VIRAL INJUSTICE

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INTRODUCTION

The coronavirus-19 pandemic ("COVID-19") has wrecked, at least for a time, virtually every feature of American life. Everyone bears some pandemic burden, but the public health costs are distributed in ways that reflect and amplify existing inequalities. During the pandemic, the communities that lost institutional contests for health-protective resources were already structurally disadvantaged.[1] There is, however, one American community whose experience of neglect and harm is almost singular: people in government custody.[2]

COVID-19 poses a unique threat to people in jails, prisons, and other detention sites.[3] The virus is transmitted more easily in confined spaces,[4] and perhaps no space contains a fixed

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[1] *See generally* Seth A. Berkowitz et al., *Covid-19 and Health Equity—Time to Think Big*, N ENGL J MED 2020, 383:e76 (Sep. 17 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2021209 (linking adverse COVID-19 outcomes to structural discrimination and disadvantage); Centers for Disease Control, *COVID-19 Racial and Ethnic Health Disparities*, at https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html (last updated Dec. 10, 2020) (providing overview of health equity considerations).

[2] Norms about terminology appropriate for this space are shifting. Virtually all concise terms for people in detention are essentializing, and many are stigmatizing (e.g., "inmate"). We do our best to refer simply to "people" in custody, but we will sometimes use the word "detainee" when there is a tight nexus between a proposition and the person's state of detention, and where the less essentializing term compromises meaning and/or clarity. Less frequently we will use the word "prisoners," and do so primarily in contexts where that word operates in conjunction with others to convey an established meaning—such as "prisoner litigation" or "prisoner release order."

[3] There is some already some early, shorter-form work from the legal academy on COVID-19 litigation against detention sites. *See*, *e.g.*, Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 NW. U.L. REV. ONLINE 59 (2020) (scrutinizing the effects of COVID-19 on pretrial detention); Sharon Dolovich, *Mass Incarceration, Meet Covid-19*, 11/16/2020 U. CHI. L. REV. ONLINE 4 (2020) (identifying COVID-19 detainee mitigation efforts and analyzing broad failures); Brandon L. Garrett, *Constitutional Criminal Procedure Post-COVID*, Harvard Law Review Blog (May 19, 2020), https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid/ (providing overview of COVID-19 litigation against correctional institutions); Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 (2020) (exploring the inability of institutions to adequately facilitate release). None of this work, however, analyzes the COVID-19 detention decisions comprehensively, across multiple custody categories.

[4] *See* CDC, Coronavirus Disease 2019 Basics (Apr. 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-

population less capable of dispersing than a detention facility.[5] American detention sites, moreover, have long lacked adequate ventilation, sanitation, and healthcare.[6] Persons serving criminal sentences are older, are more likely to have preexisting conditions, and have complex medical needs.[7] COVID-19 began to tear through detention communities as soon as it reached the United States—jails and prisons quickly became viral epicenters.[8] Notwithstanding the obvious risk, and while local jail populations declined, state and federal prison populations remained largely stable.[9] As of this writing, COVID-19 has infected over 370,000 persons in correctional custody, and, including staff, about 2,450 have died.[10]

Every outbreak at a detention center is a public health crisis; together, they represent a national catastrophe that forced courts to consider the health-protective rights of detainees during emergencies. The results are not encouraging. Despite right-remedy combinations capable of reducing viral transmission and mortality,[11] judicial intervention was quite scarce, too slow, and extremely deferential.[12] The decisional law captures what one might call a viral injustice, by which we mean an institutional equilibrium that avoids other social costs by saddling vulnerable detainees with pandemic risk. What stands out is not just the minimalist posture of the judiciary, but also its second-classing of rights and remedies that might have softened the pandemic's impact—preventing its spread within detention facilities, among staff, and to surrounding communities.

The marginalization of detainee rights started at the top and trickled down. Compare the Supreme Court's treatment of such rights with those to religious practice and expression. In

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Disease-2019-Basics.

[5] *See* Kovarsky, *supra* note 2, at 74; Dolovich, *supra* note 2, at 8.

[6] See Clark Neily, Decarceration in the Face of a Pandemic, THE CATO INSTITUTE (Apr. 30, 2020), https://www.cato.org/blog/decarceration-face-pandemic.

[7] *See* Kovarsky, *supra* note 2, at 72.

[8] *See* Dolovich, *supra* note 2, at 4; Neily, supra note 6.

[9] *See* National Academies of Sciences, Engineering, and Medicine 2020, DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19 26-28 (2020) (*hereinafter* 2020 NRC Report); Responses to the COVID-19 Pandemic, Prison Pol'y Initiative, https://www.prisonpolicy.org/virus/virusresponse.
html (updated continuously).

[10] *See* The COVID Prison Project, at https://covidprisonproject.com (last visited January 29, 2021).

[11] For an explanation of available doctrine, *see* Section I.B, *infra*.

[12] *See* Part II, *infra*.

Roman Catholic Diocese of Brooklyn v. Cuomo,[13] the Court disabled a New York provision that limited occupancy for a category of gatherings that included religious services.[14] In so many words, the Justices emphasized that even the pandemic emergency must not override the thick bundle of American rights to religious association: "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten."[15] Suffice it to say that the Court resolved the rights-versus-safety question very differently in the detention context. There were some early cases in which lower courts issued injunctions designed to curb spread at certain detention sites.[16] The Court, however, twice intervened to countermand the intervention of lower federal judges.[17] The message was clear—orders requiring large-scale release or intrusive changes to detention conditions would be subject to exceedingly strict scrutiny.

This Article is, to our knowledge, the first to map the *judicial* response to the pandemic. In Part I, we set forth the health-and-safety challenges that the pandemic posed for detention facilities, as well as the preexisting legal framework for the responsive detainee litigation. In the process, we sketch the public health crisis unfolding at American detention sites—itself a story of incompetence, indifference, and lax regulation.[18] There are, in our view, three meaningful classifications necessary to map the responsive decisional law:

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[13] 141 S. Ct. 63 (2020).

[14] More precisely, the Supreme Court stayed enforcement of the provision pending disposition on appeal. *See id.* at 65.

[15] *Id.* at 68.

[16] *See*, *e.g.* Ahlman v. Barnes, 445 F.Supp.3d 671, 694-95 (C.D. Cal. 2020), *preliminary injunction eventually overturned by* Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (granting preliminary injunction against Orange County jail in California); Valentine v. Collier, 2020 WL 5797881, at *37*38 (S.D. Tex. Sept. 29, 2020), *relief stayed pending appeal by* Valentine v. Collier, 978 F.3d 154, 158 (5th Cir. 2020) (granting permanent injunction against Texas geriatric unit for people convicted of crimes); Mays v. Dart, 456 F. Supp. 3d 966, 1017 (N.D. Ill.), *aff'd in part, vacated in part, rev'd in part*, 974 F.3d 810 (7th Cir. 2020) (granting preliminary injunction to improve conditions in Chicago's Cook County jail).

[17] *See* Barnes v. Ahlman, 140 S. Ct. 2620 (2020); Williams v. Wilson, et al., 207 L. Ed. 2d 168 (June 4, 2020).

[18] *See* Section I.A, *infra*.

(1) the type of custody;[19] (2) the substance of the health-protective right;[20] and (3) the scope of the requested remedy.[21]

In Part II, we map the COVID-19 litigation, relying on the classification scheme developed in Part I. For cases in which litigants prayed for discharge, courts avoided collective remedies and ducked constitutional questions where non-constitutional grounds for discharge were available.[22] They strayed from these basic principles primarily in cases where custody was auxiliary to some immigration proceeding.[23] For cases in which litigants sought changed conditions, the guidance from the Centers for Disease Control and Prevention ("CDC") became the standard of care, but was severed from the corresponding principle that facilities reduce overcrowding in order to permit adequate social distancing.[24]

In Part III, we draw three conclusions from the COVID-19 detainee litigation. First, in order to avoid what they perceived to be extravagant relief, courts altered remedial and substantive doctrine.[25] Second, efficacious judicial action was unusually dependent on underwhelming bureaucratic initiative and cooperation.[26] Third, the under-enforcement of health-protective rights seemed to reflect dated ideas about the danger and moral worth of people in government custody.[27] Collectively, these three conclusions suggest a broader inference about the institutional competence of judges: they lack the statutory tools and the bureaucratic partners to deal effectively with pandemic risk. These are troubling conclusions about the quality and institutional potential of judging, and they have significant implications for detainee vaccination and post-pandemic release programs.

Our objective is to describe what happened when judges had to adjudicate detainees' rights to health and safety in the crucible of emergency—and to draw conclusions at a useful level of generality. We did not code the decisional law, and so conducted no statistical analysis.[28] The body of decisions is

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[19] *See* Section I.B.1 *infra*..
[20] *See* Section I.B.2*infra*..
[21] *See* Section I.B.3, *infra*..
[22] *See* Sections II.A.1 & II.A.2, *infra*.
[23] *See* Section II.A.3, *infra*.
[24] *See* Section II.B, *infra*.
[25] *See* Section III.A, *infra*.
[26] *See* Section III.B, *infra*.
[27] *See* Section III.C, *infra*.
[28] For many reasons, the decision set would have been unsuited for such analysis. As one example, early opinions in the set would have influenced later ones. As another, there would be problems weighting decisions that applied to very different numbers of people. We

nonetheless large enough, and sufficiently populated with opinions from influential courts, that there are already meaningful things to say about the behavior of judges during the pandemic.

I. COVID-19 AS A NEW LEGAL CHALLENGE

Part I provides background and sets forth a basic framework for thinking about the judicial response to COVID-19 in American detention facilities. Judicial decision-making hinged on three questions: (1) the type of custody exercised over the people seeking relief;[29] (2) the nature of the underlying health-protective right;[30] and (3) the remedy sought.[31] We do not claim that every case can be plotted using these three attributes, but simply that these are crucial concepts for understanding why different litigation proceeded in certain ways, why judicial relief was so difficult to obtain, why judges disagreed, and why doctrine changed.

A. COVID-19 in Detention Facilities

The pandemic's disproportionate effect on detention communities is partially a story about the unique vulnerability of those populations, and partially a story about the flat-footed response of officials with health-related obligations thereto. When we refer to "sites of detention," we are describing facilities that house the following detainee categories: people in prisons and jails who have been convicted of crimes (criminal detention); people in non-criminal custody, who have been jailed and are awaiting criminal process (pretrial detention); people in non-criminal custody of Immigration and Customs Enforcement ("ICE") auxiliary to an immigration proceeding (immigration detention); and other people in non-criminal custody auxiliary to some other civil process, such as a those designated for a juvenile or a mandatory substance abuse program. A "correctional facility" is a detention site related to criminal process—that is, it is a prison or jail that houses those awaiting criminal trial or convicted of crimes.[32]

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therefore avoid false precision. Instead, this project is designed to, among other things, help identify the pockets of institutional activity that warrant more quantitative analysis.

[29] *See* Section I.B.1, *infra*.

[30] *See* Section I.B.2, *infra*.

[31] *See* Section I.B.3, *infra*.

[32] *See* Bureau of Justice Statistics, Corrections, at https://www.bjs.gov/index.cfm?ty=tp&tid=1#terms_def (last visited Jan. 10, 2020).

1. Vulnerable detention communities

Mass incarceration has created a "perfect breeding ground for the virus."[33] As of 2020, there were approximately 2.3 million people detained under color of law, including people in 1,943 state and federal prisons, 3,134 local jails, 1,772 juvenile correctional facilities, 218 immigration detention facilities, 80 Indian Country jails, and various other military prisons, civil commitment facilities, government psychiatric centers, and territorial prisons.[34] People detained in jails and immigration detention centers tend to have short stays—creating substantial turnover and a different set of health threats—while people in prison tend to serve longer sentences for more serious crimes.[35] In what follows, we detail the health vulnerabilities of these different detainee categories.

Those in prison—mostly the non-jail population convicted of crimes—would be unusually vulnerable in any physical environment. As of 2020, there were approximately 1,466,000 people in state and federal prison.[36] Many are older because they are serving longer sentences.[37] This graying detainee

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[33] Editorial, *America is Letting the Coronavirus Rage Through Prisons*, N.Y. Times (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html; *see also* Dolovich, *supra* note 2, at 4 ("From the earliest days of the pandemic, it was clear that [COVID-19] posed an outsized danger to the more than two million people locked inside America's prisons and jails.").

[34] *See* Wendy Sawyer and Peter Wagner, PRISON POLICY INITIATIVE, *Mass Incarceration: The Whole Pie 2020*, at https://www.prisonpolicy.org/reports/pie2020.html (Mar. 24, 2020).

[35] Prisons generally contain people convicted and serving longer sentences for more serious crimes. *See* Danielle Kaeble, *Time Served in State Prison, 2016*, BUREAU OF JUSTICE STATISTICS (Nov. 2018). Jails generally contain those awaiting trial or serving short criminal sentences. *See* Zhen Zeng, *Jail Inmates in 2018*, BUREAU OF JUSTICE STATISTICS (Mar. 31, 2020). People in the custody of Immigration and Customs Enforcement ("ICE") were there for an average of 55 days, although there is substantial variability based on circumstances. *See* American Immigration Council, *Immigration Detention in the United States by Agency* (Jan. 2, 2020), https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency.

[36] *See* E. Ann Carson, *Prisoners in 2018* BUREAU OF JUSTICE STATISTICS (Apr. 30, 2020).

[37] *See* Meredith Booker, *BJS Data Shows Graying of Prisons*, PRISON POL'Y INITIATIVE (May 19, 2016), https://www.prisonpolicy.org/blog/2016/05/19/bjsaging/ (discussing "boom" in elderly prison population); Emily Widra, *Since You Asked: How Many People Aged 55 or Older Are in Prison, by State?*, PRISON POL'Y INITIATIVE (May 11, 2020), https://www.prisonpolicy.org/-blog/2020/05/11/55plus/

cohort has chronic health problems, elevated mental health needs, and substantially impaired mobility.[38] Many entered prison in poor health to begin with, due in no small part to dangerous substance abuse profiles.[39]

Prison infrastructure and its environmental features make health- and safety-protective practices challenging. These facilities are generally overcrowded, which means that social distancing is difficult or impossible.[40] Dormitories are often double- or triple- bunked, there are not enough bathrooms and showers, congregate areas are crowded, and prisoners are double-celled.[41] The sanitation is bad, adequate cleaning supplies are lacking, problems with ventilation make airborne pathogens especially dangerous, and many prisons are ill-equipped to provide adequate health care.[42] These facilities have long been vulnerable to disease—including HCV, hepatitis B and C, HIV/AIDS and tuberculosis.[43] Most prisons are in rural areas, far from a hospital, thereby frustrating access to outside healthcare.[44] Physical restrictions on detainee

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(providing state-by-state data).

[38] *See* Kimberly A. Skarupski et al., *The Health of America's Aging Prison Population*, 40 EPIDEMIOLOGIC REVIEWS 157, 157 (2018); LAURA M. MARUSCHAK, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12 23 (2015).

[39] *See* MARUSCHAK, *supra* note 38, at 10.

[40] *See supra* note 5; *see also* E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2018* (Apr. 2020), https://www.bjs.gov/content/pub/pdf/p18.pdf ("At year-end 2018, the prison custody population in 12 states and the BOP was equal to or greater than their prisons' maximum rated, operational, and design capacity, and 25 states and the BOP had a total number of prisoners in custody that met or exceeded their minimum number of beds across the three capacity measures: design, operational, and rated capacity.").

[41] *See* 2020 NRC Report, *supra* note 9, at 26-28.

[42] *See id.* at 26-27.

[43] *See id.* at 14; *see also* Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates among African American Women and Men*, 52 THE JOURNAL OF LAW AND ECONOMICS 251–293 (2009) (describing spread of AIDS in carceral settings); Kathyrn M Nowotny et al., *Incarceration Rates and Incidence of Sexually Transmitted Infections in US Counties, 2011-2016*, 110 AMERICAN JOURNAL OF PUBLIC HEALTH S130-S136 (2020) (same, regarding sexually transmitted infections generally); Anne C. Spaulding & David L. Thomas, *Screening for HCV Infection in Jails*, 307 JAMA 1259–1260 (2012) (same, regarding HCV infection in jails).

[44] *See generally* Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197 (2002) (describing rural location of majority of prisons built since 1980).

movement help only so much, at least in the absence of restrictions on the movement of staff and visitors.[45]

Jails ordinarily house people awaiting trial, as well as people convicted of less-serious crimes.[46] As of 2020, there were about 631,000 people that states held in local jails, and another 60,000 in custody of U.S. Marshals.[47] There is far more detainee turnover in jails than there is in prisons, as the average time served is less than one month.[48] The reason for greater jail churn is intuitive—pretrial detention entails shorter stays because the people held there are not serving criminal sentences, and most return immediately to the community.[49] (About 10.7 million people were admitted to local jails in 2018.[50]) Like prisons, many jails are overcrowded.[51] And, as with detainees in prisons, people in jail are disproportionately afflicted with chronic health conditions, have elevated mental health care needs, and require substance abuse treatment.[52]

Jails and prisons are mostly sites of correctional detention, but these facilities also hold many people neither awaiting trial nor serving a criminal sentence. As of 2020, there were some 56,000 noncitizens in ICE custody, 46,000 of which were held in immigration detention centers.[53] There were about 44,000 minors in juvenile detention facilities,[54] and perhaps over one million people detained pursuant to civil commitment orders.[55]

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[45] *See* 2020 NRC Report, *supra* note 9, at 25.

[46] *See* Bureau of Justice Statistics, *FAQ Detail: What is the difference between jails and prisons*, https://www.bjs.gov/index.cfm?ty=qa&iid=322 (last visited Jan. 3, 2020).

[47] *See* Sawyer and Wagner, *supra* note 34. Categorizing federal custody is more difficult because of increasing use of local jails to house immigration detainees. *See* Jacob Kang-Brown et al., *People in Jail in 2019*, VERA INSTITUTE (Dec. 2019), https://www.vera.org/downloads/publications/people-in-jail-in-2019.pdf.

[48] *See* Zhen Zeng, *Jail Inmates in 2018*, BUREAU OF JUSTICE STATISTICS (Mar. 31, 2020).

[49] *See id.*

[50] *See id.*

[51] *See* 2020 NRC Report, *supra* note 9, at 26.

[52] *See id.* at 28-29. *See also*, *generally*, Carroll, *supra* note 2, at 73-77 (detailing health and safety risks specific to jail settings).

[53] *See* Sawyer and Wagner, *supra* note 34. ICE detention is also typified by high churn rates, with an average stay of about 34 days and over 500,000 new admissions in fiscal year 2019. *See* ICE Detainee Statistics, U.S. Immigration and Customs Enforcement (Dec. 18, 2020), https://www.ice.gov/coronavirus#wcm-survey-target-id.

[54] *See* Sawyer and Wagner, *supra* note 34.

[55] For an effort to estimate numbers detained pursuant to civil commitment orders, *see* Gi Lee, *How Many People Are Subjected to*

The ICE facilities experienced rapid spread of COVID-19, having "long been vulnerable to infectious disease outbreaks."[56] Juvenile facilities across the country experienced similar COVID outbreaks.[57]

That COVID-19 tore through American detention sites surprised few who were paying attention, given the decrepit state of physical facilities, ongoing failure to maintain adequate health and safety, and unique vulnerability of the detainee population. COVID-19 migrates quickly across dense populations that cannot distance or sufficiently suppress droplet dispersion, and where both symptomatic and asymptomatic persons can spread the virus.[58] COVID-19 can cause serious illness or death, and it presents increased risk for individuals with certain preexisting conditions—such as asthma—common to those in detention.[59]

Prevention and treatment at detention sites is limited. At this time, there is no cure for COVID-19. The standard protocol for minimizing spread includes maintaining physical distance, mask wearing, hand washing, restricting congregate settings, diagnostic testing, rigorous quarantining, and contact tracing.[60] Vaccines are in various stages of development and distribution, but there is no clear social consensus in favor of providing necessary dosage to people in detention who are at-risk.[61] People in government custody have filed lawsuits seeking access to the available vaccines, and those remain pending at this time.[62]

Involuntary Psychiatric Detention in the U.S.?, Society for Social Work and Research 23rd Annual Conference (2019).

[56] 2020 NRC Report, *supra* note 9, at 14. For a detailed examination of ICE detention, *see* Emily Ryo, *Introduction to the Special Issue on Immigration Detention*, 54 LAW & SOC'Y REV. 750, 751–52 (2020).

[57] *See* Josh Rovner, *COVID-19 in Juvenile Facilities*, THE SENTENCING PROJECT (Dec. 4, 2020), https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/.

[58] *See* Clinical Questions about COVID-19: Questions and Answers (Transmission), CDC (May 12, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission.

[59] *See* 2020 NRC Report, *supra* note 9, at 22.

[60] *See id.*

[61] A December 2020 review of vaccination policies found that the plans of 38 states addressed detainees, and that seven have designated detainees as top-priority. *See* David Montgomery, *Prioritizing Prisoners for Vaccine Stirs Controversy*, Pew, Jan. 5, 2021, at https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/05/prioritizing-prisoners-for-vaccines-stirs-controversy. Some of these programs have started. *See id.*

[62] *See, e.g.* Conrad Wilson, *In Lawsuit, Oregon Inmates Ask for*

2. The official response

By late March 2020, leadership across American institutions had a pretty good idea that COVID-19 was going to severely test national commitments to various health, religious, and economic priorities. There was also enough data about how the virus spread in densely populated environments to appreciate the grave risk for detention sites.[63] Public health experts cautioned that, in custodial settings, effective medical isolation and quarantine required reduced crowding and other aggressive population management.[64] They emphasized that "the most urgent first-line strategy to limit spread and improve containment is population reduction."[65]

The more populous the setting, the more difficult distancing becomes—and overcrowding in detention facilities was a particularly stark challenge. On March 13, 2020, the World Health Organization ("WHO") issued a joint statement with other international organizations containing guidance on preventing the spread of COVID-19 in custodial settings, and emphasized that overcrowding is an "insurmountable obstacle" to COVID-19 response.[66] The WHO put out a formal report two days later, recommending decarceration and the standard COVID-19 protocols recited above.[67] In October 2020, the National Academy of Sciences ("NAS") committee tasked with studying the public health response to COVID-19 in custodial settings issued a report with similar recommendations.[68] It also underscored that conditions modifications had to be coupled

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Immediate Access to COVID-19 Vaccine, Oregon Pub. Broad., Jan. 22, 2021.

[63] *See* 2020 NRC Report, supra note 9, at 12.

[64] *See* David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID*-19, J. GEN. INTERN. MED. 35, 2738–2742 (2020).

[65] *See* Elizabeth Barnert et al., *Prisons: Amplifiers of the COVID-19 Pandemic Hiding in Plain Sight*, 110 AM. J. PUB. H. 964, 964 (2020).

[66] World Health Organization, UNODC, WHO, UNAIDS, and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings (2020), https://www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings.

[67] *See* World Health Organization, Preparedness, prevention, and control of COVID-19 in prisons and other places of detention (2020), https://apps.who.int/iris/bitstream/handle/10665/336525/WHO-EURO-2020-1405-41155-55954-eng.pdf; *see also* Matthew J. Akiyama, Anne C. Spaulding & Josiah D. Rich, *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, 382 N. ENG. J. MED. 2075–2077 (2020) (providing other expert guidance on correctional practices).

[68] *See* 2020 NRC Report, *supra* note 9.

with discharge strategies: "[D]ecarceration is an appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities[.]"[69]

Those in best position to take protective action failed to take it fast enough. Start with the institution at the center: the CDC. On March 23, 2020, it issued "Interim Guidance" for detention facilities, which has been updated several times since.[70] The Interim Guidance was slim. It included no detailed rules designed to mitigate known risks in custodial settings—in marked contrast to its general rules for the public,[71] and to other expert recommendations. To be sure, the Interim Guidance included *some* recommendations.[72] It recommended face coverings, and that everyone wash hands with soap and water regularly.[73] But it provided weaker suggestions on the most pressing topics, awkwardly inviting detention sites to "consider" certain health-protective action. It invited facilities to consider restrictions on alcohol-based hand sanitizer, suspending work release and programs that assign individuals outside a facility, and certain limits on transfers between facilities.[74] Most problematically, the subsequently modified Interim Guidance continues to state that facilities need merely "consider options to prevent overcrowding."[75] It recommends social distancing as a vital precaution,[76] but endorses no mechanism for accomplishing that goal in overcrowded facilities. The failure to pair a distancing recommendation with a guideline for responsible decarceration was an obvious problem, and was flatly inconsistent with the public health consensus expressed in the WHO and NAS recommendations.[77]

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[69] *Id.* at 2.

[70] *See* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last updated Dec. 31, 2020) (hereinafter "Interim Guidance").

[71] *See* Prevent Getting Sick, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html (last updated Dec. 9, 2020).

[72] *See* Interim Considerations for SARS-CoV-2 Testing in Correctional and Detention Facilities, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html (last updated Dec. 3, 2020).

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See* Prevent Getting Sick, *supra* note 71.

[77] *See*, *e.g.*, 2020 NRC Report, *supra* note 9, at 80 ("[R]elieving population pressures in jails, prisons, and detention centers greatly facilitates adherence to CDC guidelines, controlling COVID-19 outbreaks, and reducing health risks, particularly for medically

Many state and local correctional facilities, presumably observing that the CDC Interim Guidance was both general and precatory, ignored the broader public health consensus. Many jails and prisons failed to comply even with the CDC's minimalist suggestions—they maintained restrictions on hand sanitizer, refused to implement substantial screening programs, failed to impose or enforce mask-wearing requirements on correctional staff, either under-enforced distancing guidelines or ignored them altogether, insufficiently limited visitation and transfer, and held facility admission and exit constant.[78] Testing programs "proved to be a challenge" for many state correctional institutions.[79]

The response in federal correctional facilities was a slightly different story, with a similar ending. The Attorney General emphasized that "public safety" had to guide the correctional response to COVID-19, but insisted on a definition of public safety that did not always cut in favor of detainee health: "At the same time that the defendant's risk from COVID-19 should be a significant factor in your analysis, you should also consider any risk that releasing the defendant would pose to the public."[80] The initial response of federal prisons included some restrictions on visitation and transfer, as well as some screening and quarantining of symptomatic detainees, but no testing program.[81] The Bureau of Prisons ("BOP") denied most compassionate release petitions—although, as of October, 2020, about 1,500 had been granted.[82]

Success stories were few and far between, although there was a nontrivial reduction in the size of the jail community. Between January and June of 2020, the average prison population fell by five percent and jail population by twenty.[83] The decline in the jail population was actually steeper at first, but increased somewhat after the initial drop.[84] The differences

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vulnerable people").

[78] *See* Keri Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain the Coronavirus?*, THE MARSHALL PROJECT (Mar. 6, 2020); Editorial Board, *Coronavirus Cases In Prisons Are Exploding*, WASH. POST (Aug. 21, 2020).

[79] *See* 2020 NRC Report, *supra* note 9, at 85.

[80] William P. Barr, Memorandum to All Component Department Heads and All United States Attorneys, "Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic," U.S. Dep't Justice (Apr. 6, 2020), https://www.justice.gov/file/1266901/download.

[81] *See* COVID-19 Action Plan: Phase Five, Federal Bureau of Prisons, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last updated Mar. 31, 2020).

[82] *See* 2020 NRC Report, *supra* note 9, at 58.

[83] *See id.* at 59-61.

[84] *See id.*

between jails and prisons reflect the different correctional functions of the two facility categories—with prisons housing those convicted and serving longer sentences, and jails housing those awaiting trial or serving shorter time.[85] Jails can dramatically reduce population by admitting fewer prisoners;[86] prisons, by contrast, would have to achieve substantial population reduction through discharge. Much of the jail trend was accounted for by reduced crime, reduced arrests, and reduced carceral sentencing; in contrast, there were very few prison discharges.[87]

The combined result of extreme detainee vulnerability, waffling leadership, and subordinate noncompliance has been—as one might expect—a catastrophe. As the pandemic spread, the decarceration that bureaucracies needed to pair with distancing mandates never materialized. The inability to distance and test swamped the anticipated benefits of other health and safety recommendations, when facilities even followed them. The COVID Prison Project tracks public data concerning testing and cases in correctional facilities, and, at the time of this writing, over 370,000 prisoners have contracted COVID-19, and 2,296 of them have died.[88] There have been over 89,000 cases among staff, with 142 deaths.[89]

B. Rights, Custody, and Remedies

Lawyers scrambled to initiate state and federal litigation in venues across the country.[90] They undertook that litigation in the shadow of doctrine that had been configured for very different health-and-safety challenges. Before COVID-19, legal disputes about health risk were more individualized affairs—that is, they did not occur against the backdrop of systemic risk posed by a pandemic, and they were less likely to involve actions for collectivized relief. We focus here on the state of doctrine that preexisted the pandemic. We identify the three

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[85] *See* Carson, *supra* note 36.

[86] *See* Emily Widra and Peter Wagner, *While jails drastically cut populations, state prisons have released almost no one*, PRISON POL'Y INITIATIVE (May 14, 2020), https://www.prisonpolicy.org/blog/2020/05/14/jails-vs-prison-update/.

[87] *See* 2020 NRC Report, *supra* note 9, at 61.

[88] *See* The COVID Prison Project, *supra* note 10.

[89] *See id.*

[90] Several projects track COVID-19 prisoner litigation. *See*, *e.g.*, Civil Rights Clearing House Special Collection: COVID-19, University of Michigan Law School, https://clearinghouse.net/results.php?searchSpecialCollection=62 (last visited Jan. 3, 2020); UCLA Covid-19 Behind Bars Data Project, UCLA Law School, https://law.ucla.edu/-centers/criminal-justice/criminal-justice-program/related-programs/covid-19-behind-barsdata-project/ (last visited Jan. 3, 2020).

variables that best organize that law, and that will best position readers to understand the doctrinal changes that COVID-19 caused: (1) the type of custody subject to challenge; (2) the nature of the underlying right to health-protective detention conditions; and (3) the potential remedy.

1. The custody challenged

The first thing to think about when organizing the COVID-19 detainee litigation is the type of custody being challenged. There is federal custody and state custody, and then there is criminal and non-criminal custody. The challenges available to people in detention will depend substantially on the custody category. In other words, certain substantive claims and certain remedies are available only to those in certain forms of custody.

A person subject to criminal custody is a person who has been convicted and sentenced to confinement. These people form the largest detainee category in correctional institutions.[91] Those in criminal custody are in either a jail, if the sentence is shorter, or a prison, if the sentence is longer. They must generally litigate constitutional challenges through Eighth Amendment claims that we describe momentarily.[92] Each sovereign, moreover, usually has a set of non-constitutional rights under which the people it detains may seek discharge and relief for prison conditions.[93]

Non-criminal custody is a little more complicated, in part because there is more internal variation within the category. There is pre-trial custody, where the primary constitutional constraint on detention conditions operates through the due process clauses of the Fifth and Fourteenth Amendments.[94] People in pretrial custody can also access select non-constitutional mechanisms to lodge claims involving medical care—and, like those available to those convicted of crimes, there is state-by-state and federal variation.[95]

2. The underlying right

For the purposes of mapping the decisional law, the second step centers on the nature of the underlying right asserted. These rights spring from constitutions, statutes, and other federal and state authority. Every government facility is obviously subject to the federal constitution, and there are

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[91] *See* Sawyer and Wagner, *supra* note 34.
[92] *See infra* notes 96 to 110 and accompanying text.
[93] *See* 2020 NRC Report, *supra* note 9, at 56.
[94] *See* supra notes 111 to 123 and accompanying text.
[95] *See* 2020 NRC Report, *supra* note 9, at 55-56.

different statutes and provisions that impose obligations and provide remedies for different custodial transgressions.

a. Eighth Amendment rights

In *Estelle v. Gamble* (1976),[96] the Supreme Court set forth the modern constitutional framework for adjudicating convicted-prisoner challenges to detention conditions. *Gamble* held that the Eighth Amendment obligates state authorities to provide such people with "adequate medical care,"[97] and "deliberate indifference to serious medical needs of prisoners" represents "unnecessary and wanton infliction of pain" that the Eighth Amendment proscribes.[98] *Gamble* ended up forming the basis for a two-pronged Eighth Amendment test. First, a plaintiff must demonstrate a sufficiently serious deprivation of rights.[99] Second, they must demonstrate that jail officials acted with sufficiently culpable *mens rea*—amounting to recklessness or deliberate indifference with regard to the deprivation.[100]

However important *Gamble* was in establishing a formal right to healthcare delivery in custodial settings, subsequent decisions have diminished its impact by upping the threshold for deliberate indifference.[101] In *Wilson v. Seiter,*[102] the Supreme Court reaffirmed that a *Gamble* plaintiff had to show a serious risk *and* deliberate indifference, and described the deliberate indifference requirement as a culpable state of mind.[103] *Farmer v. Brennan*[104] thereafter established that deliberate indifference required more than awareness of the facts from which the inference of risk might be drawn; prison officials "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must actually draw the inference."[105]

Although the Supreme Court has articulated a high *mens rea* threshold, it has made clear that people in prison can

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[96] 429 U.S. 97 (1976).
[97] *Id.* at 105.
[98] *Id.* at 104 (internal quotation marks and citations omitted).
[99] *See* Wilson v. Seiter, 501 U.S. 294, 298 (1991).
[100] The deliberate indifference prong was drawn straight from the language of *Gamble*. *See* 429 U.S. at 105.
[101] Things did not start out that way. *Rhodes v. Chapman*, decided in 1981, held the Eighth Amendment governed conditions-of-confinement litigation pertaining to things other than medical care, and seemed to jettison the subjective component of the Estelle inquiry. *See* 452 U.S. 337, 344-50 (1981).
[102] 501 U.S. 294 (1991).
[103] It reasoned *Rhodes* omitted reference to the subjective prong only because unnecessary to decide that case *See id.* at 299-304.
[104] 511 U.S. 825 (1994).
[105] *See id.* at 837.

obtain relief *before* they suffer harm—a rule that is obviously central to our discussion.[106] In *Helling v. McKinney*,[107] a convicted detainee alleged an Eighth Amendment violation because he had been placed next to someone who smoked five packs of cigarettes a day.[108] The Court rejected the idea that the Eighth Amendment rule contemplates only realized harm: "We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."[109] The next observation was less memorable but no less important: "Nor … may [prison officials] be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms."[110]

b. Due Process rights

The Eighth Amendment constrains only "punishment," and is therefore inapplicable to non-criminal custody. For non-criminal detainees, the due process clauses of the Fifth and Fourteenth Amendments provide the operative constraints. *Bell v. Wolfish*[111] reaffirmed that the government cannot subject people in non-criminal detention to conditions that amount to punishment,[112] and it set forth the due process rule used to distinguish punishment conditions from those that are reasonably incident to legitimate, non-punishing detention objectives.[113]

For challenges to non-criminal custody, the due process analysis actually separates into two categories. The first tracks *Bell* faithfully, and requires a court to decide whether some detention condition amounts to punishment—which simply cannot be imposed on people in non-criminal custody.[114] Per *Bell*, a detention condition is punishment when it is not

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[106] In addition to precedent discussed below, the Supreme Court has addressed the problem of communicable disease in other cases. *See*, *e.g.*, Brown v. Plata, 563 U.S. 493, 531-32 (2011) (ordering relief for prison overcrowding in partial view of effect overcrowding had on transmission of communicable disease); Hutto v. Finney, 437 U.S. 678, 682 (1978) (capping punitive isolation in partial view of transmission of communicable diseases).

[107] 509 U.S. 25 (1993).

[108] *See id.* at 28.

[109] *Id.* at 33.

[110] *Id.*

[111] 441 U.S. 520 (1979).

[112] *See id.*

[113] *See id.* at 538.

[114] *Cf.*, *e.g.*, Youngberg v. Romeo, 457 U.S. 307, 315, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

"reasonably related to a legitimate governmental objective."[115] Every court of appeals but one had used the reasonable-relationship standard to adjudicate the constitutionality of a non-criminal detention condition under the due process clause.[116] *Kingsley v. Hendrickson*, moreover, expressly disavowed a subjective intent requirement for this type of claim.[117]

The second type of due process analysis collapses *Bell* into *Gamble*, even though the former is a blanket rule against conditions amounting to punishment and the latter is a rule subdividing punishment into permissible and impermissible categories. Courts taking this second due process approach analyze *non-criminal custody* using *Gamble*'s Eighth Amendment framework—an objectively serious deprivation of rights and deliberate indifference thereto.[118] These decisions do not provide satisfying explanations for replacing a rule against all punishment (*Bell*) with an inquiry meant to recognize punishment that the law permits (*Gamble*).[119] This second type

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[115] *See Bell*, 441 U.S. at 539; *see also* Block v. Rutherford, 468 U.S. 576, 584 (1984) (holding that the reasonable-relationship standard is "to be applied in evaluating the constitutionality of conditions of pretrial detention").

[116] *See*, *e.g.*, Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 55 (2d Cir. 2017) (adopting standard); E. D. v. Sharkey, 928 F.3d 299, 307 (3d Cir. 2019) (same); Williamson v. Stirling, 912 F.3d 154, 182 (4th Cir. 2018) (same); Garza v. City of Donna, 922 F.3d 626, 632 (5th Cir. 2019) (same); Malone v. Colyer, 710 F.2d 258, 261 (6th Cir. 1983), *abrogated on other grounds by* Neitzke v. Williams, 490 U.S. 319 (1989) (same); Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 856 (7th Cir. 2017) (same); Baribeau v. City of Minneapolis, 596 F.3d 465, 483 (8th Cir. 2010) (same); Shorter v. Baca, 895 F.3d 1176, 1184 (9th Cir. 2018) (same); Blackmon v. Sutton, 734 F.3d 1237, 1241 (10th Cir. 2013) (same); Jacoby v. Baldwin Cty., 835 F.3d 1338, 1345 (11th Cir. 2016) (same); Jones v. Horne, 634 F.3d 588, 598 (D.C. Cir. 2011) (same).

[117] *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).

[118] *See*, *e.g.*, Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018) (extending two-prong standard to pretrial detention context); Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla., 871 F.3d 1272, 1279 (11th Cir. 2017) (same); Alderson v. Concordia Parish Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017) (same).

[119] To the extent that courts attempt any explanation, they read *Kingsley*'s holding—that treatment of a non-criminal detainee can be a punishment without intent—as a rejection of the deliberate indifference prong of the *Gamble* test, and then held that such a rejection applied narrowly only to excessive force claims. *See*, *e.g.*, *Whitney*, 887 F.3d at 860 n.4 ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); *Nam Dang*, 871 F.3d at 1279 n.2 (holding essentially same); *Alderson*, 848 F.3d at 419 n.4 (holding essentially same).

of due process analysis even appeared in jurisdictions that had already adopted the traditional test for branch-one due process claims (under *Bell*).[120]

There is a simple reason to keep deliberate indifference out of the non-criminal detention analysis. People in non-criminal detention have not been convicted of anything, even if they are in pretrial custody and their prosecution awaits. Constitutional protections regarding conditions of pretrial confinement must be at least as strong as those regarding prison because, as one court memorably put it: "purgatory cannot be worse than hell."[121] Despite doctrinal and practical reasons to leave deliberate indifference out of the non-criminal inquiry, confusion about constraints on non-criminal detention persists.[122]

c. Rights from statutes and state constitutions

There are also rights that arise under authority other than the federal constitution, and that apply to both criminal and non-criminal detention. For example, the Americans with Disabilities Act ("ADA") provides federal protection for individuals with disabilities in public and private accommodations, including jails and prisons.[123] Many cases challenging correctional conditions have included ADA claims,[124] which require plaintiffs to prove that they have a

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[120] *Compare*, *e.g.*, sources cited in note 118 to 119, *supra*, with sources cited in note 118, *supra* (capturing confusion in the Fifth, Eighth, and Eleventh circuits). The confusion persists even in jurisdictions that were not looking to limit *Kingsley*. Some that refused to read *Kingsley* narrowly have equated *Bell*'s reasonable-relationship test for whether something amounts to punishment with the objective prong of the *Gamble* test. *See*, *e.g.*, Miranda v. Cty. of Lake, 900 F.3d 335, 352 (7th Cir. 2018) ("We thus conclude … that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*."); Darnell v. Pineiro, 849 F.3d 17, 34-35 (2d Cir. 2017) ("Following the Supreme Court's analysis in *Kingsley*, there is no basis [to apply] the subjective intent requirement for deliberate indifference claims under the Eighth Amendment [to] apply to deliberate indifference claims under the Fourteenth Amendment."). Of course, *Kingsley* was not about the two-pronged *Gamble* framework at all. It affirmed that treatment of a non-criminal detainee could be punishment forbidden by due process, even if the jailer did not intend to punish. *See Kingsley*, 576 U.S. at 398.

[121] Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004). *But see* Brown v. Harris, 240 F.3d 383, 388 (4th Cir. 2001) (equating pretrial detainee and convicted prisoner standards).

[122] *See* Part II, *infra*.

[123] *See* 42 U.S.C. § 12101(a)(2) & (a)(5).

[124] *See* Part II, *infra*.

qualifying disability and that they were harmed by intentional discrimination, a disparate impact, or a failure to make a reasonable accommodation.[125]

At federal and state levels, moreover, there can be standards for prison health care incorporated into statutory and administrative frameworks.[126] For example, there are statutory standards for discretionary pre-trial release,[127] as well as for discharge associated with overcrowding,[128] serious illness,[129] and disease outbreaks.[130] There are also some break-glass-in-case-of provisions for unanticipated emergencies, including (sometimes) powers to order evacuation or closing of facilities.[131] State constitutions can be the source of significant constraints on detention.[132] There are too many such rights to name, but each vindicates some underlying interest in a health-protective detention practice.

3. Form of relief requested

The last major axis helpful for plotting the COVID-19 prisoner litigation centers on the form of relief requested. There are a few different remedies in play. People in detention may seek damages or (functionally) injunctive relief, with the latter category subdividing further into transfers, changed conditions, and discharge. A person in criminal custody asserting an Eighth Amendment violation might, for instance,

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[125] 42 U.S.C. § 12132, § 12112(b)(5)(A).

[126] *See* Kovarsky, supra note 2, at 83.

[127] *See*, *e.g.*, Minn. R. Crim. P. 6.01 (specifying authority for pre-trial release). For a discussion of legal authority to release people from pretrial detention, or order early release for short sentences, *see* 2020 NRC Report, *supra* note 9, at 55-56.

[128] *See*, *e.g.*, Ga. Code Ann. § 42-9-60 (2020) (specifying parole mechanisms in event of overcrowding).

[129] *See*, *e.g.*, 18 USC § 3582(c)(1)(A); United States Sentencing Guidelines Manual § 1B1.13; N.C. Gen. Stat. § 15A-1369 (2020) (providing for typical compassionate release mechanism); Wis. Stat. § 302.113(9g) (permitting compassionate release for "an extraordinary health condition"). For an overview of state compassionate release policies, and why they are rarely used, *see* 2020 NRC Report, *supra* note 9, at 57-58.

[130] *See*, *e.g.*, Mass. Gen. Laws ch. 126, § 26 (2020) (providing for transfer in case of a sufficiently dangerous disease). For a brief overview of parole or medical furlough provisions, *see* 2020 NRC Report, *supra* note 9, at 56.

[131] *See*, *e.g.*, Cal. Gov't Code § 8658 (2020) (giving wardens authority to remove endangered detainees); Maryland Code § 14-3A-03(d)(1) (stating once Governor proclaims public health emergency, Governor "may order the evacuation, closing, or decontamination of any facility.").

[132] *See*, *e.g.*, *infra* notes 209 to 212 and accompanying text.

seek compensation for some past medical damage, some health-protective practice, a release order, or a transfer to a different facility.

Start with compensatory remedies. For constitutional torts, people in state custody can use 42 U.S.C. § 1983 or seek state tort remedies, and those in federal custody can use a so-called *Bivens* action.[133] For damages claims against state and federal officials, plaintiffs will almost always have to overcome qualified immunity or something like it.[134] During the pandemic, however, most decisional law to date involves forward-looking emergency relief, rather than backward-looking compensation for harm.[135]

In federal court, most plaintiffs seeking changed prison conditions will be subject to the Prison Litigation Reform Act ("PLRA"), which imposes certain restrictions on that type relief.[136] The PLRA restricts relief, for example, when state prisoners use 42 U.S.C. § 1983 to seek prospective remedies for constitutional violations, including orders for improved conditions or discharge. The PLRA imposes strict administrative exhaustion requirements.[137] Those exhaustion requirements are strictest when a plaintiff seeks a "prisoner release order."[138] Claimants seeking such a release, which certainly includes discharge and arguably transfer, must show some sort of noncompliance with a prior remedial order.[139] They can secure relief only from a specially convened three-judge panel that must determine that crowding is the cause of

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[133] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[134] *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

[135] Over time, more victims' families may file suits seeking compensation. *See*, *e.g.*, Kelly Davis, *Inmate Sues San Diego County over Death, Alleges it was COVID,* L.A. TIMES (Nov. 23, 2020) (describing prisoner suit).

[136] Pub. L. No. 104-134, tit. 8, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (1996). *See* Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153 (2015) (summarizing litigation trends under the Act).

[137] Before they may file, the exhaustion requirements of the PRLA generally requires a prisoner to press a complaint through a facility's grievance process, appeal to all available authorities for review, and either receive a responsive ruling or wait for the time for such a ruling to expire. *See* 42 U.S.C. §. 1997e(a). However, some cases are governed under existing settlement agreements, which if they have applicable terms, may result in remedies. *See*, *e.g.*, Duvall v. Hogan, No. ELH-94-2541, 2020 WL 3402301, *7 (D. Md. June 19, 2020) (finding settlement terms not applicable).

[138] 18 U.S.C. 3626(a)(3).

[139] *See id.*

the harm and that there are no lesser ameliorative steps that the detaining facility can take.[140]

The leading PLRA case involving prisoner release orders is *Brown v. Plata* (2011),[141] which was a response to overcrowding in California correctional facilities.[142] That overcrowding, among other things, created serious medical risks associated with communicable disease transmission.[143] *Plata* underscored that a person in custody "may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[144] The Supreme Court ordered California to sufficiently decarcerate so as to lessen health risks.[145] The remedy, however, was glacial; it took over ten years for the case to move all the way through the federal judiciary.[146]

The PLRA contains what might look like an escape hatch. It does not restrict relief in "habeas corpus proceedings challenging the fact or duration of confinement in prison."[147] But habeas litigation, which is the traditional vehicle for seeking discharge, presents people in custody with a different set of challenges. Those who have been convicted, and who are litigating under habeas provisions seeking release under 28 U.S.C. § 2254 and 2255, must run a gauntlet of procedural obstacles—including rules requiring them to satisfy exhaustion,[148] successive litigation,[149] and timeliness[150] requirements. Litigating for habeas discharge under § 2241 does not entail quite the same procedural obstacles, but is limited to people in non-criminal custody. Moving from a § 2254 category to a § 2241 category is almost impossible,

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[140] *See id.* at (a)(3)(E)(ii).
[141] 563 U.S. 493 (2011).
[142] *See id.* at 499-500.
[143] *See id.* at 509.
[144] *Id.* at 510-11.
[145] *See id.* at 502.
[146] *See id.* at 507.
[147] 18 U.S.C. § 3626(g)(2).
[148] *See*, *e.g.*, 28 U.S.C. § 2254(b)(1) (imposing exhaustion rule on prisoners serving state criminal sentences).
[149] *See*, *e.g.*, 28 U.S.C. § 2244(b) (imposing severe restrictions on litigation following initial federal proceeding); 28 U.S.C. § 2255(h) (incorporating § 2244(b) rules against those serving federal sentences).
[150] *See*, *e.g.*, 28 U.S.C. § 2244(d) (imposing one-year limitations period for bringing federal habeas litigation on convicted state prisoners); 28 U.S.C. § 2255(f) (imposing same on convicted federal prisoners).

because § 2254 is by express terms applicable to any "person in custody pursuant to the judgment of a state court."

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Part I provides the background necessary to understand and organize information about COVID-19 litigation. Litigation against detention facilities is generally complex and the pertinent law is restrictive—particularly with respect to larger-scale relief. The controlling statutes and decisions usually require courts to defer to custodial discretion and expertise, the latter of which is supposed to come from repeated encounters with similar safety challenges. Having been configured to address slower moving and less systemic health risks, however, these existing bodies of related law were ill-suited to pandemic threat.

II. COVID-19 PRISONER LITIGATION

In Part II, we organize information about the judicial response to COVID-19 litigation against detention facilities. While prior health-protective suits have litigated responses to infectious disease outbreaks,[151] the scope and systemic quality of the COVID-19 risk was something else entirely. Given the novel interactions between injury, right, and remedy, the early decisional law exhibited considerable variation. We focus on injunctive remedies, because there is not yet enough case law about compensatory relief to draw firmer conclusions. In fact, many of the cases cited and discussed below are not even final judgments; they are interlocutory responses to urgent, early-stage requests for preliminary relief.[152]

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[151] Some earlier precedent came out of jail responses to the swine flu, but those decisions largely denied relief because the infection was less threatening. *See*, *e.g.* Glaspie v. New York City Dep't of Corr., 2010 WL 4967844, at *1 (S.D.N.Y. Nov. 30, 2010) ("[M]ere exposure to swine flu does not involve an unreasonable risk of serious damage to … future health[.]"). *But see* Fraher v. Heyne, 2011 WL 5240441, at *2 (E.D. Cal. Oct. 31, 2011) (finding that plaintiff with preexisting heart condition who was denied swine flu test stated a claim).

[152] *See*, *e.g.*, Torres v. Milusnic, No. CV204450CBMPVCX, 2020 WL 4197285 (C.D. Cal. July 14, 2020) (granting preliminary injunction); Martinez-Brooks v. Easter, No. 3:20-CV-00569 (MPS), 2020 WL 2813072 (D. Conn. May 29, 2020) (same); Seth v. McDonough, No. 8:20-CV-01028-PX, 2020 WL 2571168 (D. Md. May 21, 2020) (granting temporary restraining order). Other early pandemic cases granted motions for class certification or denied motions to dismiss. *See*, *e.g.*, Busby v. Bonner, No. 20-CV-2359-SHL, 2020 WL 3108713 (W.D. Tenn. June 10, 2020) (denying motion to dismiss and granting class certification in part).

Before detailing how particular right-remedy combinations fared before judges, a few global observations about the tenor of the judicial opinions are in order. First, *at an abstract level*, judges generally seemed to appreciate the unprecedented challenges that COVID-19 presented for Americans generally,[153] and for detention sites more specifically—for detainees,[154] correctional staff,[155] and surrounding communities.[156] One opinion captures a common tone: "The Court struggles to put into words the magnitude of COVID-19's devastation. … It is universally recognized that COVID-19 poses a particularly tough challenge for the incarcerated citizenry."[157] In some cases, judges were even more granular in their expressed concern, discussing risks specific to certain detention categories. For example, some decisions zeroed in on the threat of COVID-19 in ICE detention,[158] and the risks for

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[153] *See*, *e.g.*, Valentine v. Collier, 956 F.3d 797, 804 (5th Cir. 2020) ("COVID-19 poses risks of harm to all Americans."); Desmond K. B., Petitioner, v. Decker, et al., Respondents., No. CV 20-6884 (KM), 2020 WL 4530003, at *1 (D.N.J. Aug. 6, 2020) (describing "serious public health threat" but declining cases in New Jersey at the time); Janet Malam, Petitioner-Plaintiff, & Qaid Alhalmi, et al., Plaintiff-Intervenors, v. Rebecca Adducci, et al., Respondent-Defendants., No. 20-10829, 2020 WL 4391314, at *1 (E.D. Mich. July 31, 2020) ("More than four months after the first confirmed case of COVID-19 in Michigan, the coronavirus pandemic continues to teach us about the importance and power of collective action.").

[154] *See e.g.*, Rice v. USA, No. 1:19-CV-1026-P, 2020 WL 2892214, at *1 (W.D. La. June 2, 2020) ("The Court recognizes the risk to all prisoners posed by COVID-19."); Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *1 (S.D. Fla. Apr. 22, 2020) ("The Undersigned has a great amount of concern for all the detainees at the three immigration detention centers and the fear they are undoubtedly facing every single day in the midst of this horrific and scary pandemic."); United States v. Stephens, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (collecting authority in support of proposition that "inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop").

[155] *See*, *e.g.*, *Gayle*, 2020 WL 1949737, at *5 ("The Undersigned also has concern for the staff operating and working at the facilities. They, too, are undoubtedly scared—for themselves and also for their families, who they see at home when their work shifts are over.")

[156] *See*, *e.g.*, Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 341 (S.D. Tex. 2020) (explaining that "the public has an interest in preventing an outbreak" in a facility where it would "inevitably spread through the surrounding community," including hospitals and other health care providers).

[157] Seth v. McDonough, 461 F. Supp. 3d 242, 247 (D. Md. 2020).

[158] *See*, *e.g.*, S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec., No. CV 18-760 (CKK), 2020 WL 3265533, at *4 (D.D.C. June 17, 2020) (citing ICE detention test positivity figures).

large urban jails with high daily throughput.[159] The content that follows, however, demonstrates that the appreciation of such risk did not always pair with strong remedial instincts.

Second, much of the early decisional law developed in preliminary procedural postures, such as in interlocutory dispositions on motions for temporary restraining orders ("TROs") or preliminary injunctions.[160] (Many of the preliminary holdings eventually gave way to final judgments, including permanent injunctions and settlement agreements.) These preliminary orders were nonetheless an important source of law, as time had been of the essence—courts were being asked to respond quickly to the largely unchecked spread of COVID-19 in American detention facilities. Orders respecting preliminary relief almost always decided the real winners and losers, and so they represent a logical object of scrutiny for a project like ours.

Third, and not surprisingly, judges granting relief tended to rely more heavily on guidance from expert organizations, and scientific information from reputed medical and scientific journals.[161] Specifically, many opinions relied heavily on the CDC Interim Guidance, as well as on the CDC Guidelines for People at Increased Risk of Contracting COVID-19.[162] As

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[159] *See*, *e.g.*, People ex rel. Stoughton v. Brann, 67 Misc. 3d 629, 632, 122 N.Y.S.3d 866, 870 (N.Y. Sup. Ct. 2020) (highlighting risk to people in New York city correctional custody associated with population churn and staff contacts).

[160] *See* note 152, *supra*.

[161] *See*, *e.g.*, Desmond v. Decker, No. CV 20-6884 (KM), 2020 WL 4530003, at *1 (D.N.J. Aug. 6, 2020) (citing to CDC statistics); U.S. v. Ramirez, No. 19 CR. 105 (LGS), 2020 WL 4577492, at *3 (S.D.N.Y. Aug. 6, 2020) (relying on preliminary research studies showing that "patients with … diabetes, hypertension, coronary artery disease and obesity might be at a higher risk for severe disease or death from COVID-19"); United States v. Aslam, No. CR 17-50-RGA, 2020 WL 4501917 (D. Del. Aug. 5, 2020) (relying "primarily upon the CDC and the WHO" to assess the evidence the evidence presented).

[162] *See*, *e.g.*, Carlos M. R. v. Decker, No. CV 20-6016 (MCA), 2020 WL 4339452, at *1 (D.N.J. July 28, 2020) (reminding respondents that "the CDC Guidelines have made clear that correctional facilities must make 'all possible accommodations' to prevent transmission of infection to high-risk individuals"); Jose M. C. v. Tsoukaris, No. CV 20-6236 (KM), 2020 WL 3249097 (D.N.J. June 16, 2020) (rejecting petitioner's request for relief because "although petitioner suffers from hemorrhoids … this condition is not listed by the CDC as one which places him at 'higher risk' for serious illness from COVID-19"); Ferreyra v. Decker, No. 20 CIV. 3170 (AT), 2020 WL 2612199, at *1 (S.D.N.Y. May 22, 2020) (relying on fact that "CDC guidelines provide that people with asthma, or other respiratory problems are at a heightened risk of severe illness or death from contracting COVID-

explained above, however, the Interim Guidance contained light-touch suggestions on key points, and several opinions granting relief underscored that satisfying it was not sufficient to show that detention conditions were lawful.[163]

The body of decisional law available for review at this time shows that, in the early months of the pandemic, courts entertained litigation against detention sites around the country. That litigation relied on preexisting doctrine developed for lesser health and safety threats, and the plaintiffs generally sought to change the conditions of confinement or to obtain release. Although courts quickly recognized the generalized threat that COVID-19 posed, they were more often than not content to secure institutional promises to comply with the light-touch CDC Interim Guidance, and were less interested in exercising their own prophylactic initiative or operating a judicial receivership.

A. Discharge Litigation

Discharge was clearly the most aggressive relief that detainee-plaintiffs sought, and so it also proved the most elusive. Clear patterns emerged from the litigation over that remedy. First, notwithstanding public health recommendations that the most effective COVID-19 practices required decarceration, courts were resistant to order non-individualized discharge. In fact, the more collectivized the discharge requests, the more courts avoided them.[164] Discharge remedies were therefore awarded either individually or to very narrowly drawn sub-classes of vulnerable detainees.[165]

Second, and in terms of courts' willingness to order discharge in individual or small collectivized cases, there were

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19"); Basank v. Decker, No. 20 CIV. 2518 (AT), 2020 WL 1953847, at *11 (S.D.N.Y. Apr. 23, 2020) ("[T]he Court does not hold that the CDC's guidelines amount to strict rules of constitutional law that Respondents must follow in every circumstance," but "failure to implement basic elements of social distancing, isolation, and protective measures for high-risk individuals to be an overwhelming indication that the conditions of confinement are dangerous to detainees … ."); *Gayle*, 2020 WL 1949737, at *1 (ordering detention facility to "immediately comply with the CDC and ICE guidelines on providing adequate amounts of soap and water and cleaning materials to detainees").

[163] *See*, *e.g.*, Ochoa v. Kolitwenzew, No. 20-CV-2135, 2020 WL 2850706, at *11 (C.D. Ill. June 2, 2020) ("[T]he CDC's guidelines, while important, are not dispositive standing alone.").

[164] *See* Section II.A.1, *infra*.

[165] *See*, *e.g.*, Alcantara v. Archambeault, No. 20CV0756 DMS (AHG), 2020 WL 2315777, at *10 (S.D. Cal. May 1, 2020) (granting discharge to medically vulnerable subclass in ICE detention).

some very clear lines. Courts were more willing to order discharge on the basis of rights arising under something other than the federal constitution. And they were much more willing to use federal constitutional law as a basis for discharge of people in ICE detention than of people in correctional facilities.

1. Collective discharge

Courts were quite reluctant to order collective discharge, which meant almost all class actions were unsuccessful.[166] There were varied reasons for this judicial behavior. Sometimes the obstacle to collectivized release was the judicial imposition of a contested procedural doctrine,[167] and sometimes it was a reluctance to resolve the merits against an institution in a class action case.[168] We take those in turn.

Start with procedural problems with discharge-seeking class action litigation—a topic about which both of us have written (separately) at some length.[169] Such class action litigation, at least in federal court, usually happens under one of two procedural vehicles: either under the federal habeas corpus provisions or under 42 U.S.C. § 1983, the latter of which provides for injunctive relief against state officials that violate the federal constitution.[170] These procedural mechanisms presented some daunting challenges for the litigation we analyze here.

For example, the general principle that § 1983 is the preferred vehicle for conditions-improvement litigation is based on the premise that discharge is not requested, but some courts refused to permit habeas litigation in conditions cases where the detainee class sought release.[171] Unfavorable treatment of

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[166] *See* Section II.A.1, *infra*.

[167] *See infra* notes 169 to 175 and accompanying text.

[168] *See infra* notes 176 to 178 and accompanying text.

[169] *See* Brandon L. Garrett, *Aggregation in Criminal Law,* 95 CAL. L. REV. 383 (2007) (exploring aggregation in criminal law more generally); Kovarsky, *supra* note 2 (exploring phenomenon in more specific context of COVID-19).

[170] *See* 28 U.S.C. §§ 2241, 2254, 2255 (habeas provisions); 42 U.S.C. § 1983 (establishing cause of action against state officers for violating federal constitution).

[171] *See*, *e.g.*, Wilborn v. Mansukhani, 795 F. App'x 157, 163 (4th Cir. 2019) (observing seven of ten "circuits that have addressed the issue in a published decision have concluded that claims challenging the conditions of confinement cannot be brought in a habeas petition"); Seth v. McDonough, PX-20-1028, 2020 WL 2571168,*8 (D. Md. May 21, 2020) (refusing to treat habeas-denominated claims as exempt from the PLRA); *see also* Kovarsky, *supra* note 2, at 81 n.57 (collecting authority). *But see*, *e.g.*, Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) (holding that a medically vulnerable subclass of people convicted of federal crimes could bring habeas action if the conditions

habeas class claimants seeking discharge therefore persisted, notwithstanding the PLRA language carving out an exception for "habeas corpus proceedings challenging the fact or duration of confinement in prison"[172] And in cases where a mechanical rule about discharge litigation did not cause courts to subject the claims to the PLRA, judges applied various habeas exhaustion rules that either mooted the litigation or forced the plaintiff class to de-collectivize it.[173]

The exhaustion requirements applicable to people who had been convicted in state courts are difficult to escape. 28 U.S.C. § 2254(b) imposes an exhaustion condition, without exception, on "a person in custody pursuant to the *judgment* of a state court."[174] But courts have imposed exhaustion requirements on detainees *not* subject to criminal convictions, too. Some courts have held that, although § 2241 textually specifies no exhaustion requirement, grievances must nonetheless be exhausted as a prudential matter.[175] The point about de-collectivizing habeas litigation merits emphasis; these class-action holdings meant that the main path to merits adjudication was an *individualized* showing of exhaustion.

In fact, the judiciary crafted substantive tests that are quite incompatible with class-action treatment. For example, a series of federal district courts formulated an inquiry for habeas relief that resists collective analysis: (1) whether the petitioner has been diagnosed with COVID-19 or is experiencing symptoms thereof; (2) whether they are at higher risk of contracting the infection; (3) whether they have been directly exposed; (4) the effect of the physical space in which they are detained; (5) the efforts that the prison has made to prevent or mitigate harm; and (6) any other relevant factors.[176] Thus, as one court put it,

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litigation was for discharge, rather than changed condition); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 337 (S.D. Tex. 2020) ("Because Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall squarely in the realm of habeas corpus.").

[172] 18 U.S.C. § 3626(g)(2).

[173] *See* Kovarsky, *supra* note 2, at 81.

[174] Emphasis added.

[175] *See*, *e.g.*, Cameron v. Bouchard, No. CV 20-10949, 2020 WL 2569868, *14 (E.D. Mich. May 21, 2020) (noting that Sixth Circuit requires § 2241 exhaustion). For pre-COVID holdings, *compare*, *e.g.*, Beharry v. Ashcroft, 329 F.3d 51, 56-57 (2d Cir. 2003) (stating exhaustion is prudential), *and* Little v. Hopkins, 638 F.2d 953, 954 (6th Cir. 1981) (requiring § 2241 exhaustion).

[176] *See* Saillant v. Hoover, 454 F. Supp. 3d 465, 470–71 (M.D. Pa. 2020); *see also* Rice v. USA, No. 1:19-CV-1026-P, 2020 WL 2892214, at *2 (W.D. La. June 2, 2020) (using comparable set of factors and citing additional cases).

"the petitioner must make an individualized showing that he is entitled to habeas corpus relief when considering the above factors."[177] Predictably, some plaintiff classes were denied certification for failing to satisfy the Rule 23(a)(2) commonality requirement: "The differences among the factors for all inmates (or detainees, to use the term from the instant case) are so vast and fundamental that class treatment ... is completely unworkable."[178]

One thing that *did not* operate as a bar to collectivized habeas litigation was the PLRA's special rules for prisoner release orders. (As mentioned, habeas litigation is exempt from those rules,[179] which contain rather extreme exhaustion requirements, entail complex and slow-moving procedure, and require that any preliminary relief be "narrowly drawn."[180]) The problem with PLRA litigation, then, was not the impossibility of class treatment *per se*, but the inability to obtain class-wide relief at meaningful speed and scale. In § 1983 litigation, the PLRA's restrictions on prisoner release orders were often insurmountable.[181] The process of complying with the exhaustion requirements and completing the special statutory process necessary to obtain a final judicial order can take a decade or more[182]—a timeframe that was useless to detainees seeking to avoid COVID-19 risk. Classes seeking § 1983 relief sometimes argued that the PLRA exhaustion requirement should yield in light of the special challenges that COVID-19 presented, or because administrative remedies were not available, but had mixed success.[183]

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[177] *Saillant*, 454 F.Supp. 3d. at 471.

[178] Gayle v. Meade, No. 20-21553-CIV, 2020 WL 3041326, at *43 (S.D. Fla. June 6, 2020) (internal quotation marks omitted).

[179] 28 U.S.C. § 3626(g)(2).

[180] The requirement of narrowly drawn relief appears throughout the PLRA. See 18 U.S.C. § 3626(a)(1)(A), (a)(2), (b)(2), & (b)(3).

[181] *See* 18 U.S.C. § 3626(a)(3) (restrictions); Kovarsky, *supra* note 2 , at 82-83 (insurmountability thereof).

[182] *See supra* notes 141 to 146 and accompanying text.

[183] *See*, *e.g.*, Valentine v. Collier, 956 F.3d 797, 804 (5th Cir. 2020) (finding grievance procedure "available," such that plaintiffs were required to exhaust); Nelson v. Barnhart, 454 F. Supp. 3d 1087, 1094 (D. Colo. 2020) (finding nonexhaustion and noting "the Court may not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstance"); *but see* Duvall v. Hogan, No. CV ELH-94-2541, 2020 WL 3402301, at *8 (D. Md. June 19, 2020) (in course of refusing to apply exhaustion bar to claim relating back to date preceding the PLRA, noting that administrative remedies internal to jails do not cover requests for release); McPherson v. Lamont, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (finding that "administrative remedies for the relief that Plaintiffs seek are unavailable, and thus exhaustion is not required for Plaintiffs to proceed on their § 1983

2. Non-constitutional discharge

What also stands out is that—with the exception of the non-criminal detention categories discussed below—courts largely steered clear of the federal constitution. That is, where there were discharge orders, they tended to be pursuant to federal or state statutes, or state constitutions. And state courts that did afford collective relief tended to do so under state constitutions,[184] statutes,[185] or other supervisory authority,[186] rather than under the Eighth or Fourteenth Amendments.[187] That statutory relief was more robust is unsurprising given the above-stated observation that courts generally avoided collective discharge; the substantive showings that statutory discharge remedies require tend to be more individualized.

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claims"); Cameron v. Bouchard, No. CV 20-10949, F.Supp.3d, 2020 WL 2569868, *14 (E.D. Mich. May 21, 2020), *overturned on other grounds by* 815 F. App'x 978 (6th Cir. 2020) (noting caselaw regarding special circumstances in which exhaustion is not required); Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1173 (7th Cir. 2010) ("[W]e think it's also true that there is no duty to exhaust, in a situation of imminent danger, if there are no administrative remedies for warding off such a danger.").

[184] For cases relying on state law, *see* infra notes 209 to 212 and accompanying text.

[185] *See*, *e.g.*, Karr v. State, 459 P.3d 1183 (Alaska Ct. App. 2020) (interpreting bail statute and concluding COVID constituted "new information" supporting revisiting pretrial conditions).

[186] *See*, *e.g.*, Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court, 142 N.E.3d 525, 543 (Mass. 2020) (setting out presumptions and categories of people in pretrial custody eligible for release, and describing similar orders by Michigan, New Jersey, and South Carolina supreme courts); Foster v. Comm'r of Correction, 484 Mass. 698, 730, 146 N.E.3d 372, 400 (2020) (granting relief regarding drug-treatment-related civil commitments using supervisory authority); Matter of Request to Modify Prison Sentences, 231 A.3d 667 (N.J. 2020) (finding Executive Order created due process protections for several groups of people, including minors in custody of Juvenile Justice Commission). *But see* In re Petition of Pennsylvania Prison Soc'y, 228 A.3d 885, 887 (Pa. 2020) (declining to use supervisory authority to order immediate releases, but rather directing lower-court judges to consider public health concerns and limit introduction of new people to facility).

[187] *See*, *e.g.*, v. Comm'r of Correction, 484 Mass. 698, 146 N.E.3d 372 (2020), 146 N.E.3d 372, 395–96 (2020) (rejecting federal constitutional claims); Colvin v. Inslee, 195 Wash. 2d 879, 899, 467 P.3d 953, 964 (2020) (same); Matter of Writ of Habeas Corpus, No. 48053, 2020 WL 6387859, at *7 (Idaho Nov. 2, 2020) (same); People ex rel. Squirrell v. Langley, 124 N.Y.S.3d 901, 912 (N.Y. Sup. Ct. 2020) (same). *But see* Preliminary Injunction, NAACP v. Cooper, No. 20-CVS-500110 (Gen. Ct. Just. Sup. Ct. June 16, 2020) (granting relief finding state standard to be the same as the federal deliberate indifference standard).

For people in federal custody, most judicial discharge ordered on nonconstitutional grounds was ordered under the pretrial release provisions[188] (for pretrial detainees), or under either the federal compassionate release or home confinement rules (for those convicted of crimes).[189] The federal pretrial detention statute permits release for "compelling reason[s]."[190] It also allows judges to revise pretrial detention orders "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are [suitable] conditions of release[.]"[191] Some judges granted relief under that statutory standard.[192] In that statutory context, in fact, some federal judges adopted a hexa-variate formula for triage along the lines described above: symptoms, vulnerability, exposure, physical environment, available mitigation, and other factors.[193] Courts expressly linked that triage function to the flexible pretrial standards set forth by the statute.[194]

The federal compassionate release provisions are also typical in their individuation requirements,[195] which permit

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[188] *See* 18 U.S.C.A. § 3142 (containing rules for pretrial release). *See also*, *e.g.*, United States v. Michaels, No. SACR 16-76-JVS, 2020 WL 1482553, at *1 (C.D. Cal. Mar. 26, 2020) (granting temporary release to defendant who was "of an age and has medical conditions that place him in the group most susceptible to Covid-19"); United States v. Perez, No. 19 CR 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (same, citing person's "serious progressive lung disease and other significant health issues").

[189] *See* 18 U.S.C. § 3582(c) (compassionate release); 18 U.S.C. § 3624(g)(2)(A).

[190] 18 U.S.C. § 3142(i)(4).

[191] 18 U.S.C. § 3142(f).

[192] *See*, *e.g.*, United States v. Stephens, 447 F. Supp. 3d 63, 67 (S.D.N.Y. 2020) (finding COVID-related release appropriate under "compelling reason" standard). Persons on bail facing extradition have also been ordered released due to COVID risk on similar reasoning, citing the authority of extradition treaty obligations. *See* Matter of Extradition of Toledo Manrique, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020).

[193] *See*, *e.g.*, United States v. Wiseman, 461 F. Supp. 3d 740, 743 (M.D. Tenn. 2020) (applying test developed in § 2241 habeas context, described in text accompanying note 176, *supra*).

[194] *See*, *e.g.*, United States v. Martin, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (linking authority to 18 U.S.C. § 3142(f)(2)(B)). For state courts following such an approach, *see*, *e.g.*, Christie v. Commonwealth, 484 Mass. 397, 401-402 (2020) (providing order for people in pretrial detention setting out expedited and health-optimized release practice).

[195] With respect to people convicted of federal crimes, we focus on compassionate release, but the showing necessary to secure home confinement—which can be used in conjunction with compassionate

sentence reductions—including to time served—when there "are extraordinary and compelling reasons warrant[ing] such a reduction."[196] In a largely parallel rule appearing in the sentencing guidelines, there is a more granular specification of "extraordinary circumstances," which includes individualized considerations of age and medical risk.[197] The need for individuation in compassionate release determinations is reflected in the observations of one Third Circuit panel: "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release."[198]

People granted immediate discharge under federal compassionate release and home confinement provisions tended to be medically vulnerable, to have medical conditions placing them in the CDC's "at risk" category, to have been detained in detention facilities with particularly poor COVID-19 compliance, and to check other boxes relating to future danger and flight risk.[199] In *United States v. Shehata*,[200] for example, the court granted a request for immediate release from prison because, among other things: the person was sixty years old, had medical conditions that placed him at an increased risk of COVID-19 complications, and the pandemic had reached his detention facility.[201] In crafting compassionate release orders, federal courts have wide berth to impose additional conditions necessary to ensure public safety. For instance, in *Shehata*, the court reduced the person's sentence to time served, ordered home confinement for two years, extended the period of supervised release, and required him to wear a location monitoring device.[202]

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release—is similarly individualized. *See* William Barr, *Prioritization of Home Confinement as Appropriate in Response to the COVID-19 Pandemic*, Office of the Attorney General (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

196 18 U.S.C. § 3582(c)(1)(A)(i).

197 U.S.S.G § 1B1.13, Applic. Note 1.

198 United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020).

199 In addition to the case discussed below, *see*, *e.g.*, United States v. Aslam, No. CR 17-50-RGA, 2020 WL 4501917, at *3 (D. Del. Aug. 5, 2020) (granting motion for compassionate release due to "history of tuberculosis, viral hepatitis, age, and gender" and "absence of dangerousness"); United States v. Resnick, 451 F. Supp. 3d 262 (S.D.N.Y. 2020) (granting motion for compassionate release because movant is "65 years old [and] has diabetes and end-stage liver disease, making him particularly vulnerable to COVID-19").

200 No. 15-20052-01-JWL, 2020 WL 4530486 (D. Kan. Aug. 6, 2020).

201 *See id.*

202 *See id.*

Another source of discharge-seeking nonconstitutional litigation was the ADA.[203] In federal litigation, most courts have held wholesale release is simply not a "reasonable accommodation" under the ADA, even against the backdrop of the COVID-19 threat.[204] In any event, ADA claims failed poorly whether the defendant was a federal facility or a state one. (State and federal litigants are both subject to PLRA exhaustion requirements.[205]) In *Wragg v. Ortiz*, for example, the court disparaged the "bold" request that a federal facility "release any and all inmates who may have any disability" as an "all or nothing approach" that is inconsistent with necessary individuation.[206] In *Money v. Pritzker*,[207] representative state-prisoner ADA litigation against multiple Illinois facilities, the court turned back ADA theories, reasoning that correctional detainees were not the victims of intentional discrimination, were not disproportionately burdened by discretionary release procedures, and were not denied reasonable modifications of that process.[208]

People in state custody had more luck for claims that arose under state law, but only in a handful of jurisdictions. In March and April, New York courts, recognizing certain communities were especially vulnerable to COVID-19, invoked the state due process clause to release many people from local jails.[209] The state due process doctrine was more flexible than

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[203] Americans with Disabilities Act of 1990 § 302, *codified at* 42 U.S.C. § 12182(b)(2)(A)(ii). The analogous provisions in the Rehabilitation Act apply to federal programs. Rehabilitation Act of 1973 § 504, *codified at* 29 U.S.C. § 794.

[204] *See, e.g.*, Hurdle v. Comm'r of Correction, No. CV205000647S, 2020 WL 5540600, at *5 (Conn. Super. Ct. Aug. 17, 2020) (holding release would not constitute a reasonable accommodation, considering petitioner's particular disability); Wragg v. Ortiz, 462 F. Supp. 3d 476, 514 (D.N.J. 2020) (holding petitioner's request to release all people who have any disability is not a reasonable accommodation and that court must make individual circumstances determinations); *Money v. Pritzker*, 453 F.Supp.3d 1103, 1132 (N.D. Ill. Apr. 10, 2020) (rejecting ADA claims); *Frazier v. Kelley*, 460 F.Supp. 799, 830 (E.D. Ark. May 4, 2020) (finding no likelihood of success on ADA claims).

[205] 42 U.S.C. § 1997e(a).

[206] *Wragg*, F. Supp. 3d at 514.

[207] 453 F. Supp. 3d 1103 (N.D. Ill. Apr. 10, 2020).

[208] *See id.* at 1132. *Money* was in federal court. *Hurdle*, typical of ADA litigation in state court, rejected a request for discharge as reasonable accommodation, on the ground that he had PTSD and a leg injury that left him uniquely vulnerable to COVID-19. *See Hurdle*, 2020 WL 5540600, at *5.

[209] *See*, *e.g.*, People ex. rel. Stoughton v. NYS Department of Corrections, Index No. 260154/2020 (Sup. Ct. Bx. March 27, 2020)

its federal counterpart, and judges could weigh competing interests in making discharge decisions.[210] While some state courts have indicated that their constitutional law provides broader grounds for relief on *Gamble*-type claims, others have acknowledged that possibility only theoretically and have not departed from a more demanding "deliberate indifference" test.[211] Some state judges relied on *non-constitutional* state authority to expedite release, too—such as inherent supervisory power or court rules for pretrial detention practices.[212]

To conclude, people asserting rights flowing from authority other than the federal constitution fared better than those seeking discharge under the Fifth, Eighth, and Fourteenth Amendments. More specifically, there was some measured success under federal statutes configured for individual relief—provisions permitting medical release for pretrial and convicted federal detainees—and under state law. [213] Indeed, with the exception of category discussed below, most collective discharge orders involved rights arising under state constitutions.

(releasing 106 of 110 petitioners held on non-criminal technical parole violations).

[210] *See*, *e.g.*, People ex rel. Stoughton v. Brann, 122 N.Y.S.3d 866, 869 (N.Y. Sup. Ct. 2020) ("The New York due process test is simpler. A court weighs the benefit sought by the government from a condition against the harm that the condition imposes on inmates.")

[211] *See*, *e.g.*, Smith v. State, No. OP 20-0185, 2020 WL 1660013, at *2 (Mont. Mar. 31, 2020) (employing deliberate indifference test while noting that Montana right combined with Eighth Amendment provide Montanans "greater protection from cruel and unusual punishment than the 8th Amendment"); Matter of Pauley, 466 P.3d 245, 259–61 (Wash. Ct. App. 2020) (noting Washington has interpreted its state cruel punishment clause more broadly than Eighth Amendment but following deliberate indifference test); McGraw v. Comm'r of Correction, No. CV2050000631S, 2020 WL 3790738, at *4–5 (Conn. Super. Ct. June 10, 2020) (citing a state analysis of habeas claim that used deliberate indifference test).

[212] For example, the Hawaii Supreme Court ordered the release of pretrial detainees charged with lower-level offenses by suspending detention orders. *See* Matter of Custody of State of Hawai'i, 2020 WL 4873285 (Hi 2020). In contrast, several state supreme and appellate courts refused to issue writs of mandamus to provide emergency relief in response to COVID-19 at correctional facilities. *See*, *e.g.*, Kerkorian v. Sisolak, 462 P.3d 256 *2 (Nev. 2020) (denying mandamus petition and citing to similar rulings by the Kansas, Massachusetts, Montana and Washington courts).

[213] *See* Section II.A.2, *supra*.

3. The constitutional exception: non-criminal detention

Courts were largely unwilling to discharge people convicted of crimes on the basis of laws arising under the federal constitution. Litigation involving ICE detention was the exception. In these cases, the operative constitutional text was not the Eighth Amendment, but the due process clauses of the Fifth and Fourteenth Amendments. Recall that, when due process is the source of the operative constitutional constraint, courts can order relief on one of two theories. First, a court may order relief on the ground that the detention condition impermissibly amounts to punishment because it is unreasonably related to a legitimate governmental purpose.[214] Second, it might borrow the *Gamble* framework developed for people *convicted of crimes* and demand a showing of deliberate indifference.[215]

For ICE detention, many courts shied away from the deliberate indifference model in order to award relief on a less stringent showing, and many others were willing to find deliberate indifference. Federal courts in New Jersey were particularly likely to order release on the pure *Bell* rationale: that the treatment was not reasonably related to a legitimate government interest, and therefore amounted to punishment.[216] Some of these courts even went out of their way to underscore that the deliberate indifference framework was part of a different constitutional rule,[217] and they were not entirely alone. A federal judge in Florida ordered the release of 58 ICE detainees, noted that the constitutional standards for criminal and non-criminal detention were different,[218] and nevertheless determined that the facilities had been deliberately indifferent.[219] By contrast, federal courts in New

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[214] Bell v. Wolfish, 441 U.S. 520, 539 (1979).

[215] *See supra* notes 118 to 122 and accompanying text.

[216] *See*, *e.g.*, Desmond K. B., Petitioner, v. Decker, et al., Respondents., No. CV 20-6884 (KM), 2020 WL 4530003, at *6 (D.N.J. Aug. 6, 2020) (finding in favor of relief on ground treatment was not reasonably related to a legitimate governmental purpose); Carlos M. R. v. Decker, No. CV 20-6016 (MCA), 2020 WL 4339452, at *12 (D.N.J. July 28, 2020) (same); Armando C. G. v. Tsoukaris, No. CV 20-5652 (MCA), 2020 WL 4218429, at *9 (D.N.J. July 23, 2020) (same).

[217] *See*, *e.g.*, *Desmond K. B.*, 2020 WL 4530003, at *9 (finding that the plaintiff was unlikely to succeed on his "deliberate indifference claim"); *Carlos M. R.*, 2020 WL 4339452, at *11 n.27 (same).

[218] *See* Gayle v. Meade, No. 20-21553-CIV, 2020 WL 2086482, at *3 (S.D. Fla. Apr. 30, 2020), order clarified, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020).

[219] *See id.* at *5; *see also*, *e.g.*, Castillo v. Barr, 449 F. Supp. 3d 915, 922-23 (C.D. Cal. 2020) (finding deliberate indifference against ICE

York were unaware of or ignored problems with applying a deliberate indifference rule in non-criminal cases, but were willing to order relief nonetheless.[220] Setting aside how they actually conducted their merits analyses, courts reviewing ICE detention had an easier time *reaching* these issues because administrative exhaustion requirements were less imposing.[221]

The CDC Interim Guidance remained influential, even in the ICE cases. If a prisoner's medical condition fell within the "increased risk of severe illness from COVID-19" or "*might* be at an increased risk" categories from the Guidance, then these courts were more likely to order relief.[222] In *Ferreyra v. Decker*, for example, the court granted a preliminary injunction in favor of ICE detainees who had medical conditions such as asthma, emphysema, and diabetes—noting that "CDC guidelines provide that people with asthma, or other respiratory problems are at a heightened risk of severe illness or death from contracting COVID-19."[223] If, on the other hand, the prisoner's medical condition was not so designated, then some courts were less likely to grant the requested relief.[224]

For reasons that remain unclear to us, New Jersey federal court emerged as a vanguard for decision-making in ICE detention cases. Judges there began to use a three-category approach to triage relief for people in ICE custody, depending on whether the people were: (1) COVID-negative and not in the special vulnerability categories; (2) COVID-negative but in the

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facility).

[220] *See*, *e.g.*, Avendaño Hernandez v. Decker, No. 20-CV-1589 (JPO), 2020 WL 1547459, at *1 (S.D.N.Y. Mar. 31, 2020) (conducting deliberate indifference analysis to grant release); Barbecho v. Decker, No. 20-CV-2821 (AJN), 2020 WL 1876328, at *1 (S.D.N.Y. Apr. 15, 2020) (same); Ferreyra v. Decker, No. 20 CIV. 3170 (AT), 2020 WL 2612199, at *8 (S.D.N.Y. May 22, 2020) (same); Basank v. Decker, No. 20 CIV. 2518 (AT), 2020 WL 1953847, at *9-*12 (S.D.N.Y. Apr. 23, 2020) (same).

[221] *See*, *e.g.*, *Castillo*, 449 F. Supp. 3d at 921 (relaxing exhaustion requirement because constitutional claims were not within jurisdiction of administrative tribunal).

[222] Kevin M. A. v. Decker, 457 F. Supp. 3d 445, 451 (D.N.J. 2020) (granting relief); *see also* sources collected in notes 223 & 225, *infra* (listing cases). *But see*, *e.g.*, U.S. v. Salinas, No. CR H-19-309, 2020 WL 4352606, at *4 (S.D. Tex. July 29, 2020) (denying relief to "at risk" detainee).

[223] Ferreyra v. Decker, No. 20 CIV. 3170 (AT), 2020 WL 2612199, at *1 (S.D.N.Y. May 22, 2020).

[224] *See*, *e.g.*, Jose M. C. v. Tsoukaris, No. CV 20-6236 (KM), 2020 WL 3249097 (D.N.J. June 16, 2020) (denying relief where petitioner was found not to be "higher risk").

special vulnerability categories; and (3) COVID-positive.[225] Judges entertaining ICE litigation generally refused discharge to people in the first category, sometimes with caveats about how the result could change if circumstances at the facility did.[226] Courts were more willing to invoke the federal constitution in favor of discharge for people in the second category, provided there were ways to protect state interests upon release.[227] Courts were usually unwilling to discharge people in the third category—those with COVID-19—on the theory that they would present too much of a danger to public health, by which courts seem to have meant the health of people who were not in custody.[228]

The decisional law involving ICE detention also deviates from the typical pattern of constitutional avoidance because there is no standard statutory discharge mechanism; the Constitution was the only option. Judges entertaining challenges to pretrial detention, by contrast, ordinarily had access to statutory discharge remedies—recourse to constitutional law was largely unnecessary.[229] The unusual willingness to recognize constitutional violations in ICE detention cases was, therefore, a confluence of two different factors: (1) the non-criminal status of the detention meant that there was a lower threshold for constitutional injury, and (2) there was no statutory alternative for discharge remedies.

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[225] *See*, *e.g.*, Romeo S.K. v. Tsoukaris, No. CV 20-5512 (JMV), 2020 WL 2537647, at *5 (D.N.J. May 18, 2020), report and recommendation adopted, No. CV 20-5512 (JMV), 2020 WL 4364297 (D.N.J. July 29, 2020) (developing categories); *see also* Oscar P. C. v. Tsoukaris, No. CV 20-5622 (KM), 2020 WL 4915626, at *9 (D.N.J. Aug. 21, 2020) (using framework); Desmond K. B. v. Decker, No. CV 20-6884 (KM), 2020 WL 4530003, at *7 (D.N.J. Aug. 6, 2020) (same); Nicole B. v. Decker, No. CV 20-7467 (KM), 2020 WL 4048060, at *7 (D.N.J. July 20, 2020) (same); Jose M. C. v. Tsoukaris, 467 F. Supp. 3d 213, 224 (D.N.J. 2020) (same).

[226] *See*, *e.g.*, *Nicole B.*, 2020 WL 4048060, at *7 ("The petitions of detainees in the first category (no particular risk factors) have generally been denied."); *Romeo S.K.*, 2020 WL 2537647, at *5 (including caveat about changed circumstances).

[227] *See*, *e.g.*, *Nicole B.*, 2020 WL 4048060, at *7 (noting that petitions of persons with risk factors "have been granted or denied depending on the circumstances—especially, the level of the risk to the prisoner under conditions at the institution").

[228] *See*, *e.g.*, *Romeo S.K.*, 2020 WL 2537647, at *5 ("Yet, once a detainee tests positive, the public also has an interest in not introducing additional cases into the general public.").

[229] *See*, *e.g.*, *supra* note 188 (federal pretrial detention statute). *Cf*, *e.g.*, United States v. Lee, 451 F. Supp. 3d 1, 8 (D.D.C. 2020) (rejecting due process challenge to pretrial detention).

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For non-criminal detention categories, courts gravitated towards a plaintiff-friendly constitutional standard. Some courts continued to rely on the deliberate indifference framework, but others relied—faithfully, in our view—on *Bell*'s rule against treatment that amounts to punishment. Federal litigation involving these categories therefore resulted in more orders to release medically vulnerable people in ICE custody, and in more orders for larger-scale reductions in facility population. They also produced more orders to improve facility conditions, which we discuss next.

B. Changed Conditions

Along with discharge, people in custody often sought orders for defendants to adopt health-protective practices—that is, to change facility conditions. Discharge is actually a prerequisite to many such practices, because overcrowding makes them otherwise impossible.[230] The dominant rights associated with requests for changed conditions arose under the federal constitution or the ADA.[231] Ordering remedies for violations of those rights, unlike ordering statutory discharge under a pretrial or compassionate release provision, often required courts to make guilt-suggestive findings against institutions that some appeals courts were reluctant to make.

The CDC Interim Guidance loomed over conditions litigation. Institutions that complied with the Guidance were typically inoculated against coercive relief.[232] Plaintiffs, however, did obtain orders for certain mitigation measures that went beyond the CDC recommendations, such as: staff retainage necessary to segregate facility residents, testing necessary to identify outbreaks and triage treatment, and psychiatric resources necessary to protect the community's mental health.[233] Some temporary relief also directed that

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[230] *See* 2020 NRC Report, *supra* note 9, at 3 ("[D]ecarceration is an appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities[.]").

[231] *See* Section I.B.2, *supra*.

[232] *See*, *e.g.*,Duvall v. Hogan, No. CV ELH-94-2541, 2020 WL 3402301, at *13 (D. Md. June 19, 2020) (holding evidence suggests defendants were following CDC guidelines and denying emergency motion for mitigation); Roman v. Wolf, 2020 WL 2188048, *1 (9th Cir., May 5, 2020) (staying injunction to extent it exceeded CDC guidelines); In Re: The Petition of the Pa. Prison Soc'y, 2020 WL 3116883 (Pa. Apr. 3, 2020) (ordering facilities to comply with CDC Guidance).

[233] *See*, *e.g.*, Carranza v. Reams, No. 20-cv-00977-PAB, 2020 WL 2320174 (D. Colo. May 11, 2020) (granting request to segregate medically vulnerable persons); Gray v. Cty. of Riverside, 5:13-cv-00444 (C.D. Cal. April 16, 2020) (granting order requiring physically

defendants follow CDC recommendations to, among other things, identify and monitor at-risk detainees, provide additional staff and detainee training, circulate PPE and hygiene products, develop protocols for testing and isolation, and practice appropriate social distancing.[234] When jails had nominally robust policies but failed to enforce them, some courts were also willing to escalate remedies to ensure meaningful implementation.[235] (Over time, many of these orders were reversed on appeal.[236])

Many courts required compliance with the CDC Interim Guidance, and no more. In a representative case, *Seth v. McDonough*,[237] the federal district court issued one such injunction.[238] In that case, a Maryland county jail had attempted some compliance—it had provided additional soap and increased temperature checks[239]—but those measures fell short of the Interim Guidance. The court concluded the jail "implemented no functional plan to afford [high-risk] detainees any additional screening, supervision, segregated housing, or any like measure."[240] As a result, the judge entered a narrow injunction designed only to protect high-risk prisoners.[241]

For cases involving constitutional violations, injunctive remedies requiring health-protective practices were more far common than collective discharge orders.[242] In part because lower courts were, relatively speaking, more willing to order broader relief that entailed more ongoing judicial involvement,

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distanced housing, segregation of medically vulnerable people, and enhanced mental health resources for those quarantined). *But see* Mays v. Dart, No. 20-CV-2134, F.Supp.3d, 2020 WL 1812381, (N.D. Ill. Apr. 9, 2020) (denying request to segregate).

[234] *See, e.g.,* Ahlman v. Barnes, 445 F. Supp. 3d 671, 694 (C.D. Cal. 2020) (ordering spacing, communication protocols, provision of sanitary implements and access to showers and laundry, the wearing personal protective equipment, handwashing, temperature checks, and rapid medical response); Seth v. McDonough, 461 F. Supp. 3d 242, 265 (D. Md. 2020) (ordering comparable relief); Swain v. Junior, No. 20-cv-21457-KMW, 2020 WL 1692668 (S.D. Fla. Apr. 7, 2020) (same); Banks v. Booth, 459 F. Supp. 3d 143, 161-63 (D.D.C. 2020) (same). *But see* Sanchez v. Brown, 2020 WL 2615931, at *12 (N.D. Tex. 2020) (declining to impose CDC guideline compliance on jail for fear of impinging on a legislative role and threatening federalism).

[235] Banks v. Booth, No. 20-CV-849 (CKK), 2020 WL 1914896, at *9 (D.D.C. Apr. 19, 2020).

[236] *See* Section III.A.4, *infra*.

[237] 461 F. Supp. 3d 242, 253 (D. Md. 2020).

[238] *See id.* at 265.

[239] *See id.* at 251-52 (temperature checks); *id.* at 254 (soap).

[240] *Id.* at 254.

[241] *See id.* at 254-55.

[242] *See* Section II.A.1, *supra*.

such orders also triggered more appellate blowback. In *Ahlman v. Barnes*,[243] the Orange County jail case, the district court had refused a collective discharge remedy, but found that its practices likely violated the federal constitution and ordered stricter health-and-safety measures.[244] The district court noted that the CDC Interim Guidance "is not a statute, nor is it a mandate,"[245] but nevertheless treated it like "expert medical advice regarding measures needed to limit the spread of COVID-19."[246] The failure to implement those measures, the district court reasoned, was deliberate indifference.[247] The Supreme Court ultimately stayed this injunction,[248] mooting the remedy.

Ahlman wasn't the only case where appellate courts intervened to disable conditions-improvement orders entered by federal district judges. In *Mays v. Dart*,[249] the district court entered a preliminary injunction against Chicago's Cook County jail. The court ordered the jail to end group housing and double-celling, and to improve sanitation, testing, and provision of personal protective equipment.[250] The Seventh Circuit substantially narrowed that injunction, refusing to order altered facility protocols for housing and cell population.[251] The story was the same when lower courts ordered remedies for non-constitutional violations, too. *Valentine v. Collier*[252] was a case involving a Texas geriatric prison—the "Pack Unit"—in which the district court judge entered preliminary and permanent injunctions based on ADA violations.[253] The Fifth Circuit ultimately paused all injunctive relief pending appeal, finding that the suit was unlikely to succeed: the plaintiffs had failed to properly exhaust administrative remedies.[254]

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[243] 445 F. Supp. 3d 671 (C.D. Cal. 2020).
[244] *See* 445 F. Supp. 3d at 694-95. Specifically, the facility: housed detainees in overcrowded dorms, holding cells, and common areas; failed to provide people in custody with hygiene supplies; and inadequately quarantined and tested exposed residents. *See id.* at 681-82.
[245] *Id.* at 690.
[246] *Id.*at 691.
[247] *See id.* at 692.
[248] *See* Barnes v. Ahlman, 140 S. Ct. 2620 (2020).
[249] Mays v. Dart, 453 F. Supp. 3d 1074 (N.D. Ill. 2020).
[250] *See id.* at 1099-1101.
[251] *See* Mays v. Dart, 974 F.3d 810, 824 (7th Cir. 2020).
[252] Valentine v. Collier, 978 F.3d 154 (5th Cir. 2020).
[253] *Valentine v. Collier*, 2020 WL 5797881, at *1 *34, 35 (S.D. Tex. Sept. 29, 2020) (describing preliminary and entering permanent injunction).
[254] *See Valentine*, 978 F.3d at 153. The Fifth Circuit also held that the

Thus, remedies ordering improved health-and-safety practices pose challenges that are distinct from those ordering discharge. Discharge remedies can be individualized by relying on applicable statutes, but injunctions requiring improved conditions usually represent collective relief that redounds to the benefit of a particular facility population. The primary rights for injunctive remediation arise under the federal constitution or the ADA, both of which tend to require findings about the insufficiency of institutional response—findings that judges have been more hesitant to make. Faced with acute line-drawing problems and questions about institutional competence, courts largely turned to the thin CDC Interim Guidance for a standard of care.

C. Other Relief

During the COVID-19 pandemic, some people in custody sought forward-looking relief that does not fit neatly into a discharge-versus-conditions dichotomy. In such scenarios, courts are not ordering discharge or improved health-and-safety practices *per se*; but they are often ordering process auxiliary to conditions improvement or discharge.[255]

One of the most common secondary remedies was an order for detention authorities to comply with judge-made process for health-optimized release. For example, a federal court in California ordered expedited consideration of compassionate release requests made by people convicted of federal crimes—entering an order that included a notification rule, as well as requirements that eligibility be determined quickly and in light of health risk.[256] Some courts, however, were reluctant to assume receivership roles requiring them to specify and oversee process for discharge. In *Russell v. Harris County*,[257] a federal judge in Houston was clearly distressed by risks to a pretrial detainee population being discharged at insufficient

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Eighth Amendment claim would not succeed on the merits. *See id.* at 165.

[255] *See*, *e.g.*, In re Petition of Pennsylvania Prison Soc'y, 228 A.3d 885, 887 (Pa. 2020) (invoking equitable and supervisory power over lower courts and holding that judges "should consult with relevant county stakeholders to identify individuals and/or classes of incarcerated persons for potential release or transfer."); Foster v. Comm'r of Correction, 484 Mass. 698, 730, 146 N.E.3d 372, 400 (2020) ("Nonetheless, we see fit to address the situation under our supervisory authority. Going forward, a judge shall not commit an individual under G. L. c. 123, § 35, unless the judge finds that the danger posed by the individual's substance use disorder outweighs the risk of transmission of COVID-19 in congregate settings.").

[256] *See* Torres v. Milusnic, 472 F. Supp. 3d 713, 746 (C.D. Cal. 2020).

[257] *See* 454 F. Supp. 3d 624, 638 (S.D. Tex. 2020).

rates,[258] but was unwilling to require federal court to supervise local judges adjudicating bail requests.[259] The judge observed: "[g]iven how this case differs from other COVID-19 litigation, the court is operating on uncertain legal terrain with limited guidance."[260]

Some requests for secondary remediation were auxiliary not to release protocols, but to conditions-improvement remedies. In *Gayle v. Meade*,[261] and in the shadow of constitutional law barring deliberate indifference to detainee health, the federal court had entered a preliminary injunction to improve conditions in a Florida ICE detention facility.[262] When the plaintiffs credibly alleged non-compliance therewith, the court appointed a Special Master to evaluate facility practices and administer necessary relief.[263] In North Carolina, a trial court similarly appointed a Special Master to oversee correctional compliance with conditions-related preliminary orders, after finding that state officials were probably violating the state and federal constitutions.[264]

Although much of this one-off remediation came after a plaintiff prevailed in litigation that remained adversarial to the end, some of it came by way of settlement— which resulted in operational changes, collaborative monitoring, and expedited release practices. In California, for instance, detainees successfully modified an existing settlement agreement in order to secure improved conditions of confinement.[265] In Colorado, a state court entered a consent decree regarding conditions of confinement and speeding the parole process.[266] In

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[258] *See id.* at 634 ("All fear that current processes are releasing too few arrestees relative to new arrivals to stop the virus from spreading in the Jail.").

[259] *See id.*

[260] *Id.* at 635. In many localities, bond reduction rules were used to shrink jail populations, sometimes quite dramatically, and often with cooperation between among lawyers, prosecutors, and the court. *See* Malia Brink, *Hero Public Defenders Respond to Covid-19*, CRIM. JUST., Summer 2020, at 39, 41.

[261] No. 20-21553-CIV, 2020 WL 4047334, at *2 (S.D. Fla. July 17, 2020).

[262] *See id.* at *1.

[263] *See id.* at *3.

[264] Jordan Wilkie, *Special Master to Make NC Prisons Comply*, Carolina Public Press, Dec. 4, 2020; Preliminary Injunction, NAACP v. Cooper, No.: 20 CVS 500110 (Gen. Ct. Just. Sup. Ct. June 16, 2020), at https://www.acluofnorthcarolina.org/sites/default/files/20_cvs_500110_order_on_pi_with_cos.pdf.

[265] *See* Coleman v. Newsom, No. 01-CV-01351-JST, 2020 WL 1675775 (E.D. Cal. Sep. 22, 2020).

[266] *See* Tracy Harmon, *Prison Coronavirus Protocols Mark Lawsuit*

Connecticut, a federal court entered a settlement agreement between those in correctional custody and the state department of corrections, with the latter agreeing to improve conditions, make best efforts to release vulnerable people, and cooperate with a five-member monitoring panel charged with supervising the remedies.[267]

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As COVID-19 exploded across the country, it forced courts to reconcile the health of people in custody with competing interests. Before we draw more generalized conclusions about the litigation, a few observations about the decisional law stand out. Across right-remedy combinations, the proximity to crime seemed to matter quite a bit; people in ICE custody mounted the most successful class action cases, followed by those in pretrial detention. Detainees convicted of crimes faced the longest odds. Judges generally erred on the side of limited relief, leaning when possible on individualized statutory remedies or limited constitutional holdings in favor of narrow, vulnerable sub-classes. Judges were especially reluctant to make substantive medical judgments, and incorporated the CDC Interim Guidance as a standard of care.

III. THREE CONCLUSIONS

In Part III, we draw three descriptive conclusions from the observations we recited in Part II, and each has implications for the way American institutions design legal responses to pandemics. First, the judicial response to COVID-19 in America's detention facilities conformed to theories about how courts recalibrate rights in view of expected remedies and vice versa. Second, the judicial response was unusually dependent on the efficient operation and compliance of sclerotic and under-funded bureaucracies. Third, the judicial response reflected deeply entrenched assumptions about detainee danger and the equal moral worth of people in America's prisons—assumptions shared by executive and legislative actors, who also failed to intervene. All three of these conclusions suggest a broader point: a better judicial response to the next pandemic will require better tools and better institutional partners.

A. Calibrating equilibrium

Settlement Agreement, PUEBLO CHIEFTAIN, Nov. 24, 2020 (describing decree).

[267] *See* Kelan Lyons, *ACLU: CT Prisons Not Complying with Terms of COVID Lawsuit Settlement*, CT MIRROR, Oct. 29, 2020 (describing agreement).

The COVID-19 prisoner litigation was a moment of profound re-calibration of right and remedy, and the adjustment happened quickly. The decisions evince widespread discomfort with the relief projected for the incumbent right-remedy combinations—combinations not configured with an eye to pandemic threat and that would have produced broad and potentially unpopular discharge. Reflecting a desire not to be the institutional bearer of that decision-making responsibility, judges often avoided intrusive relief by changing the way crucial rights and remedies were defined and applied.

1. A note on remedial calibration

We generally agree with the view that rights and remedies do not develop in siloes; there is no such thing as a Platonic right that "exists" independent of real-world implementation and enforcement.[268] Without wading too far into the outer-most registers of the debate over "rights essentialism,"[269] suffice it to say that we start from a premise that the matrix of remedial implementation can influence the development of rights, and vice versa.

Even those familiar with Professor Daryl Levinson's canonical attack on rights essentialism might forget that one of the primary case studies in that work was federal judicial oversight of prison conditions.[270] Over time, the remedial initiative of district judges caused the Supreme Court to reduce wattage of the underlying constitutional rights.[271] Remedies based on Eighth Amendment violations placed federal district judges in receivership roles that made the modern Court especially uncomfortable,[272] and the Court responded by upping the deliberate-indifference showing necessary to trigger remedial authority.[273] The process by which remedies and rights influence one another is complex, and mediated by the rules and practices of both national and sub-national actors—but the important point is that a seemingly broad right can

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[268] *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (setting forth leading framework for thinking about rights-remedies equilibrium). *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983) (describing it as "inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy").

[269] *See* Levinson, *supra* note 268, at 858 (defining phenomenon); *see also*, *e.g.*, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 52 (1979) (offering account of right-remedy relationship often described as essentialist).

[270] *See* Levinson, *supra* note 268, at 878-82.

[271] *See id.* at 881.

[272] *See id.*

[273] *See infra* notes 300 to 318 and accompanying text.

trigger remedy-shrinking behavior from judges, executives, and legislatures; and seemingly broad remedies can cause lawmaking institutions to shrink rights.

The COVID-19 prisoner litigation demonstrates the more traditional process by which a constitutional right of uncomfortable breadth causes remedial restriction,[274] but also the process by which the fear of broad remedies prompts restrictive interpretations of the right.[275] These processes were expressed in several interrelated judicial tendencies: to conduct risk tradeoffs through more individualized non-constitutional remedies;[276] to adopt procedural rules that avoided constitutional interpretation;[277] to focus any constitutional relief on people in non-criminal detention who were perceived to pose less danger;[278] to triage remedies towards the most medically vulnerable people;[279] and to increase the influence of and raise the bar for "deliberate indifference" so as to spare detention facilities the costs of court-ordered safety improvements.[280] We discuss these tendencies below.

2. Remedies

Virtually every remedial shift reduced expected relief—sometimes in the form of delay, when time was of the essence. To achieve such a shift, some courts would thicken remedial limitations on class-action litigation, especially for plaintiff classes seeking discharge.[281] Federal courts usually cut off discharge pathways that avoided the PLRA, and then interpreted PLRA's remedial limits restrictively.[282] In the limited instances where they entertained a discharge request without subjecting it to the PLRA, they often found ways to reproduce preclusive exhaustion requirements.[283]

Again, the PLRA contains strict limits on litigation seeking "prisoner release orders," including a thick exhaustion requirement and extended process before idiosyncratic three-judge federal tribunals.[284] Statutorily excepted from these

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[274] *See* Section III.A.2, *supra*.
[275] *See* Section III.A.3, *supra*.
[276] *See supra* notes 184 to 202 and accompanying text.
[277] *See supra* notes 169 to 183 and accompanying text.
[278] *See* Section II.A.3, *supra*.
[279] *See*, *e.g.*, *supra* notes 225 to 228 and accompanying text.
[280] *See infra* notes 300 to 318 and accompanying text.
[281] *See* Section II.A.1, *supra*.
[282] *See supra* notes 171 to 173 and accompanying text; *infra* notes 284 to 287 and accompanying text.
[283] *See supra* notes 174 to 175 and accompanying text; *infra* note 289 and accompanying text.
[284] These are actually two stacked requirements. There is one provision that formally requires administrative exhaustion for all

requirements are "habeas corpus proceedings challenging the fact or duration of confinement in prison."[285] Even when detainee classes sought release in what they denominated as habeas petitions, many courts simply ruled that a habeas request for such relief did not "challeng[e] the fact or duration of confinement."[286] And once they held that detainee-class litigation was subject to the PLRA, courts generally refused to relax the PLRA release-order prohibitions or (in changed-condition suits) exhaustion requirements,[287] with some exceptions for scenarios where the procedure that required exhausting was wholly unavailable.[288] Even when courts treated detainee-class complaints as habeas litigation, judges still read procedural doctrines in ways that thwarted meaningful collective relief—applying prudential exhaustion requirements or holding that person-to-person variation in habeas claims precluded class treatment entirely.[289]

The treatment of habeas discharge litigation illustrates a broader phenomenon, too: courts simply avoided remedies that required them to reach constitutional questions at all. If they were available, courts flocked to non-constitutional remedies for health-and-safety risks, and those non-constitutional remedies tended to reinforce the individual scale of relief.[290] In pretrial litigation, for example, many courts relied on the statutory provisions permitting individualized release for health risk.[291] Courts generally discharged people convicted of crimes using individualized provisions for compassionate release or home confinement.[292]

3. Rights

When courts reached constitutional issues—either because remedial limitations were insufficiently preclusive or because statutory substitutes were unavailable (ICE detention)—the judicial response, both generally and especially in criminal detention cases, shrank the constitutional right. Courts readily

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cases subject to the PLRA, *see* 42 U.S.C. § 1997e, and another that requires the failure of a less intrusive remedial order when a prisoner seeks discharge, *see* 18 U.S.C. § 3626(a)(3).

[285] 18 U.S.C. § 3626(g)(2).

[286] *Id.* at § 3626(a)(3).

[287] *See*, *e.g.*, Maney v. Brown, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020) (holding that due to PLRA restrictions precluded order to reduce prison population).

[288] *See*, *e.g.*, McPherson v. Lamont, 457 F.Supp.3d 67, 76 (D.Ct. May 6, 2020) (concluding exhaustion requirements futile including due to risk inmates would contract COVID-19 prior to completing process).

[289] *See* Section II.A.1, *supra*.

[290] *See* Section II.A.2, *supra*.

[291] *See supra* notes 190 to 194 and accompanying text.

[292] *See supra* notes 195 to 198 and accompanying text.

accepted that the virus entailed objective risk, given its spread and severity.[293] The most significant mechanism for shrinkage was the deliberate indifference requirement—which judges applied in non-criminal contexts and defined to impose a higher intent threshold.

In *Farmer v. Brennan*,[294] the Court held that, "even if the harm ultimately was not averted," there is not an Eighth Amendment violation if officials were merely negligent, and so they must recklessly disregard the risk.[295] Under *Farmer*, deliberate indifference can exist on something less than "acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[296] Negligence alone does not support a finding of constitutional harm, but *Farmer* made clear that knowing risk and failing to respond reasonably does—that there is deliberate indifference when prisoners "face a substantial risk of serious harm and [when detention officials] disregard[] that risk by failing to take reasonable measures to abate it."[297]

There were two ways judges subtly restricted the constitutional right. The first was not so much about the content of the deliberate indifference rule as it was about the scope of its application. COVID-19 accelerated a trend in which courts applied the deliberate indifference framework—established to separate hard treatment into categories of acceptable and unacceptable punishment—in non-criminal detention contexts, where the constitution forbids punishment entirely. The deliberate indifference framework thereby displaced the *Bell* framework, which was the due process test ordinarily used to analyze non-criminal custody.

The second way judges subtly restricted underlying rights was by shifting the meaning of deliberate indifference itself. Almost all courts recognized the general threat that COVID-19 posed, and most recognized the threat to detention facilities.[298] Where courts insisted on applying the deliberate-indifference framework, the presence of constitutional harm turned on what health-protective responses precluded a deliberate indifference finding. In *Farmer*'s terms, it turned on how one defines "reasonable measures" to abate viral risk. Some lower courts

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[293] *See*, *e.g.*, Wilson v. Williams, 961 F.3d at 840 (finding respondents aware of the risk of COVID-19 where fifty-nine inmates and forty-six staff tested positive, and six inmates had died); *see also supra* notes 157 to 163 and accompanying text.
[294] 511 U.S. 825 (1994)
[295] *Id.* at 834, 844-45.
[296] *Id.* at 835.
[297] *Id.* at 847.
[298] *See supra* notes 153 to 159 and accompanying text.

essentially reasoned that the sheer magnitude of pandemic risk, and awareness thereof, meant that the failure to take sufficiently health protective measures was recklessly indifferent[299]—which is consistent with the way *Farmer* defined the concept. These cases, however, were more exception than rule.

Many judges simply converted the carefully crafted definition of deliberate indifference, which required awareness of risk and a failure to respond reasonably, into a requirement of subjective intent or knowledge.[300] The most extreme version of this view was captured in *Wragg v. Ortiz*,[301] with the court reasoning that, if detention officials "subjectively believe their containment measures are the best that they can do," the Eighth Amendment inquiry is over.[302] That interpretation of deliberate indifference is unfaithful to *Framer*, and makes relief almost impossible. Mental states approaching subjective intent are extremely difficult to prove because there the crucial information is almost always within the exclusive control of the defending party,[303] and that party is often the beneficiary of presumptions about candor and regularity.[304]

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[299] *See*, *e.g.*, Banks v. Booth, 459 F.Supp.3d 143, 157-59 (D.D.C. Apr. 19, 2020) (finding plaintiffs established likelihood of success in showing deliberate indifference where plaintiffs provided evidence defendants "are aware of the risk that COVID-19 poses to Plaintiffs' health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus").

[300] *See*, *e.g.*, Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) ("[T]he district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate."); Valentine v. Collier, 956 F.3d 797, 802 (5th Cir. 2020) ("Though the district court cited the Defendants' general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate."); Maney v. Brown, 464 F. Supp. 3d 1191, 1212 (D. Or. 2020) ("Plaintiffs do not cite to any evidence to establish that Defendants subjectively believed the measures they were taking were inadequate.") (internal citations and quotation marks omitted).

[301] Wragg v. Ortiz, 462 F. Supp. 3d. 476 (D. N.J. 2020).

[302] *Id.* at 507.

[303] *See* Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 947 (1992); Mitchell O'Shea Carney, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2580 (2020); *see also* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* The New Criminal Justice Thinking (Sharon Dolovich and Alexandra Natapoff eds. 2017) (calling attention to the "problem of other minds" in prisoner

Judges using the deliberate-framework also narrowed the constitutional rights by odd reference to judicially intuited side constraints. In many cases, they simply asked whether a detention site's response was reasonable in light of side constraints—without asking whether the side constraints were themselves reasonable. The absence of bold action was generally considered a reasonably practical constraint, so the failure to take it was usually rejected as a ground for a deliberate indifference finding.[305] For example, courts often refused to find deliberate indifference when that finding would have required broad discharge. A representative Eleventh Circuit opinion emphasized that "the inability to take positive action [in the form of decarceration] likely does not constitute a state of mind more blameworthy than negligence."[306] Nor was this reasoning limited to refusal-to-decarcerate scenarios. It carried the day in cases where plaintiffs alleged deliberate indifference for failure to facilitate social distancing.[307] And despite the CDC Interim Guidance providing that COVID-19 testing programs should include asymptomatic prisoners, many judges found that a refusal to muster resources necessary to do so was not deliberate indifference—because facilities simply could not be expected to pay to conduct facility-wide testing.[308] Why not?

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conditions litigation).

[304] *See* Friedman, *supra* note 303, at 947; David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2071 (2004); *see also* Dolovich, *supra* note 303, at 140-41 (discussing the effects of these things on review of decision-making at detention facilities).

[305] *But see* Banks v. Booth, 459 F. Supp. 3d 143, 158 (D.D.C. 2020) (aware that circumstances might reveal relief to have been unnecessary, nevertheless ordering partial relief on the ground that the facility was "failing to take comprehensive, timely, and proper steps to stem the spread of the virus").

[306] Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) (internal citations and quotation marks omitted).

[307] *See*, *e.g.*, Plata v. Newsom, 445 F. Supp. 3d 557, 563–64 (N.D. Cal. 2020) (finding where defendants did not implement social distancing, they were not deliberately indifferent because they "implemented several [other] measures"); *Wragg*, 462 F. Supp. 3d. at 509 ("That physical distancing is not possible in a prison setting, as [Plaintiffs] urge, does not an Eighth Amendment claim make.").

[308] *See* Wragg, 462 F. Supp. 3d. at 506. *But see* Savino v. Souza, 459 F. Supp. 3d 317, 331–32 (D. Mass. 2020) (finding failure to test more than twenty detainees, or conduct any contact tracing, would likely qualify as deliberate indifference); Coreas v. Bounds, 457 F. Supp. 3d 460, 463 (D.Md. Apr 30, 2020) (finding "lack of any testing for COVID-19" constituted deliberate indifference where defendant had not "actually tested anyone to date").

4. Appellate Re-calibration

Within a judicial system, appeals courts necessarily play policy-making roles that trial courts do not.[309] The pattern of policy-making evident in the pertinent appellate decisions is quite consistent with the view that COVID-19 provoked a moment of re-calibration. Across jurisdictions, appellate courts expressed discomfort with versions of rights and remedies that would permit substantial relief in lower courts—especially discharge.

Start with the U.S. Supreme Court. In *Ahlman v. Orange County*,[310] the federal district court had preliminarily enjoined practices in a jail housing 3,000 prisoners, which had experienced over 300 cases.[311] Among the practices forming the basis for the preliminary injunction were: crammed transportation; insufficiently-distanced dayroom socializing, telephone communication, and sleeping; failure to provide enough soap and other protective material; widespread denial of diagnostic testing; and an inability to separate symptomatic prisoners for treatment and subsequent isolation.[312] The district court found the risk "undeniably high" and determined that any compliance with actual jail policy was "piecemeal and inadequate."[313] In entering the preliminary injunction, the federal district court determined the facility likely violated the Eighth Amendment and the ADA.[314] The Ninth Circuit twice refused to stay the injunction.[315]

The Supreme Court, however, stayed the injunction pending further litigation, effectively mooting the remedy.[316] There was no reasoning of note in the Court's order. Four justices would have denied the State's application to dissolve the injunction.[317] Justice Sotomayor wrote a dissent reciting the problems at the jail, emphasizing that the likelihood of subsequent Supreme Court review was so low that the Court's

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309 *See* James J. Brudney Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 568 (2001).
310 140 S.Ct. 2620 (Aug. 5, 2020).
311 Ahlman v. Barnes, 445 F.Supp.3d 671, 694-95 (C.D. Cal. 2020).
312 *See id.*
313 *Id.* at 688.
314 *See id.* at 692.
315 Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *1 (9th Cir. June 17, 2020).
316 *See* 140 S.Ct. at 2620.
317 *See id.*

intervention was unwarranted, and arguing the facility could not show irreparable harm.[318]

Justice Sotomayor's position in *Ahlman* is somewhat noteworthy because it was Justice Sotomayor who had exercised in-chambers power to stay an injunction against Elkton Federal Correctional Institution ("FCI-Elkton") without even referring the question to her colleagues.[319] (The Sixth Circuit later vacated the injunction on the grounds that the plaintiffs had failed to show deliberate indifference.[320]) The difference in Justice Sotomayor's view of the two pieces of litigation may be explained by reference the fact that the *Ahlman* injunction was for changed conditions,[321] whereas the FCI-Elkton injunction was for discharge.[322]

The tendency of appeals courts to pare back trial-court relief was evident in the decision-making of the federal circuits, too. We mentioned the FCI-Elkton injunction, which the Sixth Circuit vacated on the ground that there was no deliberate indifference.[323] In another example, a federal district judge had issued a preliminary injunction against Michigan's Oakland County Jail, having found that it had fallen short of the CDC Interim Guidance.[324] The Sixth Circuit quickly vacated the district court's injunction, however, concluding the jail had "responded reasonably" to COVID-19 and there was no deliberate indifference.[325] Indeed, there were instances of appeals courts stepping in to limit trial remedies in the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.[326]

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[318] *See id.* at 2620 (Sotomayor, J. dissenting).
[319] *See* Mark Williams, Warden, et al., Applicants v. Craig Wilson, et al., 207 L. Ed. 2d 168 (June 4, 2020).
[320] *See* Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020).
[321] *See Ahlman*, 140 S.Ct. at 2619 (Sotomayor, J. dissenting).
[322] *See* Wilson, 961 F.3d at 844.
[323] *See* Wilson, 961 F.3d at 844.
[324] *See* Cameron v. Bouchard, 462 F. Supp. 3d 746, 784 (E.D. Mich.), *on reconsideration*, No. CV 20-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020), *and vacated*, 815 F. App'x 978 (6th Cir. 2020).
[325] *See* Cameron v. Bouchard, 815 F. App'x 978, 988 (6th Cir. 2020)
[326] *See*, *e.g.*, Hope v. Warden York Cty. Prison, 972 F.3d 310 (3d Cir. 2020) (finding immigration detainees failed to show substantial likelihood of success on claim that government was deliberately indifferent to their serious medical needs); Valentine v. Collier, 2020 WL 6039993, *5-8 (5th Cir. October 13, 2020) (granting prison's emergency motion for stay of preliminary injunction, finding district court had incorrectly applied Eighth Amendment deliberate indifference standard); Marlowe v. LeBlanc, 810 Fed. App'x. 302 (5th Cir. 2020) (staying temporary restraining order regarding conditions in state prison, requiring compliance with prison's own internal policies and that facility submit a plan to ensure social distancing and

We underscore that there is a meaningful inference to be drawn from the results in appeals courts, and their necessary status as policy-makers. Moreso than trial courts, appeals courts calibrate right and remedy in ways that control subsequent inquiries in that jurisdiction. As a result, they order and deny relief with an eye more towards what they believe to be a workable long-term equilibrium. It is therefore unsurprising to see those courts engaged in more conspicuous re-calibration—either by restricting the scope of the right, or the remedy. We are aware of no cases in which an appeals court awarded relief that district court denied.

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When COVID-19 hit America's detention sites, courts were immediately confronted with incumbent right-remedy combinations that, if straightforwardly applied, would have required substantial intrusions on detention policy and operations. Although judges leaned heavily on non-constitutional law tailored to individualized inquiry, many still had to wrestle with how sincerely to honor constitutional precedent configured for different risks. As one might expect, the lower-court adjudication was quite deferential to detention authorities, but there were cases deciding that detention conditions violated the federal constitution—especially when the plaintiffs were in non-criminal custody.[327]

Insofar as it was more hostile to broad constitutional relief, appellate decision-making had a different feel. In cases where remedies involved intrusive relief, senior tribunals dissolved health-protective TROs and preliminary injunctions, stayed permanent injunctions pending appeal, ordered further fact

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hygiene practices); Cameron v. Bouchard, 815 Fed.App'x. 978, 985 (6th Cir. 2020) (vacating preliminary injunctive relief, citing *Wilson v. Williams*, supra, and finding that the jail "acted reasonably" to prevent the spread of COVID-19); Wilson v. Williams, 961 F.3d 829, 845-846 (6th Cir. 2020) (vacating the district court's preliminary injunction, in case brought by medically vulnerable federal prisoners, holding "petitioners had not shown a likelihood of success on the merits of their Eighth Amendment claim, because they had not satisfied the subjective component of the deliberate indifference inquiry"); Mays v. Dart, 974 F.3d 810, 813 (7th Cir. 2020) (partially staying district court's preliminary injunction, finding district court failed to afford proper deference to the Sheriff's judgment regarding safety and security); Roman v. Wolf, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020) (staying preliminary injunction except to the extent necessary to comply with CDC Interim Guidance); Swain v. Junior, 958 F.3d 1081 (11th Cir. 2020) (finding district court erred in awarding injunctive relief because jail could not be expected to "do the impossible.").

[327] *See* Section II.A.3, *supra*.

finding before deciding issues against jailers, interposed exhaustion rules, and remanded for determinations pursuant to more deferential standards.[328] Simply put, the appellate courts limited the scope of winnable relief, either by paring back substantive rights or by restricting remedies.

B. Bureaucratic Limitations

Prisoner-conditions adjudication was also defined by the institutional limits of judicial action, evident when controlling law required courts to defer to and work through sclerotic detention bureaucracies. Although orders to put people behind bars require the state to overcome multiple institutional vetoes,[329] the collective action problem works the other way thereafter. It may take a village to imprison someone, but it also takes a village to get them out. Courts had a difficult time taking effective action because of bureaucratic friction up and down the custody chain, both before and after moments of judicial intervention. Multiple sites of resistance and dysfunction meant that securing timely judicial relief at sufficient scale was exceptionally challenging.

Strategies that depend on coordinated and decisive bureaucratic initiative are probably bad ones. Detention facilities are underfunded, and that shortfall has clear effects on public health measures.[330] Correctional personnel are also the lowest-status workers in law enforcement—with little training, high turnover, and lower pay.[331] The health and safety of people in custody is therefore subject to the layered decision-making of a short-staffed and modestly trained professional community with limited oversight and accountability.[332] COVID-related discharge often required the input of these frontline facility officials, as well as records unit officers, mental health professionals, senior corrections commissioners, prison physicians or other health providers capable of giving appropriate referrals, parole commissioners, and risk panelists.[333]

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[328] *See* Section III.A.4, *supra*.

[329] To subject someone to criminal custody, for example, requires the effective sign off of police, multiple prosecutors, a jury, and the judiciary.

[330] *See* NRC Report, *supra* note 41, at 31.

[331] *See* John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 485 (2006); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 666 n.119 (1993).

[332] *See* Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 303-04 (2010).

[333] *See* Kovarsky, *supra* note 2, at 86 n.84.

Judicial activity predicated on the functional operation of that bureaucratic ecosystem—an ecosystem often working at some institutional remove from correctional leadership—is at a significant disadvantage. Detention bureaucracies complicated relief because they slowed exhaustion that must usually be complete before judicial intervention begins, because their health-and-safety practices were given deference typically accorded to administrative action, and because so much of the judicial relief awarded had to work through the problematic bureaucracies themselves.

1. Bureaucracy and exhaustion

On the front end, much of the relief available in federal courts requires that detained complainants have exhausted remedies—institutional remedies, administrative remedies, and, in the case of federal litigation, state judicial remedies.[334] Exhaustion often required detainees to make futile requests that consumed precious time. If the exhaustion requirements did not require that the detainee have received an adverse decision, then they usually required them to wait until requests for relief timed out.[335]

Moving a detainee expeditiously through administrative process necessary to exhaust a claim requires multiple moments of bureaucratic initiative. Delay by any actor in the chain slows exhaustion, and any judicial relief contingent thereupon.[336] Exhaustion requirements may be particularly insurmountable during a pandemic, when overwhelmed prison administrators will struggle to respond on timetables necessary to afford meaningful relief. For example, in the federal system, many compassionate release requests went unanswered for months; when they were answered they were typically denied.[337]

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[334] *See supra* notes 137 to 146 and accompanying text.

[335] *Cf*, *e.g.*, Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) ("[A]vailable administrative remedies are exhausted when the time limits for the prison's response set forth in the prison Grievance Procedures have expired.").

[336] *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 461 (2014); Kovarsky, *supra* note 2, at 88 nn.84-85 and accompanying text.

[337] *See* Keri Blakinger and Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.* THE MARSHALL PROJECT (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied.

2. Bureaucracy and deference

Another problem centered on deference models operating on assumptions about administrative deliberation and expertise.[338] Not only do deference practices bake in assumptions about the integrity of administrative process and the desirability of its outcomes,[339] there is also a longstanding tradition of deference to the public heath decision-making of local and state authorities.[340] During the pandemic, however, the predicates for routinized deference were absent. The faith typically placed in administrative leadership ended up as rather unjustified—as one might expect when object of deference was the ability of prison officials to manage once-in-a-lifetime pandemic risk.

Whereas deference to administrative expertise would ordinarily be justified on the theory that science should be privileged in the decision-making,[341] the deference to the CDC Interim Guidance appeared to have the opposite effect. Judges fixated on the Interim Guidance—which was general, minimalist, and precatory[342]—as a scientific lodestar.[343] Setting aside its generality and nonmandatory status, the Interim Guidance was inadequate because it was not paired with the need to reduce overcrowding—a pairing that WHO and NAS reports emphasized.[344] Judges, in short, used the Interim Guidance as a means to discount information presented by most other public health experts.[345]

3. Bureaucracy and process

The struggles associated with the intense bureaucratic presence were nowhere more evident than when courts had to enforce bureaucratic compliance. Under these circumstances, judicial interventions were aimed at the bureaucratic substructure necessary to produce health-protective outcomes rather than in the form of orders for discharge or changed

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338 *See* Eric Berger, *Comparative Capacity and Competence*, 2020 WIS. L. REV. 215, 236 (2020).
339 *See id.* at 234.
340 *See* Andrew Brunsden, *Hepatitis C in Prisons: Evolving Toward Decency Through Adequate Medical Care and Public Health Reform*, 54 UCLA L. REV. 465, 497 (2006); Friedman, *supra* note 303, at 947.
341 *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 241 (1984); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1727 (2011).
342 *See supra* notes 71 to 77 and accompanying text.
343 *See supra* notes 232 to 241 and accompanying text.
344 *See supra* notes 66 to 69 and accompanying text.
345 *See id.*

conditions *per se*. Many of these interventions placed judges in precisely the receivership roles that have historically made the Supreme Court uncomfortable.[346] Recall *Gayle v. Meade*, in which a federal court had to appoint a Special Master just to ensure that an ICE facility complied with prior remedial orders.[347]

The need for judges to guarantee the integrity of bureaucratic decision-making was especially prominent in several pieces of litigation attacking practices at federal correctional institutions. Some of the formal legal rules in the federal system were favorable, at least for certain detainee categories seeking individualized relief. The First Step Act, enacted in 2018, had already created new avenues for compassionate release.[348] In March 2020, the CARES Act vested the Justice Department with other broad discharge powers, built on existing home confinement and compassionate release authority.[349] With respect to home confinement, the Attorney General issued implementing directives to the BOP, ordering federal correctional facilities to use the new statutory tools to secure protection for older people with preexisting medical conditions.[350] Memorializing those directives in April, the AG singled out the need for expeditious action at FCI-Oakdale (LA), FCI-Danbury (CT), and FCI-Elkton (OH).[351]

Despite discharge-friendlier authority, bureaucratic resistance within the BOP quickly necessitated judicial involvement. At the top levels, BOP further limited the statutorily identified groups eligible for home confinement,[352]

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[346] *See supra* note 272 and accompanying text.

[347] *See* Gayle v. Meade, No. 20-21553-CIV, 2020 WL 4047334, at *3 (S.D. Fla. July 17, 2020).

[348] 18 U.S.C. § 3582(c)(1)(A).

[349] *See* Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

[350] *See* Clare Hymes, *Barr Tells Federal Prisons To Send Inmates Home in Response to Coronavirus Outbreak*, CBS News (Mar. 27, 2020), https://www.cbsnews.com/news/attorneygeneral-william-barr-bureau-of-prisons-send-inmates-home-coronavirus-covid-19/ [https://perma.cc/5ZFC-H8YQ].

[351] *See* Attorney General William Barr, Memorandum for Director of Bureau of Prisons (Apr. 3, 2020), https://www.politico.com /f/?id=00000171-4255-d6b1-a3f1-c6d51b810000 [https://perma.cc/VXN2-SF8A].

[352] *See* Federal Bureau of Prisons, COVID-19 Action Plan: Phase Five (Mar 31, 2020), https://www.bop.gov/resources/news/20200331_ covid19_action_plan_5.jsp.

[352] *See* Clare Hymes, *Amid COVID-19 Threat, Inmates and Families Confused by Federal Guidance on Home Confinement Release*, CBS NEWS (Apr. 24, 2020), https://www.cbsnews.com/news/amid-covid-19-threat-inmates-and-families-confused-byfederal-guidance-on-home-

and gave limited guidance as to how to use the compassionate release provisions in COVID-19 cases.[353] There was substantial friction at lower bureaucratic levels, too. A federal judge had to issue a temporary restraining order against FCI-Danbury, which failed "to take [the AG's order and corresponding legislation] seriously."[354] At that facility, there were 241 compassionate release applications during the first six weeks of the COVID-19 emergency, and none were granted.[355] A federal judge called the BOP's discharge procedures "Kafkaesque."[356]

Even when subject to a judicial order, some facilities "made only minimal effort to get at-risk inmates out of harm's way,"[357] and the appetite for ongoing judicial enforcement was less than an inch deep. A month after a federal judge issued a preliminary injunction against FCI-Elkton, the warden had *still* failed to discharge a single person.[358] The federal district court entered another order further directing compliance, but that order was stayed pending appeal by the U.S. Supreme Court and later reversed by the Sixth Circuit.[359] When a federal judge dismissed a comparable suit about activity at FCI-Oakdale, she disparaged the class action as an attempt to make her a "de facto 'super' warden."[360]

C. Detention Exceptionalism

The pandemic required legal institutions to rethink the operation of several constitutional rights, yet there is something unique in the tone and decision-making of COVID-19 detention cases. This "detention exceptionalism" was, we strongly suspect, attributable to entrenched beliefs about the safety risks posed by, and moral worth attributed to, people in

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confinement-release/.

[353] Compassionate release legislation permitted officials to release individuals if "extraordinary and compelling reasons warrant such a reduction[.]" 18 U.S.C. § 3582(c)(1)(A). *See also* Wilson v. Williams, No. 4:20-CV-00794, 2020 WL 2542131, at *4 (N.D. Ohio May 19, 2020) (describing BOP guidance on compassionate release criteria, consisting of a list of non-exclusive factors).

[354] Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 427 (D. Conn. 2020).

[355] *See id.*

[356] United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *1 (S.D.N.Y. Apr. 20, 2020).

[357] Wilson v. Williams, No. 4:20-CV-00794, 2020 WL 2542131, at *2 (N.D. Ohio May 19, 2020).

[358] *See id.*

[359] *See* Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (appellate disposition); Williams v. Wilson, 2020 WL 2988458 (Mem) (2020) (Supreme Court action).

[360] Livas v. Myers, 2:20-cv-00422-TAD-KK (W.D.LA. April 22, 2020).

American detention facilities. One does not have to look hard to find supportive evidence.

Compare the Supreme Court treatment of detainee's rights with its treatment of personal rights in other stress-tested contexts. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[361] the Supreme Court voted 5-4 to enjoin enforcement of a New York rule concerning occupancy limits for religious services.[362] The New York rule had limited the permissible size of religious gatherings, which were in turn pegged to the size of the physical space involved.[363] As mentioned, the Court acknowledged that its justices "are not public health experts" and that they should "respect the judgment of those with special expertise and responsibility in this area," but nonetheless declared that "even in a pandemic, the Constitution cannot be put away and forgotten."[364] In a noticeable deviation from a pattern of minimalist intervention on constitutional issues, the Court decided the matter even though New York had already relaxed restrictions to permit larger religious gatherings.[365]

Roman Catholic Diocese of Brooklyn, and the general category of decision-making associated with it,[366] demonstrates a contrast between the treatment of constitutional rights in detention litigation, on the one hand, and the treatment of constitutional rights in other contexts, on the other. Vulnerable detainees incapable of protecting themselves through autonomous decision-making bear partially-enforced constitutional rights, while religious groups capable of self-protection can expect full enforcement of rights to religious practice and expression—justified by grand references to the uncompromising application of constitutional principles during emergencies. We believe that such detainee exceptionalism reflects views that: (1) people who have spent time in custody pose a substantially elevated danger to the community; and (2)

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[361] 141 S. Ct. 63 (2020).
[362] *See id.* at 69.
[363] *See id.* at 66.
[364] *Id.* at 68.
[365] *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68.
[366] Exemptions from generally applicable health-and-safety rules are gaining traction in the lower courts, too. Relying on *Roman Catholic Diocese of Brooklyn*, the Sixth Circuit—which vacated the FCI-Elkton remedies—preliminarily enjoined the Toledo County Public School District's generally applicable order closing school facilities, because it resulted in closing religious schools. *See* Monclova Christian Academy v. Toledo-Lucas County Health Dept., No. 20-4300 (6th Cir. 2020), at https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0392p-06.pdf.

the health of such people is somehow worth less than the health of other community members.

1. The perception of danger

Inflated perception of safety risk plays a clear role release practices across institutions. By "perceived safety risk," we mean to describe the perceived risk of releasing a detainee into the general population. Perception of safety risk would, for instance, explain the relative litigation success enjoyed by ICE detainees, and the relative failures experienced by those in custody because they were convicted of crimes.[367]

The literature critical of mass incarceration shares a common empirical insight: the American public, and the institutions that translate its punishment preferences, over-estimate the criminality that detention averts.[368] Imprisonment does not perform any of the offense-reduction functions nearly as well as people once believed—not with respect to the incapacitation or specific deterrence of the person in custody, and not with respect to the general deterrence of other people.[369] These effects are clearly non-existent when the imprisonment is some increment of an already-long sentence, and when it involves an older detainee.[370] Nevertheless, the belief that more detention improves public safety persists,[371] and it explains why even the broadest decarceration initiatives often exclude sentence reductions for people convicted of violent offenses.[372]

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[367] *See* Part II.A.3. *supra*.

[368] *Cf.*, *e.g.*, Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775, 782 (2020) (summarizing modern research on relationship between imprisonment and recidivism as "suggest[ing] that prison is not more effective than non-custodial sanctions at reducing recidivism"); Thomas S. Ulen, *Law and Subjective Well-Being*, 82 U. CHI. L. REV. 1753, 1772 (2015) (referring to "accumulating empirical evidence" that suggests smaller-than-believed causal relationship between incarceration and deterrence).

[369] *See* Mirko Bagaric, Dan Hunter, Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 94-95 (2018).

[370] *See* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 14-15 (2017) (lengthening sentences); John Monahan et. al., *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191, 192 (2017) (older offenders).

[371] *See* Binder & Notterman, *supra* note 370, at 30.

[372] *See* J.J. Prescott, Benjamin Pyle, Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1643 n.1 (2020) (collecting sources).

Perceptions of safety threat indeed seemed to drive certain decision-making patterns. Recall that courts were most willing to invoke constitutional law and to order collective discharge in ICE detention cases,[373] where the purpose of detention was not to punish or otherwise prevent criminality, but to ensure review of alleged immigration violations. On the other hand, courts were least willing to intervene in cases involving people convicted of crimes and sentenced to prison time. They were willing to order individualized release in certain cases, but the pace and mix of releases demonstrate that perception of recidivism risk remained a major driver of judicial intervention.

The danger-constrained approach to prison discharge severely limited the response to pandemic risk, because it limited the ability to sufficiently decarcerate. Judges can order statutory discharge only for detainees that the legislature has declared eligible for such relief.[374] Most releases therefore involved older people, or medically vulnerable people convicted of lesser crimes.[375] But most people who are convicted and serving prison time do not have that profile; they are serving longer sentences for violent or otherwise serious criminality.[376] Under criteria adopted by many states, for example, people in custody because they were convicted of violent crimes are simply ineligible for early release.[377]

And although courts were willing to order individualized release for convicted detainees, they were categorically unwilling to order remedies that would have required broader

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[373] *See* II.A.3.

[374] *See* Dara Lind, *The Prison Was Built to Hold 1,500 Inmates. It Had Over 2,000 Coronavirus Cases*, PROPUBLICA (June 18, 2020), https://www.propublica.org/article/the-prison-was-built-to-hold-1500-inmates-it-had-over-2000-coronavirus-cases.

[375] *See*, *e.g.*, Ann E. Marimow, *Sick, Elderly Prisoners are At Risk for COVID-19. A New D.C. Law Makes It Easier For Them To Seek Early Release*, Wash. Post (Dec. 30, 2020), https://www.washingtonpost.com/local/legal-issues/sick-elderly-inmates-coronavirus-release/2020/12/29/5342816c-3fcd-11eb-8db8-395dedaaa036_story.html

[376] *See* Prescott et al., *supra* note 372, at 1648; *see also* 2020 NRC Report, *supra* note 9, at 57-58 (concluding that there is "little evidence" that parole release, compassionate release, or other early release measures successfully reduced prison populations").

[377] *See* Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020); *see also* Mirko Bagaric et. al., *Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties-but Science Has the Answer*, 53 IND. L. REV. 499, 523 (2020) (discussing with respect to federal prisoners).

discharge. They refused to order discharge *per se*,[378] and they were extraordinarily reluctant to order health-protective practices to which prisons objected on security grounds.[379] Opinions refusing relief against prisons are replete with non-specific concerns about safety risk, and generally fail to grapple with the empirical fact that those concerns are grossly exaggerated. It therefore comes as no surprise that prisons were uniquely unable to achieve population reduction necessary to slow COVID-19 spread.[380]

The decisional treatment of jails and other sites of pretrial detention lands somewhere in the middle, but it still demonstrates the judicial focus on perceived safety risk. In 1984, Congress expressly directed federal courts to consider public safety in pretrial bail determinations, and the Supreme Court approved that criterion three years later.[381] A great deal of data nonetheless captures how poorly judicial officials predict the pretrial risk, and how heavily those officials err on the side of detention.[382] Releasing tranches of pretrial detainees poses little threat to public safety,[383] but judicial intervention at American jails remained quite sensitive to exaggerated risk.[384]

All of this is to say that, as we begin to search for reasons why courts second-classed rights to detainee health and safety, we can think of a good place to start looking. The pattern of COVID-19 detainee decisions reflect a longstanding and generalized idea that releasing people from correctional

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[378] *See* Section II.A.1, *supra*.
[379] *See supra* notes 306 to 308 and accompanying text.
[380] *See* 2020 NRC Report, *supra* note 9, at 56-57.
[381] *See United States v. Salerno*, 481 U.S. 739, 755 (1984).
[382] *See generally* Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. 439, 469-75 (2020) (discussing adoption of risk-assessment tools to predict danger in pretrial decision-making); *see also* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497 (2012) (collecting sources showing that judges predict pretrial crime poorly and noting potential of algorithmic risk assessment instruments); Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1280 (2018) (discussing the role of algorithmically-augmented prediction as central to bail reform).
[383] *See* Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020) (collecting studies), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/.
[384] *See*, *e.g.*, Doug Colbert and Colin Starger, *Bail Injustice In the Time of COVID-19*, THE BALTIMORE SUN (Sep. 7, 2020), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0906-bail-reform-20200907-crgclw6s4jhavmmtdks4ebniqm-story.html (documenting phenomenon in Maryland bail proceedings).

custody poses broad safety risks. Enforcement of established rights against health risk crashed into an extremely well-defined interest in release avoidance that underlies the commitment to incarceration as a public safety strategy. The enforcement of every right involves a tradeoff with some countervailing interest—but few of those interests are as triggering as that in the "the community's" safety from people accused or convicted of criminality.

2. The value of detainees

The other pillar of detention exceptionalism centers on the moral worth of those in detention—specifically, the American tendency to treat such people as less worthy of investment and protection.[385] It is fairly well established that, when people assert that incarceration improves public safety, they mean safety of the unincarcerated public.[386] To the extent that prior criminality predicts future offending, placing those who have committed crimes behind bars does not *prevent* crime so much as it does *change where it happens*.[387] To the extent that criminality is situational,[388] incarceration is just as likely to increase crime as it is to suppress it; detention is criminogenic.[389]

The notion that incarceration improves social safety persists not so much on the back of robust empirical support, but because society cares less about the disutility of crime victims who are themselves accused or convicted of criminality. As Professors Guyora Binder and Ben Notterman put it, "Since incapacitation strategies do not achieve utility, it seems probable that they have prevailed and persist because of their distributive or expressive effects."[390] Americans accept such distribution and expression because, to put things bluntly, they accept that people in custody are "without equal moral or political standing."[391]

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[385] *See generally* Sharon Dolovich, Exclusion and Control in the Carceral State, 16 Berkeley J. Crim. L. 259 (2011) (linking mass carceral practices to general view of prisoners' sub-humanity).
[386] *See id.* at 272-74.
[387] *See* Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537, 540 (2015).
[388] *See* Binder & Notterman, *supra* note 370, at notes 233 to 255 and accompanying text.
[389] *See* Joshua C. Cochran et al., *Assessing the Effectiveness of Correctional Sanctions*, 30 J. QUANTITATIVE CRIMINOLOGY 317 (2014).
[390] Binder & Notterman, *supra* note 370, at 43.
[391] Dolovich, *supra* note 385, at 330.

And so it is with COVID-19.[392] Notwithstanding the overwhelming risk associated with infection in such crowded and under-protected environments, American institutions resist discharge by vague reference to public safety.[393] It seems difficult to argue that such references to public safety involve anything like a rigorous utilitarian calculation, because COVID-19 presents health risks to detention communities that almost certainly swamp risks associated with discharge. Instead, these references to safety reflect a longstanding American practice of discounting the interests and moral worth of people in government custody. In the influenced discourse and decision-making, the damage to detainee populations simply matters less than damage to other communities.[394]

CONCLUSION

The way courts enforce detainee-protective rights and remedies during the pandemic is different from the way they enforce other rules. Imagine if, in *Ahlman* (the Orange County jail case), the Supreme Court had applied the same logic it used in *Roman Catholic Diocese of Brooklyn* (the New York religious practice case). The prisoners-rights opinion would have emphasized that, during a pandemic, an order refusing relief "would lead to irreparable injury," risking serious harm or death.[395] That *Ahlman* opinion would have declared that, notwithstanding the "special expertise and responsibility" of nonjudicial actors, "even in a pandemic, the Constitution cannot be put away and forgotten."[396] That version of *Ahlman* would have changed the result for people in the Orange County detention facility, and it would have set a very different tone for pandemic judging.

That version of *Ahlman* is a counterfactual. Instead, the Supreme Court called for no such intervention, and judges were part of a broader injustice forcing those in America's detention facilities to bear a staggering share of COVID-19 risk. Judges might have lacked the desire, imagination, or

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[392] Professor Dolovich draws a similar conclusion about some of the judicial response. *See* Dolovich, *supra* note 2, at 5.

[393] *See supra* note 380; *see also* Mays v. Dart, 974 F.3d 810, 813 (7th Cir. 2020) (invoking safety risks).

[394] *See* Dolovich, *supra* note 385, at 330-31.

[395] Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87, 2020 WL 6948354, at *1 (U.S.
Nov. 25, 2020) ("They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest.")

[396] Id. at *3.

confidence to order sufficiently health-protective remedies, but we will never know—because they were constrained by limited authority and bureaucratic resistance. As far as health-protective detention practices go, judicial intervention is part of a much larger process of institutional settlement—across bureaucracies, between administrative subordinates and leadership, and involving multiple branches of government. Any entity within that ecosystem would struggle to produce appropriate levels of health protection without concerted action from others. Judges were no different, and perhaps they were uniquely disadvantaged.

What to do going forward? How will these same problems, for example, affect how America vaccinates the 2.3 million people in detention? Before there can be any serious improvement, bureaucracies and other nonjudicial institutions will have to treat pandemic risk differently than other health-and-safety threats, developing statutes and regulations that permit responsive action without cumbersome, individualized showings of health risk. And American institutions will have to overcome their empirically dubious resistance to decarceration—judges must be willing and able to order more discharge, to coerce conditions improvement notwithstanding the need for complementary release, and to assume receivership roles necessary to ensure compliance with these judicial orders. We hope that many will learn lasting lessons in the flimsy judicial response to COVID-19 at American detention sites, but we are dubious. Absent a broad social commitment to more sweeping judicial remedies, the past will remain a sad prologue.