"ON THE BOOKS" IN THEORY, "UNAVAILABLE" IN PRACTICE: THE IMPACT OF THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT ON TRANSGENDER PEOPLE IN CUSTODY

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In 1996, Congress passed the Prison Litigation Reform Act (PLRA) with the goal of limiting the number of frivolous federal lawsuits filed by people in custody. One of the PLRA's key provisions is the exhaustion requirement, which requires people in custody to attempt to resolve their grievances within the prison before federal courts can hear their claims. Legal scholars who write about transgender people in custody often analyze the merits of claims but give little attention to the procedural roadblocks posed by the PLRA and its exhaustion provision. And PLRA scholars have yet to examine the exhaustion provision from a trans-informed lens. Thus, there exists a scholarly gap in two directions.

Drawing on a survey of federal case law and original interviews conducted with legal advocates, this Note argues that the exhaustion provision stands as a nearly insurmountable barrier to trans people's ability to remedy the challenges they face in custody. Unsurprisingly, the PLRA's exhaustion requirement burdens trans people in ways it burdens non-trans people. But it also burdens trans people in exacerbated or wholly specific ways. As a result, the exhaustion requirement systematically prevents trans people from resolving their non-frivolous grievances and leaves them vulnerable to continued abuse in prisons.

In addition to its doctrinal contribution, this Note also centers trans people's experiences in a way that most case law does not. The goal of this Note is to call attention to the specific hardships trans people face while incarcerated and offer small- and large-scale solutions to ensure that they have meaningful access to justice.

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TABLE OF CONTENTS

INTRODUCTION 676

I. INCARCERATED TRANSGENDER PEOPLE AND THE PLRA'S EXHAUSTION REQUIREMENT: A GAP IN THE LITERATURE 679

A. Transgender People in Custody, Their Challenges, and Their Legal Claims 680

1. Exposure of Transgender People to the Criminal Legal System 680

2. Harms and Remedies for Transgender People in Custody 681

B. The PLRA, the Exhaustion Provision, and Its Scholarly Criticism 687

1. The Prison Litigation Reform Act 687

2. Criticisms of the Exhaustion Requirement 691

C. Gap in the Literature from Two Angles 693

II. CHALLENGES THE PLRA'S EXHAUSTION REQUIREMENT PLACES ON TRANSGENDER PEOPLE IN CUSTODY 695

A. Analytical Approach 695

1. Theoretical Perspective 695

2. Methodology 696

B. Impact of the PLRA's Exhaustion Provision on Incarcerated Transgender People 698

1. The Pre-Grievance Period 698

2. The Grievance Period 701

3. In Court 705

III. SOLUTIONS TO HELP TRANSGENDER PEOPLE IN CUSTODY RESOLVE THEIR GRIEVANCES AND OBTAIN ACCESS TO JUSTICE 716

A. Accounting for Emergency Situations 716

B. Expanding the Judicial Interpretation of "Unavailable" in the First and Third *Ross* Scenarios 719

C. Implementing LGBTQ Coordinators 722
D. Large-Scale Change 723
CONCLUSION 724

INTRODUCTION

Jason Harmon, a non-binary person, was incarcerated at California State Prison, Los Angeles County (LAC)—a male prison—on January 18, 2018.[1] Harmon's cellmate soon after threatened Harmon with sexual assault because of Harmon's gender identity.[2] Harmon alerted an LAC staff member, Officer Bridgeforth, but Bridgeforth laughed at Harmon, encouraged Harmon's cellmate to commit the assault, and warned Harmon not to file a complaint about Bridgeforth's actions.[3] Harmon was sexually assaulted within weeks of entering LAC.[4]

Harmon lodged an internal complaint with their prison describing the incident and pleading for help, but troubles continued. One LAC official, Officer Lewandowski, deliberately misgendered Harmon and engaged in a "months-long campaign of harassment designed to coerce Mx. Harmon to withdraw their complaints."[5] That official also refused to move Harmon to a new facility—in violation of California law—and instead assigned Harmon to a unit inhabited by Harmon's "known enemies."[6] Harmon then attempted to take their own life through overdose.[7] All the while, another prison staff member, Officer Rosales, threatened to kill Harmon, encouraged them to attempt suicide, and failed to seek medical attention after witnessing Harmon's overdose.[8]

Harmon survived,[9] and, unable to find recourse within their prison, sought redress in federal court. Harmon brought "one count of

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1. Opening Brief of Appellant Jason Harmon at 1, Harmon v. Lewandowski, 2023 WL 2570425 (9th Cir. Mar. 20, 2023) (No. 22-55396).
2. *Id.* at 6.
3. *Id.* at 1, 6.
4. *Id.* at 1, 8.
5. *Id.* at 1, 8–9.
6. *Id.* at 2, 10.
7. *Id.* at 2, 11.
8. *Id.*
9. Other gender non-conforming individuals have not survived prison mistreatment. In 2019, Layleen Xtravaganza Cubilette-Polanco, a trans woman incarcerated at Rikers Island for committing a misdemeanor, was found dead in her solitary confinement cell after suffering a seizure. Kate Sosin, *New Video Reveals Layleen Polanco's Death at Rikers Was Preventable, Family Says*, NBC NEWS (June 13, 2020), https://www.nbcnews.com/feature/nbc-out/new-video-reveals-layleen-polanco-s-death-rikers-was-preventable-n1230951 [https://perma.cc/6389-Q7S8]. Practitioners have argued that the inflexibility of her prison's grievance procedure may have prevented her from obtaining timely medical attention that could have

Failure to Protect under 42 U.S.C. § 1983 against Bridgeforth, one count of Retaliation for Filing Grievances under 42 U.S.C. § 1983 against Lewandowski, and one count of Failure to Provide Necessary Medical Treatment under 42 U.S.C. § 1983 against Rosales."[10] The Central District of California granted summary judgment for the three officer defendants, however, holding that Harmon failed to properly exhaust their administrative remedies with respect to each of the claims, as is required under the Prison Litigation Reform Act (PLRA).[11] Harmon appealed to the Ninth Circuit, arguing that they did exhaust their administrative remedies or that such remedies were not available to them.[12] The Ninth Circuit, however, affirmed, finding that Harmon had failed to exhaust their claims against any of the three defendants.[13] Thus, the PLRA precluded Harmon from recovering for the harms they endured at the hands of these three prison officials.[14]

In 1996, Congress passed the PLRA with the goal of limiting the number of frivolous lawsuits filed by people in custody[15] in federal

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saved her life. ASHE MCGOVERN ET AL., FIRST REPORT OF THE TASK FORCE ON ISSUES FACED BY TGNCNBI PEOPLE IN CUSTODY 90 (2022).

10. Opening Brief of Appellant Jason Harmon at 2, 18, Harmon v. Lewandowski, 2023 WL 2570425 (9th Cir. Mar. 20, 2023) (No. 22-55396).

11. *Id.*; Harmon v. Lewandowksi, No. 2:20-cv-09437-VAP-MRWx, 2021 WL 6618681, *9–12 (C.D. Cal. Nov. 30, 2021); Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A, 1932; 42 U.S.C. §§ 1997a–1997c, 1997e–1997f, 1997h).

12. Opening Brief of Appellant Jason Harmon at 19–21, Harmon v. Lewandowski, 2023 WL 2570425 (9th Cir. Mar. 20, 2023) (No. 22-55396).

13. Harmon v. Lewandowski, No. 22-55396, 2023 WL 2570425, at *1–2 (9th Cir. Mar. 20, 2023).

14. The PLRA has not precluded Harmon from bringing claims against five other prison officials: Correctional Officers Vaughan, Hanks, and Hernandez; Sargent Perez; and Lieutenant Gaffney. Harmon v. Lewandowski, Case No. 2:20-cv-09437-VAP-MRWx, 2021 WL 6618681, at *1, *11 (C.D. Cal. Nov. 30, 2021) (noting that the prison did not include Vaughan, Hanks, or Hernandez in its motion to dismiss and denying motions to dismiss as to Perez and Gaffney because Harmon exhausted claims with respect to these two officials). There is ongoing litigation against these five officials to determine whether Harmon can recover against them. E-mail from Dr. Jennifer Orthwein, Partner, Medina Orthwein LLP, to Author (Dec. 6, 2023, 3:34 EST) (on file with Author).

15. This Note uses the term "person in custody" to refer to persons in criminal custody because the PLRA only applies to criminal, rather than civil, detentions. *See, e.g.*, Jones v. Cuomo, 2 F.4th 22, 24 (2d Cir. 2021) (holding that a civilly detained person need not comply with the PLRA). This Note refrains from using words like "inmate," "prisoner" or "convict" because of these words' dehumanizing effect. *See* Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA (Mar. 31, 2021), https://www.vera.org/news/words-matter-dont-call-

courts.[16] The PLRA's hallmark provision is the exhaustion requirement, which requires people in custody to attempt to internally resolve their grievances[17] through the very system that has harmed them before federal courts can adjudicate their claims.[18]

Legal scholars who write about transgender, gender non-conforming, and intersex people in custody have focused much of their attention on analyzing the merits of claims, giving little attention to the procedural roadblocks posed by the PLRA and its exhaustion provision.[19] And PLRA scholars have yet to examine the exhaustion provision from a trans-informed, or gender non-conforming, lens.[20] Thus, there exists a scholarly gap in two directions.

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people-felons-convicts-or-inmates [https://perma.cc/WLV4-DFUF] ("Language is powerful. It shapes thoughts and attitudes, and it can have a serious effect on how a society sees and treats groups of people.").

16. 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/XZ52-PBX2]; *see also* 141 CONG. REC. S14607 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (stating the PLRA will "go far in preventing inmates from abusing the Federal judicial system").

17. Grievance systems vary widely across states and across prisons or jails. If a trans person is incarcerated in a New York State prison, for example, and wishes to complain about being misgendered by a prison official, they must follow the Department of Corrections and Community Supervisions (DOCCS) three-step Inmate Grievance Procedure (IGP). According to the IGP, a person in custody must file a grievance by first submitting "a complaint to the clerk within 21 calendar days of an alleged occurrence." N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2007). An IGP supervisor may grant an extension if there are "mitigating circumstances" such as "timely attempts to resolve a complaint informally," but there are no exceptions if the person in custody files a complaint more than forty-five days after an alleged incident. *Id.* § 701.6(g)(1)(i)(*a*). A timely filed grievance should also "contain a concise, specific description of the problem and the action requested." *Id.* § 701.5(a)(2). The IGP defines a grievance as a complaint "about the substance or application of any written or unwritten policy, regulation, procedure or rule of the Department of Correctional Services or any of its program units, or the lack of a policy, regulation, procedure or rule." *Id.* § 701.2(a). After filing a timely grievance, there are three stages of review. First, the Inmate Resolution Grievance Committee (IRGC) reviews the grievance. *Id.* § 701.5(b). If the person in custody is not satisfied with the IRGC's decision, they can appeal to the facility superintendent. *Id.* § 701.5(c). If they are still not satisfied, they can appeal one more time to the Central Office Review Committee. *Id.* § 701.5(d). After this stage, the person in custody has exhausted the DOCCS grievance system.

18. 42 U.S.C. § 1997e(a).

19. *See infra* Section I.A (discussing the literature on legal remedies for transgender people in custody).

20. *See infra* Section I.B (discussing the literature on the PLRA and its exhaustion provision).

Drawing on interviews with legal advocates of incarcerated trans people and federal cases involving trans plaintiffs litigating the exhaustion provision, this Note examines the exhaustion provision's impact on incarcerated trans people. It argues that the exhaustion provision stands as a formidable barrier to resolution for trans people in custody. The PLRA's exhaustion requirement burdens trans people not only in the ways it burdens non-trans people but also in exacerbated or wholly specific ways. As a result, exhaustion systematically prevents trans people from resolving their non-frivolous grievances and leaves them vulnerable to continued abuse in prisons.

It is important to clarify the use of terminology. This Note examines the impact of the exhaustion provision on transgender, gender non-conforming, and intersex (TGNCI) people because these groups often experience similar problems while incarcerated.[21] However, because this Note relies almost entirely on cases, studies, and interviews concerning transgender people, this Note sometimes uses the word "trans" or "transgender" when making conclusory statements. When discussing individuals who identify with other labels—such as non-binary or intersex—it uses those labels.

Part I of this Note provides background information on the challenges TGNCI people face while incarcerated, introduces the PLRA, discusses the criticism that the PLRA has received, and highlights gaps in the literature. With this foundation laid, Part II then analyzes the impact of the PLRA's exhaustion provision on TGNCI people. Finally, Part III offers recommendations to better ensure TGNCI people have meaningful access to justice while incarcerated.

I. INCARCERATED TRANSGENDER PEOPLE AND THE PLRA'S EXHAUSTION REQUIREMENT: A GAP IN THE LITERATURE

Part I provides background information and explains the gap in the literature that this Note fills. Section I.A discusses the challenges many transgender people face while incarcerated, the legal claims they have relied on to address those challenges, and the legal scholarship surrounding those claims. Section I.B introduces the PLRA and discusses the criticism PLRA scholars have given to the exhaustion

21. SYLVIA RIVERA L. PROJECT & TAKEROOT JUST., IT'S STILL WAR IN HERE: A STATEWIDE REPORT ON THE TRANS, GENDER-NON CONFORMING, INTERSEX EXPERIENCE IN NEW YORK PRISONS AND THE FIGHT FOR TRANS LIBERATION, SELF-DETERMINATION AND FREEDOM 7 (2021) (discussing how TGNCI people often experience "lack of access to medical services, . . . verbal abuse by corrections officials, . . . sexual and physical violence, [and] retaliation for placing grievances").

requirement. Section I.C highlights the gap in the literature that exists between these two lines of scholarship.

A. Transgender People in Custody, Their Challenges, and Their Legal Claims

1. Exposure of Transgender People to the Criminal Legal System

Recent estimates hold that there are over six thousand people in federal and state prisons who identify as transgender.[22] Approximately one in five trans women in the United States have experienced incarceration in their lifetime,[23] whereas about two in one hundred women in the general population will experience the same.[24] And among Black trans people, almost half have experienced incarceration.[25] The National Center for Transgender Equality reported that almost ten percent of Black trans women experienced incarceration within a one-year period, a rate ten times higher than the general population.[26] These studies likely underestimate the number of transgender people in custody due to significant data collection barriers.[27] Even so, the reported rate of incarceration among trans individuals is alarmingly high.

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22. EMMA STAMMEN & NAZGOL GHANDNOOSH, THE SENT'G PROJECT, INCARCERATED LGBTQ+ ADULTS AND YOUTH 3 (2022) (citing Michael Balsamo & Mohamed Ibrahim, *Justice Department Reviewing Policies on Transgender Inmates*, ASSOCIATED PRESS (Sept. 17, 2021, 6:24 AM), https://apnews.com/article/religion-crime-prisons-minnesota-illinois-007d87693249a9831867a5289c09e612 [https://perma.cc/7LLM-9YLC]; Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436 [https://perma.cc/A8D4-8HFT?type=image]).

23. *Id*. at 4.

24. Alexander F. Roehrkasse & Christopher Wildeman, *Lifetime Risk of Imprisonment in the United States Remains High and Starkly Unequal*, SCI. ADVANCES Dec. 2022, at fig.2.

25. STAMMEN & GHANDNOOSH, *supra* note 22, at 4.

26. NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 5 (2018) (citing SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 190 (2015)).

27. *See* Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477, 495 (2020) (describing how many trans people do

These high incarceration rates are directly tied to the discrimination many trans people face outside of carceral confinement. Many trans people may be forced into situations that put them at heightened risk of criminal legal involvement.[28] Trans people are also more likely to be profiled and prosecuted for their actions, regardless of whether they are engaging in unlawful behavior.[29] Trans people even face risks when they are *victims* of crimes.[30] Trans people's disproportionate incarceration rates are thus tied to the pervasive prejudice they face in society.

2. Harms and Remedies for Transgender People in Custody

Once transgender people are in custody, they are especially vulnerable to mistreatment. Some challenges they may experience include being assaulted and harassed by staff and other people in

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not come out as trans in prison because they fear "discrimination, retaliation, and abuse").

28. *See* Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 171 (2006) (describing the "narrowing of opportunities" trans children face because they are often kicked out of schools and their homes but foster-care is ill-equipped to support them); STAMMEN & GHANDNOOSH, *supra* note 22, at 5 (discussing the high rate of poverty amongst transgender people due to societal discrimination—including in employment—which has led many trans people to face substance abuse problems, and in turn has pushed trans people "to engage in street-based economies—such as drug sales and sex work—that increase their risk of criminal legal involvement").

29. STAMMEN & GHANDNOOSH, *supra* note 22, at 5 ("Police bias, anti-trans laws, and discriminatory bail practices contribute to higher rates of incarceration for LGBTQ+ people, especially trans women of color."); Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. RACE, GENDER & SOC. JUST. 5, 13 n.34, 15 (2017) (describing reports of "public behavior" and "loitering" laws being "applied excessively" to trans people and finding nearly sixty percent of trans survey participants being stopped by police despite not violating the law). Some states have repealed their public loitering laws. *E.g.* Greg Owen, *California Gov. Gavin Newsom Signs Bill Ending "Walking While Trans" Law*, LGBTQ NATION (July 6, 2022), https://www.lgbtqnation.com/2022/07/california-gov-gavin-newsom-signs-bill-ending-walking-trans-law/ [https://perma.cc/WQ62-HGC3]. Many, however, still retain them. *See, e.g.*, OHIO REV. CODE ANN. § 2907.241(a)(l)–(5) (West 2023) (outlining Ohio's "[l]oitering to engage in solicitation" statute (2022); N.J. STAT. ANN. § 2C:34-1.1 (West 2022) (outlining New Jersey's "[l]oitering for the purpose in engaging in prostitution" statute).

30. Carpenter & Marshall, *supra* note 29, at 9 (noting that trans people experience domestic abuse at high rates, but reporting such abuse "frequently results in the transgender victim being arrested").

custody, being mis-housed or placed in solitary confinement, and being denied access to gender-affirming care.[31] This Section discusses these problems, the legal remedies available to plaintiffs experiencing each type of harm, and the existing legal scholarship on these issues.

i. Violence and Harassment

A large percentage of transgender people experience physical violence and general harassment in prisons.[32] Studies demonstrate that trans people in custody are around ten times more likely to be victims of sexual assault than cisgender people in custody.[33] Many transgender people in custody also experience invasive strip searches by prison staff.[34] Outside of searches, prison staff also frequently fail to respect the privacy needs of transgender individuals by, for example, disclosing their gender dysphoria or HIV status.[35]

People in custody who experience violence and harassment have different legal remedies available to them depending on the harm they endure. Courts have found violations of the Eighth Amendment's prohibition on cruel and unusual punishment[36] when prison officials assault people in custody,[37] but scholars have argued that courts give

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31. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 13–16; Nicole A. Francisco, *Bodies in Confinement: Negotiating Queer, Gender Nonconforming, and Transwomen's Gender and Sexuality Behind Bars* 10 LAWS 1, 3 (2021).

32. GraceAnn Caramico, Note, *Thank You Sophia Burset: A Call on the Federal Bureau of Prisons to Break Free of the Chains of Tradition in Order to Protect Transgender Inmates*, 18 GEO. J. GENDER & L. 81, 86 (2017); *see also* SYLVIA RIVERA L. PROJECT & TAKEROOT JUST., *supra* note 21, at 24 (finding that 95% of transgender respondents reported facing verbal abuse and derogatory slurs from corrections officers and over 75% reported being misgendered).

33. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 13; *see also* Caramico, *supra* note 32, at 86 ("Over 24% of transgender inmates report being sexually assaulted by another inmate, whereas only 2% of the overall inmate population reports being sexually assaulted. Over 16% of transgender inmates report being sexually assaulted by correctional staff, whereas only 2.4% of the overall inmate population reports being sexually assaulted."); ACLU & NAT'L CTR. FOR LESBIAN RTS., KNOW YOUR RIGHTS: LAWS, COURT DECISIONS, AND ADVOCACY TIPS TO PROTECT TRANSGENDER PRISONERS 4 (2014) ("In one study of transgender women housed in California men's prisons, 59% reported being sexually assaulted.") [hereinafter ACLU KNOW YOUR RIGHTS].

34. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 15.

35. *Id.* at 16.

36. U.S. CONST. amend. VIII.

37. COLUM. HUM. RTS. L. REV., CHAPTER 30: SPECIAL INFORMATION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PRISONERS, *in* A JAILHOUSE LAWYER'S MANUAL 1027, 1041 (12th ed. 2020) [Hereinafter JLM, CH. 30]. To win

officials too much leeway when deciding what conduct violates the Eighth Amendment.[38] If prison officials sexually assault people in custody, victims can bolster their arguments by pointing to the Prison Rape Elimination Act (PREA), which sets standards for prisons to follow in exchange for federal funding, though PREA creates no private cause of action.[39] When others in custody, rather than prison officials, commit the assault, courts have found prison officials liable under the Eighth Amendment for failure to protect.[40] Scholarship has highlighted that this standard, which applies to all people in custody, arose from a case involving a trans person in custody—*Farmer v. Brennan*—but the doctrine has evolved in such a way that trans people face difficulties winning their cases.[41] Outside of assault, if prison

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such a claim, a plaintiff must prove that (1) the prison official subjectively acted with a guilty state of mind such that the assault was out of malice and (2) the assault objectively resulted in physical injury or a large risk of serious injury. COLUM. HUM. RTS. L. REV., CHAPTER 24: YOUR RIGHT TO BE FREE FROM ASSAULT BY PRISON GUARDS AND OTHER INCARCERATED PEOPLE, *in* A JAILHOUSE LAWYER'S MANUAL 817, 825 (12th ed. 2020).

38. *See, e.g.*, Caramico, *supra* note 32, at 88 ("[P]rison officials enjoy broad boundaries of acceptable behavior. . . . This wide gap of permissible behavior, between what is inhumane and what is comfortable, affords prison officials a significant amount of discretion in their conduct with inmates.").

39. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006); Pub. L. No. 108-79, 117 Stat. 978 (2003). While the Act required the Department of Justice to investigate the phenomenon of prison rape, scholarship has criticized PREA for failing to actually reduce sexual violence in prisons. *See*, *e.g.*, Tasha Hill, Comment, *Sexual Abuse in California Prisons: How the California Rape Shield Fails the Most Vulnerable Populations*, 21 UCLA WOMEN'S L.J. 89, 108 n.111, 114 (2014) (describing PREA standards and contending that "prison rape will continue to be treated as a mere joke"); Derek Gilna, *Five Years After Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), https://www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate [https://perma.cc/ZV6J-GNL3] (noting that by 2016, forty states had not complied with PREA standards).

40. To demonstrate an Eighth Amendment violation, an individual must prove that "(1) the prison official exhibited 'deliberate indifference' to [their] health or safety by ignoring an excessive risk to [them]; and (2) the injury [they] suffered was severe." JLM CH. 30, *supra* note 37, at 1042 (citing Farmer v. Brennan, 511 U.S. 825, 835 (1994)). In *Farmer*, a transgender woman brought a lawsuit based on her prison staff's failure to protect her, and the Supreme Court defined "deliberate indifference" as a failure to act when prison staff knew of a "substantial risk of serious harm." 511 U.S. at 837.

41. Sarah Ortlip-Sommers, Note*, Living Freely Behind Bars: Reframing the Due Process Right of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 370 (2021) ("*Farmer* still does not pose an easy path to victory for trans plaintiffs. On the contrary, the standards remain somewhat convoluted and often [rely] on dangerous assumptions.").

officials conduct unreasonable strip searches, trans people in custody have found success in bringing Fourth Amendment claims.[42] Finally, if prison officials disclose a trans person's gender identity without consent, advocacy organizations have noted that trans people have successfully argued that the officials violated their constitutional right to privacy.[43]

ii. Housing

Transgender people face unique housing challenges while incarcerated. First, "most agencies automatically house transgender prisoners in . . . facilities based on their [sex assigned at birth]."[44] Such protocols place transgender people at heightened risk of the aforementioned types of violence.[45] Prison officials then often place trans people in solitary confinement on the theory that it will keep them safe.[46] This brings a new set of challenges because prolonged solitary confinement can lead to "long-term psychological harm,"[47] further stigmatization by "emphasizing their status as transgender,"[48] abuse "due to decreased visibility and oversight,"[49] and a restriction in "access to programs and services available to other inmates."[50]

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42. Courts have protected the right of transgender people to be searched in private. Farmer v. Perrill, 288 F.3d 1254, 1260 (10th Cir. 2002); Meriwether v. Faulkner, 821 F.2d 408, 417–18 (7th Cir. 1987). The U.S. District Court for the District of Columbia found strip searches "unreasonable," and thus a Fourth Amendment violation, when a male prison guard strip-searched a transgender woman in front of other male prisoners and staff against the woman's will. Shaw v. District of Columbia, 944 F. Supp. 2d 43, 55–57 (D.D.C. 2013); *see also* Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir. 1992) (finding that a male prisoner had a valid Fourth Amendment claim when strip-searched by a female officer).

43. ACLU KNOW YOUR RIGHTS, *supra* note 33, at 12 (citing Powell v. Shriver, 175 F.3d 107, 113–14 (2d Cir. 1999); Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000)).

44. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 14; *see also* Francisco, *supra* note 31, at 3 ("The overwhelming majority of prisons in the United States ascribe gender to genitalia.").

45. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 14; *see also* SYLVIA RIVERA L. PROJECT & TAKEROOT JUST., *supra* note 21, at 25 (finding that 90% of transgender women respondents in men's prisons were physically assaulted, 80% were assaulted by prison staff, and 75% percent were sexually assaulted by prison officials).

46. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 14; Caramico, *supra* note 32, at 86.

47. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 14.

48. Caramico, *supra* note 32, at 86.

49. *Id.*

50. *Id.*

In terms of remedies for housing challenges, trans people have only just begun to find success through legal mechanisms. PREA standards outline that prisons should make individualized housing placements for transgender people, rather than automatically assign them to housing based on their sex assigned at birth,[51] and several states have recently enacted legislation to conform to these standards.[52] In the courtroom, trans people have found success by bringing equal protection arguments,[53] and scholars have highlighted that federal courts are becoming more sympathetic to Eighth Amendment claims.[54]

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51. ACLU KNOW YOUR RIGHTS, *supra* note 33, at 10; *see also* 28 C.F.R. § 115.42(c) (2012) ("In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.").

52. Leila Miller, *California Prisons Grapple with Hundreds of Transgender Inmates Requesting New Housing*, L.A. TIMES (Apr. 5, 2021), https://www.latimes.com/california/story/2021-04-05/california-prisons-consider-gender-identity-housing-requests [https://perma.cc/32UY-XPE4] (noting that California, Connecticut, and Massachusetts enacted PREA-conforming legislation).

53. In 2018, Strawberry Hampton was the "first transgender woman transferred to a woman's prison as a result of litigation." *Health and Safety:* Hampton v. Illinois Department of Corrections, RODERICK & SOLANGE MACARTHUR JUST. CNTR., https://www.macarthurjustice.org/case/hampton-v-idoc/ [https://perma.cc/XVQ7-M9F6] [hereinafter MACARTHUR JUST. CTR.]. The Southern District of Illinois granted Hampton—whose legal name was Deon Hampton at the time of the case—a preliminary injunction, stating that she had "a greater than negligible chance of success on the merits of her equal protection claim with regard to her placement in a male prison." Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *12 (S.D. Ill. Nov. 7, 2018). The preliminary injunction ordered the Illinois Department of Corrections to consider "all evidence for and against transferring Hampton to a women's facility." *Id*. After consideration, Illinois transferred her to a women's prison and no further litigation on the issue was necessary. MACARTHUR JUST. CTR, *supra*.

54. Jennifer Levi & Kevin M. Barry, *Transgender Rights & the Eighth Amendment*, 95 S. CAL. L. REV. 109, 138–39 (2021) (arguing that "Eighth Amendment litigation has also opened the doors to gender appropriate housing for incarcerated transgender people" and citing cases). The authors also highlight that due process arguments have gained some traction. *Id*. at 138–39 n.159. Others have advocated for more creative housing arguments. *See, e.g.,* Alexa Scarpaci, Note, *Transgender Youth in Federal Prisons: Finding a Civil Cause of Action Based on Housing Discrimination*, 41 WOMEN'S RTS. L. REP. 29, 50 (2019) (arguing that "[t]ransgender youth who are subjected to inappropriate housing placements while in federal juvenile justice facilities due to the BOP's violation of the PREA National Standard . . . have a claim of negligence per se against the [Bureau of Prisons] for any harm they suffer as a result of this violation").

iii. Gender-Affirming Care

Transgender people in custody often do not receive necessary gender-affirming care. Many trans people suffer from gender dysphoria.[55] Even though there is wide medical consensus that gender-affirming care is a necessary and sometimes life-saving measure for people with gender dysphoria, "many agencies refuse to allow prisoners to receive this" care.[56] Gender-affirming care can constitute "access to psychiatric treatment, hormone therapy," or gender confirmation surgery (GCS).[57] Prison officials have argued that treatment would be "cosmetic" rather than medically necessary and that such procedures would leave transgender people at heightened risk of abuse by fellow people in custody.[58] These officials either do nothing to address the needs of people with gender dysphoria or inadequately provide antidepressants and counseling.[59]

To receive gender-affirming care while incarcerated, transgender people have—with varying degrees of success—brought Eighth Amendment claims.[60] Much scholarly attention has been devoted to comparing the courts' approaches in these cases.[61] Outside of the Eighth Amendment, in a 2022 case involving a transgender

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55. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 15. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines gender dysphoria as "a marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration" accompanied with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 451–52 (5th ed. 2013).

56. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 15.

57. Samantha Braver, Note, *Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals*, 120 COLUM. L. REV. 2235, 2239 (2020).

58. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 26, at 15.

59. Caramico, *supra* note 32, at 87.

60. Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014); Edmo v. Corizon, Inc., 935 F.3d 757, 785 (9th Cir. 2019); Gibson v. Collier, 920 F.3d 212, 219 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

61. For analyses of courts' approaches, see Braver, *supra* note 57; Julian S. Cohen, Note, *Suffering Uncompounded: Civilizing Healthcare Standards for Gender Dysphoric Prisoners*, 42 CARDOZO L. REV. 2651 (2021); Jen L. Davison, Note, *The Edges Are Bleeding: Constitutional Proxies and Imprisoned Trans Bodies in* Edmo *and* Gibson, 39 MINN. J. L. & INEQ. 107 (2021); Patricia O'Neill, Comment, *Dysphoria of Adequate Care: Health Care of Incarcerated Transgender Individuals in American Prisons and Courts*, 31 TUL. J. L. & SEXUALITY 121 (2022); Mike Greene, Comment, *Adree Edmo, The Eighth Amendment, and Abolition: Evaluating the Fight for Gender-Affirming Care in Prisons*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 445 (2022).

person in custody, the Fourth Circuit held that gender dysphoria is protected under the Americans with Disabilities Act (ADA).[62] Litigants may try, and already have tried,[63] to argue that denial of GCS constitutes an ADA violation.

B. The PLRA, the Exhaustion Provision, and Its Scholarly Criticism

1. The Prison Litigation Reform Act

President Clinton signed the PLRA into law on April 26, 1996. The law was a response to decades of progress for incarcerated individuals' access to the federal courts and the corresponding increase in litigation.[64] Before the 1960s, incarcerated people could not meaningfully seek redress for the conditions of their confinement because courts refused to hear their claims.[65] In 1964, the Supreme Court held that a person in custody brought a valid cause of action when he alleged that prison officials discriminated against him on the basis of religion,[66] and the Court continued to grant favorable decisions for incarcerated people throughout the next decade.[67]

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62. Williams v. Kincaid, 45 F.4th 759, 769 (4th Cir. 2022).

63. The Department of Justice recently filed a statement of interest in support of a trans plaintiff challenging a District Court for the Northern District of Georgia decision upholding the Georgia Department of Corrections' denial of gender-affirming care. Press Release, U.S. Dep't of Just., Justice Department Files Statement of Interest in Lawsuit Concerning Treatment for Gender Dysphoria in Correctional Settings (Jan. 8, 2024), https://www.justice.gov/opa/pr/justice-department-files-statement-interest-lawsuit-concerning-treatment-gender-dysphoria [https://perma.cc/Z88M-XL5U]. Like the plaintiff, the Department of Justice argued the ADA covered gender dysphoria. *Id.*

64. BERNARD D. REAMS JR. & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB. L. NO. 104-134 110 STAT. 1321, at iii, vii. (1997).

65. JOHN BOSTON, THE PLRA HANDBOOK: LAW AND PRACTICE UNDER THE PRISON LITIGATION REFORM ACT xv (Richard Resch ed., 2022) [hereinafter BOSTON, PLRA HANDBOOK]. For example, the Tenth Circuit, relying on the "hands off-doctrine," stated that "courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Loon, 213 F.2d 771, 771 (10th Cir. 1954) (per curiam).

66. BOSTON, PLRA HANDBOOK, *supra* note 65, at xv (citing Cooper v. Pate, 378 U.S. 546 (1964) (per curiam)).

67. *Id*. at xv.

As a result, more and more people in custody filed suit in federal court.[68] In 1970 alone, 2,267 incarcerated individuals brought civil suits in federal court, and by 1995—the year before the PLRA was passed—the number reached 39,008.[69] In response to the increasing number of lawsuits, justices, judges, and politicians began to react less favorably to what they viewed as frivolous cases.[70] House members introduced the first iteration of the PLRA on January 4th, 1995.[71] The bill—the "Taking Back Our Streets Act of 1995"—took its name directly from Newt Gingrich's *Contract With America,* a political platform Republicans leveraged to retake the House and Senate in 1994.[72] While this initial Act failed, congressmembers continued to introduce various iterations of the PLRA in both the House and the Senate throughout the 104th Congress.[73] The PLRA finally passed when it was added to an appropriations bill that President Clinton signed into law on April 26th,1996.[74]

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68. *Id*. at xvi.

69. *Id*. Simultaneously, however, the United States saw a large increase in the prison population as a result of mass incarceration. Margo Schlanger & Betsy Ginsberg, *Pandemic Rules: COVID-19 and the Prison Litigation Reform Act's Exhaustion Requirement*, 72 CASE W. RSRV. L. REV. 533, 539 fig. A (2022). From 1991 to 1995 alone, the prison population grew by 375,000. *Id.* at 539.

70. BOSTON, PLRA HANDBOOK, *supra* note 65, at xvi; Schlanger & Ginsberg, *supra* note 69, at 539; *see also* 141 CONG. REC. S14607 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.").

71. H.R. 3, 104th Cong. (1995).

72. NEWT GINGRICH & RICHARD ARMEY, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 40–46 (1994).

73. *See, e.g*., S. 243, 104th Cong. (1995) (introduced January 19th); H.R. 667, 104th Cong. (1995) (introduced January 25th); S. 400, 104th Cong. (1995) (introduced February 14th); S. 672, 104th Cong. (1995) (introduced April 4th); S. 816, 104th Cong. (1995) (introduced May 17th); S. 866, 104th Cong. (1995) (introduced May 25th); H.R. 2076, 104th Cong. (1995) (introduced July 19th but PLRA-related provision not added until September 19th, *see* 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995)); S. 1093, 104th Cong. (1995) (introduced July 28th); S. 1279, 104th Cong. (introduced September 27th); H.R. 2468, 104th Cong. (1995) (introduced October 11th); H.R. 2488, 104th Cong. (1995) (introduced October 17th); S. 1495, 104th Cong. (1995) (introduced December 21st); H.R. 2992, 104th Cong. (1996) (introduced February 29th); H.R. 3019, 104th Cong. (1996) (introduced March 5th and became law on April 26th); S. 1594, 104th Cong. (1996) (introduced March 6th); H.R. 3206, 104th Cong. (1996) (introduced March 29th).

74. BOSTON, PLRA HANDBOOK, *supra* note 65, at xvi; Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996)

The PLRA governs "civil actions with respect to prison conditions" filed by incarcerated people.[75] These actions are defined as "civil proceeding[s] arising under Federal law with respect to the conditions of confinement."[76] The PLRA is a complex statute with many provisions, some of which have been the subject of thousands of lawsuits.[77]

This Note focuses on the exhaustion provision, which has been the most common subject of PLRA litigation.[78] It 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."[79] Therefore, there are two ways for persons in custody to have their claims heard in federal court: They must either exhaust their prison's administrative remedies or such remedies must be unavailable.[80]

If administrative remedies are "available," plaintiffs must exhaust them before a federal court can hear the merits of their claims.[81] The Supreme Court has clarified that "there is no question that exhaustion is mandatory under the PLRA."[82] Exhaustion must also be "proper," meaning that plaintiffs must comply with all "deadlines and other critical procedural rules" of the prison in question.[83] Importantly, it is "the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[84] The Supreme Court also ruled that there are no exceptions for "special circumstances" that are not outlined in the prison's requirements[85] and that these requirements apply to "all inmate suits about prison life, whether they involve general circumstances or particular episodes."[86]

(codified as amended at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A, 1932; 42 U.S.C. §§ 1997a–1997c, 1997e–1997f, 1997h).

75. 18 U.S.C. § 3626(g)(2).

76. *Id*.

77. Schlanger & Ginsberg, *supra* note 69, at 540.

78. BOSTON, PLRA HANDBOOK, *supra* note 65, at 100.

79. 42 U.S.C. § 1997e(a) (emphasis added).

80. Ross v. Blake, 578 U.S. 632, 642 (2016).

81. *Id.* However, "failure to exhaust is an affirmative defense" that prisons must raise, so "inmates are not required to specially plead or demonstrate exhaustion in their complaints." Jones v. Bock, 549 U.S. 199, 216 (2007).

82. *Jones*, 549 U.S. at 199–200.

83. Woodford v. Ngo, 548 U.S. 81, 84, 90–91 (2006).

84. *Bock*, 549 U.S. at 218.

85. *Ross*, 578 U.S. at 635.

86. Porter v. Nussle, 534 U.S. 516, 532 (2002).

The only situation in which plaintiffs are excused from exhaustion is when administrative remedies are unavailable. In the seminal case *Ross v. Blake*, the Supreme Court held that "[t]he only limit to § 1997e(a)'s mandate is the one baked into its text: An inmate need exhaust only such administrative remedies as are 'available.'"[87] "To be 'available' under the PLRA, a remedy must afford 'the possibility of some relief for the action complained of.'"[88] If there is no available remedy, the exhaustion requirement does not apply.[89]

There are two possible situations when a remedy might be "unavailable." The first is when there is no applicable remedy on the books in the prison's grievance system. The Second Circuit hypothesized such a scenario in dicta: "[If an] inmate's suit complains that he was beaten by prison guards, and the institution provides a grievance proceeding for inmate complaints about food (but none for complaints about beatings) . . . Section 1997e(a) does not require the inmate to pursue a grievance procedure."[90]

The second, more common unavailability scenario is when the "administrative remedy, although officially on the books, is not capable of use to obtain relief."[91] *Ross* provided three examples,[92] though the list is not exhaustive.[93] First, "an administrative procedure is unavailable when . . . it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates."[94] Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use."[95] Third, a procedure is unavailable "when prison administrators thwart inmates from

87. *Ross*, 578 U.S. at 648.

88. Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004) (quoting Booth v. Churner, 532 U.S. 731, 738 (2001)).

89. *Ross*, 578 U.S. at 642.

90. Snider v. Melindez, 199 F.3d 108, 113 n.2 (2d Cir. 1999). The Supreme Court has not provided any examples but suggested that no remedy would be available on the books "where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint." *Booth*, 532 U.S at 736.

91. *Ross*, 578 U.S. at 643.

92. *Id*. at 643–44.

93. *See, e.g.*, Williams v. Corr. Officer Priatno, 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of that case.").

94. *Ross*, 578 U.S. at 643.

95. *Id.*

taking advantage of a grievance process through machination, misrepresentation, or intimidation."[96]

2. Criticisms of the Exhaustion Requirement

While scholars, practitioners, and non-governmental organizations have criticized many of the PLRA's provisions,[97] this Note centers on the exhaustion requirement. Some scholars have criticized how the exhaustion requirement has reduced the number of meritorious lawsuits.[98] Because prisons create the grievance procedures, they are incentivized to make the procedures difficult to navigate to deter individuals—including those with meritorious grievances—from making use of them.[99] Because the PLRA offers no guidelines or requirements for these procedures, "the sky's the limit for the procedural complexity or difficulty of the exhaustion regime."[100] Some prisons have even responded to successful lawsuits by making their grievance procedures more complicated for people in custody.[101] Further, incarcerated people avoid filing lawsuits, not only because the grievance systems are too complicated to maneuver, but also because reporting may put them in an uncomfortable or even dangerous position, such as needing to file a grievance with the very person that assaulted or abused them.[102]

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96. *Id.* at 644.

97. *See, e.g.*, HUM. RTS. WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 23–28 (2009) [hereinafter NO EQUAL JUSTICE] (criticizing the PLRA's physical injury requirement, which requires plaintiffs to demonstrate physical injury to recover compensatory damages); 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, 143–52 (2008) (criticizing the physical injury and exhaustion provisions); Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 261 (2018) (criticizing the PLRA's fee system requirements because they discourage lawyers from taking incarcerated people's cases by imposing a cap on attorney's fees).

98. From 1995 to 2001, lawsuits by incarcerated people fell by 43% despite a 21% increase in the prison population over the same time period. NO EQUAL JUSTICE, *supra* note 97, at 3. By 2006, lawsuits were down 60% from their 1995 number. *Id.*

99. *Id.* at 12; *see also* Schlanger & Shay, *supra* note 97, 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.").

100. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1650 (2003).

101. NO EQUAL JUSTICE, *supra* note 97, at 12.

102. *Id.* (citing Sanders v. Bachus, No. 1:07-CV-360, 2008 WL 5422857, at *5 (W.D. Mich. Dec. 10, 2008)).

Others have critiqued the exhaustion requirement because the grievance procedures are unreasonably technical. Scholars and advocacy organizations highlight that courts have dismissed cases when plaintiffs filed a grievance in the wrong ink color;[103] missed a two-day filing window because they were placed in solitary confinement without access to forms;[104] and failed to comply with temporal or procedural requirements due to illiteracy,[105] mental illness,[106] and severe physical injury.[107] Given that the vast majority of lawsuits are brought pro se, it is not surprising that "technical mistakes resulting in inadvertent non-compliance with the exhaustion requirement" are commonplace in litigation involving incarcerated people.[108]

Finally, the exhaustion provision has been critiqued for putting people in custody in danger due to its inefficiencies. Grievance procedures often require people in custody to file claims within short periods of time, but there is no mandate for the prison staff to expedite their review process unless the grievance procedure requires such expedition.[109] Because the prison staff make the procedures, they often give themselves a large cushion. Indeed, the California Department of Corrections System previously had no time limits, and as a result,

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103. Fenster & Schlanger, *supra* note 16.

104. NO EQUAL JUSTICE, *supra* note 97, at 14 (citing Latham v. Pate, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007)).

105. *Id.* at 16 (citing Ramos v. Smith, 187 F. App'x 152, 154 (3d Cir. 2006)). In *Ramos*, the court found that Plaintiff's illiteracy did not excuse him from missing his 20-day appeal period because he did not affirmatively seek help from the warden. 187 F. App'x at 154.

106. *Id.* (citing Yorkey v. Pettiford, No. 8:07–1037–HMH–BHH, 2007 WL 2750068, at *4 (D.S.C. Sept. 20, 2007)). In *Yorkey*, the court found that Plaintiff's mental illness did not excuse him from his prison's four-stage appellate procedure. 2007 WL 2750068, at *4.

107. *Id*. (citing Parker v. Adjetey, 89 F. App'x 886, 887–88 (5th Cir. 2004) (per curiam)). In *Parker*, the court found that Plaintiff was not excused from missing his 15-day filing requirement even though he was hospitalized and placed in a coma. 89 F. App'x at 887–88.

108. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 (2001).

109. Amy Pétre Hill, Note, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 241 (2002). For an example of a grievance procedure that requires expedition, see ADMIN. REV. & RISK MGMT. DIV., TEX. DEP'T OF CRIM. JUST., OFFENDER GRIEVANCE OPERATIONS MANUAL 17–18, 59, 78 (2012) (outlining that prison staff must respond to emergency medical grievances within 35 days of receiving a complaint).

people in custody died because their basic medical needs were not met.[110]

C. Gap in the Literature from Two Angles

Section I.A discussed the literature on transgender people in custody. While there has been considerable scholarship analyzing judicial decisions involving trans individuals' rights in prison, there has been very little scholarship on the challenges that incarcerated transgender people face in bringing their claims to federal court in the first place. The vast majority of scholarship on transgender people in custody has examined the merits of claims and has ignored the PLRA or relegated it to a footnote or fleeting sentence.[111]

Section I.B discussed the literature on the PLRA and its exhaustion provision. While there has been much scholarship criticizing the PLRA, this scholarship has mostly applied a provision-by-provision approach.[112] Scholarship centering plaintiffs rather than provisions has highlighted how the PLRA negatively affects sexual abuse victims,[113] people with disabilities,[114] people navigating COVID-

110. Hill, *supra* note 109, at 227.

111. *See, e.g.*, Ortlip-Sommers, *supra* note 41, at 358, 365 (focusing on the merits of claims brought by "assuming [PLRA] procedural hurdles are crossed"); Cohen, *supra* note 61, at 2671 n.110 (limiting discussion of the PLRA to a footnote). In fact, a review of *Queer (In)justice: The Criminalization of LGBT People in the United States*—the seminal book examining the experiences of queer people in the criminal legal system—notes that the book's theorists missed the opportunity to apply their queer lens to the PLRA. Giovanna Shay & J. Kelly Strader, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 178 (2012).

112. *See, e.g.*, Fenster & Schlanger, *supra* note 16, at 2–4 (critiquing the exhaustion, three strikes, and physical injury provisions); Schlanger & Shay, *supra* note 97, at 143–52 (critiquing the physical injury and exhaustion provisions); NO EQUAL JUSTICE, *supra* note 97, at 11–28 (critiquing the exhaustion and physical injury provisions); Boston, *supra* note 108, at 434–53 (critiquing the physical injury and prospective relief provisions).

113. Hill, *supra* note 39, at 110–14.

114. Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL'Y & L. 281, 297 (2010) (analyzing "the current incarnation of the PLRA through a disability-conscious lens").

19,[115] juveniles,[116] and women.[117] The only piece of PLRA scholarship to center trans people did not consider the exhaustion provision.[118] Yet, as a historical matter, the experiences of trans and gender non-conforming people in custody have been intertwined with the PLRA's exhaustion requirement since before the statute's passage.[119] Thus,

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115. Schlanger & Ginsberg, *supra* note 69.

116. Anna Rapa, Comment, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 265 (2006) (arguing the PLRA should not apply to juveniles).

117. *See generally* April Surrell, Reporting Behaviors of Women Inmates 15 (2017) (M.S. Thesis, University of Alabama) (examining the experience of women reporting sexual abuse in prisons).

118. Hunter Kravitz, Note, *The Prison Litigation Reform Act and the Physical Injury Requirement in the Context of Transgender Inmates*, 4 CARDOZO INT'L & COMP. L. REV. 1041 (2021).

119. Arguments that transgender or gender non-conforming people in custody had filed frivolous claims came at the state and federal level. In Arizona, a 1993 article in the *Tucson Citizen* discussed the problem of "unnecessary inmate legal activities." David Pittman, *Frivolous Inmate Lawsuits Rampant*, TUCSON CITIZEN, Feb. 13, 1993, at 6A. The journalist wrote that "among the most startling filings are suits which would require the state to . . . [a]llow medical treatment needed for a male inmate to change his sex." *Id*. Arizona would soon after pass a state precursor to the PLRA on April 26th, 1994—exactly two years before the PLRA became law. Ariz. S.B. 1111, 41st Legislature, Second Regular Session (1994); 1994 Ariz. Legis. Serv. Ch. 358 (West). Among other provisions, the law, according to the then-state attorney general, "removes good-time credits if a prisoner files a frivolous lawsuit." Grant Woods, *Guest Opinion*, TUCSON CITIZEN, Feb. 27, 1995, at 7A. The Arizona law would later serve as a model for the federal PLRA. *See e.g.*, 141 CONG. REC. S7524–25 (daily ed. May 25, 1995) (statement of Sen. Dole) (introducing S. 866, "Prison Litigation Reform Act") ("Finally, Mr. President, I want to express my thanks to Arizona Attorney General Grant Woods. In many respects, the Prison Litigation Reform Act is modeled after the attorney general's own State initiative in Arizona."); 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) (joining Senator Dole in introducing S. 866) ("The Dole-Kyl bill is based on similar provisions that were enacted in Arizona."); 141 CONG. REC. S14, 629 (daily ed. Sept. 29, 1995) (statement of Sen. Kyl) ("Obviously, this legislation is going to pass. I just wanted to indicate where this came from. The attorney general of Arizona, Grant Woods, brought this matter to my attention several months ago, and we brought it to the majority leader, and we introduced legislation to cut the prisoner litigation.").

Allegations that trans or gender non-conforming people filed frivolous claims also arose at the federal level. In *Jones v. Warden of the Statesville Correctional Center,* for example, the Northern District of Illinois opened its 1995 opinion with the following line: "Anthony Jones, who sometimes refers to himself as Tonya or Tasha Star Jones, is an Illinois inmate with a penchant for lingerie and litigation." 918 F. Supp. 1142, 1145 (N.D. Ill. 1995). The judge dismissed the request for female clothing as frivolous. *Id.* at 1146.

this Note fills in the gaps of Sections I.A and I.B. by centering trans and gender non-conforming plaintiffs in the context of the exhaustion requirement.

Filling this gap is important. First, courts are an essential avenue of redress for transgender people who face serious problems in prisons, so it is vital to understand how incarcerated trans people access this key remedial source. Second, this Note serves as a case study for the ways in which the PLRA may disparately impact populations that are particularly vulnerable to abuse within the broader, already vulnerable, incarcerated population.

II. CHALLENGES THE PLRA'S EXHAUSTION REQUIREMENT PLACES ON TRANSGENDER PEOPLE IN CUSTODY

Part II analyzes the ways in which the PLRA's exhaustion requirement impacts transgender people in custody. Section II.A provides the analytical approach for such an analysis, introducing the theoretical perspective and methodology. Section II.B then analyzes the challenges the exhaustion provision places on trans people in custody (1) before they file grievances, (2) while they try to exhaust their grievances, and (3) when they bring claims to court. It argues that at each of these stages, the PLRA's exhaustion provision places unique burdens on trans people that prevent them from resolving their non-frivolous claims and leave them vulnerable to continued abuse.

A. Analytical Approach

1. Theoretical Perspective

This Note adopts a "critical trans political perspective," proposed by transgender activist and legal scholar Dean Spade. This perspective examines "how law structures and reproduces vulnerability for trans populations."[120] Spade suggests examining the "domain of administrative law" because administrative agencies, like prisons, are responsible for making "trans people's lives administratively impossible."[121] Thus, this Note makes a conscious

120. DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 15, 29–30 (2011).

121. *Id*. at 31–32; *see also* JOEY L. MOGUL, ANDREW J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES xiii (Michael Bronski ed., 2011) (advocating for the need to "turn a

effort to look behind facially neutral[122] language in the PLRA to explore how its exhaustion provision may disproportionately impact trans people and reproduce their vulnerabilities.

2. Methodology

To understand how the PLRA's "neutral" exhaustion provision impacts trans people in custody, this Note employs a phenomenological research methodology, which seeks to understand the lived experience of the law.[123] This approach "places the people affected by legal decisions at its center"[124] because affected people are "best informed about the dynamics of the harm they have endured."[125] It is inspired by the work of Mari Matsuda, who asks scholars to "look[] to the bottom"—to the experiences of the "least advantaged"—in order to understand how the law really works.[126]

This Note draws on a range of sources. It includes federal court case law, assembling cases from Westlaw post-dating *Ross v. Blake*'s elaboration of the exhaustion requirement.[127] But this Note also acknowledges the shortcomings of relying on cases. First, court decisions come from the voices of judges, rather than the experiences of incarcerated people themselves.[128] Second, the vast majority of trans people in custody cannot or do not bring their claims to court, so their

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queer lens on the criminal legal system in the United States" to understand how the carceral system has contributed to the modern-day oppression of LGBT people).

122. SPADE, *supra* note 120, at 30.

123. Nick J. Sciullo, *Queer Phenomenology in Law: A Critical Theory of Orientation*, 39 PACE L. REV. 667, 674 (2019).

124. *Id.*

125. Amber Baylor, *Centering Women in Prisoners' Rights Litigation*, 25 MICH. J. GENDER & L. 109, 115 (2018).

126. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987) ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law.").

127. This Note employed the search term "('intersex' or 'gender non-conforming' or 'transgender!' or 'non-binary') & 'Prison Litigation Reform Act'" on Westlaw. This search yielded 346 results as of January 2nd, 2023. After eliminating cases pre-dating *Ross* and not pertaining to the exhaustion requirement, 87 remained. This Note draws on high-level observations from these 87 cases but devotes more in-depth analysis to cases in which trans, intersex, or gender non-conforming people argue they were not required to exhaust their prison's grievance systems, as explained further in Section II.B.3.

128. *Id.* at 15 (contending that "court decisions . . . marginaliz[e] individual narratives").

stories are inherently absent from case law.[129] In other words, trying to understand the impact of the exhaustion requirement on trans people by looking at case law would be like "studying the iceberg from its tip."[130] Nonetheless, this Note is interested in "the tip"—the courtroom—as one component of the experience of navigating the PLRA.

Because of the pitfalls of case law, this Note also draws heavily on interviews with legal advocates of incarcerated trans people who have tried to navigate the PLRA. Lawyers can draw on the lived experiences of trans people in custody and offer a nuanced perspective on how the intricacies of legal provisions may impact their clients' lives.[131]

To procure interviews, this Note employed a "purposeful sampling" approach, which involves "selecting individuals . . . that are especially knowledgeable about or experienced with a phenomenon of interest."[132] After finding lawyers who met these qualifications, this Note employed a "snowball" strategy in which early interviewees provided the names of potential interviewees.[133] The interviewees work in a range of geographic areas—including New York, California, the State of Washington, and Washington, D.C.—and collectively have represented hundreds of incarcerated trans people.[134] They also come

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129. *See infra* Sections II.B.1–.2 (uncovering the ways in which incarcerated trans people are prevented from even getting to the courtroom stage).

130. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC. REV. 1133, 1134 (1990).

131. This Note does not draw on interviews with incarcerated trans people because disclosing information may leave them vulnerable to future harm. Nonetheless, future scholars should consider ethical ways to draw on the direct experience of incarcerated trans people.

132. Lawrence A. Palinkas et al., *Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research*, 42 ADMIN. POL'Y & MENTAL HEALTH 533, 534 (2015). To find individuals with such knowledge or experience, the Author contacted legal academics who write about queer issues or the PLRA and practitioners who have represented incarcerated transgender people.

133. *Id*. at tbl.1.

134. Zoom Interview with Dr. Jennifer Orthwein, Partner, Medina Orthwein LLP (Dec. 16, 2022); Zoom Interview with Erin Beth Harrist, Dir. of the LGBTQ+ Unit, The Legal Aid Soc'y (Nov. 28, 2022); Zoom Interview with A.D. Lewis, Staff Att'y, Prison L. Off. (Nov. 18, 2022); Zoom Interview with Whit Washington, Staff Att'y, Transgender Gender-Variant & Intersex Just. Project (Dec. 15, 2022); Zoom Interview with Alex Binsfeld, Dir. of Legal, Transgender Gender-Variant & Intersex Just. Project (Dec. 15, 2022).

from a range of employment backgrounds—from legal aid and community-based organizations to nonprofit and for-profit law firms.[135]

B. Impact of the PLRA's Exhaustion Provision on Incarcerated Transgender People

This Section analyzes the ways in which the PLRA's exhaustion provision burdens trans people in custody. It divides its analysis into three components that emulate the phases an individual may go through to address their grievance. First, it examines the pre-grievance period—when a trans person has suffered a harm and is deciding what steps to take to address the problem. Second, it examines the grievance period—when a trans person has decided to submit a grievance and is working through the prison's procedures. Finally, it examines the courtroom experience—the period when a trans person has found no relief through their prison, so they file a case in federal district court. At each step of the process, the PLRA's exhaustion requirement burdens trans people not only in the ways it burdens non-trans people, but also in exacerbated or wholly specific ways. As a result, exhaustion under the PLRA systematically prevents trans people from resolving their non-frivolous grievances and puts trans people in danger of "reproduc[ing] vulnerabilit[ies]"[136] through further suffering.

1. The Pre-Grievance Period

Trans people are uniquely burdened during the pre-grievance phase because prison social dynamics limit their access to information about filing grievances. Even if they have such access, fear of outing themselves and of retaliation prevents them from filing.

Interviewees echoed many of the challenges discussed earlier[137]—lawyers recounted problems their clients face in receiving gender-affirming care,[138] in being housed in accordance with their

135. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; Zoom Interview with Erin Beth Harrist, *supra* note 134; Zoom Interview with A.D. Lewis, *supra* note 134; Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

136. SPADE, *supra* note 120, at 29.

137. *See supra* Section I.A.2 (discussing the challenges transgender people while incarcerated).

138. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; Zoom Interview with Erin Beth Harrist, *supra* note 134; Zoom Interview with A.D. Lewis,

gender identity,[139] and in being misgendered.[140] They also discussed the rampant violence their trans clients face—on account of being trans—from both people in custody and prison officials.[141]

Trans people are disproportionately prevented from seeking justice after experiencing these types of harm because of the unique challenges many face in accessing information. Interviewees discussed how the social dynamics of a prison prevent trans people from even knowing they are required to exhaust.[142] While prisons and jails are supposed to provide an orientation to newly incarcerated people, which includes information on the PLRA and the grievance process, not all facilities do so.[143] And when they do, people in custody receive a significant amount of information at the same time during these orientations, so it is unreasonable to expect them to retain such information.[144] Further, when grievance processes change, incarcerated people often do not receive updated training.[145] As a result, understanding the operation of a prison depends on informal word-of-mouth exchanges rather than on official orientations.[146] But trans people are frequently either placed in solitary confinement or

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supra note 134; Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

139. Zoom Interview with Erin Beth Harrist, *supra* note 134; Zoom Interview with A.D. Lewis, *supra* note 134; Zoom Interview with Whit Washington, *supra* note 134.

140. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

141. Zoom Interview with A.D. Lewis, *supra* note 134 (recounting that nearly every trans person in custody he has spoken with has faced threats of violence or actual episodes of violence); Zoom Interview with Erin Beth Harrist, *supra* note 134 (describing sexual assault against trans people in custody as "rampant"). Lawyers also discussed how guards tampered with trans people's food, restricted their ability to leave their cells, and denied them access to routine medical needs unrelated to gender-affirming care. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

142. Zoom Interview with A.D. Lewis, *supra* note 134.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*; *see also* Zoom Interview with Whit Washington, *supra* note 134 ("Prison is a series of inter-personal communications between staff members and people in custody."); Lori Sexton & Valerie Jenness, *"We're Like Community": Collective Identity and Collective Efficacy Among Transgender Women in Prisons for Men*, 18 PUNISHMENT & SOC. 544, 545–46 (2016) ("[C]arceral environments are organized around cooperation and collaboration based on institutionally recognized shared identities" and "those with non-normative gender identities" are at the bottom of the prison social order).

socially ostracized,[147] so they often cannot participate in this integral information-sharing system.[148] As an attorney who spends up to fifty percent of his working hours speaking with incarcerated trans people stated: "Many trans people I work with lack information to understand how the laundry system works. If they do not receive the information to understand basics like this, they are not going to know how to exhaust an administrative grievance."[149]

Trans people in some instances are able to overcome this ostracization to learn about the grievance procedures. Attorneys at the Transgender Gender-Variant & Intersex Justice Project described how trans "elders," who have been incarcerated for long enough and targeted enough times, are familiar with the need to grieve.[150] These elders then help younger or newly incarcerated trans individuals file their claims.[151] Ultimately, however, trans people who do not have the support networks of elders may be unaware that they can even file a grievance.

Even if trans people are aware of the need to grieve, they may choose not to because of fear—a factor often exacerbated for trans people. By filing a grievance related to trans-specific issues, a person in custody must "out" themselves to the facility, which can be a dangerous decision for a trans person.[152] And if they are afraid to come out to the clerk who receives the complaints, they might forgo grieving altogether.[153]

Others who are out as trans may refrain from filing a grievance because they believe they will face retaliation. Prisons often operate as small communities where everyone knows everyone, so trans people

147. *See supra* Section I.A.2 (discussing the literature on harms faced by transgender people in custody).

148. Zoom Interview with A.D. Lewis, *supra* note 134.

149. *Id*.

150. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

151. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

152. Zoom Interview with Erin Beth Harrist, *supra* note 134; *see also* JASON LYDON, KAMARIA CARRINGTON, HANA LOW, REED MILLER & MAHSA YAZDY, BLACK & PINK, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY 29 (2015) (reporting that many incarcerated queer people in custody try to hide their sexual orientation or gender identity because "there are significant consequences to prisoners and prison staff knowing (or thinking they know)" this information).

153. Zoom Interview with Erin Beth Harrist, *supra* note 134.

know that filing could put them in danger.[154] For example, one attorney recounted how their trans clients have told them about other trans people who are too afraid of retaliation to even send a letter to a lawyer.[155] Despite knowing the trans person may have a grievance, lawyers are put in a bind because if they write to that incarcerated person, the person could be put in additional danger; it is an insidious Catch-22.[156] Thus, a "very small percentage of trans people take the risk to grieve."[157]

Therefore, trans people are uniquely burdened during the pre-grievance phase. When trans people experience legitimate grievances in prison, the PLRA's exhaustion provision poses a substantial barrier to justice because a large percentage of trans people do not even file grievances to begin with. Whether they lack the network to learn about exhaustion requirements due to the social ostracization, fear outing themselves, or fear retaliation, many trans people do not even attempt to resolve their grievances. As a result, they are susceptible to further abuse because bad acts go unchallenged. In Spade's words, their "vulnerabilities [are] reproduced."[158]

2. The Grievance Period

Even trans people who know they have to exhaust and decide to file and pursue a grievance are uniquely burdened. These individuals are often unable to complete exhaustion because of literacy and retaliation issues that are especially pronounced for transgender people in custody.

First, the labyrinthine complexity of grievance procedures prevents trans people—just as it can prevent all people—from fully grieving. Interviewees discussed how grievance procedures can change with insufficient notice given to people in custody,[159] how few trans people besides elders know what steps they need to take after filing a

154. *Id*.
155. Zoom Interview with Whit Washington, *supra* note 134.
156. *Id*.
157. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.
158. SPADE, *supra* note 120, at 29.
159. Zoom Interview with Whit Washington, *supra* note 134.

grievance,[160] and how prison staff give trans people in custody faulty guidance.[161]

While the procedures are complicated for all grievers, these problems can be exacerbated for trans people. First, as discussed, trans people are more likely to be physically or socially segregated and thus less likely to have a community that can help them navigate exhaustion if they do decide to file a grievance.[162] Second, systemic educational inequity ensures that many trans people cannot grieve their complaints. As one attorney described, "trans folk are often forced out of their homes and out of the education system[, leading to] a skewed level of reading and writing comprehension,"[163] and studies support these insights.[164] A Prison Law Office attorney described how his trans clients with low literacy levels struggle to follow complex grievance procedures, but the PLRA offers no exceptions for such people.[165]

Other trans people are unable to exhaust because they know they will face severe retaliation *after* filing. Trans people are at heightened risk of such retaliation.[166] Officers often throw out

160. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134; Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

161. Zoom Interview with Alex Binsfeld, *supra* note 134.

162. *See supra* Section II.B.1 (discussing the impact prison social dynamics have on trans people's access to information).

163. Zoom Interview with Whit Washington, *supra* note 134.

164. NEAL A. PALMER, EMILY A GREYTAK & JOSEPH G. KOSCIW, GLSEN, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND THE SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH xi, 14, 17 (2016) (finding that LGBTQ students are more likely to drop out of school than non-LGBTQ students and highlighting that dropout rates are connected to hostile school environments, a common experience for transgender students in particular); KERITH J. CONRON, KATHRYN K. O'NEILL & LUIS A. VASQUEZ, THE WILLIAMS INSTITUTE, EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 5 (2022) ("[L]ower levels of education . . . have been documented among transgender people versus their heterosexual, cisgender peers.").

165. Zoom Interview with A.D. Lewis, *supra* note 134; *see also* Ribet, *supra* note 114, at 299 ("A . . . problem with the exhaustion requirement is that prison grievance procedures often involve no provisions for accessibility to prisoners with disabilities (as well as prisoners with English/literacy limits).").

166. SYLVIA RIVERA L. PROJECT & TAKEROOT JUST., *supra* note 21, at 26, 46 (finding two-thirds of TGNCI respondents in New York prisons faced retaliation upon filing sexual assault-related grievances and three-fourths of all New York TGNCI grievers faced retaliation); Victoria Law, *Trans Women Who Report Abuse in Prison Are Targets of Retaliation*, TRUTHOUT (Aug. 23, 2020), https://truthout.org/articles/trans-women-who-report-abuse-in-prison-are-targets-

grievances filed by trans people,[167] attack them,[168] or place them in solitary confinement.[169] Events like these were "sadly not uncommon."[170] In California state prisons, some staff belong to "The Green Wall," a self-described "gang" of prison officials who abuse incarcerated people who file complaints, and a California-based attorney recounted that they particularly target trans people.[171] Other attorneys have encountered situations in which prison staff have planted weapons in their trans clients' cells after they filed a complaint.[172] Staff have also restricted trans people's access to medication and tampered with their showers and bathrooms after filing a complaint.[173] This rampant retaliation has the effect of deterring trans people from exhausting their grievances: "[W]hen trans people have to go to the very people who are harming them and keeping them caged—the people who are not affirming the most basic part of their identity—and have to beg those people to follow the rules of their prison," the result is that trans people often just stop trying to exhaust.[174]

Given these obstacles, many practitioners do not view the PLRA as a viable means of achieving relief for their trans clients. One attorney stated that they rarely encounter trans individuals who have exhausted,[175] and another concluded that "the grievance system is not

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of-retaliation/ [https://perma.cc/Z9RQ-K56R] (California Department of Correction and Rehabilitation "data collection shows that correctional staff disproportionately target and retaliate against transgender women when they report PREA allegations").

167. Zoom Interview with A.D. Lewis, *supra* note 134; *see also* SYLVIA RIVERA L. PROJECT & TAKEROOT JUST., *supra* note 21, at 46 (finding that fifty-nine percent of TGNCI respondents tried to use the New York grievance system but were prevented from doing so because officers threw out or failed to deliver grievances).

168. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; Zoom Interview with Erin Beth Harrist, *supra* note 134.

169. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; Zoom Interview with Erin Beth Harrist, *supra* note 134.

170. Zoom Interview with Erin Beth Harrist, *supra* note 134.

171. Zoom Interview with Alex Binsfeld, *supra* note 134; *see also* Craig Farris, *The Prison Guard Green Wall Gang*, L.A. PROGRESSIVE (Mar. 31, 2021), https://www.laprogressive.com/prison-reform-2/the-prison-guard-green-wall-gang [https://perma.cc/6QGE-PAX9] (describing the Green Wall as a "a criminal 'gang' of rogue prison guards" who beat incarcerated people "simply for complaining about a previous abuse").

172. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; Zoom Interview with Whit Washington, *supra* note 134.

173. Zoom Interview with Whit Washington, *supra* note 134.

174. Zoom Interview with A.D. Lewis, *supra* note 134.

175. Zoom Interview with Whit Washington, *supra* note 134.

really a means of relief" for her trans clients.[176] Thus, exhaustion "prevents access to justice [for trans people] in prison, [but] we need access to justice there more than anywhere."[177] These sentiments accord with Spade's notion that the regulation of agencies like prisons can make "trans people's lives administratively impossible."[178]

Because the PLRA and its exhaustion requirement stand as a nearly insurmountable obstacle for trans people, practitioners try to bypass the PLRA through alternative routes to best serve their clients. Some lawyers have tried to argue that violations of the Americans with Disabilities Act do not require PLRA exhaustion.[179] Others have pursued claims in state rather than federal courts, but such a pursuit meets similar pitfalls if the state court has a similar exhaustion requirement.[180] A more successful alternative has been pursuing a hearing before an Administrative Law Judge (ALJ) when the state's grievance procedures allow for such a hearing.[181] Finally, practitioners

176. Zoom Interview with Erin Beth Harrist, *supra* note 134.

177. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

178. SPADE, *supra* note 120, at 31–32.

179. Zoom Interview with Alex Binsfeld, *supra* note 134; Zoom Interview with A.D. Lewis, *supra* note 134. *But see, e.g.*, Jones v. Smith, 266 F.3d 399, 400 (6th Cir. 2001) (holding that PLRA exhaustion was required for a person in custody's ADA claim); O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056, 1062 (9th Cir. 2007) (same); Fauconier v. Clarke, 966 F.3d 265, 274 (4th Cir. 2020) (same).

180. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134; *see, e.g.,* WIS. STAT. § 801.02(7)(a)(3)(b) (exhaustion provision of the Wisconsin Prison Litigation Reform Act).

181. Zoom Interview with Whit Washington, *supra* note 134 (pointing to *Brown v. Patuxent Inst.*, OAH No. DPSC-IGO-2V-14-33232, IGO No. 2014113 (Md. Off. of Admin. Hearings, Aug. 17, 2015)).

In Maryland state prisons, a grievant first must generally file a complaint using an "administrative remedy procedure form." ALJ. MD. CODE REGS. 12.07.01.04(A). If the person in custody finds no resolution, the Executive Director of the Inmate Grievance Office then reviews the grievance and decides whether to dismiss it—perhaps because the person in custody did not exhaust the administrative remedy procedure—or submit to a hearing with an ALJ. *Id*. at 12.07.01.01(B)(5), 04, 06(A), 7(A)(3) (2024). At the hearing, "the [g]rievant bears the burden of proving, by a preponderance of the evidence, that the [Maryland] DOC's action was arbitrary and capricious." *Brown*, IGO No. 2014113, at 6 (citing MD. CODE REGS. 12.07.01.08A(1), C(l)(2015)). "[A]n ALJ may determine that an administrative decision is arbitrary and capricious . . . if (a) [t]he decision maker or makers did not follow applicable laws, regulations, policy or procedures; (b) The applicable laws, regulations, policy or procedures were intended to provide the grievant a procedural benefit; and (c) The failure to follow applicable laws, regulations, policy or procedures prejudiced the grievant." *Brown*, IGO No. 2014113, at 11.

avoid legal mechanisms altogether by informally requesting that prison staff halt future abuse and monitoring whether prison staff comply with such requests.[182]

Thus, of the small percentage of trans people who file grievances, an even smaller portion fully exhaust their claims. Trans people are disproportionately likely to face difficulties navigating labyrinthine grievance procedures due to literacy challenges, and they are highly likely to be prevented from fully grieving because of the rampant retaliation they face due to their transgender identity. As a result, exhaustion is not a viable means of resolution for incarcerated trans people.

3. In Court

Despite the many problems related to grieving, incarcerated trans people still do file cases in federal court. Some do so after having clearly satisfied the PLRA's exhaustion requirement,[183] while others file because they believe they are excused from exhausting under the

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In *Brown*, a transgender woman grieved that a Maryland prison placed her in administrative segregation due to her transgender status, failed to train its staff or institute a policy on how to interact with transgender people in custody, and had staff inappropriately watch her shower, all in violation of PREA. OAH No. DPSC-IGO-2V-14-33232, IGO No. 2014113, at 18–19, 24–26, 29 (Aug. 17, 2015). The ALJ found the prison's actions were arbitrary and capricious and awarded the plaintiff $5,0000 in damages. *Id.* at 31. The court reasoned that PREA constituted a "law[], regulation[], policy, or procedure[]" that could be violated, *id.* at 12, which is an important departure from the possibilities of PREA in state or federal court. As the court explained: "Patuxent [Institution] argues that I should not consider PREA because it does not create a private cause of action. I note that the Grievant is not pursuing a private cause of action in this grievance. Rather, the Grievant is asserting . . . that PREA is an 'applicable law, regulation, policy or procedure' that is intended to provide her with 'a procedural benefit,' that the law, regulation, policy or procedure was violated by Patuxent employees, and that the violation 'prejudiced' the Grievant. The fact that the Grievant would not be able to file a separate claim based on PREA in a federal or state court has no bearing on this administrative proceeding." *Id*. (internal citations omitted).

Thus, this case highlights that grievance procedures that include administrative hearings may be a more promising route for trans plaintiffs because they can more meaningfully enforce PREA than they otherwise could in state or federal court.

182. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

183. Section I.A discussed the literature on the merits of trans plaintiffs' cases. Given that plaintiffs in those cases made it to the merits, either they must have satisfied the PLRA's exhaustion requirement or the defendants chose to not raise an exhaustion defense.

Act. Because this Note examines trans people's experiences while going through the PLRA's exhaustion requirements, it focuses on the latter group.[184] Within this latter group, there are two subgroups. The first subgroup includes trans plaintiffs who did not attempt to exhaust their prison's grievance procedures before filing suit. The second subgroup includes trans plaintiffs who attempted to exhaust their prison's grievance procedures but did not fully exhaust them before bringing suit.

This Section begins by highlighting a key problem that trans plaintiffs face in both subgroups: lack of legal representation. Next, it focuses on the subgroup of trans plaintiffs who did not attempt to exhaust before filing suit, arguing that courts' narrow interpretation of *Ross v. Blake*[185]—the seminal case defining when an administrative remedy is unavailable and thus exhaustion is excused—fails to account for the lived reality of trans people in custody and thus unduly prevents plaintiffs from this subgroup from having their claims heard on the merits. Finally, this Section highlights that *Ross* may help the second subgroup of trans plaintiffs—those who do attempt to exhaust—though trans people are rarely able to take advantage of this doctrine. Taken together, this Section suggests that the PLRA's exhaustion requirement is a barrier to justice for trans people not only when navigating their prisons' internal grievance procedures[186] but also in the courtroom.

i. Lack of Legal Representation in Court

Before delving into *Ross*, it is important to highlight an initial feature that poses problems for trans plaintiffs seeking to navigate the PLRA: lack of legal representation. A small percentage of incarcerated trans people bring their claims to court, but those who do begin at a disadvantage because they rarely have legal representation.[187] This is

184. Trans people are also more likely to end up in the latter group because many are unable to exhaust their prisons' grievance procedures. *See supra* Sections II.B.1–.2.

185. 578 U.S. 632 (2016).

186. *See supra* Sections II.B.1–.2 (discussing the challenges trans people face before grieving and while grieving, respectively).

187. Indeed, of the 87 plaintiffs in this Note's dataset of cases, only 12 had lawyers. Plaintiffs had legal representation in Alexandria v. Collier, No. 21-50022, 2022 WL 3971294 (5th Cir. 2022); Iglesias v. Fed. Bd. of Prisoners, No. 19-CV-415-NJR, 2021 WL 6112790 (S.D. Ill. Dec. 27, 2021); Harmon v. Lewandowksi, No. 2:20-cv-09437-VAP-MRWx, 2021 WL 6618681 (C.D. Cal. Nov. 30, 2021); Jasmaine v. Gazoo, No. 3:18-cv-00533-MR, 2021 WL 243865 (W.D.N.C. Jan. 25, 2021); Winter

not necessarily unique to trans people in custody,[188] but it nonetheless represents a substantial obstacle.[189] The lack of legal representation only exacerbates the challenges described below.

ii. *Ross*'s Limits for Transgender Plaintiffs Who Have Not Attempted to Exhaust

Narrowing in on *Ross*'s application in trans plaintiffs' cases reveals how it overlooks the lived reality of many trans people in custody. As discussed in Part I, the *Ross* Court clarified when grievance procedures are "unavailable," and thus allow people in custody to sidestep the exhaustion requirement.[190] *Ross* provided three non-

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v. Richman, 2020 WL 6940760, No. 17-1322-LPS (D. Del. Nov. 25, 2020); Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2019 WL 2118219 (S.D. Ill. May 15, 2019); Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018); Becker v. Sherman, No. 1:16-CV-828 AWI JDP (PC), 2018 WL 4616281 (E.D. Cal. Sept. 25, 2018); Edmo v. Idaho Dep't of Corr., No. 1:17-cv-00151-BLW, 2018 WL 2745898 (D. Idaho June 7, 2018); Johnson v. Robinson, No. 3:15-cv-00298-JPG-RJD, 2017 WL 5448399 (S.D. Ill. Sept. 29, 2017); Williams v. Paramo, 695 F. App'x 200 (9th Cir. 2017); Dunn v. Dunn, 219 F. Supp. 3d 1100 (M.D. Ala. 2016). Of these 12, two cases were in the circuit courts. Alexandria v. Collier, No. 21-50022, 2022 WL 3971294, 2022 WL 3971294 (5th Cir. 2022); Williams v. Paramo, 695 F. App'x 200 (9th Cir. 2017). Two involved the same plaintiff, Strawberry Hampton, and same counsel, the Roderick and Solange MacArthur Justice Center. Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2019 WL 2118219 (S.D. Ill. May 15, 2019); Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018). Thus, only eight trans or gender non-conforming plaintiffs had representation in their district court cases. *See generally* Chinyere Eze & 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/E8ST-ZSU4] ("There is a dire need for legal advocacy. As pro bono legal counsel can be difficult to come by, almost all of [the claims by transgender people in custody] are filed pro se.").

188. *See* Schlanger, *supra* note 100, at 1624 ("[N]early all inmate civil rights cases are filed pro se.").

189. One lawyer highlighted that trans people almost always bring their cases pro se and legal organizations are typically only willing to represent them if their cases reach circuit courts. Zoom Interview with A.D. Lewis, *supra* note 134. Another attorney attributed this reality to the PLRA's attorney's fees cap provision. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134. This provision caps attorney's fees at 150% of a monetary award. 42 U.S.C. § 1997e(d)(2); *see also* Umphres, *supra* note 97, at 261 (arguing that courts' interpretation of 42 U.S.C. § 1997e(d)(2) has created a "perverse disincentive for attorneys to appear in even potentially *meritorious* cases").

190. *See supra* text accompanying notes 87–96.

comprehensive[191] scenarios when an administrative procedure is "unavailable": (1) when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when it is "so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[192]

Trans people who bring federal lawsuits *before* attempting to file grievances with their prison—often because they have emergencies or because they fear retaliation—have found little success in arguing that administrative remedies were unavailable as defined by *Ross*. The following cases demonstrate how the doctrine fails to account for the experiences of incarcerated trans people.

The first doctrinal challenge relates to incarcerated trans people who are facing emergencies. Incarcerated trans people are highly likely to face emergency situations,[193] but exhaustion does not give way to such a reality under current case law. In *Iglesias v. Federal Bureau of Prisons*, for example, a trans woman named Cristina Iglesias filed a lawsuit seeking a preliminary injunction that would "enjoin[] Defendants . . . to protect Iglesias from the known and serious risks of harm she continues to face while housed in a male facility."[194] Iglesias argued she did not need to first file a grievance about her prison's failure to protect her because "she was . . . raped, assaulted, and under persistent risk of life-threatening harm," so "a time-consuming administrative procedure . . . present[ed] no 'possibility of some relief' for PLRA exhaustion purposes."[195] The Southern District of Illinois, however, dismissed her claim because no "imminent danger" exception to exhaustion existed.[196] Thus, she did not have a valid *Ross* claim.

In *Hampton v. Baldwin*, a 2018 case involving a trans woman seeking transfer to a female facility, the Southern District of Illinois

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191. *See, e.g.*, Williams v. Corr. Officer Priatno, 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear exhaustive, given the Court's focus on three kinds of circumstances that were 'relevant' to the facts of that case.").

192. Ross v. Blake, 578 U.S. 632, 643–44 (2016).

193. *See supra* Section I.A (discussing the dangerous situations faced by transgender people in custody such as physical abuse and sexual assault from other people in custody and prison officials).

194. Iglesias v. Fed. Bureau of Prisoners, No. 19-CV-415-NJR, 2021 WL 6112790, at *1 (S.D. Ill. Dec. 27, 2021).

195. *Id.* at *47 (internal citations omitted).

196. *Id.*

discussed, in greater detail than the *Iglesias* court later would, the relationship between emergency situations and exhaustion requirements.[197] The court made clear that under the PLRA "an emergency does not exempt an inmate from exhausting his administrative remedies" but clarified that Illinois state prisons do have an emergency grievance procedure.[198] However, the Seventh Circuit has not decided how long a person in custody who files an emergency grievance must wait before they can bypass the emergency procedure and file suit in federal court,[199] with two days being insufficient in *Fletcher v. Menard Correctional Center*[200] and twenty-nine days being sufficient in *Hampton*.[201] Either way, a plaintiff must at least pursue the emergency grievance procedure, rather than bypass it, before a court can hear their claims.

The case law regarding emergencies puts trans people in particular danger because they frequently face imminent harm while incarcerated, especially if they are seeking to be moved from a hostile cell or facility.[202] While having an emergency grievance system in place may potentially be a positive step towards ensuring the safety of trans and other people who face immediate safety concerns, the PLRA requires no such system, so it is up to individual prisons or state legislatures to implement one.[203] Thus, under the exhaustion requirement, trans people can be required to slog through the administrative procedures and wait weeks for a response while the threat of immediate violence looms large. And even in states like Illinois that have an emergency grievance system, a trans person who is placed with a cellmate who threatens them with immediate violence may be required by current case law to wait days—or many days

197. Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *1 (S.D. Ill. Nov. 7, 2018).

198. *Id*. at *25 (citing ILL. ADMIN. CODE tit. 20, § 504.840 (2017)).

199. *Id*. at *26.

200. *Id*. (citing Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1174–75 (7th Cir. 2010)).

201. *Id*. at *29–30.

202. *See supra* Sections I.A.2, II.B.1, and text accompanying notes 1–4 (highlighting that trans people often face imminent danger when, for example, housed with transphobic cellmates).

203. Zoom Interview with Erin Beth Harrist, *supra* note 134.

longer[204]—before they can bypass the emergency grievance procedure process and seek relief in court.[205]

The second doctrinal challenge relates to trans people who file lawsuits before grievances because they are worried about harm or retaliation from prison officials. In *Knutson v. Hamilton*, for example, Knutson filed equal protection claims in the Western District of Virginia based on incidents of correctional officers placing them in a Special Housing Unit and beating them every two hours, during which the officers called Knutson transphobic slurs.[206] Knutson also highlighted that a prison psychologist made discriminatory statements related to Knutson's gender identity.[207] Knutson argued that they were excused from exhausting because they were "fearful of further attacks by the correctional officers," thus satisfying the third *Ross* scenario related to threats or intimidation.[208] Knutson supported these claims by their own testimony and the testimony of fellow people in custody who had experienced retaliation upon filing grievances.[209] The court found Knutson did not satisfy the third *Ross* scenario.[210]

This court's finding was based on a two-pronged test set out by the Eleventh Circuit in *Turner v. Burnside*[211]—a test that courts have used to examine whether the third *Ross* scenario is satisfied.[212] Under *Turner*, a threat makes a prison administrative remedy unavailable if (1) subjectively, "the threat did deter the plaintiff inmate from lodging a grievance or pursing a particular part of the process"; and (2) objectively, "the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust."[213]

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204. *See* ADMIN. REV. & RISK MGMT. DIV., TEX. DEP'T OF CRIM. JUST., OFFENDER GRIEVANCE OPERATIONS MANUAL 59, 78 (2012) (outlining that Texas State prisons have 35 days to respond to emergency medical grievances and 40 days for other emergency grievances).

205. Fletcher, 623 F.3d at 1174–75.

206. *See* Knutson v. Hamilton, No. 7:20-cv-00455, 2021 WL 4163981, at *1 (W.D. Va. Sept. 13, 2021) (recounting that officers called Knutson a "piece of transgender shit," a "transgender motherfucker," and a "transgender bitch").

207. *Id.* at *2.

208. *Id.* at *3.

209. *Id.* at *4.

210. *Id.* at *6.

211. 541 F.3d 1077 (11th Cir. 2008).

212. *Id.* at *3 (citing *Turner*, 541 F.3d at 1085).

213. *Id.* (citing *Turner*, 541 F.3d at 1085).

The Third,[214] Ninth,[215] and Tenth[216] Circuits have since adopted the *Turner* test.[217]

In *Knutson*, the court held that the plaintiff failed both prongs of the *Turner* test and therefore did not satisfy the third *Ross* scenario.[218] On the subjective front, the court reasoned that because Knutson filed three other grievances while at the same facility, any threat they received in this instance did not subjectively deter them from filing.[219] On the objective front, the court cited *McBride v. Lopez*—the case in which the Ninth Circuit adopted the *Turner* test—for the proposition that statements by prison officials that had "no 'apparent relation to the use of the grievance system,'" or were not directed at the plaintiff in question, could not be used to satisfy the objective prong.[220]

The analysis in *Knutson* is indicative of the way that the PLRA's exhaustion provision particularly harms trans individuals. First, the *Knutson* court did not consider why a trans person may be subjectively afraid to file a trans-related claim while simultaneously being able to file other claims.[221] As discussed earlier in this Part, trans people may be deterred from filing grievances because of fears of outing themselves.[222] Along similar lines, trans people, regardless of whether they are out, may be uncomfortable grieving trans-related issues

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214. Rinaldi v. United States, 904 F.3d 257, 269 (3d Cir. 2018).

215. McBride v. Lopez, 807 F.3d 982, 987–88 (9th Cir. 2015).

216. Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011).

217. Courts in other circuits, however, have questioned whether an incarcerated person's subjective belief about availability is relevant under *Ross*. *See, e.g.*, Galberth v. Washington, 14 Civ. 691 (KPF), 2017 WL 3278921, at *11 (S.D.N.Y. July 31, 2017) (finding, in the context of a trans person who did not file a grievance with their prison because of mental health issues, that *Ross* may "preclude[] consideration of a prisoner's subjective sense of availability").

218. *Knutson*, 2021 WL 4163981, at *6.

219. *Id.* at *5.

220. *Id.* at *3–5 (quoting *McBride*, 807 F.3d at 988). Other courts have argued that trans people fail the *subjective* prong of the *McBride* test when the mistreatment is not directly tied to the grievance system. *See* Moore v. Hickey, No. CV-18-08221-PCT-DLR (MTM), 2021 WL 8972092, at *10 (D. Ariz. Jan. 26, 2021) (finding that a trans person in custody failed the subjective prong when they were "singled out" and "treated differently" but not "specifically because Plaintiff sought to file a grievance").

221. *See* BOSTON, PLRA HANDBOOK, *supra* note 65, at 315–16 (discussing the problems with courts holding that "a claim of unavailability of the grievance system because of intimidation is defeated by a prisoner's filing of other complaints or grievances").

222. *See supra* Section II.B.1 (arguing that fear of "outing" prevents trans people from grieving).

because they do not want to draw further attention to their gender identity but may feel no discomfort about other issues.

Second, the court provided no analysis on why a threat unrelated to the grievance system, or evidence of others facing retaliation for using the grievance system, necessarily fails the objective prong. Trans people experience enormous levels of hostility in prisons which deter them from filing complaints altogether,[223] and this deterrence occurs whether the threats are specific to the grievance system or not. It is not a great leap to understand that an "ordinary" trans person would believe that the grievance system would be unavailable to them when prison staff consistently fail to "affirm[] the most basic part of [their identity]."[224] Consider the following hypothetical: a correctional officer sexually abuses a trans person in custody and threatens to kill them because of their gender identity. Under *Knutson*, if that trans person were too afraid to grieve and went straight to federal court, their claim would be dismissed because it failed the objective prong as the threat was not, for example, to harm them if they file a grievance.[225] Similarly, if a trans person were to provide evidence that other trans people who did file faced retaliation, such evidence would not be sufficient under *Knutson* to excuse a failure to exhaust.[226] *Knutson* fails to see how transphobic actions make a "reasonable" trans person afraid to file a grievance—or how "neutral" administrative laws impact trans people in the words of Spade.[227] Thus, trans people must risk their safety and attempt to exhaust in order to put forth viable *Ross* claims.[228]

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223. *See supra* Section II.B.1 (uncovering the ways in which trans people are prevented from filing grievances).

224. Zoom Interview with A.D. Lewis, *supra* note 134.

225. *Knutson*, 2021 WL 4163981, at *4–5 (finding the third *Ross* prong unsatisfied when the threats that deterred the plaintiff from exhausting did not specifically pertain to the "filing of a grievance").

226. *Id.* (finding the third *Ross* prong unsatisfied even when "other inmates ma[de] the general accusation that [prison] staff threaten to retaliate, or do retaliate, against inmates who file administrative remedies").

227. SPADE, *supra* note 120, at 30.

228. *Knutson* is not the only case to dismiss a gender non-conforming person's claims because they were too afraid to file a grievance due to transphobic treatment while incarcerated. *See* Cameron v. Menard, No. 5:16–cv–71–gwc–jmc, 2016 WL 5017390, at *1, *4 (D. Vt. Aug. 24, 2016), *report and recommendation adopted*, No. 16-cv-71, 2016 WL 4995063 (D. Vt. Sept. 19, 2016) (dismissing claims of a trans person who had "been subjected to harassment and unequal treatment due to her gender identity" because she "claim[ed] to have been harassed by *inmates*, not officials"); Harmon v. Lewandowksi, No. 2:20-cv-09437-VAP-MRWx, 2021 WL

iii. *Ross*'s Possibilities for Transgender Plaintiffs Who Have Attempted to Exhaust

Trans people who bring federal lawsuits *after* lodging a grievance but before fully exhausting—because they face retaliation directly tied to grieving or because the procedure becomes a dead end—have found more success under *Ross*. Nonetheless, trans plaintiffs have rarely utilized this doctrine and it does not offer foolproof success.

One type of post-lodging case involves trans plaintiffs who made arguments under the third *Ross* scenario involving threat or intimidation.[229] Through an analysis of all TGNCI cases involving exhaustion, this Note found only three cases in which plaintiffs found favorable results under this prong.[230] In all three cases, the courts ruled in favor of the plaintiffs when they faced threats from correctional officers after filing grievances that were directly tied to the grievance process and stopped pursuing the grievance process because of such threats.[231] Still, not every trans plaintiff who made third prong *Ross* arguments after lodging a grievance and receiving a threat tied to that grievance found success; courts have ruled against transgender

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6618681, at *12 (C.D. Cal. Nov. 30, 2021) (dismissing claims of non-binary person who did not exhaust because of generalized fear of retaliation).

229. *See* Ross v. Blake, 578 U.S. 632, 644 (2016) (finding administrative remedies unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.").

230. Dataset on file with Author.

231. Gray v. Fed. Bureau of Prisons, No. 5: 21-137-DCR, 2021 WL 4782257, at *2 (finding Plaintiff survived summary judgment on exhaustion issue when the prison captain threatened to place her in a special housing unit or move her to a "more dangerous yard" if she continued "to send any more requests" regarding "transgender-related matters"); Sweet v. Ruiz, No. ED CV 19-663 JVS (MRW), 2020 WL 4919683, at *1–2, *4 (C.D. Cal. July 20, 2020) (finding Plaintiff survived summary judgment by a "thin margin" when an officer threatened her with administrative segregation if she did not withdraw her grievance related to an improper pat-down); Williams v. Paramo, 695 F. App'x 200, 202 (9th Cir. 2017) (finding a trans woman satisfied the third *Ross* prong because officers spread rumors that she was a sex offender and stated it was "not [their] problem" when she reported threats from prison gang members directly tied to those rumors).

plaintiffs in these scenarios by challenging the plaintiffs' credibility[232] or by ignoring *Ross* altogether.[233]

A second type of post-lodging case involves TGNCI plaintiffs who made arguments under the first *Ross* scenario—when procedures operate as a dead-end.[234] This Note found two such cases in which plaintiffs argued they did not need to complete the exhaustion process, and courts found in their favor. In *Baker v. Jordan*, the plaintiff argued that "[d]efendants violated her Eighth Amendment rights by failing to provide [her] hormone treatment."[235] Baker followed her prison's grievance procedures and the Grievance Committee agreed that it would have a professional evaluate her for hormone replacement therapy.[236] Satisfied with this outcome, she did not appeal the decision.[237] However, when it became clear that the Grievance Committee failed to take action to secure such a professional, and instead informed her "that any distress she was feeling was due to an alleged rape" rather than to her gender dysphoria, Baker was no longer within the allotted three-day timeframe to file an appeal.[238] The defendants argued that Baker failed to exhaust by not appealing, but the Western District of Kentucky found that remedies were unavailable to her under the first prong of *Ross*.[239]

Meanwhile, in *Morris v. Fletcher*, an intersex person in custody brought suit for being denied hormone shots.[240] The Western District of Virginia found the plaintiff was excused from completing the grievance procedure because following the grievance instructions "would have seemingly placed Morris on an endless loop of requesting services, being denied services, having a subsequent grievance rejected

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232. *See, e.g.*, Scott v. Frame, 3:20cv5968-MCR-HTC, 2021 WL 6690008, at *1–2, *8–9 (N.D. Fla. Dec. 9, 2021) (finding transgender Plaintiff lacked credibility because she successfully filed other grievances at the same facility in the past and recommending that the court dismiss her claims on failure to exhaust grounds).

233. William J. Rold, *Tenth Circuit Leaves Prisoners Who Want to Marry Each Other in Procedural Morass*, 2022 LGBT L. NOTES 10, 10 (2022) (critiquing the decision in Johnson v. Pettigrew, No. 22-6015, 2022 WL 17333074 (10th Cir. Nov. 30, 2022) for "not cit[ing] or apply[ing] the key Supreme Court case of *Ross v. Blake* . . . which speaks at length about unavailability").

234. *Ross*, 578 U.S. at 643.

235. Baker v. Johnson, No. 3:18-cv-471, 2022 WL 17718516, at *3 (W.D. Ky. Dec. 15, 2022).

236. *Id.* at *4.

237. *Id.* at *5.

238. *Id.* at *2, *5.

239. *Id.* at *4–5 (citing Ross v. Blake, 578 U.S. 632, 643 (2016)).

240. Morris v. Fletcher, No. 7:15cv00675, 2017 WL 11515256, at *1 (W.D. Va. Mar. 28, 2017).

as a request for services, and being told again to request services, without a way for [Morris] to grieve the denial of those services."[241] Thus, the court concluded that administrative remedies were not available to Morris.[242] Notably, however, the district judge had to expressly overrule the magistrate judge, who found that remedies were available to Morris.[243]

Thus, while not foolproof, *Ross* does provide helpful doctrine for trans people who have already lodged a grievance but have not completed exhaustion. Still, the practical effects of the doctrine are lacking. There is a difference between having a doctrine on paper and taking steps to ensure that such a doctrine is accessible to people in custody. Of the eighty-seven cases analyzed for this study, this Note found only *five* examples of trans, intersex, or gender non-conforming plaintiffs successfully relying on *Ross*-based arguments—with one first faltering before a magistrate judge.

There are many more trans people in custody who face problems after attempting to grieve than the five discussed here.[244] Their absence in the case law should not be ignored.[245] Instead, their absence points to the limits of current *Ross* doctrine. How can we expect trans people in custody—who are almost always pro se,[246] who often face serious medical and safety issues,[247] who are likely to be socially ostracized or placed in solitary confinement,[248] who may not have the literacy or network to navigate labyrinthine prison procedures[249]—to file a successful lawsuit after the people incarcerating them have threatened, harmed, or ignored them for trying to resolve their claims related to an integral part of their identity?

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241. *Id.* at *2.

242. *Id.*

243. *Id.*

244. *See supra* Section II.B.2 (discussing the problems faced by trans people who try to grieve).

245. *See generally* Saidiya Hartman, *Venus in Two Acts*, SMALL AXE, June 2008, at 1, 11 (encouraging exploring silences in the archive).

246. *See supra* text accompanying notes 187–189 discussing the problem of lack of legal representation).

247. *See supra* Section I.A.2 (discussing the challenges trans people face while incarcerated).

248. *See supra* Sections I.A.2, II.B.1 (discussing the role of social networks in prisons and its impact on filing grievances).

249. *See supra* Sections II.B.1–.2 (discussing the challenges trans people face in exhausting administrative remedies).

On the whole, the PLRA's exhaustion requirement burdens incarcerated trans people by systematically weeding out their meritorious claims. Whether they are stopped at the pre-grievance, grievance, or courtroom phase, a large portion of incarcerated trans people are unable to move beyond procedure and have their claims heard on the merits.

III. SOLUTIONS TO HELP TRANSGENDER PEOPLE IN CUSTODY RESOLVE THEIR GRIEVANCES AND OBTAIN ACCESS TO JUSTICE

Part III draws on Spade's writing as a framework for proposing solutions. Spade argues that "[t]ransformative change" can benefit from "law reform work but does not center it."[250] Instead, reforms should focus on harm-reduction, or in the words of Spade, "support[] those most exposed" to a system's harms.[251] Those most exposed, Spade contends, should lead the way in pushing towards larger-scale change, which involves dismantling "violent systems structured through law."[252] Thus, harm-reduction reforms can better enable marginalized groups to "survive" and advocate for such systemic change.[253]

This Part draws on Spade's framework by building on recommendations from lawyers representing incarcerated trans people to best ensure that "the populations most directly impacted" guide recommendations.[254] It proposes three harm-reduction reforms—accounting for emergency situations, expanding the judicial interpretation of "unavailable" under *Ross,* and implementing LGBTQ grievance coordinators—and then offers ideas for larger-scale, "transformative change."[255]

A. Accounting for Emergency Situations

Incarcerated trans and gender non-conforming people are highly likely to face emergency situations,[256] but the PLRA prevents them from remedying these situations in a timely matter.[257] Under the

250. SPADE, *supra* note 120, at 15, 28.
251. *Id.* at 41.
252. *Id.* at 29, 41.
253. *Id.* at 29.
254. *Id.* at 28.
255. *Id.* at 15, 28.
256. *See supra* Section I.A.2 (discussing the harms trans people often face while incarcerated).
257. *See supra* Section II.B.3 (discussing the challenges trans litigants face in litigating the exhaustion requirement).

current implementation of the PLRA, trans people struggle to navigate a long grievance procedure when they have an urgent medical or other need.[258] Thus, the lives of incarcerated trans people would be greatly improved if their urgent needs could be addressed either by the prison or by the court in an efficient matter.

Legal scholars Margo Schlanger and Betsy Ginsberg have argued for a change to the PLRA's handing of emergency situations in the COVID-19 context,[259] and their suggestions could also benefit incarcerated trans people. Their first recommended intervention is through judicial interpretation.[260] They argue that when a person in custody "seeks time-sensitive prevention of harm, but the grievance system is unable to respond promptly," the "dead end" *Ross* prong should be satisfied.[261] Courts should rule similarly when incarcerated trans people face imminent harms.

Their second recommended intervention leverages the roles of state agencies and legislatures.[262] The PLRA is deferential to the prison's grievance procedure.[263] Thus, Schlanger and Ginsberg advocate for prison or legislature-created emergency procedures that (1) have sound "emergency" definitions and (2) allow "speedy processing."[264] They point to Delaware's state prison system as having a sensible "emergency" definition because its "criteria are functional, rather than hinging on an arbitrary time limit."[265] They also point to Virginia, among several other states, as having an appropriately "speedy process[]" because emergency grievers need to wait only eight hours before they can bring federal lawsuits.[266] By contrast, they point

258. Zoom Interview with Erin Beth Harrist, *supra* note 134.
259. Schlanger & Ginsberg, *supra* note 69, at 538.
260. *Id*. at 547–54.
261. *Id*. at 549 (citing Ross v. Blake, 578 U.S. 632, 643 (2016)).
262. *Id*. at 554–61.
263. *Id*. at 554.
264. *Id*. at 554–555.
265. *Id*. at 555 (citing STATE OF DEL. DEP'T OF CORR., POLICY NO. 4.4, INMATE GRIEVANCE POLICY 1 (2011), https://bidcondocs.delaware.gov/DOC/DOC_1205Commiss_INFO2.pdf [https://perma.cc/CTT8-62FF]). Delaware defines an emergency grievance as "[a]n issue that concerns matters which under regular policy time limits would subject the inmate to a substantial risk of personal, physical or psychological harm." STATE OF DEL. DEP'T OF CORR., *supra*, at 1.
266. *Id*. at 556 (citing VA. DEP'T OF CORR., OPERATING PROC. 866.1, OFFENDER GRIEVANCE PROCEDURE 14 (2021), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-866-1.pdf [https://perma.cc/4MQ3-TZ2T]).

out that states like New York impose no temporal requirements on prisons to respond to emergency grievances.[267]

The solutions posed by Schlanger and Ginsberg would benefit trans people just as they would people facing COVID-19-related problems. Whether at risk of danger because of an infectious virus or a transphobic cellmate, people in custody need a mechanism to quickly resolve their problems to secure their own safety. Trans people would especially benefit from such reforms because they so frequently face emergency situations.[268] Regardless, identifying and addressing the problem of a lack of emergency procedures has the opportunity to increase access to justice not only for trans people, but for all people in custody.

While emergency procedures provide benefits, they also come with limitations. As Schlanger and Ginsberg point out, prisons that do have emergency procedures give prison officials significant discretion in determining what constitutes an emergency.[269] This poses special problems for trans people in custody. Legal advocates, in the context of gender-affirming care, have discussed the dangers associated with giving prison officials the power to say who is trans and who "needs" gender-affirming care.[270] Similarly, prison officials who are insensitive or hostile to the issues affecting many trans people in custody may deem those issues non-urgent. Thus, adding an emergency grievance procedure, while helpful, cannot be a complete solution, as it would still operate within a carceral system that has repeatedly and systemically devalued trans lives.

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267. *Id*. at 557 n.90 (citing N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, NO. 4040, INMATE GRIEVANCE PROGRAM 14 (2016), https://doccs.ny.gov/system/files/documents/2022/12/4040.pdf [https://perma.cc/L4EH-ZYP5?type=image]); *see also* Zoom Interview with Erin Beth Harrist, *supra* note 134 (discussing challenges imposed by New York's vague emergency procedures).

268. *See supra* Sections I.A, III.B.3 (discussing the emergency situations trans people might face and highlighting that the PLRA does not provide exceptions for such emergencies).

269. Schlanger & Ginsberg, *supra* note 69, at 555 (citing, for example, COLO. DEP'T OF CORR., REGUL. NO. 850-04, GRIEVANCE PROCEDURE 8 (2022), https://cdoc.colorado.gov/about/department-policies [https://perma.cc/KA6N-ZG4B]).

270. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with Alex Binsfeld, *supra* note 134.

B. Expanding the Judicial Interpretation of "Unavailable" in the First and Third *Ross* Scenarios

Courts have developed a narrow understanding of what "unavailable" means in 42 U.S.C. § 1997e(a). Under the third *Ross* scenario—which states that a remedy is unavailable if "prison administrators thwart inmates from taking advantage of [the grievance procedure] through machination, misrepresentation, or intimidation"[271]—courts require that trans people not only objectively and subjectively believe remedies are unavailable but also base these beliefs on threats that are (1) directed at them and (2) specifically about retaliation for filing grievances.[272] Lawyers working with trans people have expressed frustration with this narrow interpretation.[273] To address this problem, the interpretation of "unavailable" should be expanded to include (1) situations in which trans people fear filing because other trans people faced transphobic-based retaliation for grieving and (2) situations in which trans people fear filing because of transphobic threats that are not directly tied to retaliation.

There are doctrinal arguments that support expanding "unavailable" in these two ways. The first expansion could find support under the first *Ross* scenario, which states that a remedy is unavailable "when [a grievance procedure] operates as a simple dead end."[274] John Boston argues that under this scenario:

> [R]eferences to procedures where "officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates" or where officials "decline ever to exercise" their apparent authority, and [*Ross*'s] reference to "facts on the ground" showing no possibility of relief, seem to say rather plainly that prisoners can defeat the non-exhaustion defense by showing generally that the administrative remedy never works for them, perhaps because of the actions and attitudes of the decision-makers, regardless of whether they personally made any effort to exhaust that system.[275]

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271. Ross v. Blake, 578 U.S. 632, 644 (2016).

272. *See supra* Section II.B.3.ii (describing case law in which trans people argue exhaustion is excused under *Ross*).

273. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

274. *Ross*, 578 U.S. at 643.

275. BOSTON, PLRA HANDBOOK, *supra* note 65, at 281 (citing *Ross*, 578 U.S. at 643).

Boston contends that this part of *Ross* stands for the proposition that a person in custody can excuse exhaustion by pointing to the past results of a grievance system.[276]

Futility may in fact be a viable non-exhaustion defense.[277] Boston notes that this facet of *Ross* "has been little acknowledged or explored," but he points to cases that relied on the language or logic of this part of *Ross* to excuse plaintiffs who forwent exhaustion based on other incarcerated people's experiences.[278] In one such case, *Apodoca v. Raemisch*, the District of Colorado found the plaintiff's claims survived summary judgment when he did not attempt to exhaust because the defendants "creat[ed] an institution-wide hostile environment of retaliation and of routinely thwarting grievances."[279] Lawyers supporting incarcerated trans people have similarly expressed interest in the expansion of "unavailability" to include situations where there is a "culture of retaliation" towards trans people filing grievances—a culture that appears common.[280] Thus, if future courts heed Boston's argument or adopt decisions like *Apodaca*, trans people could bypass exhaustion by demonstrating a culture of hostility to other trans grievers.[281]

The second expansion would allow trans people to bypass exhaustion if they provide evidence of transphobic treatment not directly tied to retaliation. This expansion could find support in the third *Ross* scenario.[282] The Ninth Circuit has seemingly endorsed this approach in dicta:

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276. *Id.*

277. *Id.* (discussing how *Ross* may overrule the contention that futility does not excuse exhaustion).

278. *Id.*

279. Apodaca v. Raemisch, No. 15–cv–00845–REB–MJW, 2015 WL 13709770, at *3 (D. Colo. Sept. 8, 2015), *report and recommendation adopted*, 2015 WL 13215657 (D. Colo. Oct. 30, 2015), *rev'd on other grounds*, 864 F.3d 1071 (10th Cir. 2017).

280. *See* Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134 (describing an "overall culture of hatred towards trans folk" in prisons).

281. Excusing exhaustion by pointing to the failures of similarly situated individuals is a well-settled practice in other legal arenas, such as international human rights law. For example, the Inter-American Court of Human Rights requires petitioners to exhaust domestic alternatives before it will hear their case. INT'L JUST. RES. CENTER, EXHAUSTION OF DOMESTIC REMEDIES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 7 (2018). However, "[i]f a similarly situated victim has already unsuccessfully pursued a particular remedy," domestic exhaustion is excused. *Id.*

282. Alternatively, such an expansion could find support from cases holding that the three *Ross* unavailability scenarios are not exhaustive. Williams v. Corr.

> [A threat] need not explicitly reference the grievance system in order to deter a reasonable inmate from filing a grievance . . . there [just] must be some basis in the record from which the district court could determine that a reasonable prisoner of ordinary firmness would have understood the prison official's actions to threaten retaliation if the prisoner chose to utilize the prison's grievance system."[283]

Courts have yet to apply the Ninth Circuit's dicta, but it could be helpful to trans people. As many interviewees recounted, when prison officials refuse to affirm a fundamental part of trans people's identities, many trans people reasonably conclude that they would face retaliation if they tried to grieve.[284] As a result, a "very small percentage of trans people take the risk to grieve."[285] If courts expand the interpretation of "unavailable" as proposed here, they would open the courts to these individuals as an avenue of redress.

While expanding "unavailability" in these two ways could help incarcerated trans people, there are serious limitations. One advocate expressed doubts that judges would be willing to expand the definitions in such ways given recent trends in the federal courts.[286] Another advocate opined that, even if a "similarly-situated person" doctrine developed, courts could still likely distinguish between trans plaintiffs to argue that the doctrine is not applicable.[287] Yet another pointed out that the ability to conduct discovery to substantiate arguments is restricted in prisons, especially when plaintiffs are pro se.[288]

The larger problem with these proposed expansions is that they might only have a small impact. The vast majority of incarcerated trans people do not bring their claims to court, so subtle arguments about "availability" under *Ross v. Blake* misunderstand the core problem.[289] Even if courts expanded *Ross*, it is unreasonable to expect trans people in custody, with greatly restricted information, to become aware of such legal developments and consequently lodge cases in

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Officer Priatno, 829 F.3d 118, 123 n.2 (2d Cir. 2016); Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018); Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017).

283. McBride v. Lopez, 807 F.3d 982, 988 (9th Cir. 2015).

284. Zoom Interview with Whit Washington, *supra* note 134; Zoom Interview with A.D. Lewis, *supra* note 134; Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

285. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

286. Zoom Interview with Whit Washington, *supra* note 134.

287. Zoom Interview with Erin Beth Harrist, *supra* note 134.

288. Zoom Interview with Dr. Jennifer Orthwein, *supra* note 134.

289. Zoom Interview with A.D. Lewis, *supra* note 134.

federal court. As one attorney put it, a "wonky fix" to the interpretation of the PLRA will not be sufficient.[290]

C. Implementing LGBTQ Coordinators

If a key problem is that many trans people do not grieve their non-frivolous issues because they fear the consequences, one helpful reform would be to alter the grievance process to make it safer for trans people. A queer-specific grievance procedure could provide this more reliable avenue of redress.[291] Such a procedure could include LGBTQ coordinators whom trans people could approach about grievances. Trans people may be more likely to—and importantly, more likely to believe that they can—safely grieve if an institutional figure is dedicated to supporting LGBTQ people's grievances.[292] Indeed, the Task Force on Issues Faced by TGNCNBI People in Custody issued a report in 2022 offering similar types of recommendations for New York City prisons.[293] This recommendation came about because those who respond to initial grievances often "do not receive specialized training in working with . . . TGNCNBI people."[294]

Implementing LGBTQ coordinators, however, poses logistical challenges and fundamental drawbacks. Logistically, prisons would have to agree to fund coordinators and people in custody would have to trust these prison-hired individuals. A more fundamental concern is that this reform works to expand current systems rather than dismantle them. Creating a role for an LGBTQ grievance coordinator

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290. *Id.*

291. Importantly, prison policies specific to queer or trans people are not unprecedented. Many prisons' policies and state laws afford rights specifically to incarcerated trans people. *See* CTR. FOR CONST. RTS. & NAT'L LAW.'S GUILD, THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON app. E at 133 (6th ed., 2021) (outlining LGBTQ prison policies in ten state prison systems).

292. In the healthcare context, research has demonstrated that LGBT individuals are unlikely to use healthcare providers that they perceive as not appreciating their unique healthcare needs. Natasha D. Williams & Jessica N. Fish, *The Availability of LGBT-Specific Mental Health and Substance Abuse Treatment in the United States*, 55 HEALTH SERVS. RSCH. 932, 933 (2020). Instead, LGBT individuals "often seek out health care providers that have a stated affirmative practice, even when the presenting problem is not related to their sexual orientation or gender identity." *Id.*

293. *See* McGovern et al., *supra* note 9, at 91 (calling for the creation of a "special team that monitors and reports all complaints made by TGNCNBI people in custody").

294. *Id.* at 90.

would, in the words of Spade, "slightly tinker with [a] harmful system[], thereby strengthening, stabilizing, and legitimizing"[295] the view that we should have mandatory grievance procedures. Resources could perhaps be better spent on more transformative changes.[296] Nonetheless, LGBTQ coordinators may provide more access to justice for incarcerated trans people in the short-term.

D. Large-Scale Change

Harm-reduction reforms around emergency procedures, expansion of judicial interpretation, and implementation of LGBTQ coordinators are not fully satisfying because each might only have a limited impact while simultaneously legitimizing harmful systems. Spade contends that law school constrains its students to come up with solutions that fit into existing legal frameworks, thereby perpetuating these harmful systems.[297] This Section follows Spade's guidance by exploring changes that may not seem possible at this point in time but that nonetheless provide goalposts for the future.

Evidently, repealing the PLRA would be a transformative change. Practitioners, academics, NGOs, and even congressmembers have advocated for the repeal of the entire Act, arguing it fundamentally restricts access to justice.[298] Some of the individuals most acquainted with the PLRA are calling for its repeal, and as Matsuda writes, the closer we get to those with lived experience, the more we should listen.[299] This Note provides more evidence for the contention that repeal of the exhaustion provision may be necessary.

Short of repeal, another change could be to drastically limit the types of claims that must satisfy exhaustion procedures. One interviewee argued that non-trivial matters like medical care and

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295. SPADE, *supra* note 120, at 185.

296. Zoom Interview with Alex Binsfeld, *supra* note 134.

297. SPADE, *supra* note 120, at 185.

298. Zoom Interview with Alex Binsfeld, *supra* note 134; Zoom Interview with Whit Washington, *supra* note 134; *see also* Fenster & Schlanger, *supra* note 16 ("The PLRA should be repealed. It was bad policy in the 1990s . . . and allowing it to continue today is even worse policy."); NO EQUAL JUSTICE, *supra* note 97, at 41 ("Human Rights Watch consistently has called for [the PLRA's] reform or repeal since its enactment in 1996."); Easha Anand, Emily Clark & Daniel Greenfield, *How The Prison Litigation Reform Act Has Failed for 25 Years*, THE APPEAL (Apr. 26, 2021), https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/ [https://perma.cc/7Z8H-LNAA] ("Repealing the PLRA is part of Congresswoman Ayanna Pressley's criminal justice agenda.").

299. Matsuda, *supra* note 126, at 324–25.

issues of immediate safety should not be subject to grievance requirements.[300] Another suggested that marginalized or particularly vulnerable groups should not be subject to the exhaustion requirement, though they recognize that this contention could be applied to all people in custody.[301]

No matter the change, it is important to center and listen to trans voices.[302] Advocates contend that the most impactful changes come from talking to trans people on the ground, finding out what their struggles are, and advocating for the changes they want to see.[303]

These recommendations, however, suggest that any change focused on the PLRA might not solve the underlying problems faced by trans people. The small-scale reforms in Sections III.A–.C and the larger changes in Section III.D all operate with the understanding that trans people will have problems addressing their grievances because of—to put it simply—transphobia. Each reform or larger-scale change seeks to find ways for trans people to avoid the transphobic roadblocks that the PLRA and its exhaustion provision have enabled—and thus help trans people "survive" so they can mobilize for greater change.[304] But none of the approaches do anything to address the "root cause" of the problem—transphobia in prisons.[305] Thus, while all of these efforts may help trans people in custody, they will not be sufficient to address the root causes of why many trans people face serious challenges while incarcerated.

CONCLUSION

In *Harmon*—the case discussed in the Introduction—the government lawyers representing the California prison painted a very different picture in their brief than did Harmon's advocates.[306] The government made no mention of Harmon's experience of sexual abuse;

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300. Zoom Interview with Erin Beth Harrist, *supra* note 134.

301. Zoom Interview with Whit Washington, *supra* note 134.

302. SPADE, *supra* note 120, at 28.

303. Zoom Interview with A.D. Lewis, *supra* note 134; *see also* SPADE, *supra* note 120, at 186 ("The goals of this work should not be merely about changing what laws and policies say. Instead, the work should build the capacity of directly impacted people to work together and push for change that will significantly improve their lives.").

304. *See* SPADE, *supra* note 120, at 29 (describing the proper role of legal reforms).

305. *Id.* at 185 (discussing the need to address "root causes").

306. Defendants-Appellees' Answering Brief at 1, Harmon v. Lewandowski, 2023 WL 2570425 (9th Cir. Mar. 20, 2023) (No. 22-55396).

the officers' threats, neglect, and encouragement of suicide; or Harmon's actual suicide attempt.[307] Instead, the government focused entirely on Harmon's alleged failures in complying with the grievance procedures.[308]

It is not surprising that the government masked Harmon's human experience. As this Note has demonstrated, that is exactly what the PLRA and its exhaustion provision do. The PLRA fails to take into account the real-world social dynamics that affect how many trans or gender-nonconforming people in custody resolve their serious problems. As a result, the rigid exhaustion requirement prevents a large percentage of these people from even trying to resolve their evidently non-frivolous issues and puts the small percentage of TGNCI people who decide to grieve—like Harmon—in danger and with little hope of resolution. The current exhaustion system does not work for trans people in custody, and scholars, legal practitioners, and policymakers should consider new approaches.

307. *Id*. at 1–2.

308. *See id.* (discussing how Harmon failed to identity an officer by name, failed to attach supporting documents, and failed to demonstrate that they feared following the grievance procedure).