COMMENTS

Real Laws from Imagined Facts: The Formative Role of Assumption in Prison Litigation Reform Act Exhaustion Doctrine

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In Woodford v. Ngo*, the Supreme Court made explicit the judicial assumption that most prisons have effective internal grievance procedures, firmly cementing that assumption within Prison Litigation Reform Act (PLRA) exhaustion doctrine. Reliance on this assumption has contributed to doctrinal rules that map poorly onto the factual realities of prisons and require constant clarification by the Supreme Court. Indeed, the Supreme Court has been called upon twice in the past decade to sort out the mess of doctrinal rules governing PLRA exhaustion, first in* Ross v. Blake *and again this year in* Perttu v. Richards*. Examining the Court's path to* Ross *and* Perttu*, this Comment argues that the Court's reliance on the assumption mandated in* Woodford *blinded it to the Seventh Amendment issue raised by its 2016 holding in* Ross*, which the Court recently resolved in* Perttu*. Ultimately, efficiency is one of the core justifications for PLRA exhaustion, and the Supreme Court's perpetual cycle of clarifying (and reclarifying, and reclarifying again) its construction of a single statutory provision fails to serve that end.*

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INTRODUCTION

On April 23, 2020, three inmates of Baraga Maximum Correctional Facility (BMCF) in Michigan—Kyle Brandon Richards, Robert Lee Kissee, and Kenneth D. Pruitt, Jr.—filed a civil action under 42 USC § 1983 against their resident unit manager (RUM), Thomas Perttu, in federal district court.[1] The prisoners' fifty-page handwritten complaint alleged that Perttu engaged in a pattern of prolific and repetitive sexual abuse against more than a dozen inmates.[2] The complaint further alleged that Perttu destroyed the prisoners' legal mail, extorted them to perform sexual acts, and threw out their grievance filings.[3] But despite these graphic allegations, Richards, Kissee, and Pruitt failed to plead their way into court.[4]

Prison litigants must comply with the Prison Litigation Reform Act[5] (PLRA), which contains an exhaustion provision that bars prisoners' claims from district court "until such administrative remedies as are available are exhausted."[6] Yet compliance is far easier said than done. As Perttu's accusers wrote: "We, Plaintiffs, attempted to exhaust remedies to the best of our ability. We fear for our life and saftey [sic] and need immediate intervention.

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1 Complaint at *1, Richards v. Perttu, 2021 WL 8055485 (W.D. Mich. Dec. 3, 2021) (No. 2:20-cv-76) [hereinafter Richards Complaint].

2 *Id.* at *3.

3 *Id.*

4 Richards v. Perttu, 2021 WL 8055485, at *13 (W.D. Mich. Dec. 3, 2021), *report and recommendation adopted*, 2022 WL 842654 (W.D. Mich. Mar. 22, 2022), *rev'd*, 96 F.4th 911 (6th Cir. 2024), *aff'd*, 145 S. Ct. 1793 (2025).

5 Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

6 42 U.S.C. § 1997e(a).

We need [ ] immediate aid . . . ."[7] Nonetheless, the U.S. District Court for the Western District of Michigan determined that the prisoners had failed to scrupulously comply with all steps of BMCF's prisoner grievance system (PGS) before filing their claim with the court. The court therefore dismissed their case for failure to exhaust administrative remedies.[8]

The BMCF prisoners' experience is emblematic of cases subject to PLRA exhaustion. As noted above, the PLRA's sparse exhaustion provision provides that "[n]o action shall be brought [by a prisoner] with respect to prison conditions . . . until such administrative remedies as are available are exhausted."[9] In the nearly thirty years since the PLRA was enacted, this bare-bones requirement has been the subject of judicial debate.[10] In *Woodford v. Ngo*,[11] the Supreme Court determined that the PLRA exhaustion provision requires *proper* exhaustion of PGSs, meaning that prisoners must scrupulously comply with every procedural requirement of their prison's grievance system before filing a complaint.[12] A decade later in *Ross v. Blake*,[13] the Court recognized a textual exception to PLRA exhaustion: prisoners need only exhaust *available* administrative remedies—that is, remedies practically "capable of use."[14] *Ross* instructs lower court judges to conduct a

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7 Richards Complaint, *supra* note 1, at *3.

8 Richards v. Perttu, 2022 WL 842654, at *2–3 (W.D. Mich. Mar. 22, 2022) (order approving and adopting report and recommendation).

9 42 U.S.C. § 1997e(a).

10 *See, e.g.*, Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that the petitioner was required to exhaust the prison grievance process even though the process could not provide the monetary relief requested by the petitioner); Porter v. Nussle, 534 U.S. 516, 532 (2002) (holding that excessive force claims are subject to the PLRA's exhaustion requirement); Woodford v. Ngo, 548 U.S. 81, 93 (2006) (holding that the PLRA requires "proper exhaustion"); Jones v. Bock, 549 U.S. 199, 216–24 (2007) (holding that nonexhaustion is an affirmative defense, exhausted claims are severable from unexhausted claims, and a prisoner is not required to identify by name in his administrative grievance all of the persons later named in his civil suit unless the PGS in question established such a requirement); Ross v. Blake, 578 U.S. 632, 638 (2016) (holding that "[u]nder the PLRA, a prisoner need only exhaust 'available' administrative remedies"). For a more detailed overview of PLRA exhaustion case law from *Booth* through *Jones*, see Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 591–97 (2014).

11 548 U.S. 81 (2006).

12 *Id.* at 88–93.

13 578 U.S. 632 (2016).

14 *Id.* at 642 (quotation marks omitted) (quoting *Booth*, 532 U.S. at 737–38) (referencing various dictionary definitions of "available").

fact-intensive inquiry in each case to determine if the particular PGS at issue was capable of use.[15]

But trial courts' applications of this exception have raised constitutional issues. On appeal from the case against Perttu discussed above, the Sixth Circuit split from the Seventh Circuit's interpretation of the Seventh Amendment's right to a civil jury trial in disputes regarding PLRA exhaustion.[16] Generally, the Seventh Amendment preserves a plaintiff's right to trial by jury in suits at common law when the value in controversy exceeds $20.[17] However, modern civil procedure allows judges, rather than juries, to resolve some factual disputes (including those germane to subject matter jurisdiction, personal jurisdiction, or venue) without violating the Seventh Amendment.[18] Thus, not every factual issue in a suit at common law triggers the Seventh Amendment jury right.

But what of PLRA exhaustion? Under the PLRA, exhaustion of available administrative remedies is mandatory. In a typical PLRA case, the prison or official raises a prisoner's failure to exhaust as an affirmative defense. A federal judge then weighs the evidence presented to determine whether the prisoner properly exhausted his administrative remedies and may proceed with his claim.[19] Every circuit to consider the question has agreed that the Seventh Amendment permits a judge to find facts relevant *solely* to the question of exhaustion at this stage.[20] However, the Sixth and Seventh Circuits are split on whether such judicial factfinding violates the Seventh Amendment when the disputed exhaustion facts are intertwined with the merits of a plaintiff's underlying claim. (Such facts are hence referred to as "intertwined

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15 *Id.* at 643 ("To state that standard, of course, is just to begin; courts in this and other cases must apply it to the real-world workings of prison grievance systems.").

16 *See* Richards v. Perttu, 96 F.4th 911, 920–21 (6th Cir. 2024) (disagreeing with *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008)).

17 U.S. CONST. amend. VII.

18 *See Pavey*, 544 F.3d at 741; *see also, e.g.*, McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 188–90 (1936) (resolving factual disputes germane to subject matter jurisdiction); Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 712–13 (7th Cir. 2002) (resolving factual disputes relating to personal jurisdiction).

19 *See Ross*, 578 U.S. at 648.

20 *See, e.g.*, *Pavey*, 544 F.3d at 741; *see also* Lee v. Willey, 789 F.3d 673, 677–78 (6th Cir. 2015); Small v. Camden County, 728 F.3d 265, 269 (3d Cir. 2013); Messa v. Goord, 652 F.3d 305, 308 (2d Cir. 2011); Dillon v. Rogers, 596 F.3d 260, 272 (5th Cir. 2010); Bryant v. Rich, 530 F.3d 1368, 1375–77 & n.15 (11th Cir. 2008); Wyatt v. Terhune, 315 F.3d 1108, 1119–20 (9th Cir. 2003).

facts.")[21] Intertwined facts could arise, for example, when the circumstances interfering with the plaintiff's participation in the PGS also give rise to the alleged rights violations themselves.

The Seventh Circuit addressed the issue in *Pavey v. Conley*,[22] holding that judicial factfinding on intertwined facts does not violate the Seventh Amendment.[23] The court reasoned that only issues that end the litigation of a plaintiff's claim must be tried by a jury and that dismissals for nonexhaustion are not litigation-ending because they are typically issued without prejudice.[24] The Seventh Circuit further held that a judge may determine intertwined facts at the exhaustion stage without violating the Seventh Amendment as long as a jury is permitted to reexamine the judge's factual determination at trial.[25] In *Richards v. Perttu*,[26] the Sixth Circuit rejected the Seventh Circuit's position in *Pavey*, holding that findings of nonexhaustion do effectively end the litigation of a plaintiff's claim and thus must be tried by a jury.[27] The defendants appealed, and the Supreme Court affirmed in June 2025.[28]

Thus, for the second time in less than a decade, the Supreme Court has had to clarify the scope of the PLRA's exhaustion requirement—and this time, the confusion stemmed directly from the Court's own prior intervention in *Ross*.[29] *Perttu v. Richards*[30] raises the question: Why did *Ross* fail to contemplate the Seventh Amendment concerns raised by judicial resolution of factual disputes common to both exhaustion and the merits? Ultimately, this Comment argues that the assumption that PGSs are practically capable of use in most cases led the Supreme Court to pay insufficient attention to the potential Seventh Amendment issues

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21 *See generally Perttu*, 96 F.4th 911 (using this terminology throughout).

22 544 F.3d 739 (7th Cir. 2008).

23 *Id.* at 740–42. Christopher Pavey filed an excessive force claim against prison guards he alleged broke his left arm and claimed that he had been unable to participate in his prison's grievance process because he was left-handed and therefore unable to fill out the paper grievance form. The intertwined fact was the severity of the injury to Pavey's left arm. *Id.*

24 *See id.* at 741.

25 *Id.* at 742.

26 96 F.4th 911 (6th Cir. 2024).

27 *Id.* at 921–23.

28 *See generally* Perttu v. Richards, 145 S. Ct. 1793 (2025).

29 The confusion surrounding intertwined facts stems from *Ross* because *Ross* directs trial courts to conduct a more searching, fact-intensive inquiry into exhaustion, and this method of inquiry raises Seventh Amendment implications that might not have been present before.

30 145 S. Ct. 1793 (2025).

that *Ross* generated. As exemplified by *Ross*, making law to govern an idealized prison system that does not in fact exist creates unworkable doctrine that lower courts struggle to map onto the realities of prison life. In the end, the self-reinforcing saga of unintended consequences from *Woodford* to *Perttu* highlights an important aspect of the Court's prison law jurisprudence: the central role of unsubstantiated factual assumptions about the nature of inmates, prisons, and prison officials in the construction of prisoners' rights.

The Comment proceeds as follows. Part I recounts three inmates' experience attempting to navigate PLRA exhaustion in order to illustrate that the idea that PGSs are practically capable of providing relief to inmates is a fiction. Part II synthesizes existing scholarship that establishes the ubiquity of assumption throughout prison law and attempts to explain the Court's resistance to empiricism in prison doctrine. Part III traces how the assumption that PGSs are practically capable of use in most cases came to be embedded in the reasoning of *Woodford*, the 2006 Supreme Court case that proved critical to the Court's lack of foresight in *Ross*. Part IV explains the contours of *Ross*'s unavailability exception and argues that the *Ross* Court should have anticipated *Perttu*'s intertwined facts problem. Finally, Part V examines how the *Ross* Court's reliance on a set of assumptions laid out in *Woodford* led to its failure to anticipate intertwined facts and addresses potential counterarguments.

I. A CASE STUDY OF PLRA EXHAUSTION AND JUDICIAL FACTFINDING: KYLE BRANDON RICHARDS, ROBERT LEE KISSEE, AND KENNETH D. PRUITT

Richards, Kissee, and Pruitt sued their resident unit manager, Perttu, based on allegations of sexual abuse, retaliation, and destruction of property.[31] In his retaliation claim, Richards alleged that Perttu prevented him from filing grievances related to Perttu's alleged sexual abuse by ripping up the grievances or otherwise destroying them.[32] The complaint lays out several specific instances when Perttu allegedly destroyed grievances that Richards had intended to file.[33] Richards also claimed that Perttu

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[31] Richards Complaint, *supra* note 1, at *3.

[32] *Id.* at *19–21.

[33] *Id.*

threatened to kill him if he persisted in trying to file more grievances and that he was wrongfully held in administrative segregation (a form of restrictive housing where inmates are separated from the general population) for doing so.[34]

A magistrate judge held an evidentiary hearing to determine whether the claimants had exhausted their administrative remedies as required by the PLRA. During the hearing, Perttu presented evidence that prison grievance procedures were generally available to the three plaintiffs throughout their confinement.[35] Perttu also presented Michigan Department of Corrections (MDOC) records showing that none of the plaintiffs properly appealed any relevant grievances through the final step of the prison's grievance process prior to filing suit.[36] But the plaintiffs presented testimonial evidence that administrative remedies were not available to them because Perttu thwarted their efforts to file grievances.[37] Ultimately, the magistrate judge recommended that the district court find that Perttu had proved by a preponderance of the evidence that Richards, Kissee, and Pruitt had failed to exhaust their administrative remedies and had failed to prove that Perttu had prevented them from filing grievances.[38] Over the plaintiffs' objections, the district court adopted the report and recommendation, and it dismissed the case without prejudice.[39]

The plaintiffs' experience is emblematic of PLRA exhaustion inquiries under *Ross*. Under the PLRA, prisoners must properly exhaust their prison's PGS (i.e., they must exactly comply with all procedural requirements of the system) before a court may hear their claim,[40] and the PLRA does not set a minimum standard for acceptable system procedures.[41] Therefore, the particular procedural requirements a prisoner must exhaust are left almost entirely to the discretion of individual prison officials. Many commentators have suggested that putting the height of the exhaustion barrier in the hands of prison officials, who risk facing litigation if exhaustion is met, leads to PGSs designed to frustrate

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[34] *Id.* at *21.

[35] Richards v. Perttu, 2021 WL 8055485, at *10 (W.D. Mich. Dec. 3, 2021) (report and recommendation).

[36] *Id.* at *1.

[37] *Id.* at *7.

[38] *Id.* at *13.

[39] Richards v. Perttu, 2022 WL 842654, at *3 (W.D. Mich. Mar. 22, 2022).

[40] *See Woodford*, 548 U.S. at 90–91.

[41] *See* 42 U.S.C. § 1997e.

successful exhaustion.[42] Indeed, many PGSs have tight filing deadlines and impose complex procedural requirements upon prisoners.[43] Some grievance procedures require prisoners to informally resolve issues with the offending official.[44]

Navigating complex PGSs requires a level of legal competence few prisoners possess, so few prisoners can properly exhaust them. The district court's overruling of the plaintiffs' objection regarding exhaustion of Grievance AMF-20-01-6-22B, one of Richards's many unexhausted grievances at issue in *Richards v. Perttu*,[45] is a key example.[46] The district court's ruling relied on the magistrate judge's determination that Richards's grievance was not properly exhausted because he had not received a response to his final appeal when he filed his complaint in federal court.[47] This determination turned on the magistrate judge's interpretation of ambiguous

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[42] *See, e.g.*, Mikkor, *supra* note 10, at 578:

> For incarcerated plaintiffs, it is defendants, their co-workers, and their supervisors—that is, corrections department staff—who control the [internal grievance procedure] process that plaintiffs are required to have successfully navigated before they bring suit. The PLRA exhaustion regime thus creates misaligned incentives that make it vulnerable to significant bias in its operation.

See also Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1152–53 (2023) ("Because prison officials oversee the grievance process, they can respond to an incarcerated plaintiff's litigation success by amending the grievance policy to impose a more onerous pleading standard . . . . Prison administrators have devised pleading barriers to defeat even the *successful* claims of incarcerated people." (emphasis in original)); *id.* at 1165 ("The existing structure empowers prisons to respond to a litigation defeat—what should act as a constraint on pleading restrictions—by imposing a more difficult pleading standard to further immunize themselves from future liability."). *But see Woodford*, 548 U.S. at 102:

> Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims. Respondent does not contend, however, that anything like this occurred in his case, and it is speculative that this will occur in the future. Corrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances.

[43] *See* PRIYAH KAUL, GREER DONLEY, BEN CAVATARO, ANELISA BENAVIDES, JESSICA KINCAID & JOSEPH CHATHAM, PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 11–17, 19–22 (2015).

[44] *See id.* at 12; *Policy Directive 03.02.130: Prisoner/Parolee Grievances*, MICH. DEP'T OF CORR. 3 (Oct. 21, 2021), https://perma.cc/G7MV-J6UT (allowing a grievance to be rejected if "[t]he grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond their control or if the issue falls within the jurisdiction of Internal Affairs in the Office of Executive Affairs").

[45] 2022 WL 842654 (W.D. Mich. Mar. 22, 2022).

[46] *Id.* at *2.

[47] *Id.*

language in MDOC Policy Directive 03.02.130,[48] which sets out the procedural requirements of PGSs in the state of Michigan.[49] MDOC Policy Directive 03.02.130 states in relevant part:

> Complaints filed by prisoners/parolees regarding grievable issues as defined in this policy serve to exhaust their administrative remedies only when filed as a grievance through all three steps of the grievance process in compliance with this policy.[50]

Richards interpreted this provision to mean that he had exhausted his grievance when he *filed his final appeal*, so he brought his claim in the district court soon after he did so.[51]

Unfortunately for Richards, the magistrate judge interpreted MDOC Policy Directive 03.02.130 to mean that Richards's grievance could only be exhausted after Richards *received a response* to his final appeal, meaning that Richards had filed his claim with the district court prematurely.[52] The magistrate judge determined that the relevant provision merely clarifies that, except when specific exceptions apply, there is a three-step process through which a prisoner must exhaust his complaint.[53] The district court then concluded that the section of the policy directive discussing the final step of the grievance process suggests that issuance of a final response ends the process because the directive states that such a response "is final."[54] Looking to Supreme Court precedent, the district court approved the judgment of the magistrate judge based on its determination that the purpose of PLRA exhaustion was to give the prison "an opportunity to correct its own mistakes . . . before being haled into federal court."[55] To be sure, the magistrate judge construed the ambiguous provision according to basic principles of statutory construction. He considered the meaning of the words within the policy statement as a whole while keeping

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48 *See generally Policy Directive 03.02.130*, *supra* note 44.

49 *Perttu*, 2022 WL 842654, at *2.

50 *Policy Directive 03.02.130*, *supra* note 44, at 1.

51 *See Perttu*, 2022 WL 842654, at *2.

52 *Perttu*, 2021 WL 8055485, at *9–10 (report and recommendation).

53 *Id.*

54 *Perttu*, 2022 WL 842654, at *2 (quotation marks omitted) (quoting *Policy Directive 03.02.130*, *supra* note 46, at 7).

55 *Id.* (alteration in original) (quotation marks omitted) (quoting *Woodford*, 581 U.S. at 89).

an eye toward consistency with precedent and the PLRA's statutory purpose.[56] Requiring pro se prisoners to complete this exercise, however, assumes a level of technical legal expertise that most prisoners cannot reasonably be expected to marshal.

To put this issue in stark perspective, Michigan's grievance procedure is in many respects more user-friendly than most, making Richards's difficult experience the norm, not an exception.[57] Though Michigan imposes the tight filing deadlines characteristic of most PGSs, it appears to allow prisoners leave to amend their complaint after a procedural error and exempts prisoners filing internal affairs claims from the general requirement that they attempt to resolve their grievance with the subject of their complaint before making the initial grievance filing.[58] Nonetheless, three plaintiffs proceeding pro se with some forty-five claims against RUM Perttu between them failed to properly exhaust a single grievance.[59] The facts of *Perttu* thus reinforce the formidable barrier that the PLRA imposes, even in cases of egregious allegations of abuse.

Unable to properly exhaust, the plaintiffs' only hope of proceeding on their claims was to argue that they were entitled to an exhaustion exception under *Ross*, which was also fruitless. Specifically, they were left to argue that BMCF's PGS was not practically available to them because Perttu had thwarted their efforts to file grievances.[60] To determine if the plaintiffs were entitled to an exception to the exhaustion requirement under *Ross*, the magistrate judge had to engage in substantial factfinding. The plaintiffs presented testimonial evidence that Perttu had prevented them from accessing the PGS by destroying their

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56 *See id.*

57 *See, e.g.*, Mikkor, *supra* note 10, at 583–85 (summarizing requirements designed to limit litigation, including an Arkansas requirement limiting prisoners from attaching additional pages to grievance forms while mandating that prisoners include specific details in their initial grievance). *See generally* KAUL ET AL., *supra* note 43.

58 *Policy Directive 03.02.130*, *supra* note 44, at 4, 6–7.

59 *Perttu*, 2021 WL 8055485, at *9–10 (report and recommendation).

60 *Id.* at *10:

> Because the undersigned finds that RUM Perttu met his burden of proving, by a preponderance of the evidence, that administrative remedies were generally available, and that Plaintiffs failed to exhaust those remedies, the burden shifts to Plaintiffs to show that the grievance procedures were effectively unavailable to them. Here, Plaintiffs assert that the unavailability of the procedures was procured by RUM Perttu's destruction of grievances.

grievances, threatening them, and engaging in other forms of intimidation and misrepresentation.[61] Perttu disputed the plaintiffs' allegations, presenting contradictory evidence.[62] Ultimately, the magistrate judge determined that the testimony given by the plaintiffs' witnesses was not credible because the testimony was "either substantially guided by Richards's manner of questioning or wholly conclusory, [ ] often contradicted prior statements or documentary evidence admitted throughout the bench trial," and was further undercut by Perttu's testimony regarding the layout of the prison.[63] Given this determination that the plaintiffs' witnesses lacked credibility, the magistrate judge concluded that the plaintiffs had failed to provide sufficient evidence that BMCF's PGS was effectively unavailable to them.[64]

The plaintiffs' experience tracks the typical life cycle of PLRA claims. First, despite a good faith effort to comply with all procedural requirements of his prison's PGS, the prisoner finds that he has not properly exhausted his administrative remedies pursuant to the requirements of the PLRA. He must therefore argue that he is excused from the exhaustion requirement under *Ross*'s practical unavailability exception. To determine whether the PGS was practically available, a magistrate judge then conducts a fact-intensive inquiry into the inner workings of the PGS and the prisoner's experience attempting to navigate the PGS, with the prisoner's ability to proceed hanging in the balance.

II. THE EMPIRICAL GAP IN PRISON LAW

Existing scholarship emphasizes that the Supreme Court's prison doctrine often lacks an empirical basis. This Part overviews seminal recent scholarship and reveals a common underlying truth: prison law is often not grounded in the facts of prison life, but rather in judges' unsubstantiated assumptions about prison life. In the past decade, scholars have noted that these assumptions are not only often substituted for fact but also play a formative role in prison doctrine. As this Comment illustrates, shaping doctrine around such assumptions creates confusing legal rules that often map poorly onto the facts before trial courts. This circumstance, in turn, generates conflicting interpretations

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61 *See id.* at *7.

62 *See id.* at *2–6, *7–8.

63 *Id.* at *10.

64 *Perttu*, 2021 WL 8055485, at *10.

among lower courts and other unforeseen consequences. Part II.A introduces the theory of selective empiricism, which illustrates the ubiquity of assumption in prison law broadly by exhibiting how unsubstantiated generalizations about prisons conflict across different areas of doctrine. Part II.B, in turn, addresses the assumptions specific to PLRA exhaustion doctrine.

A. Selective Empiricism, Statism, and the Transsubstantive Approach to Prison Law

Professors Justin Driver and Emma Kaufman have argued that courts routinely engage in "selective empiricism" by making factual generalizations about how prisons work that determine case outcomes but contradict across different areas of doctrine.[65] Ultimately, Driver and Kaufman attributed the fundamental incoherence of prison law to these inconsistent factual generalizations, which are facilitated by the Supreme Court's malleable notion of "the prison."[66] The authors offered three insights about the relationship between prisons and federal courts: (1) judges' reliance on prison tropes, rather than factual realities, undermines prisoners' rights; (2) the Supreme Court's transsubstantive approach to prison law facilitates the construction of those prison tropes; and (3) the judiciary suffers from a dearth of knowledge about penal institutions due to its resistance to empirical research.[67]

1. The Supreme Court is selectively empirical with respect to prison law.

Driver and Kaufman used the term "selective empiricism" to refer to courts' process of making contradictory, unsupported factual generalizations about prisoners and penal institutions in distinct lines of prison law doctrine.[68] Crucially, these assumptions drive courts' legal conclusions about prisoners' rights.[69] Therefore, inconsistent depictions of prisoners, prison officials, and prisons have played a critical but covert role in circumscribing prisoners' rights.[70]

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65 *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 567–70 (2021).

66 *Id.*

67 *See id.* at 566–83.

68 *See, e.g.*, *id.* at 569–70.

69 *See id.* at 541.

70 *See* Driver & Kaufman, *supra* note 65, at 570.

To make this concept more concrete, consider the Supreme Court's shifting depiction of prisoner literacy across access-to-court cases (which concern prisoners' constitutional rights not to be blocked from filing legal challenges and prisons' obligation to provide legal resources and assistance to ensure these rights) and PLRA exhaustion cases. In access-to-court cases, the Supreme Court has repeatedly asserted that an overwhelming number of prisoners are functionally illiterate.[71] By contrast, PLRA exhaustion cases assume that the average prisoner possesses the legal acumen to navigate both the PLRA and his prison's complex grievance procedure, as exemplified in Part I by Richards, Kissee, and Pruitt's experience. Thus, assumptions regarding prisoner literacy are at once wholly lacking in empirical support and plainly inconsistent across different lines of doctrine. Nonetheless, in the context of both PLRA exhaustion and access-to-court cases, literacy assumptions are operative in holdings that limit prisoner's rights.

2. The Supreme Court is highly deferential to prisons and the state in its approach to prison law.

But Driver and Kaufman did identify one consistent aspect of courts' assumptions: contradicting generalizations tend to support state (and therefore prison) interests.[72] Sticking with the literacy example, generalizations about prisoner illiteracy in access-to-court cases, such as *Lewis v. Casey*,[73] can be squared with assumptions about prisoners' legal sophistication in PLRA exhaustion doctrine by considering the Court's desire to preserve state resources.[74] The *Lewis* Court declined to provide Arizona prisoners with better law libraries and increased legal assistance, reasoning that providing enough resources to service an overwhelmingly illiterate prisoner population would be an undue burden on the state.[75] However, when prisoners seek to sue prisons in federal court in PLRA exhaustion cases and are thus a threat

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71 *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 488 (1969) (invalidating a Tennessee prison policy barring prisoners from assisting each other with habeas claims because without jailhouse lawyers, illiterate prisoners were, "in effect, denied access to the courts" by their illiteracy); Lewis v. Casey, 518 U.S. 343, 354 (1996) (describing prisoners as "mostly uneducated and indeed largely illiterate").

72 *See* Driver & Kaufman, *supra* note 65, at 569.

73 518 U.S. 343 (1996).

74 *See* Driver & Kaufman, *supra* note 65, at 567.

75 *Lewis*, 518 U.S. at 354.

to the state, courts claim that prisoners are not only literate, but savvy and cunning institutional actors.[76]

Driver and Kaufman suggested that the literacy cases reveal the Court's uncertainty about the constitutional implications of prisoners' dependence on the state.[77] A core consideration of prisoners' rights is that imprisonment is a deprivation of rights that in turn yields claims to new, positive rights created by the state's responsibility to protect and care for the people it imprisons.[78] The Court has avoided navigating the complicated relationship between rights forfeiture and rights acquisition by selectively making inconsistent generalizations about prisons and prisoners.[79] Thus, selective empiricism covertly serves a statist end: "Rather than announcing that prisoners lack rights, courts have recognized prisoners' rights and then employed factual generalizations to diminish their content."[80]

3. The Supreme Court takes a transsubstantive approach to prison law.

Finally, Driver and Kaufman argued that the Supreme Court's transsubstantive approach to prison law facilitates this lack of empiricism in prison doctrine.[81] The Court's approach to prison law focuses on the idiosyncrasies of the prison environment itself as opposed to the specific constitutional right in question. Thus, the approach is "transsubstantive" (with the substance being the specific right at issue) because the prison-first approach remains the same no matter which right is being considered. The Court held in *Turner v. Safley*[82] that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[83] To determine if a policy meets this standard, a court

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76 *See* Driver & Kaufman, *supra* note 65, at 568; *Woodford*, 548 U.S. at 95 (arguing that prisoners are cunning enough to deliberately circumvent PGSs in order to skirt the PLRA exhaustion requirement).

77 *See* Driver & Kaufman, *supra* note 65, at 568.

78 *Id.*

79 *Id.*

80 *Id.* at 570.

81 *See id.* ("[T]he faulty empiricism in prison cases stems from the standards the Court has adopted. The doctrine *invites* the incoherence." (emphasis in original)).

82 482 U.S. 78 (1987).

83 *Id.* at 89 (introducing a new standard of review for prisoners' constitutional claims).

must consider the state's asserted interest, obvious policy alternatives, and other means of exercising the right.[84] Most importantly, courts must also consider the effect of protecting the right on prison budgets and the relationships between prisoners and guards.[85] Though the *Turner* standard does not apply to *all* constitutional rights claims brought by prisoners,[86] it influences how judges tend to view prisoners' constitutional claims. *Turner* is therefore emblematic of "the emergence of a field in which a person's status as a prisoner overshadows the particular right he has chosen to assert."[87]

By prioritizing the institution in which a constitutional right is claimed over the right itself, the transsubstantive approach to prisoners' rights emblemized by the *Turner* standard prompts courts to make broad factual assertions about prisoners, prisons, and prison life. Because the doctrine places a primacy on the prison context, case outcomes turn more on factual disputes about the nature of prisons themselves than on the specific legal question or right at issue. Thus, parties are incentivized to make (and courts must hear and determine the validity of) broad factual assertions about prisons and prisoners. For example, assume that a court cares about protecting right *X*, but right *X* is only violated if circumstance *Y* exists. Also assume that whether circumstance *Y* exists is in dispute. The government is incentivized to argue that circumstance *Y* does not exist. Moreover, if there is little actual evidence about whether circumstance *Y* exists, those arguments turn on broad and general assertions about why one should or should not believe that *Y* exists. Thus, parties end up making broad assertions, such as "prisoners are largely illiterate." When courts accept these sorts of assertions, they create doctrinal rules that turn on broad generalizations. But these arguments often lack empirical rigor and amount to little more than assertions. Critically, these broad assertions delineate the institutional parameters within which the constitutional right before the court is to be construed.

When prisoners' constitutional rights are at issue, the right obviously must be construed within the context of the prison.

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84 *Id.* at 89–91.

85 *See* Driver & Kaufman, *supra* note 65, at 571.

86 *See Turner*, 482 U.S. at 95 ("It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" (alteration in original) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974))).

87 Driver & Kaufman, *supra* note 65, at 571.

However, the lack of empirical rigor in defining the prison context creates opportunities for parties to be strategic. The *Turner* standard further exacerbates this issue because it puts an even higher primacy on the prison context than is already logistically required by explicitly mandating consideration of prison-specific dynamics in the rights construction itself. The *Turner* standard also encourages a high level of deference to prison officials that is unique in comparison to other civil rights laws.[88] Because it requires courts to consider institutional prison dynamics, such as the allocation of prison resources and the potential effects of judicial action on prison-specific actors (prisoners and guards) as they carry out prison-specific roles, Driver and Kaufman asserted that the *Turner* standard is an "unusually domain-specific, forgiving version of rational basis review, which produces a body of law that is unusually dependent on the government's depiction of prison life."[89]

B. Critical Assumptions in PLRA Exhaustion Law

PLRA exhaustion law is built upon several core assumptions. Professor Alison Mikkor has elucidated how the assumptions built into PLRA exhaustion blind the doctrine to the possibility of PGSs biased against prisoner exhaustion and prisoners' limited capacity to exhaust.[90] Beginning with "bias blindness," Mikkor noted that because current PLRA exhaustion doctrine is highly deferential to prison officials' prerogative to set PGSs, the doctrine gives unprecedented power to defendants to limit plaintiffs' abilities to exhaust.[91] This structure makes it more likely that PGSs will be biased in favor of prison staff instead of operating as a neutral problem-solving mechanism.[92] Deference is justified by a key assumption: that PGSs are primarily motivated by prison officials' desire to "resolve problems within jails and prisons efficiently, decisively, and fairly."[93] However, by predicating itself on this assumption, PLRA exhaustion doctrine forces courts to turn a blind eye to an equally plausible competing one: that correction

88 *See id.* at 572.
89 *Id.* at 571.
90 Mikkor, *supra* note 10, at 579–88.
91 *Id.* at 579–80.
92 *See id.* at 582.
93 *Id.* at 578.

agencies have a significant stake in preventing successful prisoner lawsuits.[94] Mikkor argued that bias blindness ultimately encourages PGSs that will shut down complaints (rather than identify and solve problems) because a PGS that shuts down complaints is more likely to immunize a corrections agency and its staff from liability.[95]

After the PLRA was enacted, several state corrections agencies updated their grievance procedures "to contain increasingly onerous, difficult-to-satisfy requirements that are intended to defeat prisoner lawsuits."[96] For example, the Arkansas Department of Corrections began to prohibit prisoners from attaching additional pages to grievance forms (which effectively limited the information a prisoner could provide in her grievance) at the same time it began to require prisoners to include specific details in their initial grievances.[97] As Mikkor noted, these policy changes show that corrections departments are well aware of their capacity to use complex PGSs to construct roadblocks to prisoner lawsuits.[98]

Mikkor further argued that assumptions in PLRA exhaustion doctrine blind courts to a prisoner's capacity to exhaust.[99] This is especially problematic because questions of capacity should be central to the exhaustion analysis.[100] Congress intended the PLRA to limit frivolous suits.[101] The exhaustion provision targets such claims indirectly by anticipating that the burdens associated with exhaustion will deter frivolous claims.[102] In turn, the proper exhaustion requirement is justified by the fear that manipulative prisoners will do an end run around PGS procedures if they are not made mandatory.[103] However, a prisoner who cannot perfectly

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94 *See id.* at 574, 585.

95 Mikkor, *supra* note 10, at 585; *see also* Yang, *supra* note 42, at 1152–53.

96 Derek Borchardt, Note, *The Iron Curtain Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 498 (2012).

97 *See id.* at 506.

98 Mikkor, *supra* note 10, at 583.

99 *Id.* at 586–88.

100 *See id.* at 586.

101 *See id.* at 589–90.

102 *See id.* at 586.

103 *See* Mikkor, *supra* note 10, at 586; *cf. Woodford*, 548 U.S. at 89 ("Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust."); *id.* at 89 n.1:

> One can conceive of an inmate's seeking to avoid creating an administrative record with someone that he or she views as a hostile factfinder, filing a lawsuit primarily as a method of making some corrections official's life difficult,

comply with a PGS's requirements is not intentionally flouting the exhaustion requirement.[104] And a prisoner's lack of capacity to exhaust does not neatly correlate with the merits of his claims: those prisoners suffering the most serious injuries will often have the greatest difficulty complying with PGS requirements.[105] Ultimately, because PLRA exhaustion doctrine bars inquiry into a prisoner's capacity to exhaust,[106] it operates to bar potentially meritorious suits that Congress never intended to preclude.[107]

* * *

Critically, the role of assumptions in PLRA exhaustion doctrine is one manifestation of a broader problem in prison law. Taking a bird's eye view of the Supreme Court's prison law doctrine, Driver and Kaufman have exposed the Court's faulty empirics by pointing out inconsistent assumptions across different lines of doctrine. The inconsistencies reveal the lack of substance behind the assumptions: if prisoners were truly as illiterate as they are presented to be in access-to-court doctrine, they could not possibly become literate upon attempting to file a claim governed by the PLRA (or vice versa). Though both assumptions cannot be true, both are formative of their respective doctrinal rules. Mikkor, in turn, has suggested that in the context of PLRA exhaustion, assumptions about the motives of prison officials and about prisoners' capacity to navigate PGSs may wholly eclipse and replace the relevant facts of a given case. In PLRA exhaustion doctrine, assumptions do not simply muddy the facts—they threaten to occlude them entirely.

This scholarly framework is useful in explaining why the *Ross* Court failed to anticipate the unworkability of the unavailability exception, which this Comment argues is a symptom of the critical role of assumption in PLRA exhaustion doctrine. As discussed in Parts IV and V, the exception's unworkability stems from the mismatch between the assumption that most PGSs are practically capable of use and the actual usability of most PGSs. This assumption blinded the *Ross* Court to relevant facts on the

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or perhaps even speculating that a suit will mean a welcome—if temporary—respite from his or her cell.

104 *See* Mikkor, *supra* note 10, at 586.

105 *See id.* at 586–88.

106 *See Woodford*, 548 U.S. at 85 ("Exhaustion is no longer left to the discretion of the district court, but is mandatory." (citing Booth v. Churner, 532 U.S. 731, 739 (2001))).

107 *See* Mikkor, *supra* note 10, at 593.

ground, making it unable to recognize the disconnect between the circumstances presumed in the doctrine and the realities of prisons.

III. THE BIRTH OF ASSUMPTION IN *WOODFORD V. NGO*

Core aspects of Driver and Kaufman's and Mikkor's critiques of prison doctrine are evident in the reasoning of *Woodford v. Ngo*, which was handed down by the Supreme Court in 2006. In *Woodford*, the Supreme Court construed the PLRA's mandatory exhaustion provision to require "proper exhaustion of administrative remedies."[108] This Part argues that creating the proper exhaustion requirement required the *Woodford* Court to codify two driving assumptions in PLRA exhaustion doctrine: (1) prisoners will deliberately circumvent PGSs unless they are forced to comply with them; and (2) prison officials have good faith incentives to maintain PGSs sufficient to address prisoners' meritorious grievances, so they can generally be expected to do so. In relying on these assumptions, *Woodford* established the groundwork for its lack of foresight a decade prior to *Ross*.

Proper exhaustion effectively imposes a default sanction on potential plaintiffs: if a prisoner fails to scrupulously comply with all the PGS's procedural requirements and filing deadlines, his claim must be dismissed for failure to exhaust administrative remedies.[109] The PLRA exhaustion provision provides, "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."[110] That provision is notably silent on the procedural default sanction imposed by the *Woodford* Court; the "proper" exhaustion requirement is nowhere to be found in the statutory text. The majority supported its construction with an analogy to the doctrine of exhaustion in administrative law.[111] Because aggrieved parties in many cases may choose to exhaust their administrative remedies without being required to do so, statutory exhaustion provisions serve a purpose when a "significant number of aggrieved parties, if given the choice, would not voluntarily exhaust."[112] Requiring these parties

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[108] *Woodford*, 548 U.S. at 84.

[109] *See id.* at 88–93.

[110] 42 U.S.C. § 1997e(a).

[111] *See Woodford*, 548 U.S. at 88–91.

[112] *Id.* at 89.

to properly comply with all steps of an agency's remedial procedure "creates an incentive for [them] to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims."[113] Applied to the PLRA, proper exhaustion "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors."[114]

The majority's justification for requiring proper exhaustion relies on the assumption that absent such a requirement, prisoners would deliberately engage in gamesmanship to circumvent prison grievance proceedings and proceed directly to federal court.[115] Indeed, the opinion details how a prisoner may intentionally bypass a prison's grievance procedure under an ordinary exhaustion requirement:

> [A] prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds.[116]

This hypothetical scenario demonstrates how the Court assumes as a preliminary matter that most prisoners will not wish to resolve their grievances through their prisons' grievance processes and will act in bad faith to avoid having to do so. Therefore, the use of the hypothetical does little to support the majority's analogy to administrative law. The opinion argues that proper exhaustion is appropriate in administrative law when a *significant number* of aggrieved parties would not voluntarily exhaust, not simply when an aggrieved party wishing to circumvent exhaustion may theoretically be capable of doing so. However, the hypothetical fails to explain why a significant number of prisoners

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113 *Id.* at 90.

114 *Id.* at 94.

115 *See Woodford*, 548 U.S. at 95 ("A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction."); *see also id.* at 118 (Stevens, J., dissenting) ("Much of the majority opinion seems to assume that, absent the creation of a waiver sanction, prisoners will purposely circumvent prison grievance proceedings.").

116 *Id.* at 95.

would engage in the sort of gamesmanship the majority describes. The Court's reasoning therefore relied on the implicit assumption that *most* prisoners left to their own devices will act in bad faith to avoid exhausting PGSs.

The majority's assumption of prisoners' bad faith avoidance of PGSs is particularly troubling considering the majority's second assumption: that prison officials have incentives to maintain effective grievance systems. The opinion dismisses as "speculative" the contention that requiring proper exhaustion would lead prison administrators to devise procedural requirements designed to trap unwary prisoners.[117] The opinion asserts that "[c]orrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances."[118] This assertion fails to grapple with the phenomenon, highlighted in Part II.B, that prisons in fact often have incentives to prevent exhaustion and avoid exposure to litigation.

Thus, *Woodford* cemented two key assumptions in PLRA exhaustion doctrine: (1) prisoners will deliberately circumvent PGSs unless they are forced to comply with them; and (2) prison officials have good faith incentives to maintain PGSs sufficient to address prisoners' meritorious grievances, so they can generally be expected to do so. While the first assumption is often expressed less explicitly than the second, it remains a driving background principle in exhaustion inquiries. According to the *Woodford* Court, prisoners' assumed bad faith is the reason why effective PGSs (resulting from prison officials' assumed good faith) are insufficient to incentivize prisoners to voluntarily exhaust their administrative remedies—and why proper exhaustion must be imposed.[119]

IV. THE PUZZLE OF *ROSS V. BLAKE* AND *PERTTU V. RICHARDS*

A decade after *Woodford*, the Supreme Court instructed lower court judges to conduct a fact-intensive inquiry to decide

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[117] *Id.* at 102.

[118] *Id. But see* Mikkor, *supra* note 10, at 582 ("Non-exhaustion confers immunity from liability on prison staff, and by casting corrections staff in a dual role—as both the entity that makes the rules and the subject of the administrative complaint—the law empowers corrections departments to grab that prize.").

[119] *See Woodford*, 548 U.S. at 95.

exhaustion in *Ross v. Blake*.[120] A fundamental question raised by *Perttu v. Richards* is why the Court failed to settle the Seventh Amendment concerns raised by intertwined facts in *Ross*. Reading *Ross* on its face, it seems readily predictable that the unavailability exception would lead to an increase in judicial determination of facts relevant to the merits at the exhaustion stage—so the *Ross* Court's failure to anticipate the intertwined facts issue flags a problem within PLRA doctrine itself. This Comment suggests that the *Ross* Court overlooked the Seventh Amendment concerns generated by its holding because it relied on *Woodford*'s assumption that prisons typically maintain PGSs sufficient to address prisoners' meritorious grievances. This Part summarizes *Ross*'s core holding and explains why the Supreme Court should have anticipated the Seventh Amendment complications presented by intertwined facts, most notably with respect to First Amendment retaliation and Eighth Amendment excessive force claims.

A. *Ross*'s Unavailability Exception

In *Ross*, the Supreme Court foreclosed an exception based on "special circumstances"[121] but recognized a separate textual exception to the PLRA exhaustion requirement. Pointing to the phrase "as are available" in the PLRA exhaustion provision, the Court held that a prisoner need only exhaust *practically available* remedies, i.e., those remedies "capable of use to obtain relief."[122] If an administrative remedy is not practically available to a prisoner, a court may allow his unexhausted claim to proceed.[123]

In particular, the *Ross* Court noted three circumstances in which an administrative remedy, though officially on the books, would not be capable of use.[124] The first circumstance occurs when prison officials are unable or consistently unwilling to provide relief.[125] An example of this circumstance is a prison handbook that

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[120] *See Ross*, 578 U.S. at 643 ("To state that [practical unavailability] standard, of course, is just to begin; courts in this and other cases must apply it to the real-world workings of prison grievance systems."); *id.* at 645 ("The facts of this case raise questions about whether . . . Blake had an "available" administrative remedy to exhaust."); *id.* at 648 (remanding for a lower court to "perform a thorough review" and address legal issues the Supreme Court highlighted concerning availability of administrative remedies).

[121] These circumstances include when a prisoner reasonably but mistakenly believes that he has exhausted his administrative remedies. *See Ross*, 578 U.S. at 638–42.

[122] *Id.* at 638, 643.

[123] *See id.* at 642–44.

[124] *See id.* at 643–44.

[125] *Id.* at 643.

directs inmates to submit their grievances to a particular administrative office, while in practice that office disclaims the capacity to consider those petitions.[126] The second circumstance occurs when administrative schemes are so opaque that they become incapable of use.[127] The unavailability test in this circumstance is whether "no ordinary prisoner" trying to use the PGS could "make sense of what it demands."[128] The third circumstance arises when prison administrators thwart inmates attempting to take advantage of a grievance process through "machination, misrepresentation, or intimidation."[129] For example, a prison official may "devise procedural systems . . . in order to 'trip[ ] up all but the most skillful prisoners'" or mislead or threaten individual inmates to prevent their use of otherwise proper procedures.[130] However, *Ross*'s unavailability exception is not limited to these three enumerated circumstances, and *Ross* directs lower courts to engage in a fact-specific inquiry to determine whether an administrative procedure was "available" to a prisoner in the particular circumstances of his case.[131]

B. Why the *Ross* Court Should Have Anticipated Intertwined Facts

The Supreme Court should have been aware of the potential Seventh Amendment concern posed by intertwined facts when it construed the unavailability exception in *Ross*. The exception prescribes a fact-intensive inquiry at the exhaustion stage and is both vague on application and indeterminate in scope. Because proper exhaustion is a strict and unforgiving requirement that few can meet, most prisoners' only hope to proceed past the exhaustion inquiry is to argue that their claim warrants exception under *Ross*, the only exhaustion exception recognized by the Supreme Court. The *Ross* Court should have anticipated that many prisoners would attempt to invoke the *Ross* exception, resulting in a rise in judicial factfinding at the exhaustion stage.[132]

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

127 *Id.*

128 *Id.* at 644.

129 *Id.*

130 *Id.*

131 *See Ross*, 578 U.S. at 643 ("To state that standard, of course, is just to begin; courts in this and other cases must apply it to the real-world workings of prison grievance systems.").

132 *See* Meredith Sterritt, Note, *The Prison Litigation Reform Act &* Ross v. Blake*: Why the Constitution Requires Amending the Exhaustion Requirement to Protect Inmates' Access to Federal Court*, 53 SUFFOLK U. L. REV. 115, 117 (2020):

Because most circuits agree that judges may determine facts germane only to exhaustion, a predicted increase in judicial factfinding on those disputes alone may not have raised Seventh Amendment concerns.[133] But this Section argues that it was readily predictable that intertwined facts would arise with respect to at least two types of claims: First Amendment retaliation claims and Eighth Amendment excessive force claims. Moreover, the circuit split on the Seventh Amendment implications of intertwined facts was brewing when the Supreme Court decided *Ross*, so the issue was not unprecedented.

Intertwined facts are foreseeable for at least two types of claims. First, one would almost always expect overlap between facts relevant to a First Amendment retaliation claim and those relevant to a claim that prison remedies were unavailable due to machination, misrepresentation, or intimidation by prison officials. Indeed, this gave rise to the overlapping facts in *Perttu*.[134] The law in multiple circuits has long been that an inmate has an undisputed First Amendment right to file grievances against prison officials on his own behalf.[135] Moreover, the key inquiry in a First Amendment retaliation claim is whether the defendant's actions would deter the plaintiff from engaging in protected conduct (i.e., filing a grievance).[136] Because First Amendment retaliation claims and unavailability due to machination, misrepresentation,

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> The *Ross* holding, however, also presented an analytical paradox for lower courts; theoretically a court must dismiss a case for lack of exhaustion without considering the merits of the claim, but in order to determine whether the inmate's case is exempt from the exhaustion requirement under *Ross*, the judge must examine the merits of the claim.

[133] *See* Lee v. Willey, 789 F.3d 673, 678 (6th Cir. 2015); Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013); Messa v. Goord, 652 F.3d 305, 309–10 (2d Cir. 2011) (per curiam); Dillon v. Rogers, 596 F.3d 260, 271–72 (5th Cir. 2010); Bryant v. Rich, 530 F.3d 1368, 1376–77 (11th Cir. 2008); Pavey v. Conley, 544 F.3d 739, 741–42 (7th Cir. 2008); Wyatt v. Terhune, 315 F.3d 1108, 1119–20 (9th Cir. 2008), *overruled on other grounds by* Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en banc). *But see* Brief in Opposition at 13–17, *Perttu*, 145 S. Ct. 1793 (No. 23-1324) (arguing that factfinding at the exhaustion stage should be done by a jury regardless of whether there are intertwined facts because a finding of nonexhaustion ends the claim).

[134] *Perttu*, 96 F.4th at 920 (concluding that the factual disputes concerning exhaustion—i.e., whether Perttu prevented Richards from filing grievances—were intertwined with the merits of Richards's retaliation claim because Richards made out a prima facie First Amendment retaliation case when he alleged that Perttu destroyed Richards's grievances in response to Richards's attempted filing of those grievances).

[135] *See, e.g.*, Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000); Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995), *overruled on other grounds by* Shaw v. Murphy, 532 U.S. 223 (2001); Friedl v. City of New York, 210 F.3d 79, 85–87 (2d Cir. 2000).

[136] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999).

or intimidation claims effectively turn on the same general inquiry—whether the prisoner was prevented from accessing the prison grievance system—the Court should have anticipated that resolution of these claims would turn on the same facts.

Second, one would also expect facts to frequently overlap between an excessive force or inhumane conditions claim brought under the Eighth Amendment and a claim that prison remedies were unavailable due to intimidation by prison officials. Dissenting in *Woodford*, Justice John Paul Stevens noted that inmates who are sexually assaulted by guards or whose sexual assaults by other inmates are facilitated by guards have suffered "grave deprivations of their Eighth Amendment rights."[137] Nonetheless, "the PLRA's exhaustion requirement risks barring such claims when a prisoner fails . . . to file her grievance (perhaps because she *correctly* fears retaliation) within strict time requirements."[138] Justice Stevens asked whether the PGS in this scenario would afford an inmate a meaningful opportunity to raise her meritorious grievance,[139] but the question of whether the inmate was prevented from accessing the grievance system due to intimidation is equally appropriate. A prisoner who suffers a sexual assault in prison may have both a colorable Eighth Amendment claim and a colorable argument that the act of being sexually assaulted by a prison official constituted intimidation sufficient to prevent her from accessing the PGS. In these circumstances, disputed facts regarding the severity of the assault would be relevant to both the exhaustion issue and the Eighth Amendment claim.[140]

Finally, though only the Seventh Circuit had spoken directly on the issue, the circuit split on the Seventh Amendment implications of intertwined facts was brewing when the Supreme Court

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137 *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting).

138 *Id.* (emphasis added).

139 *Id.* at 121 (citing Women Prisoners v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994)).

140 Additionally, the PLRA contains a predocketing screening provision that requires courts to screen out complaints that are "frivolous, malicious, or fail[ ] to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). A complaint must therefore allege some plausible facts to survive predocketing screening and progress to the exhaustion stage. Because the difficulty of proper exhaustion means that most prisoners will argue that a *Ross* exception excuses them from the exhaustion requirement, the *Ross* Court should have anticipated that lower court judges deciding exhaustion would have to settle disputed facts germane to both exhaustion and the merits in at least some cases. *See id.*; *see also* Deblasio v. Johnson, 128 F. Supp. 2d 315, 326 (E.D. Va. 2000) (holding that "[f]rivolous complaints" warranting dismissal under 28 U.S.C. § 1915A are those based on inarguable legal conclusions or fanciful factual allegations), *aff'd sub nom.* Madison v. Johnson, 12 F. App'x 149 (4th Cir. 2001).

decided *Ross*. In 2008, the Seventh Circuit held in *Pavey* that the Seventh Amendment does not entitle a plaintiff to a jury trial for intertwined facts.[141] In 2014, the Ninth Circuit's *Albino v. Baca*[142] decision indicated that it agreed with the Seventh Circuit's holding in *Pavey*[143] (though the Sixth Circuit later characterized the Ninth Circuit's agreement as dicta).[144] Then, in the 2015 case *Lee v. Willey*,[145] the Sixth Circuit did not directly address intertwined facts but held that "disputed issues of fact regarding exhaustion under the PLRA present[ ] a matter of judicial administration that [can] be decided in a bench trial" when "factual disputes [ ] are not bound up with the merits of the underlying dispute."[146] The Second Circuit similarly left open the question of intertwined facts with a similar holding in the 2011 case *Messa v. Goord*.[147] While neither *Lee* nor *Messa* explicitly addressed the question, district courts in the Second Circuit, beginning with *Rickett v. Orsino*[148] in 2013, had relied on *Messa* to determine that the Seventh Amendment requires a jury to decide intertwined facts.[149] Finally, district courts in the First and D.C. Circuits had held that in some cases, a plaintiff was entitled to a jury trial on exhaustion facts even when those facts were not intertwined with the merits.[150]

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141 *Pavey*, 544 F.3d at 741.

142 747 F.3d 1162 (9th Cir. 2014) (en banc).

143 *Id.* at 1171 ("We agree with the Seventh Circuit that, if a factual finding on a disputed question is relevant both to exhaustion and to the merits, a judge's finding made in the course of deciding exhaustion is not binding on a jury deciding the merits of the suit.").

144 *Perttu*, 96 F.4th at 921.

145 789 F.3d 673 (6th Cir. 2015).

146 *Id.* at 678 (quoting *Messa*, 652 F.3d at 309).

147 652 F.3d 305 (2d Cir. 2011); *id.* at 309 ("Matters of judicial administration often require district judges to decide factual disputes that are not bound up with the merits of the underlying dispute. In such cases, the Seventh Amendment is not violated.").

148 2013 WL 1176059 (S.D.N.Y. Feb. 20, 2013), *report and recommendation adopted*, 2013 WL 1155354 (S.D.N.Y. Mar. 21, 2013).

149 *Id.* at *22–23.

150 In *Davis v. D.C. Department of Corrections*, 623 F. Supp. 2d 77 (D.D.C. 2009), an inmate's 42 U.S.C. § 1983 claim against a corrections department, its director, and its administrator, alleging that the inmate was the victim of sexual misconduct by a prison guard, was not dismissed for failure to exhaust under 42 U.S.C. § 1997e(a). *Id.* at 80–81. Although the prison's misconduct database revealed no grievances by the inmate, he swore that he told staff members of misconduct, which was one of two ways that the prison allowed misconduct to be reported. *Id.* The court held that a jury would have to decide whether the inmate's claim that he reported misconduct was credible, such that the exhaustion requirement was satisfied. *Id.* In *Maraglia v. Maloney*, 499 F. Supp. 2d 93 (D. Mass. 2007), prison officials alleged that a prisoner did not exhaust administrative remedies, as was required by the PLRA. *Id.* at 96–97. He alleged that he did exhaust, receiving no answers to his grievances. *Id.* The court found a fact dispute as to issues

Ross instructs lower court judges to conduct a fact-intensive inquiry to decide whether prisoners have exhausted their administrative remedies, so a fundamental question raised by *Perttu* is why the Court failed to settle the Seventh Amendment concerns raised by intertwined facts when it decided *Ross*. Especially considering that the circuit split on intertwined facts was forming when *Ross* was decided, it was readily predictable that the unavailability exception would lead to an increase in judicial determination of facts relevant to the merits at the exhaustion stage—particularly with respect to claims arising out of the First and Eighth Amendments. The magnitude of the *Ross* Court's oversight highlights a problem inherent to PLRA doctrine itself: the ubiquitous substitution of generalized assumptions about PGSs for the facts of real PGSs that real prisoners must attempt to navigate.

V. SOLVING THE PUZZLE OF *ROSS* AND *PERTTU*: THE *WOODFORD* ASSUMPTIONS

Now that we know why the *Ross* Court should have anticipated that intertwined facts would pose an issue, we must answer why it did not do so. This Part argues that the Supreme Court failed to anticipate the intertwined facts problem in *Ross* because it relied on *Woodford*'s assumption that prisons maintain PGSs sufficient to address prisoners' meritorious grievances. First, Part V.A acknowledges that institutional constraints may have contributed to the *Ross* Court's blindness to the intertwined facts problem. Part V.B examines a potential counterargument: it is possible that the *Ross* Court believed that *Pavey* was correctly decided and that other circuits would simply follow the Seventh Circuit, such that no court would hold that prisoners were entitled to a jury trial on intertwined facts under the Seventh Amendment. However, because *Pavey* itself relies on the *Woodford* assumptions, accepting *Pavey*'s holding could not absolve the *Ross* Court of this Comment's central criticism. Finally, Part V.C posits that the *Woodford* assumptions prevented the *Ross* Court from recognizing that *Ross* was a dramatic departure from earlier PLRA precedent and caused the Court to overlook the intertwined facts problem. In this way, *Ross* suffers from the same problem as the precedent before it: the practical unavailability exception could only be narrow in scope if *Woodford*'s unempirical assumptions about the

underlying the affirmative defense of exhaustion that turned on witness credibility, and it denied dismissal because jury resolution was needed. *Id.*

efficacy of PGSs were accurate, and the realities of PGSs are dramatically different from the PGSs the Court imagined when it construed the exception.

A. Institutional Informational Constraints Exacerbate the Effect of PLRA Exhaustion Assumptions

The *Ross* Court may have been unaware of the potential problem posed by intertwined facts simply due to the way information filters up to the Supreme Court. The Supreme Court relies on the parties before it to present all relevant information.[151] Yet neither the parties' briefs nor the amicus briefs submitted in *Ross* mentioned intertwined facts or the Seventh Amendment, so there is no concrete indication that the *Ross* Court was on notice of intertwined facts.[152] Ultimately, this Comment argues that the *Ross* Court should nonetheless have been aware that (1) its holding could give rise to exhaustion inquiries with intertwined facts and (2) lower courts may disagree on whether the Seventh Amendment requires a jury to decide those facts. The Supreme Court's reliance on the parties before it to provide relevant information may put informational blinders on the Supreme Court that isolate it from the full scope of its decision's impact, especially when it construes specific provisions of a lengthy, complex statute like the PLRA in isolation.

While some institutional constraints are inevitable, the broad assumptions characteristic of PLRA exhaustion doctrine may be particularly pernicious in the appellate, and especially the Supreme Court, context. Appeals courts do not find facts, so they are even further removed from the facts on the ground than the trial courts. A court must be exposed to the facts of a case to recognize the disconnect between those facts and the dominant assumptions in the doctrine. Thus, the more isolated a court is

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[151] *See* Greenlaw v. United States, 554 U.S. 237, 243 (2008) ("[I]n the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

[152] *See generally* Brief for Petitioner, *Ross*, 578 U.S. 632 (No. 15-339); Brief for Respondent, *Ross*, 578 U.S. 632 (No. 15-339); Reply Brief for Petitioner, *Ross*, 578 U.S. 632 (No. 15-339); Brief for the United States as Amicus Curiae Supporting Petitioner, *Ross*, 578 U.S. 632 (No. 15-339); Brief of Amici Curiae State of West Virginia and 38 Other States in Support of Petitioner, *Ross*, 578 U.S. 632 (No. 15-339); Brief of Amici Curiae Legal Aid Society of New York and Morningside Heights Legal Services, Inc. in Support of Respondent, *Ross*, 578 U.S. 632 (No. 15-339); Brief of National Police Accountability Project and Human Rights Defense Center as Amici Curiae in Support of Respondent, *Ross*, 578 U.S. 632 (No. 15-339).

from the factual circumstances of the case before it, the greater the role for assumptions to play in the outcome. Because the Supreme Court is already in a poor institutional position to consider the full impact of a given doctrinal rule, it is especially important that it have a clear picture of the real-world circumstances in which that rule will apply.

B. Counterargument: The Supreme Court Assumed the Circuits Would Follow *Pavey v. Conley*

When *Ross* was decided, only the Seventh Circuit had spoken directly on the question of intertwined facts. It is possible that the *Ross* Court assumed that the other circuits would follow the Seventh in obviating the Seventh Amendment question posed by intertwined facts. In 2008, the Seventh Circuit held in *Pavey* that the Seventh Amendment does not entitle a plaintiff to a jury trial when the exhaustion and merits issues share common facts.[153] Part IV.B argues that the circuit split on intertwined facts was brewing when *Ross* was decided. However, when *Ross* was decided, *Pavey* was the only circuit court opinion directly addressing intertwined facts, so it is possible that the *Ross* Court was aware of the intertwined facts problem but felt that *Pavey* had settled the Seventh Amendment issue. If the *Ross* Court assumed that other circuits would follow *Pavey*, it could be argued that the Court granted certiorari in *Perttu* in order to reimpose the Seventh Circuit rule it assumed was correct all along. But the outcome of *Perttu* belies the notion that the Supreme Court had ever agreed with *Pavey*. In any case, *Pavey*'s Seventh Amendment analysis adopts an unempirical factual assumption that follows from the *Woodford* assumptions. Thus, if the *Ross* Court relied on *Pavey*, that reliance would still be consistent with this Comment's core argument: reliance on unempirical assumptions about the nature of PGSs led the *Ross* Court to pay insufficient attention to the Seventh Amendment concerns attendant to intertwined facts.

Ultimately, the Seventh Circuit held that prisoners do not have a Seventh Amendment jury trial right on intertwined facts.[154] After plaintiff Christopher Pavey filed an excessive force claim against prison guards who he alleged broke his arm, the defendants claimed that Pavey had failed to exhaust his administrative remedies because he did not file a timely grievance with

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[153] *Pavey*, 544 F.3d at 741.

[154] *Id.*

prison authorities.[155] Pavey countered that he was unable to file the grievance because he could not prepare the paperwork himself, as Pavey is left-handed and his left arm was broken.[156] Thus, the gravity of the injury to Pavey's arm was a fact germane to both the exhaustion issue and the merits of his excessive force claim. However, noting that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right [under the Seventh Amendment]," the Seventh Circuit reasoned that "juries decide cases" (i.e., issues that end the litigation), "not issues of judicial traffic control" (i.e., issues that determine the proper forum for dispute resolution).[157] Ultimately, the Seventh Circuit determined Pavey's case to be one of judicial traffic control and held that the Seventh Amendment did not entitle him to jury factfinding.

The *Pavey* court's categorization of PLRA exhaustion as an issue of judicial traffic control rather than the sort of "deadline issue" typically decided by a jury rests upon its assumption that "in many cases the only consequence of a failure to exhaust is that the prisoner must go back to the bottom rung of the administrative ladder."[158] The court acknowledged that no administrative remedies remained available to Pavey, so a failure to exhaust would end the litigation of his claim.[159] However, it assumed that as a general matter, a prisoner would be able to restart his prison's grievance procedure after failing to exhaust in his first attempt.

This assumption is erroneous. In practice, the "bottom rung" of most administrative ladders is circumscribed by a tight deadline to file the initial complaint (typically, within fifteen days of the date the incident occurred).[160] Therefore, shunting a prisoner back to the beginning of his prison's grievance procedure does indeed end the litigation because most prisoners who have failed to exhaust their administrative remedies the first time around, like Pavey, will *never* be able to do so. Taking into account the realities of PGSs (which Pavey's experience is emblematic of, not exceptional to), PLRA exhaustion is a deadline issue by the *Pavey* court's own definition.

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155 *Id.* at 740.

156 *Id.*

157 *Id.* at 741.

158 *Pavey*, 544 F.3d at 741.

159 *Id.*

160 *Id.*; *see also Woodford*, 548 U.S. at 118 (Stevens, J., dissenting); KAUL ET AL., *supra* note 43, at 19–22.

The assumption that administrative remedies remain viable after a plaintiff's initial failure to exhaust is also central to the Seventh Amendment safety valve the Seventh Circuit creates for "peculiar" cases in which the exhaustion and merits issues share overlapping facts.[161] In such cases, "any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits."[162] Of course, juries may only reexamine judicial findings if a prisoner eventually overcomes the exhaustion hurdle. Many PGSs render this practically impossible.[163] When these systems set the height of the exhaustion barrier, a jury will almost never be assembled to reexamine disputed facts germane to the merits—even if a prisoner's claim is meritorious.[164]

In sum, *Pavey*'s holding turns on the following two assumptions: (1) administrative remedies typically remain available to plaintiffs after a failure to exhaust, and (2) overlap between the disputed facts relating to exhaustion and those relating to the merits is a rare, peculiar circumstance. These assumptions are consistent with and follow from the central assumptions in *Woodford* that prison officials can generally be expected to act in good faith and maintain internal grievance systems sufficient to address prisoners' meritorious grievances.[165] Adopting its own generalized assumptions, the *Pavey* court explicitly disregarded the facts of the case before it and created doctrine tailored to the sort of PGS imagined by the *Woodford* assumptions. Because *Pavey* is simply a case study of the operation of the *Woodford* assumptions in the context of the intertwined facts problem, accepting *Pavey*'s holding could not absolve the *Ross* Court's reliance on unempirical assumptions.

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161 *Pavey*, 544 F.3d at 741–42 ("A peculiarity of this case is a possible overlap between the factual issues relating to exhaustion and those relating to the merits of the excessive-force claim.").

162 *Id.* at 742.

163 *See* KAUL ET AL., *supra* note 43, at 19–22.

164 *See Perttu*, 96 F.4th at 921 (arguing that *Pavey*'s "fatal flaw" is that "the rationale that a jury may reexamine the judge's factual findings rings hollow if the prisoner's case is dismissed for failure to exhaust . . . administrative remedies" because "[i]n such an instance, a jury would never be assembled to resolve the factual disputes").

165 *See supra* Part III.

C. The Supreme Court Likely Did Not Realize the Full Magnitude of *Ross*'s Departure from Extant PLRA Exhaustion Precedent

Finally, due to its reliance on the *Woodford* assumptions, the *Ross* Court may not have recognized the full extent of its departure from earlier PLRA precedent, but because *Ross* is a clear invitation to trial judges to conduct a more rigorous inquiry into exhaustion facts, it marks a clear shift in the doctrine. Because it failed to recognize *Ross* as a major departure from extant precedent, the Court necessarily also failed to recognize that *Ross* created additional opportunities for intertwined facts to arise at the exhaustion inquiry.

Commentators have interpreted *Ross* in two ways. The first interpretation is that *Ross* is simply another instance of the Court clarifying the narrowness of exceptions to PLRA exhaustion.[166] Indeed, the *Ross* Court rejected a judicially created "special circumstances" exception.[167] The Court further emphasized the unavailability exception's consistency with the purposes of PLRA exhaustion identified in prior precedent (minimizing the number of unexhausted claims allowed to proceed to the merits).[168] Moreover, the *Ross* Court explicitly stated that it pulled the three enumerated circumstances in which the unavailability exception may apply from cases in which the Court and lower courts had already allowed exceptions to exhaustion.[169] Thus, at face value, *Ross* is entirely consistent with the Court's prior precedent because it is merely another instance of the Supreme Court's rejecting a lower court's attempt to carve out a judicially-created exception to the PLRA and of the Court's clarifying and synthesizing the ad hoc exhaustion exceptions it has allowed over the years.

But other commentators have interpreted *Ross* as holding the door open for a concrete, textual exception to PLRA exhaustion.[170] *Ross* recognized a textual basis for exception that may encompass

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166 *See, e.g.*, Jacqueline Hayley Summs, Comment, *Grappling with Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement in* Ross v. Blake, 69 ADMIN. L. REV. 467, 483–85 (2017).

167 *Ross*, 578 U.S. at 638.

168 *See id.* at 639–42.

169 *See id.* at 643.

170 *See generally, e.g.*, Nicola A. Cohen, Note, *Why* Ross v. Blake *Opens a Door to Federal Courts for Incarcerated Adolescents*, 51 COLUM. J.L. & SOC. PROBS. 177 (2017); Steve Vladeck, *Opinion Analysis: Justices Hold Door Open to Prisoner Suit Even While Rejecting "Special Circumstances" Exception to PLRA Exhaustion Requirement*, SCOTUSBLOG (June 7, 2016), https://perma.cc/4KEV-VWGV.

a scope similar to the Fourth Circuit's judicially created "special circumstances" exception.[171] When *Ross* was first decided, some commentators suggested that it may signal the Court's readiness to take a more hands-on approach to PLRA exhaustion.[172] Ultimately, lower courts do not seem to have interpreted *Ross* accordingly; an overwhelming number of claims are still dismissed for failure to exhaust.[173]

However, neither the content and scope of the unavailability exception itself nor its reliance on unempirical assumptions distinguish *Ross* from prior precedent. *Ross* is distinct in its explicit direction to apply the exception to real world grievance procedures and the majority's detailed example of what such an application should entail.[174] Together, these aspects of *Ross* are a direct invitation for lower courts to take a harder look at the inner workings of PGSs during the exhaustion inquiry—the clearest ever issued by the Supreme Court. This invitation has led to more rigorous judicial factfinding during the exhaustion inquiry, which is the change that created the intertwined facts problem.

Pre-*Ross* PLRA exhaustion doctrine encouraged judicial review that was both highly formalistic and deferential to a prison's own account of the plaintiff's experience with its internal grievance system. Extant precedent provided only that exhaustion was mandatory (i.e., not subject to judge-made or equitable exceptions) and that proper exhaustion was required.[175] Thus, the typical exhaustion inquiry was largely limited to two questions: (1) Did the prison hold out a PGS? (2) Did the prisoner comply with the procedural requirements of the PGS? The limited inquiry was also highly deferential to prisons and officials. The Court implied in *Jones v. Bock*[176] that lower courts were not permitted to

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171 *See Ross*, 578 U.S. at 642, 645 ("The facts of this case raise questions about whether, given these principles, Blake had an 'available' administrative remedy to exhaust.").

172 *See, e.g.*, Vladeck, *supra* note 170:

> [A]lthough the Court stopped short of holding that the relevant administrative remedies were not in fact available to Blake, it did far more than simply send the case back to the Fourth Circuit to explore the matter de novo. Instead, the opinion of the Court closed by providing specific questions for the court below to consider.

173 *See* Cohen, *supra* note 170, at 200; *see also, e.g.*, Bradshaw v. Piccolo, 772 F. Supp. 3d 331, 349 (W.D.N.Y. 2025); Booker v. Armstrong, 2025 WL 1148693, at *3 (S.D. Tex. Apr. 17, 2025).

174 *Ross*, 578 U.S. at 645–48.

175 *See supra* Part III.

176 549 U.S. 199 (2007).

consider the merits of the PGS.[177] The only thing a court could consider during an exhaustion inquiry was whether the PGS had been complied with.[178]

Though the exhaustion determination has always been within the domain of the lower courts, the exhaustion inquiry prescribed under the pre-*Ross* regime did not require searching or critical investigation into the specifics of a plaintiff's attempts to navigate his PGS. Rather, it sent a clear message to lower courts that such an inquiry was inappropriate. While a rigorous inquiry into a prisoner's experience within the PGS would require a court to confront and genuinely grapple with a reality that directly challenges the *Woodford* assumptions, a simplistic and deferential inquiry does not. Thus, the inquiry encouraged by pre-*Ross* doctrine facilitated the continuity of the *Woodford* assumptions by limiting lower courts' engagement with factual circumstances that would challenge those assumptions. Confined to such an inquiry, lower courts were ill-equipped to recognize that the *Woodford* assumptions were inconsistent with the actual operation of many PGSs.

In many respects, *Ross* sounds in the same deferential language as earlier PLRA doctrine. The *Ross* majority noted that it expected that the circumstances warranting exception will rarely arise, which suggests that the unavailability exception is narrow. The majority's expectation, however, was not based on empirical evidence about the mechanics of PGSs, but rather on *Woodford*'s assumption that prisons will likely maintain well-functioning grievance procedures because they have incentives to do so.[179] Because it adopted the *Woodford* assumptions, the *Ross* Court created law fit to govern the claims of a class of prisoner litigants who typically have access to PGSs that are capable of resolving their meritorious grievances. If prison officials were not so consistently unwilling or unable to provide relief that the PGS is effectively a "dead end," if the average PGS were not so confusing that "no ordinary prisoner [could] discern or navigate it," and if prison officials did not often engage in "machination, misrepresentation, or intimidation" to prevent prisoners from accessing prison grievance systems, the *Ross* exception would be narrow, as

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177 *See id.* at 218 ("[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.").

178 *See id.*

179 *Ross*, 578 U.S. at 643 (citing *Woodford*, 548 U.S. at 102).

the majority predicted.[180] Thus, *Ross* suffers from the same central issue as prior PLRA exhaustion precedent: while the narrowness of the exception turns on *Woodford*'s assumptions about the efficacy of PGSs, the realities of PGSs are dramatically different from the PGSs the Court has imagined.

However, the *Ross* majority's explicit direction to apply the exception to real-world grievance procedures and its detailed example of the considerations that ought to drive a lower court's inquiry denote a key change: the invitation for lower courts to engage in a rigorous (and perhaps less deferential) review of a prisoner's attempt to exhaust his PGS.[181] In *Ross*, the majority found that the evidentiary submissions from both parties "len[t] some support to [plaintiff Shaidon] Blake's account" that the commencement of one avenue of PGS investigation closes off another, in spite of what the state's Inmate Handbook provides, "while also revealing Maryland's grievance process to have, at least at first blush, some bewildering features."[182] Over the next three pages of the opinion, the majority detailed the aspects of Maryland's PGS it found "bewildering." For example, it considered evidence that the PGS has been applied inconsistently across prisoner grievances and expressed some doubt as to whether Maryland's proffered PGS is a true representation of its internal procedures.[183] The majority further inquired: "[I]f that really is Maryland's procedure . . . , why does the Inmate Handbook not spell this out?"[184]

The *Ross* majority's inquiry strayed in both tone and substance from *Woodford* and *Jones*. These differences are obscured in part by *Ross*'s framing, which explicitly emphasizes consistency with the Supreme Court's prior PLRA cases.[185] Nonetheless, with both the Sixth Circuit and the Supreme Court condemning reliance on the assumption that prisoners who fail to exhaust their claims may typically reinitiate the prison grievance process,[186] *Perttu* indicates that *Ross* was indeed a dramatic departure. The Sixth Circuit first identified *Pavey*'s "fatal flaw," contending that "the rationale that a jury may reexamine the

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[180] *See id.* at 643–44.

[181] *Id.* at 645–48.

[182] *Id.* at 646.

[183] *Id.* at 646–48.

[184] *Ross*, 578 U.S. at 647.

[185] *See id.* at 639–40 ("We have taken just that approach in construing the PLRA's exhaustion provision—rejecting every attempt to deviate (as the Fourth Circuit did here) from its textual mandate.").

[186] *See Perttu*, 96 F.4th at 921; *Perttu*, 145 S. Ct. at 1805–06.

judge's factual findings rings hollow if the prisoner's case is dismissed for failure to exhaust his or her administrative remedies."[187] The Supreme Court then made explicit what the Sixth Circuit implied: the above rationale is *Pavey*'s fatal flaw because in most cases, "[b]y the time a case is dismissed for failure to exhaust, grievance deadlines will have long since passed."[188] In the Court's own words, this timeline would render exhaustion "impossible."[189] In another unprecedented move, the Court explicitly rejected the unsupported assumption that prison administrators will handle unexhausted grievances in good faith and acknowledged their competing incentives to do otherwise: "[Perttu] points to the fact that prison administrators in some (but not all) jurisdictions have discretion to excuse missed grievance deadlines, with no evidence of how often administrators actually exercise that discretion, let alone in cases where—as here—doing so would foreseeably set up a second lawsuit."[190]

Together, *Ross* and *Perttu* illustrate this Comment's core claim that more rigorous examination of the factual realities of prisons facilitates the creation of doctrine tailored to (and therefore more cleanly applicable to) the circumstances and parties to which it applies. As explained above, *Ross* invited courts to consider prison grievance systems with a more critical eye. Both the Sixth Circuit and the Supreme Court accepted this invitation in *Perttu* when each refused to assume that unexhausted claims would simply be shunted back to the beginning of the grievance process, as the Seventh Circuit assumed in *Pavey*. Identifying this assumption as a falsehood—instead of relying on it—revealed a critical misalignment between PLRA exhaustion doctrine and the factual realities of prisons. When applied to actual prison grievance systems, *Pavey*, the only circuit court precedent directly addressing intertwined facts prior to the *Perttu* litigation, circumvented the intent of the legislature and may run afoul of the Seventh Amendment.[191]

Important here, the *Woodford* assumptions were critical in obscuring the magnitude of the change in *Ross*. Because the *Ross*

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187 *Perttu*, 96 F.4th at 921.

188 *Perttu*, 145 S. Ct. at 1805.

189 *Id.*

190 *Id.*

191 Because the Supreme Court upheld the Sixth Circuit's holding on statutory grounds, it left open the Seventh Amendment question. *See id.* at 1806–07.

Court, relying on the *Woodford* assumptions, dramatically underestimated how often an on-the-books PGS would not be "capable of use" in practice, it likely also underestimated how often intertwined facts would arise in practice. A prisoner cannot possibly plead intertwined facts if he cannot even plead exhaustion facts.

A court unaware of or unconcerned with intertwined facts likely would have considered *Ross*'s rigorous inquiry to be largely inconsequential. Barring the intertwined fact problem, increasingly rigorous inquiries could only increase the number of unexhausted claims progressing to the merits if those inquiries actually revealed that PGSs were often unavailable in practice—a reality the *Woodford* assumptions flatly reject. If the *Woodford* assumptions in fact reflect the realities of PGSs, as the *Ross* Court believed, the prescribed inquiry would have at most a marginal effect on the number of unexhausted claims allowed to proceed because, in the usual case, the inquiry would reveal only that the PGS held out by the prison was indeed practically available to the prisoner, so the *Ross* exception would not apply and the claim would be dismissed for failure to exhaust. If the Supreme Court had based the *Ross* exception on an accurate understanding of PGSs, it may have more fully contemplated the implications of its inquiry and recognized the potential for intertwined facts.

CONCLUSION

In short, the Supreme Court's highly deferential attitude toward prisons has led it to create doctrinal rules that only make sense when applied to factual circumstances created by the Court (or presented by the state and accepted by the Court). However, because these rules are confusing to apply in practice (e.g., how can the *Ross* exception be narrow when it seems to apply in circumstances that occur relatively regularly?), lower courts must be creative to square the doctrine with the realities of prison life. Thus, the Supreme Court is regularly called upon to clarify PLRA exhaustion doctrine and strike down lower courts' inconsistent interpretations. All the Supreme Court's attempts at clarification before *Perttu* had rested, however, on the same highly deferential, unempirical factual assumptions that made the doctrine difficult to apply in the first place. Therefore, the cycle of confusion and clarification is likely to persist as long as the Supreme Court creates doctrine designed to operate in factual circumstances distinct from those in which it must be applied by lower courts.

Efficiency is one of the core purposes of PLRA exhaustion, and it is difficult to see how the Supreme Court's constant practice of clarifying (and reclarifying, and reclarifying again) its construction of a single statutory provision serves that end. If the point of PLRA exhaustion is to reduce the burden of prisoner litigation on the federal court system, exhaustion doctrine must be clear and easy to administer. Indeed, this principle drives the simplicity of the paradigmatic two-step exhaustion inquiry prescribed by the Court pre-*Ross* (Did the prison hold out a PGS? If yes, did the prisoner properly exhaust the PGS held out by the prison?). However, the administrability of this inquiry depended on the lower courts' ability to substitute the *Woodford* assumptions for the realities of prison life in order to avoid the complexities of PGS exhaustion, as the Supreme Court did when it created the inquiry.

The exhaustion inquiry prescribed by *Ross* disrupted the practice of substitution in the lower courts by giving them greater license to grapple with the inherent complexities of navigating a PGS as an incarcerated person. This in turn had the unintended effect of creating a circuit split on intertwined facts. Given the highly consequential role of the *Woodford* assumptions in the unintended consequences of *Ross*, *Ross*'s inconsistency with prior exhaustion doctrine does not indicate a problem with *Ross*'s holding but with the cases preceding it.

Perttu demonstrates that after *Ross*, the Supreme Court does not intend to merely reinstate the cognitive dissonance permitted by the *Woodford* assumptions. *Perttu*'s unequivocal critique of deferential assumptions solidifies the shift initiated by *Ross*—PLRA exhaustion doctrine is evolving. Because this evolution has been occurring relatively covertly, buried deep within the Court's analyses in *Ross* and *Perttu*, there is a considerable risk that this rare litigant-friendly shift in PLRA exhaustion doctrine may be noticed only by the relatively small group of academics who study deferential assumption in prison law. For the doctrinal improvements to actually benefit those navigating PLRA exhaustion, lawyers must begin citing *Perttu* to challenge attempts to rely on deferential assumptions during exhaustion hearings. Perhaps even more critically, prisoners themselves must be made aware of *Perttu*'s significance. Most prison litigants proceed pro se at exhaustion hearings. Proceeding pro se, the odds are stacked against prison litigants discovering and leveraging *Perttu* on their own, especially because recent precedent has dramatically scaled

back prisoners' access to law libraries.[192] Thus, pro se prison litigants must be provided resources that explain the significance of *Perttu* and offer guidance on when and how it ought to be cited.

Ultimately, *Ross* and *Perttu* are moving PLRA exhaustion doctrine in the right direction—toward law grounded in the practical realities of PGSs that maps cleanly onto the factual circumstances before lower courts. By disrupting the constant cycle of clarification, unintended consequences, and reclarification, empirically supported PLRA exhaustion doctrine will promote judicial economy in the long term.

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[192] *See supra* notes 73–75 and accompanying text.