions—including complaints against another person who, while acting "under color of state law,"[63] violates a prisoner's federal constitutional or statutory rights.[64] Practically, exhaustion is required when a prisoner challenges actual prison conditions that the inmate believes violate his constitutional or federal statutory rights.[65] Therefore, exhaustion is not required should a prisoner file suit against a fellow inmate—e.g., a battery claim.[66]

---

62 *Id.* § 1997e(h).

63 PRISON LAW OFFICE, LAWSUITS FOR MONEY DAMAGES AGAINST PRISON OFFICIALS 6 (2012), http://prisonlaw.com/wp-content/uploads/2015/09/PersonalInjuryfullJuly2012.pdf [https://perma.cc/9SB2-TULB] ("Prison staff, as employees of the state working in their jobs, act under color of state law."); *see also* 42 U.S.C. § 1983.

64 *See* 42 U.S.C. § 1983; Porter v. Nussle, 534 U.S. 516, 532 (2002) ("[T]he 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."); PRISON LAW OFFICE, *supra* note 63, at 6.

65 The following are examples of violations for which prisoners may file a federal civil rights suit after exhausting their administrative remedies. These situations would require exhaustion before filing suit. This list is not exhaustive, but is certainly extensive. *See* PRISON LAW OFFICE, *supra* note 63, at 6–8 (outlining the below examples). The Supreme Court has found that inadequate medical care amounting to deliberate indifference to a serious medical need violates the Eighth Amendment prohibition on cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Coleman v. Wilson, 912 F. Supp. 1282, 1315 (E.D. Cal. 1995) (applying to mental health care). The Court has also held that the use of excessive force which amounts to malicious or sadistic harm violates the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 9 (1992); Whitley v. Albers, 475 U.S. 312, 320–21 (1986). An Eighth Amendment violation also occurs if prison officials are deliberately indifferent to bad living conditions that amount to a serious deprivation of the "minimal civilized measure of life's necessities," *Hudson*, 503 U.S. at 9, which include "adequate food, clothing, shelter, sanitation, medical care, and personal safety," Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Race discrimination can be a violation of the Fourteenth Amendment and will be subjected to a strict scrutiny test by the courts. *See* Johnson v. California, 543 U.S. 499, 515 (2005). Additionally, discrimination against the disabled could be a violation of the prisoner's rights under the federal Americans with Disabilities Act and the Rehabilitation Act of 1973. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209 (1998). Violations of certain due process rights constitute violations under the Fourteenth Amendment for those in custody, including the rights to notice and a hearing. Superintendent v. Hill, 472 U.S. 445, 453 (1985); Wolff v. McDonnell, 418 U.S. 539, 563 (1974); Zimmerlee v. Keeney, 831 F.2d 183, 188 (9th Cir. 1987).

66 Note that there are separate procedures for state tort suits against prison or parole officials. For example, in California, prior to bringing a state tort lawsuit against the state or a state official or employee, prisoners must send their claim to the State Victim Compensation and Government Claims Board. PRISON LAW OFFICE, *supra* note 63, at 12.

Thus, the PLRA exhaustion provision requires that incarcerated or detained individuals who wish to file a complaint challenging prison conditions must initially complete the prison's internal grievance process before seeking relief in federal court.[67] In theory, this provision is consistent with the legislative intent of decreasing the number of "frivolous" lawsuits brought by prisoners.[68] In practice, however, the exhaustion requirement has led to grave consequences that are quite inconsistent with the original legislative intent.

A. Problems Associated with Mandatory Exhaustion

The PLRA's broad exhaustion provision does not provide standards or guidelines for prison officials to follow.[69] Rather, prison officials generally construct their own internal grievance procedures, subject to no external oversight.[70] If there is even a single misstep by a complainant during the grievance process, that individual might be barred from refiling her grievance[71] and, crucially, from bringing even meritorious claims in court.[72] This dilemma presents a major conflict of interest and is one of the primary issues with exhaustion: prison officials are the subjects of these grievances,[73] and absent regulatory constraint, they are incentivized "to fashion ever higher procedural hurdles in their grievance processes."[74]

1. Lack of Accountability

The current system under the PLRA incentivizes prison officials to draft procedural hurdles because if a prisoner misses a step in the grievance process or does not properly follow the instructions, the

---

67 Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 575 (2014); *see also* Booth v. Churner, 532 U.S. 731, 740–41 (2001) (holding that the PLRA requires administrative exhaustion even where grievance process does not permit award of money damages and prisoner seeks only money damages).

68 *See* SCHRADER, *supra* note 49, at 3.

69 *See* 42 U.S.C. § 1997e(a).

70 *See* Schlanger & Shay, *supra* note 33, at 149.

71 *See id.* at 148.

72 Woodford v. Ngo, 548 U.S. 81, 83–84, 96 (2006) (finding that a prisoner cannot satisfy exhaustion "by filing an untimely or otherwise procedurally defective administrative grievance or appeal," and reasoning that "[a] prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction"); *see* Schlanger & Shay, *supra* note 33, at 148–49.

73 Mikkor, *supra* note 67, at 578 ("For incarcerated plaintiffs, it is defendants, their coworkers, and their supervisors—that is, corrections department staff—who control the [grievance] process that plaintiffs are required to have successfully navigated before they bring suit.").

74 Schlanger & Shay, *supra* note 33, at 149.

prisoner may forever be barred from bringing suit in federal court.[75] Thus, the more difficult it is for the prisoner to follow instructions, the more difficult it is to ever commence a lawsuit.[76] This structure often allows defendants to evade punishment.[77] Consequently, there is a twofold accountability problem plaguing almost every U.S. prison.

First, the exhaustion provision undermines *external accountability* by eliminating "judicial review based on an inmate's failure to comply with his prison's own internal, administrative rules."[78] There is no direct oversight during any stage of the process.[79] Prisoners, in theory, can litigate to hold the corrections department accountable.[80] Unfortunately, it is virtually impossible for those aggrieved to reach litigation. Thus, the best suited system to hold prison officials accountable—the judiciary—is ousted from the process.[81]

Second, the exhaustion provision also undermines *internal accountability* "by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion."[82] Those who file complaints generally expect "that the pre-litigation process that a plaintiff is required to have completed will not be controlled by his opponent in litigation."[83] But here, "[i]n a prison grievance system, a prisoner is complaining *about* the actions of prison staff *to* prison staff using rules administered and often written *by* prison staff and corrections officials."[84] This results in a clear potential for bias, incentivizing

---

75 *See Woodford*, 548 U.S. at 90–91 ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."); Dale v. Lappin, 376 F.3d 652, 655 (7th Cir. 2004) ("In order to properly exhaust, a prisoner must submit inmate complaints and appeals 'in the place, and at the time, the prison's administrative rules require.'" (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002))).

76 *See* FATHI, *supra* note 24, at 14–16.

77 *See id.*; Schlanger & Shay, *supra* note 33, at 149 ("[T]he more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit.").

78 Schlanger & Shay, *supra* note 33, at 150.

79 *See id.*; *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1650 (2003) ("[T]he sky's the limit for the procedural complexity or difficulty of the exhaustion regime.").

80 Mikkor, *supra* note 67, at 577.

81 *See, e.g.*, FATHI, *supra* note 24, at 14–16.

82 Schlanger & Shay, *supra* note 33, at 150.

83 Mikkor, *supra* note 67, at 579.

84 *Id.*

prison officials to draft difficult procedural hurdles in order to dismiss potentially meritorious grievances.[85]

Grievance procedures differ among prison facilities, but tend to follow the same basic guidelines.[86] When a "prisoner," as defined by the statute, has a complaint regarding prison conditions, the inmate must first fill out a grievance form, provided by prison officials, within the statute of limitations time period.[87] Second, the prisoner must submit the grievance form to program staff who typically make the initial decision as to whether to grant the relief sought, to deny, or to dismiss the grievance entirely.[88] If denied grievance, the prisoner must then appeal the decision through multiple levels to complete proper exhaustion.[89] However, dismissal is quite different than pure denial. When prison staff dismiss a grievance, they determine the prisoner's grievance to be "procedurally insufficient."[90] Once prison officials deem it "procedurally insufficient," the prisoner can no longer appeal.[91] But this determination does not constitute exhaustion, essentially barring the individual prisoner from bringing suit in court.[92]

In constructing its grievance procedures, prison officials often impose a strict statute of limitations, meaning that a prisoner wishing to file a grievance must do so within a certain time period after the incident in question, and the prisoner also must appeal within the designated time periods post-denial.[93] If the complainant does not timely file or appeal, the prisoner loses his right to do so altogether (both internally through the grievance process and also within federal and state courts).[94]

Prison officials have numerous reasons for imposing these statutes of limitations, many of which are legitimate. The U.S. criminal justice system, in many cases, has required imposing statutes of limitations for efficacy reasons—mostly because it is difficult to obtain witnesses and to reconstruct the incident through memory and evidence after significant delay since the incident occurred.[95] As a result, injus-

---

85 *See* Fathi, *supra* note 24, at 12.

86 For a discussion of various grievance procedures, see *infra* Section II.A.1.

87 Mikkor, *supra* note 67, at 575–76.

88 *Id.* at 580.

89 *Id.*

90 *See id.*

91 *Id.*

92 *Id.*

93 *See* Fathi, *supra* note 24, at 13–14.

94 *See id.*

95 *See* Woodford v. Ngo, 548 U.S. 81, 95 (2006) ("When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories

tice and unfairness may occur where statutes of limitations are eliminated entirely.

2. *Inconsistent with Legislative Intent: Meritorious Claims Are Often Blocked from Receiving Fair Review by Judges*

Unfortunately, the exhaustion provision has prevented both frivolous *and* nonfrivolous claims from reaching Article III judges.[96] While the number of cases filed has consistently declined,[97] the number of successful cases has also proportionately declined.[98] If the PLRA had truly been successful in its efforts to prevent only frivolous claims from reaching federal courts, then the percentage of successful cases should have increased.

This suggests that the PLRA has not merely blocked frivolous claims from reaching the courts. Rather, "the PLRA has simply tilted the playing field against prisoners across the board."[99] In other words, all prisoners with complaints, whether frivolous or meritorious, face a nearly impossible obstacle in reaching the courts. This reality is an unintended result of the PLRA because the drafters of the bill, including Senator Orrin Hatch, "d[id] not want to prevent inmates from raising *legitimate claims*."[100]

B. *Dismissals for Failure to Exhaust*

Federal courts have interpreted exhaustion strictly, dismissing serious claims brought by juveniles based on a failure to exhaust. For example, in *Brock v. Kenton County*,[101] a juvenile inmate alleged that while handcuffed and defenseless, prison officers "hit him and used a stun gun on him."[102] Although the juvenile did not know nor have reason to know about the grievance system, the Sixth Circuit held that Brock's failure to exhaust his administrative remedies barred his

are still fresh, and evidence can be gathered and preserved."); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954).

96 *See* Schlanger & Shay, *supra* note 33, at 148–49.

97 *See supra* note 57.

98 *See* FATHI, *supra* note 24, at 3.

99 *See id.*

100 141 CONG. REC. 27,042 (1995) (statement of Sen. Hatch) (emphasis added); *see also* 141 CONG. REC. 4,275 (1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.").

101 93 F. App'x 793 (6th Cir. 2004).

102 *Id.* at 795 (alleging also that an officer "grabbed him by the testicles and marched him down the hall to an isolation cell").

§ 1983 complaint.[103] The Southern District of Indiana similarly granted a motion for summary judgment in favor of the prison-official defendants in a case where a juvenile alleged that "the Superintendents . . . failed to protect him from assault . . . and caused him to be placed in an unsafe housing location."[104] The juvenile had not filed a timely grievance.[105]

In *Doe v. Cook County*,[106] the plaintiffs claimed that defendants had failed to protect "their rights to safety, freedom of punishment without trial, reasonably nonrestrictive confinement conditions, and reasonable care (including adequate food, shelter, education, and medical care)."[107] Despite the serious allegations, the Northern District of Illinois ruled that it was unclear whether there was exhaustion and thus directed the plaintiffs to file an amended complaint demonstrating that they had affirmatively exhausted all internal remedies.[108]

In 2016, the Western District of Washington dismissed a juvenile's claim of a constitutional violation of his freedom of religion for a failure to exhaust.[109] The plaintiff in *Bizzell v. King County Department of Adult & Juvenile Detention*[110] alleged three different claims related to his religious freedom.[111] For one of the dismissed claims, the court stated that he had failed to file a grievance.[112] For the remaining two claims, the court found that the plaintiff had filed, but failed to meet the five-day deadline to appeal the grievance staff's dismissal.[113]

C. An Exhaustion Exception

Although the Supreme Court has stated that it "will not read futility or other exceptions into [the PLRA's] statutory exhaustion requirements,"[114] district courts within the Second Circuit have recognized a limited exception to exhaustion, originating from the

---

103 *Id.* at 798–99.

104 M.C. *ex rel.* Crider v. Whitcomb, No. 1:05-cv-0162, 2007 WL 854019, at *1 (S.D. Ind. Mar. 2, 2007).

105 *Id.*

106 No. 99 C 3945, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

107 *Id.* at *1.

108 *Id.* at *4.

109 Bizzell v. King Cty. Dep't of Adult & Juvenile Det., No. C16-401, 2016 WL 6956831, at *1 (W.D. Wash. Oct. 24, 2016).

110 No. C16-401, 2016 WL 6956831 (W.D. Wash. Oct. 24, 2016).

111 *Id.* at *1.

112 *Id.* at *4–5 (claim "[r]egarding [h]is [o]mission from the July 2015 [l]ist for Ramadan" (emphasis omitted)).

113 *Id.* at *2–4 (claims "[r]egarding Jum'ah [s]ervices and [r]eligious [h]ead [c]overings" (emphasis omitted)).

114 Booth v. Churner, 532 U.S. 731, 741 n.6 (2001).

"*Hemphill* Framework": unavailability.[115] There are several different ways in which exhaustion may be considered unavailable. First, there is the possibility that remedies are literally unavailable—i.e., where the prisoner is incapacitated in some way such that he is physically unable to complete a grievance.[116] Second, there may be systemic unavailability if the correctional facility has not implemented a proper grievance system.[117] Finally, remedies may be effectively unavailable where prison staff have intervened in a manner as to threaten the safety of the prisoner should he file the grievance.[118] In *V.W. ex rel. Williams v. Conway*,[119] the Northern District of New York held that remedies were effectively unavailable when "staff consistently refus[ed] to provide grievance forms, ignor[ed] grievances, and in some cases thr[ew] grievances in the trash."[120] Absent this limited exception, however, courts will interpret exhaustion as mandatory for adults and juveniles alike.[121]

II. How the Criminal Justice System Fails to Protect Children and Why Reform Is Necessary

The PLRA, and all of its provisions, "applies by its plain terms to juveniles" both in juvenile facilities and in adult prisons.[122] Because children occupy a particularly vulnerable position in the incarceration context, this Note focuses on potential solutions only with respect to juveniles.

There are many reasons to believe that incarcerated juveniles stand on a different footing than their adult counterparts. These chil-

115 *See* Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004); Mikkor, *supra* note 67, at 597–98. The Framework originally allowed the district court to overlook a failure to exhaust where (1) administrative remedies were not available to the prisoner; (2) the defendants' actions prevented inmates from completing the exhaustion process; or (3) plaintiffs alleged "special circumstances." Mikkor, *supra* note 67, at 600–06. The Second Circuit, however, abrogated its own decision in 2016, clarifying that only the "unavailability" prong of the exception remains intact. *See* Riles v. Buchanan, 656 F. App'x 577, 581 (2d Cir. 2016) (citing Williams v. Priatno, 829 F.3d 118, 123 (2d Cir. 2016)).

116 *See* Mikkor, *supra* note 67, at 600–02.

117 *See id.*

118 *See id.* at 602–03.

119 236 F. Supp. 3d 554 (N.D.N.Y. 2017).

120 *Id.* at 585 (involving challenges to a prison's "routine imposition of solitary confinement" on juvenile inmates).

121 *See* Doe v. Cook Cty., No. 99 C 3945, 1999 WL 1069244, at *3 (N.D. Ill. Nov. 22, 1999).

122 Schlanger & Shay, *supra* note 33, at 152; *see* 18 U.S.C. § 3626(g)(5) (2012) ("[T]he term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law[.]").

dren are "often undereducated" with "very high rates of psychiatric disorders."[123] Their reading skills, conceptualization skills, maturity levels, lack of sophistication, and short attention spans all make it particularly difficult to follow strict grievance procedures.[124] Juvenile facilities do not provide incarcerated children access to law libraries.[125] While this is likely due to literacy rates amongst juvenile offenders, the absence of law libraries has a direct effect on their ability to learn their rights and understand what type of prison conditions they can successfully challenge.[126] Furthermore, the district court in *Minix v. Pazera*[127] suggested that children might not be able to rely on parents or guardians to guide them through the grievance process.[128] As a result of their inability to access useful resources—a law library and a parent's guidance, for example—incarcerated youth are held "to an impossibly high standard of self-reliance" to complete a complex grievance process.[129]

A. *Evidence of Systemic Abuse in Juvenile Correctional Facilities*

Although there is reason to believe assaults on incarcerated youth are underreported,[130] there is also ample evidence that serious issues occur in juvenile facilities—which is normally remedied by courts. A Human Rights Watch report in 2007 brought some of these problems to light.[131] The report detailed the sexual abuse by two high-ranking prison officials inside the West Texas State School and further highlighted the efforts of the DOJ to notify the governor of Texas of the constitutional violations occurring inside another facility.[132] Furthermore, the Bureau of Justice Statistics published harrowing statistics of sexual violence occurring in juvenile correctional facilities.[133] In

---

123 Schlanger & Shay, *supra* note 33, at 152.

124 FATHI, *supra* note 24, at 21 (referencing a telephone interview conducted by Human Rights Watch with Orlando Martinez, former director of juvenile corrections for the states of Georgia and Colorado, on April 16, 2009, although a transcript has not been made public).

125 Schlanger & Shay, *supra* note 33, at 152.

126 *Cf. id.* at 152–53.

127 No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005).

128 *Id.* at *4.

129 Schlanger & Shay, *supra* note 33, at 153.

130 *See* Woodford v. Ngo, 548 U.S. 81, 118 (2006) (Stevens, J., dissenting) (discussing the real possibility of a fear of retaliation).

131 *See generally* FATHI, *supra* note 24.

132 *See id.* at 34.

133 *See generally* RAMONA R. RANTALA & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SURVEY OF SEXUAL VIOLENCE IN JUVENILE CORRECTIONAL FACILITIES, 2007–12—STATISTICAL TABLES (2016), https://www.bjs.gov/content/pub/pdf/ssvjcf0712st.pdf [https://perma.cc/KCS9-PUUZ].

2012, there were 228 allegations of abusive sexual contact between youth and 133 allegations of sexual harassment against detention staff.[134]

In recognizing children's particular vulnerabilities, the DOJ investigated various allegations of constitutional violations occurring inside juvenile facilities.[135] In response to perceived violations, the DOJ issued Statements of Interest and negotiated agreements with the facilities in violation.[136]

For example, in February 2014, the DOJ filed a Statement of Interest in a class action lawsuit "challenging the solitary confinement policies and failure to educate youth with disabilities in the Contra Costa County Juvenile Hall."[137] "In 2010, the [DOJ] entered into a settlement agreement with the New York State Office of Children and Family Services . . . requir[ing] the state to provide youth in the facilities with reasonably safe living conditions as well as adequate and appropriate mental health care and treatment."[138] However, the DOJ is limited in its ability to investigate every single allegation of abuse.[139] Although the DOJ can assist in large-scale abuse investigations,[140] the DOJ's role alone cannot replace the duties of lawmakers to ensure the safety of children inside detention centers.

---

134 *Id.* at 7.

135 Two statutes provide the DOJ with the authority to investigate: (1) the Civil Rights of Institutionalized Persons Act, specifically, 42 U.S.C. § 1997a (2012); and (2) the Violent Crime Control and Law Enforcement Act of 1994, specifically, 42 U.S.C. § 14141 (2012). *Department of Justice Actions in Juvenile Justice*, NAT'L JUVENILE DEF. CTR., http://njdc.info/department-of-justice-actions-in-juvenile-justice/ [https://perma.cc/QU3K-PQWB]. Specifically, the DOJ Civil Rights Division, Special Litigation Section has the authority to conduct investigations. *Id.*

136 *Id.*

137 *Id.*; *see also* Statement of Interest of the United States of America at 2, G.F. v. Contra Costa Cty., No. 3:13-cv-03667-MEJ (N.D. Cal. Feb. 13, 2014).

138 *Department of Justice Actions in Juvenile Justice*, *supra* note 135; *see also* Settlement Agreement, United States v. New York (N.D.N.Y. July 14, 2010), http://njdc.info/wp-content/uploads/2015/10/Agreement-Regarding-NY-Juvenile-Facilities.pdf [https://perma.cc/UQ2H-QEGC].

139 The Civil Rights of Institutionalized Persons Act, specifically 42 U.S.C. § 1997a, "allows [the DOJ] to review conditions and practices within juvenile justice institutions." *Rights of Juveniles*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/rights-juveniles [https://perma.cc/Q97U-J3Q7] (last updated Sept. 14, 2017). However, under that statute, the DOJ has "no authority to assist with individual claims. [It] also cannot correct a problem in a federal facility or actions by federal officials. [It] do[es] not assist in criminal cases." *Id.* Furthermore, DOJ civil rights attorneys spend, on average, 6,000 hours on any given project, and "[f]rom initiation to conclusion, these cases often take years to complete." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FY 2017 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 37 (2016), https://www.justice.gov/jmd/file/820981/download [https://perma.cc/8Z5N-9DB3].

140 *See Rights of Juveniles*, *supra* note 139.

1. *Procedural Obstacles Make Children's Compliance with Grievance Procedures Difficult*

Many states' grievance procedures for juveniles suffer from problems that impede children's ability to obtain an effective resolution. First, many procedures impose an excessively short statute of limitations—for non–Prison Rape Elimination Act of 2003 ("PREA")[141] claims—for both filing the initial grievance and for filing the appeal.[142] Second, many procedures fail to specify whether a parent or guardian may file the grievance on behalf of their child.[143]

In Indiana, for example, juveniles are subjected to an even harsher statute of limitations than adults—where adults must submit grievances within twenty working days of the incident,[144] juveniles must submit grievances within a mere ten working days.[145] Similarly, Maine's grievance process for juveniles provides for a fifteen-day period in which the grievant must file, allowing a limited exception only if "the resident makes a clear showing that it was not possible for the resident to file the form within the fifteen (15) day period."[146] In North Carolina, juveniles are expected to file a grievance within a mere twenty-four hours of the incident.[147]

In some states, the problem is not necessarily with the statute of limitations, but rather with the amount of time allowed to appeal. For example, in Mississippi, the Division of Youth Services does not a provide specific time period in which grievances must be filed.[148] How-

---

141 Pub. L. No. 108-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601–15609 (2012)).

142 *See infra* Section IV.A.2.

143 *See infra* text accompanying notes 231–34.

144 Ind. Dep't of Corr., Offender Grievance Process 16 (2010), http://www.in.gov/idoc/files/00-02-301__Grievance_Procedure_1-01-10.pdf [https://perma.cc/4VAC-C2G5].

145 Ind. Dep't of Corr., Youth Grievance Process 7 (2015), http://www.in.gov/idoc/files/03-02-105__Youth_Grievance_Process_4-1-2015.pdf [https://perma.cc/LBK4-VRCS].

146 Maine's exception does not include incidents where "a resident was seeking assistance, gathering information, or conducting research." Me. Dep't of Corr., Resident Grievance Process, General 4 (2012), https://www.maine.gov/sos/cec/rules/03/201/c12s291.doc [https://perma.cc/MBH5-UP98].

147 N.C. Dep't of Juvenile Justice & Delinquency Prevention, Detention Services—Nondisciplinary Grievance Report (2004), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/North_Carolina_Dept_of_Juvenile_Justice_Delinquency_Sample_Grievance_Form.pdf [https://perma.cc/DE4H-WFEV].

148 Miss. Dep't of Human Servs., Div. of Youth Servs. Juvenile Insts., Youth Grievance 2 (2012), http://www.mdhs.ms.gov/wp-content/uploads/2018/01/XV2-Youth-Grievanc.pdf [https://perma.cc/U24P-UYY9].

ever, the grievance procedures explicitly state that juveniles only have forty-eight hours to *appeal* a decision by a grievance officer.[149]

In contrast, other states have imposed exemplary grievance procedures, particularly those which do not specify a statute of limitations period for either initial filing of the grievance or appeals. For example, Georgia does not impose a single statute of limitations upon juveniles wishing to file a grievance; it also requires grievance officials to issue a response within seventy-two hours, and a "final agency decision" within five days.[150] Furthermore, Georgia's procedure instructions specify that anyone may file a grievance on behalf of the juvenile, although it must be reviewed by the Office of the Ombudsman, rather than through the normal procedures.[151]

2. *An "Exception" to the Statute of Limitations in Grievance Procedures*

For claims related to rape or sexual victimization, exhaustion of administrative remedies is still required.[152] But the PREA provides specific standards for these types of claims.[153] Congress enacted the PREA in 2003 to address "the serious problem of prison rape and sexual abuse."[154] Pursuant to the statute, the DOJ promulgated additional regulations within 28 C.F.R. § 115.352 in 2012.[155] The regulations specify that "[t]he agency shall not impose a time limit on when

149 *Id.* at 4.

150 GA. DEP'T OF JUVENILE JUSTICE, GRIEVANCE PROCESS 4–5 (2015), http://www.djj.state.ga.us/Policies/DJJPolicies/Chapter15/DJJ15.2GrievanceProcess.pdf [https://perma.cc/JB4N-R8VH]; *see also* OR. YOUTH AUTH., Youth Grievance Process 2 (2013) (specifying there is "no time limit on when a youth may file a grievance"), http://www.oregon.gov/OYA/policies/II-F-1.1.pdf [https://perma.cc/T8AM-YUT8].

151 *Id.* at 3–4.

152 *See* 28 C.F.R. § 115.352 (2017); *see also* Alex Friedmann, *Prison Rape Elimination Act Standards Finally in Effect, but Will They Be Effective?*, PRISON LEGAL NEWS (Sept. 15, 2013), https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/ [https://perma.cc/CFH2-UWU4] ("[P]risoners are still required to exhaust available administrative remedies . . . .").

153 *See* Friedmann, *supra* note 152.

154 *Id.*

155 28 C.F.R. § 115.352. Considered by some as "the most significant law reform project undertaken on U.S. prison issues in the twenty-first century[,] . . . Congress passed [the] PREA unanimously in 2003." Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 802 (2014). The PREA was a bipartisan bill, and one of the lead sponsors was then-Senator and now–Attorney General Jeff Sessions. Friedmann, *supra* note 152. It took another nine years, until 2012, for the DOJ to "promulgate[] long-awaited implementing regulations, pursuant to the statutory mandate to detect, prevent, reduce, and punish prison rape." *Id.* These regulations were promulgated in 28 C.F.R. pt. 115.

a resident may submit a grievance regarding an allegation of sexual abuse."[156] Thus, there is no statute of limitations for claims alleging sexual abuse. The DOJ's regulation also states that a "resident who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint"[157]—and further mandates that "[s]uch grievance is not referred to a staff member who is the subject of the complaint."[158] Theoretically, such grievances then never reach the hands of the alleged perpetrator. Finally, the DOJ's regulations include that "[t]hird parties . . . shall be permitted to assist residents in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of residents."[159]

Although the PREA—and the DOJ's accompanying codified regulations—provide promising steps to curtail sexual assaults in prisons and bind the Federal Bureau of Prisons, the laws are not directly binding on state agencies.[160] In an attempt to impose the PREA's requirements on state detention facilities, the statute provides financial incentives.[161] But this enforcement mechanism is weak at best. After an audit once every three years,[162] "[i]f an agency's facilities are not in full compliance with [the] PREA, its qualifying federal grants may be reduced by five percent."[163] One might surmise that "the withdrawal of a relatively small percentage of funds may not seem an overwhelming threat."[164]

In addition to weak enforcement on state institutions, the PREA is limited to claims of rape or sexual assault, and the statute does not impose an actual exception to exhaustion despite the seriousness of the claims. Ultimately, the PREA does, however, provide guidance as to what ideal grievance procedures should resemble.[165]

---

156 28 C.F.R. § 115.352(b)(1).

157 *Id.* § 115.352(c)(1).

158 *Id.* § 115.352(c)(2).

159 *Id.* § 115.352(e)(1); *see also id.* § 115.352(e)(2) ("If a third party, other than a parent or legal guardian, files such a request on behalf of a resident, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.").

160 *See* Arkles, *supra* note 155, at 806.

161 *See id.* at 806; *see also* 42 U.S.C. § 15607(c) (2012); 28 C.F.R. § 115.401(a).

162 28 C.F.R. § 115.401(a).

163 Arkles, *supra* note 155, at 806; *see* 42 U.S.C. § 15607(c).

164 Arkles, *supra* note 155, at 806.

165 *See infra* Section IV.A.2 (solution influenced by the PREA).

III. Immaturity and Vulnerability: The Supreme Court's Reasons for Treating Children Differently in the Criminal Justice Context

There are certainly contexts in which children are treated differently than adults. Children are not allowed to "smoke, drink, vote, drive without restrictions, give blood, [or] buy guns," amongst numerous other constraints.[166] These restrictions reflect society's understanding that children lack the maturity and judgment to engage in certain activities.[167] With recent opinions, the Supreme Court has added criminal justice to the various contexts in which juveniles should not be held to the same standard as adults.

A. Supreme Court Opinions Reflecting the Differences Between Children and Adults

There are four seminal Supreme Court cases outlining the rationale for treating children differently than adults: *Roper v. Simmons*,[168] *Graham v. Florida*,[169] *Miller v. Alabama*,[170] and *J.D.B. v. North Carolina*.[171] The former three involve questions of punishment, while *J.D.B.* marks an important shift by finding that children should also be treated differently outside of the punishment context.[172]

In *Roper*, Justice Kennedy, writing on behalf of the majority, held the death penalty to be "disproportionate punishment" for offenders who committed an offense before turning eighteen years old.[173] *Roper* thus barred capital punishment for juvenile offenders.[174] The Court relied on "evidence of national consensus against the death penalty for juveniles," noting that "30 States prohibit the juvenile death penalty," while "the practice is infrequent" in the states that do not have the prohibition.[175] Furthermore, "no State that previously prohibited capital punishment for juveniles has reinstated it."[176] The Court con-

166 Bryan Stevenson, Just Mercy 270 (2015).

167 *Id.*

168 543 U.S. 551 (2005).

169 560 U.S. 48 (2010).

170 567 U.S. 460 (2012).

171 564 U.S. 261 (2011).

172 *See generally id.*

173 *Roper*, 543 U.S. at 575; Kimberly P. Jordan, *Kids Are Different: Using Supreme Court Jurisprudence About Child Development to Close the Juvenile Court Doors to Minor Offenders*, 41 N. Ky. L. Rev. 187, 188–90 (2014).

174 *See Roper*, 543 U.S. at 578.

175 *Id.* at 564.

176 *Id.* at 566.

cluded that "our society views juveniles . . . as 'categorically less culpable than the average criminal.' "[177]

The *Roper* Court further discussed the particular reasons why juveniles cannot be "classified among the worst offenders," such that they would be subject to the death penalty.[178] Justice Kennedy noted that juveniles' lack of maturity "often result[s] in impetuous and ill-considered actions and decisions."[179] The majority also recognized that this lack of maturity and diminished sense of responsibility has led almost every State to prohibit juveniles "from voting, serving on juries, or marrying without parental consent."[180] Additionally, the Court noted that "juveniles are more vulnerable or susceptible to negative influences and outside pressures," partially because "juveniles have less control, or less experience with control, over their own environment."[181] Because of these differences and societal consensus, the Court in *Roper* held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty" for juvenile offenders.[182]

Five years after the *Roper* decision, the Court, in *Graham v. Florida*, determined that a juvenile also could not be imprisoned for life without parole for a nonhomicide offense.[183] The Court again noted that there is a "national consensus" against lifetime imprisonment of juveniles for nonhomicide offenses, citing the infrequency of such sentences nationwide.[184] Because "[c]ommunity consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual,"[185] the majority in *Graham* revisited the various characteristics differentiating juveniles from adults as outlined in *Roper*.[186] Because "[n]o recent data provide[d] reason to reconsider the [*Roper*] Court's observations," the *Graham* Court adopted the same understanding.[187]

Following in *Graham*'s footsteps, in 2012, the Court in *Miller v. Alabama* held that sentencing a juvenile to life in prison without the possibility of parole constituted "cruel and unusual punishment," re-

---

177 *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

178 *Id.* at 569.

179 *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

180 *Id.*

181 *Id.*

182 *Id.* at 578.

183 Graham v. Florida, 560 U.S. 48, 82 (2010); *see* Jordan, *supra* note 173, at 190.

184 *Graham*, 560 U.S. at 62–63 (noting that "nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses").

185 *Id.* at 67 (quoting Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)).

186 *See id.*

187 *Id.* at 68.

gardless of whether the crime was a homicide.[188] Justice Kagan, writing for the Court, clarified the precedent: "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."[189] The *Miller* Court again noted the same character traits pertinent to making such a conclusion, relying on both common sense and psychological studies.[190] Also, the *Miller* Court extended *Graham*'s reasoning to homicide offenses, explaining that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[191] Therefore, it was reasonable for the Court to broaden *Graham*'s scope to homicide offenses.

The Supreme Court has also found that the differences between adults and children require consideration even at the arrest stage, further supporting the argument that the criminal justice system should treat juveniles differently. In *J.D.B. v. North Carolina*, the Court held that a judge must consider a juvenile suspect's age when completing *Miranda* custody analysis.[192] *J.D.B.* involved the criminal justice system's first contact with juveniles: the arrest.[193] Thus, the case was not about sentencing. The Court determined that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[194] Again, the *J.D.B.* Court drew commonsense conclusions, namely that "children 'generally are less mature and responsible than adults[]'; that [children] 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them[]'; [and] that [children] 'are more vulnerable or susceptible to . . . outside pressures' than adults."[195]

J.D.B. was a monumental decision in that it "open[ed] the door to a discussion about the juvenile justice system as a whole."[196] The discussion about the juvenile justice system is no longer limited to sentencing procedures, and there is finally an opportunity for progress in other circumstances where juveniles are unjustly affected.

---

188 Miller v. Alabama, 567 U.S. 460, 489 (2012); *see* Jordan, *supra* note 173, at 190–91.

189 *Miller*, 567 U.S. at 471.

190 *See id.* at 471–72.

191 *Id.* at 473.

192 *See* J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011).

193 *See id.* at 264; Jordan, *supra* note 173, at 191.

194 *J.D.B.*, 564 U.S. at 272.

195 *Id.* (sixth alteration in original) (citations omitted) (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); then quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion); and then quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

196 Jordan, *supra* note 173, at 192.

B. *Why Supreme Court Precedent Demands Change in the Custody Context*

The Supreme Court opinions highlighted above—reflecting upon the distinctions between children and adults and ensuring the requisite protections for juveniles at both the arrest and sentencing stages—necessitate the next critical change: protection for children while in *custody*.

In each of these cases, the Court has identified several features uniquely present in juveniles that indicate that children should be treated differently. Pertinently, the Court has identified both immaturity and vulnerability as two key differentiating characteristics in children.[197]

First, immaturity in juveniles is crucial to understanding the grievance process because it is a character trait that leads children to make wrong decisions or succumb to peer pressure when faced with stressful situations.[198] When faced with a difficult situation behind prison walls, juveniles often fail to make the appropriate decision, such as quickly reporting an incident and following all requisite filing protocols.[199] As a result of children's lack of "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,"[200] it might take longer for children to report an incident. It is also exceptionally difficult for children to abide by each step in the grievance process because they are provided more opportunities to make wrong decisions or give up altogether. Understanding immaturity, and how it affects juveniles, requires the criminal justice system to be more lenient to account for this difference.

Second, juveniles are generally more vulnerable than adults.[201] This vulnerability is even more pronounced in detention facilities, where juveniles are likely at risk, neglected, impaired, and up to eight times more likely to suffer from post-traumatic stress disorder than the general community.[202] Because "juveniles have less control, or less

---

197 *Id.* at 196–97; *see also Supreme Court Decision Affirms Justice System Must Treat Youth Differently*, ANNIE E. CASEY FOUND. (Jan. 25, 2016), http://www.aecf.org/blog/supreme-court-decision-affirms-justice-system-must-treat-youth-differently/ [https://perma.cc/CX7H-ZKRS] (mentioning children's lack of maturity as something that leads to recklessness and impulsiveness).

198 Jordan, *supra* note 173, at 197.

199 *Cf. id.*

200 *J.D.B.*, 564 U.S. at 272 (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)).

201 *Id.*

202 Jordan, *supra* note 173, at 197; *see* STEVENSON, *supra* note 166, at 270. Post-traumatic stress disorder ("PTSD") "is a mental health problem that some people develop after experienc-

experience with control, over their own environment,"[203] they are susceptible to abuse in prison. By the same rationale, juveniles are also susceptible to pressure to allow the abuse to persist rather than calling attention to it, particularly in situations where they have to report the incident to the perpetrator of the abuse.[204] Further, juveniles might not wish to report constitutional violations through the internal grievance process out of fear of repercussions.[205] Accordingly, the system must account for this vulnerability by providing greater protections over these children and allowing more lenience with respect to the reporting protocol.

IV. Changing How Juveniles Are Treated in Custody

Taking into account the immaturity and vulnerability distinguishable in children, as well as evidence of systemic abuse in juvenile facilities, this Note recommends a solution for Congress to implement and standards for the DOJ to formally recommend. Under this proposal, the internal grievance procedures would remain available if the minor wished to utilize them, but compliance with such procedures would not be required to file suit for federal civil rights violations.

A. *Amending the Prison Litigation Reform Act to Exempt Juveniles from Exhaustion*

First, Congress should amend the PLRA to create an exception to the exhaustion requirement for juveniles. The proposed amendment would read as follows: "Minors housed in either juvenile or adult facilities who wish to file suit against a member of the prison staff for federal civil rights violations are exempted from the exhaustion process."

An exhaustion exception will allow juveniles to file suit directly with the court, rather than first exhausting the internal grievance process.[206] The purpose of this amendment is to resolve the accountability problem and ensure that prison staff are not placed in a position

---

ing or witnessing a life-threatening event, like combat, a natural disaster, a car accident, or sexual assault." *PTSD: National Center for PTSD*, U.S. Dep't of Veterans Aff., https://www.ptsd.va.gov/public/ptsd-overview/basics/what-is-ptsd.asp [https://perma.cc/SN8K-SA9M] (last updated Sept. 15, 2017). The symptoms of PTSD include: "[r]eliving the event," "[a]voiding situations that remind you of the event," "[h]aving more negative beliefs and feelings," and "[f]eeling keyed up." *Id.*

203 Roper v. Simmons, 543 U.S. 551, 569 (2005).

204 *Cf.* Jordan, *supra* note 173, at 197.

205 *Cf. id.*; Woodford v. Ngo, 548 U.S. 81, 118 & n.14 (2006) (Stevens, J., dissenting).

206 *See* 42 U.S.C. § 1997e(a) (2012).

where there is a conflict of interest.[207] The status quo requires prison staff to review all grievance requests, including those against themselves and their peers.[208] This inherent bias provides the staff with a clear incentive to dismiss or deny grievance requests.[209] Therefore, Congress should amend the PLRA by adding the language of the exception directly into the text of the PLRA.

Critics may be concerned by a proposal to eliminate exhaustion because it might increase prisoner litigation or create precedent for future exceptions. With respect to an increase in prisoner litigation, however, history proves that any increase will almost certainly be de minimis.[210] When Congress drafted the PLRA, it was not concerned with juveniles filing suit; in fact, juveniles had produced very little litigation up to that point in 1996.[211]

In response to creating precedent for future exceptions, this Note focuses on the unique problem with respect to children, not adults. This Note should not be read as encouraging a complete elimination of the exhaustion requirement; nor does it argue that the exhaustion provision is inherently flawed.[212] Rather, it recognizes that children in custody are particularly vulnerable. Recent Supreme Court precedent demands that the criminal justice system treat juveniles differently and protect them as they would children not in custody.[213] In other words, it is the distinguishing characteristics of children which require such an exemption for children.[214]

Thus, Congress should pass a limited exception which reflects the problems inherent in the juvenile criminal justice system. Devising an exception only for juveniles is a workable solution that will have a positive impact on society's most vulnerable citizens, and also prevent a crippling increase in litigation.[215]

---

207 *See supra* Section I.A.1.

208 *See supra* Section I.A.1.

209 *See supra* Section I.A.1.

210 *See* Schlanger & Shay, *supra* note 33, at 154.

211 *See id.*; *see also* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. Rev. 675, 681 (1998) (explaining that in the twenty years prior to the PLRA's enactment, there were "[fewer] than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers").

212 Exhaustion for adult prisoners "reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court." Woodford v. Ngo, 548 U.S. 81, 94 (2006). Exhaustion also "provides prisons with a fair opportunity to correct their own errors." *Id.*

213 *See supra* Part III.

214 *See supra* Section III.B.

215 *See, e.g.*, Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 Geo. Wash. L. Rev. 1, 32, 40–41 (1985).

B. *Formal Recommendations for State and Local Officials to Improve Grievance Procedures for Minors*

One can presume that some minors will prefer to use the internal grievance process rather than the court system, especially where these individuals require more immediate relief.[216] Because juveniles are particularly vulnerable to the procedural hurdles already implemented,[217] this Note proposes that the DOJ Civil Rights Division make formal recommendations to correctional facilities to alter the grievance procedures for minors. These formal recommendations would take the form of a report providing "guiding principles" and would closely mirror the DOJ regulations already codified from the PREA.[218]

There are three main areas for improvement, with the understanding that a failure to comply with these instructions may result in dismissal of the prison officials: (1) the statute of limitations;[219] (2) allowing prison officials to review grievances where they are a subject of the grievance itself;[220] and (3) the ability of parents or guardians to file

216 Some experts have suggested that incarcerated children have a short attention span and, thus, wish to resolve their issues as quickly as possible. *See, e.g.*, FATHI, *supra* note 24, at 31. With abbreviated statutes of limitations and a brief (often scant) investigative period, it is commonly understood that the grievance process results in a shorter time frame in which relief may be granted as compared to the litigation process. *See, e.g.*, *supra* Section I.A.1. Therefore, depending on the allegations, incarcerated youth might wish to file a grievance rather than pursue formal litigation.

217 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005).

218 28 C.F.R. § 115.352 (2017). The DOJ has used this exact method before when it published a report and recommendations in January of 2016. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (2016), https://www.justice.gov/archives/dag/file/815561/download [https://perma.cc/J9MT-XHG7]. "The Report includes more than 50 'Guiding Principles,' which are intended as best practices for correctional facilities across the American criminal justice system." *Id.* at 2. The purpose in providing these principles is to give a "roadmap for correctional systems seeking direction on future reforms." *Id.* Importantly, the "Guiding Principles do not have the force of law" and "implementation and application of these Guiding Principles involve the exercise of judgment of relevant Department officials." *Id.* at 2 n.1. Thus, this portion of the solution would be discretionary. Ideally, these recommendations would be binding at least on the Federal Bureau of Prisons, similar to the PREA. *See* 42 U.S.C. § 15607(b) (2012). But they can only be binding if there is a direct statutory mandate from Congress. *See* 28 C.F.R. pt. 115; Arkles, *supra* note 155, at 802. Thus, Congress would need to draft an entirely new bill, similar to the PREA, that applies solely to juvenile facilities, and the waiting process for the DOJ to fashion new regulations in accordance with their statutory mandate could take as long as nine years, as it did with the PREA. *See* Arkles, *supra* note 155, at 802. Therefore, as an initial step, the DOJ should publish nonbinding formal recommendations and monitor both the short-term and long-term progress.

219 *See, e.g.*, Mikkor, *supra* note 67, at 575–76.

220 *See supra* Section I.A.1.

grievances on behalf of their children.[221] Minimal guidance in these areas can positively change the lives of detained children. Thus, the DOJ Civil Rights Division should make formal recommendations to the department of corrections officials to implement specific changes in their juvenile grievance procedures for those who wish to utilize the internal grievance process. The recommendations should be modeled as follows:

> Grievance procedures directed towards juveniles shall include
> (1) a minimum forty-five-day statute of limitations with respect to filing, with a guarantee that those forty-five days do not include days during which the grievant is physically incapable of filing;
> (2) a minimum twenty-day statute of limitations with respect to any appeal;
> (3) a provision expressly providing that the subject of the complaint will not receive the grievance; and
> (4) a provision explicitly stating that parents and/or guardians may assist with or complete the grievance forms on behalf of the juvenile.[222]

Beginning with the statute of limitations, there are two separate issues: (1) the statute of limitations with respect to the initial filing and (2) the statute of limitations with respect to the appeals process. Although some states implement exemplary grievance procedures that do not contain an explicit statute of limitations, and the PREA requires no statute of limitations for claims of sexual violence,[223] other states implement a statute of limitations for non-PREA claims that is entirely too short, even as brief as twenty-four hours.[224] For a child navigating this system alone, these short deadlines can be impossible to meet. And because failure to file within the statute of limitations likely results in a complete bar in pursuing relief from the prison staff,[225] many meritorious claims are left unresolved, leaving these vulnerable children without any remedies for the injustices they suffered. Even if children have timely filed their initial grievance, they often

---

221 *See supra* Introduction; *see also* Minix v. Pazera, No. 1:04 CV 447 RM, 2005 WL 1799538, at *2 (N.D. Ind. July 27, 2005).

222 The language of the proposed recommendations closely mirrors the regulations imposed by the DOJ for the PREA. *See supra* text accompanying notes 156–159.

223 *See, e.g.*, 28 C.F.R. § 115.352(b)(1) (2017); GA. DEP'T OF JUVENILE JUSTICE, *supra* note 150, at 3–4.

224 *See, e.g.*, N.C. DEP'T OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 147.

225 Schlanger & Shay, *supra* note 33, at 148.

have to meet even stricter deadlines if they seek to appeal the prison staff's decisions.[226]

The clearest method of resolving both problems inherent with a brief statute of limitations and the inconsistencies between states is to recommend a minimum statute of limitations for juveniles. The final number decided must strike a difficult but careful balance—too short a time period results in the problems outlined in this Note, while too long a time period makes it difficult for prison staff to properly investigate the issue.[227]

This Note recommends enacting a *forty-five day minimum* statute of limitations with respect to the initial filing, with a guarantee that those forty-five days do not include days during which the juvenile grievant is physically incapable of filing.[228] With respect to appeals, this Note proposes a minimum of a *twenty-day* statute of limitations.

There is also the possibility that the subject of the grievance will be one of the officers reviewing the grievance.[229] If this occurs, or if the child at least believes so, then children vulnerable to abuse will be unlikely to file due to fear of retaliation from that officer.[230] Thus, the DOJ should include in its formal recommendations that officers who are named a party in the grievance may not review the grievance under any circumstance.

Finally, the last issue concerns whether parents or guardians may file a grievance on behalf of their children. There is not necessarily a clear answer to this question. *Minix* highlights the problem with the ambiguity. Chief Judge Miller confusingly asserts both that there was "no basis upon which Mrs. Minix ha[d] standing to assert the rights" of her son and that "inconsequential variance from the prescribed process should not trump substance."[231] Judge Miller retracted on this question of "standing" by claiming that substance should trump form anyway—in other words, that Mrs. Minix could in fact file a grievance on behalf of her son.[232] But Judge Miller quickly moved away from a useful conclusion by finding, "Mrs. Minix's efforts were not directed

226 *See, e.g.*, MISS. DEP'T OF HUMAN SERVS., *supra* note 148, at 2, 4 (failing to provide a statute of limitations for the initial filing, but allowing for only forty-eight hours to appeal).

227 *See supra* Section I.A.

228 For example, the grievant would be physically incapable of filing when he is hospitalized or in a solitary confinement cell.

229 *See* Mikkor, *supra* note 67, at 579, 581.

230 *Cf.* Jordan, *supra* note 173, at 197 (explaining that children's potential for making poor choices increases under stress).

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

232 *See id.*

to the proper people, did not contain the information needed, and did not issue within anything near the prescribed time."[233]

Some might read this interpretation as implying that parents can file on behalf of their child so long as they file properly according to the grievance requirements. Others may assume that parents cannot successfully file grievances on behalf of their children. To resolve this confusion, at least one state clarifies in its grievance procedure instructions that parents may file.[234] But this creates another perplexity: whether those states lacking an explicit clause bar the parents from filing on their children's behalf. To ensure compliance amongst prison staff and courts, therefore, the DOJ should recommend that parents or guardians may assist or file a grievance on behalf of the juvenile for individuals *under the age of eighteen*.

C. Alternative Options

Besides maintaining the status quo, there are alternative options to this Note's proposal. For example, one author examined the approach of solving the exhaustion problem by applying the "Hemphill Framework."[235] The "Hemphill Framework" is a judge-made exception to exhaustion applicable in the Second Circuit.[236] While the "Hemphill Framework" is a positive step because it "tak[es] into account the constraints on a prisoner's ability to exhaust,"[237] the framework falls short of having a concrete impact for multiple reasons.

First, although the "Hemphill Framework" originally included three categories of exceptions—unavailability, estoppel, and special circumstances[238]—the Second Circuit recently concluded that only unavailability is a proper exception to exhaustion.[239] Thus, the recently revised "Hemphill Framework" is relatively limited.

Second, proving unavailability under the "Hemphill Framework" depends heavily on the facts of any given case and, thus, on the way those facts are presented in the courtroom.[240] However, many prison-

---

233 *Id.*

234 *See* GA. DEP'T OF JUVENILE JUSTICE, *supra* note 150. Additionally, the DOJ regulations associated with the PREA also require this clarification. 28 C.F.R. § 115.352(e)(1) (2017).

235 Mikkor, *supra* note 67, at 597–98.

236 *See* Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004), *abrogated by* Riles v. Buchanan, 656 F. App'x 577, 581 (2d Cir. 2016).

237 Mikkor, *supra* note 67, at 599.

238 *See supra* note 115 and accompanying text.

239 *Riles*, 656 F. App'x at 581 (citing Williams v. Priatno, 829 F.3d 118, 123 (2d Cir. 2016)).

240 Mikkor, *supra* note 67, at 599–600.

ers' rights actions are commenced pro se, and "the skilled presentation of a justification narrative" is therefore unlikely.[241]

Third, while judicially made "laws" can often be effective as a framework that other courts may rely upon, the vast majority of courts—including outside the scope of the Second Circuit's jurisdiction—are not bound by this framework. The problems outlined in this Note would be better resolved by the federal legislature to ensure compliance. Further, a complete exception will ensure that minors' rights are protected without having to provide a specific rationale in court for a failure to exhaust.[242]

Alternatively, this Note could have suggested only amending the PLRA to exempt juveniles and ignored recommending changes to existing juvenile grievance procedures. However, such a limited solution ignores the fact that many children will still prefer utilizing the grievance process rather than courts.[243] An amendment creating an exception will not, and should not, eliminate the juvenile grievance process. When a child seeks more immediate relief, the child might prefer using the grievance process first.[244] Thus, there should be changes to the grievance procedures to ensure that each juvenile's claim is reviewed in the most reasonable way possible.

Another author suggested that "[t]he exhaustion provision should not be eliminated, but rather amended to require that prisoners' claims be presented in some reasonable form to corrections officials prior to adjudication, even if that presentment occurs after the prisons' grievance deadline."[245] But it is unclear what this suggestion would solve. Notification is problematic because many juveniles fail to report abuses for the very reason that they fear retaliation.[246] Forcing juveniles to notify staff, particularly where the allegations are against a particular staff member, will likely do more harm than good and will also likely deter juveniles from reporting abuse altogether.

Conclusion

Recent Supreme Court jurisprudence has introduced a change in philosophy and policy with respect to juveniles who enter the criminal justice system. These changes necessitate further reform for juveniles

---

241 *Id.* at 600.

242 *See supra* text accompanying notes 239–40.

243 *See supra* note 211 and accompanying text.

244 *See supra* note 216.

245 Schlanger & Shay, *supra* note 33, at 151–52.

246 *Cf.* Jordan, *supra* note 173, at 197.

in custody. First, Congress should amend the PLRA to exempt children from the exhaustion provision. Second, because many children will still wish to use the internal grievance program, the DOJ Civil Rights Division should make formal recommendations to state and local officials in amending their current grievance procedures. Often alone, children should not be expected to successfully navigate complex administrative grievance procedures when alleging serious constitutional violations. As society's most vulnerable, all children should be guaranteed protection.