Viral Injustice

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The COVID-19 pandemic blighted all aspects of American life, but people in jails, prisons, and other detention sites experienced singular harm and neglect. Housing vulnerable detainee populations with elevated medical needs, these facilities were ticking time bombs. They were overcrowded, underfunded, unsanitary, insufficiently ventilated, and failed to meet even minimum health-and-safety standards. Every unit of national and sub-national government failed to prevent detainee communities from becoming pandemic epicenters, and judges were no exception.

This Article takes a comprehensive look at the decisional law growing out of COVID-19 detainee litigation and situates the judicial response as part of a comprehensive institutional failure. We read hundreds of COVID-19 custody cases, and our analysis classifies the decision-making by reference to three attributes: the form of detention at issue, the substantive right asserted, and the remedy sought. Several patterns emerged. Judges avoided constitutional holdings whenever they could, rejected requests for ongoing supervision, and resisted collective discharge—limiting such relief to vulnerable subpopulations. The most successful litigants were detainees in custody pending immigration proceedings, and the least successful were those convicted of crimes.

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We draw three conclusions that bear on subsequent pandemic responses, including vaccination efforts, and on incarceration more generally. First, courts avoided robust relief by recalibrating rights and remedies, particularly those relating to the Eighth and Fourteenth Amendments. Second, court intervention was especially limited by the behavior of bureaucracies responsible for the detention function. Third, the judicial activity reflected entrenched assumptions about the danger and moral worth of prisoners that are widespread but difficult to defend. Before the judiciary can effectively respond to the dangers posed by a pandemic, nonjudicial institutions will have to tolerate large-scale, exigency-driven releases from custody, and judges will have to overcome their empirically dubious resistance to decarceration.

INTRODUCTION

The coronavirus-19 pandemic (COVID-19) 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 was, however, one American community whose experience of neglect and harm was almost singular: people in government custody.[2]

COVID-19 poses a unique threat to people in jails, prisons, and other detention sites.[3] During the early stages of the pandemic, persons held in custody were 5.5 times more likely than other people to be infected with COVID-19 and 3 times more likely to die from infection.[4] COVID-19 began to tear through

1. *See generally* Seth A. Berkowitz, Crystal Wiley Cené & Avik Chatterjee, *Covid-19 and Health Equity—Time to Think Big*, 383 NEW ENG. J. MED. e76(1) (2020) (linking adverse COVID-19 outcomes to structural discrimination and disadvantage); *COVID-19 Racial and Ethnic Health Disparities*, CTR. FOR DISEASE CONTROL (Dec. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html [https://perma.cc/4N6U-JTG7] (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 "prisoner" 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 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*, 2020 U. CHI. L. REV. ONLINE 4 (2020) [hereinafter Dolovich, *Mass Incarceration, Meet Covid-19*] (identifying COVID-19 detainee mitigation efforts and analyzing broad failures); Brandon L. Garrett, *Constitutional Criminal Procedure Post-COVID*, HARV. L. REV. BLOG (May 19, 2020), https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid/ [https://perma.cc/2A4W-MMUB] (providing an 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* Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602–03 (2020). For further discussion of the statistic, see Benjamin A. Barsky, Eric Reinhart, Paul Farmer & Salmaan Keshavjee, *Vaccination Plus Decarceration — Stopping Covid-19 in Jails and Prisons*, 384 NEW ENG. J. MED 1583, 1584 (2021).

detention communities as soon as it reached the United States—jails and prisons quickly became viral epicenters.[5] The heightened rates of mortality and infection are products of several combined problems. The virus is transmitted more easily in confined spaces,[6] and perhaps no space contains a fixed population less capable of dispersing than a detention facility.[7] American detention sites, moreover, have long lacked adequate ventilation, sanitation, and healthcare.[8] Persons serving criminal sentences are older, are more likely to have preexisting conditions, and are more likely to have complex medical needs.[9] As of this writing, COVID-19 has infected over 439,000 persons in correctional custody, and, including staff, about 2,900 have died.[10]

Every outbreak at a detention center is a public health crisis; together, they represent a national catastrophe that forced judges to consider the health-protective rights of detainees during emergencies. The results were 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 and adjacent staff with pandemic risk. What stands out is not just the judiciary's minimalist posture 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 during the pandemic started at the top and trickled down. Compare the Supreme Court's treatment of such rights (which would likely save lives) with its treatment of the rights to religious practice and expression (which may place people at risk). For example, in *Roman Catholic Diocese of Brooklyn v. Cuomo*,[13] the Court disabled a New York provision, enacted during the height of the pandemic, 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

5. *See* Dolovich, *Mass Incarceration, Meet Covid-19*, *supra* note 3, at 4; Clark Neily, *Decarceration in the Face of a Pandemic*, CATO INST. AT LIBERTY (Apr. 30, 2020), https://www.cato.org/blog/decarceration-face-pandemic [https://perma.cc/P7BM-NSE6].

6. *See* COVID-19: Frequently Asked Questions (Oct. 21, 2021), https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics [https://perma.cc/CD4P-TXRU].

7. *See* Kovarsky, *supra* note 3, at 74; Dolovich, *Mass Incarceration, Meet Covid-19*, *supra* note 3, at 8.

8. *See* Neily, *supra* note 5.

9. *See* Kovarsky, *supra* note 3, at 74.

10. *See* COVID PRISON PROJECT (last visited Nov. 30, 2021), https://covidprisonproject.com.

11. *See infra* Section I.B for an explanation of available doctrine.

12. *See infra* Part II.

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.

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 the spread of the pandemic at certain detention sites.[16] The Court, however, twice intervened, using so-called "shadow docket" orders to countermand the intervention of lower federal judges—despite detailed lower-court factfinding concluding that some preliminary relief was necessary to prevent irreparable harm to the lives and health of detainees.[17] The message was clear: the Court would enforce deference to the public-health-and-safety decisions of detention officials.

This Article is, to our knowledge, the first to comprehensively map the *judicial* response to the pandemic's effect on persons in custody. 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: (1) the type of custody or form of detention at issue;[19] (2) the substance of the health-protective right asserted;[20] and (3) features of the remedy sought.[21]

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15. *Id.* at 68.

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

17. *See Ahlman*, 140 S. Ct. at 2620; *see also id.* at 2621 (Sotomayor, J., dissenting); Williams v. Wilson, 207 L. Ed. 2d 168, 168 (June 4, 2020). Both were "shadow docket" orders, issued without oral argument and without a signed "opinion of the court." *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015) (coining "shadow docket" as a term). Regarding the growth in the use and the divisiveness of shadow docket rulings, see Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket and the Kennedy Effect*, SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/ [https://perma.cc/2YDB-5VXF].

18. *See infra* Section I.A. For an important overview from a public health perspective, see NAT'L ACADEMIES OF SCIS., ENG'G & MED., DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 26–28 (Emily A. Wang, Bruce Western, Emily P. Backes & Julie Schuck eds., 2020) [hereinafter 2020 NAS REPORT].

19. *See infra* Section I.B.1.

20. *See infra* Section I.B.2.

21. *See infra* Section I.B.3.

In Part II, we map the COVID-19 litigation, relying on the classification scheme developed in Part I. For cases in which litigants sought release from detention, courts avoided collective remedies and ducked constitutional questions where non-constitutional grounds for discharge were available.[22] They strayed from these principles of avoidance and granted relief primarily in cases where custody was auxiliary to some immigration proceeding—from the perspective of those in custody, perhaps the lone bright spot in COVID-19 detention litigation.[23] For cases in which litigants sought changed conditions, the guidance from the Centers for Disease Control and Prevention (CDC) became a de facto (and problematic) standard of care, in part both because that guidance was highly informal and because it downplayed the fact that correctional facilities needed to 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 narrowed 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: in addition to any shortage of will, 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 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. We do not mean to suggest that inadequate protection of

22. *See infra* Sections II.A.1 & II.A.2.

23. *See infra* Section II.A.3.

24. *See infra* Section II.B. For an excellent critique of the CDC standards and the role that they played in litigation, see Developments in the Law, *Conditions of Confinement, COVID-19, and the CDC*, 134 HARV. L. REV. 2233 (2021).

25. *See infra* Section III.A.

26. *See infra* Section III.B.

27. *See infra* Section III.C.

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, 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.

detention communities is solely or primarily the judiciary's fault. There is more than enough institutional blame to go around, and there was little political will to manage risks on behalf of unpopular constituencies. Our point is that judges did not serve as a backstop to protect persons held in custody and that trial judges who tried were largely superseded by appellate courts.[29]

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;[30] (2) the nature of the underlying health-protective right;[31] and (3) the remedy sought.[32] We do not claim that every case can be neatly plotted using these three attributes, but simply that these are crucial concepts for understanding the pertinent judicial behavior.

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.[33]

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29. *See* Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANNUAL REV. OF CRIMINOLOGY (forthcoming 2022) [hereinafter Dolovich, *The Failed Regulation and Oversight of American Prisons*] (manuscript at 5.16), annualreviews.org/doi/pdf/10.1146/annurev-criminol-011518-024445 [https://perma.cc/6L3A-5YF6] ("The almost uniform refusal of the federal judiciary to respond to urgent appeals for broad constitutional relief during the pandemic despite demonstrable elevated risk posed to the incarcerated by COVID powerfully illustrates just how little meaningful constitutional protection for people in custody the federal courts are prepared to provide." (internal citations omitted)); *cf. id.* (manuscript at 5.4) (explaining that, in "a well-functioning system, the courts would provide a backstop to legislative or executive failure").

30. *See infra* Section I.B.1.

31. *See infra* Section I.B.2.

32. *See infra* Section I.B.3.

33. *See Corrections*, BUREAU OF JUST. STAT. (Feb. 18, 2021), https://www.bjs.gov/index.cfm?ty=tp&tid=1#terms_def [https://perma.cc/8873-PY2S].

1. Vulnerable Detention Communities

Mass incarceration has created a "perfect breeding ground for the virus."[34] 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, and some unknown number of Indian Country jails, as well as various other military prisons, civil commitment facilities, government psychiatric centers, and territorial prisons.[35] 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.[36] In what follows, we detail the health vulnerabilities of these different detainee categories.

People in prison—mostly the non-jail population convicted of crimes—are people with vulnerable health profiles, even setting aside that they live in dangerous confinement. As of 2020, there were approximately 1,466,000 people in state and federal prison.[37] Many are older because they are serving longer sentences.[38] This graying detainee cohort has chronic health problems, elevated mental health needs, and substantially impaired mobility.[39] Many entered prison

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34. Editorial Bd., *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 [https://perma.cc/E3G7-A2RH]; *see also* Dolovich, *Mass Incarceration, Meet Covid-19*, *supra* note 3, 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.").

35. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/J28G-PDRW].

36. Prisons generally contain people convicted and serving longer sentences for more serious crimes. *See* DANIELLE KAEBLE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST, NCJ 252205, TIME SERVED IN STATE PRISON, 2016 (2018), https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf [https://perma.cc/2CAG-YM36]. Jails generally contain those awaiting trial or serving short criminal sentences. *See* ZHEN ZENG, BUREAU OF JUST. STAT., DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 1 (2020), https://bjs.ojp.gov/content/pub/pdf/ji18.pdf [https://perma.cc/5AAJ-V68Z]. 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* AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/8389-2DTR].

37. *See* E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253516, PRISONERS IN 2018, at 1 (2020), https://bjs.ojp.gov/content/pub/pdf/p18.pdf [https://perma.cc/LV69-7GCS].

38. *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/ [https://perma.cc/J4E5-E4W8] (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/ [https://perma.cc/9WFE-UHYM] (providing state-by-state data).

39. *See* Kimberly A. Skarupski, Alden Gross, Jennifer A. Schrack, Jennifer A. Deal & Gabriel B. Eber, *The Health of America's Aging Prison Population*, 40 EPIDEMIOLOGIC REVS. 157, 157 (2018);

in poor health to begin with, due in no small part to dangerous substance abuse profiles.[40]

Prison infrastructure and its environmental features make health-and-safety-protective practices challenging. Detention facilities are generally overcrowded, which means that social distancing is difficult or impossible.[41] Dormitories are often double- or triple-bunked, there are not enough bathrooms and showers, congregate areas are crowded, and detainees are double-celled.[42] 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.[43] These facilities have long been vulnerable to disease—including hepatitis B and C, HIV/AIDS, and tuberculosis.[44] Most prisons are in rural areas and far from a hospital, thereby frustrating access to outside healthcare.[45] Physical restrictions on detainee movement help only so much, at least in the absence of restrictions on the movement of staff and visitors.[46]

Jails ordinarily house people awaiting trial, as well as people convicted of less-serious crimes.[47] 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.[48] There is far more detainee turnover in jails than there is in prisons, and the average jail stay

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LAURA M. MARUSCHAK, MARCUS BERZOFSKY & JENNIFER UNANGST, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, at 23 (2015), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf [https://perma.cc/R8VD-ANBY].

40. *See* MARUSCHAK ET AL., *supra* note 39, at 10.

41. *See* Neily, *supra* note 7; *see also* CARSON, *supra* note 37 ("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.").

42. *See* 2020 NAS REPORT, *supra* note 18, at 26–28.

43. *See id.* at 26–27.

44. *See id.* at 14, 17; *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 J.L. & ECON. 251 (2009) (describing spread of AIDS in carceral settings); Kathyrn M. Nowotny, Marisa Omori, Melanie McKenna & Joshua Kleinman, *Incarceration Rates and Incidence of Sexually Transmitted Infections in US Counties, 2011–2016*, 110 AM. J. OF PUB. HEALTH S130 (2020) (same, regarding sexually transmitted infections generally); Anne C. Spaulding & David L. Thomas, *Screening for HCV Infection in Jails*, 307 J. AM. MEDICAL ASS'N 1259 (2012) (same, regarding HCV infection in jails).

45. *See generally* Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing rural location of majority of prisons built since 1980).

46. *See* 2020 NAS REPORT, *supra* note 18, at 25.

47. *See Frequently Asked Questions: What is the Difference Between Jails and Prisons?*, https://www.bjs.gov/index.cfm?ty=qa&iid=322 [https://perma.cc/GX8N-XJ26].

48. *See* Sawyer & Wagner, *supra* note 35. Categorizing federal custody is more difficult because of increasing use of local jails to house immigration detainees. *See* JACOB KANG-BROWN, OLIVER HINDS, EITAL SCHATTNER-ELMALEH & JAMES WALLACE-LEE, VERA INSTITUTE OF JUST., PEOPLE IN JAIL IN 2019, at 2 (2019), https://www.vera.org/downloads/publications/people-in-jail-in-2019.pdf. [https://perma.cc/9ERB-AYLH].

is less than one month.[49] 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.[50] (About 10.7 million people were admitted to local jails in 2018.[51]) Like prisons, many jails are overcrowded.[52] And, as with people in prisons, people in jails are disproportionately afflicted with chronic health conditions, have elevated mental health care needs, and require substance abuse treatment.[53] These underlying vulnerabilities, population turnover, and visitation patterns combine to transform jails into "epidemiologic pumps" that spread COVID-19 to surrounding communities and exacerbate structural health disparities.[54]

Jails and prisons are mostly sites of correctional detention, but considerable government custody involves neither those awaiting trial nor those serving a criminal sentence. As of 2020, there were some fifty-six thousand noncitizens in ICE custody, forty-six thousand of whom were held in immigration detention centers.[55] (The rest are mostly in local jails or private prisons.[56]) There were about forty-four thousand minors in juvenile detention facilities[57] and perhaps over one million people detained pursuant to civil commitment orders.[58] Of these non-correctional detainee populations, those in ICE custody are most significant for our purposes. People that ICE detained at local jails struggled to socially distance[59] and were naturally subject to any other health-and-safety risks those facilities created. Facilities specializing in ICE detention experienced rapid spread of COVID-19, having "long been vulnerable to infectious disease outbreaks."[60] These facilities were "tinderboxes" that presented "ideal

49. *See* ZENG, *supra* note 36, at 1.

50. *See id.*

51. *Id.*

52. *See* 2020 NAS REPORT, *supra* note 18, at 26.

53. *See id.* at 28–29. *See generally* Carroll, *supra* note 3, at 73–77 (detailing health and safety risks specific to jail settings).

54. Barsky, et al., *supra* note 4, at 1583; *see also* Eric Reinhart & Daniel L. Chen, *Association of Jail Decarceration and Contagion Policies with COVID-19 Case Growth Rates in US Counties*, JAMA NETWORK OPEN: PUB. HEALTH, no. 9, Sept. 2021, at 1, 2 ("COVID-19 outbreaks in jails, prisons, and immigrant detention facilities do not only pose risks to incarcerated people, they also appear to spread to surrounding communities. This carries particularly pronounced consequences for Black and Latinx communities that are subjected to disproportionately high rates of arrest and incarceration, which may partially explain the disproportionate burden of COVID-19 that has been borne by racialized groups in the US.").

55. *See* Sawyer & Wagner, *supra* note 35.

56. *See Detention Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T (Mar. 11, 2021) https://www.ice.gov/detention-facilities [https://perma.cc/8GCV-PXKR].

57. *See* Sawyer & Wagner, *supra* note 35.

58. For an effort to estimate numbers detained pursuant to civil commitment orders, see Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERVS. 61 (2020).

59. *See, e.g.*, Basank v. Decker, 449 F. Supp. 3d 205, 215 (S.D.N.Y. 2020) (involving ICE detention in New Jersey jails).

60. 2020 NAS REPORT, *supra* note 18, 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,

incubation conditions for COVID-19"[61]: overcrowding, close-quartered sleeping and dining, spotty laundry and other cleaning services, and substandard medical care.[62]

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 aerosol droplet dispersion, and where both symptomatic and asymptomatic persons can spread the virus.[63] 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.[64]

Prevention and treatment at detention sites is limited. At this time, there is no cure for COVID-19. In addition to vaccinating, the standard protocol for minimizing spread includes physical distancing, mask wearing, hand washing, restricting congregation, diagnostic testing, rigorous quarantining, and contact tracing.[65] Vaccines have been distributed with varying degrees of success although, at least initially, people in government custody had to file lawsuits seeking vaccine access.[66] Despite urgent and clear recommendations from the National Academy of Sciences (NAS) and the American Medical Association, the CDC long refused to issue guidelines prioritizing the vaccination of detainees—focusing instead on staff.[67] In Colorado, state politicians spiked an early plan devised by state health experts to vaccinate incarcerated people.[68] In

751–52 (2020). Juvenile facilities across the country experienced similar COVID outbreaks. *See* Josh Rovner, *COVID-19 in Juvenile Facilities*, SENT'G PROJECT (May 18, 2021), https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/ [https://perma.cc/R6N7-3DAR].

61. Thakker v. Doll, 451 F. Supp. 3d 358, 367 (M.D. Pa. 2020) (internal quotation marks omitted).

62. *See id.* at 367–68. *See generally* Letter from Scott A. Allen, Professor Emeritus, Clinical Med., U.C. Riverside Sch. of Med. & Josiah Rich, Professor of Med. & Epidemiology, Warren Alpert Med. Sch. of Brown Univ., to various House and Senate Committee Chairpersons and Ranking Members (Mar. 19, 2020), https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf [https://perma.cc/7Z5M-UHZ5] (detailing COVID-19 risks at ICE facilities).

63. *See* Clinical Questions about COVID-19: Questions and Answers (Transmission), CTR. DISEASE CONTROL (Nov. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission [https://perma.cc/57Z2-6KKS].

64. *See* 2020 NAS REPORT, *supra* note 18, at 2.

65. *See id.* at 22.

66. *See, e.g.*, Conrad Wilson, *In Lawsuit, Oregon Inmates Ask for Immediate Access to COVID-19 Vaccine*, OREGON PUB. BROAD. (Jan. 22, 2021), https://www.opb.org/article/2021/01/22/oergon-prisons-lawsuit-covid-19-vaccine/ [https://perma.cc/W5FU-SSCG].

67. *See* Barsky et al., *supra* note 4, at 1584.

68. *See id.*

fact, jurisdictions are still struggling to vaccinate their detainee populations, due in part to the failure to invest in vaccine education efforts.[69]

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.[70] Public health experts cautioned that, in custodial settings, effective medical isolation and quarantine required that facilities reduce crowding and initiate other aggressive population management strategies.[71] The experts emphasized that "the most urgent first-line strategy to limit spread and improve containment is population reduction."[72]

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 it emphasized that overcrowding is an "insurmountable obstacle" to COVID-19 response.[73] The WHO put out a formal report two days later, recommending decarceration and the standard COVID-19 protocols recited above.[74] In October 2020, the NAS committee tasked with studying the public health response to COVID-19 in custodial settings issued a

69. 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: STATELINE (Jan. 5, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/05/prioritizing-prisoners-for-vaccines-stirs-controversy [https://perma.cc/6D6L-9CUV]. Some of these programs have started. *See id.* By the summer of 2021, there were some isolated success stories, but "most of the United States' prison systems have struggled to vaccinate inmates." Ann Hinga Klein, *Some U.S. States Have Higher Vaccination Rates Inside Prisons Than Outside*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/06/01/us/vaccine-prison-covid.html [https://perma.cc/H46U-LQPR].

70. *See* 2020 NAS REPORT, *supra* note 18, at 12.

71. *See, e.g.*, David H. Cloud, Cyrus Ahalt, Dallas Agustine, David Sears & Brie Willians, *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19*, 35 J. GEN. INTERNAL MED. 2738, 2738–42 (2020).

72. *See* Elizabeth Barnert, Cyrus Ahalt & Brie Williams, *Prisons: Amplifiers of the COVID-19 Pandemic Hiding in Plain Sight*, 110 AM. J. PUB. HEALTH 964, 964 (2020).

73. *UNODC, WHO, UNAIDS, and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings*, WORLD HEALTH ORG. (May 13, 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 [https://perma.cc/MX5G-TL3V].

74. *See* WORLD HEALTH ORG., 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 [https://perma.cc/AK4N-9ZM9]; *see also* Matthew J. Akiyama, Anne C. Spaulding & Josiah D. Rich, *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, 382 NEW ENG. J. MED. 2075, 2075–77 (2020) (providing other expert guidance on correctional practices).

report with similar recommendations.[75] It also underscored that conditions modifications had to be coupled with discharge strategies: "[D]ecarceration is an appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities . . . ."[76] Underscoring the importance of the WHO and NAS recommendations more quantitatively, one widely-cited study showed that a 9 percent drop in an urban jail population reduced transmission by 56 percent.[77]

Those in the best position to take protective action nonetheless 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.[78] 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[79] and to other expert recommendations. To be sure, the Interim Guidance was designed not to bind decisionmakers, but to provide information about best practices to them, and it did include *some* more clearly stated recommendations.[80] It recommended face coverings and regular handwashing.[81] But it provided weaker suggestions on the most pressing topics, inviting detention sites to "consider" certain health-protective action. It invited facilities to consider restrictions on alcohol-based hand sanitizer, suspension of work release and programs that assign individuals outside a facility, and certain limits on transfers between facilities.[82] Most problematically, the subsequently modified Interim Guidance continued to state that facilities needed merely to "consider options to prevent overcrowding."[83] It recommended social distancing

75. *See* 2020 NAS REPORT, *supra* note 18, at 88–106.

76. *Id.* at 2.

77. *See* Barsky et al., *supra* note 4, at 1585 (citing Giovanni S. P. Malloy, Lisa Puglisi, Margaret L. Brandeau, Tyler D. Harvey & Emily A. Wang, *Effectiveness of Interventions to Reduce COVID-19 Transmission in a Large Urban Jail: A Model-Based Analysis*, 11 BMJ OPEN 1, 6 (2021)).

78. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, FED. BUREAU OF PRISONS (Mar. 27, 2020) [hereinafter *Interim Guidance*], https://www.bop.gov/foia/docs//CDCCorrectionalfacilityguidance3.23.pdf [https://perma.cc/KLL9-B6HU]. We note that, more recently, the Interim Guidance was updated on June 9, 2021. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTR. DISEASE CONTROL (June 9, 2021) [hereinafter *Interim Guidance June 2021*], https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#anchor_1623260857775 [https://perma.cc/LJ9G-NG3W]; *see also* Developments in the Law, *supra* note 24, at 2247 ("As agency actions go, these guidelines are informal."); *id.* at 2249 (the guidelines were issued "largely without discernible procedural safeguards" and with "almost no context describing its reasoning in adopting each specific measure, and even less in rejecting alternatives").

79. *See Prevent Getting Sick*, CTR. DISEASE CONTROL (Apr. 27, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html [https://perma.cc/25PA-8HMB].

80. *See Interim Guidance*, *supra* note 78.

81. *See id.*

82. *See id.*

83. *See id.* The June 9, 2021 modifications preserve that language. *See Interim Guidance June 2021*, *supra* note 78.

as a vital precaution[84] but endorsed no mechanism for accomplishing that goal in overcrowded facilities. It did not recommend release.[85] 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.[86]

Many state and local correctional facilities, presumably observing that the CDC Interim Guidance was both general and aspirational, 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 departure constant.[87] Testing programs "proved to be a challenge" for many state correctional institutions.[88]

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."[89] 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.[90] The Bureau of Prisons

84. *See Interim Guidance June 2021*, *supra* note 78.

85. *See* Developments in the Law, *supra* note 24, at 2255 ("[T]he interim guidance does not mention release at all, except to suggest certain protocols for making sure the inherently transient population of prison and detention centers does not infect communities on the way out.").

86. *See, e.g.*, 2020 NAS REPORT, *supra* note 18, 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 vulnerable people.").

87. *See* Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain the Coronavirus?*, MARSHALL PROJECT (Mar. 6, 2020) https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus [https://perma.cc/ZBD7-JA85]; Editorial Board, *Coronavirus Cases in Prisons Are Exploding*, WASH. POST (Aug. 21, 2020) https://www.washingtonpost.com/opinions/coronavirus-cases-in-prisons-are-exploding-more-people-need-to-be-let-out/2020/08/21/711b7b9a-e306-11ea-8dd2-d07812bf00f7_story.html [https://perma.cc/T9QT-XCDW].

88. *See* 2020 NAS REPORT, *supra* note 18, at 84.

89. Memorandum from William Barr, Att'y Gen., to All Heads of Department Components and All United States Attorneys 2 (Apr. 6, 2020), https://www.justice.gov/file/1266901/download [https://perma.cc/B4QT-XVEV] ("Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic").

90. *See COVID-19 Action Plan: Phase Five*, FED. BUREAU OF PRISONS (Mar. 31, 2020), https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp [https://perma.cc/QTN4-6TNK].

(BOP) denied most compassionate release petitions—as of June 2021, only thirty-six such requests (out of over thirty thousand petitions) had been granted.[91]

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 5 percent and the jail population by 20.[92] The decline in the jail population was actually steeper at first, but the population increased somewhat after the initial drop.[93] The differences 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.[94] Jails can dramatically reduce population by admitting fewer prisoners;[95] 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.[96]

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 physically distance and to test for the virus swamped the anticipated benefits of other health and safety recommendations, even when facilities followed them.[97] The COVID Prison Project tracks public data concerning testing and cases in correctional facilities, and, at the time of this writing, over 439,000 prisoners have contracted COVID-19, and 2,661 of them have died.[98] There have been over 122,000 cases among staff, with 242 deaths.[99]

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91. There have been 3,221 people ordered released under the provisions, but 3,185 of the releases were ordered by judges, over the BOP's objections. *See* Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, MARSHALL PROJECT (Jun. 11, 2021), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 [https://perma.cc/7B4T-FFNW].

92. 2020 NAS REPORT, *supra* note 18, at 59–61. Some other sources have reported the change in jail population in considerable detail and disclose figures that differ slightly from those reported by the NAS. *See, e.g.*, TODD D. MINTON, ZHEN ZENG & LAURA M. MARUSCHAK, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., IMPACT OF COVID-19 ON THE LOCAL JAIL POPULATION, JANUARY-JUNE 2020, at 1 (2021), https://www.bjs.gov/content/pub/pdf/icljpjj20.pdf [https://perma.cc/J2HD-GUZH].

93. *See* 2020 NAS REPORT, *supra* note 18, at 59.

94. *See* CARSON, *supra* note 37, at 2.

95. *See* Emily Widra & 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/ [https://perma.cc/5KPX-QEFF].

96. *See* 2020 NAS REPORT, *supra* note 18, at 61.

97. *See generally* Barsky et al., *supra* note 4 (explaining the need to couple decarceration with any other strategy for reducing COVID in detention facilities).

98. *See* COVID PRISON PROJECT, *supra* note 10.

99. *See id.*

B. Rights, Custody, and Remedies

Lawyers scrambled to initiate state and federal litigation in venues across the country.[100] 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 often 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 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. (See Table 1 for a visual layout of how custody type relates to the site of detention.)

Table 1: Detention Site by Major Custody Type[101]

Custody Type	Sovereign	Site of Detention
Convicted of Crime	Federal	Long Sentences: by BOP in federal prisons, contracted private and local facilities Short Sentences: by U.S. Marshals in BOP-operated facilities, contracted private, state, and local facilities
	State	Long Sentences: Prisons and contracted private facilities Short Sentences: Local jails and contracted private facilities
Pending Trial	Federal	By U.S. Marshals in metropolitan detention centers, contracted private and local facilities
	State	Local jails

100. Several projects track COVID-19 prisoner litigation. *See, e.g.*, *Special Collection: COVID-19*, UNIV. OF MICH. L. SCH.: C.R. CLEARING HOUSE, https://clearinghouse.net/results.php?searchSpecialCollection=62 [https://perma.cc/6VEY-G8LS]; *Covid-19 Behind Bars Data Project*, UCLA L.: COVID BEHIND BARS DATA PROJECT, https://uclacovidbehindbars.org/ [https://uclacovidbehindbars.org/].

101. *See* Sawyer & Wagner, *supra* note 35.

Custody Type	Sovereign	Site of Detention
(Pretrial Detention)		
Pending Immigration Proceeding	Federal	ICE detention centers, contracted private and local facilities

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.[102] They must generally litigate constitutional challenges through Eighth Amendment claims that we describe momentarily.[103] 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.[104] Those in criminal custody are in either a jail, if the sentence is shorter, or a prison, if the sentence is longer.

Non-criminal custody is a little more complicated, in part because there is more internal variation within the category. There is pretrial custody, where the primary constitutional constraint on detention conditions operates through the Due Process Clauses of the Fifth and Fourteenth Amendments.[105] People in pretrial custody can also access select non-constitutional mechanisms to lodge claims involving medical care—and, like those mechanisms available to people convicted of crimes, there is state-by-state and federal variation.[106] Although formally denominated as non-criminal, pretrial detention is often considered correctional custody. Pretrial detainees in state custody are usually in local jails.[107] Pretrial detainees in federal custody are formally under the control of the U.S. Marshals, although they might be held at one of several types of detention sites: a Metropolitan Detention Center operated by the BOP, a local jail, or a private facility.[108]

ICE detention, by contrast, is non-criminal *and* non-correctional. People in ICE detention are there because the federal government has determined that they should be held pending some immigration proceeding.[109] ICE custody can be mandatory or non-mandatory, depending largely on the factual predicate for the

102. *See id.*
103. *See infra* notes 113 to 128 and accompanying text.
104. *See* 2020 NAS REPORT, *supra* note 18, at 56.
105. *See supra* notes 129 to 142 and accompanying text.
106. *See* 2020 NAS REPORT, *supra* note 18, at 55–56.
107. *See* Sawyer & Wagner, *supra* note 35.
108. *See id.*
109. *See Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T (Nov. 12, 2021), https://www.ice.gov/detain/detention-management [https://perma.cc/WWU7-4ZVZ].

detention.[110] Because ICE custody is federal, the primary constitutional provision at issue is the Due Process Clause of the Fifth Amendment. Crucially, the non-correctional status of the detention means that people challenging ICE custody need not satisfy the exacting exhaustion requirements that hobble litigation undertaken by people in correctional custody.[111] Usually, people detained pending immigration proceedings are physically held either at ICE facilities or at local jails.[112]

2. The Underlying Right

For 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 subject to the Federal Constitution. Other statutes and provisions impose additional obligations and provide remedies for different custodial transgressions.

a. Eighth Amendment Rights

In *Estelle v. Gamble* (1976),[113] 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."[114] And, "deliberate indifference to serious medical needs of prisoners" represents "unnecessary and wanton infliction of pain" that the Eighth Amendment proscribes.[115] *Gamble* ended up forming the basis for a two-pronged Eighth Amendment test. First, a plaintiff must demonstrate a sufficiently serious deprivation of rights.[116] Second, they must demonstrate that correctional officials acted with sufficiently culpable *mens rea*—amounting to recklessness or deliberate indifference with regard to the deprivation.[117]

However important *Gamble* was in establishing a formal right to health protection for people in custody, subsequent decisions have diminished

110. *See* 8 U.S.C. § 1226(c) (setting forth categories of so-called "mandatory detention"); *see also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 138 (2013) (discussing the relationship between mandatory detention and removal).

111. Specifically, those in detention pending immigration proceedings are not subject to the structures of the Prison Litigation Reform Act ("PLRA"). *See infra* notes 155 to 166 and accompanying text; *see also* 42 U.S.C. § 1997e(h) ("[T]he term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.").

112. *See* Sawyer & Wagner, *supra* note 35.

113. 429 U.S. 97 (1976).

114. *Id.* at 105.

115. *Id.* at 104 (internal quotation marks and citations omitted).

116. *See* Wilson v. Seiter, 501 U.S. 294, 298 (1991).

117. The deliberate-indifference prong was drawn straight from the language of *Gamble*. *See* 429 U.S. at 105.

Gamble's impact by upping the threshold for deliberate indifference.[118] In *Wilson v. Seiter,*[119] 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.[120] *Farmer v. Brennan*[121] 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 also draw the inference."[122] On the Court's reasoning, the Eighth Amendment did not bar cruel and unusual *conditions*; it barred cruel and unusual *punishment*.[123]

Although the Supreme Court has articulated a high *mens rea* threshold, it has made clear that convicted people can obtain relief *before* they suffer harm—a rule that is obviously central to our discussion.[124] In *Helling v. McKinney*,[125] a convicted detainee alleged an Eighth Amendment violation because he had been placed next to someone who smoked five packs of cigarettes a day.[126] 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."[127] 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."[128]

b. Due Process Rights

The Eighth Amendment constrains only "punishment" and is therefore inapplicable to non-criminal custody, such as pretrial or immigration detention. For non-criminal detainees, the Due Process Clauses of the Fifth and Fourteenth

118. Things did not start that way. *Rhodes v. Chapman*, decided in 1981, held the Eighth Amendment governed conditions-of-confinement litigation concerning things other than medical care and seemed to jettison the subjective component of the *Gamble* inquiry. *See* 452 U.S. 337, 344–50 (1981).

119. 501 U.S. 294.

120. The Supreme Court reasoned *Rhodes* omitted reference to the subjective prong only because it was unnecessary to decide that case. *See id.* at 299–304.

121. 511 U.S. 825 (1994).

122. *Id.* at 837.

123. *Id.*

124. 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 disease).

125. 509 U.S. 25 (1993).

126. *See id.* at 28.

127. *Id.* at 33.

128. *Id.*

Amendments provide the operative constraints. *Bell v. Wolfish*[129] reaffirmed that the government cannot subject people in non-criminal detention to conditions that amount to punishment,[130] and it set forth a due process rule distinguishing punitive conditions from those that are reasonably incident to legitimate, non-punitive detention objectives.[131]

The precise category of non-criminal custody subject to challenge is important. For many years and for challenges to *pretrial* detention, courts largely ignored *Bell's* requirement that conditions be reasonably related to a legitimate purpose in favor of a *Gamble* framework—even though the former is a blanket rule against punitive conditions and the latter is a rule subdividing punitive conditions into permissible and impermissible categories. That is, courts historically analyzed due process challenges to pretrial custody by determining whether there was an objectively serious deprivation of rights and deliberate indifference thereto.[132] However, after *Kingsley v. Hendrickson*—a use-of-force case, not a conditions-of-confinement case, that underscored *Bell*'s absence of a subjective intent requirement[133]—some courts subjected pretrial detention to a modified *Gamble* rule consisting only of an objective prong.[134]

Despite the pervasive use of rules derived from the deliberate-indifference framework, these decisions do not provide satisfying explanations for replacing a rule against all punitive conditions (*Bell*) with an inquiry meant to recognize punitive conditions that the law permits (*Gamble*). For that reason, one can

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129. 441 U.S. 520 (1979).

130. *Id.* at 535.

131. *Id.* at 538.

132. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886 n.15 (2009) [hereinafter Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*] (collecting sources and concluding that "courts routinely regard the Fourteenth Amendment due process rights of plaintiffs challenging the conditions of their confinement in jail as identical to those accorded sentenced offenders under the Eighth Amendment"); *see also* Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018) (extending two-pronged standard to pretrial detention context); Dang v. Seminole Cnty. 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).

133. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015). For an extremely useful discussion of *Kingsley* and its potential significance for other types of litigation against correctional institutions, see David M. Shapiro, *To Seek A Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 131–33 (2016).

134. *See, e.g.*, Miranda v. Cnty. 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 was a use-of-force case rejecting a maliciousness requirement that applied to claims by convicted prisoners. *See Kingsley*, 576 U.S. at 398. For that reason, other courts continued to insist on the "subjective prong" of the deliberate-indifference framework for pretrial adjudication. *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."); *Dang*, 871 F.3d at 1279 n.2 (holding essentially same); *Alderson*, 848 F.3d at 419 n.4 (holding essentially same).

imagine an analysis of non-criminal detention proceeding differently, and more uniformly—tracking *Bell*'s rule against punitive conditions, with punitive conditions defined as those not reasonably related to a legitimate government objective.[135] Indeed, at one point or another, every court of appeals but one has used the reasonable-relationship standard to adjudicate the constitutionality of a non-criminal detention condition under the Due Process Clauses.[136] Most of these cases came after *Kingsley*.[137]

The distinction between this somewhat latent punitive-detention test (*Bell*) and the more dominant deliberate-indifference approach (*Gamble*) became more consequential in the ICE detention cases that followed the COVID-19 outbreak.[138] As a normative matter, 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,[139] 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: "[P]urgatory cannot be worse than hell."[140] Despite doctrinal and practical reasons to leave deliberate indifference out of the non-criminal inquiry, confusion about constraints on non-criminal detention persists.[141]

c. Rights from Statutes and State Constitutions

Some rights arise under authority other than the Federal Constitution and apply to both criminal and non-criminal detention. For example, the Americans with Disabilities Act (ADA) provides federal statutory protection for individuals with disabilities in public and private accommodations, including jails and

135. *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").

136. *See, e.g.*, Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 55 (2d Cir. 2017) (adopting reasonable-relationship 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) (same), *abrogated on other grounds by* Neitzke v. Williams, 490 U.S. 319 (1989); Mulvania v. Sheriff of Rock Island Cnty., 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 Cnty., 835 F.3d 1338, 1345 (11th Cir. 2016) (same); Jones v. Horne, 634 F.3d 588, 598 (D.C. Cir. 2011) (same).

137. *See supra* note 136; *see also* Shapiro, *supra* note 133, at 132–33 (predicting that *Kingsley* might produce case law lowering burden on pretrial plaintiffs).

138. *See infra* Section 3.

139. *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.").

140. 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).

141. *See infra* Part II.

prisons.[142] Many cases challenging detention conditions have included ADA claims,[143] which require plaintiffs to prove that they have a qualifying disability and that they were harmed by intentional discrimination, a disparate impact, or a failure to make a reasonable accommodation.[144]

At federal and state levels, moreover, there can be standards for facility healthcare incorporated into statutory and administrative frameworks.[145] For example, there are statutory standards for discretionary pretrial release,[146] as well as for discharge associated with overcrowding,[147] serious illness,[148] and disease outbreaks.[149] There are also some break-glass-in-case-of provisions for unanticipated emergencies, including (sometimes) powers to order evacuation or closing of facilities.[150] State constitutions can be a source of significant constraints on detention.[151] There are too many such rights to name, but each vindicates some underlying interest in a health-protective detention practice.

3. The Form of Relief Requested

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

142. *See* 42 U.S.C. § 12101(a)(2), (a)(5); Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (holding that the ADA applies to state jails and prisons).

143. *See infra* Part II.

144. 42 U.S.C. §§ 12112(b)(5)(A), 12132.

145. *See* Kovarsky, *supra* note 3, at 83.

146. *See, e.g.*, MINN. R. CRIM. P. 6.01 (specifying authority for pretrial release). For a discussion of legal authority to release people from pretrial detention, or order early release for short sentences, see 2020 NAS REPORT, *supra* note 18, at 55–56.

147. *See, e.g.*, GA. CODE ANN. § 42-9-60 (2020) (specifying parole mechanisms for overcrowding).

148. *See, e.g.*, 18 U.S.C. § 3582(d); U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018); 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 NAS REPORT, *supra* note 18, at 57–58.

149. *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 NAS REPORT, *supra* note 18, at 56.

150. *See, e.g.*, CAL. GOV'T CODE § 8658 (West 2021) (giving wardens authority to remove endangered detainees); MD. CODE ANN. § 14-3A-03(d)(1) (LexisNexis 2018 & Supp. 2021) (stating once Governor proclaims public health emergency, Governor "may order the evacuation, closing, or decontamination of any facility").

151. *See, e.g.*, *infra* notes 235 to 238 and accompanying text.

custody can use a so-called *Bivens* action.[152] For damages claims against state and federal officials, plaintiffs will almost always have to overcome qualified immunity or something similar.[153] During the pandemic, however, most decisional law to date involves forward-looking emergency relief, rather than backward-looking compensation for harm.[154]

In federal court, many plaintiffs seeking non-compensatory remedies will be subject to the Prison Litigation Reform Act (PLRA).[155] 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.[156] Those exhaustion requirements are strictest when a plaintiff seeks a "prisoner release order."[157] Claimants seeking such a release, which certainly includes discharge and arguably transfer, must show some sort of noncompliance with a prior remedial order.[158] They can secure relief only from a specially convened three-judge panel that must determine that crowding is the cause of the harm and that there are no lesser ameliorative steps that the detaining facility can take.[159] Crucially, the PLRA does not constrain litigation that plaintiffs in ICE detention undertake.[160]

The leading PLRA case involving prisoner release orders is *Brown v. Plata* (2011),[161] which responded to overcrowding in California correctional facilities.[162] Overcrowding, among other things, created serious medical risks associated with communicable disease transmission.[163] *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

152. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

153. *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

154. Over time, more victims' families may file suits seeking compensation. *See, e.g.*, Kelly Davis & Jeff McDonald, *Inmate's Family Sues San Diego County over His Death, Alleges It Was COVID,* L.A. TIMES (Nov. 29, 2020), https://www.latimes.com/california/story/2020-11-29/inmates-family-sues-san-diego-county-alleged-covid-death [https://perma.cc/Z4MG-A7S2] (describing prisoner suit).

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

156. Before a prisoner may file, the exhaustion requirements of the PRLA generally require them 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 may result in remedies if they have applicable terms. *See, e.g.*, Duvall v. Hogan, No. 94-2541, 2020 WL 3402301, *7 (D. Md. June 19, 2020) (finding settlement terms not applicable).

157. 18 U.S.C. § 3626(a)(3).

158. *See id.*

159. *See id.* § 3626(a)(3)(E)(ii).

160. *See supra* note 111 and accompanying text.

161. 563 U.S. 493 (2011).

162. *See id.* at 499–500.

163. *See id.* at 509.

care, is incompatible with the concept of human dignity and has no place in civilized society."[164] The Supreme Court ordered California to sufficiently decarcerate to lessen health risks.[165] The remedy, however, was glacial; it took over ten years for the case to move through the federal judiciary.[166]

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."[167] But habeas litigation, which is the traditional vehicle for seeking discharge, presents different challenges. Convicted plaintiffs 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,[168] successive litigation,[169] and timeliness[170] requirements. Litigating for habeas discharge under § 2241 does not entail quite the same procedural obstacles, but it is usually limited to people in non-criminal custody. Moving from a § 2254 category to a § 2241 category would at least appear to be difficult because § 2254 is expressly applicable to any "person in custody pursuant to the judgment of a state court."[171]

* * *

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 for 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 the pandemic threat.[172]

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164. *Id.* at 510–11.

165. *See id.* at 502.

166. *See id.* at 507.

167. 18 U.S.C. § 3626(g)(2).

168. *See, e.g.*, 28 U.S.C. § 2254(b)(1) (imposing exhaustion rule on prisoners serving state criminal sentences).

169. *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).

170. *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).

171. *See* 28 U.S.C. § 2254(a). *But see* Michael L. Zuckerman, *When the Conditions Are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1, 51 (2021) (expressing sense that "most COVID-19 habeas claims arise under § 2241 rather than § 2254, 2255").

172. Deference to detention practices that involve serious medical risks seems to make little sense if the deferred-to institutions do not have the training and expertise to accurately assess them. Indeed, there were serious concerns about the healthcare expertise of leadership at the federal Bureau of Prisons. *See* Keri Blakinger, *Prisons Have a Health Care Issue—And It Starts at the Top, Critics Say*, MARSHALL PROJECT (July 1, 2021), https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say [https://perma.cc/2VDB-C2UH].

II.
COVID-19 PRISONER LITIGATION

In Part II, we organize information about the judicial response to COVID-19 litigation against detention facilities. Although prior health-protective suits contested institutional responses to other infectious disease outbreaks,[173] 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 discussed below are not final judgments; they are interlocutory responses to urgent, early-stage requests for preliminary relief.[174]

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 seemed to appreciate the unprecedented challenges that COVID-19 presented for Americans generally,[175] and for detention sites more specifically—for detainees,[176] correctional staff,[177] and

173. 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, No. 10-cv-00951, 2011 WL 5240441, at *5 (E.D. Cal. Oct. 31, 2011) (finding that plaintiff with preexisting heart condition who was denied swine flu test stated a claim).

174. *See, e.g.*, Torres v. Milusnic, 472 F. Supp. 3d 713, 746 (C.D. Cal. 2020) (granting preliminary injunction); Martinez-Brooks v. Easter, No. 20-CV-00569, 2020 WL 2813072 (D. Conn. May 29, 2020) (same); Seth v. McDonough, No. 20-CV-01028, 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, 466 F. Supp. 3d 821 (W.D. Tenn. 2020) (denying motion to dismiss and granting class certification in part).

175. *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. v. Decker, 477 F. Supp. 3d 357, 360 (D.N.J. 2020) (describing "serious public health threat" but declining cases in New Jersey at the time); Malam, v. Adducci, 475 F. Supp. 3d 721, 727 (E.D. Mich. 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."), *amended by* Malam v. Adducci, No. 20-10829, 2020 WL 4818894 (E.D. Mich. Aug. 19, 2020).

176. *See, e.g.*, Rice v. United States, No. 19-CV-1026, 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 *5 (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, 447 F. Supp. 3d 63, 65 (S.D.N.Y. 2020) (collecting authority in support of proposition that "inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop").

177. *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.")

surrounding communities.[178] 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."[179] In some cases, judges were even more granular in their concern, discussing risks specific to certain detention categories. For example, some decisions zeroed in on the threat of COVID-19 in ICE detention[180] and the risks for large urban jails with high daily throughput.[181] 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—for example, on motions for temporary restraining orders (TROs) or preliminary injunctions.[182] (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 was then of the essence; courts were being asked to respond quickly to the largely unchecked spread of COVID-19 in detention facilities. Orders respecting preliminary relief almost always decided the real winners and losers, and so they represent a logical object of scrutiny for our project.

Third, and not surprisingly, judges granting relief tended to rely more heavily on guidance from expert organizations, and on scientific information from reputed medical and scientific journals.[183] Specifically, many opinions relied heavily on the CDC Interim Guidance and the CDC Guidelines for People at Increased Risk of Contracting COVID-19.[184] As explained above, however,

178. *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 healthcare providers).

179. *Seth v. McDonough*, 461 F. Supp. 3d at 247–48.

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

181. *See, e.g.*, People *ex rel.* Stoughton v. Brann, 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).

182. *See supra* note 174.

183. *See, e.g.*, Desmond K. B. v. Decker, 477 F. Supp. 3d 357, 360 (D.N.J. Aug. 6, 2020) (citing CDC statistics); United States v. Ramirez, No. 19 CR. 105, 2020 WL 4577492, at *2 (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 higher risk for severe disease or death from COVID-19"); United States v. Aslam, No. CR 17-50, 2020 WL 4501917, at *4 (D. Del. Aug. 5, 2020) (relying "primarily upon the CDC and the WHO" to assess the evidence presented).

184. *See, e.g.*, Carlos M. R. v. Decker, No. 20-6016, 2020 WL 4339452, at *10 (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, 467 F. Supp. 3d 213 (D.N.J. 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, 2020 WL 2612199, at *6 (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

the Interim Guidance contained light-touch suggestions on key points. And several opinions granting relief underscored that satisfying the Interim Guidance was not sufficient to show that detention conditions were lawful.[185]

The body of decisional law available at this time shows that, in the first year 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 from COVID-19, they were more often content to secure institutional promises to comply with the light-touch CDC Interim Guidance. Courts were less interested in exercising their own prophylactic initiative or in operating a judicial receivership. To the extent that one category of detainee-plaintiffs fared better than others, it was people in ICE detention—they often had to make lesser constitutional showings than other categories of detainee-plaintiffs. Furthermore, challenges to ICE detention are not subject to the plaintiff-crippling provisions of the PLRA.

A. Discharge Litigation

Discharge was the most aggressive relief that detainee-plaintiffs sought, and so it also proved the most elusive. Clear patterns emerged from the litigation. First, notwithstanding public health recommendations that the most effective COVID-19 practices required decarceration, courts were resistant to non-individualized discharge. In fact, the more collectivized the discharge requests, the more courts avoided them.[186] Discharge remedies were therefore awarded either individually or to very narrowly drawn sub-classes of vulnerable detainees.

Second, and in terms of courts' willingness to order discharge in individual or small collectivized cases, there were 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 for discharge of people in correctional facilities.

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contracting COVID-19"); Basank v. Decker, No. 20 CIV. 2518, 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 v. Meade, No. 20-21553, 2020 WL 1949737, at *4 (S.D. Fla. Apr. 22, 2020) (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").

185. *See, e.g.*, Ochoa v. Kolitwenzew, 464 F. Supp. 3d 972, 987 (C.D. Ill. 2020) ("[T]he CDC's guidelines, while important, are not dispositive standing alone.").

186. *See infra* Section II.A.1.

1. Collective Discharge

Courts were quite reluctant to order collective discharge for people in correctional custody, which meant almost all class actions belonging to that category of litigation were unsuccessful.[187] There were varied reasons for this judicial behavior. Sometimes the obstacle to collectivized release was the judicial imposition of a contested procedural doctrine,[188] and sometimes it was a reluctance to resolve the merits against an institution in a class action case.[189] We take those in turn.

Starting with procedural problems in discharge-seeking class action litigation—a topic about which both of us have written (separately) at some length.[190] 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.[191] These procedural mechanisms presented some daunting challenges for the litigation we analyze here.

For example, the preference for § 1983 in conditions-improvement litigation is based on the premise that discharge is not requested, because discharge-seeking litigation takes place (the thinking goes) through habeas lawsuits. But some courts refused to permit habeas litigation in conditions cases where the detainee class also sought release.[192] Unfavorable treatment of habeas class claimants seeking discharge from correctional facilities therefore persisted, notwithstanding the PLRA's exception for "habeas corpus proceedings challenging the fact or duration of confinement in prison."[193] And in cases where a mechanical rule about discharge litigation did not cause courts to subject the

187. *See infra* Section II.A.1.

188. *See infra* notes 190 to 196 and accompanying text.

189. *See infra* notes 197 to 199 and accompanying text.

190. *See* Brandon L. Garrett, *Aggregation in Criminal Law,* 95 CALIF. L. REV. 383 (2007) (exploring aggregation in criminal law more generally); Kovarsky, *supra* note 3 (exploring phenomenon in more specific context of COVID-19).

191. *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).

192. *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 [and] concluded that claims challenging the conditions of confinement cannot be brought in a habeas petition"); Seth v. McDonough, 461 F. Supp. 3d 242, 255 (D. Md. 2020) (refusing to treat habeas-denominated claims as PLRA-exempt); *see also* Kovarsky, *supra* note 3, 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 litigation was for discharge, rather than changed conditions); 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.").

193. 18 U.S.C. § 3626(g)(2).

claims to the PLRA, judges applied various habeas exhaustion rules that either mooted the litigation or forced the plaintiff class to de-collectivize it.[194]

The exhaustion requirements applicable to people 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."[195] But courts have imposed exhaustion requirements on pretrial 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.[196] 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 were quite incompatible with class-action treatment. For example, a series of federal district courts formulated an inquiry for habeas relief that resisted 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.[197] Thus, as one court put it, "the petitioner must make an individualized showing that he is entitled to habeas corpus relief when considering the above factors."[198] 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."[199]

Furthermore, and with respect to preliminary injunction requests, the judiciary sometimes expressed a preference for timing that placed plaintiffs in a catch-22. For example, in *Baxley v. Jividen*, the district court denied relief, noting that it was too early to conclude that defendants were likely to violate the Eighth

194. *See* Kovarsky, *supra* note 3, at 81.

195. 28 U.S.C. § 2254(a), (b) (emphasis added).

196. *See, e.g.*, Cameron v. Bouchard, 462 F. Supp. 3d 746, 766 (E.D. Mich. 2020) (noting that the Sixth Circuit requires § 2241 exhaustion), *overturned on other grounds by* Cameron v. Bouchard, 815 F. App'x 978 (6th Cir. 2020). For pre-COVID holdings, compare, for example, Beharry v. Ashcroft, 329 F.3d 51, 56–57 (2d Cir. 2003) (stating exhaustion is prudential), with Little v. Hopkins, 638 F.2d 953, 954 (6th Cir. 1981) (requiring § 2241 exhaustion).

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

198. *Saillant*, 454 F. Supp. 3d. at 471.

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

or Fourteenth Amendments.[200] The court denied relief because the jail had no reported positive cases of COVID-19, even though it recognized that the jail's planning would be "stress-tested" by the virus in the weeks after the order.[201] If the court meant to suggest that the plaintiffs could protect their health-and-safety interests by returning to the court after the outbreak, then such a theory is troubling: the litigation would obviously be too late.

With the exception of habeas litigation, which was typically exempt from the PLRA's special rules for prisoner release orders,[202] the major problem with PLRA-restricted litigation was the inability to obtain class-wide relief at meaningful speed and scale. The rules for prisoner release orders,[203] which contain rather extreme exhaustion requirements, entail complex and slow-moving procedures and require that any preliminary relief be "narrowly drawn."[204] Indeed, those restrictions on prisoner release orders were often insurmountable.[205] 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[206]—a timeframe that was useless to detainees seeking to avoid COVID-19 risk. Classes seeking § 1983 relief sometimes argued that the PLRA exhaustion requirements should yield in the face of the special challenges that COVID-19 presented or because administrative remedies were not available, but the plaintiffs had mixed success.[207]

One way to avoid procedural obstacles to collective discharge was through settlement. In Illinois, about 1,000 people who were nearing the end of their

200. Baxley v. Jividen, No. 18-1526, 2020 WL 1802935, at *7 (S.D.W. Va. Apr. 8, 2020) ("[T]he timing of Plaintiffs' Motion factors into the Court's decision. At present, there have been no reported cases of COVID-19 in West Virginia prisons.").

201. *Id.*

202. *See* 18 U.S.C. § 3626(g)(2).

203. *Id.* § 3626(a)(3).

204. 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).

205. *See* 18 U.S.C. § 3626(a)(3) (restrictions); Kovarsky, *supra* note 3, at 78 (insurmountability thereof).

206. *See supra* notes 161 to 166 and accompanying text.

207. *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); Nellson 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. 94-2541, 2020 WL 3402301, at *8 (D. Md. June 19, 2020) (refusing to apply exhaustion bar to claim relating back to a date preceding PLRA and noting that administrative remedies internal to jails do not cover release requests); 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 claims"); Cameron v. Bouchard, 462 F. Supp. 3d 746, 767–68 (E.D. Mich. 2020) (noting case law regarding special circumstances in which exhaustion is not required), *overturned on other grounds by* 815 F. App'x 978 (6th Cir. 2020); 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.").

prison sentences were released as part of a settlement in a federal lawsuit.[208] North Carolina settled constitutional claims, resulting in an agreement to release 3,500 people.[209] In Virginia, a federal suit resulted in a settlement requiring the release of about 1,000 prisoners.[210] (We do not want to overstate the incidence of settlement; one noteworthy feature of the COVID-19 litigation was settlement avoidance and the state's desire to litigate procedural barriers.)

2. Non-Constitutional Discharge

What also stands out is that—with the exception of the settlements and the immigration detention 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 afforded collective relief tended to do so under state constitutions,[211] statutes,[212] or other supervisory authority,[213] rather than under the Eighth or Fourteenth Amendments.[214] That statutory relief was more robust is unsurprising given that courts generally avoided collective discharge; the substantive

208. *See* Jason Meisner & Annie Sweeney, *About 1,000 Illinois Prisoners to be Released Under COVID-19 Lawsuit Settlement*, CHICAGO TRIB. (Mar. 23, 2021), https://www.chicagotribune.com/news/criminal-justice/ct-illinois-prison-covid-lawsuit-settlement-20210323-awvjaxszvjg5najbzaoloplrze-story.html [https://perma.cc/B7GQ-967A].

209. *See* Virginia Bridges, *NC to Release 3,500 State Prison Inmates Early in COVID Lawsuit Agreement*, NEWS & OBSERVER (Feb. 25, 2021), https://www.newsobserver.com/news/local/article249516810.html [https://perma.cc/45AR-8GGS].

210. *See* Whorley v. Northam, No. 20cv255, 2020 WL 2485923, at *1–3 (E.D. Va. May 12, 2020) (settlement resulting in agreement to release over 1,000 persons). *But see* Press Release, ACLU Va., ACLU of Virginia Sends Second Notice of Noncompliance in COVID-19 Lawsuit Against VDOC for Failure to Follow Court-Approved Settlement (Sept. 24, 2020), https://www.acluva.org/en/press-releases/aclu-virginia-sends-second-notice-noncompliance-covid-19-lawsuit-against-vdoc-failure [https://perma.cc/TAP2-ULQM].

211. For cases relying on state law, see *infra* notes 235 to 238 and accompanying text.

212. *See, e.g.*, Karr v. Alaska, 459 P.3d 1183, 1185 (Alaska Ct. App. 2020) (interpreting bail statute and concluding COVID constituted "new information" supporting revisiting pretrial conditions).

213. *See, e.g.*, Comm. Pub. Couns. Servs. v. Chief Just. of Trial Ct., 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 Corr., 146 N.E.3d 372, 400 (Mass. 2020) (granting relief regarding drug-treatment-related civil commitments using supervisory authority); *In re* 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 Pa. 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).

214. *See, e.g.*, *Foster*, 146 N.E.3d at 395–96 (rejecting federal constitutional claims); Colvin v. Inslee, 467 P.3d 953, 964 (Wash. 2020) (same); *In re* Application for 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* N.C. St. Conf. of the NAACP v. Cooper, No. 20-CVS-500110 (Gen. Ct. Just. Super. Ct. June 16, 2020) (order granting preliminary injunction finding state standard to be the same as the federal deliberate-indifference standard).

showings that statutory discharge remedies require tend to be more individualized.

For people in federal custody, most judicial discharges ordered on non-constitutional grounds were ordered under the pretrial release provisions (for pretrial detainees)[215] or the federal compassionate release or home confinement rules (for those convicted of crimes).[216] The federal pretrial detention statute permits release for "compelling reason[s]."[217] 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 . . . .."[218] Some judges granted relief under that statutory standard.[219] In that statutory context, 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.[220] Courts expressly linked that triage function to the flexible pretrial standards set forth by the statute.[221]

The federal compassionate release provisions are also typical in their individuation requirements,[222] which permit sentence reductions—including to time served—when there are "extraordinary and compelling reasons warrant[ing] such a reduction."[223] 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

215. *See* 18 U.S.C. § 3142 (containing rules for pretrial release)*; see also* United States v. Michaels, No. 16-76, 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, 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (citing person's "serious progressive lung disease and other significant health issues").

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

217. 18 U.S.C. § 3142(i).

218. *Id.* § 3142(f).

219. *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 In Re* Extradition of Toledo Manrique, 445 F. Supp. 3d 421, 422 (N.D. Cal. 2020).

220. *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 196).

221. *See*, *e.g.*, United States v. Martin, 447 F. Supp. 3d 399, 401 (D. Md. 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, 142 N.E.3d 55 (Mass. 2020) (providing order for people in pretrial detention setting out expedited and health-optimized release practice).

222. 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 release, is similarly individualized. *See* Memorandum from William Barr, Att'y Gen., to the Dir. of the Bureau of Prisons, (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf [https://perma.cc/D9S3-LZ6V] ("Prioritization of Home Confinement as Appropriate in Response to the COVID-19 Pandemic").

223. 18 U.S.C. § 3582(c)(1)(A)(i).

risk.[224] The need for individuation in compassionate release determinations is reflected in the observations of one Third Circuit panel: "[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release."[225]

People who were granted an 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.[226] In *United States v. Shehata*,[227] 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 was detained in a facility with COVID-19 cases.[228] 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.[229]

Another source of discharge-seeking, non-constitutional litigation was the ADA.[230] 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.[231] In any event, ADA claims fared poorly whether the defendant was a federal facility or a state one. (State and federal litigants are both subject to PLRA exhaustion requirements.[232]) In *Wragg v. Ortiz*, the court disparaged the "bold" request that a federal facility "release any and all inmates

224. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018).

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

226. In addition to the case discussed in this paragraph, see, for example, United States v. Aslam, No. CR 17-50, 2020 WL 4501917, at *3, *5 (D. Del. Aug. 5, 2020) (granting motion for compassionate release due to "history of tuberculosis, his history of viral hepatitis, his age, gender" and "absence of dangerousness"), and United States v. Resnick, 451 F. Supp. 3d 262, 269 (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").

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

228. *Id.* at *1.

229. *Id.* at *2–3.

230. Americans with Disabilities Act of 1990 § 302, 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, 29 U.S.C. § 794.

231. *See, e.g.*, Hurdle v. Comm'r of Corr., 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, 1133 (N.D. Ill. 2020) (rejecting ADA claims); Frazier v. Kelley, 460 F. Supp. 3d 799, 834 (E.D. Ark. 2020) (finding no likelihood of success on ADA claims).

232. 42 U.S.C. § 1997e(a).

who may have any disability" as an "all or nothing approach" that was inconsistent with necessary individuation.[233] In *Money v. Pritzker*,[234] a representative piece of state-prisoner ADA litigation against multiple Illinois facilities, the court turned back ADA theories. It reasoned that correctional detainees were not the victims of intentional discrimination nor disproportionately burdened by discretionary release procedures, nor denied reasonable modifications of that process.[235]

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 of 2020, New York courts, recognizing certain communities as especially vulnerable to COVID-19, invoked the state due process clause to release many people from local jails.[236] The state due process doctrine was more flexible than its federal counterpart, and judges could weigh competing interests in making discharge decisions.[237] While some state courts indicated that their constitutional law provides broader grounds for relief on *Gamble*-type claims, others acknowledged that possibility only theoretically and have not departed from a more demanding "deliberate indifference" test.[238] 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.[239]

To conclude, those in correctional custody who asserted rights flowing from authority other than the Federal Constitution fared better than those seeking discharge under the Fifth, Eighth, and Fourteenth Amendments. More

233. *Wragg*, 462 F. Supp. 3d at 514.

234. 453 F. Supp. 3d 1103 (N.D. Ill. 2020).

235. *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.

236. *See*, *e.g.*, Writ of Habeas Corpus, People *ex. rel.* Stoughton v. Brann, Index No. 260154/2020 (N.Y. Sup. Ct. Mar. 25, 2020) (releasing 106 of 110 petitioners held on non-criminal technical parole violations).

237. *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.").

238. *See*, *e.g.*, Smith v. State, No. 20-0185, 2020 WL 1660013, at *2 (Mont. Mar. 31, 2020) (employing deliberate-indifference test while noting that Montana right combined with Eighth Amendment to provide Montanans "'greater protection[ ] from cruel and unusual punishment' than the Eighth Amendment"); *In re* 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 Corr., 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).

239. For example, the Hawai'i Supreme Court ordered the release of pretrial detainees charged with lower-level offenses by suspending detention orders. *See In re* Custody of State of Hawai'i, 2020 WL 4873285, at *2 (Haw. 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, 2020 WL 2121524, at *2 (Nev. Apr. 30, 2020) (denying mandamus petition and citing to similar rulings by the Kansas, Massachusetts, Montana, and Washington courts).

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.[240] Indeed, except for the category discussed below, most collective discharge orders involved rights arising under state constitutions.

3. The Constitutional Exception: Immigration Detention

Courts were largely unwilling, on the basis of laws arising under the Federal Constitution, to discharge people convicted of crimes. Litigants subject to ICE detention, however, fared somewhat better,[241] particularly in the First and Ninth federal circuits.[242] Freed from the PLRA and working with a more plaintiff-friendly suite of constitutional rights,[243] many courts found punitive conditions,[244] deliberate indifference,[245] or both. For example, the Ninth Circuit

240. *See supra* Part II.A.2.

241. People in ICE custody might be subject to detention designated as mandatory or non-mandatory. *See supra* note 109 and accompanying text. For our purposes, that distinction is less important because courts have generally refused to interpret the statutory status of "mandatory" detention to preclude release in the face of constitutional violations. *See*, *e.g.*, Malam v. Adducci, 452 F. Supp. 3d 643, 662 (E.D. Mich. 2020) ("But as set forth above, Petitioner's continued detention is in violation of the United States Constitution, to which 8 U.S.C. § 1226(c) must give way."); Basank v. Decker, 449 F. Supp. 3d 205, 215 (S.D.N.Y. 2020) ("However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c).").

242. *See infra* notes 246 to 254 and accompanying text. *See also*, *e.g.*, Yanes v. Martin, 464 F. Supp. 3d 467, 475 (D.R.I. 2020) (ordering release at Wyatt Detention Facility in Rhode Island), *appeal dismissed*, No. 20-1762, 2020 WL 8482783 (1st Cir. Oct. 6, 2020); Gomes v. U.S. Dep't of Homeland Sec., Acting Sec'y, 460 F. Supp. 3d 132, 135 (D.N.H. 2020) (ordering relief for those detained at Strafford County House of Corrections notwithstanding "highly competent superintendent who has approached this public health emergency with great concern"); Alcantara v. Archambeault, No. 20cv0756, 2020 WL 2315777, at *8 (S.D. Cal. May 1, 2020) (collecting cases and observing that, "[i]n the Ninth Circuit, the majority of district courts that have considered the issue have concluded there is a likelihood [that] plaintiffs [subject to ICE detention] will prevail on [Fifth Amendment due process] claims," before ultimately agreeing with that majority). In contrast to the examples in this footnote and recited below, the Third Circuit denied punitive-conditions and deliberate-indifference claims where the plaintiffs had asserted they were being detained notwithstanding their elevated COVID-19 risk. *See* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 326–31 (3d Cir. 2020).

243. *See supra* note 110 and accompanying text (discussing inapplicability of PLRA).

244. Federal courts in New Jersey, for example, were particularly likely to order release on the ground that some detention condition was punitive because the condition was not reasonably related to a legitimate government interest and therefore amounted to punishment. *See*, *e.g.*, Desmond K. B. v. Decker, 477 F. Supp. 3d 357, 369–70 (D.N.J. 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, 2020 WL 4339452, at *12 (D.N.J. July 28, 2020) (same); Armando C. G. v. Tsoukaris, No. CV 20-5652, 2020 WL 4218429, at *9 (D.N.J. July 23, 2020) (same). Some of these courts even went out of their way to underscore that the deliberate-indifference framework did not control punitive-conditions claims. *See*, *e.g.*, *Desmond K. B.*, 447 F. Supp. 3d at 370 (finding that the plaintiff was unlikely to succeed on his "deliberate indifference claim"); *Carlos M. R.*, 2020 WL 4339452, at *11 n.27 (same).

245. 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, and nevertheless determined that the facilities had been deliberately indifferent. *See* Gayle v. Meade, No. 20-21553-CIV, 2020 WL 2086482, at *3, *5 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020); *see also*, *e.g.*, Castillo v. Barr, 449 F. Supp. 3d 915, 922–23 (C.D.

approved a district court decision provisionally certifying a class of 1,370 people housed at the Adelanto ICE Processing Center, determining that the detention conditions violated the Fifth Amendment and ordering that population be reduced so as to allow social distancing.[246] The Ninth Circuit also approved of a district court order to institute a bail process for ICE detainees at the Mesa Verde Detention Facility and the Yuba County Jail, resulting in the indefinite release of over 130 people.[247] And a federal district court in Massachusetts certified a class of people detained at Bristol County House of Correction, ultimately ordering that the facility stop admissions and institute bail proceedings for people who remained.[248]

One of the most important developments grew out of a nationwide injunction issued by a judge in the Central District of California. In *Fraihat v. U.S. Immigration & Customs Enforcement*, the court certified a class consisting of all people in ICE custody who had risk factors or disabilities, making them more vulnerable to COVID-19.[249] Citing ICE's decision to adopt non-binding guidance for the first month of the pandemic and the failure to formulate a plan for those who were especially vulnerable, the court determined that ICE had been deliberately indifferent—specifically, that it had exhibited "callous indifference to the safety and wellbeing of the Subclass members."[250] It also found that the ICE detention amounted to punitive confinement in violation of *Bell*[251] and that it violated Section 504 of the Rehabilitation Act.[252] The court ultimately required ICE to identify, track, and make individualized custody determinations for vulnerable people in ICE detention.[253] ICE responded by transmitting what it

Cal. 2020) (finding deliberate indifference against ICE facility). By contrast, federal courts in New York were unaware of or ignored problems with applying a deliberate-indifference rule in non-criminal cases, but were willing to order relief nonetheless. *See*, *e.g.*, Avendaño Hernandez v. Decker, 450 F. Supp. 3d 443, 447–48 (S.D.N.Y. Mar. 31, 2020) (conducting deliberate-indifference analysis to grant release); Barbecho v. Decker, No. 20-cv-2821, 2020 WL 1876328, at *4–6 (S.D.N.Y. Apr. 15, 2020) (same); Ferreyra v. Decker, No. 20 CIV. 3170, 2020 WL 2612199, at *8 (S.D.N.Y. May 22, 2020) (same); Basank v. Decker, No. 20 CIV. 2518, 2020 WL 1953847, at *9–12 (S.D.N.Y. Apr. 23, 2020) (same); *see also*, *e.g.*, *Malam*, 452 F. Supp. 3d at 658 ("This type of Fifth Amendment claim is analyzed under the same rubric as Eighth Amendment claims brought by prisoners." (internal quotation marks and citations omitted)).

246. *See* Roman v. Wolf, 977 F.3d 935, 942–45 (9th Cir. 2020). By the time the Ninth Circuit reviewed the order, the 1,370-person plaintiff class was comprised of only 748 people who remained in detention. *See id.* at 945.

247. *See* Zepeda Rivas v. Jennings, 845 F. App'x 530, 532–33 (9th Cir. 2021).

248. *See* Savino v. Souza, 459 F. Supp. 3d 317, 321 (D. Mass. 2020).

249. *See* 445 F. Supp. 3d 709, 736–41 (C.D. Cal. 2020), *order clarified*, No. 19-1546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), and *rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021).

250. *Id.* at 743–46.

251. *See id.* at 746–47.

252. *See id.* at 747. The Rehabilitation Act parallels the ADA, except that it applies to federal detention.

253. *See id.* at 751.

called a "broadcast message" directing its field offices to conduct *Fraihat* determinations in accordance with the court order.[254]

In terms of raw docket entries, the U.S. District Court for the District of New Jersey heard many cases. At the beginning of the pandemic, the district court chief issued a (controversial) standing order requiring individualized treatment of detainee litigation.[255] Judges there began to use a three-category approach to triage relief for people in ICE custody, depending on whether they were (1) COVID-negative and not in the special vulnerability categories; (2) COVID-negative but in the special vulnerability categories; and (3) COVID-positive.[256] 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.[257] 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.[258] Courts were

254. *See* ENF'T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T, COVID-19 PANDEMIC RESPONSE REQUIREMENTS (2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf [https://perma.cc/5FN2-ZCME]. Regarding broadcast messages to field offices, see DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN., OIG-21-58, ICE'S MANAGEMENT OF COVID-19 IN ITS DETENTION FACILITIES PROVIDES LESSONS LEARNED FOR FUTURE PANDEMIC RESPONSES 24 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-58-Sep21.pdf [https://perma.cc/42DH-H75F] ("On three occasions, ERO sent broadcast e-mails to all field offices with an attached list of Fraihat subclass members who still needed custody re- determinations."), at https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-58-Sep21.pdf. In the immediate aftermath of that order, the practical onus remained on the detained person—or their family or lawyer—to identify their at-risk status, provide appropriate documentation, and move custody-review proceedings forward. *See* E-mail from Benjamin Salk to Lee Kovarsky (Mar. 16, 2021, 16:38 CST) (on file with author). Perhaps for this reason, on March 10, 2021, the district court agreed to appoint a special master to administer the ordered relief. *See* Order Granting Plaintiff's Motion to Appoint Special Master, Fraihat v. ICE, No. 19-cv-01546 (C.D. Cal. Mar. 10, 2021), ECF No. 281.

255. *See In re* Habeas Petitions from Immigr. Detainees Seeking Immediate Release Due to COVID-19 (D.N.J. Apr. 17, 2020) (standing order), https://www.njd.uscourts.gov/sites/njd/files/2020-10.pdf [https://perma.cc/ZGX2-HV8P]; *see also* Letter from Jeanne LoCicero, Legal Dir., ACLU of N.J., Lauren Major, Managing Att'y, Det. Project, Zoe Levine, Legal Dir., Immigr. Prac., Bronx Defs., Richard Bailey, Supervising Immigr. Att'y, Brooklyn Def. Servs., Alisa Wellek, Exec. Dir., Immigr. Def. Project, Lawrence S. Lustberg, Dir., John J. Gibbons Fellowship in Pub. Interest & Const. L., Deborah Lee, Deputy-Att'y-in-Charge, Immigr. L. Unit, Legal Aid Soc'y & Lori A. Nessel, Dir., Ctr. for Soc. Just., Seton Hall Univ. Sch. of L., to Chief Judge Freda L. Wolfson, Dist. of N.J. (Apr. 22, 2020) (on file with author) (challenging practice).

256. *See, e.g.*, Romeo S.K. v. Tsoukaris, No. 20-5512, 2020 WL 2537647, at *5 (D.N.J. May 18, 2020), *report and recommendation adopted*, No. 20-5512, 2020 WL 4364297 (D.N.J. July 29, 2020) (developing categories); *see also* Oscar P. C. v. Tsoukaris, No. CV 20-5622, 2020 WL 4915626, at *9 (D.N.J. Aug. 21, 2020) (using framework); Desmond K. B. v. Decker, 477 F. Supp. 3d 357, 367 (D.N.J. 2020) (same); Nicole B. v. Decker, No. 20-7467, 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).

257. *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).

258. *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").

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 seemed to have meant the health of people who were not in custody.[259] In adjudicating relief for people in these categories, these federal courts were especially focused on using the punitive-conditions framework rather than the deliberate-indifference analysis crafted for prison conditions.[260]

In sum, the ICE detention cases are a site of relatively greater judicial discharge for three interrelated reasons. First, the non-criminal status of the detention meant that there was a lower threshold for constitutional injury. Second, there was no statutory alternative for discharge remedies;[261] for the most part, courts lacked access to statutes that would have kept relief more individualized. Third, the PLRA did not require onerous exhaustion before seeking relief from a federal court.

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 a prerequisite to many such practices because overcrowding makes them otherwise impossible.[262] The dominant rights associated with requests for changed conditions arose under the Federal Constitution or the ADA.[263] 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 endorse.

The CDC Interim Guidance loomed over conditions litigation. Institutions that complied with the Guidance were typically inoculated against coercive relief.[264] 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

259. *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.").

260. *See supra* note 244 (citing District of New Jersey cases).

261. *See, e.g.*, *supra* note 215 (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).

262. *See* 2020 NAS REPORT, *supra* note 18, at 2 ("[D]ecarceration is an appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities . . . .").

263. *See supra* Part I.B.2.

264. *See*, *e.g.*, Duvall v. Hogan, No. 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, at *1 (9th Cir. May 5, 2020) (staying injunction to extent it exceeded CDC guidelines); *In Re* Petition of Pa. Prison Soc'y, 228 A.3d 885, 887 (Pa. 2020) (ordering facilities to comply with CDC Guidance). For a critique of the deference given to CDC guidance in conditions of confinement litigation, see Developments in the Law, *supra* note 24, at 2234–54.

mental health.[265] Some temporary relief also directed that defendants follow CDC recommendations to 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.[266] When jails had nominally robust policies but failed to enforce them, some courts were also willing to escalate remedies to ensure meaningful implementation.[267] (Over time, many of these orders were reversed on appeal.[268])

Many courts required compliance with the CDC Interim Guidance and no more. In a representative case, *Seth v. McDonough*,[269] the federal district court issued one such injunction.[270] In that case, a Maryland county jail had attempted some compliance by providing additional soap and increased temperature checks,[271] but those measures fell short of the Interim Guidance. The court concluded that the jail "implemented no functional plan to afford such [high-risk] detainees any additional screening, supervision, segregated housing, or any like measure."[272] As a result, the judge entered a narrow injunction designed only to protect high-risk prisoners.[273]

For cases involving constitutional violations, injunctive remedies requiring health-protective practices were far more common than collective discharge orders.[274] In part because lower courts were, relatively speaking, more willing to order broader relief that entailed more ongoing judicial involvement, such orders also triggered more appellate blowback. In *Ahlman v. Barnes*,[275] the Orange County jail case, the district court had refused a collective discharge remedy but ordered stricter health-and-safety measures because it found that the site's

265. *See, e.g.*, Carranza v. Reams, No. 20-cv-00977, 2020 WL 2320174, at *15 (D. Colo. May 11, 2020) (granting request to segregate medically vulnerable persons); Gray v. Cnty. of Riverside, 13-cv-00444 (C.D. Cal. April 16, 2020) (granting order requiring physically distanced housing, segregation of medically vulnerable people, and enhanced mental health resources for those quarantined). *But see* Mays v. Dart, 453 F. Supp. 3d 1074, 1094 (N.D. Ill. Apr. 9, 2020) (denying request to segregate).

266. *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 of 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, 2020 WL 1692668, at *1–2 (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 *19 (N.D. Tex. May 22, 2020) (declining to impose CDC guideline compliance on jail for fear of impinging on a legislative role and threatening federalism).

267. *Banks*, 459 F. Supp. 3d at 161–63.

268. *See infra* Part III.A.4.

269. 461 F. Supp. 3d at 253.

270. *See id.* at 265.

271. *See id.* at 251–52 (temperature checks); *id.* at 254 (soap).

272. *Id.* at 254.

273. *See id.* at 254–55.

274. *See supra* Part II.A.1.

275. 445 F. Supp. 3d 671 (C.D. Cal. 2020).

practices likely violated the Federal Constitution.[276] The district court noted that the CDC Interim Guidance was "not a statute, nor [was] it a mandate,"[277] but nevertheless treated it like "expert medical advice regarding measures needed to limit the spread of COVID-19."[278] The failure to implement those measures, the district court reasoned, was deliberate indifference.[279] The Supreme Court ultimately stayed this injunction,[280] mooting the remedy.

Ahlman wasn't the only case where appellate courts intervened to disable conditions-improvement orders entered by federal district court judges. In *Mays v. Dart*, the district court entered a preliminary injunction against Chicago's Cook County jail.[281] The court ordered the jail to end group housing and double-celling and to improve sanitation, testing, and provision of personal protective equipment.[282] The Seventh Circuit substantially narrowed that injunction, refusing to order altered facility protocols for housing and cell population.[283] The story was the same when lower courts ordered remedies for non-constitutional violations, too. *Valentine v. Collier*[284] 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.[285] 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.[286]

In sum, 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 are collective relief that redounds to the benefit of some facility population. The primary rights for injunctive remediation usually arise under the Federal Constitution or the ADA. Both 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.

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276. *See id.* at 694–95. 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.

277. *Id.* at 690.

278. *Id.*at 691.

279. *See id.* at 692.

280. *See* Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020) (mem.).

281. Mays v. Dart, 453 F. Supp. 3d 1074, 1099 (N.D. Ill. 2020).

282. *See id.* at 1099–1101.

283. *See* Mays v. Dart, 974 F.3d 810, 824 (7th Cir. 2020).

284. Valentine v. Collier, 978 F.3d 154 (5th Cir. 2020).

285. Valentine v. Collier, 490 F. Supp. 1121, 1127–28, 1170, 1171–72 (S.D. Tex. Sept. 29, 2020) (describing preliminary and entering permanent injunction), *rev'd*, 993 F.3d 270 (5th Cir. 2021).

286. *See Valentine*, 978 F.3d at 158. The Fifth Circuit also held that the Eighth Amendment claim would not succeed on the merits. *See id.* at 165.

C. Other Relief

During the COVID-19 pandemic, some people in custody sought forward-looking relief that did not fit neatly into a discharge-versus-conditions dichotomy. In such scenarios, courts have not ordered discharge or improved health-and-safety practices *per se*; but they often ordered process auxiliary to conditions improvement or discharge.[287]

One of the most common secondary remedies was an order for detention authorities to comply with the 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. The order included a notification rule, as well as requirements that eligibility be determined quickly and in light of health risk.[288] Some courts, however, were reluctant to assume receivership roles requiring them to specify and oversee the process for discharge. In *Russell v. Harris County*,[289] a federal judge in Houston was clearly distressed by risks to a pretrial detainee population being discharged at insufficient rates[290] but was unwilling to require the federal court to supervise local judges adjudicating bail requests.[291] The judge observed: "Given how this case differs from other COVID-19 litigation, the court is operating on uncertain legal terrain with limited guidance."[292]

Some requests for secondary remediation were auxiliary not to release protocols, but to conditions-improvement remedies. In *Gayle v. Meade*,[293] 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.[294] When the plaintiffs credibly alleged non-compliance therewith, the court appointed a Special Master to evaluate facility practices and administer necessary relief.[295] In North Carolina, a trial court similarly appointed a Special Master to oversee correctional

287. *See, e.g.*, *In re* Petition of Pa. 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 Corr., 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.").

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

289. 454 F. Supp. 3d 624 (S.D. Tex. 2020).

290. *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.").

291. *See id.* at 639.

292. *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. MAG., Summer 2020, at 39, 41.

293. No. 20-21553, 2020 WL 4047334, at *2 (S.D. Fla. July 17, 2020).

294. *See id.* at *2–3.

295. *See id.* at *3–4.

compliance with conditions-related preliminary orders, after finding that state officials were probably violating the state and federal constitutions.[296]

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, convicted detainees successfully modified an existing settlement agreement in order to secure improved prison conditions.[297] In Colorado, a state court entered a consent decree regarding conditions of confinement and speeding up of the parole process.[298] In Connecticut, a federal court entered a settlement agreement between those in correctional custody and the state department of corrections. The state department of corrections agreed to improve conditions, make best efforts to release vulnerable people, and cooperate with a five-member monitoring panel charged with supervising the remedies.[299]

* * *

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 they 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

296. Jordan Wilkie, *Special Master to Make NC Prisons Comply*, CAROLINA PUB. PRESS (Dec. 4, 2020), https://carolinapublicpress.org/40366/special-master-to-make-nc-prisons-comply-with-court-orders-during-pandemic/ [https://perma.cc/72BE-9PUZ]; N.C. State Conf. of the NAACP v. Cooper, No. 20 CVS 500110 (Gen. Ct. Just. Super. Ct. June 16, 2020) (preliminary injunction).

297. *See* Coleman v. Newsom, 455 F. Supp. 3d 926, 931 (E.D. Cal. 2020).

298. *See* Tracy Harmon, *Prison Coronavirus Protocols Mark Lawsuit Settlement Agreement,* PUEBLO CHIEFTAIN (Nov. 24, 2020), https://www.chieftain.com/story/news/2020/11/25/state-prison-officials-and-aclu-staff-settle-virus-safety-lawsuit/6346357002/ [https://perma.cc/Z2MV-Z5EG] (describing decree).

299. *See* Kelan Lyons, *ACLU: CT Prisons Not Complying with Terms of COVID Lawsuit Settlement*, CT POST (Oct. 30, 2020), https://www.ctpost.com/news/coronavirus/article/ACLU-CT-prisons-not-complying-with-terms-of-15684871.php [https://perma.cc/E369-GGA4] (describing agreement).

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. These assumptions are 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

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. These incumbent combinations were not configured with an eye to pandemic threat and 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. Background on Remedial Equilibration

We generally agree with the view that rights and remedies do not develop in silos; there is no such thing as a Platonic right that "exists" independent of real-world implementation and enforcement.[300] Without wading too far into the outer-most registers of the debate over "rights essentialism,"[301] 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.[302] Over time, the remedial initiative of district judges caused the Supreme Court to reduce the wattage of the underlying constitutional rights.[303] Remedies based on Eighth Amendment

300. *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, 679 (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").

301. *See* Levinson, *supra* note 300, 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).

302. *See* Levinson, *supra* note 300, at 878–82.

303. *See id.* at 881 ("Expansive district court structural reform of prisons where conditions are not chronically or severely unconscionable has provoked the Supreme Court to curtail the scope of the right.").

violations placed federal district judges in receivership roles that made the modern Court especially uncomfortable.[304] The Court responded by upping the deliberate-indifference showing necessary to trigger remedial authority.[305] 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 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.[306] It also demonstrates the process by which the fear of broad remedies prompts restrictive interpretations of the right.[307] These processes were expressed in several interrelated judicial tendencies: to conduct risk tradeoffs through more individualized non-constitutional remedies;[308] to adopt procedural rules that avoided constitutional interpretation;[309] to focus any constitutional relief on people in non-criminal detention who were perceived to pose less danger;[310] to triage remedies towards the most medically vulnerable people;[311] 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.[312] 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.[313] Federal courts usually cut off discharge pathways that avoided the PLRA, and then interpreted PLRA's remedial limits restrictively.[314] 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.[315]

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304. *See id.*

305. *See infra* notes 332 to 340 and accompanying text.

306. *See supra* Part III.A.2.

307. *See supra* Part III.A.3.

308. *See supra* notes 211 to 229 and accompanying text.

309. *See supra* notes 241 to 261 and accompanying text.

310. *See supra* Part II.A.3.

311. *See*, *e.g.*, *supra* notes 256 to 259 and accompanying text (explaining such an approach for those in ICE detention).

312. *See infra* notes 332 to 340 and accompanying text.

313. *See supra* Part II.A.1.

314. *See*, *e.g.*, *supra* notes 192 to 194 and accompanying text (non-PLRA pathways); *infra* notes 316 to 319 and accompanying text (PLRA remedial limits).

315. *See supra* note 196 and accompanying text; *infra* note 321 and accompanying text.

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.[316] Statutorily excepted from these requirements are "habeas corpus proceedings challenging the fact or duration of confinement in prison."[317] 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."[318] 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.[319] There were some exceptions for scenarios where the procedure that required exhausting was wholly unavailable.[320] Even when courts treated detainee-class complaints as habeas litigation, judges still read procedural doctrines in ways that thwarted meaningful collective relief. For example, they applied prudential exhaustion requirements or held that person-to-person variation in habeas claims precluded class treatment entirely.[321]

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.[322] In pretrial litigation, for example, many courts relied on the statutory provisions permitting individualized release for health risk.[323] Courts generally discharged people convicted of crimes using individualized provisions for compassionate release or home confinement.[324]

316. These are actually two stacked requirements. There is one provision that formally requires administrative exhaustion for all 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).

317. 18 U.S.C. § 3626(g)(2).

318. *Id.* § 3626(a)(3).

319. *See*, *e.g.*, Valentine v. Collier, 956 F.3d 797, 804–05 (5th Cir. 2020) (finding administrative procedure sufficiently speedy and accessible so as to not to disable exhaustion requirement under the statute).

320. *See*, *e.g.*, McPherson v. Lamont, 457 F. Supp. 3d 67, 76 (D. Ct. 2020) (concluding exhaustion futile for reasons including risk that inmates would contract COVID-19 prior to completing process); Maney v. Brown, 464 F. Supp. 3d 1191, 1207 (D. Or. 2020) ("Based on the current record, the Court concludes that ODOC's administrative grievance procedure is currently unavailable for the relief Plaintiffs seek in this case, and therefore exhaustion is not required for Plaintiffs to proceed on their Section 1983 claims.").

321. *See supra* Part II.A.1.

322. *See supra* Part II.A.2.

323. *See supra* notes 215, 217 to 221 and accompanying text.

324. *See supra* notes 222 to 225 and accompanying text.

3. Rights

When courts reached constitutional issues—either because remedial limitations were insufficiently preclusive or because statutory substitutes were unavailable (ICE detention)—they stingily applied the constitutional rights, both generally and especially in criminal detention cases. Courts readily accepted that the virus entailed objective risk, given its spread and severity.[325] 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*,[326] 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 officials must recklessly disregard the risk before detainees may obtain Eighth Amendment relief.[327] 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."[328] Negligence alone does not support a finding of constitutional harm, but *Farmer* made clear that knowing risk and failing to respond reasonably does. *Farmer* established 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."[329]

Judges subtly restricted the constitutional right in two ways. The first was not so much about the content of the deliberate-indifference rule as it was about the scope of its application. The deliberate-indifference framework was established to separate hard treatment into categories of acceptable and unacceptable punishment. COVID-19 accelerated a trend in which courts applied the framework 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.[330] 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, the

325. *See*, *e.g.*, Wilson v. Williams, 961 F.3d 829, 840 (6th Cir. 2020) (finding that the respondents were aware of the risk of COVID-19 where fifty-nine inmates and forty-six staff tested positive, and six people incarcerated in the facility had died); *see also supra* notes 178 to 185 and accompanying text.

326. 511 U.S. 825 (1994).

327. *Id. at* 844–45.

328. *Id.* at 835.

329. *Id.* at 847.

330. *See supra* notes 175 to 181 and accompanying text.

constitutional harm turned on how one defines "reasonable measures" to abate viral risk. In some cases, lower courts 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,[331] which is consistent with the way *Farmer* defined the concept. These cases, however, were more exception than rule.

Deliberate indifference requires awareness of risk and a failure to respond reasonably. Many judges simply converted this carefully crafted definition into a requirement of subjective intent or knowledge.[332] The most extreme version of this view was captured in *Wragg v. Ortiz*,[333] with the court reasoning that, if detention officials "subjectively believe their containment measures are the best they can do," the Eighth Amendment inquiry is over.[334] That interpretation of deliberate indifference—ratcheting up the necessary showing to a level well beyond recklessness—is unfaithful to *Farmer* and makes relief far more difficult to obtain. Subjective intent is extremely difficult to prove because the defending party typically has exclusive control of the crucial information regarding mental state.[335] Moreover, that party is often the beneficiary of presumptions about candor and regularity.[336]

Judges using the deliberate-indifference framework also narrowed the constitutional rights by odd reference to judicially intuited side constraints. In

331. *See*, *e.g.*, Banks v. Booth, 459 F. Supp. 3d 143, 157–59 (D.D.C. 2020) (finding that the plaintiffs established a likelihood of success in showing deliberate indifference where they provided evidence that the 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").

332. *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 omitted)).

333. 462 F. Supp. 3d. 476 (D.N.J. 2020).

334. *Id.* at 507.

335. *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) ("As a practical matter, it is virtually impossible for . . . plaintiffs to prove the intent of prison officials . . . ."); 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) ("[E]ven if [a] decision was in part motivated by animus, the private nature of prison officials' decisions makes it nearly impossible to uncover the smoking gun evidence of intent that courts have found persuasive in the past."); *see also* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 133 (Sharon Dolovich & Alexandra Natapoff eds., 2017) [hereinafter Dolovich, *Canons of Evasion*] (calling attention to the "problem of other minds" in prisoner conditions litigation).

336. *See* Friedman, *supra* note 335, at 947; David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2071 (2004); *see also* Dolovich, *Canons of Evasion*, *supra* note 335, at 140–41 (discussing the effects of these things on the review of decision-making at detention facilities).

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. Courts generally considered the absence of bold action to be a reasonably practical constraint, so they usually rejected the failure to take such action as a ground for a deliberate-indifference finding.[337] 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 a positive action [in the form of decarceration] likely does not constitute a state of mind more blameworthy than negligence."[338] 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.[339] 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. Facilities simply could not be expected to pay to conduct facility-wide testing.[340] Why not? Many courts seemed uncomfortable answering that question.

4. Appellate Re-Calibration

Within a judicial system, appeals courts necessarily play policy-making roles that trial courts do not.[341] The pattern of policy-making in pertinent appellate decisions is consistent with the view that COVID-19 provoked 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*, the federal district court had preliminarily enjoined practices in a jail housing 3,000

337. *But see* Banks v. Booth, 459 F. Supp. 3d 143, 158 (D.D.C. 2020) (where the court was aware that circumstances might reveal relief to have been unnecessary, but 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").

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

339. *See*, *e.g.*, Plata v. Newsom, 445 F. Supp. 3d 557, 563–64 (N.D. Cal. 2020) (finding that where defendants did not implement social distancing, they were not deliberately indifferent because they "implemented several [other] measures"); Wragg v. Ortiz, 462 F. Supp. 3d. 476, 509 (D.N.J. 2020) ("That physical distancing is not possible in a prison setting, as [Plaintiffs] urge, does not an Eighth Amendment claim make.").

340. *See Wragg*, 462 F. Supp. 3d. at 506. *But see* Savino v. Souza, 459 F. Supp. 3d 317, 331–32 (D. Mass. 2020) (finding that the 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. 2020) (finding that a "lack of any testing for COVID-19" constituted deliberate indifference where the defendant had not "actually tested anyone to date").

341. *See* James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 565, 568 (2001).

prisoners, which had experienced over 300 cases.[342] 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.[343] The district court found the risk "undeniably high" and determined that any compliance with actual jail policy was "piecemeal and inadequate."[344] In entering the preliminary injunction, the federal district court determined the facility likely violated the Eighth Amendment and the ADA.[345] The Ninth Circuit twice refused to stay the injunction.[346]

The Supreme Court, however, stayed the injunction pending further litigation, effectively mooting the remedy.[347] There was no reasoning of note in the Court's "shadow docket" order.[348] Four justices would have denied the State's application to dissolve the injunction.[349] 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 intervention was unwarranted, and arguing the facility could not show irreparable harm.[350] Justice Sotomayor summarized the record developed in the district court as follows:

> [I]nmates described being transported back and forth to the jail in crammed buses, socializing in dayrooms with no space to distance physically, lining up next to each other to wait for the phone, sleeping in bunk beds two to three feet apart, and even being ordered to stand closer than six feet apart when inmates tried to socially distance.[351]

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.[352] (The Sixth Circuit later vacated the injunction on the grounds that the plaintiffs had failed to show deliberate indifference.[353]) The difference in Justice Sotomayor's view of the two cases

342. 445 F. Supp. 3d 671, 679–80, 694–95 (C.D. Cal. 2020).
343. *See id.*
344. *Id.* at 688.
345. *See id.* at 691–92.
346. Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *1 (9th Cir. June 17, 2020).
347. *See* Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020) (mem.).
348. *See supra* note 17.
349. *See Ahlman*, 140 S. Ct. at 2620.
350. *See id.* at 2621–22 (Sotomayor, J., dissenting).
351. *Id.* at 2621.
352. *See* Williams v. Wilson, 207 L. Ed. 2d 168 (2020) (mem.).
353. *See* Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020).

may be explained by the fact that the *Ahlman* injunction was for changed conditions,[354] whereas the FCI-Elkton injunction was for discharge.[355]

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 eventually vacated on the ground that there was no deliberate indifference.[356] 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.[357] The Sixth Circuit quickly vacated the district court's injunction, however, concluding that the jail had "responded reasonably" to COVID-19 and that there was no deliberate indifference.[358] Indeed, there were instances of appeals courts stepping in to limit trial remedies in the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.[359]

We underscore that there is a meaningful inference to be drawn from the results in appeals courts and from their necessary status as policy-makers. More so 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 by restricting the scope of the right or the remedy. We are aware of no cases in which an appeals court awarded relief that a district court denied.

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354. *See Ahlman*, 140 S. Ct. at 2620 (Sotomayor, J., dissenting).

355. *See Wilson*, 961 F.3d at 844.

356. *Id.*

357. *See* Cameron v. Bouchard, 462 F. Supp. 3d 746, 784 (E.D. Mich. 2020), *reconsidered by* No. 20-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020), *and vacated*, 815 F. App'x 978 (6th Cir. 2020).

358. *See Cameron*, 815 F. App'x at 988.

359. *See*, *e.g.*, Hope v. Warden York Cnty. Prison, 972 F.3d 310 (3d Cir. 2020) (finding that immigration detainees failed to show a substantial likelihood of success on the claim that government was deliberately indifferent to their serious medical needs); Valentine v. Collier, 978 F.3d 154, 162–66 (5th Cir. 2020) (granting a prison's emergency motion for stay of preliminary injunction, finding the district court had incorrectly applied the Eighth Amendment deliberate-indifference standard); Marlowe v. LeBlanc, 810 F. App'x. 302 (5th Cir. 2020) (staying a temporary restraining order regarding conditions in a state prison, requiring compliance with that prison's own internal policies and that the prison submit a plan to ensure social distancing and hygiene practices); *Cameron*, 815 F. App'x. at 985 (vacating preliminary injunctive relief, citing *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), and finding that the jail "acted unreasonably" to prevent the spread of COVID-19); *Wilson*, 961 F.3d at 844–45 (vacating the district court's preliminary injunction, in a case brought by medically vulnerable federal prisoners, holding that the 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 the district court's preliminary injunction, finding that the 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 a preliminary injunction except to the extent necessary to comply with CDC Interim Guidance); Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) (finding that the district court erred in awarding injunctive relief because the jail could not be expected to do the "impossible").

* * *

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.[360]

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 factfinding before deciding issues against jailers, interposed exhaustion rules, and remanded for determinations pursuant to more deferential standards.[361] 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,[362] the collective action problem works the other way thereafter. It may take a village to imprison someone,[363] 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.[364] Correctional personnel are also the lowest-status workers in law enforcement—with little training, high

360. *See supra* Part II.A.3.

361. *See supra* Part III.A.4.

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

363. *Cf.* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (commenting that "it takes a village to incarcerate someone").

364. *See* NAS Report, *supra* note 18, at 31.

turnover, and lower pay.[365] The health and safety of people in custody are therefore subject to the layered decision-making of a short-staffed and modestly trained professional community with limited oversight and accountability.[366] 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.[367] Even at the highest levels, corrections leadership may lack a public health background.[368]

The bureaucratic ecosystem is often working at some institutional remove from correctional leadership, which itself may lack any background in responding to a public health crisis. Judicial activity that is predicated on the functional operation of this ecosystem, particularly during exigent circumstances, is at a significant disadvantage. Detention bureaucracies complicated relief because they slowed the exhaustion that must usually be completed before judicial intervention begins. Courts gave the health-and-safety practices of detention facilities the deference that is typically accorded to administrative action but did so in the absence of the expertise and administrative process that justifies such deference in other settings. Moreover, much of the judicial relief awarded was implemented, haltingly, by 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 institutional, administrative, and, in the case of federal litigation, state judicial remedies.[369] Exhaustion often required detainees to make futile requests that consumed precious time. If the exhaustion requirements did not require that the detainees have received an adverse decision, then they usually required them to wait until requests for relief timed out.[370]

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365. *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).

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

367. *See* Kovarsky, *supra* note 3, at 86 n.84.

368. *See* Keri Blakinger, *Prisons Have a Health Care Issue—And it Starts at the Top, Critics Say*, MARSHALL PROJECT (July 1, 2021), https://www.themarshallproject.org/2021/07/01/prisons-have-a-health-care-issue-and-it-starts-at-the-top-critics-say [https://perma.cc/2VDB-C2UH].

369. *See supra* notes 156 to 166, 194 to 196, 203 to 207, 232, 315 to 316, 319 to 321 and accompanying text.

370. *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."), *overruled on other grounds by* Gonzalez v. Seal, 702 F.3d 785 (5th Cir. 2012).

Moving a detainee expeditiously through the 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.[371] 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.[372]

2. Bureaucracy and Deference

Deference models that operate on assumptions about administrative deliberation and expertise create another problem.[373] Not only do deference practices bake in assumptions about the integrity of the administrative process and the desirability of its outcomes,[374] they also perpetuate a longstanding tradition of deference to the public health decision-making of local and state authorities.[375] Deference to a single detention site's policies, moreover, has historically been a signal requirement of the pertinent decisional law.[376] During the pandemic, however, the predicates for routinized deference were absent. The faith typically placed in administrative leadership became rather unjustified—as one might expect when the 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,[377] the deference to the CDC Interim Guidance appeared to have the opposite effect. Judges fixated on the Interim Guidance—which was general, minimalist, and

371. *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 3, at 88 nn.84–85 and accompanying text.

372. *See* Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, MARSHALL PROJECT (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied [https://perma.cc/7K2A-93QM]; Blakinger & Neff, *supra* note 91 and accompanying text.

373. *See* Eric Berger, *Comparative Capacity and Competence*, 2020 WIS. L. REV. 215, 236 (2020).

374. *See id.* at 234.

375. *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 335, at 947–48.

376. *See* Dolovich, *The Failed Regulation and Oversight of American Prisons*, *supra* note 29 (manuscript at 5.13 to .15).

377. *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).

precatory[378]—as a scientific lodestar.[379] 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.[380] The CDC largely deferred to correctional authorities in its reluctance to touch on release as they key mechanism to permit social distancing, and then judges reaffirmed that deference. Judges, in short, used the Interim Guidance as a means to discount information presented by most other public health experts.[381]

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 conditions *per se*. Many of these interventions placed judges in precisely the ongoing receivership roles that have historically made the Supreme Court uncomfortable.[382] 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.[383]

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.[384] In March 2020, the CARES Act vested the Justice Department with other broad discharge powers built on existing home confinement and compassionate release authority.[385] 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.[386] Memorializing those directives in April, the U.S. Attorney General singled out

378. *See supra* notes 79 to 86 and accompanying text.
379. *See supra* notes 264 to 273 and accompanying text.
380. *See supra* notes 73 to 76 and accompanying text.
381. *See id.*
382. *See supra* note 304 and accompanying text.
383. *See* Gayle v. Meade, No. 20-21553, 2020 WL 4047334, at *3 (S.D. Fla. July 17, 2020).
384. 18 U.S.C. § 3582(c)(1)(A).
385. *See* Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020).
386. *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/attorney-general-william-barr-bureau-of-prisons-send-inmates-home-coronavirus-covid-19/ [https://perma.cc/T86E-V7CF].

the need for expeditious action at FCI-Oakdale (LA), FCI-Danbury (CT), and FCI-Elkton (OH).[387]

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[388] and gave limited guidance as to how to use the compassionate release provisions in COVID-19 cases.[389] 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 Attorney General's order and corresponding legislation] seriously."[390] At that facility, there were 241 compassionate release applications during the first six weeks of the COVID-19 emergency, and none were granted.[391] A federal judge called the BOP's discharge procedures "Kafkaesque."[392]

Even when subject to a judicial order, some facilities "made only minimal effort to get at-risk inmates out of harm's way,"[393] 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.[394] 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.[395] 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."[396]

387. *See* Memorandum from William Barr, Att'y Gen., to the Dir. of Bureau of Prisons 1 (Apr. 3, 2020), https://www.politico.com/20/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000 [https://perma.cc/7MS9-FD8F].

388. *See COVID-19 Action Plan: Phase Five*, *supra* note 90.

388. *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-by-federal-guidance-on-home-confinement-release/ [https://perma.cc/9QCD-6DL8].

389. 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. 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), *vacated*, No. 20-cv-00794, 2020 WL 1910481 (6th Cir. Sept. 17, 2020).

390. Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 415 (D. Conn. 2020).

391. *See id.*

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

393. *Wilson*,, 2020 WL 2542131, at *2.

394. *See id*.

395. *See* Wilson v. Williams, 961 F.3d 829 (6th Cir. 2020) (appellate disposition); Williams v. Wilson, 207 L. Ed. 2d 168 (2020) (mem.).

396. Livas v. Myers, 455 F. Supp. 3d 272, 283 (W.D.La. 2020).

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. We strongly suspect this "detention exceptionalism" was attributable to entrenched beliefs about the safety risks posed by, and moral worth attributed to, people in American detention facilities. One does not have to look hard to find supportive evidence.

Compare the Supreme Court treatment of detainees' rights with its treatment of personal rights in other stress-tested contexts. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[397] the Supreme Court voted 5-4 to enjoin enforcement of a New York rule concerning occupancy limits for religious services.[398] 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.[399] 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."[400] 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.[401]

Roman Catholic Diocese of Brooklyn, and the general category of decision-making associated with it,[402] demonstrates a contrast between the treatment of constitutional rights in detention litigation and in other contexts. Vulnerable detainees, incapable of protecting themselves through autonomous decision-making, bear partially enforced constitutional rights. Meanwhile, 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 the views that: (1) people who have spent time in custody pose a substantially elevated danger to the community; and (2) the health of such people is somehow worth less than the health of other community members.

397. 141 S. Ct. 63 (2020).
398. *See id.* at 69.
399. *See id.* at 66.
400. *Id.* at 68.
401. *See id.*
402. 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 Acad. v. Toledo-Lucas Cnty. Health Dept., No. 20-4300 (6th Cir. Dec. 31, 2020).

1. The Perception of Danger

Inflated perception of safety risk plays a clear role in release practices across institutions. By "perceived safety risk," we 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.[403]

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.[404] Imprisonment does not perform any offense-reduction functions nearly as well as people once believed—not with respect to the incapacitation or specific deterrence of the person in custody, nor with respect to the general deterrence of other people.[405] These effects are clearly non-existent when the imprisonment is some increment of an already-long sentence and when it involves an older detainee.[406] Nevertheless, the belief that more detention improves public safety persists,[407] and it explains why even the broadest decarceration initiatives often exclude sentence reductions for people convicted of violent offenses.[408]

Indeed, perceptions of safety threat 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,[409] 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

403. *See supra* Part II.A.3.

404. *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 the 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).

405. *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).

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

407. *See* Binder & Notterman, *supra* note 406, at 30.

408. *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).

409. *See supra* Part II.A.3.

decarcerate. Judges can order statutory discharge only for detainees that the legislature has declared eligible for such relief.[410] Most releases therefore involved older people or medically vulnerable people convicted of lesser crimes.[411] 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.[412] Under criteria adopted by many states, for example, people incarcerated for violent crimes are simply ineligible for early release.[413]

And although courts were willing to order individualized release for convicted detainees, they were categorically unwilling to order remedies that would have required broader discharge. They refused to order discharge *per se*,[414] and they were extraordinarily reluctant to order health-protective practices to which prisons objected on security grounds.[415] Opinions refusing relief against prisons are replete with non-specific concerns about safety risks 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 the population reduction necessary to slow COVID-19 spread.[416]

The decisional treatment of jails and other sites of pretrial detention lands somewhere between that of ICE and post-conviction facilities, 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.[417] 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

410. *See*, *e.g.*, 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 [https://perma.cc/5MMA-KPB6] (explaining that Ohio's vulnerable prisoner population "did not hugely benefit from the release policy" because "governors and state legislatures are still afraid to release violent criminals even if their crimes were committed decades ago" and because "[t]he prisoners most vulnerable to the coronavirus are among the least likely to be released by either emergency clemency or many reform bills").

411. *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 [https://perma.cc/L9QA-7DPJ].

412. *See* Prescott et al., *supra* note 408, at 1648; *see also* 2020 NAS REPORT, *supra* note 18, at 57–58 (concluding that there is "little evidence" that parole release, compassionate release, or other early release measures successfully reduced prison populations).

413. *See* Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847 (2020); *see also* Mirko Bagaric, Gabrielle Wolf & Daniel McCord, *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).

414. *See supra* Part II.A.1.

415. *See*, *e.g.*, *supra* notes 338 to 340 and accompanying text (discussing refusal to order remedies that required decarceration, which reflects generalized intuitions about public safety).

416. *See* 2020 NAS REPORT, *supra* note 18, at 56–57.

417. *See* United States v. Salerno, 481 U.S. 739, 755 (1984).

detention.[418] Releasing tranches of pretrial detainees poses little threat to public safety,[419] but judicial intervention in American jails remained quite sensitive to exaggerated risk.[420]

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 reflects a longstanding and generalized idea that releasing people from correctional custody poses broad safety risks. Enforcement of established rights against health risk crashed into an extremely well-defined interest in the release avoidance fueling 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 "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.[421] It is fairly well established that, when people assert that incarceration improves public safety, they mean safety of the unincarcerated public.[422] 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*.[423] And to the extent

418. *See generally* Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 469–75 (2020) (discussing the adoption of risk-assessment tools to predict danger in pretrial decision-making); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497 (2012) (collecting sources showing that judges predict pretrial crime poorly and noting the 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).

419. *See* Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/ [https://perma.cc/HN26-NVFR] (collecting studies).

420. *See*, *e.g.*, Doug Colbert & Colin Starger, *Bail Injustice in the Time of COVID-19*, BALT. SUN (Sep. 7, 2020), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0906-bail-reform-20200907-crgclw6s4jhavmmtdks4ebniqm-story.html [https://perma.cc/6LD4-D6MP] (documenting phenomenon in Maryland bail proceedings).

421. *See generally* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259 (2011) [hereinafter Dolovich, *Exclusion and Control*] (linking mass carceral practices to a general view of prisoners' sub-humanity); Dolovich, *The Failed Regulation and Oversight of American Prisons*, *supra* note 29 (manuscript at 5.16) ("Any adequate explanations for this state of affairs must involve reckoning with the moral value—or, more aptly, the moral disvalue—American society collectively ascribes to the lives and well-being of people in prison.").

422. *See* Dolovich, *Exclusion and Control*, *supra* note 421, at 272–74.

423. *See* Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537, 540 (2015).

that criminality is situational,[424] incarceration is just as likely to increase crime as it is to suppress it; detention is criminogenic.[425]

The notion that incarceration improves social safety persists not because of robust empirical support, but because society cares less about the disutility of crime victims who are 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."[426] Americans accept such distribution and expression because, to put things bluntly, they accept that people in custody are "without equal moral or political standing."[427] There are profound race and class dimensions to this equilibrium—given the scale, demography, and history of American detention.[428]

And so it is with COVID-19.[429] Notwithstanding the overwhelming risk associated with infection in such crowded and under-protected environments, American institutions resist discharge by vague reference to public safety and without reference to the racialized patterns of harm to vulnerable populations.[430] It seems difficult to argue that such references to public safety involve any rigorous utilitarian calculation. COVID-19 presents health risks to detention communities (and those around them) 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.[431]

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424. *See* Binder & Notterman, *supra* note 406, at 32–34.

425. *See* Joshua C. Cochran, Daniel P. Mears & William D. Bales, *Assessing the Effectiveness of Correctional Sanctions*, 30 J. QUANTITATIVE CRIMINOLOGY 317 (2014).

426. Binder & Notterman, *supra* note 406, at 43.

427. Dolovich, *Exclusion and Control*, *supra* note 421, at 330.

428. *See* 2020 NAS REPORT, *supra* note 18, at 23 ("[A]dmission to and release from incarceration are spatially concentrated in low-income, predominantly Black and Hispanic neighborhoods. . . . In addition to their socioeconomic disadvantage, people at greatest risk of incarceration are also in poor health, burdened disproportionately by chronic health conditions.").

429. Professor Dolovich draws a similar conclusion about some of the judicial response. *See* Dolovich, *Mass Incarceration, Meet Covid-19*, *supra* note 3, at 5.

430. *See*, *e.g.*, Mays v. Dart, 974 F.3d 810, 813 (7th Cir. 2020) (invoking safety risks); *cf. also* Eric Reinhart & Daniel L. Chen, *Carceral-Community Epidemiology, Structural Racism, and COVID-19 Disparities*, 118 PNAS 1, 1 (2021) ("Given disproportionate policing and incarceration of racialized residents nationally, the criminal punishment system may explain a large proportion of racial COVID-19 disparities noted across the United States.").

431. *See* Dolovich, *Exclusion and Control*, *supra* note 421, at 330–31. Pursuant to what Professor Dolovich has called America's "carceral bargain," *see* Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 132, at 892, society chooses imprisonment not to deter or to incapacitate or to exact retribution, but to forget. And forgetting is easier when the humanity of detainees is diminished, which in turn reduces the bargained-for obligations of the detaining state.

CONCLUSION

The way courts enforced detainee-protective rights and remedies during the pandemic was markedly different from how they enforced other constitutional rules. Imagine if, in *Ahlman* (the Orange County jail case), the U.S. 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.[432] 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."[433] 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. Judges were part of a broader injustice that forced those in America's detention facilities to bear a staggering share of COVID-19 risk. Judges might have lacked the desire, imagination, or 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 through multiple branches of government.[434] 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 the institutional resistance captured here affect how America vaccinates and otherwise protects 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, issue orders requiring improved conditions notwithstanding the need for complementary release, and assume receivership roles necessary to ensure compliance with these judicial orders. We hope that many will learn lasting

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432. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct 63, 66 (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.").

433. *Id.* at 68.

434. *See* Dolovich, *The Failed Regulation and Oversight of American Prisons*, *supra* note 29 (manuscript at 5.2) ("In practice, when it comes to prisons, the checks and balances built into the system have almost entirely failed, with no branch proving able or willing to ensure even minimally decent carceral conditions.").

lessons from the largely indifferent and ineffectual 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.