

2026 SUPPLEMENT

**INCARCERATION
AND THE LAW
CASES AND MATERIALS**

Eleventh Edition



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PREFACE

This annual Supplement includes the following:

- Corrections to prior errata: Front matter (pp. v–vii), Figure 1.15 on p. 58, and the numbering of Chapter 10’s parts B.3 and B.4.
- Chapter 2: A replacement for the transitional passage before *Rasho v. Jeffries*, describing the Fifth Circuit’s en banc decision in *Parker v. Hooper*—which reads the Supreme Court’s decision in *Farmer v. Brennan* to make officials’ good-faith remedial efforts sufficient to negate deliberate indifference—and a district court’s account of what that approach does to injunctive remedies.
- Chapter 3: A short addition on four recent courts of appeals decisions on qualified immunity and solitary confinement, two denying it and two granting it while announcing standards for future cases.
- Chapter 6: A new note on the digitization of prisoner mail—third-party scanning vendors, the litigation challenging them, and the limits courts have preserved for legal mail and for notice of rejection. Also revisions to note 5.c and Table 6.1, reflecting the Supreme Court’s decision, in *Landor v. Louisiana Department of Corrections and Public Safety*, that RLUIPA does not authorize damages against state officials sued in their individual capacities.
- Chapter 8: An excerpt from Arielle Tolman’s forthcoming article *Prosecuting Prisoners*, the first empirical account of criminal prosecution for conduct in custody; a new note on the circuit split over whether Sandin governs prisoners’ property interests; and a new note on Executive Order 14164 and the litigation over transferring the thirty-seven commuted federal death-row prisoners to ADX Florence.
- Chapter 12: Substantial new material on the transgender-housing litigation—the D.C. Circuit’s decision vacating the preliminary injunctions in *Doe v. Blanche*, the district court’s individualized findings on remand, and the countervailing injunction obtained by cisgender women at FMC Carswell in *Fleming v. Rule*. Also an update to note 6 on transgender medical care, following *Kingdom v. Trump* through the Bureau of Prisons’ successor policy and the resulting appeals.
- Chapter 14: A paragraph on the PLRA’s needs-narrowness-intrusiveness findings and consent-decree implementation plans, and a new paragraph on the workaround successive preliminary injunction workaround courts have allowed to the ninety-day limit on preliminary relief.
- Chapter 15: New material on the continuing contraction of *Bivens*, including a circuit disagreement over how close a claim must be to Carlson; a Third Circuit decision refusing to graft the PLRA’s physical-injury requirement onto the

FTCA; and a Third Circuit application of the physical-injury rule to psychological harm.

- Chapter 16: Additions on exhaustion after harm materializes, and on what does not count as a strike under § 1915(g).
- Chapter 19: A new subpart on implied causes of action for damages under state constitutions, surveying divergent approaches and adding *Bott v. DeLand* (Utah 1996) as a principal case. We have also added to the online companion to Chapter 19 (<https://incarcerationlaw.com/chapter/chapter-19/>) the complaint filed in *Jenkins-Millage v. Oregon Department of Corrections*, a putative class action recently filed in state court challenging solitary confinement practices under the state constitution's "unnecessary rigor" clause.

With this supplement, we also make an authorship transition: Now that David Shapiro has left law teaching, he is coming off this casebook. (We're grateful to him for his excellent work and collegueship on the two past editions.) His shoes will be filled by Aaron Littman, at UCLA School of Law.

As always, comments and suggestions are welcome. Send them to mschlan@umich.edu.

Margo Schlanger
Aaron Littman
July 2026

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PREFACE

On pp. v, vi, and vii, correct the following errors:

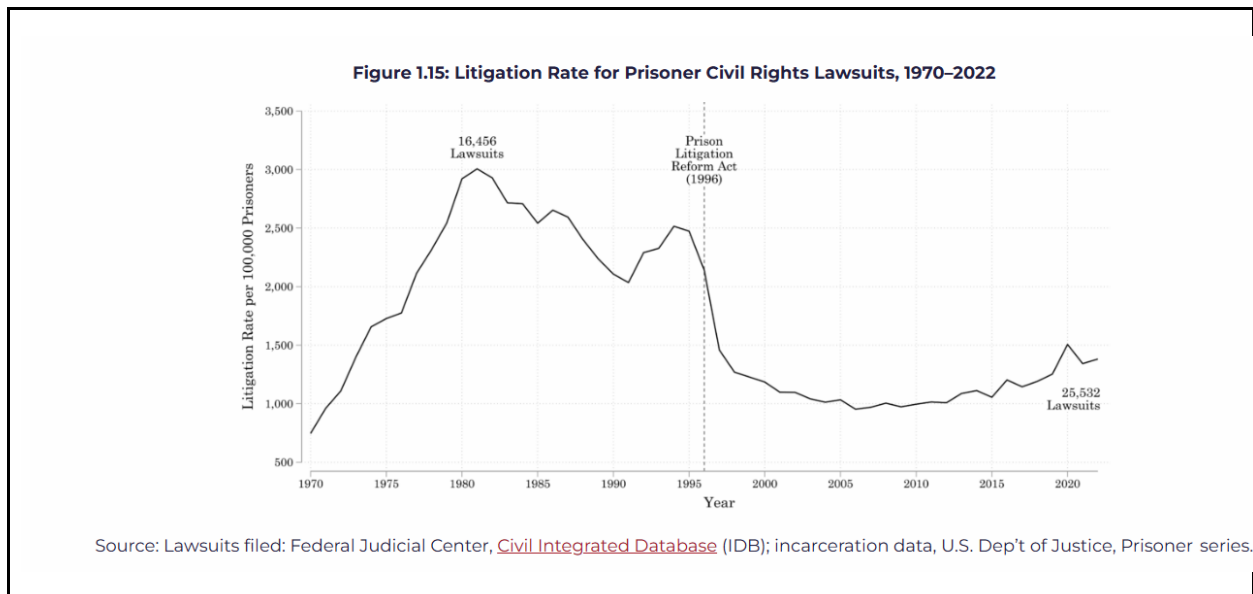
Some chapter numbers are incorrect:

- Chapter 7 should be 6.
- Chapter 8 should be 7.
- Chapter 9 should be 8.

A corrected version is [here](#).

CHAPTER 1. PRISONS, JAILS, AND PRISONERS' RIGHTS: AN INTRODUCTION

On p. 58, correct Figure 1.15 (which is also in the [Data Supplement](#)):



CHAPTER 2. CONDITIONS OF CONFINEMENT

A. CRUEL AND UNUSUAL PUNISHMENT: CONVICTED PRISONERS

On p. 148, substitute what follows for the paragraph that precedes *Rasho v. Jeffries*:

COVID-related conditions claims might have fared somewhat better but for the changing leanings of the federal courts of appeals in the years surrounding and succeeding the pandemic. Two Trump Administrations have shifted the courts significantly to the right, and the 2020s have accordingly not been kind to claims brought by incarcerated people in general. The Fifth Circuit’s en banc opinion vacating a comprehensive plaintiffs’ judgment in a class action addressing medical care failings at the Louisiana State Penitentiary modeled the state-friendly approach. The opinion, by Judge Edith Jones, castigated the district court’s “atavistic court rulings that seek to control prison management in violation of constitutional law and fundamental principles of federalism.” *Parker v. Hooper*, 171 F.4th 736, 741 (5th Cir. 2026) (en banc). It built from *Farmer v. Brennan*’s note that deliberate indifference “should be determined in light of the prison authorities’ current attitudes and conduct”: their attitudes and conduct at the time suit is brought and persisting thereafter.” *Id.* at 756 (quoting *Farmer*). The majority quoted *Farmer*’s requirement of reasonable response to risk (“[P]rison officials ... may be found free from liability if they responded reasonably to the risk, *even if the harm ultimately was not averted.*”) (emphasis added by the en banc court). But the Fifth Circuit’s emphasis was on good faith rather than objective reasonableness: “The Defendants’ remedial efforts may prove insufficient to cure all the identified institutional problems, but they indicate concern and sincerity on the part of prison officials that negate subjective indifference.” And again: “[W]hen prison officials have attempted to care for a prisoner’s medical needs, even if the care falls short, they have not exhibited subjective deliberate indifference.”

If this approach becomes dominant, so that *any* official effort to address harmful conditions is constitutionally sufficient, injunctive remedies may become essentially unavailable in Eighth Amendment cases. For example, a recent district court opinion explained:

Before *Parker*, the Court would have found Defendants liable under the Eighth Amendment for acting with deliberate indifference to the health and safety of incarcerated persons under *Farmer*, in which the U.S. Supreme Court held that “[a] prison official may be held liable under the Eighth Amendment for acting with ‘deliberate indifference’ to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Under the *Parker* Ruling, however, the Court is constrained to find that Defendants’ implementation of remedial measures negates a finding of subjective deliberate indifference, ***even though these remedial measures are inadequate to cure the constitutional violation.***

Voice of the Experienced (VOTE) v. LeBlanc, No. 23-cv-01304, 2026 WL 1472248, at *16 (M.D. La. May 26, 2026) (emphasis in original).

In short, lower courts have the ability to weaken or strengthen the deliberate indifference standard considerably based on how they interpret and apply it in a given case. The debate between the majority and the dissent in the case that follows further exemplifies differing approaches.

CHAPTER 3. SOLITARY CONFINEMENT

C. CHALLENGES TO SOLITARY CONFINEMENT, 1995 TO PRESENT

On p. 268, add before the first full paragraph:

These concerted efforts have led, in the past few years, to several significant appellate decisions. In two, the court denied qualified immunity to defendant prison officials facing Eighth Amendment claims related to solitary confinement. See *Cintron v. Bibeault*, 148 F.4th 37, 52 (1st Cir. 2025) (“prolonged social and sensory deprivation”); *Finley v. Huss*, 102 F.4th 789, 812 (6th Cir. 2024) (“placing mentally ill inmates in dangerous forms of solitary confinement”). And in two more, the court granted qualified immunity on due process claims but clearly established that extended solitary confinement would trigger constitutional scrutiny going forward. See *Perry v. Spencer*, 94 F.4th 136, 154 (1st Cir. 2024) (en banc) (solitary confinement exceeding thirty days henceforth creates “presumption” of atypical and significant hardship); *Jackson v. Anastasio*, 150 F.4th 851 (7th Cir. 2025) (three-month terms in “disgusting conditions will suffice to show a loss of protected liberty requiring procedural protections, as will longer terms of solitary confinement alone”). On the other hand, the Seventh Circuit recently affirmed a grant of summary judgment to prison mental healthcare providers sued by a prisoner who spent eight years in solitary confinement stemming from disciplinary infractions; the court concluded that no reasonable jury could find that the providers violated the Eighth Amendment by providing ineffective treatment and by recommending additional time in solitary confinement despite the obvious risks to his mental health. *Sanders v. Moss*, 153 F.4th 557 (7th Cir. 2025).

CHAPTER 6. FREEDOM OF EXPRESSION AND RELIGION

B. FIRST AMENDMENT RIGHTS IN PRISONS AND JAILS

On p. 446, add a new note 5 (and change the existing notes 5 and 6 to 6 and 7):

5. Digital substitutions for analog and face-to-face communications are multiplying, as are cases challenging and (mostly) upholding them. Many jails and prisons now route all incoming non-legal mail to a third-party vendor (such as Smart Communications, Securus Technologies’ Digital Mail Center, or TextBehind), which scans the physical mail, creates a digital copy, and delivers only the electronic image to the prisoner via tablet or kiosk. Many incarcerated people report that the resulting communications are a shadow of their prior links to the outside. One writes, for example:

Under the new policy of digitizing mail, incarcerated people are losing the visceral experience of touching a letter or smelling perfume on an envelope, but we must also endure the technical problems associated with a nascent system.

The addition of scanning has resulted in extended wait times for mail delivery, blurry photographs and unreadable letters. Missing pages are a common occurrence, while some mail is just lost in a quagmire of inefficiency.

Ryan M. Moser, *Physical Mail Was My Lifeline to the Outside World—and Now It’s Gone*, Truthout (Oct. 26, 2022), <https://truthout.org/articles/physical-mail-was-my-lifeline-to-the-outside-world-and-now-its-gone/>.

Courts have overwhelmingly upheld these programs for non-privileged mail, often focusing on the risk that paper mail may be laced with drugs. See, e.g., *Glaum v. Braun*, No. 1:24-cv-146, 2026 WL 883451 (D.N.D. Mar. 31, 2026); *LaNear v. Taylor*, No. 4:24-cv-629, 2025 WL 3250856 (E.D. Mo. Nov. 21, 2025); see also *Hum. Rts. Def. Ctr. v. Bd. of Cnty. Comm’rs for Strafford Cnty., N.H.*, 654 F. Supp. 3d 85 (D.N.H. 2023) (denying preliminary injunction against jail’s ban on incoming publications, in light of tablet availability). But digitization does not supplant the rules governing how mail must be handled. For example, prisoners retain notice rights when mail is rejected. *Benning v. Comm’r, Ga. Dep’t of Corr.*, 71 F.4th 1324 (11th Cir. 2023) (applying *Procurier v. Martinez* notice requirements to outgoing prisoner email). And claims of mail interference remain viable. *Philip v. Tenn. Dep’t of Corr.*, No. 3:26-cv-146, 2026 WL 1223926 (E.D. Tenn. May 5, 2026). Similarly, digitization programs cannot override legal mail’s special protections. See, e.g., *Christmas v. Nabors*, 76 F.4th 1320 (11th Cir. 2023).

C. HEIGHTENED STATUTORY PROTECTION FOR RELIGIOUS EXERCISE

On pp. 472-73, replace the text of note 5.c:

c. Likewise, the Supreme Court held in *Landor v. Louisiana Department of Corrections and Public Safety*, 146 S. Ct. 1931 (2026), that damages are not available against state officials sued in their individual capacities: “Under the Spending Clause, Congress lacks regulatory authority to impose liability on them directly and must depend instead on consent. And because they never agreed to answer suits like this one, Mr. Landor’s case cannot proceed against them any more than a breach of contract action might proceed against a defendant who never formed a contract.”

Table 6.1 summarizes the current landscape:

TABLE 6.1: STATUTORY CAUSES OF ACTION IN RELIGION CASES

	Statutory cause of action	Damages available?
Official capacity:		
Federal government or official	RFRA	No—federal sovereign immunity
State government or official	RLUIPA	No—state sovereign immunity; <i>Sossamon v. Texas</i> , 563 U.S. 277 (2011)
Individual capacity:		
Federal official	RFRA	Yes— <i>Tanzin v. Tanvir</i> , 592 U.S. 43 (2020)
State official	RLUIPA	No— <i>Landor v. Louisiana Dep’t of Corr.</i> , 146 S. Ct. 1931 (2026)

As often occurs as a result of sovereign immunity, many violations of prisoners’ religious rights have no remedy if damages are unavailable. Consider, for example, the facts as reported by the Supreme Court in *Landor*:

Damon Landor is a Rastafarian whose religious convictions require him to leave his hair uncut. In 2020, after a conviction in Louisiana state court, Mr. Landor spent a few months in custody. Near the end of his sentence, as officers transferred him from one facility to another, Mr. Landor grew concerned that the new facility’s intake officers might cut his hair pursuant to standard LDOC grooming policies. To avoid that possibility, he provided the officers with a copy of *Ware v. LDOC*, 866 F.3d 263 (5th Cir. 2017), which held that RLUIPA generally bars prisons from cutting Rastafarians’ hair. But, Mr. Landor says, the LDOC officers in the new facility responded by throwing his

copy of *Ware* in the trash and proceeding to shave his head, causing him to violate his religious beliefs.

Because the damage was already done—and because he is no longer in prison—an injunction is no remedy. Should this matter?

CHAPTER 8. PROCEDURAL DUE PROCESS

B. PRISON/JAIL DISCIPLINARY PROCEEDINGS, TRANSFERS, AND PLACEMENT IN SOLITARY CONFINEMENT

1. BACKGROUND ON PRISON DISCIPLINE

On p. 516, add the following at the end of the page:

And of course, authorities can prosecute crimes committed in jail or prison using ordinary criminal procedures. While empirical data are scarce, such prosecutions occur regularly. A forthcoming article is the first in-depth look; it presents data that 2-8% of state prisoners in California, New York, Texas, and Wisconsin have convictions of these types.

ARIELLE W. TOLMAN, PROSECUTING PRISONERS

79 Stan. L. Rev. ____ (forthcoming 2027)

Conduct that is criminalized in the free world is also criminalized when it occurs inside prisons. Possession of and trafficking in illicit drugs, assault, battery, and murder, are crimes both inside and outside of prison walls that may be committed by both prisoners and free people alike. This body of “general” criminal law applies regardless of the defendant’s status as incarcerated.

But in every jurisdiction nationwide, there is some criminal law that applies only to prisoners, criminalizing conduct only because the offender is incarcerated. This body of “prisoner-specific” criminal law includes statutes criminalizing escape, the possession of contraband items such as cellphones or currency, weapons such as knives or razors, and licit drugs such as alcohol and tobacco. Less commonly, it also includes laws criminalizing use of social networking websites, self-mutilation, voluntary sexual contact with other prisoners, and repeated prison disciplinary infractions.

In addition, there is some conduct that is criminalized in the free world but is punished more severely if the defendant is a prisoner. This body of “prisoner-enhanced” criminal law includes, for example, statutes that classify assaults, participation in riots and illicit drug possession by prisoners as higher-level felonies. It also includes statutes that make conduct like throwing bodily-fluid or possessing marijuana a felony rather than a misdemeanor when committed by a prisoner, and statutes that make murders committed by incarcerated persons capital crimes. Prisoner-enhanced criminal law further includes sentencing statutes that enhance punishment of prisoners across the board or require sentences to be imposed consecutively if offenses are committed while a person is already in state custody. And habitual offender statutes apply in most cases because persons incarcerated in state prisons almost always have been convicted of a past felony.

3. IS ANY PROCESS DUE

NOTES AND QUESTIONS ON SANDIN V. CONNER

On p. 555, add after note 7:

8. A circuit split exists as to the applicability of *Sandin* to prisoners' property interests. Some courts have taken the reasonable view that it does not apply, "by both its terms and its reasoning"; although "[i]t is readily apparent why prison administrators need some flexibility to restrict inmate liberty, . . . it is far less apparent why prison officials would need the same flexibility in depriving inmates of their property." *Brown v. Stapleton*, 142 F.4th 252, 258 (4th Cir. 2025) (involving challenge to \$15 fine deducted from trust account for removal of mask during shave). But others—especially the Tenth Circuit—do view *Sandin* as the relevant framework. See *Cosco v. Uphoff*, 195 F.3d 1221, 1223-24 (10th Cir. 1999).

On p. 563, add this note:

3. The day he reassumed office, President Trump issued Executive Order 14164, Restoring the Death Penalty and Protecting Public Safety, § 3(e), 90 Fed. Reg. 8,463, 8,464 (Jan. 20, 2025) (published Jan. 30, 2025), directing the Attorney General to "evaluate the places of imprisonment and conditions of confinement for each of the 37 murderers whose Federal death sentences were commuted by President Biden and . . . to ensure that these offenders are imprisoned in conditions consistent with the monstrosity of their crimes and the threats they pose." After each commuttee received a hearing and an appeal, each was soon redesignated to the United States Penitentiary, Administrative Maximum Facility, in Florence, Colorado, commonly known as ADX Florence. "The most restrictive prison in the federal system, ADX Florence—nicknamed 'the Alcatraz of the Rockies'—is intended to house prisoners that cannot be safely imprisoned elsewhere." *Taylor v. Trump*, 823 F. Supp. 3d 17, 18 (D.D.C. 2026). The prisoners sued, arguing that their hearings were (a) constitutionally required, and (b) a sham. The district court found this likely true and granted preliminary injunctive relief, preventing the transfer until their lawsuit was completed. *Id.* Do you think the government should have to make individualized determinations, via individualized hearings, prior to assigning convicted murderers to a prison that imposes particularly harsh conditions?

CHAPTER 12. LGBTQ PRISONERS

On p. 696, strike this language: As this casebook goes to press, appeal is pending. See <https://clearinghouse.net/case/45986/>. And substitute:

The TRO soon became a preliminary injunction, and the litigation multiplied: parallel cases produced similar injunctions protecting eighteen plaintiffs in all, each before Judge Lamberth. Because the PLRA dictates that preliminary relief in prison-conditions cases "shall automatically expire on the date that is 90 days after its entry" unless the court makes the findings required for final prospective relief, 18 U.S.C. § 3626(a)(2), the district court renewed the injunctions every 90 days—and the government, to preserve its rights, appealed each renewal. The D.C. Circuit consolidated the appeals. See <https://clearinghouse.net/case/45986/>.

[Continue with existing text]

On p. 700, insert before 2 (Other Housing Issues):

In April 2026, the D.C. Circuit resolved the consolidated appeals, vacating the preliminary injunctions then in effect and dismissing as moot the appeals from injunctions that had already expired under § 3626(a)(2). *Doe v. Blanche*, 172 F.4th 901 (D.C. Cir. 2026). The Court explained:

To the extent the [district] court’s reasoning categorically forbids placing any transgender woman in a men’s prison, plaintiffs do not defend it on appeal. They instead urge us to sustain the preliminary injunctions on the narrower ground that the individual plaintiffs before the court all have characteristics that make them particularly vulnerable to violence, abuse, and psychiatric harm in men’s prisons.

The existing record does not include findings of fact about the individual plaintiffs’ vulnerabilities, or about the reasons on which the Bureau relied in placing plaintiffs in women’s facilities in the first place, to enable us to sustain the district court’s preliminary injunctions on either of the narrower, plaintiff-specific grounds urged on appeal. We thus vacate the operative preliminary injunctions and remand for further proceedings. The district court remains free to consider, as it deems appropriate, whether plaintiffs may be entitled to relief on those or other available grounds that may be supported by further findings of fact and analysis.

On remand the district court granted a new preliminary injunction resting on individualized findings (issued under seal) that each plaintiff would face a substantial risk of violence and severely exacerbated gender dysphoria in a men’s facility, that the government knew of the risk, and that mandatory transfer was not a reasonable response to it. *Doe v. Blanche*, No. 1:25-cv-286, 2026 WL 1642068 (D.D.C. June 7, 2026). The government again appealed; briefing is pending.

Meanwhile, litigation in Texas came from the opposite direction. In *Fleming v. Rule* (N.D. Tex., filed Feb. 19, 2025), cisgender women incarcerated at FMC Carswell—a federal women’s medical facility—sued pro se under the Religious Freedom Restoration Act and the First, Eighth, and Fourteenth Amendments, seeking the removal of all “biological males” from the facility. Counsel appeared, additional cisgender women intervened as plaintiffs, and plaintiffs broadened their requested relief—including vacatur of the PREA regulations that authorize case-by-case placement of transgender women in women’s facilities. The federal government posed no real opposition, and on June 2, 2026, the court preliminarily enjoined the government to house inmates assigned male at birth at Carswell separately from the intervenor-plaintiffs, with separate movement and scheduling. See <https://clearinghouse.net/case/47502/>.

The two injunctions then met. Several of the D.C. plaintiffs are incarcerated at Carswell, and each set of litigants told their respective court about the other’s order. In his June 7 order, Judge Lamberth concluded that the injunctions do not conflict: the D.C. order forbids transferring the plaintiffs out of women’s facilities; the Texas order requires separation *within* such a facility. But in mid-July 2026, the government announced that it would transfer additional *Doe* plaintiffs to Carswell—where the *Fleming* injunction would confine them to a segregated unit—and the *Doe* plaintiffs moved to enforce their injunction. As this supplement goes to press, Judge Lamberth has set briefing and a hearing on whether an order barring transfer to a segregated unit within a women’s facility is covered by the *Doe* complaint.

D. TRANSGENDER MEDICAL CARE

On page 719, replace the text of note 6:

6. Executive Order 14168 provides: “The Attorney General shall ensure that the Bureau of Prisons revises its policies concerning medical care to be consistent with this order, and shall ensure that no Federal funds are expended for any medical procedure, treatment, or drug for the purpose of conforming an inmate’s appearance to that of the opposite sex.” How might this provision of the Executive Order affect state departments of corrections?

In the federal system, the prohibition on using federal funds to support treatment that would “conform[] an inmate’s appearance to that of the opposite sex” creates a significant barrier to care for transgender people in custody. In *Kingdom v. Trump*, the district court (Judge Lamberth, again) certified a class of the more than 2,000 people in BOP custody with gender dysphoria and preliminarily enjoined the policy, ordering the BOP to continue hormone therapy and related accommodations (though not surgical care). No. 1:25-cv-691, 2025 WL 1568238 (D.D.C. June 3, 2025). The court found the plaintiffs likely to succeed both under the Eighth Amendment and under the APA, because the implementing memoranda gave no reasoned explanation for reversing the agency’s prior treatment policies. Note the two tracks: what does the APA theory add to the constitutional one, and why might a court prefer to rest on it?

Kingdom’s docket since then has dealt with compliance and retaliation. In February 2026, the BOP issued a new policy treating psychotherapy as the primary treatment for gender dysphoria and argued that this reasoned successor policy dissolved the basis for the injunction; the court disagreed and on June 17, 2026 enjoined the new policy too. As this Supplement goes to press, the D.C. Circuit had stayed one of the district court’s injunctions on procedural grounds and was weighing a stay of the operative one. For current developments, see <https://clearinghouse.net/case/46207/>. Returning to the *Gibson* and *Keohane* courts’ reasoning that where the medical community disagrees about a treatment’s necessity, denial is not deliberate indifference—does that reasoning support § 4(c)’s categorical funding bar?

CHAPTER 10. RACE AND NATIONAL ORIGIN DISCRIMINATION

On pp. 618 and 621, the parts currently numbered B.3 and B.4 are part of B.2 and should not be separately numbered.

CHAPTER 14. INJUNCTIVE LITIGATION

D. THE PRISON LITIGATION REFORM ACT

2. THE PLRA IN OPERATION

b. Scope of Relief Authorized

On p. 818, add before the last full paragraph:

In a protracted medical/dental care prison class action, the consent decree (entered with PLRA findings) provided that the Illinois Department of Corrections would develop an appropriate implementation plan to flesh out the more general provisions of the decree itself—and when the state failed to do so, the district court simply adopted a designated monitor’s proposals. The Seventh Circuit agreed with the district court that *enforcement* of a more detailed implementation provision would first require need-narrowness-intrusiveness findings for that provision. *Lippert v. Hughes*, 171 F.4th 992, 1001 (7th Cir. 2026). [Continue with “On the other hand”]

c. Preliminary Relief

On p. 820, add the following as the first full paragraph:

As the reference above to a “successor preliminary injunction” suggests, however, courts have allowed a workaround to the 90-day limit on preliminary relief. The Ninth Circuit has held, for example: “Nothing in the statute limits the number of times a court may enter preliminary relief. If anything, the provision simply imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted.” *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001). The result can be a large number of repeat preliminary injunctions, as a case heads through dispositive motion practice and to trial. See, e.g., *Robinson v. Labrador*, No. 1:24-cv-00306-DCN, 2026 WL 1707249 (D. Idaho June 12, 2026) (granting an eighth preliminary injunction in a case challenging Idaho’s statute barring the use of state funds and facilities to provide hormone therapy to transgender prisoners). See <https://clearinghouse.net/case/45690>.

[continue with the next paragraph, which starts “Commentators on the PLRA”]

CHAPTER 15. DAMAGES: CAUSES OF ACTION AND DEFENSES

B. CIVIL RIGHTS ACTIONS AGAINST THE FEDERAL GOVERNMENT: *BIVENS*

On p. 904, add at the end of the paragraph beginning “The upshot appears to be”:

Even claims that appear to be virtually identical to *Carlson* are on increasingly shaky ground. True, the Ninth Circuit recently rejected a challenge to *Carlson*’s applicability to a medical deliberate indifference claim involving not only “the exact same type of conduct” but also “the same officer rank, institutional setting, judicial guidance, and governing legal mandate.” *Schwartz v. Miller*, 153 F.4th 918, 932 (9th Cir. 2025) (concluding that “the chronic nature of [the

plaintiffs] medical condition and the lesser severity of his medical mistreatment” were not “meaningful differences” from *Carlson*). However, the Fourth Circuit came out the other way in a medical care case, concluding that the lesser severity of harms allegedly suffered by the plaintiff and the fact that his claims “implicate[d] broader systemic issues” rather than “discrete acts of malfeasance,” rendered them distinct enough from *Carlson* to amount to a new context. *Spivey v. Breckon*, 173 F.4th 174, 179-80 (4th Cir. 2026) (holding that no *Bivens* claim was available).

D. THE FEDERAL TORT CLAIMS ACT

1. THE INCLUSION OF PRISONS IN THE FTCA

On p. 923, add at the end of the section (before 2):

Courts have likewise often resisted special prison-specific FTCA rules. For example, in *Freeman v. Lincalis*, 158 F.4th 166 (3d Cir. 2025), the Third Circuit held that the FTCA’s presentment requirement did not implicitly incorporate the PLRA physical-injury requirement; the plaintiff prisoner was not required to mention physical injury in his administrative claim.

F. DAMAGES: TYPES AND RECOVERY

1. THE PLRA PHYSICAL INJURY RULE

On p. 934, add at the end of the first full paragraph:

On the other hand, in *White v. United States*, No. 25-1883, 2026 WL 127943 (3d Cir. Jan. 16, 2026), the pro se federal prisoner plaintiff alleged under the Federal Tort Claims Act that negligently imposed near-freezing temperatures, combined with “snack packs” rather than meals, triggered his post-traumatic stress disorder and placed him in fear for his life. The Third Circuit found these allegations did not amount to physical injury and dismissed the claim.

CHAPTER 16. THE LITIGATION PROCESS

A. EXHAUSTION OF REMEDIES

On p. 967, add after the sentence beginning “Even after all this”:

For example, if a prisoner, aware that he faces grave risk, fully exhausts the grievance process, must he exhaust a second time after officials fail to protect him and the harm materializes? Or is once enough? See *Sheltra v. Christensen*, 124 F.4th 1195, 1203 (9th Cir. 2024) (adopting continuing violations doctrine).

B. FILING FEES AND “THREE-STRIKES”

On p. 970, add before the sentence beginning “A dismissal on a ground”:

Nor are voluntary dismissals or those on *Younger* abstention grounds. See *Spencer v. Barajas*, 140 F.4th 1061, 1066 (9th Cir. 2025); *Burrell v. Shirley*, 142 F.4th 239, 248 (4th Cir. 2025).

And add the word “claim” to the first sentence of the next paragraph:

In *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020), the Supreme Court held based on the language of § 1915(g) that dismissals for failure to state a claim count as a strike regardless of whether the dismissal is with or without prejudice.

CHAPTER 19. STATE CONSTITUTIONAL LAW

On p. 1065, add a new subpart:

C. IMPLIED CAUSES OF ACTION FOR DAMAGES

Even if a state constitutional provision is more protective than the U.S. Constitution’s Eighth Amendment, another question arises in the context of damages claims. Because most states have not enacted statutory vehicles equivalent to § 1983 for bringing such claims, courts must determine—as do federal courts hearing *Bivens* cases—whether an implied cause of action is available. Otherwise, the provision’s protection can be enforced only prospectively, through litigation seeking injunctive relief.

State supreme courts’ approaches to these questions have diverged. The Michigan Supreme Court held several decades ago that a damages remedy was unavailable for violations of the state constitution by municipalities or individual government employees. *Jones v. Powell*, 612 N.W.2d 423, 426-27 (Mich. 2000). But after finding a damages remedy open to plaintiffs suing *state* officials, *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855 (Mich. 2022), the court now appears willing to reconsider municipal liability. See *Reeves v. Cnty. of Wayne*, 29 N.W.3d 498 (Mich. 2026) (granting appeal and expressly instructing parties to brief this issue). The Nevada Supreme Court recently concluded after lengthy analysis that a damages remedy was implied—and that qualified immunity did not apply in cases raising state constitutional claims. *Mack v. Williams*, 522 P.3d 434 (Nev. 2022). Courts have often held that the existence of an implied damages right of action depends on the absence of an alternative damages path. See *Bauserman*, 983 N.W.2d 855; *N.C. Bar & Tavern Ass’n v. Stein*, 919 S.E.2d 684 (N.C. 2025). On the other hand, in some states, equitable relief is all there is. See, e.g., *Luna v. Tyler*, 711 S.W.3d 708 (Tex. App.—Houston [1st Dist.] 2025, no pet.); see also *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148–49 (Tex. 1995).

In the (older) case that follows, the Utah Supreme Court allowed a damages remedy, focusing on the “self-executing” nature of the constitutional provisions at issue.

BOTT V. DELAND

922 P.2d 732 (Utah 1996)

OPINION of JUSTICE RICHARD HOWE, joined by CHIEF JUSTICE MICHAEL ZIMMERMAN and JUSTICE LEONARD RUSSON.

Bott became an inmate at the Utah State Prison on October 5, 1987. After almost two years of incarceration, he began experiencing blurred vision in his right eye. He reported this condition to a prison medical technician, and the technician informed Laney [a nurse practitioner] of Bott’s complaint. A few days later, Laney examined Bott’s eyes, determined that his condition was not serious, and placed him on a waiting list to see an optometrist. During the next four weeks, the vision in both of his eyes steadily worsened until he lost all of the vision in his right eye and most

of the vision in his left. He also suffered from increasingly severe headaches, nausea, dizziness, and body aches. Bott asserts that although he complained repeatedly of these symptoms to the medical technicians and to Laney, they did not adequately examine him or inform a physician of his condition. In accordance with prison procedure, he submitted a grievance concerning his lack of medical attention to the appropriate correctional officer. Two weeks later, with the help of another inmate, he filed another grievance, complaining that he still had not received any medical attention. However, nearly another two weeks passed before he was examined by an optometrist. The optometrist observed signs of hemorrhaging in Bott's retina and sent him directly to the University of Utah Medical Center, where he was diagnosed with malignant hypertension and severe renal failure. By the time of the trial, he was dependent upon hemodialysis three times each week, and his life expectancy had allegedly greatly diminished.

Bott initiated * * * an action against [other defendants and] Laney[.] That action alleged a claim for damages under the "unnecessary rigor" clause, article I, section 9 of the Utah Constitution, and under 42 U.S.C. § 1983 for the violation of Bott's right to be free from cruel and unusual punishments under the Eighth Amendment of the United States Constitution. * * * The jury [] found that [the defendants] violated Bott's rights under article I, section 9 of the Utah Constitution and, as a result, Bott suffered \$490,000 in damages.

* * *

Defendants [] contend that article I, section 9 cannot be the basis for a recovery of damages against them. Article I, section 9 provides:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

It has been recognized that the guarantee against cruel and unusual punishment focuses specifically on the methods or conditions of punishment, while the guarantee against unnecessarily rigorous treatment extends both to prisoners and to arrestees and protects them against unnecessary abuse. *Sterling v. Cupp*, 625 P.2d 123, 129–30 (Or. 1981). However, this court has seldom found occasion to examine the full import of these guarantees, and the issue of whether a court can award a claimant damages for the violation of these guarantees is one of first impression.

Article I, section 9 may provide the basis for an award of damages if it is a self-executing provision—which traditionally allows courts to award injunctions and invalidate conflicting statutes—and if it furnishes sufficient authority for remedies of money damages. Courts have developed the concept of self-execution as a means of determining whether a constitutional provision may be enforced without implementing legislation. A constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. *Davis v. Burke*, 179 U.S. 399, 403 (1900). In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." *In re Montello Salt Co.*, 53 P.2d 727, 729 (Utah 1936). In addition, the fact that the legislature may enact supplementary legislation to further protect or regulate a right in a constitutional provision does not prevent the provision from being self-executing. Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

Article I, section 9 is a self-executing provision. This provision does more than state general principles; it prohibits specific evils that may be defined and remedied without implementing legislation. Indeed, this court has already defined and enforced this provision without the aid of legislation. Also, the history of the provision indicates that the framers most likely intended it to

have immediate effect without implementing legislation. It was drafted on the basis of similar state and federal cruel and unusual punishment clauses that arose from the English Bill of Rights of 1689, which actively and immediately proscribed tortures and other barbaric practices and was enforced without further definition by parliament. *Gregg v. Georgia*, 428 U.S. 153, 169–70 (1976). Like the English courts, American state and federal courts have interpreted and applied cruel and unusual punishment clauses without the aid of legislation. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103–06 (1976) (giving effect to federal cruel and unusual punishment clause without implementing legislation). Further, this provision is a prohibitory provision, and such provisions are usually self-executing at least to the extent that courts may void incongruous legislation.

Having determined that article I, section 9 is self-executing, we must now determine whether self-executing clauses provide an adequate basis for a recovery of damages. The decisions of other courts on this issue vary widely. While the states are divided, the United States Supreme Court has held that self-executing federal constitutional provisions may be the basis for an award of money damages. In the landmark ruling *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 407 (1971), the Court allowed a claimant to recover damages from federal narcotics agents directly under the Fourth Amendment for the violation of his right against unreasonable searches and seizures. Later, in *Carlson v. Green*, 446 U.S. 14, 17, 24 (1980), the Court extended this ruling to allow a deceased prisoner’s mother to recover damages from prison officials for violating her son’s Eighth Amendment right against cruel and unusual punishments. However, federal courts have acknowledged that the ruling in *Carlson* does not “constitutionalize” prisoners’ tort actions. Rather, a prisoner may recover damages for inadequate medical care only upon a showing of “deliberate indifference,” as defined by the United States Supreme Court in *Estelle*, 429 U.S. at 103–06.

State courts have taken several different approaches in interpreting state constitutional provisions. Some courts entirely reject attempts to recover damages for the violation of state constitutional rights. Others have followed the United States Supreme Court and have allowed recovery under state cruel and unusual punishment clauses upon a showing of deliberate indifference. Some courts have held that while money damages are available for constitutional violations, government employees are entitled to good faith immunity if their challenged actions were not in violation of any clearly established constitutional right as articulated in case law. Other courts allow claimants to collect damages from government employees upon a showing of intentional, reckless, or careless disregard or fraud or misdoing.

The only common feature of all of these cases is that they hold that simple negligence is not sufficient justification for a damage claim.

After examining the reasoning of courts that have ruled on the issue of whether self-executing provisions allow awards of money damages, we find those cases allowing awards to be more persuasive. In recognizing a claim for money damages under the Fourth Amendment, Justice Brennan, writing for the United States Supreme Court asserted:

[I]t must . . . be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by . . . statutes.

Bivens, 403 U.S. at 407. We agree. The history of individual rights as embodied in the Magna Charta and other fundamental documents supports this view. Under English law, individuals had access to remedies of money damages for violations of their individual rights, and these rights, enumerated in fundamental documents, were the forerunners of many of the provisions adopted in federal and state bills of rights. Thus, the framers of the Utah Constitution, who

adopted article I, section 9 against this background, most likely contemplated an award of money damages for the violation of these rights. We also recognize that if prisoners' rights under article I, section 9 are violated, injunctive relief may not be adequate to remedy prisoners' injuries. We cannot deny such prisoners monetary relief simply because many jurisdictions have not clearly established that such relief is available for the violation of constitutional rights. Thus, we conclude that self-executing constitutional provisions allow for awards of money damages.

Next, we must determine whether self-executing provisions provide a basis for an award of damages against state employees or only from the state. In arguing against a recovery of damages from state employees, defendants assert that courts have never allowed recovery against private individuals without implementing legislation. Defendants point out that "it took an act of Congress in the form of the 'Klu Klux Klan Act' of 1871 to provide a tort-like remedy for the violation of a citizen's rights under the United States Constitution" (citing *Monroe v. Pape*, 365 U.S. 167, 170–71, overruled on other grounds by *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978)). We acknowledge that in cases involving sexual or racial discrimination by private businesses and institutions, this court, along with other courts, has refused to impose liability in the absence of implementing legislation. However, we reject defendants' argument for two reasons. First, the cases cited by defendants did not involve self-executing constitutional provisions such as article I, section 9. Second, state employees cannot be categorized as purely private individuals because they have a unique capacity to harm which private individuals do not have. We recognize that "injuries inflicted by officials acting under color of law are substantially different in kind than those inflicted by private parties." *Moresi v. State*, 567 So.2d 1081, 1093 (La. 1990). The actions of officials are apparently authorized by the law, and an "agent acting . . . in the name of the state possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* This is particularly true in the case of prisoners, who have no choice but to accept the actions of officials that directly affect their daily lives. Thus, we find that prisoners may collect damages from prison employees for the violation of their rights under article I, section 9.

Although we hold that prisoners are entitled to recover damages from prison employees, it does not follow that employees may be held liable for any injury. A prison employee's "lot is not so unhappy" that he cannot possess any human frailties of forgetfulness, distractibility, or misjudgment without rendering himself liable for a constitutional violation. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Neither must he "choose between being charged with dereliction of duty" if he does not carry out the instructions of his superiors and "being mulcted in damages [for a constitutional violation] if he does." *Id.* To engender liability, an employee's conduct must be voluntary and sufficiently culpable to contravene a prisoner's right to be free from cruel and unusual punishments and unnecessary rigor.

We hold that a prisoner may not recover damages under article I, section 9 unless he shows that his injury was caused by a prison employee who acted with deliberate indifference or inflicted unnecessary abuse upon him. The deliberate indifference standard protects prisoners from cruel and unusual punishments, and the unnecessary abuse standard protects prisoners from unnecessary rigor. See Utah Const. art. I, § 9.

* * *

[Omitted: Partial concurrence and dissent of Associate Chief Justice I. Daniel Stewart, joined by Justice Christine Durham.]

Four years later, in *Spackman ex rel. Spackman v. Board of Education of Box Elder County School District*, 16 P.3d 533 (Utah 2000), the court "clearly establish[ed] an analytical framework for determining when damages would be an appropriate remedy for the violation of a self-executing

constitutional provision.” It articulated a three-part requirement: the plaintiff must show a flagrant violation of a clearly established constitutional right, that existing remedies do not redress the injury, and that equitable relief is wholly inadequate. Though *Spackman* substantially clarified the implications of *Bott* for other state constitutional provisions, it is not clear that it meaningfully altered the standards applied to prisoners raising unnecessary rigor claims.