

**2024 SUPPLEMENT**

**INCARCERATION  
AND THE LAW  
CASES AND MATERIALS**

**Tenth Edition**



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# 2024 SUPPLEMENT

## PREFACE

Most of this Supplement repeats the 2022 version, but items added this year are in *italic* below. The Supplement includes the following:

- Chapter 2: Discussion of the COVID-19 pandemic in jails and prisons, and the federal court's skeptical stance towards resulting conditions of confinement claims. And more discussion (*including some added 2024*) of the developing split in authority regarding the impact of the Supreme Court's *Kingsley v. Hendrickson* decision on pretrial detention conditions cases.
- Chapter 3: A short addition relating to some courts' rejection of solitary confinement claims. *Some material is new to this version of the Supplement.*
- Chapter 5: *Added notes material on the Prison Rape Elimination Act and its uses in litigation.*
- Chapter 6: A short addition on First Amendment claims relating to visitation in prison. Other additions cover the developing case law in the Roberts Court and lower courts on RLUIPA, including *Ramirez v. Collier*, 595 U.S. 411 (2022) (granting death-row prisoner's challenge to Texas's refusal to allow his pastor to pray aloud and touch him as he is executed), and two examples of court of appeals decisions, one going each way. And a few sentences about *Tanzin v. Tanvir*, 592 U.S. 43 (2020) (allowing damages against government officials sued in their individual capacity under RFRA).
- Chapter 11: *An added note on heightened scrutiny for sex discrimination.*
- Chapter 12: We add some additional discussion of transgender prisoners and social transition needs.
- Chapter 14: About two pages address the developing (though still unsettled) boundary between habeas and injunctive litigation, which has been pushed by COVID-related litigation. *A new table summarizes the PLRA's impact on the prevalence of court orders.* We also add a paragraph about the PLRA's constraints on prospective relief, from *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200 (11th Cir. 2021), and a couple of paragraphs about the PLRA's preliminary injunctive time limits, which were not discussed in the original casebook.
- Chapter 15: Several paragraphs describe the Supreme Court's continuing hostility to *Bivens* remedies. Two new pages deal with qualified immunity and the level of generality appropriate for analysis of prior precedent; they briefly excerpt several court of appeals decisions and the Supreme Court's decision in *Taylor v. Riojas*, 592 U.S. 7 (2020).
- Chapter 16: We add three pages about administrative exhaustion, including in *Ramirez v. Collier*, 595 U.S. 411 (2022), and *Valentine v. Collier*, 978 F.3d 153

(5th Cir. 2020), 141 S.Ct. 57 (2020) (Sotomayor, J., dissenting from denial of vacatur application).

- Chapter 19: We add an excerpt addressing voting by people in jails.
- Chapter 20: This is new chapter (shortened considerably from its version in the 2021 Supplement), now titled “State Court and Executive Responses to COVID-19 Behind Bars.” It includes an Illinois Executive Order and a Massachusetts Supreme Judicial Court opinion.

As always, comments and suggestions are welcome.

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## CHAPTER 2. CONDITIONS OF CONFINEMENT

### A. CRUEL AND UNUSUAL PUNISHMENT: CONVICTED PRISONERS

Add the following before Part B, on page 135:

When the COVID-19 pandemic reached the United States in early 2020, jails and prisons were especially hard hit. The combination of close confinement, medically vulnerable populations, and lack of personal control for prisoners meant that they faced a high risk of infection and illness, without the opportunity to take many of the ameliorative steps available to non-prisoners. The result was both infection and death rates several times higher in prisons and jails than on the outside: A study of deaths as of June 2020 found the death rate in prison to be three times the rate outside, after adjusting for age and sex distributions. See Saloner et al, COVID-19 Cases and Deaths in Federal and State Prisons, 324 JAMA 602 (2020). In many states, prisons and jails were slow to offer vaccines to incarcerated people, and many staff members declined vaccination.

In jails, especially, adjustments to pretrial release policies and other pandemic-related policy and situational changes led to a sharp though largely temporary decrease in population. Some prisons released many individuals on various new or augmented compassionate release or parole programs. See Chapter 20 (in this Supplement) for a discussion of some of these changes. But for those who stayed incarcerated, in addition to the toll taken by COVID, pandemic-related lockdowns and staff shortages subverted ordinary jail and prison programs and services. Non-COVID medical and mental health care suffered, as did the availability of visits and programs (including programs required prior to parole consideration). The image that follows illustrates a letter written by a man incarcerated in Louisiana about the results.



*Taslim von Hattum; used with permission of Voice of the Experienced*

A wave of lawsuits challenged institutional decisionmaking related to social distancing (or its absence), masks and sanitation measures, vaccination policies and practices, and more. These cases proceeded in state and federal court, using many different procedural vehicles (see Chapter 14.A, in this Supplement) and citing a variety of theories. Incarcerated individuals have won some of these cases but they have lost many more. (For citations, see Margo Schlanger & Betsy Ginsberg, *Pandemic Rules: Covid-19 and the Prison Litigation Reform Act's Exhaustion Requirement*, 72 Case Western Res. L. Rev 533 (2022).)

In response to Eighth Amendment litigation attacking alleged prevention and treatment failures, many courts parsed the deliberate indifference standard to require that prison officials do something—but not necessarily all that much—in response to COVID risk. For example, when the Fifth Circuit rejected an Eighth Amendment COVID challenge, it summarized, “any argument that TDCJ [Texas Department of Criminal Justice] evinced a wanton disregard for any serious medical needs is dispelled by the affirmative steps it took to contain the virus.” *Valentine v. Collier*, 978 F.3d 154, 164 (5th Cir. 2020) (internal quotation marks omitted). See also, e.g., *Belton v. Gautreaux*, 20-cv-00278, 2021 WL 400474, at \*6 (M.D. La. Feb. 4, 2021) (rejecting challenge to jail’s COVID response that was limited to 24-hour-per-day lock down of those with COVID, because that response constituted “affirmative steps” “implemented to abate the risks,” which is all the Eighth Amendment requires). Some courts even introduced a new requirement that plaintiffs prove not only that defendants knew about the risk and failed to respond reasonably to it, but also that defendants themselves subjectively believed their own response was inadequate. See, e.g., *Marlowe v. LeBlanc*, 810 F. App’x 302, 305 (5th Cir. 2020) (“Even assuming that Plaintiff’s testimony somehow satisfies *Farmer’s* objective requirement, the district court cited no evidence establishing that Defendants subjectively believed that the measures they were (and continue) taking were inadequate.”).

Other courts that rejected COVID claims purported to take *Farmer’s* reasonable response requirement more seriously, but their actual analysis was extraordinarily deferential to the government. Consider, for example, *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020) in which a panel majority wrote:

The key inquiry is whether the BOP “responded reasonably to th[is] risk.” *Farmer*. The BOP contends that it has acted “assiduously to protect inmates from the risks of COVID-19, to the extent possible.” These actions include

implement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing] inmates’ movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing] staff and visitors and subject[ing] them to enhanced screening; clean[ing] common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff.

The BOP argues that these actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton cannot be found to violate the Eighth Amendment. We agree.

In dissent, Chief Judge Cole characterized the action plan as a lot of nothing:

The BOP casts its overall response to COVID-19 as a “multiphase action plan.” That phrase sounds good on paper; it conveys the message that the BOP is doing all that it possibly can to address the outbreak at Elkton. But it means little until we look behind

the curtain and examine whether the plan's phases move the BOP closer to keeping the inmates safe. Such an examination here reveals that the BOP's six-phase plan to address COVID-19 is far less impressive than its title suggests. That plan consists of two different phases addressing the screening of inmates, an entire phase consisting of only taking inventory of the BOP's cleaning supplies, a phase where the BOP confined inmates to their quarters where they cannot socially distance, and a final phase that just extended the previous one. It turns out, then, that the "six-phase" plan is, for practical purposes, a four-phase plan where one phase is taking inventory of supplies and another involves the locking of inmates in 150-person clusters where they cannot access the principal method of COVID-19 prevention. Suffice to say, with stakes this high, the specifics matter far more than the headline. As another court observed, "[t]he government's assurances that the BOP's 'extraordinary actions' can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease."

As Sharon Dolovich has commented, "[T]aking a closer look at the details of this official response, it is hard to see how it could be thought a reasonable response, if 'reasonable' means in any way adequate to mitigate the risk." Sharon Dolovich, *The Coherence of Prison Law*, 135 Harv. L. Rev. Forum 302, 337 (2022).

The Supreme Court came down heavily against the plaintiffs in these cases. In *Wilson v. Williams*, prior to the opinion just quoted, the Supreme Court had granted a stay of the district court injunction pending appeal, without opinion. \_\_\_ S.Ct. \_\_\_, 2020 WL 2988458 (June 4, 2020). This was not the Court's only such "shadow docket" COVID jail/prison order. In another such case, involving a prison in Texas, the district court granted first preliminary and then final relief, both stayed by the Court of Appeals for the Fifth Circuit. See *Valentine v. Collier*, preliminary injunction issued, 2020 WL 1899274 (S.D. Tex., Apr. 16, 2020), opinion issued 455 F.Supp.3d 308 (S.D. Tex., Apr. 20, 2020), stayed, 56 F.3d 797 (2020) (per curiam) (5th Cir., Apr. 22, 2020), application to vacate stay denied, 140 S.Ct. 1598 (May 14, 2020); final injunction issued, 490 F.Supp.3d 1121 (S.D. Tex., Sep. 29, 2020), stayed, 978 F.3d 154 (5th Cir., Oct. 13, 2020). When the second of these stays came before the Supreme Court, Justice Sotomayor dissented from the denial of the plaintiffs' request that the district court order be allowed to have effect, writing in *Valentine v. Collier*, 141 S.Ct. 57 (2020):

[T]he Fifth Circuit's analysis makes clear that it substituted its own view of the facts for that of the District Court. For instance, in highlighting the prison's policy requiring masks and social distancing, the Fifth Circuit chose to ignore the District Court's express finding that "staff non-compliance with regard to wearing PPE [personal protective equipment] and social distancing were regular, daily features of life in the Pack Unit." Similarly, the Fifth Circuit gave special weight to the prison's testing efforts, while disregarding the critical flaws identified by the District Court. To start, no mass testing occurred until about a month after the prison's first casualty. Even then, inmates had to wait one to two weeks to get their results, which, according to the prison's own experts, was "simply too long to effectively contain the spread of the virus." Respondents knew of tests with shorter turnaround times but never explored the possibility of using them. *Ibid.* Perhaps most troublingly, the prison continued to house inmates diagnosed with COVID-19 together with inmates who tested negative—a failure that respondents obscured by "misrepresent[ing] certain facts" to the District Court. In short, far from "dispell[ing]" an inference of deliberate indifference, the prison's actions highlighted by the Fifth Circuit only confirm it.

At bottom, the Fifth Circuit rejected the District Court's careful analysis of subjective deliberate indifference based on the Fifth Circuit's view that respondents took



reasonable “affirmative steps” to respond to the virus. But merely taking affirmative steps is not sufficient when officials know that those steps are sorely inadequate and leave inmates exposed to substantial risks. That was the case here: The District Court found that respondents “were well aware of the shortcomings” in their response “and nevertheless chose to stay the course, even after a number of inmates died.” Respondent Collier even admitted that prison officials “‘were not doing everything [they] should have been.... Thin[g]s like restricting, isolating, PPE access, cleaning supplies.’ “ To be sure, the “Eighth Amendment does not mandate perfect implementation,” but it also does not set a bar so low that any response by officials will satisfy it. Given the evidence in the record, there is no basis to overturn the District Court’s finding of deliberate indifference.

The COVID-19 pandemic has also raised issues about how to reconcile the requirement to respond reasonably to known risks of serious harm with the rights of staff under, for example, collective bargaining agreements, and also with the possibility that required actions might provoke staff discontent or even resignation.

In several states, correctional employees challenged vaccine mandates in state court proceedings. In New Jersey, correctional employees challenged a vaccine mandate by arguing that the governor “lacked the authority to mandate vaccinations; acted arbitrarily by failing to adequately tailor the executive order to the magnitude of the emergency; failed to comply with statutory procedural requirements; and violated the constitutional rights of appellants’ members.” *New Jersey State Policemen’s Benv. Assn. v. Murphy*, 271 A.3d 333 (N.J. Super. App. Div. 2022). The New Jersey Superior Court rejected the challenge relying in part on CDC recommendations that deemed high vaccine coverage (for prison staff) “critical to protect staff and people who are incarcerated [or] detained.” It noted that “[s]taff vaccination coverage is particularly important given their frequent contact with the outside community, which creates the opportunity for potential introduction [of the virus] to the facility.”

In Illinois, correctional employees exercised their right to challenge a COVID vaccine mandate through arbitration. After employees argued that the state lacked the authority to impose a vaccine mandate, the neutral arbitrator found that “[t]he lawful authority of the State is supported by a very long line of court decisions dating back to 1905 which demonstrate that the State can mandate vaccinations.” The arbitrator further found that “[t]he interests and welfare of the public are best served with a vaccine mandate as proposed by the State. Overwhelming scientific evidence offered by the State shows that the vaccines are effective and safe and the best method to prevent infection.” *In the Matter of the Arbitration between State of Illinois and AFSCME Council 31*, Case Nos. S-MA-22-121, Arb. Ref.: 21.318, <https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-22-121.pdf>. At the request of the employees’ union, Illinois’ prison vaccine mandate extends to “visitors, vendors and other non-employees.” [https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-22-121\\_final\\_after\\_remand.pdf](https://www2.illinois.gov/ilrb/arbitration/Documents/S-MA-22-121_final_after_remand.pdf).

On the other hand, in *Plata v. Newsom*, Nos. 21-16696, 21-16816, 2022 WL 1210694 (9th Cir. Apr. 25, 2022), a unanimous court of appeals panel reversed a district court requirement of mandatory vaccination for staff (absent a religious exemption):

Plaintiffs and the Receiver argue Defendants’ approach was deliberately indifferent because: (1) CDCR disregarded the Receiver’s conclusion that, “given the rapid and ongoing spread of the Delta variant in California, mandatory COVID-19 vaccination for institutional staff is necessary to provide adequate health protection for incarcerated persons”; and (2) “[o]nce COVID-19 infection has been introduced into a prison, it is virtually impossible to contain”; and (3) staff are the primary vector for introducing the virus to correctional facilities. Plaintiffs further argue that a staff vaccination mandate is necessary to protect inmates from the risks of COVID-19 because CDCR’s other

mitigation measures are insufficient—masking and physical distancing are inconsistently enforced in prison, and testing offers only limited protection. In support of this position, the Receiver points to a study showing that full vaccination consistently reduces household viral spread of the alpha and delta variants of COVID-19. The Receiver also notes that, in the absence a full staff vaccination mandate, CDCR experienced approximately 2.5 times the infection rate of the California general population during the peak of the Omicron variant.

A decision to adopt an approach that is not the most medically efficacious does not itself establish deliberate indifference, and the record does not include evidence demonstrating how much more effective a vaccine mandate would be compared to Defendants’ existing measures to mitigate the introduction and spread of COVID-19 in a custodial environment, nor is it clear from the record that this is an unquantifiable figure. Moreover, the Receiver’s authority extends to the prison’s health care system, not overall prison administration. Defendants are tasked with meeting non-medical imperatives such as maintaining sufficient staffing to operate the state’s correctional institutions safely. Defendants and Intervenor stress that over 700 correctional officers are currently eligible to retire, and suggest some correctional staff may do so rather than continue to work in the face of a vaccine mandate. The district court’s orders denying Defendants’ and Intervenor’s motions for stay deemed Defendants’ staffing concerns “speculative,” but the district court did not make specific findings regarding the total number of correctional personnel, the impact the loss of up to 700 correctional officers would have on CDCR’s ability to safely operate the prisons and provide programming, the likelihood that staff eligible to retire might do so rather than receive vaccinations, nor CDCR’s ability to hire replacement staff. In the absence of such findings, we must defer to the prison’s balancing of administrative concerns. See *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25, 37 (1993). On this record, Plaintiffs did not meet their burden of establishing Defendants’ vaccination policy was deliberately indifferent, and we vacate the district court’s orders on appeal concluding otherwise. See *Helling* (holding that deliberate indifference “should be determined in light of the prison authorities’ current attitudes and conduct”).

## C. DUE PROCESS: PRETRIAL DETAINEES

### *NOTES AND QUESTIONS ON STANDARDS FOR PRETRIAL DETENTION CONDITIONS*

Replace the last paragraph of note 2, on page 184 with the following two paragraphs:

Courts of Appeals disagree on this issue. On the one hand, the courts to address the question in full and reasoned decisions have held that *Kingsley*’s objective approach extends to non-force claims brought by pretrial detainees. See *Castro v. Cty. of Los Angeles*, *supra*; *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (holding that the “subjective prong” of a claim of deliberate indifference to conditions of confinement under the Fourteenth Amendment must be “defined objectively” in light of *Kingsley*); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (pretrial detainees’ medical care claims “are subject only to the objective unreasonableness inquiry identified in *Kingsley*”); *Echols v. Johnson* 105 F. 4th 973 (7th Cir. 2024) (a jail detainee suing for failure to protect must show that an officer defendant “acted in an objectively reasonable way in taking or failing to take action to mitigate the risk of harm”); *Short v. Hartman*, 87 F.4th 593, 605 (4th Cir. 2023) (“[W]e hold, as four of our sister circuits have previously, that *Kingsley* is irreconcilable with precedent requiring pretrial detainees to meet a subjective standard to

succeed on claims under the Fourteenth Amendment for prison officials' deliberate indifference to excessive risks of harm to the inmate.”); *Brawner v. Scott Cnty.*, 14 F.4th 585 (6th Cir. 2021) (applying objective standard to pretrial detainee’s medical care claim).

Other circuits have hewed to their pre-*Kingsley* precedent in non-force cases brought by pretrial detainees, meaning that they continue to apply the subjective deliberate standard that *Farmer* applied to conditions claims brought by convicted prisoners. These decisions, however, generally contain less reasoning and provide little explanation of how the holdings comport with *Kingsley*. See *Cope v. Cogdill*, 3 F.4th 198, 207 & n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017)).

## CHAPTER 3. SOLITARY CONFINEMENT

Add at the top of page 246:

Not all the precedent favors reform. For example, the 7th Circuit upheld repeated “yard restrictions” that entirely eliminated plaintiff Michael Johnson’s access to the outdoors and to large muscle exercise for three years of his time in solitary confinement. The Court of Appeals declined to apply the deliberate indifference test, instead holding that “imposing consecutive 90-day periods of no-yard privileges for separate misconduct violations does not violate the Eighth Amendment unless the sanctions were meted out for ‘some utterly trivial infraction of the prison’s disciplinary rules.’” *Johnson v. Prentice*, 29 F. 4th 895, 904 (2022) (quoting *Pearson v. Ramos*, 237 F. 3d 881, 884-85), reh’g en banc denied, 47 F. 4th 529 (7th Circ. 2022). The Supreme Court denied certiorari review, over a vehement dissent by Justice Jackson (joined by Justices Sotomayor and Kagan) The dissent complained that the 7th Circuit’s “utterly trivial infraction” test bears no relationship to this legal standard, because it did not weigh “the indisputable risks to health or safety that a prolonged period of exercise deprivation can cause.” *Johnson v. Prentice*, 601 U. S. \_\_\_, 144 S.Ct. 11, 15 (2023).

Or in another example, in *Crane v. Utah Dep’t of Corr.*, 15 F.4th 1296 (10th Cir. 2021), the plaintiff’s decedent, who had unspecified psychosis, major depressive disorder, and intellectual disability (including brain damage and impulse control disorders), committed suicide at age 17, in prison. He had spent long periods in punitive isolation for non-violent infractions, was rarely let out of his cell, and he was often denied recreation, exercise equipment, media, commissary, visitation, and library privileges. He received two more consecutive 20-day punitive segregation sentences without consultation with mental health staff, in apparent violation of prison policy, and then got two more disciplinary notices meaning he would probably get more segregation time. After an argument with a staff member who did not let him out for his exercise period, he hanged himself using the bunk bed and sheets and towels in his cell. The district court granted judgment on the pleadings based on qualified immunity and the court of appeals affirmed, commenting that the district court cases the plaintiff cited were insufficient to demonstrate clearly established law:

These cases share a common theme. They stand for the proposition that isolating mentally ill inmates in conditions that seriously and predictably exacerbate their mental illness is cruel and unusual when the official has subjective knowledge of both the mental illness and the impact of isolation. Although these trial court decisions may portend future legal developments, they do not constitute clearly established law capable of overcoming qualified immunity here.

District court cases lack the precedential weight necessary to clearly establish the law for qualified immunity purposes.

Add before Notes and Questions, on page 250:

The immediate impact of the COVID-19 pandemic was to increase use of lockdowns and isolation. See, e.g., Alana Rosenberg, et al., “It’s just us sitting there for 23 hours like we done something wrong”: Isolation, Incarceration, and the COVID-19 pandemic. *PLoS ONE* 19:2: <https://doi.org/10.1371/journal.pone.0297518> (Feb. 19, 2024). There’s not yet good evidence on the longer-term impact, but it may be significant. See, e.g., The Report of the Attorney General Pursuant to Section 16(b)(i) of Executive Order 14074 (Feb. 1, 2023), at <https://www.justice.gov/d9/2023-02/Section%2016%28b%29%28i%29%20Report%20-%20Final%20-%20Initial%20508.pdf>.

## CHAPTER 5. SEXUAL ABUSE

### A. THE PRISON RAPE ELIMINATION ACT

Add to note 4, p. 298:

*Doe v. Macleod*, No. 3:18-cv-03191, 2024 WL 987559, at \*2 (C.D. Ill. Mar. 7, 2024) (upholding jury instruction that allowed the jury to consider evidence of PREA violation as “relevant to the question of whether Plaintiff faced a substantial risk of serious harm”; the jury instruction explained that “the issue is whether Defendants [failed to protect Plaintiff from being sexually assaulted by Defendant MacLeod, not whether a rule, procedure, state law, or PREA might have been violated”).

After note 4, add a new note 5, p. 298:

PREA is also implicated in cases where people in custody allege prison officials subjected them to unlawful retaliation for filing PREA complaints. For example, in *California Coal. for Women Prisoners v. United States*, No. 4:23-cv-4155-YGR, \_\_\_ F.Supp.3d \_\_\_, 2024 WL 1290766, at \*21 (N.D. Cal. Mar. 15, 2024), a putative class of women incarcerated in a federal prison sought injunctive relief to redress conditions the federal court described as an intolerable, “dysfunctional mess” . . . in dire needs of immediate change.” This “mess” included widespread sexual abuse documented by the U.S. Department of Justice as well as the criminal indictment of a former warden. Among other allegations, the plaintiffs alleged that when they filed PREA complaints, prison officials would retaliate against them by placing them in the specialized housing unit (SHU), where they were confined to their cells for 23 hours per day. Women likened the SHU to a dungeon. After an evidentiary hearing, the court found that the prison’s “long history of using the SHU to inappropriately quell inmates’ First Amendment rights can no longer be countenanced. . . . The SHU is draconian. . . . [I]solation in those small, white cells leads to an increased risk of suicide. With a population of which 90% have experienced trauma, that risk is compounded. Using it to punish FCI Dublin’s incarcerated population for making false reports of misconduct poses a serious risk of also deterring legitimate ones.” See also *Rivers v. Squires*, No. 23-cv-154-LJV, 2024 WL 2702203, at \*1 (W.D.N.Y. May 24, 2024) (woman in custody alleged a First Amendment retaliation claim in cases where, after she reported that she was raped, prison officials placed her in solitary confinement); *Martin v. Halstead*, No. 1:21-cv-465, 2023 WL 9383276, at \*2 (W.D. Mich. Sept. 26, 2023), report and recommendation adopted, 2024 WL 278212 (W.D. Mich. Jan. 25, 2024) (Plaintiff stated a First Amendment retaliation claim where he alleged

that, after he requested a PREA complaint form because a correctional officer verbally sexually harassed him, the correctional officer filed a false PREA complaint against him.).

Add a new note 6 and renumber the existing note 5 as note 7.

A prison system’s systematic failure to comply with PREA regulations can also be deemed the kind of widespread policy and practice failure that allows suit against state officials in their official capacities. In *Unique v. Claybaugh*, No. 22-cv-00711-PCP, \_\_\_ F.Supp.3d \_\_\_, 2024 WL 189018, at \*8 (N.D. Cal. Jan. 17, 2024), two transgender people housed in various California prisons file a complaint that California prisons repeatedly failed to comply with PREA regulations—alleged failures included violations of PREA mandates regarding monitoring vulnerable people in custody and providing safe housing. The district court refused to dismiss plaintiffs’ claims against the CDCR Secretary, finding that “[p]laintiffs have pleaded a systematic violation of the federal PREA regulations that require prisons to safely house vulnerable inmates. These allegations sufficiently identify a policy or practice for which state officials can be sued in their official capacity.”

## **CHAPTER 6. FREEDOM OF EXPRESSION AND RELIGION**

### **B. FIRST AMENDMENT RIGHTS IN PRISONS AND JAILS**

#### **3. VISITATION AND FAMILY**

Add on page 416, before part 4:

While most post-*Overton* case law rejects visitation claims, this is not universally true. For example, in *Manning v. Ryan*, 13 F.4th 705 (8th Cir. 2021) (per curiam), the plaintiff alleged that while detained at a county jail he was denied visitation with his children under a blanket policy barring visits to pretrial detainees by minor children. The court of appeals affirmed summary judgment on qualified immunity grounds, because the right at issue was not clearly established. However, the court noted:

The time is ripe, however, to clearly establish that such behavior may amount to a constitutional violation in the future. In *Turner v. Safley*, a case involving inmate marriage, the Supreme Court held that prisoners retain a limited constitutional right to intimate association, and any limitations must be “reasonably related to legitimate penological interests.” Years later, in *Overton v. Bazzetta*, the Supreme Court explained that, consistent with *Turner*, limitations on visitation privileges may be unconstitutional if “applied in an arbitrary manner to a particular inmate,” but not if imposed “for a limited period as a regular means of effecting prison discipline.” With those decisions in mind, we join the Seventh Circuit in holding that prison officials who permanently or arbitrarily deny an inmate visits with family members in disregard of the factors described in *Turner* and *Overton* have acted in violation of the Constitution.

## C. HEIGHTENED STATUTORY PROTECTION FOR RELIGIOUS EXERCISE

### 2. STRICT SCRUTINY IN PRISON

#### NOTES AND QUESTIONS

Add a new note 2, on page 432:

Flush with new Trump-appointed judges, the Supreme Court and, following its lead, the courts of appeals, have grown increasingly protective of religious exercise across American life—including behind bars. At the same time, the habits of deference remain strong. The result is somewhat inconsistent recent case law. For example, contrast the first two cases described below with the last one:

In *Ramirez v. Collier*, 595 U.S. 411 (2022), the Supreme Court found that RLUIPA compelled the State of Texas to grant a death-sentenced prisoner’s request that his pastor be admitted to the execution chamber and allowed to “pray over” the prisoner—praying out loud while laying hands him. The Court found the state’s defense of its contrary policy “conclusory”: the defendants, it said “assert that, ‘under the circumstances in Texas’s chamber, allowing speech during the execution is not feasible.’ [But they] do not explain why. Nor do they explore any relevant differences between Texas’s execution chamber or process and those of other jurisdictions. Instead, they ask that we simply defer to their determination. That is not enough under RLUIPA.” Similarly, the Court found that the state had insufficiently justified its ban on touch. Against the state’s assertion of the need to keep the pastor’s hands away from IV lines, the Court offered options (“For example, Texas could allow touch on a part of the body away from IV lines, such as a prisoner’s lower leg.”). The Court complained: “Texas does nothing to rebut these obvious alternatives, instead suggesting that it is Ramirez’s burden to ‘identify any less restrictive means.’ That gets things backward. Once a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy ‘is the least restrictive means of furthering [a] compelling governmental interest.’”

In *Ackerman v. Washington*, 16 F.4th 170 (6th Cir. 2021), the court of appeals affirmed an injunction barring defendants from requiring prisoners approved for a kosher diet from being served a vegan diet—a single religious diet designed to satisfy all religious objections to any food. The appellate court agreed with the district court’s conclusion that the plaintiffs sincerely believed their religion required them to consume kosher meat and dairy on the Sabbath and on four holidays, and cheesecake on Shavuot. It cited in support several sources describing Jewish law and custom, and explained that commissary purchases of the desired items would not suffice because prisoners were not allowed to bring them to the chow hall, and the plaintiffs understood Jewish law to prescribe that these items be consumed at “mealtime.” Defendants asserted that accommodating plaintiffs’ beliefs would cost the department \$10,000 a year. The court explained that RLUIPA (and RFRA) sweep broadly: “the reasonable and the unreasonable, the orthodox and the idiosyncratic all enjoy protection. In the end, the sincerity requirement is just a ‘credibility assessment’ that asks if a prisoner’s religious belief is honest.” Although the court noted that “[t]he cheesecake issue is trickier” than the others, it found no clear error in the district court’s pro-plaintiff decision.

On the other hand, consider *Faver v. Clarke*, 24 F.4th 954 (4th Cir. 2022), in which the court of appeals affirmed a district court decision for the government against an RLUIPA challenge by a Muslim plaintiff to the state’s “single-vendor” policy for commissary items. That policy, the plaintiff complained, required him to buy prayer oils from a company that also sold “swine and idols” to other prisoners, which he believed Islam prohibits. Notwithstanding the burden on his

sincerely held beliefs, the court of appeals held, there was no error in the district court’s conclusion that the single-vendor policy was the least-restrictive method by which the state could serve its compelling interest of “preventing contraband, which promotes prison safety and security, and reducing the time prison personnel must devote to checking commissary shipments, which controls costs.” Requiring the state to approve two vendors, rather than one, was too heavy an intrusion into state prerogatives.

Substitute the following for note 4 (also on page 432):

4. RFRA’s authorization of “appropriate relief against a government,” defined to include “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” authorizes damages against government officials sued in their individual capacity. *Tanzin v. Tanvir*, 592 U.S. 43 (2020). Because of sovereign immunity, however, damages are *not* available in RLUIPA actions against states, themselves, although RLUIPA uses identical language. See *Sossamon v. Texas*, 563 U.S. 277, 285–86 (2011) (RLUIPA’s reference to “appropriate relief” against states that receive federal funds, 42 U.S.C. § 2000cc–2(a), –5(4)(A), is insufficiently explicit to mean that such states have waived immunity from damages liability). Courts are currently split on whether *Tanzin*’s logic applies to RLUIPA lawsuits, authorizing damages individual capacity actions against state (or for that matter, county) officials. For a variety of positions and additional case citations, see, e.g., *Robbins v. Robertson*, No. 7:15-cv-00124, 2022 WL 80476 (M.D. Ga. Jan. 6, 2022); *Gill v. Coyne*, No. 3:18-cv-00631, 2021 WL 4811300 (W.D. Ky. Oct. 14, 2021); *Ruplinger v. Louisville/Jefferson Cnty. Metro Gov’t*, No. 3:19-CV-583-DJH-RSE, 2021 WL 682075, at \*4 (W.D. Ky. Feb. 22, 2021).

## CHAPTER 11. WOMEN PRISONERS

### A. CONDITIONS OF CONFINEMENT: PROGRAMMING AND SEXUAL ABUSE

On page 591, add a new note 2 and renumber subsequent notes accordingly:

2. The majority opinion in *Women Prisoners of D.C.* cited *Turner v. Safley* in support of its general deference to prison officials, but did not expressly apply *Turner*’s “legitimate penological interest” test; both the majority and the dissent instead looked to non-prison equal protection law as relevant. Subsequent cases have held more explicitly that, like race discrimination under *Johnson v. California*, 543 U.S. 499 (2005), sex discrimination behind bars is subject to heightened scrutiny. See, e.g., *Harrison v. Kernan*, 971 F.3d 1069 (9th Cir. 2020); *Williamson v. Maciol*, 839 F. App’x 633 (2d Cir. 2021).

# CHAPTER 12. LGBTQ PRISONERS

## B. PREVENTING SEXUAL VICTIMIZATION

### 2. HOUSING DECISIONS

#### d. Transgender Prisoners and Prison Assignments

Replace note 5 on page 658 with the following:

Under the Trump administration, in 2018, a new Federal Bureau of Prisons policy regarding housing trans people stated that “officials would use biological sex as the initial determination for housing.” This was a change from the policy in place during the Obama administration, which provided that people would be housed “by gender identity where appropriate.” In January 2022, the Biden administration reverted, updating the BOP’s “Transgender Offender Manual” to explicitly incorporate PREA regulatory requirements that officials make housing decisions on a “case by case basis” considering both “the inmate’s health and safety” as well as any “management or security problems.” U.S. Department of Justice, Federal Bureau of Prisons, Transgender Offender Manual (January 13, 2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf>.

## C. TRANSGENDER MEDICAL CARE

Add new note 2 (at page 669) and renumber notes 2-4 accordingly:

2. The *Monroe* litigation excerpted above has continued and is still not resolved. In another preliminary injunction decision, *Monroe v. Meeks*, No. 18-cv-00156, 2022 WL 355100 (S.D. Ill. Feb. 7, 2022), the court entered many more detailed orders, including on the topic of social transition and housing. The court agreed with plaintiffs’ position that for trans people, housing placement often implicates serious medical needs; Judge Rosenstengel found that “[s]ocial transition (including housing in a facility matching one’s gender identity and access to gender-affirming clothing and other items) is a medically necessary component of treatment for some prisoners with gender dysphoria, yet under the [state policy], nonmedical staff continue to have the power to block transfer requests even if the medical or mental health providers recommend transfer as part of an individual’s treatment.” Compare the elements of a failure to protect claim to a claim alleging inadequate medical care. Under which theory would a trans woman in custody seeking a transfer to women’s prison be most likely to succeed?

On the issue of social transitioning, rather than surgery, the Eleventh Circuit has taken a position similar to the Fifth Circuit’s in *Gibson*. In *Keohane v. Fla Department of Corrections*, 952 F.3d 1257 (11th Cir. 2020), the court of appeals reversed a district court order requiring the Florida Department of Correction (FDC) to grant the social transitioning requests of a trans woman in custody. The plaintiff had requested “to wear long hair, makeup, and female undergarments,” but the state refused these requests because they conflicted with prison policy requiring male inmates to keep their hair short and to wear male undergarments. The FDC also argued that security concerns would arise were Ms. Keohane to present as a woman in a men’s prison. The panel majority noted that the medical experts were divided on whether social transition was required to treat the plaintiff’s gender dysphoria. The plaintiff’s retained experts had testified that social transition was required; members of the FDC medical team testified that social transitioning would be “psychologically pleasing” to the plaintiff—but was not a medical necessity. Pointing to these conflicting views, the Eleventh Circuit found that “when the medical community can’t agree on the appropriate course of care, there is simply no legal basis for concluding that the treatment



provided is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.” The Court also gave great deference to the FDC’s assertion that Ms. Keohane’s social transitioning request would create serious security concerns.

In a detailed dissent, Judge Wilson critiqued the majority’s reasoning, writing that it inappropriately “crowns security king”:

[T]he majority holds that the FDC can shrug off Keohane’s medical need if it decides that the security risks of the treatment outweigh its necessity. \* \* \* The district court did not conclude that the FDC denied treatment because it considered Keohane’s need for social transitioning and decided that the security risks outweighed her need. The court found that the FDC did not consider necessity or security at all when denying treatment, because prison officials blindly deferred to the FDC’s clothing policy. Said differently, prison officials denied treatment because of the policy, not because of their views on her need for the treatment or the security risks it presents.

Add at the end of note 4 (renumbered as note 5), page 669:

How should prison officials weigh medical need and security, if they conflict?

## CHAPTER 14. INJUNCTIVE LITIGATION

### A. THE BOUNDARY BETWEEN HABEAS CORPUS, INJUNCTIVE, AND DAMAGES RELIEF

In place of the first sentence after the first full paragraph on page 708, insert the following:

In declaring that *Preiser*’s plaintiff was required to use the habeas vehicle, not Section 1983, the Supreme Court expressly declined to address the converse question—whether habeas is available for a conditions of confinement claim. The Court noted: “When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal. But we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983.” The issue remains open in the Supreme Court, see *Ziglar v. Abbasi*, 582 U.S. 120 (2017), and has split the courts of appeals, see *Wilborn v. Mansukhani*, 795 F. App’x 157 (4th Cir. 2019) (cataloging case law).

Litigation challenging prison and jail responses to the COVID-19 pandemic pushed recent development. In dozens or hundreds of federal lawsuits, prisoner-plaintiffs—especially those with preconditions that amplified the risk to their health and welfare—sought release from incarceration because it increased their probability of COVID-19 infection. Many filed their cases as petitions for a writ of habeas corpus, or pled their cases in the alternative as injunctive complaints *and* habeas petitions. They relied on *Preiser*’s oft-repeated link of habeas to challenges to “the fact or duration of . . . confinement.”

These would-be habeas litigants were at least in part responding to the Prison Litigation Reform Act’s exemption for “habeas corpus proceedings challenging the fact or duration of confinement in prison” from its stringent constraints on entry, scope, and term of relief, including, especially, the requirements that a “prisoner release order” be granted only after “an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and . . . the defendant has had a reasonable amount of time to comply with the previous court orders,” only “crowding is the primary cause of the violation of a Federal

right” at issue, and only after an arduous process specified by statute. 18 U.S.C. §§ 3626(g)(2); (a)(3). For more on PLRA regulation of “prisoner release orders” see Chapter 14.D.4.<sup>1</sup>

Seeking the benefit of that PLRA exemption, some prisoners and their lawyers framed their actions under habeas, leading to deepened consideration of this boundary issue. Courts have so far disagreed on two questions: first, whether habeas corpus was an appropriate vehicle for COVID claims seeking release, and, second, if habeas *was* appropriate, the impact on the PLRA’s prisoner release order requirements.

On the first issue, cases denying access to the habeas vehicle include, for example, *Rice v. Gonzalez*, 985 F.3d 1069 (5th Cir.), in which the Fifth Circuit pointed out that it had long been on the side of the post-*Preiser* divide that disallows use of habeas to challenge conditions of confinement. It then reasoned that the detainee-plaintiff’s Fourteenth Amendment case citing his increased vulnerability to COVID-19 was, in reality, a conditions case, because it did not “impugn the underlying legal basis for the fact or duration of his confinement.” So he was required to proceed under Section 1983. See also *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020); *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020). But the Sixth Circuit was one of several that reached a contrary conclusion, even though it, too, takes the no-habeas-for-conditions position. In *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), the court of appeals allowed plaintiffs’ habeas corpus petition to proceed, because “[r]ather than arguing that there are particular procedures or safeguards” that must be put in place to prevent the spread of COVID-19 in their facility, they contended that there were “no conditions of confinement sufficient to prevent irreparable constitutional injury” at that facility. By seeking release, they challenged the “fact or extent of their confinement,” such that jurisdiction under federal habeas provisions was proper. See also Michael L. Zuckerman, *When the Conditions Are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. Cin. L. Rev. 1, 37–44 (2021) (“a prisoner who brings a habeas claim alleging that he cannot constitutionally be confined in a given facility . . . levels an attack that is ‘just as close to the core of habeas corpus as an attack on the prisoner’s conviction’” (citing *Preiser v. Rodriguez*)).

In *Wilson*, the Sixth Circuit also found for the plaintiff on the second issue, holding, simply, “[t]he PLRA does not apply in habeas proceedings.” But some other courts—though not, so far, a court of appeals—have disagreed. See, e.g., *Mays v. Dart*, 456 F. Supp. 3d 966 (N.D. Ill. 2020) (“[b]y specifying that a ‘civil action with respect to prison conditions does not include habeas corpus proceedings challenging the fact or duration of confinement in prison,’ the language of the PLRA appears suggests [sic] that it may cover other types of habeas corpus proceedings” such as those—allowed in the Seventh Circuit—challenging the conditions of confinement).

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<sup>1</sup> Moreover, because of the PLRA, the advantage cited in *Preiser* of injunctive rather than habeas proceedings—avoiding the requirement of pre-lawsuit exhaustion—has disappeared and may even now be reversed. The PLRA’s administrative exhaustion requirement has been interpreted to be even less forgiving than habeas doctrine. As Chapter 16.A describes, under the PLRA, prisoner-plaintiffs in injunctive actions are required to fully exhaust even obviously futile avenues for relief. Habeas exhaustion doctrine, while quite onerous, imposes no such hurdle to federal lawsuits. And habeas cases are exempt from PLRA exhaustion requirements. See, e.g., *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001) (citing cases.) On the other hand, some courts have administered habeas exhaustion in such a way as to undermine or even eliminate the possibility of collective litigation. See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 Cal. L. Rev. 117 (2022). This issue seems to have played less of a role than the prisoner release order issue in the choice of litigation form.

In a series of cases addressing the boundary between habeas and damages rather than injunctive actions, the Supreme Court emphasized that *Preiser* is relevant for both and reinforced the idea that habeas is the exclusive vehicle for federal challenges to convictions. [\[continue from here\]](#)

## D. THE PRISON LITIGATION REFORM ACT

### 2. THE PLRA IN OPERATION

On page 756, before a., insert:

**Table 14.1: Incidence of Court Orders, Local Jails and State Prisons, 1983–2006, 2019**

	Year	(a) Total Facilities	(b) Facilities with Orders	(c) Total Population	(d) Population Housed in Facilities with Orders
Local Jails	1983	3,338	18%	227,541	51%
	1988	3,316	18%	336,017	50%
	1993	3,268	18%	466,155	46%
	1999	3,365	17%	607,978	32%
	2006	3,282	11%	756,839	20%
	2019	2,924	5%	706,205	12%
State Prisons	1984	694	27%	377,036	43%
	1990	957	28%	617,859	36%
	1995	1,084	32%	879,766	40%
	2000	1,042	28%	1,042,637	40%
	2005	1,067	18%	1,096,755	22%
	2019	1,039	22%	1,138,623	25%

Data source: Bureau of Justice Statistics, Prison and Jail Censuses. For details see [incarcerationlaw.com](http://incarcerationlaw.com).

#### b. Scope of Relief Authorized

On page 761, 10 lines into the first full paragraph, before “For an exploration of . . .” add:

Other courts, however, have read the statute to make more of an impact. For example, in *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200 (11th Cir. 2021), the court wrote:

[T]he PLRA supercharges some of the traditional equitable principles of injunctive relief. While courts were already required to ensure injunctions are no broader than necessary, the PLRA emphasizes the importance of narrow tailoring in prison litigation by requiring courts to make specific findings that “such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” The PLRA also supercharges and particularizes the traditional public interest consideration by providing that courts “shall give *substantial weight* to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” This requirement applies to the issuance of permanent as well as preliminary injunctive

relief, and presumably applies both to the determination of whether the plaintiff is entitled to an injunction and to the tailoring of the injunction.

Add at page 763, as a new subpart between b. and c.:

#### **x. Preliminary relief**

The PLRA, § 3626(a)(2), includes the same scope restrictions for preliminary as well as final injunctive relief. And it requires “automatic expir[ation]” of any preliminary injunction on its 90th day “unless the court . . . makes the order final before the expiration of the 90-day period.”

The provision has garnered sustained attention in cases challenging COVID-related practices—failures relating to personal protective equipment, social distancing, vaccination, and the like. When plaintiffs won preliminary relief in a district court, the government defendants often sought reversal from more conservative courts of appeals. Unless briefing is expedited, the preliminary injunctions are likely to expire prior to appellate argument; at that point, courts of appeals have (so far) consistently held the appeal moot. See, e.g., *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200 (11th Cir. 2021) (“[W]e believe the entry of a permanent injunction is necessary to prevent a preliminary injunction from expiring by operation of law after 90 days under the PLRA’s ‘unless’ clause”, even though “[m]aking” a preliminary injunction order final is a strange way to speak of entering a final judgment incorporating an injunction.” And “[o]ur precedent is clear that when a preliminary injunction expires by operation of law under § 3626(a)(2), any appeal from that injunction is moot.”); *Banks v. Booth*, 3 F.4th 445 (D.C. Cir. 2021) (rejecting plaintiffs’ argument that the preliminary injunction was exempt from PLRA expiration because the case sounded in habeas and challenged the “fact” of confinement, and agreeing with the government that the preliminary injunction had expired, rendering the appeal moot); *Melendez v. Sec’y, Fla. Dep’t of Corr.*, No. 21-13455, 2022 WL 1124753, at \*4 (11th Cir. Apr. 15, 2022) (holding one appeal moot because a first preliminary injunction had expired by the terms of the PLRA, but reaching the merits of a second, successor preliminary injunction and appeal). See also *Ahlman v. Barnes*, 20 F.4th 489, 494 (9th Cir. 2021), cert. denied, No. 21-1351, 2022 WL 1738610 (U.S. May 31, 2022) (dismissing a preliminary injunction appeal as moot in a COVID case where the Supreme Court had granted a stay of that injunction: “While the Supreme Court’s stay may have prevented the injunction from having any further effect, it did not toll the 90-day limit unambiguously detailed in the PLRA.”)

#### **4. POPULATION CAPS: *BROWN V. PLATA***

On page 811, before Part E, insert:

For discussion of the interaction of the PLRA’s “prisoner release order” provision and habeas relief, particularly in COVID-related litigation, see Supplement Chapter 14.A.

## CHAPTER 15. DAMAGES: CAUSES OF ACTION AND DEFENSES

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

Add at the end of note 3, page 846:

Even after *Ziglar* and *Hernandez*, the Supreme Court has continued to narrow the *Bivens* remedy, arguably reducing it to a dead letter except in cases exhibiting an extremely close factual resemblance to one of the three cases in which the Court itself allowed a *Bivens* suit. As noted above, *Bivens* itself recognized an implied damages remedy for an alleged Fourth Amendment violation by a federal agent. In 2022, the Supreme Court decided *Egbert v. Boule*, 596 U.S. 482 (2022). The Court acknowledged the factual similarities to *Bivens*: “*Bivens* and this case do involve similar allegations of excessive force and thus arguably present almost parallel circumstances or a similar mechanism of injury.” *Id.* at 495. Nonetheless, the Court refused to allow a damages remedy on the ground that *Egbert*, unlike *Bivens*, involved an alleged Fourth Amendment violation by a Border Patrol agent working close to the U.S. border with Canada. The Court reasoned that law enforcement along the border raised potential national security concerns not present in *Bivens*.

*Egbert* provides a new gloss on the two-step process for extending *Bivens*, asserting that both steps come down to a single inquiry: “A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited [than federal courts] to weigh the costs and benefits of allowing a damages action to proceed.” (emphasis in original) It is easy to come up with *any* rational reason for something—and there are very few contexts where one would have to be irrational to think that Congress could be better equipped than federal courts to weigh costs and benefits.

Recall that *Carlson* recognized a *Bivens* remedy in a case where a prisoner sued federal officials under the Eighth Amendment for deficient medical care. One could argue, applying *Egbert* to the prison context, that *Carlson* only extends to prisoner’s Eighth Amendment medical care claims, and not to other prison conditions claim arising under that same constitutional provision. In fact, even before *Egbert*, some courts began to slice up conditions claims brought by prisoners under the Eighth Amendment. “Not surprisingly, multiple district courts have held that Eighth Amendment claims outside the field of medical care present new *Bivens* contexts.” *Silva v. Ward*, 2019 WL 4721052 (W.D. Wis. 2019) (collecting cases refusing to extend *Carlson* to other Eighth Amendment claims regarding prison conditions, including claims based on “black box” restraints, adequate nutrition, and pigeon infestations). *Egbert* is likely to accelerate this trend.

### C. QUALIFIED IMMUNITY

#### NOTES AND QUESTIONS

Substitute for note 1, at page 854-55:

1. Qualified immunity decisions often turn on the level of generality used by the court as it considers if the right in question was “clearly established.” Many opinions credit the qualified immunity defense absent an incredible degree of convergence between the facts at issue and those in prior case law. For example, in *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021), the decedent, Monroe, strangled himself with a phone cord in view of the officer on duty, Laws. Laws did not

call for medical assistance and did not enter the cell. Instead, he called the jail administrator, who arrived ten minutes later. They unwrapped the cord but did not attempt resuscitation, instead calling paramedics, who started chest compressions after another seven minutes. The Fifth Circuit held that the case law was clear that “[i]n general, a prison official who knew of a serious threat to inmate safety” was required to “respond[] reasonably.” Thus plaintiff was correct that the defendant officer’s failure to immediately seek medical assistance violated the Constitution:

. . . [W]atching an inmate attempt suicide and failing to call for emergency medical assistance is not a reasonable response. This was especially true in the situation at hand, where jail policy did not permit Laws to personally enter the jail cell to assist Monroe until a second staff member arrived. Calling for emergency assistance was a precaution that Laws knew he should have taken, and failing to do so was both unreasonable and an effective disregard for the risk to Monroe’s life. . . . For these reasons, we now make clear that promptly failing to call for emergency assistance when a detainee faces a known, serious medical emergency—e.g., suffering from a suicide attempt—constitutes unconstitutional conduct.

But the defendant nonetheless won the case under qualified immunity, because the facts of prior cases supported liability for supported liability only when a defendant did *nothing* to protect life, and the defendant “did *something*: he called [the jail administrator] for assistance and she called 911, albeit not as promptly as should have been done.”

Similarly, consider *Wade v. United States*, 13 F.4th 1217 (11th Cir. 2021), in which the plaintiff cut his hand and, bleeding profusely, was placed in a cell and not provided medical care for several hours. Subsequently he was sent to a hospital for treatment of a broken bone and partially severed tendon. The district court denied qualified immunity, holding that the relevant law was clearly established by a prior appellate precedent about failure to treat a prisoner’s bleeding cut, *Aldridge v. Montgomery*, 753 F.2d 970 (11th Cir. 1985) (per curiam). The 2021 Eleventh Circuit disagreed. Like the Fifth Circuit in *Cope*, the court agreed with a general statement of law that seemed to cover the facts (here that “it was clearly established that [u]nder the Eighth Amendment, prisoners have a right to receive medical treatment for their illnesses and injuries”). But as in *Cope*, the Court required a far more granular similarity between the case before it and the prior precedent. It distinguished *Aldridge* on four bases:

First, the nature of the injuries is different. In *Aldridge*, the plaintiff suffered an injury to his head—one of the most sensitive areas of the human body—whereas here, Wade suffered an injury to his hand. Considering that both cuts were about the same size, the injury to a bodily extremity, such as Wade’s hand, is less serious than the injury in *Aldridge*.

Second, there is a substantial difference between what the defendants observed about the plaintiff’s wound in each case. In *Aldridge*, the defendants observed that the plaintiff continued to bleed for two-and-a-half hours while in their custody. Thus, their awareness of the seriousness of the injury increased over time and was readily apparent. Here, all that can be said is that Captain Lewis was aware that Wade’s hand was still bleeding during a brief 10-minute escort to the SHU, at which point he left Wade in the custody of other personnel. . . .

Third, the quantity of blood is different. Although Wade testified that he told Captain Lewis that he was “leaking” an indeterminate amount of blood “all over” and leaving a “path of blood” as they walked, Wade has never alleged that the blood soaked his clothing or pooled on the floor of the SHU cell, as was the case in *Aldridge*. . . .

Fourth, and finally, Captain Lewis left Wade under the supervision of other personnel who were equipped to treat Wade. Shortly after Captain Lewis and Wade reached the cell, other USP-Atlanta officers arrived, removed Wade’s handcuffs, and took custody of him. Wade’s holding cell was no more than three feet from the medical exam room where medical staff rendered medical care to SHU inmates. These circumstances stand in stark contrast to those in Aldridge, when the defendants were informed that the plaintiff required medical attention at a different location—a hospital—but ignored that need for two-and-a-half hours.

Taking all these important factual distinctions together, we have no difficulty concluding that it would not have been clear to an objectively reasonable officer in Captain Lewis’s situation that his conduct violated clearly established law.

The Supreme Court has fostered this approach in many recent summary reversals of qualified immunity denials, especially in cases involving use of force by police officers in the field. See, e.g., *White v. Pauly*, 580 U.S. 73 (2017) (per curiam); *Kisela v. Hughes*, 584 U.S. 100 (2018); *City of Escondido, Cal. v. Emmons*, 586 U.S. 38 (2019); *City of Tahlequah v. Bond*, 595 U.S. 9 (2021).

On the other hand, the Supreme Court recently insisted that some constitutional violations are sufficiently “obvious” to defeat qualified immunity even in the absence of a factually identical prior case. In *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam), the Court reversed a grant of qualified immunity. The Court described the facts as follows:

Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in “‘massive amounts’ of feces”: all over the floor, the ceiling, the window, the walls, and even “‘packed inside the water faucet.’” Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

In granting qualified immunity, the Fifth Circuit had “noted ‘ambiguity in the caselaw’ regarding whether ‘a time period so short [as six days] violated the Constitution.’” The Supreme Court distinguished the case the court of appeals pointed to—*Davis v. Scott*, 157 F.3d 1003, 1004 (5th Cir. 1998), describing its holding as “no Eighth Amendment violation where inmate was detained for three days in dirty cell and provided cleaning supplies.” These facts were, the Supreme Court said, “too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor’s right.” Qualified immunity was appropriate on the basis of general case law barring unsanitary conditions because “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time. See *Hope v. Pelzer*, 536 U.S. 730 (2002) (explaining that ‘a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.’).”

## CHAPTER 16. THE LITIGATION PROCESS

### A. EXHAUSTION OF REMEDIES

Change the count of Supreme Court cases from five to six, on page 892, and add to page 903, before the last paragraph on the page:

In a case that appealed to the conservative Justices’ commitment to free exercise of religion, the Supreme Court issued one more pro-plaintiff discussion of PLRA exhaustion in 2022, holding that while the statute enforces a state’s grievance rules, it does not require adoption of the state’s after-the-fact interpretation of those rules. In *Ramirez v. Collier*, 595 U.S. 411 (2022), the prisoner-plaintiff, facing imminent execution by lethal injection requested that his pastor be allowed to “lay hands” on him and “pray over” him during the execution. The Court rejected the state’s argument that the plaintiff had been insufficiently clear that he was requested audible rather than silent prayer, and also rejected its interpretation of its own exhaustion rules:

Nor are we persuaded by respondents’ argument that Ramirez should have filed his grievance sooner. In Texas, prisoners must raise a grievance within “15 days from the date of the alleged incident or occurrence.” Respondents contend that Ramirez should have filed his grievance within 15 days of when Texas issued its revised execution protocol (April 21, 2021), or within 15 days of when he learned that his pastor would be allowed inside the chamber (May 4, 2021). Both suggestions are untenable. Neither the revised execution protocol nor the State’s decision to admit Pastor Moore put Ramirez on notice that religious touch and audible prayer would be banned inside the execution chamber. To the contrary, Texas had long permitted such activities. Ramirez says—and respondents do not dispute—that he first learned of the prohibition on religious touch on June 8, 2021. Ramirez filed the grievance that sparked this litigation just three days later, on June 11. We thus have little trouble concluding that the grievance was timely, and that we may proceed to the merits.

Still, the case reporters are replete with opinions reading *Ross v. Blake* narrowly and disallowing lawsuits, including in cases of very serious harm. In *Varnier v. Shepard*, 11 F.4th 1252 (11th Cir. 2021), for example, the court dismissed a use of force case with injuries that included a “broken eye socket, jaw, and nose, and extensive bruising,” where the involved officers resigned and were criminally prosecuted. Even though use of force grievances were automatically terminated as grievances and forwarded to internal affairs, that didn’t constitute a “dead end” under *Ross*, the court of appeals held. And since the internal affairs investigation of plaintiff’s assault was initiated not by the plaintiff but by the plaintiff’s parents and the warden, he had not, himself, exhausted. Case dismissed.

The COVID pandemic provoked some vivid disagreements about *Ross*’s scope. In *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020), plaintiffs sought a speedy prison response to the COVID threat. They asked the court to excuse non-exhaustion on the theory that the slow process on offer was for that reason “unavailable” under *Ross v. Blake*. The district court granted first preliminary and then final injunctive relief, both stayed by the Court of Appeals for the Fifth Circuit, which wrote:

The district court impermissibly applied a “special circumstances” exception, like the one the Supreme Court rejected in *Ross*, under the guise of an availability analysis. Its main rationale was that [the Texas Department of Criminal Justice’s (“TDCJ”)] grievance process is incapable of responding to the rapid spread of COVID-19. In other words, the grievance process is not amenable to current circumstances. But under *Ross*, special circumstances—even threats posed by global pandemics—do not matter.



When the second of these stays came before the Court, in *Valentine v. Collier*, 141 S.Ct. 57 (2020), Justice Sotomayor dissented from the Court’s denial of the application to vacate the court of appeals’ stay:

COVID–19 was first detected in the Pack Unit in April 2020, after one inmate, Leonard Clerkly, contracted the virus and died. Since then, over 500 inmates have tested positive (more than 40% of the inmate population), and 19 more have died. The Pack Unit’s 20 deaths account for 12% of all confirmed and presumed deaths from COVID–19 in the entire Texas Department of Criminal Justice (TDCJ) prison system. \* \* \*

The prison’s grievance process is lengthy, beginning with mandatory informal dispute resolution and followed by up to 160 days of formal review. Remarkably, when this suit was filed, “COVID-related grievances were not treated differently from other types of grievances,” despite inmates’ attempts to designate them as emergencies. Both [plaintiffs] filed grievances that remained pending for over two months during the outbreak. By respondent Collier’s own admission, the prison’s policy “‘did not give adequate attention to the COVID–19 issue.’”

Given the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief. In just 116 days, nearly 500 inmates contracted COVID–19, leading to 74 hospitalizations and 19 deaths. At least one inmate, Alvin Norris, died before the prison took any steps in response to his grievance. Both [plaintiff] Valentine and another inmate, Gary Butaud, contracted COVID–19 while their grievances remained pending.

The Fifth Circuit erred as a matter of law when it disregarded these findings by the District Court. The Fifth Circuit seized on language in *Ross* rejecting a judicially created exception to exhaustion for “‘special circumstances,’” and concluded that “special circumstances—even threats posed by global pandemics—do not matter.” But the special-circumstances exception rejected in *Ross* applied when inmates failed to exhaust available remedies. In rejecting such an exception, this Court nonetheless recognized that the PLRA “contains its own, textual exception to mandatory exhaustion” that applies when remedies are not “available.” Contrary to the Fifth Circuit’s analysis, consideration of “the real-world workings of prison grievance systems” is central to assessing whether a process makes administrative remedies available. When this suit was filed, the Pack Unit’s process plainly did not. As the District Court put it, the PLRA “cannot be understood as prohibiting judicial relief while inmates are dying.”

## **MARGO SCHLANGER & BETSY GINSBERG, PANDEMIC RULES: COVID-19 AND THE PRISON LITIGATION REFORM ACT’S EXHAUSTION REQUIREMENT**

72 Case Western Res. L. Rev (2022)

[[T]ime and again, courts have thrown [COVID] cases out based on the PLRA—especially, on the PLRA’s instruction to dismiss civil rights cases unless “such administrative remedies as are available are exhausted” (that is, unless the incarcerated plaintiff worked the complaint all the way through the prison’s or jail’s grievance system).

The pandemic is far from the first situation in which the PLRA exhaustion requirement has thwarted constitutional oversight of prison and jail conditions. But it has exposed a particularly egregious problem: the mismatch between a mandate to use internal grievance systems and those grievance systems’ systemic inability to address emergency situations. Here, we propose three solutions. To be clear, implementation of these steps would constitute only a limited improvement; the result would merely be to increase the possibility of federal-court

adjudication of incarcerated plaintiffs’ claims on the merits, reducing the collateral litigation of exhaustion efforts. But even these partial fixes seem worthwhile.

The proposals are these: First, incarcerated plaintiffs should be allowed to proceed with their federal lawsuits if the press of an emergency renders a prison’s or jail’s grievance system “unavailable” because it is unable to process their complaint quickly enough to offer any relief. [T]his is already the right answer under existing case law—but so far, many district courts have declined to follow this path. The second proposal focuses on possible actions at the state and local levels, because it is corrections agencies, not the PLRA, that determine what procedures must be exhausted or whether the defense is raised in litigation. Any prison or jail unhappy with allowing incarcerated plaintiffs to proceed in federal court or amenable to allowing them to access court quickly in emergency circumstances could implement working emergency grievance systems. We provide some parameters to guide any such system. In addition, state legislatures could enact legislation forfeiting or waiving the exhaustion defense in cases seeking emergency relief. The third solution addresses the reluctance of district judges to excuse non-exhaustion when they should; we propose that the PLRA be amended to pretermitt the “availability” inquiry by eliminating the statutory exhaustion requirement in emergency situations. We offer suggested legislative text to accomplish this end.

## **CHAPTER 19. ACCOUNTABILITY: VOTING, STANDARDS, AND EXTERNAL OVERSIGHT**

### **A. POLITICAL POWER**

On page 984, add at the end of Part A:

#### **NICOLE D. PORTER, VOTING IN JAILS**

The Sentencing Project (May 7, 2022)

In local jails, the vast majority of persons are eligible to vote because they are not currently serving a sentence for a felony conviction. Generally, persons are incarcerated in jail pretrial, sentenced to misdemeanor offenses, or are sentenced and awaiting transfer to state prison. Of the 745,000 individuals incarcerated in jail as of 2017 nearly two-thirds (64.7%), or 482,000, were being held pretrial because they had not been able to post bail. Of the 263,000 who were serving a sentence, the vast majority had been convicted of a misdemeanor offense that does not result in disenfranchisement.

Despite the fact that most persons detained in jail are eligible to vote, very few actually do. Jail administrators often lack knowledge about voting laws, and bureaucratic obstacles to establishing a voting process within institutions contribute significantly to limited voter participation. Indeed, acquiring voter registration forms or an absentee ballot while incarcerated is challenging when someone cannot use the internet or easily contact the Board of Elections in their community. In addition, many persons in jail do not know they maintain the right to vote while incarcerated, and there are few programs to guarantee voting access.

Problems with voting in jail disproportionately impact communities of color since almost half (48%) of persons in jail nationally are African American or Latino. Other racial groups, including Native Americans and Asians, comprise about 2% of the jail population, or 13,000 persons as of 2017.

In recent years, some jurisdictions have adopted policies and practices to ensure voting access for persons incarcerated in local jails because of initiatives developed by jail leadership and advocacy organizations. This report examines six programs designed to expand voting access for eligible incarcerated citizens. The success and expansion of these efforts will improve democracy. A 1974 Supreme Court decision in *O'Brien v. Skinner* [414 U.S. 524 (1974)] affirmed the voting rights of certain incarcerated persons without government interference, though a federal appeals court recently upheld an Ohio law that established a more restrictive timeframe for persons confined in jail to request an absentee ballot than for individuals confined in a hospital. In practice, the limited efforts to reach voters in jail have encountered logistical complications. Consequently, implementing a voter registration and absentee ballot collection system is a challenge in spaces where many residents are detained for relatively short periods of time. For example, most individuals incarcerated in a jail in the early months of a calendar year will not still be there by the time of a fall election, as they will have either posted bail, been acquitted of their charges, served their jail term, or been transferred to prison following a felony conviction.

Nevertheless, jurisdictions have flexibility and ways to address these challenges when implementing a voting program. Practices vary by jurisdiction:

- California and Texas jails enable individuals to submit a voter-registration form and absentee or vote-by-mail request in the jail through coordinated voter registration initiatives.
- Massachusetts jails consider detainees to be “specially qualified” and they do not have to register before completing an absentee ballot.
- Residents in Chicago jails benefit from a policy that supports voter participation among homeless residents, who can vote if they include the address of a recognized shelter.
- Cook County (Chicago), Los Angeles County, and the District of Columbia facilitate in-person voting in their jails.

To improve access to voting, some states require county election officials to develop procedures and plans to deliver ballots to voters in jails. For example, in 2019 the Colorado Secretary of State implemented a rule mandating the state’s 64 sheriffs to coordinate with county clerks to facilitate voting in jails) Arizona officials enacted a similar rule in 2019. \* \* \*

Residents detained in jail may legally vote in every state, and a number of advocacy organizations have been engaged in efforts to enact processes to make this possible. Frequently, they partner with local jail and election officials to facilitate voter registration and absentee voting. In Massachusetts, the group Ballots Over Bars (BOB) coordinated over 30 volunteers to facilitate jail voting in five counties in 2018. BOB volunteers assisted voters in submitting absentee ballot applications for the primary and general election. In Ohio, an advocacy coalition that includes All Voting is Local and Northeast Ohio Voter Advocates registered jailed voters in three counties and assisted them in completing absentee ballots)

Returning residents are leading jail voting efforts throughout the country. The Ordinary People Society (TOPS) has led the “Let My People Vote” campaign since 2003 and worked to facilitate voting among incarcerated residents in Alabama, Georgia, Florida, Mississippi, and Tennessee. TOPS organizers train volunteers to register eligible incarcerated voters, helps them complete absentee ballots, and aids in submitting ballots to local election officials.<sup>35</sup>) In Maryland, Out for Justice and Life after Release have supported ballot access for jailed voters while Voices of the Experienced in Louisiana has long championed similar initiatives.

## CHAPTER 20. STATE COURT AND EXECUTIVE RESPONSES TO COVID-19 BEHIND BARS

As Chapter 2.A’s supplemental material describes, the COVID-19 pandemic inflicted an enormous amount of suffering behind bars, and led to thousands of deaths. COVID-related litigation brought by incarcerated plaintiffs involved many of the issues addressed in this casebook and therefore added via this Supplement: the appropriate standard of liability for conditions of confinement challenges brought by convicted prisoners and pretrial detainees (see Chapter 2.A); the line between habeas and non-habeas lawsuits (see Chapter 14.A); the operation of the Prison Litigation Reform Act’s administrative exhaustion requirement (see Chapter 16.A) and rules limiting the availability of “prisoner release orders” (see Chapter 14.D.4); and more.

With federal courts proving widely unhospitable, advocates, activists, people inside prisons and jails, and their family members also turned to the state courts and the executive branch in an effort to protect people in custody from the threat. Advocates developed alternative legal strategies in part to bypass the procedural legal hurdles imposed by the Prison Litigation Reform Act and to put political pressure on state governors to act with urgency to address the harm COVID-19 posed to incarcerated and detained people.

Governors in multiple states, including [New Jersey](#), [Colorado](#), [Michigan](#), [Pennsylvania](#), [New Mexico](#), [Illinois](#), and [Maryland](#), issued executive orders that encouraged and/or allowed Department of Corrections to release sentenced people from custody and/or waive procedural barriers to various early release mechanisms. Relevant excerpts of the Illinois executive order are below:

### ILLINOIS EXECUTIVE ORDER 2020-21 EXECUTIVE ORDER IN RESPONSE TO COVID-19 (COVID-19 EXECUTIVE ORDER NO. 19)

April 6, 2020

WHEREAS, in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials; and,

WHEREAS, for the preservation of public health and safety throughout Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take additional significant measures consistent with public health guidance to slow and stop the spread of COVID-19; and,

WHEREAS, social distancing, which consists of maintaining at least a six-foot distance between people, is the paramount strategy for minimizing the spread of COVID-19 in our communities; and,

WHEREAS, certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people who have serious chronic health conditions such as heart disease, diabetes, lung disease or other conditions; and,

WHEREAS, the Illinois Department of Corrections (IDOC) currently has a population of more than 36,000 male and female inmates in 28 facilities, the vast majority of whom, because of

their close proximity and contact with each other in housing units and dining halls, are especially vulnerable to contracting and spreading COVID-19; and,

WHEREAS, the IDOC currently has limited housing capacity to isolate and quarantine inmates who present as symptomatic of, or test positive for, COVID-19; and,

WHEREAS, to ensure that the Director of the IDOC may take all necessary steps, consistent with public health guidance, to prevent the spread of COVID-19 in the IDOC facilities and provide necessary healthcare to those impacted by COVID-19, it is critical to provide the Director with discretion to use medical furloughs to allow medically vulnerable inmates to temporarily leave IDOC facilities, when necessary and appropriate and taking into account the health and safety of the inmate, as well as the health and safety of other inmates and staff in IDOC facilities and the community;

THEREFORE, \* \* \* I hereby order the following, effective immediately and for the remainder of the duration of the Gubernatorial Disaster Proclamations:

Section 1. \* \* \* furlough periods shall be allowed for up to the duration of the Gubernatorial Disaster Proclamations as determined by the Director of IDOC; \* \* \* and furloughs for medical, psychiatric or psychological purposes shall be allowed at the Director's discretion and consistent with the guidance of the IDOC Acting Medical Director.

In a number of states, advocates petitioned directly to state supreme courts seeking the release of people who were particularly vulnerable to COVID-19. Some courts denied these petitions. See, e.g., *Money v. Jeffreys*, Case No. 125912 (Ill. 2020) (minute order); *Colvin v. Inslee*, 467 P.3d 953 (Wash. 2020). Others, however, granted significant relief. Hawaii's Supreme Court appointed a special master who coordinated the release of hundreds of people. See *Office of the Public Defender v. Connors*, SCPW-20-0000200, and *Office of the Public Defender v. Ige*, SCPW-20-0000213 (report available at <https://s3.documentcloud.org/documents/6834410/Special-Master-Report.pdf>). A ruling from the Supreme Court in Massachusetts resulted in many pretrial releases:

**COMMITTEE FOR PUBLIC COUNSEL SERVICES V.  
CHIEF JUSTICE OF THE TRIAL COURT**  
142 N.E.3d 525 (Mass. 2020)

JUSTICE FRANK M. GAZIANO, joined by CHIEF JUSTICE RALPH GANTS and JUSTICES DAVID A. LOWY, KIMBERLY S. BUDD, ELSPETH B. CYPHER, & SCOTT L. KAFKER.

The petitioners, the Committee for Public Counsel Services (CPCS) and the Massachusetts Association of Criminal Defense Lawyers (MACDL), bring our focus to the situation with respect to COVID-19 confronting individuals who are detained in jails and houses of correction pending trial, and individuals who have been convicted and are serving a sentence of incarceration in the Commonwealth. To allow the physical separation of individuals recommended by the CDC, the petitioners seek the release to the community of as many individuals as possible as expeditiously as possible, indeed, on the day of argument in this case, according to one of them. They offer a number of different legal theories under which a broad-scale release might be accomplished. We conclude that the risks inherent in the COVID-19 pandemic constitute a changed circumstance within the meaning of Mass. Gen. Laws ch. 276, § 58, tenth par., and the provisions of Mass. Gen. Laws ch. 276, § 557.

As the petitioners have argued, and the respondents agree, if the virus becomes widespread within correctional facilities in the Commonwealth, there could be questions of violations of the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the

Massachusetts Declaration of Rights; nonetheless, at this time, the petitioners themselves clarified in their reply brief and at oral argument that they are not raising such claims.

1. Background. COVID-19 in jails and prisons. All parties agree that, for several reasons, correctional institutions face unique difficulties in keeping their populations safe during this pandemic. First, confined, enclosed environments increase transmissibility. Maintaining adequate physical distance, i.e., maintaining six feet of distance between oneself and others, may be nearly impossible in prisons and jails. Second, proper sanitation is also a challenge; the petitioners have submitted affidavits from Department of Public Health (DPH) officials stating that, during recent routine inspections of Massachusetts correctional institutions (prior to the declaration of emergency), DPH inspectors discovered a concerning number of repeat environmental health violations.

Finally, while many people who contract COVID-19 are able to recover without the need for hospitalization, those who become seriously ill from the virus may require hospitalization, intensive treatment, and ventilator support. Severe cases are most likely to occur among the elderly and those with underlying medical conditions. Those in prisons and jails have an increased prevalence, relative to the general population, of underlying conditions that can make the virus more deadly. The DOC and the petitioners agree that hundreds of those incarcerated in the Commonwealth suffer from chronic diseases, and nearly 1,000 incarcerated individuals are over sixty years of age.

Experts warn that an outbreak in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic. First, the DOC has limited capacity to offer the sort of specialized medical interventions necessary in a severe case of COVID-19. Thus, as seriously ill individuals are transferred from correctional institutions to outside hospitals, any outbreak in a correctional institution will further burden the broader health care system that is already at risk of being overwhelmed. Second, correctional, medical, and other staff enter and leave correctional institutions every day. Should there be a high concentration of cases, those workers risk bringing infections home to their families and broader communities. \* \* \*

2. Relief sought. All parties agree that a significant COVID-19 outbreak in Massachusetts correctional institutions would pose considerable risks to those who are incarcerated, correctional staff, and the broader community. They disagree significantly about current conditions in correctional institutions, whether widespread release for some populations would be more harmful than beneficial, and the proper means by which to reduce the number of people held in custody, before jail and after conviction. \* \* \*

3. Discussion. We agree [with the petitioners] that the situation is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary. We also agree with the Attorney General and the district attorneys that the process of reduction requires individualized determinations, on an expedited basis, and, in order to achieve the fastest possible reduction, should focus first on those who are detained pretrial who have not been charged with committing violent crimes.

Having carefully examined the petitioners' arguments, we conclude that a modification of Rule 29 in the manner requested by the petitioners, such that judges could revise and revoke indefinitely valid sentences that have been imposed posttrial would result in a violation of [Mass. Declaration of Rights] art. 30<sup>b</sup> by allowing judges essentially to perform the functions of the parole board. Absent a violation of constitutional rights, which the petitioners agree has not been

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<sup>b</sup> [Article 30 provides, in pertinent part "the judicial [department] shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."]

established on this record, we also do not have authority under Mass. Gen. Laws ch. 211, § 3, to exercise supervision over parole, furlough, or clemency decisions by the DOC, the parole board, the sheriffs, and other members of the executive branch.

a. The court's superintendence authority. General Laws c. 211, § 3, provides that the Supreme Judicial Court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." The court's general superintendence authority extends to "the administration of all courts of inferior jurisdiction," and permits the issuance of "writs, summonses and other process and such orders, directions and rules as may be necessary or desirable for the furtherance of justice." In the past, we have exercised our extraordinary superintendence authority to remedy matters of public interest "that may cause further uncertainty within the courts".

A petitioner seeking relief under Mass. Gen. Laws ch. 211, § 3, "must present a substantial claim involving important substantive rights, and demonstrate that any error cannot adequately be remedied in the course of trial or normal appellate review." Here, the petitioners claim that continued confinement in a jail or prison implicates concerns of fundamental fairness, and rights secured by the due process clauses of the Federal and State Constitutions (pretrial detainees) and the Eighth Amendment (inmates serving a sentence and pretrial detainees).

b. Pretrial detainees. We conclude, given the severity of the COVID-19 pandemic, that the petitioners, as representatives of incarcerated individuals, have established standing to bring their claim, and an entitlement to relief. \* \* \*

To effectuate such relief, pretrial detainees who are not charged with [a violent] offense\* \* \*, and who are not being held without bail subsequent to a determination of dangerousness \* \* \*, as well as individuals who are being held pending a final probation violation hearing, are entitled to expedited hearings on their motions for reconsideration of bail. These categories of pretrial detainees shall be ordered released on personal recognizance unless the Commonwealth establishes, by a preponderance of the evidence, that release would result in an unreasonable danger to the community or that the individual presents a very high risk of flight.

In making a determination whether release would not be appropriate, the judge should consider the totality of the circumstances, including (1) the risk of the individual's exposure to COVID-19 in custody; (2) whether the defendant, \* \* \* would pose a safety risk to the victim and the victim's family members, witnesses, the community, or him- or herself if released; (3) whether the defendant is particularly vulnerable to COVID-19 due to a preexisting medical condition or advanced age; (4) for a defendant who is accused of violating a condition of probation, whether the alleged violation is a new criminal offense or a technical violation; and (5) the defendant's release plan. \* \* \*

c. New arrests. We are persuaded that the limitations that courts in other jurisdictions have placed on new detentions and incarcerations are compelling, and we adopt similar measures to reduce as far as possible the influx of new individuals into correctional institutions. Following any arrest during the COVID-19 state of emergency, and until further order of this court, a judicial officer should consider the risk that an arrestee either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before the court. Given the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a high-risk condition as defined by the CDC, the age and health of an arrestee should be factored into such a bail determination. This is an additional, temporary consideration beyond those imposed by the relevant bail statutes. \* \* \*

d. Incarcerated individuals serving sentences. The petitioners also seek release of multiple groups of individuals who are currently serving sentences of incarceration. They suggest, inter alia, that,

in order to do so, we eliminate the requirement in Rule 29 that motions to revise or revoke a sentence be filed within sixty days of the imposition of the sentence or the issuance of the rescript. See Mass. R. Crim. P. 29 (a) (2). \* \* \*

Our broad power of superintendence over the courts does not grant us the authority to authorize courts to revise or revoke defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release. Rule 29 is designed to protect the separation of powers as set forth in art. 30. "The execution of sentences according to standing laws is an attribute of the executive department of government." To attempt to "revise," i.e., cut short, sentences in the current situation would be to perform the function of the parole board, thereby "effectively usurp[ing] the decision-making authority constitutionally allocated to the executive branch." \* \* \*

While we cannot order that relief be granted to sentenced inmates who have been serving a legal sentence, and who have not timely moved to revise or revoke that sentence, mechanisms to allow various forms of relief for sentenced inmates exist within the executive branch. The parole board, for example, has authority to release individuals who have become eligible for parole because they have reached their "minimum term of sentence." An inmate in a house of correction can receive early parole consideration and be released up to sixty days prior to the minimum term based on "any ... reason that the Parole Board determines is sufficiently compelling." Once an inmate reaches eligibility, the parole board must hold a hearing to decide whether to grant the inmate a parole permit. The parole board "shall only grant a parole permit if they are of the opinion that there is a reasonable probability that ... the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." If denied parole, inmates generally are entitled to a rehearing after either one or five years, but the board may hold an earlier rehearing at its discretion.

The parole board nonetheless reported at oral argument that it has made no efforts to accelerate the scheduling of parole hearings. The board reports that currently approximately 300 individuals have been deemed appropriate for release and have been awarded parole through the ordinary process, but have yet to be granted parole permits that would result in their actual release from custody because the board has not reduced what the board says is a standard delay in preparing for release. During normal times, the two-week delay the board states is standard might be reasonable. But these are not normal times. We urge the board to expedite release of these previously-approved individuals, as well as to expedite hearings on other inmates who are eligible for parole.

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Government response to COVID demonstrated the *possibility* of significant American decarceration. In fact, 2019 to 2020 saw a 15% prison decline and a 25% jail decline—38% at the trough. But 2021 partially reversed this trend. Prison population levels were essentially static. See Jacob Kang-Brown, *People in Prison in Winter 2021-22*, tbl. 2 (Vera Institute of Justice, Feb. 2022), [https://www.vera.org/downloads/publications/People in Prison in Winter 2021-22.pdf](https://www.vera.org/downloads/publications/People%20in%20Prison%20in%20Winter%202021-22.pdf). And jail population levels rebounded to close to pre-COVID levels. Wendy Sawyer, *New Data: The Changes in Prisons, Jails, Probation, and Parole in the First Year of the Pandemic* (Prison Policy Institute, Jan. 11, 2022), [https://www.prisonpolicy.org/blog/2022/01/11/bjs\\_update/](https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/); Emily Widra, *State Prisons and Local Jails Appear Indifferent to COVID Outbreaks, Refuse to Depopulate Dangerous Facilities* (Prison Policy Institute, Feb. 10, 2022), [https://www.prisonpolicy.org/blog/2022/02/10/february2022\\_population/](https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/). Some systems stakeholders describe the 2021 increase in jail populations as inevitable, noting that the de-population was a temporary, emergency fix, and attributing the increase in jail population to perceptions of increasing crime rates and political backlash from police unions after the 2020 racial justice uprisings. In the words of one public defender, "this system knows a particular approach a particular way of doing business." Wihua



Li, et al., Jail Populations Creep Back up After COVID-19 (The Marshall Project, June 6, 2010), <https://www.themarshallproject.org/2021/06/07/jail-populations-creep-back-up-after-covid-19>.