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WHEN THE CONDITIONS ARE THE CONFINEMENT: EIGHTH AMENDMENT HABEAS CLAIMS DURING COVID-19

*Michael L. Zuckerman**

INTRODUCTION

Imagine you are a lawyer with clients inside a prison under which a sinkhole has just opened. The prison is slowly sinking into the ground and filling with water. Though the prison is attempting to pump out excess water, the water level is projected to rise some five or so feet over the coming weeks.

Some of the people incarcerated at the prison are taller and know how to swim, which suggests that they will be unlikely to drown to death, though their imprisonment will become more uncomfortable than usual. Some are shorter or do not know how to swim, which suggests that they will be more likely to drown to death—though, of course, it is possible that some or even many of these people will also survive.

You are alarmed that the prison is not moving these people out of the sinking prison. But when you complain about the danger, the Warden responds that the prisoners were all validly convicted and sentenced and that the prison staff are working hard to mitigate the water-level rise by pumping out the excess water. They are also providing the prisoners with flotation devices in the meantime.

You have heard reports from your clients that these measures have not been as widely implemented as the Warden claims. But you are also not convinced that, even if these measures are implemented as promised, they are effective enough to protect your clients from a substantial risk of serious harm. Simply being incarcerated in this sinking prison itself, you might think, violates the Eighth Amendment's prohibition on cruel and unusual punishment.

What do you do?

You may do something similar to what a small constellation of lawyers around the country (myself included) tried to do as the novel coronavirus,

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COVID-19, spread rapidly in state and federal prisons, jails, and other detention facilities. In this Article, I tell the story of eight major cases involving COVID-19 in prisons and discuss the legal issues and tensions that arose from these cases. The overall trajectory of these cases is dispiriting: a foreseeable risk to the health and lives of people whose wellbeing is at the mercy of the state became an unnecessary disaster, with hundreds of thousands of prisoners infected by the spring of 2021 and more than two thousand dead.

My goals in this Article are threefold. First, I hope to provide a starting point for practitioners or incarcerated people who may find themselves litigating similar issues in the future—seeking release from confinement that itself violates the Eighth Amendment. Because these issues are complex and inherently urgent, there is rarely the luxury of extended doctrinal research.¹

Second, I hope to make a record of what transpired before the world moves on and these cases are lost to the sands of Westlaw and Lexis. Chronicling what has happened—even (or especially) when one disagrees with the results—is valuable in and of itself.²

Third, I offer a critical analysis of the cases themselves and the doctrine involved. While the cases hinged on an unprecedented factual backdrop—a worldwide pandemic—the doctrinal tensions that arose and the trends that the cases followed are by no means unique. Rather, they cast in harsher relief much that was already true about mass incarceration in the United States and the law that confronts those who wish to make the system more humane. The conditions of incarceration are bad, and in virtually all cases throughout our “carceral archipelago,”³ they put people at much graver risk of harm than they would otherwise face.⁴ The procedural and substantive hurdles to remedying those risks through

1. In doing so, I do not write on a blank slate. See, e.g., Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 NW. U. L. REV. ONLINE 59 (2020); Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, 11/16/2020 U. CHI. L. REV. ONLINE 4; Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 109 CALIF. L. REV. ____ (forthcoming 2021); Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 (2020); *Developments in the Law — Conditions of Confinement, Covid-19, and the CDC*, 134 HARV. L. REV. 2233 (2021). I had submitted a full draft of this piece before learning of Professors Garrett and Kovarsky’s forthcoming Article, so I distinguish at a few points within where I later drew on their work, where I independently came to a similar conclusion, and where I respectfully part ways with their analysis.

2. Cf. Hon. Bernice B. Donald, *Judicial Independent, Collegiality, and the Problem of Dissent in Multi-Member Courts*, 94 N.Y.U. L. REV. 317, 329–30 (2019) (discussing and collecting sources addressing the value of dissenting opinions as keeping alive the possibility of persuading a majority in the future).

3. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 298 (Alan Sheridan trans., Pantheon Books 1977) (1975).

4. See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886–89 (2009); Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 152–153 (2020).

litigation are tall to begin with, and they sometimes seem to grow taller when even the existing rules would seem to dictate victory for the plaintiffs.⁵ Given the unparalleled size and scope of American incarceration, the stakes of such an unforgiving doctrinal landscape are immense.⁶

This Article proceeds in four parts. Part I offers a brief overview of the legal landscape as COVID-19 arose—both the barriers to successful claims by incarcerated people and the (limited) legal paths to decarceration that were available. Part II surveys recent jurisprudential history, detailing eight prominent federal cases involving Eighth Amendment claims arising out of COVID-19 outbreaks at carceral facilities, most of which involved in-depth litigation over the availability of release via habeas corpus. Part III, the heart of the Article, discusses the key tensions raised by these cases—each a potential stumbling block for courts and litigants. Specifically, Part III addresses: (A) the interaction between habeas, classic “conditions of confinement” cases, and the relevant legal constraints on each type of suit; (B) the nature of Eighth Amendment “deliberate indifference” under these circumstances; (C) what procedural devices, such as class-wide representation, are proper for adjudicating these claims in an efficient and effective way; (D) federalism and comity concerns that arise when the institution at issue is a state facility and how these concerns may cash out through exhaustion requirements; (E) unsettled questions regarding temporary release as a form of preliminary versus final relief; and (F) the relationship between rights and remedies in this context. Part IV proposes statutory and jurisprudential solutions to these tensions and concludes.

I. THE LEGAL LANDSCAPE AS THE CRISIS UNFOLDED

Prisoners in this country don’t have many good years, but 1996 was an especially bad one.⁷ That was the year that both the Antiterrorism and

5. See, e.g., Godfrey, *supra* note 4, at 155, 171–74; Dolovich, *supra* note 4, at 895–907; see also Garrett & Kovarsky, *supra* note 1, at 43–53 (coming to a similar conclusion).

6. See, e.g., Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (noting that the United States incarcerates roughly 2.2 million people, “more than any other country on Earth,” and, “[w]ith just 5% of the world’s population, . . . incarcerates nearly 25% of the world’s prisoners”). It bears emphasizing, too, that “[m]ass incarceration has not touched all communities equally,” but rather includes substantial racial disparities. See generally THE SENTENCING PROJECT, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/>. “Black men are six times as likely to be incarcerated as white men,” for example, “and Latinos are more than 2.5 times as likely.” *Id.* This means, of course, that carceral infections will also disproportionately affect racial minorities, given that they are incarcerated at disproportionate rates to begin with.

7. Where I do so, I use the term “prisoners” with awareness that there is a range of feelings, most centrally among incarcerated people themselves, about this and other labels. See generally Blair Hickman,

Effective Death Penalty Act (AEDPA)⁸ and the Prison Litigation Reform Act (PLRA) came into full force.⁹ These Colossus cousins now stand astride the two main courthouse doors open to U.S. prisoners. Neither is welcoming.

2020 was also an especially bad year—it was the year that COVID-19 swept through the nation’s jails, prisons, and detention facilities.¹⁰ As of September 2020, the known prisoner fatality rate was twice as high as the broader public rate.¹¹ As of late December 2020, at least 275,000 prisoners had tested positive, a number that equates roughly to one in five

Inmate. Prisoner. Other. Discussed., MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed> (collecting reported preferences and thoughts from incarcerated and non-incarcerated respondents). In keeping with at least one plurality’s preference, *id.*, and my own inclination, I primarily use “incarcerated person” or “incarcerated people” when speaking at a high level of generality. Where, as in this piece, I seek to distinguish between people incarcerated in prisons specifically—as opposed to incarcerated in jails (where they may be detained pretrial and legally innocent) or immigration detention facilities—I use the word “prisoner” to communicate that more specific meaning. When quoting other authors, I retain whatever terminology these authors use (the words themselves being a form of data). *See also* Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration*, MARSHALL PROJECT (Apr. 12, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration>.

In some instances, I use the word “prisoner” because I fear the risk of sanitizing that comes with more progressive terms. The millions of people our society has chosen to incarcerate are much more than prisoners, but we should not allow ourselves to look away from, or sand the edges off, the fact that we have also made them prisoners, in many cases when there was no good reason to do so. *See generally*, *e.g.*, PAUL BUTLER, CHOKEHOLD (2017); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); RUTH WILSON GILMORE, GOLDEN GULAG (2007); ABBE SMITH, GUILTY PEOPLE (2020); Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

8. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.).

9. Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

10. *See, e.g.*, N.Y. Times Editorial Board, *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>.

11. KEVIN T. SCHNEPEL, COUNCIL ON CRIMINAL JUSTICE, COVID-19 IN U.S. STATE AND FEDERAL PRISONS 3 (Sept. 2020). Some skeptics protest that incarcerated people may be more likely to come from communities that have sustained high COVID-19 infection rates, and that therefore they might still be safer in prison; I have seen at least a few prosecutors offer such speculations. But these assertions ignore the degree to which prisons themselves may contribute to extramural spread, and the fact that the calculation cited above already accounts for several variables—including state, age, and race/ethnicity, *id.* at 6—gives further cause (especially under conditions of de facto segregation) to conclude that this skepticism is misguided. *See* Jordan Wilkie, *Prisons Contribute to Racial Imbalance in COVID-19 Impact in NC*, CAROLINA PUB. PRESS (Feb. 11, 2021), <https://carolinapublicpress.org/42342/prisons-contribute-to-racial-imbalance-in-covid-19-impact-in-nc>. More fundamentally, however, the prisoners-are-safer argument fails to account for the moral significance of the state taking away a person’s ability to make his own health-related choices and instead subjecting him to a situation that poses a particular risk of infection and death. *See, e.g.*, *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); *cf.* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 756–74 (2005). (Like others, I use male pronouns where necessary because most people incarcerated in the United States are men. *See, e.g.*, Godfrey, *supra* note 4, at 153 n.12.)

prisoners—a rate that is, in turn, four times that of the broader population yet still likely “a vast undercount.”¹² By March 29, 2021, that number exceeded 390,000 cases.¹³ Over two thousand prisoners have died.¹⁴

Little more needs to be said about the dangers of COVID-19, which has dominated much of the year’s discourse. The core, largely undisputed facts relevant to incarcerated people are: (1) that COVID-19 is a highly infectious respiratory disease that especially afflicts older people and people with certain health conditions, both of which are groups that represent a growing share of prisoners; (2) that in the absence of a vaccine or effective therapy, the only effective way to avoid transmission is to engage in social distancing; and (3) that prisons, like cruise ships and nursing homes, are the kind of congregate environments that are especially susceptible to rapid and unchecked COVID-19 transmission.¹⁵ Everyone who was paying attention feared that COVID-19’s arrival would be catastrophic for incarcerated people.¹⁶ And the data above show, those fears have largely been confirmed.¹⁷

12. See Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

13. *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Mar. 29, 2021). The Marshall Project stopped collecting this data in June 2021. *Id.* For more recent data, see COVID PRISON PROJECT, <https://covidprisonproject.com/> (last visited Sept. 24, 2021).

14. MARSHALL PROJECT, *supra* note 13 (as of Mar. 29, 2021); see also COVID PRISON PROJECT, *supra* note 13. By that time, COVID-19 had already killed more prisoners than have been executed under the modern death penalty. Doug Berman, *The New Death Penalty: COVID Has Now Killed in Nine Months More U.S. Prisoners Than Capital Punishment over Last 50+ Years*, SENTENCING L. & POL’Y BLOG (Dec. 5, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/12/the-new-death-penalty-covid-has-now-killed-in-nine-months-more-us-prisoners-than-capital-punishment.html.

15. *E.g.*, CTRS. FOR DISEASE CONTROL & PREVENTION, *Coronavirus Disease 2019 (COVID-19): Guidance for Correctional & Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Aug. 22, 2021); Andre G. Montoya-Barthelemy et al., *COVID-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, 58 AM. J. PREV. MED. 888 (2020); Weihua Li & Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, MARSHALL PROJECT (Mar. 19, 2020, 2:45 PM), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>. Because the litigation on which this Article focuses predates the availability of a COVID-19 vaccine, I cabin my discussion accordingly.

16. See, e.g., *United States v. Rodriguez*, 451 F. Supp. 3d 392, 394 (E.D. Pa. 2020) (“Prisons are tinderboxes for infectious disease. The question whether the government can protect inmates from COVID-19 is being answered every day, as outbreaks appear in new facilities.”); Danielle Ivory, *We Are Not a Hospital: A Prison Braces for the Coronavirus*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>; Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>; Li & Lewis, *supra* note 15.

17. See *supra* notes 10–14 and accompanying text. One potential countervailing shift is that courts at least temporarily slowed the rates at which they were sending people to prisons; the federal prison population, ended 2020 at a “new modern low of 152,184.” See Doug Berman, *Federal Prison Population Closes Out 2020 at New Modern Low of 152,184 According to BOP*, SENTENCING L. & POL’Y

This Part provides a brief overview of the legal landscape as the COVID-19 pandemic took root, focusing on (A) AEDPA's legal barriers to bringing successful federal habeas corpus claims, (B) the PLRA's legal barriers to bringing successful prison-conditions claims, and (C) legal provisions authorizing prisoner release that were or became available as the pandemic emerged.

A. Habeas Corpus and AEDPA

"[T]he traditional function of" the writ of habeas corpus "is to secure release from illegal custody."¹⁸ Federal law allows any district court, acting within its "respective jurisdiction,"¹⁹ to grant a writ of habeas corpus whenever a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."²⁰ Such a "court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."²¹

That is capacious statutory text. It has, of course, been substantially cabined—sometimes by Congress, sometimes by federal courts—in many classic habeas scenarios. For example, state prisoners seeking to challenge the validity of their convictions or sentences are subject to the restrictions in 28 U.S.C. §§ 2244, 2254, which include an automatic prohibition on repeated claims,²² automatic forfeiture of many (though not all) claims not presented in an earlier habeas petition,²³ mandatory exhaustion of available and effective state remedies,²⁴ and an extremely high bar for review, requiring either a profound error by the last state court to review the prisoner's case on the merits or a basis in constitutional

BLOG (Dec. 31, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/12/federal-prison-population-closes-out-2020-at-new-modern-low-of-152184-according-to-bop.html. Some jails and local courts took at least provisional steps to reduce the number of people detained pretrial or incarcerated for misdemeanors and other low-level offenses. See generally PRISON POL'Y INITIATIVE, *Responses to the COVID-19 Pandemic* (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>. But the raw numbers still speak for themselves, and the fact that things could have gone worse does not mean that they went well.

18. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); see also *Hamama v. Homan*, 912 F.3d 869, 875 (6th Cir. 2018) ("The traditional remedy provided by habeas is 'removing the injury of unjust and illegal confinement.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137 (1768))).

19. 28 U.S.C. § 2241(a).

20. *Id.* § 2241(c)(3).

21. *Id.* § 2243.

22. *Id.* § 2244(b)(1).

23. *Id.* § 2244(b)(2) (with exceptions for (i) new, retroactive constitutional rules recognized by the Supreme Court and (ii) newly discovered evidence that "could not have been discovered through . . . due diligence," so long as these facts plus the overall record would "establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty").

24. *Id.* § 2254(b)(1).

doctrine newly promulgated by the U.S. Supreme Court or newly available, previously undiscoverable-with-ordinary-diligence facts.²⁵

Similarly, though somewhat less restrictively, while a federal prisoner “claiming the right to be released upon the ground that [his] sentence was” illegal or otherwise unjustified may file a petition under § 2255 “to vacate, set aside or correct the sentence.”²⁶ These motions are subject to another set of constraints outlined in § 2255, including a one-year period of limitations²⁷ and limits on subsequent filings that resemble those imposed on incarcerated people who were convicted in state court.²⁸

B. Prisoner Civil-Rights Suits and the PLRA

Enacted in the shadow of a high number of prisoner filings, the PLRA, in theory, was meant to facilitate “fewer and better prisoner suits.”²⁹ Its critics have noted that its “new decision standards have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court.”³⁰

The PLRA places multiple constraints on courts whenever they are asked to issue “[p]rospective relief in any civil action with respect to prison conditions.”³¹ For instance, the PLRA proscribes preliminary injunctive relief unless it is “narrowly drawn,” extends “no further than necessary to correct the harm,” and is “the least intrusive means necessary to correct that harm.”³² The law likewise prohibits any “prisoner release order” until the court has already entered a “less intrusive” order that “has failed to remedy the deprivation” after a “reasonable amount of time” for compliance.³³ The PLRA also requires that any such release order be issued by a three-judge court,³⁴ which itself is subject to a strict standard of review: the court must find, under a clear-and-convincing standard, that the violation is primarily caused by “crowding” and that no other relief will suffice.³⁵ On top of that, and more, the statute imposes a strict

25. *Id.* § 2254(d)–(e).

26. *Id.* § 2255(a).

27. *Id.* § 2255(f).

28. *See id.* § 2255(h).

29. *Jones v. Bock*, 549 U.S. 199, 203 (2007).

30. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1644 (2003); *see* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1772 n.10 (2003) (collecting sources).

31. 18 U.S.C. § 3626(a)(1)(A).

32. § 3626(a)(2).

33. § 3626(a)(3)(A).

34. § 3626(a)(3)(B).

35. § 3626(a)(3)(E). Read literally, this language would seem to suggest that even a three-judge court cannot provide for prisoner releases if “crowding” is not the source of the constitutional problem. As at least one court has noted, that cannot be right. *See Plata v. Brown*, 427 F. Supp. 3d 1211, 1223–24

exhaustion requirement.³⁶ The PLRA’s restrictions regarding any “civil action with respect to prison conditions” do not, however, apply to “habeas corpus proceedings challenging the fact or duration of confinement in prison.”³⁷ As discussed further below, this language came to the fore in most of the major COVID-19 habeas cases.

C. Release Authorities

Federal prisoners facing COVID-19 were not, however, without options—nor were judges or executive officials who might have wished to move them to safety. On the judicial side, federal prisoners can apply for “compassionate release” by showing that “extraordinary and compelling reasons warrant such a reduction.”³⁸ In addition, as discussed below, they can seek a writ of habeas corpus.

On the executive side, the Federal Bureau of Prisons (“BOP”) has several tools at its disposal. For one, it can grant 30-day furloughs for medical treatment or “engaging in any other significant activity consistent with the public interest.”³⁹ Even before COVID-19, it was also empowered to “conduct a pilot program” for home confinement for “eligible elderly offenders and eligible terminally ill offenders.”⁴⁰ In addition, the BOP can put prisoners nearing the end of their terms on pre-release home confinement.⁴¹

The federal Coronavirus Aid, Relief, and Economic Security (“CARES”) Act⁴² enhanced these powers. Specifically, Congress provided that, “[d]uring the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the

(N.D. Cal. 2013) (“[I]magine that a prison were so dilapidated that no one could predict when the walls would crumble down . . . but that Defendants refused to transfer those inmates despite being aware of that risk [C]rowding would not be the cause (let alone the primary cause) of the constitutional violation, and adopting [such an] interpretation of ‘prisoner release order’ would thus prevent any court — single-judge or three-judge — from entering a transfer order. . . . This would prevent vindication of the inmates’ constitutional rights and would therefore be impermissible.”). Another court has speculated that “[t]he reference to ‘crowding’ may have the effect of removing single-plaintiff cases from within the ambit of Section 3626(a)(3), because an order involving only one inmate might not be viewed as reducing a prison population in any meaningful way.” *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1124 (N.D. Ill. 2020).

36. 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)

37. 18 U.S.C. § 3626(g)(2).

38. 18 U.S.C. § 3582(c)(1)(A)(i); *see, e.g., United States v. Pabon*, 458 F. Supp. 3d 296, 300 (E.D. Pa. 2020) (granting compassionate release to prisoner with significant COVID-19 comorbidities). Certain federal prisoners can also seek compassionate release when they have reached 70 years of age and served at least 30 years in prison. 18 U.S.C. § 3582(c)(1)(A)(ii).

39. 18 USC § 3622(a)(3), (6).

40. 34 U.S.C. § 60541(g).

41. 18 U.S.C. § 3624(c)(2).

42. Pub. L. No. 116-136 (2020).

maximum amount of time for which the Director is authorized to place a prisoner in home confinement.”⁴³ On March 26, 2020, Attorney General Barr directed BOP officials “to prioritize the use of [existing] statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic.”⁴⁴ On April 3, 2020, he issued a follow-up memorandum activating the CARES Act provision and directing facilities with significant COVID-19 outbreaks (among them FCI Oakdale, FCI Danbury, and FCI Elkton) “to move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.”⁴⁵

While this Article focuses on litigation in the federal courts (albeit in many cases regarding state facilities), state courts and state executive officials were not powerless. In Ohio (where I practice), many state prisoners are eligible to apply for “judicial release” under state law, at least so long as they are serving nonmandatory sentences and have served a required portion of those sentences.⁴⁶ Most governors, meanwhile, had the power to grant commutations or reprieves with limited procedural constraints, which would have allowed them to grant prisoners the ability to defer the balance of their sentences until it would be safe for those sentences to resume.⁴⁷ There have also been significant habeas cases in state court yielding at least temporary relief under state law.⁴⁸

43. *Id.* § 12003(b)(2).

44. William Barr, Memorandum to Director of Bureau of Prisons, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

45. William Barr, Memorandum to Director of Bureau of Prisons, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, at 1 (Apr. 3, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf [hereinafter “Barr Memo”]; *see also id.* (“Immediately maximize appropriate transfers to home confinement of all appropriate inmates held at FCI Oakdale, FCI Danbury, FCI Elkton, and at other similarly situated BOP facilities where COVID-19 is materially affecting operations”). As will become clear later on, these exhortations went largely unheeded.

46. *See* Ohio Rev. Code § 2929.20. For a summary of nascent state efforts to allow for a “second look” at sentences, *see* Nazgol Ghandnoosh, THE SENTENCING PROJECT, A SECOND LOOK AT INJUSTICE (May 12, 2021), <https://www.sentencingproject.org/publications/a-second-look-at-injustice/>.

47. *See* Joshua Vaughn, *A Rarely Used Power Could Free Prisoners in Pennsylvania. But the Governor Is Not Using It.*, THE APPEAL (Mar. 31, 2020), <https://theappeal.org/pennsylvania-coronavirus-governor-prison-reprieves/>; Rachel Barkow, *Our Leaders Have the Power to Release People in Prison. Now They Must Use It.*, THE APPEAL (Mar. 27, 2020), <https://theappeal.org/coronavirus-prison-commutations/>; Ben Notterman, *Reprieves May Be the Smartest Way to Get Virus-Vulnerable People out of U.S. Prisons.*, WITNESS LA (Apr. 20, 2020), <https://witnessla.com/op-ed-reprieves-may-be-the-smartest-way-to-get-virus-vulnerable-people-out-of-u-s-prisons/>; Michael Zuckerman, *The Fastest Way for Gov. DeWine to Save Lives in Ohio Prisons.*, OHIO CAPITAL JOURNAL (Apr. 20, 2020), <https://ohiocapitaljournal.com/2020/04/20/the-fast-way-for-gov-dewine-to-save-lives-in-ohio-prisons/>. *See generally* NYU CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, USING EXECUTIVE CLEMENCY TO MITIGATE THE SPREAD OF COVID-19 IN CORRECTIONAL FACILITIES, <https://www.law.nyu.edu/centers/adminofcriminallaw/COVID-19> (last visited Aug. 22, 2021).

48. *See, e.g.*, In re Von Staich, 56 Cal. App. 5th 53, 84 (2020) (ordering state officials “to

Many of these tools were inefficient; they required applications, waiting periods, and sometimes high degrees of individualized analysis, disproportionate to the speed at which a disease like COVID-19 can move through a prison.⁴⁹ And in any event, none was used with the vigor that prisoners and their loved ones would have hoped for in the face of a dangerous, rapidly advancing pandemic. For those reasons and others, prisoners and their attorneys often turned to the federal courts. Part II surveys eight significant cases and the timeline over which they unfolded.

II. PROMINENT COVID-19 PRISON AND JAIL LITIGATION

COVID-19 litigation in the federal courts raised a number of complicated legal questions in a novel, urgent context. This Part provides an illustrative survey of eight prominent cases. It summarizes six cases in which incarcerated people sought habeas relief based on an asserted violation of the Eighth Amendment's Cruel and Unusual Punishments Clause: Section A of this Part examines four cases involving prisons, and therefore, people already convicted of crimes. Section B assesses two cases involving jails, which house people serving relatively short sentences and as well as pretrial detainees who were denied or unable to afford bail. Section C summarizes two cases involving civil-rights claims for improvements in the conditions of confinement themselves (that is, non-habeas relief) that nevertheless illustrate important trends in the relevant Eighth Amendment analysis. Finally, Section D briefly rehearses the overall timeline. By taking a deeper dive into a smaller number of cases, this Part seeks to demonstrate for readers focused on the habeas remedy how the core issues regarding government confinement and the pandemic played out at a granular level, while also providing readers more generally with a wider-angle view of how the cases unfolded and intersected as a group.⁵⁰ These descriptive summaries also help to tee

immediately commence the design and implementation of plans to expedite release or transfer of the number of inmates necessary to reduce San Quentin's population to 50 percent of its June 2020 population"), *vacated*, Staich on H.C., 477 P.3d 537 (Cal. 2020); Order on Writ of Habeas Corpus and Writ of Mandate, *Campbell v. Barnes*, No. 30-2020-01141117 (Cal. Orange Cnty Super. Ct. Dec. 11, 2020) (ordering 50% reduction in population of all congregate areas in Orange County jails). For more on these pathways, see Garrett & Kovarsky, *supra* note 1, at 33–34. Because this Article focuses on federal habeas claims, I do not delve into these types of cases, though the opportunities may be significant.

49. See generally, e.g., *United States v. Osorto*, 445 F. Supp. 3d 103 (N.D. Cal. 2020) (Breyer, J.) (providing history and overview of compassionate-release process in pandemic context).

50. My method for picking these cases was not overly scientific—my goal was to cover different geographies (West, Midwest, South, Northeast); different types of criminal-process-related custody (prisons and jails); different types of claims (primarily habeas but some non-habeas); and different levels of success for incarcerated people in intensively lawyered impact litigation involving COVID-19 and the Eighth Amendment. To that end, the cases I chose include the three that drew writing by members of the U.S. Supreme Court (*Elkton*, *Valentine*, *Barnes*); the two in which incarcerated people won lasting victories (*Danbury*, *Lompoc*); the first case to draw a lengthy opinion on the possibility of statewide relief

up the more analytical and normative discussion to which the Article turns in Part III.

A. Prison Cases

This Section discusses habeas litigation involving four prisons or prison systems, three of which are federal: FCI/FSL Elkton (litigation in which I participated), the Illinois prison system, FCI Danbury, and FCI/USP Lompoc.

1. FCI/FSL Elkton

To begin with the case I know best: the litigation surrounding Elkton, a low-security facility housing roughly 2,000 federal prisoners located in Lisbon, Ohio.⁵¹ In keeping with its low-security status, Elkton houses prisoners in “dormitory-style housing units” of 250–300 prisoners; “[e]ach side of a housing unit contains approximately 150 bunks resulting in two to three inmates sharing a cube and sleeping a few feet away from each other.”⁵² These open-bay conditions make social distancing impossible. Similarly, other aspects of the facility’s layout ensure that prisoners will be “in close proximity” when showering, using the bathroom, picking up meals, or using phones and computers.⁵³

By early April 2020, Elkton was in the midst of a major COVID-19 outbreak;⁵⁴ it was one of the three federal facilities singled out by Attorney General Barr for maximal home confinement in his April 3,

(*Money*); and two others (*Cameron, Swain*) that, as of August 2021 and not counting the cases already mentioned, are the most-cited appellate opinions (per Westlaw) issued in this vein between March and August 2020 (that is, the months during which litigation on these issues was seemingly at its zenith). There is, of course, no doubt that reasonable minds could substitute a different set. In any event, as in modernist literature, there is value in zooming in on a smaller number of specific things, without need to rank relative grandeur. For a higher-level analysis of trends that emerged across the full gamut of cases—spanning different types of custody (including immigration detention, which I do not discuss), different judicial forums, and different forms of relief sought—see Garrett & Kovarsky, *supra* note 1, at 23–43.

51. See *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020). Technically, Elkton is comprised of two facilities: FCI Elkton and FSL Elkton. See *id.* at 832. For simplicity, I use “Elkton” to refer to both, and some sources use “FCI Elkton” the same way. For a thorough and more normative summary of the Elkton case, see Dolovich, *supra* note 1, at 21–24.

52. *Wilson*, 961 F.3d at 833.

53. See *id.* at 834–35; see also *id.* at 840.

54. See Keri Blakinger & Keegan Hamilton, “*I Begged Them To Let Me Die*”: How Federal Prisons Became Coronavirus Death Traps, MARSHALL PROJECT (June 18, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>; Shane Hoover, *Fourth Inmate at Ohio Federal Prison in Elkton Dies from Coronavirus*, COLUMBUS DISPATCH (Apr. 14, 2020, 11:15 AM), <https://www.dispatch.com/news/20200414/fourth-inmate-at-ohio-federal-prison-in-elkton-dies-from-coronavirus>.

2020, memo.⁵⁵ On April 13, 2020, four prisoners filed a federal suit on behalf of themselves and other similarly situated Elkton prisoners claiming that these conditions violated the Eighth Amendment.⁵⁶ They primarily sought habeas relief under 28 U.S.C. § 2241, or in the alternative, injunctive relief under 28 U.S.C. § 1331 and the Eighth Amendment itself.⁵⁷ On April 22, 2020, invoking habeas jurisdiction, Judge James Gwin issued a preliminary injunction.⁵⁸

At that time, there had been at least 59 prisoner infections, 46 staff infections, and six prisoner deaths.⁵⁹ But the infection numbers themselves were impossible to know for sure because of “shockingly limited available testing,” as Elkton had “received only 50 COVID-19 swab tests and one Abbott Rapid testing machine with 25 rapid tests.” Judge Gwin cited “Elkton’s testing debacle” as “one example of th[e] deliberate indifference” that he concluded the petitioners were likely to prove.⁶⁰

Judge Gwin conditionally certified a medically vulnerable subclass of Elkton prisoners and ordered the prison officials, including the BOP, to identify all members of the subclass and to evaluate each “for transfer out of Elkton through any means,” prioritizing review by medical vulnerability.⁶¹ Subclass members deemed “ineligible for compassionate release, home release, or parole or community supervision” would have to “be transferred to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished.”⁶² Although these prisoners would “remain in BOP custody, . . . the conditions of their confinement would be enlarged.”⁶³

The prison officials appealed and sought a stay from the district court

55. *Barr Memo*, *supra* note 45, at 1.

56. Emergency Petition for Writ of Habeas Corpus, Injunctive, and Declaratory Relief, D.E. 1, *Wilson v. Williams*, No. 20-cv-794 (N.D. Ohio Apr. 13, 2020). This and many other federal-court filings are available from the University of Michigan Law School’s online Civil Rights Litigation Clearinghouse, available at <https://www.clearinghouse.net/> (last visited Aug. 22, 2021).

57. *See id.* at 3–4.

58. *Wilson v. Williams*, 455 F. Supp. 3d 467 (N.D. Ohio 2020), *vacated*, 961 F.3d 829.

59. *Id.* at 471, 480.

60. *Id.* at 479. As explained further below, *see infra* notes 312–317, the Eighth Amendment’s Cruel and Unusual Punishments Clause prohibits prison officials from being deliberately indifferent to a prisoner’s serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Supreme Court has held that this standard requires both objective and subjective indifference—both an actual, substantial risk and a conscious disregard of that risk by the officials. *Farmer v. Brennan*, 511 U.S. 825, 834, 837, 840 (1994).

61. *Wilson v. Williams*, 455 F. Supp. 3d at 481.

62. *Id.*

63. *Id.* at 480–81. Previously in the order, Judge Gwin explained that enlargement was “not release, although some courts refer to it using the terms release or bail,” but rather separate use of inherent judicial power to alter “the place of custody.” *Id.* at 474. For discussion of the enlargement power, see Section III.E, *infra*.

and the Sixth Circuit. Both courts denied those requests, with the Sixth Circuit denial coming on May 4, 2020.⁶⁴

Compliance with the district court's order, however, was halting. On May 6, 2020, the prisoners filed a Motion for Enforcement with the district court. On May 19, 2020, Judge Gwin granted that motion,⁶⁵ noting that Elkton had still conducted only 524 total tests⁶⁶ and stating that the prison officials had been "thumbing their nose at their authority to authorize home confinement."⁶⁷ Judge Gwin ordered the officials "to make full use of" home confinement "beyond the paltry grants" it had made so far, including eliminating certain automatic bars and disregarding other factors, such as low or moderate incident reports, that had led to prior denials.⁶⁸ He also ordered detailed explanations for any continued denials,⁶⁹ responses to pending compassionate-release applications "within 7 days on a continuing basis,"⁷⁰ and an explanation showing cause within seven days why each prisoner still denied home confinement or compassionate release could not be sent to a different prison where social distancing was achievable.⁷¹

The next day, the prison officials sought a stay of the original preliminary injunction from the U.S. Supreme Court. The U.S. Supreme Court denied that request on May 26, 2020, but its brief statement noted that the officials were "seeking a stay only of the District Court's April 22 preliminary injunction" and had not yet "sought review of or a stay of the May 19 order" in the Sixth Circuit.⁷² "Particularly in light of that procedural posture," the Court wrote, the request was denied "without prejudice to the Government seeking a new stay if circumstances warrant."⁷³ Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the stay outright.⁷⁴

The prison officials soon filed renewed stay motions in the district court and the Sixth Circuit. The Sixth Circuit issued a denial on June 1,

64. *Wilson v. Williams*, No. 20-3447, 2020 U.S. App. LEXIS 14291 (6th Cir. May 4, 2020); *see Wilson*, 961 F.3d at 836.

65. *See Wilson*, 961 F.3d at 836; *see also* Mot. to Enforce, *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio May 6, 2020), D.E. 51; Order Granting Motion to Enforce, *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio May 19, 2020), D.E. 85.

66. Order Granting Motion to Enforce at 2, *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio May 19, 2020), D.E. No. 85.

67. *Id.* at 7.

68. *Id.*

69. *Id.* at 7–8.

70. *Id.* at 9.

71. *Id.* at 10.

72. Denial of Appl. for Stay, *Williams v. Wilson*, No. 19A1041 (May 26, 2020).

73. *Id.*

74. *Id.*

2020,⁷⁵ and the district court followed suit on June 4, 2020.⁷⁶ On June 1, 2020, however, the prison officials also filed a renewed stay application with the U.S. Supreme Court.⁷⁷ Justice Sotomayor issued an administrative stay on June 4, 2020, pending resolution of the appeal of the preliminary injunction, which was scheduled for oral argument the following day.⁷⁸

On June 9, 2020, the Sixth Circuit vacated the district court's preliminary injunction.⁷⁹ Writing for the panel's majority,⁸⁰ Judge Gibbons first concluded that the district court properly exercised jurisdiction under 28 U.S.C. § 2241 because the prisoners were asserting "that there are no conditions of confinement sufficient to prevent irreparable constitutional injury at Elkton" and therefore were seeking "release."⁸¹ Judge Gibbons added, however, that habeas also limited what types of relief were available. While declining "to set forth a comprehensive list," Judge Gibbons concluded that a transfer order would not be authorized under § 2241.⁸²

Judge Gibbons then turned to the preliminary-injunction factors and, specifically, to the prisoners' likelihood of success on their Eighth Amendment claim. While concluding that the objective component of the deliberate-indifference analysis was "easily satisfied,"⁸³ Judge Gibbons concluded that the prisoners were unlikely to prevail on the subjective component "because, as of April 22, the BOP responded reasonably to the known, serious risks posed by COVID-19."⁸⁴ Judge Gibbons noted, for example, that the BOP "implemented a six-phase action plan to reduce the risk of COVID-19 spread at Elkton, . . . including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks."⁸⁵ Her majority opinion concluded that the prisoners had failed to show a likelihood of success on the merits and that this failure was "dispositive."⁸⁶

75. Order Denying Motion for Stay, *Wilson v. Williams*, No. 20-3447 (6th Cir. June 1, 2020), Doc. No. 46-2.

76. Order Denying Respondent's Motion for Stay, *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio June 4, 2020), D.E. 109.

77. Appl. for Stay, *Wilson*, 455 F. Supp. 3d 467 (N.D. Ohio 2020) (No. 19A1047) (June 1, 2020).

78. *Id.*; Order on Appl. for Stay, *Wilson v. Williams*, No. 19A1047 (June 4, 2020).

79. *Wilson v. Williams*, 961 F.3d 829, 845 (6th Cir. 2020).

80. Judge Gibbons was joined by Judge Cook. *Id.* at 832. Chief Judge Cole issued a separate opinion concurring in part and dissenting in part. *Id.*

81. *Id.* at 838.

82. *Id.* at 838–39.

83. *Id.* at 840.

84. *Id.*

85. *Id.* at 841.

86. *Id.* at 844.

Chief Judge Cole concurred in part and dissented in part, agreeing that jurisdiction was proper under § 2241 but disagreeing that transfer was an inappropriate form of relief.⁸⁷ Chief Judge Cole also disagreed that the prisoners were unable to demonstrate deliberate indifference,⁸⁸ likening the situation to a prior Sixth Circuit case in which prison officials had been deemed “deliberately indifferent when they persisted in treating an inmate’s medical condition with medication that was known to be ineffective instead of an alternative that had proven to be much more effective in addressing the condition.”⁸⁹ This “failure” was “more jarring” given that Congress and the Attorney General had both gone “out of their way to urge the BOP to take more aggressive measures to address the virus in its facilities.”⁹⁰

Chief Judge Cole also stated that while the phrase “‘multiphase action plan’ . . . sounds good on paper,” a “look behind the curtain . . . reveal[ed] that the BOP’s six-phase action plan” was “far less impressive than its title suggest[ed].”⁹¹ Ultimately, he observed, “the ‘six-phase’ plan is, for practical purposes, a four-phase plan where one phase is taking inventory of supplies and another involves the locking of inmates in 150-person clusters where they cannot access the principal method of COVID-19 prevention.”⁹²

2. The Illinois State Prisons

The boldest COVID-19 case likely involved Illinois state prisons. It was really two cases—*Money v. Pritzker*⁹³ and *Money v. Jeffreys*⁹⁴—though the district court resolved them together,⁹⁵ so I therefore discuss them as one. There, ten Illinois prisoners scattered across the State’s correctional facilities brought putative class actions raising both civil-rights claims under § 1983 and habeas claims under 28 U.S.C. § 2254 in federal court, all based primarily (and as relevant here) on the Eighth Amendment as made enforceable against the States by the Fourteenth.⁹⁶ The prisoners sought immediate injunctive relief, including—at least ultimately—transfer or release, and asked the district court to certify six separate subclasses based on medical risk factors and eligibility for

87. *Id.* at 846 (Cole, C.J., concurring in part and dissenting in part).

88. *Id.*

89. *Id.* at 846–47.

90. *Id.* at 847.

91. *Id.* at 848.

92. *Id.*

93. 20-cv-2093 (N.D. Ill. 2020).

94. 20-cv-2094 (N.D. Ill. 2020).

95. *See Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020).

96. *Id.* at 1112.

certain forms of relief.⁹⁷ The first two subclasses alone contained nearly 16,000 people.⁹⁸

The case did not last long in its prominent phase: filed on April 2, 2020,⁹⁹ it yielded one of the first big federal COVID-19 opinions on April 10, 2020, when Judge Robert Dow, Jr., issued an opinion and order denying the preliminary relief that the prisoners sought.¹⁰⁰ Judge Dow began by considering the riddle of whether a suit could seek relief under both § 1983 and the habeas statute.¹⁰¹ He observed that while habeas petitioners generally seek “release from *custody*,” the petitioners in this case had conceded that they were not seeking release from custody and were challenging “only the conditions of their confinement.”¹⁰² While noting a “thick and tangled web” of statutes and case law, Judge Dow ultimately concluded that the prisoners could go forward with their § 1983 claims, and that it was “at least plausible—though far less certain—that they also ha[d] a right to seek habeas relief as well.”¹⁰³

Regarding the § 1983 claims, Judge Dow turned to the PLRA. Reflecting on the Supreme Court’s decision in *Brown v. Plata*¹⁰⁴ (which was “the only instance” in which a federal court had ordered thousands of state prisoners released, and then only after a complex, 12-year process¹⁰⁵), as well as subsequent litigation over COVID-19 in the ongoing *Plata* litigation and the nature of the relief sought by the *Money* prisoners, Judge Dow ultimately concluded that what they sought amounted to a “prisoner release order” subject to the PLRA’s requirements.¹⁰⁶ “Reducing the prison population is not just a side effect of the case—it is the whole point,” Judge Dow reasoned. “They want to remove inmates from prison because they are vulnerable in those facilities.”¹⁰⁷

Even if the PLRA did not apply, Judge Dow noted, other problems existed. For one, Judge Dow doubted that class-wide relief was permissible. While there were ample common questions, it was unclear that any of them was “likely to drive the resolution of the case.”¹⁰⁸ Rather,

97. *Id.* at 1115–16; *see also id.* at 1120.

98. *Id.* at 1116.

99. *See Compl.*, *Money*, 453 F. Supp. 3d 1103 (N.D. Ill. Apr. 2, 2020) (No. 20-cv-2093), D.E. 1.

100. *Money*, 453 F. Supp. 3d at 1137.

101. *Id.* at 1117–19.

102. *Id.* at 1118.

103. *Id.* at 1119.

104. 563 U.S. 493 (2011).

105. *Money*, 453 F. Supp. 3d at 1122.

106. *Id.* at 1126.

107. *Id.* at 1125.

108. *Id.* at 1127. To certify a class action there must be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Commonality requires at least one question common to all of the class.”

Judge Dow reasoned that the need for “individualized determinations” made the case a poor candidate for class adjudication.¹⁰⁹ The “permutations,” he concluded, were “endless.”¹¹⁰

Judge Dow also noted “serious concerns under core principles of federalism and the separation of powers, especially given [the prisoners’] request for sweeping relief in the form of a mandatory injunction.”¹¹¹ Observing that “the federal judiciary only rarely intrudes into the management of state prisons, and only once in history has actually ordered the release of prisoners on a scale anywhere near what Plaintiffs hope to accomplish through this litigation,”¹¹² Judge Dow cautioned that while *Plata* indicated that relief was appropriate at least under some circumstances, the pace of the case cautioned against interceding.¹¹³

Finally, Judge Dow concluded that the prisoners’ claims failed for lacking a sufficient likelihood of success on the merits.¹¹⁴ While agreeing immediately that COVID-19 posed a serious risk to the prisoners, Judge Dow concluded that under the deliberate-indifference standard, the prisoners had “no chance of success” because the defendants had “come forward with a lengthy list of the actions they ha[d] taken to protect” Illinois prisoners.¹¹⁵ The defendants, Judge Dow wrote, were clearly “trying, very hard, to protect inmates against the virus,” and there was no support in the record for the assertion that they had “turned the kind of blind eye and deaf ear to a known problem that would indicate ‘total unconcern’ for the inmates’ welfare.”¹¹⁶

Finally, Judge Dow dispatched the prisoners’ habeas claims, noting that the federal habeas statutes impose exhaustion requirements on state prisoners who wish to seek habeas relief from federal courts.¹¹⁷ Judge Dow noted that it was “undisputed” that the prisoners had not done so,¹¹⁸ and he concluded that there were no grounds for waiving the requirement because the prisoners had not shown that the state court system was unavailable.¹¹⁹

members, the answer to which is “apt to drive the resolution of the litigation.” *Money*, 453 F. Supp. 3d at 1127 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

109. *Id.* at 1128.

110. *Id.*

111. *Id.* at 1128–29.

112. *Id.* at 1129.

113. *Id.* at 1129–30.

114. *Id.* at 1130–33.

115. *Id.* at 1131.

116. *Id.* at 1132 (citation omitted). I return below to whether this and other applications of the deliberate-indifference standard were consistent with Eighth Amendment doctrine as explained by the Supreme Court.

117. *Id.* at 1134; *see also* 28 U.S.C. 2254(b)–(c); *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

118. *Money*, 453 F. Supp. 3d at 1135.

119. *Id.* at 1136.

3. FCI Danbury

One of the only fully successful cases, *Martinez-Brooks v. Easter*¹²⁰ arose out of the COVID-19 outbreak at FCI Danbury, a low-security federal facility in Connecticut.¹²¹ Like Elkton, Danbury was one of the three federal prisons singled out by Attorney General Barr in his April 3, 2020 memo exhorting BOP to “maximize” the use of home confinement in response to the outbreaks.¹²² On April 27, 2020, four medically vulnerable prisoners at Danbury brought the case as a petition for writ of habeas corpus under § 2241 and requested an “emergency order of enlargement.”¹²³

On May 12, 2020, Judge Michael Shea granted a temporary restraining order (“TRO”). Regarding jurisdiction, Judge Shea emphasized that he was “not modify[ing] any sentences,” but rather ensuring that medically vulnerable prisoners would “receive prompt review of either a request for compassionate release or consideration for home confinement” under BOP’s existing statutory authority.¹²⁴ He stated that the prisoners were not seeking “release” from BOP custody but that, in any event, Second Circuit precedent allowed bail for habeas petitioners in “extraordinary or exceptional circumstances” in which bail is “necessary to make the habeas remedy effective.”¹²⁵ Citing two of the Elkton decisions to date, Judge Shea also found the PLRA inapplicable, observing that because the prisoners were claiming that their confinement at Danbury itself violated the Eighth Amendment and thus were seeking an order ending that confinement, they were engaged in a “habeas proceeding challenging ‘the fact . . . of confinement in prison.’”¹²⁶ He also rejected BOP’s invocation of the Second Circuit’s exhaustion doctrine, concluding that “[g]iven the rapid spread of COVID-19 at FCI Danbury,” the prisoners had “shown that they would likely suffer irreparable harm if they were required to exhaust the administrative remedy process.”¹²⁷

On the merits of the TRO, Judge Shea concluded that the prisoners

120. 459 F. Supp. 3d 411 (D. Conn. 2020).

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

122. *See id.* at 414–15; *see also* Barr Memo, *supra* note 45.

123. Petition for Writ of Habeas Corpus, *Martinez-Brooks*, 459 F. Supp. 3d 411 (No. 3:20-cv-00569) (D. Conn. Apr. 27, 2020), D.E. 1; *see also supra* note 63 and accompanying text; *infra* Section III.E.

124. *Martinez-Brooks*, 459 F. Supp. 3d at 430.

125. *Id.* at 431 (quoting *Mapp v. Reno*, 241 F.3d 221, 226 (2d. Cir. 2001)).

126. *Id.* at 434 (“Because Petitioners contend that the Eighth Amendment violation inheres in their incarceration at Danbury FCI and cannot be remedied unless they are removed from that setting, Petitioners are challenging the fact—or ‘existence’—of their confinement.” (citing *Wilson v. Williams*, 455 F.Supp.3d 467, 474–75, 480–81 (N.D. Ohio 2020); Order at 6, D.E. 23-1, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020))).

127. *Id.* at 437–38.

were likely to succeed in establishing an Eighth Amendment violation because, in addition to the substantial risk posed by COVID-19 at Danbury, they had shown subjective indifference in the Warden's lackluster efforts "to transfer medically vulnerable prisoners . . . to home confinement" and poor handling of requests for compassionate release under § 3582(c)(1)(A).¹²⁸ As Judge Shea summarized, despite the CARES Act's specific authorization for home confinement and the Attorney General's "exhortations," FCI Danbury's "implementation of this directive . . . ha[d] been slow and inflexible."¹²⁹ For example, the Respondents had been ignoring health risks in their home-confinement evaluations, instead "focusing on those who have served the larger portions of their sentences" and even "categorically disqualif[y]ing" those who had not served at least half of their sentences.¹³⁰ While the Government had suggested "compassionate release as an alternative," that was clearly "a dead end": while there had been 241 compassionate-release applications filed since the pandemic began, the Warden had granted "exactly 0."¹³¹

While noting the intramural measures that the Warden had claimed to have implemented, Judge Shea observed that the Warden did "not dispute the impossibility of instituting effective social distancing measures in facilities, like FCI Danbury, where the vast majority of the population lives and sleeps in large dormitory halls lined with bunk beds, sharing bathroom and shower facilities."¹³² Because "containment" was impossible without effective social distancing, home confinement was "the only viable measure by which the safety of highly vulnerable inmates" could be "reasonably assured."¹³³ Given the crisis, "the Warden's failure to make prompt, broader use of [home confinement] authority to protect the lives of vulnerable inmates [wa]s likely to constitute deliberate indifference."¹³⁴ And the Warden's failure to grant a single compassionate-release request, whether because she was setting "an impossible high bar" or simply "applying an obsolete one," along with the languorous pace at which Danbury was processing such requests, further supported the same conclusion.¹³⁵

The order did not, however, require the release of any particular

128. *Id.* at 440–41.

129. *Id.* at 441.

130. *Id.* Similarly, "any inmate with an incident report in the past 12 months—no matter the seriousness—[wa]s deemed ineligible for home confinement, regardless of any health condition he or she might have." *Id.*

131. *Id.*

132. *Id.* at 443; *see id.* at 442.

133. *Id.* at 443.

134. *Id.*

135. *Id.* at 445; *see id.* at 446.

prisoner; this “determination,” Judge Shea wrote, “must be individualized.”¹³⁶ Judge Shea concluded, however, that “multi-party treatment” was “likely appropriate,” given that the relief being granted was applicable to the entire medically vulnerable subclass, multi-party treatment was consistent with judicial economy, and each of the Rule 23(a) requirements weighed in favor of multi-party treatment as well.¹³⁷

Judge Shea’s TRO required the Warden to take several steps in short order. First, she had to publicly identify all medically vulnerable prisoners within three days.¹³⁸ Second, within the same time period, she had to “[f]inalize and implement a process that makes full and speedy use of” her home-confinement authority while “prioritizing” vulnerable prisoners and “assigning substantial weight” to COVID-19 risk factors, along with eliminating any factors that could lead to mandatory denials regardless of risk factors.¹³⁹ Third, within seven days, she had to act on all pending compassionate-release requests from medically vulnerable prisoners, implement a process to ensure that future applicants would receive responses within the same time frame, and either update the relevant compassionate-release guidelines to account for COVID-19 or show cause as to why she should not have to do so.¹⁴⁰ In addition, within 13 days, she had to complete a home-confinement review and provide individual explanations for each denial of home confinement or transfer.¹⁴¹

In this case, the prison officials did not appeal, and the parties over the summer negotiated a settlement that would allow for expanded use of home confinement “pursuant to the standards set forth in” the May 12, 2020 order.¹⁴² Specifically, the parties agreed that the prison officials would set up a process for reviewing each medically vulnerable Danbury prisoner for home confinement, assigning “substantial weight” to COVID-19 risk factors and including a “medical clinician” in the process, along with transparency about the process and written explanations for any denials.¹⁴³

136. *Id.* at 447. Judge Shea declined to require new safety measures, stating that factual disputes about what measures had already been implemented precluded him from concluding that the prisoners were likely to succeed on that part of their claim. *Id.* at 449.

137. *Id.* at 451; *see id.* at 452.

138. *Id.* at 454.

139. *Id.* at 455.

140. *Id.* at 455–56.

141. *Id.* at 456.

142. Mem. of Law in Support of Petitioner’s Motion to Certify Settlement Class and for Appointment of Class Representative and Class Counsel at 6, D.E. 134, *Whitted v. Easter*, No. 3:20-cv-00569 (D. Conn. Aug. 3, 2020). The case’s name changed after Dianthe Martinez-Brooks and other named petitioners were released. *See id.* at 2 n.1.

143. *Id.*

4. FCI/USP Lompoc

The other bright spot among the federal COVID-19 habeas cases, *Torres v. Milusnic*,¹⁴⁴ followed a similar path to the Danbury litigation. Lompoc,¹⁴⁵ another federal facility—about an hour northwest of Santa Barbara, California, featuring both a minimum-, low-, and medium-security facility—had a 60% infection rate when five prisoners brought this putative class action on May 16, 2020, seeking relief under § 2241 or alternatively under § 1331 for asserted Eighth Amendment violations.¹⁴⁶ On July 14, 2020, Judge Consuelo Marshall granted a preliminary injunction and provisionally certified a medically vulnerable class of prisoners over age 50 or with certain health conditions, ordering the Warden and BOP to evaluate all relevant prisoners for home confinement; to give “substantial weight to the inmate’s risk factors”; to update their compassionate-relief criteria to account for COVID-19; and to recommend approval or deny all compassionate-release applications before them.¹⁴⁷

On the jurisdictional question, the court cited decisions from the Elkton and Danbury litigation, among others, to conclude that habeas jurisdiction under § 2241 was proper. “Because Petitioners contend there are no set of conditions of confinement that could be constitutional,” Judge Marshall wrote, “the Court finds Petitioners challenge the fact of their confinement.”¹⁴⁸

On the merits of the Eighth Amendment claim, the court found that the officials’ lackadaisical approach to home confinement and compassionate release created a likelihood of success on the merits.¹⁴⁹ Judge Marshall observed, for example, that despite the CARES Act and the Attorney General’s exhortations, “[a]s of April 20, 2020, only 59 Lompoc inmates had been considered for home confinement and 24 inmates were scheduled to be released to home confinement or a Residential Reentry

144. 472 F. Supp. 3d 713 (C.D. Cal. 2020).

145. Because, like Elkton, the facility technically includes both FCI and USP Lompoc, *see Torres v. Milusnic*, 472 F. Supp. 3d 713, 720 (C.D. Cal. 2020), I use “Lompoc” collectively.

146. Complaint and Petition at 42–46, *Torres*, 472 F. Supp. 3d 713 (C.D. Cal. 2020) (No. CV 20-4450), D.E. 1.

147. *Torres*, 472 F. Supp. 3d at 746–47. The court denied the prisoners’ request for a TRO requiring prison officials “to implement . . . specific safety measures” in light of “disputed facts.” *Id.* at 734.

148. *Id.* at 726. The court rejected the prison officials’ PLRA argument, citing the Elkton case, in light of the fact that the prisoners were properly “challenging the fact of their confinement” under § 2241. *See id.* at 742. The court also concluded that administrative exhaustion was excused because these remedies were “not available,” in light of prisoners having been “instructed by prison officials not to submit grievances and requests for compassionate release because such grievances and requests were not being accepted due to understaffing” and at least one petitioner showing that his compassionate-release request had not received a response. *Id.* at 743.

149. *See id.* at 740.

Center,”¹⁵⁰ along with other evidence that the officials had “ignored . . . the known urgency to consider inmates for home confinement, particularly those most vulnerable.”¹⁵¹ In addition, there was “no evidence demonstrating consideration of Lompoc inmates’ risk factors . . . in evaluating requests for compassionate release, and Petitioners’ evidence suggest[ed] requests for compassionate release [we]re discouraged/not being accepted at Lompoc.”¹⁵² In sum, Judge Marshall concluded that the prisoners were likely to succeed on their Eighth Amendment claims given both the officials’ failures to use their powers more aggressively or demonstrate that they were taking COVID-19 risk into account.¹⁵³

As with the Elkton litigation, compliance with the terms of the district court’s order was contested. On September 10, 2020, the prisoners moved for enforcement of the preliminary injunction,¹⁵⁴ and on October 8, 2020, Judge Marshall granted the motion, concluding that the prison officials were “not making full and speedy use of their CARES Act authority in violation of the preliminary injunction.”¹⁵⁵ The court ordered the Warden and BOP to confirm that all class members previously identified as approved for home confinement had actually been released and to explain any delays for prisoners who had not yet been released.¹⁵⁶ The court also offered the officials to identify any prisoners who were denied home confinement and instead sent to a halfway house despite having “no history of violence, no sex-offense- or terrorism-related convictions” and lacking a high PATTERN score, as well as any prisoners denied home confinement in lieu of a halfway house despite having “a viable release plan.”¹⁵⁷

* * *

Reading through the past four cases, one might think that the prisoners more or less batted .500. In fact, the results were far more disappointing.¹⁵⁸ As Professor Sharon Dolovich summarizes:

150. *Id.* at 736.

151. *Id.* at 738 (citing the Elkton and Danbury cases).

152. *Id.* at 738–39.

153. *Id.* at 740. Judge Marshall also concluded that the four Rule 23(a) prerequisites, as well as Rule 23(b)(2), were satisfied for purposes of a provisional class certification. *See id.* at 743–46.

154. Notice of Motion and Motion to Enforce Compliance, *Torres*, 472 F. Supp. 3d 713 (C.D. Cal. 2020) (No. CV 20-4450), D.E. 93.

155. Order Granting Motion to Enforce Compliance at 3–4, *Torres*, 472 F. Supp. 3d 713 (C.D. Cal. 2020) (No. CV 20-4450), D.E. 105.

156. *Id.* at 5.

157. *Id.* at 5–6.

158. For other examples of defeats, see, for example, *Wragg v. Ortiz*, 462 F. Supp. 3d 476 (D.N.J.

[T]o date, of the innumerable class actions that have been brought by incarcerated plaintiffs since March, only two—*Martinez-Brooks v. Easter* and *Torres v. Milusnic*—have yielded releases. Each involved a single federal facility . . . [a]nd in each case, the number of people released has thus far been relatively small, 119 from Danbury and 165 from Lompoc.¹⁵⁹

Indeed, it seems likely that, as Dolovich observes, “by the third week of May, by which time a number of appellate decisions had already been entered and the first Supreme Court order issued in *Wilson* [the Elkton case], corrections officials would have seen enough to know which way the wind was blowing.”¹⁶⁰ The Danbury and Lompoc cases built on the Elkton cases, and they unfolded in appellate jurisdictions (the Second and Ninth Circuits) where the BOP may well have judged its prospects worse than it did in the Sixth Circuit.

B. Jail Cases

Given their status as “mostly temporary waystations,” jails offered both higher promise and higher peril when it came to criminal defendants facing involuntary exposure to COVID-19.¹⁶¹ On the optimistic side, because median stays are shorter, often subject (for pretrial detainees) to the discretion of judges with regard to bail, and the offenses (or alleged offenses) involved are comparatively more likely to be minor, judges (and sometimes sheriffs) can more easily “take steps to shrink jail populations” both by restricting the pipeline of new detainees and by revisiting some detention decisions (for example, revisiting bail) with “relatively little political risk of the sort that has largely thwarted meaningful decarceration efforts since the ‘tough on crime’ era began.”¹⁶² Efforts across the country “had a notable effect”: “[b]y mid-May 2020, the median national jail population had dropped by 31 percent from the start of the pandemic.”¹⁶³ Unfortunately, this trend did not last, and the numbers soon “began to creep back up,” with “at least 50 percent of the reductions” having been “erased by new admissions” as of October 1.¹⁶⁴

But there are dispiriting features, too. First, transparency is especially limited: while prisons are no paragons on transparency, it has been comparatively easier to track the COVID-19 crisis unfolding there.¹⁶⁵

2020) (Fort Dix); *Livas v. Myers*, 455 F. Supp. 3d 272 (W.D. La. 2020) (FCI Oakdale).

159. Dolovich, *supra* note 1, at 24 n.46.

160. *Id.* at 24.

161. Dolovich, *supra* note 1, at 15.

162. *Id.* at 15–16.

163. *Id.* at 17.

164. *Id.*

165. See UCLA LAW, COVID-19 BEHIND BARS DATA PROJECT, <https://uclacovidbehindbars.org/> (lasted visited Oct. 22, 2021); *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT,

While “the biggest jail systems now publish their data on dashboards of the sort found on DOC websites, most jails around the country post no data at all.”¹⁶⁶ Second, because average prison stays are much longer than average jail stays,¹⁶⁷ we should expect people incarcerated in jails to face even greater danger from COVID-19 exposure (given the churn). Nevertheless, they may be less likely to secure counsel to bring a legal challenge, both because they may be less likely to reach out (whether because they have a higher likelihood of imminent release or because they are focused on a pending prosecution) and because they are concomitantly easier to moot out or otherwise pick off as plaintiffs. Third, while prisons are generally run by the state or federal government, jails are often managed by cash-strapped counties and other local municipalities.¹⁶⁸

For all these reasons (and likely more), criminal defendants generally think of jail conditions as even worse than prison conditions, making it no surprise that the COVID-19 situation in jails was always likely to be bleak. Two big federal habeas cases involving jails—*Cameron v. Bouchard*, which involved Michigan’s Oakland County Jail, and *Barnes v. Ahlman*, which involved the Orange County Jail—show a pattern of trial-court success followed by appellate court reversal.

1. The Oakland County Jail

The Oakland County Jail, in Michigan, houses over 1,600 detainees across three main housing units, some of which are dormitory-style and others of which are celled.¹⁶⁹ “In some housing areas, inmates sleep a foot apart or less and, in others, inmates may have to sleep side-by-side in the middle of the floor. . . . All inmates, no matter where they are housed, share showers, toilets, sinks, brooms, and cleaning supplies.”¹⁷⁰

Detainees at the Oakland County Jail brought this case on April 17, 2020, as another combination putative civil-rights class action under § 1983 and representative habeas petition under § 2241.¹⁷¹ That same day,

<https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Oct. 22, 2021).

166. Dolovich, *supra* note 1, at 28.

167. “The average jail term is less than 30 days.” *Id.* at 15 n.25. The average prison term, on the other hand, is roughly two and a half years. See Danielle Kaebler, U.S. DEP’T OF JUSTICE, TIME SERVED IN STATE PRISON, 2016 (Nov. 2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> (average time served of 2.6 years for U.S. prisoners released in 2016).

168. See Lauren-Brook Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CENTER FOR JUSTICE (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level>.

169. *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 755–56 (E.D. Mich. 2020), *vacated*, *Cameron v. Bouchard*, 815 F. App’x 978 (6th Cir. 2020).

170. *Id.* at 756.

171. *Id.* at 753.

Judge Linda Parker issued a TRO directing the jail officials to improve sanitation and health safety at the jail and ordered them to disclose the names of all medically vulnerable detainees.¹⁷² On May 21, 2020, Judge Parker granted a preliminary injunction, requiring the jail officials to take further steps to slow the spread of the virus internally and to provide information “to enable the Court to implement a system for considering the release on bond or other alternatives to detention in the Jail for each subclass member.”¹⁷³ Judge Parker wrote that “[i]n extraordinary cases like this, federal judges have the authority to release detainees on bail while their habeas petitions are pending.”¹⁷⁴

On May 26, 2020, the Sixth Circuit denied a stay,¹⁷⁵ and on May 31, the district court “began the process for granting bail for members of the medically vulnerable subclass.”¹⁷⁶ In the meantime, the Elkton litigation was unfolding while the Supreme Court had denied the first stay application on May 26, 2020.¹⁷⁷ Justice Sotomayor had entered an administrative stay on June 4, 2020.¹⁷⁸ On June 5, 2020, the *Cameron* Defendants renewed their motion for a stay with the Sixth Circuit “arguing that intervening changes in the law warranted a reconsideration of our initial denial of their motion.”¹⁷⁹ On June 9, a majority of the *Wilson* panel vacated the Elkton preliminary injunction,¹⁸⁰ and on June 11, a majority of the *Cameron* panel granted the *Cameron* defendants’ renewed stay motion.¹⁸¹ On July 9, largely following the rationale of the Elkton decision, the Sixth Circuit vacated the preliminary injunction in *Cameron* as well.¹⁸²

Chief Judge Cole, who had also been on the *Wilson* panel, dissented. While questioning the majority’s use of *Wilson*—a prison case—as binding precedent for cases involving pretrial detainees,¹⁸³ Chief Judge

172. *Id.* at 753.

173. Order at 6, *Cameron*, No. 2:20-cv-10949 (E.D. Mich. May 21, 2020), D.E. 94.

174. *Id.* at 7 (citing *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Savino v. Souza*, 453 F.Supp.3d 441, 452–54 (D. Mass. 2020)).

175. *Cameron v. Bouchard*, No. 20-1469, 2020 U.S. App. LEXIS 16741 (6th Cir. May 26, 2020).

176. *Cameron v. Bouchard*, 815 F. App’x 978, 982 (6th Cir. 2020).

177. Order Denying Appl. for Stay, *Williams v. Wilson*, No. 19A1041 (May 26, 2020).

178. *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (Mem) (June 4, 2020).

179. *Cameron*, 815 F. App’x at 983.

180. *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020).

181. *Cameron v. Bouchard*, 818 Fed. App’x 393 (6th Cir. June 11, 2020). Chief Judge Cole dissented.

182. *Cameron*, 815 F. App’x at 983; *see, e.g., id.* at 985 (calling steps taken by Defendants “very similar to the steps taken by the officials in *Wilson*”); *id.* at 988 (“Given our decision in *Wilson*, a case that is binding on us, we agree with Defendants that Plaintiffs are unlikely to succeed on the merits of their Eighth and Fourteenth Amendment claims.”).

183. *Id.* at 989 (Cole, C.J., dissenting). Both the majority and the dissent avoided the lurking issue regarding whether the same deliberate-indifference test that applies under the Eighth Amendment should apply to legally innocent, pretrial detainees (whose claims are subject to Fourteenth Amendment due

Cole further averred that *Wilson* did “not stretch so far as to foreclose a constitutional claim based on the record” in *Cameron*,¹⁸⁴ detailing evidence suggesting that the Defendants were “more interested . . . in convincing courts” that they were acting responsibly rather than actually “keeping the inmates in their care safe.”¹⁸⁵ For example, he noted seemingly retaliatory transfers of detainees who sought to raise concerns and grievances, as well as changes in posted times that were suspiciously timed to an inspection of the jail.¹⁸⁶ He also noted credibility determinations made by Judge Parker as well as the Jail’s seemingly “irrational allocation of resources,” such as keeping “some cells empty while leaving other inmates in multi-person cells,”¹⁸⁷ and seemingly inadequate quarantine procedures, which seemed to have exposed possibly infectious detainees to previously uninfected ones.¹⁸⁸

2. The Orange County Jail

Another combination habeas–civil rights case, *Ahlman v. Barnes*, was filed on April 30, 2020.¹⁸⁹ As of the prior day, “117 people in the Orange County Jail ha[d] tested positive for COVID-19 out of 227 people who were tested.”¹⁹⁰ At that time, “there were nearly 3,000 inmates still in the Jail’s care, 488 of whom were medically vulnerable to COVID-19.”¹⁹¹

On May 26, 2020, Judge Jesus Bernal granted partial immediate relief for the detainees, ordering that the Jail undertake fourteen steps to mitigate the spread of COVID-19 while denying a request for detainee releases on the ground that it was not clearly necessary (and therefore not further addressing the applicability of habeas relief).¹⁹² Judge Bernal noted that while the officials had “reduced the Jail’s population,” they had

process), *cf.* *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), by concluding that the result was the same “under the more-stringent Eighth Amendment review that all parties agree[d] applies to the claims of the convicted inmates at the jail.” *Cameron*, 815 F. App’x at 989 (Cole, C.J., dissenting); *see id.* at 984–85 (majority opinion).

184. *Id.* at 991 (Cole, C.J., dissenting).

185. *Id.*

186. *Id.* at 991–92.

187. *Id.* at 993.

188. *Id.* at 993–94.

189. Petition for Writ of Habeas Corpus and Compl., *Ahlman v. Barnes*, 445 F. Supp. 3d 671, (C.D. Cal. 2020) (No. 20-cv-835), ECF No. 1.

190. *Id.* at 1.

191. *Barnes v. Ahlman*, 140 S. Ct. 2620, 2624 (2020) (Sotomayor, J., dissenting from grant of stay).

192. *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 693–95, 695 n.18 (C.D. Cal. 2020). “Because it is plausible that the Jail could mitigate many of the risks presented by COVID-19 with better compliance with the CDC Guidelines,” Judge Bernal reasoned, “Plaintiffs have not met their burden to demonstrate that the need for release outweighs the risks of releasing of 488 inmates without individualized assessments.” *Id.* at 693.

“failed to meet the 50% target reduction rate set by” their own health service,¹⁹³ had instituted only a partial quarantine and inadequate social distancing,¹⁹⁴ and engaged in questionable testing practices, including allowing detainees “awaiting the outcome of a COVID-19 test . . . to return to the general population.”¹⁹⁵ He concluded that their compliance with CDC guidelines had “been piecemeal and inadequate,” noting that it was “belied by the fact that there [were by then] 369 confirmed COVID-19 cases in the Jail—up from only 26 confirmed cases less than a month” before.¹⁹⁶

Judge Bernal also suggested that “the CDC Guidelines represent the floor, not the ceiling, of an adequate response” at a facility with so many cases.¹⁹⁷ “As the rate of infection rises,” he wrote, “so must the required response.”¹⁹⁸ Judge Bernal described the need for a sliding scale: “one bar of soap a week may not be deliberately indifferent where there are no infections but it certainly is where—as here—there are hundreds of infected individuals with new cases daily.”¹⁹⁹

On June 12, 2020, the Ninth Circuit denied a stay of the preliminary injunction while issuing a limited remand for the district court to consider whether “changed circumstances . . . might merit modification or dissolution of the preliminary injunction.”²⁰⁰ On June 26, 2020, the district court denied the Defendants’ application to dissolve the injunction,²⁰¹ and on June 29, the Ninth Circuit denied a further stay

193. *Id.* at 680.

194. *Id.* at 681.

195. *Id.* at 682.

196. *Id.* at 688-89. Judge Bernal observed that this meant that “[a]n individual incarcerated at the Jail [wa]s nearly one hundred times more likely to get COVID-19 than the average resident of Orange County.” *Id.*

197. *Id.* at 691.

198. *Id.*

199. *Id.*

200. *Ahlman v. Barnes*, No. 20-55568, 2020 U.S. App. LEXIS 18677, at *2 (9th Cir. June 12, 2020). The Ninth Circuit issued an opinion on June 17, 2020, expanding on the June 12 order. *See Ahlman v. Barnes*, No. 20-55568, 2020 U.S. App. LEXIS 20801, at *2 & n.1 (9th Cir. June 17, 2020). The court of appeals largely relied on the District Court’s factual findings, subject to clear-error review, noting that “[o]n those facts, which portrayed a response that fell well short of the CDC guidelines and resulted in an explosion of COVID-19 cases in the jail.” *Id.* at *9. The court also noted that the jail officials’ arguments on appeal were “diametrically opposed to their litigation position in the district court,” where they had claimed that they had “*already implemented*” the “measures requested by Plaintiffs (and later incorporated into the injunction),” a paradox that doomed their irreparable-injury claims. *Id.* at *7-8. Judge Ryan Nelson concurred in part and dissented in part, asserting that the majority was “adopt[ing] an unprecedented interpretation” of the Constitution by allowing the district court to order the jail to go beyond the CDC’s Interim Guidance. *Id.* at *12-13.

201. Order (1) Denying Defs. Ex Parte Appl. to Dissolve Inj.; (2) Granting Pls.’ Mot. For Expedited Disc.; (3) Den. Pls.’ Appl. To Shorten Time; and (4) Vacating the July 20, 2020 Hearing, *Ahlman, v. Barnes*, 2020 U.S. Dist. LEXIS 223677 (C.D. Cal. June 26, 2020) (No. 20-cv-835), No. 93.

application.²⁰²

On August 5, 2020, by a 5–4 margin, the U.S. Supreme Court granted a stay of the preliminary injunction.²⁰³ Justices Breyer and Kagan noted their dissents, and Justice Sotomayor issued an opinion, joined by Justice Ginsburg, dissenting from the grant of the stay. In her dissent, Justice Sotomayor noted that while the Jail had “voluntarily released 53 percent” of its detainees and “claim[ed] that it had largely implemented the CDC Guidelines and radically increased hygiene and cleaning within its walls, the District Court, whose factual findings are owed deference, found the reality to be very different.”²⁰⁴ And as she noted in response to the Jail’s claim that the preliminary injunction went beyond CDC Guidelines, the Jail had cited “just two alleged discrepancies: first, that the District Court ordered the Jail to provide adequate spacing of six feet or more between incarcerated people, whereas the CDC Guidelines suggest only that six feet of space is ‘ideal[]’; and second, that the injunction requires daily temperature checks and screening questions.”²⁰⁵

C. *Non-Habeas Cases*

Not all federal COVID-19 cases sought release; some plaintiffs brought standard civil-rights claims seeking intramural improvements in prison conditions instead or as well. Some of these cases nevertheless generated significant rulings (generally negative for prisoners) regarding the meaning of the Eighth Amendment in the context of COVID-19, thereby impacting cases proceeding under the habeas theory. Below, I discuss two such cases: one involving a Texas geriatric prison, and one involving a Miami-Dade County jail.

1. Texas’s “Pack Unit”

The *Valentine v. Collier* litigation concerned the “Pack Unit,” “a geriatric prison in southeast Texas that has been ravaged by COVID-19.”²⁰⁶ This § 1983 putative class action was filed on March 30, 2020, raising Eighth Amendment, Americans with Disabilities Act (“ADA”), and Rehabilitation Act of 1973 claims.²⁰⁷

202. *Ahlman v. Barnes*, No. 20-55568, 2020 U.S. App. LEXIS 20300 (9th Cir. June 29, 2020).

203. *Barnes*, 140 S.Ct. at 2620.

204. *Id.* at 2622 (Sotomayor, J., dissenting from grant of stay).

205. *Id.* at 2623 (alteration in original).

206. *Valentine v. Collier*, 141 S. Ct. 57, 57 (Nov. 16, 2020) (Mem.) (Sotomayor, J., dissenting from denial of application to vacate stay).

207. Compl. and Application at 28-31, *Valentine v. Collier*, 455 F. Supp. 3d 308 (S.D. Tex. 2020) (No. 20-cv-1115), ECF No. 1. Many other COVID-19 cases also raised ADA claims. *See, e.g.*, Garrett & Kovarsky, *supra* note 1, at 19, 32. Those claims are important, but outside the scope of this Article.

On April 16, 2020, Judge Keith Ellison entered a preliminary injunction, requiring officials at the Texas Department of Criminal Justice (TDCJ) to take a number of steps to reduce the spread of COVID-19 within the Pack Unit.²⁰⁸ In a memorandum opinion filed a few days later, Judge Ellison noted that the prison had “refused to give inmates alcohol-based hand sanitizer or disposable paper towels,”²⁰⁹ had insufficiently communicated information on how to protect against transmission of COVID-19,²¹⁰ had engaged in very limited testing (64 prisoners out of 1,248 at the time of the injunction),²¹¹ and was unable to provide for adequate social distancing.²¹² He concluded that exhaustion should be excused “[i]n light of the alarming speed” of COVID-19²¹³ and the prison’s “lengthy administrative procedure, which TDCJ may choose to extend at will.”²¹⁴

On the Eighth Amendment question, Judge Ellison found that the TDCJ actions fell “short of their own policy” and did “not reasonably abate the extremely high risk facing the inmates in Pack Unit.”²¹⁵ To the extent his order demanded something more than TDCJ and CDC policies required, Judge Ellison explained, it did so “with great care and out of great necessity.”²¹⁶

On April 22, 2020, in a *per curiam* opinion, the Fifth Circuit stayed the preliminary injunction.²¹⁷ The majority of the panel concluded that the prison officials were likely to prevail for two reasons relating to the Eighth Amendment question.²¹⁸ First, while the COVID-19 risk was real, the panel stated that the district court had “acknowledged that the ‘extra measures’ it required ‘go[] beyond TDCJ and CDC policies,’” whereas the prisoners had “cited no precedent holding that the CDC’s recommendations are insufficient.”²¹⁹ Second, the prisoners had shown insufficient evidence of TDCJ’s subjective deliberate indifference to

208. Preliminary Injunction Order, *Valentine*, 455 F. Supp. 3d 308 (S.D. Tex. 2020) (No. 20-cv-1115), ECF No. 40.

209. Memorandum and Order at 10, *Valentine*, 455 F. Supp. 3d 308 (S.D. Tex. 2020) (No. 20-cv-1115), ECF No. 51.

210. *Id.* at 11–12.

211. *See id.* at 7, 12.

212. *Id.* at 12–13.

213. *Id.* at 16.

214. *Id.* at 17.

215. *Id.* at 21.

216. *Id.* at 25.

217. *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020). Judge Higginson concurred in the judgment.

218. *Id.* at 801.

219. *Id.* at 802. In addition, the panel noted, the District Court could not enjoin the State “to follow its own laws and procedures.” *Id.* at 802; *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

satisfy the test for an Eighth Amendment claim.²²⁰ On the other stay factors, the court likewise sided with TDCJ, concluding that the order “created ‘an administrative nightmare’ for TDCJ” and that this “harm” was “particularly acute because the district court’s order interferes with the rapidly changing and flexible system-wide approach that TDCJ has used to respond to the pandemic so far.”²²¹ Nor, the court reasoned, had the prisoners demonstrated that they would “suffer irreparable injuries *even after* accounting for the protective measures” that TDCJ was taking.²²² The majority added that the prisoners “appear[ed]” to face PLRA problems both in terms of a failure to exhaust available remedies and the breadth of the district court’s order.²²³

On May 14, 2020, the Supreme Court denied an application to vacate the stay,²²⁴ and on June 5, the Fifth Circuit vacated the preliminary injunction.²²⁵ On September 29, 2020, following an eighteen-day trial, Judge Ellison entered a permanent injunction, requiring TDCJ to undertake a list of 17 obligations similar to those in the preliminary injunction.²²⁶

On October 13, 2020, a new panel of the Fifth Circuit stayed the permanent injunction.²²⁷ While acknowledging that the grievance process was “[b]y all accounts . . . suboptimal,” the court concluded, first, that the procedure was nevertheless “available,” and thus that the prisoners were required to exhaust.²²⁸ Because there was no “‘special circumstances’ exception” in the PLRA, the panel reasoned, “even threats posed by global pandemics” did “not matter.”²²⁹

220. *Valentine*, 956 F.3d at 802.

221. *Id.* at 803; *see id.* at 804.

222. *Id.* at 804.

223. *See id.* at 805–06. Judge Higginson based his concurrence in the judgment on the exhaustion point, noting that the court’s opinion did “not foreclose the possibility that, upon expedited consideration, our court may nonetheless conclude that a remedy using the [TDCJ] grievance system is not ‘available’ because of the immediacy of the COVID-19 medical emergency coupled with statements credited by the district court that prisoners’ grievances may not be addressed promptly.” *Id.* at 806 (Higginson, J., concurring in the judgment).

224. *Valentine v. Collier*, 140 S. Ct. 1598 (2020). Justice Sotomayor filed a statement respecting the denial, joined by Justice Ginsburg, “to highlight the disturbing allegations presented below” and to note that “where plaintiffs demonstrate that a prison grievance system cannot or will not respond to an inmate’s complaint, they could well satisfy an exception to the PLRA’s exhaustion requirement.” *Id.* (statement of Sotomayor, J.).

225. *Valentine v. Collier*, 960 F.3d 707, 707 (5th Cir. 2020). Judge Davis “reluctantly concur[red] in the judgment . . . because conditions ha[d] dramatically changed in the prison since the preliminary injunction issued.” *Id.* (Davis, J., concurring in the judgment).

226. *Valentine v. Collier*, 490 F. Supp. 3d 1121, 1175 (S.D. Tex. 2020), *rev’d*, 993 F.3d 270 (5th Cir. 2021).

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

228. *Id.* at 161–62.

229. *Id.* at 161; *see also id.* (“The district court made much of TDCJ’s ‘acknowledgment that the existing grievance process was inadequate in light of COVID-19 and the implementation of a new set of

“But even if Plaintiffs could surmount the PLRA,” the panel concluded, “their Eighth Amendment claim” was likely to fail given the “affirmative steps” TDCJ had taken.²³⁰ The panel acknowledged several TDCJ omissions: it had “failed to enforce social distancing in the Pack Unit, particularly in the showers”; it “did not increase the janitorial staff’s access to training or supplies”; its “staff regularly violated the mask policy”; sanitation and mask-wearing were substandard in the prison laundry; there was a lack of hand sanitizer and working sinks; there was no contact-tracing plan; and the testing “turnaround time . . . was between one and two weeks at the start of the pandemic.”²³¹ Still, the panel concluded that Judge Ellison had “held TDCJ to a higher standard than the Constitution imposes” and that “[t]he Eighth Amendment does not enact the CDC guidelines.”²³² “To be sure,” the panel wrote, “the district court identified lapses in TDCJ’s response to COVID-19. As a matter of policy, TDCJ could have done more to protect vulnerable inmates in the Pack Unit. But federal judges are not policymakers.”²³³

On November 16, 2020, the U.S. Supreme Court denied an application to vacate the stay.²³⁴ Justice Sotomayor, joined by Justice Kagan, dissented.²³⁵ She noted that “[g]iven the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief.”²³⁶ She also wrote that the “the Fifth Circuit’s analysis makes clear that it substituted its own view of the facts for that of the District Court” on the Eighth Amendment question.²³⁷ Further, she highlighted a few facts that had come out at trial, such as the fact that one prisoner had been transferred immediately after 14 days elapsed even though he was still symptomatic,²³⁸ and that one warden “was not concerned about assigning cleaning duties” to wheelchair-bound prisoners “because a disabled inmate ‘could put a broom against his neck and push it with a wheelchair.’”²³⁹

On March 26, 2021, the Fifth Circuit vacated the permanent injunction, reversed the district court’s judgment, and entered judgment for the state defendants.²⁴⁰ All three judges on the panel concluded that the

procedures.’ But inadequate is not a synonym for unavailable.” (citation omitted)).

230. *Id.* at 162–64.

231. *Id.* at 164.

232. *Id.*

233. *Id.* at 165.

234. *Valentine v. Collier*, 141 S. Ct. 57 (2020) (mem.).

235. *Id.*

236. *Id.* at 60 (Sotomayor, J., dissenting from denial of application to vacate stay).

237. *Id.* at 61.

238. *Id.*

239. *Id.* at 59.

240. *Valentine v. Collier*, 993 F.3d 270, 277, 291 (5th Cir. 2021).

defendants' conduct did not rise to the level of an Eighth Amendment violation, with the majority ultimately concluding, essentially, that the defendants could not be said to have violated the Eighth Amendment for having done "their best."²⁴¹

2. Miami-Dade's Metro West Detention Center

Another combination habeas–civil rights putative class action, *Swain v. Junior*, was filed on April 5, 2020, following a COVID-19 outbreak at a Miami-Dade County jail.²⁴² Judge Kathleen Williams entered a TRO two days later.²⁴³ On April 29, Judge Williams granted the plaintiffs' motion for a preliminary injunction in part, ordering the defendants to take specific steps at the Metro West Detention Center to increase detainee safety, including providing for social distancing and imposing reporting requirements.²⁴⁴ Presumably because Judge Williams denied relief under § 2241, citing Eleventh Circuit precedent,²⁴⁵ the case evolved as a § 1983 case.

On May 5, 2020, a motions panel of the Eleventh Circuit stayed the preliminary injunction.²⁴⁶ The majority wrote that Judge Williams had "incorrectly collapsed the subjective and objective components" of the Eighth Amendment test, "treat[ing] the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk."²⁴⁷ The majority also relied on an expert report ordered by Judge Williams for the proposition that the jail officials were "doing their best" and had "implemented many measures to curb the spread of the virus."²⁴⁸ In addition to likelihood of success on the merits, the majority also concluded that the other factors weighed in the jail officials' favor, including that they would "be irreparably injured absent a stay" because they would "lose the discretion vested in them under state law to allocate scarce resources."²⁴⁹ The majority added that the district court had also "likely erred" in failing to address exhaustion under the PLRA.²⁵⁰

241. *See id.* at 289 n.38 (quoting *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020)). Judge Oldham concurred in the judgment, chiding the majority for including positive dicta about the district judge's handling of the case. *Id.* at 291–95.

242. Petition and Complaint, *Swain v. Junior*, No. 20-cv-21457 (S.D. Fla. Apr. 5, 2020), D.E. 1.

243. Order, *Swain*, No. 20-cv-21457 (S.D. Fla. Apr. 7, 2020), D.E. 25.

244. *Swain v. Junior*, 457 F. Supp. 3d 1287, 1317–18 (S.D. Fla. 2020), *vacated*, 961 F.3d 1276. At the time, at least 163 detainees and 17 staff members had been infected. *Id.* 1292.

245. *See id.* at 1314–17; *see also Swain v. Junior*, 958 F.3d 1081, 1086 n.1 (11th Cir. 2020).

246. *Swain*, 958 F.3d at 1085.

247. *Id.* at 1089.

248. *Id.* (citation omitted).

249. *Id.* at 1090; *see id.* at 1091.

250. *Swain*, 958 F.3d at 1091–92. Judge Wilson dissented. *Id.* at 1092–93.

On June 15, 2020, a merits panel of the Eleventh Circuit vacated the preliminary injunction.²⁵¹ The majority noted that the jail officials “had purchased and installed ionizers to purify the air and body-heat cameras to measure inmates’ temperatures, . . . had begun testing even asymptomatic inmates,” had released “nearly 900 inmates” (bringing the population “to less than 70% of its capacity”), and “would continue working to reduce the inmate population.”²⁵² Nevertheless, the majority acknowledged that, per the detainees, it was still “difficult or impossible to distance from other inmates in certain spaces or during certain times of the day.”²⁵³

The majority observed that the district court’s order had focused on “the fact that COVID-19 was continuing to spread” and “the impossibility of achieving adequate social distancing.”²⁵⁴ This was an error, the majority stated, because neither of these factors, in its view, established Eighth Amendment subjective indifference.²⁵⁵ “Failing to do the ‘impossible’ doesn’t evince indifference,” the majority wrote, “let alone deliberate indifference.”²⁵⁶ Indeed, it observed, the jail officials had taken “numerous *other* measures—besides social distancing—to mitigate the spread of the virus.”²⁵⁷ The majority added that the district court erred in failing to address PLRA exhaustion²⁵⁸ and in applying the other three preliminary-injunction factors.²⁵⁹

In her dissent, Judge Beverly Martin found no evidence of an abuse of discretion by the district court, as the record demonstrated that the defendants had “knowingly maintained conditions” that created “an impermissibly high risk of illness and death” both “by maintaining a dangerously high jail population” and “by failing to implement needed safety measures.”²⁶⁰ Despite being aware of the risks, Judge Martin wrote, they “continued to detain significantly more people than Metro West can safely hold during this pandemic,” making detainees “much

251. *Swain v. Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020). Judge Beverly Martin dissented. *Id.* at 1294.

252. *Id.* at 1282.

253. *Id.* at 1283.

254. *Id.* at 1286.

255. *Id.* at 1287.

256. *Id.*

257. *Id.* at 1289.

258. *Id.* at 1291.

259. *Id.* at 1292–94. The majority chided the District Court for failing to make findings regarding whether the detainees would suffer irreparable injury even in the absence of the preliminary injunction given the steps that the jail officials were already taking. *Id.* at 1292–93. It also concluded that the District Court had given “insufficient consideration to the burdens with which the injunction would saddle the defendants.” *Id.* at 1293.

260. *Id.* at 1296 (Martin, J., dissenting).

more likely to contract COVID-19.”²⁶¹ Their “knowing failure,” she argued, “sits comfortably at the heart of what our Court considers to be deliberate indifference.”²⁶²

D. The Overall Timeline

What did this progression look like in aggregate? I have arranged the key milestones below, highlighting victories (or what were primarily victories) for incarcerated people in green and defeats (or what were primarily defeats) in yellow:

Date	Case	Court	Event
3/30/2020	Valentine	S.D. Tex.	Case filed
4/2/2020	Money	N.D. Ill.	Case filed
4/5/2020	Swain	S.D. Fla.	Case filed
4/7/2020	Swain	S.D. Fla.	TRO granted
4/10/2020	Money	N.D. Ill.	PI denied
4/13/2020	Wilson	N.D. Ohio	Case filed
4/16/2020	Valentine	S.D. Tex.	PI granted
4/17/2020	Cameron	E.D. Mich.	Case filed
4/17/2020	Cameron	E.D. Mich.	TRO granted
4/21/2020	Cameron	E.D. Mich.	PI granted
4/22/2020	Wilson	N.D. Ohio	PI granted
4/22/2020	Valentine	5th Cir.	PI stayed
4/27/2020	Martinez-Brooks	D. Conn.	Case filed
4/29/2020	Swain	S.D. Fla.	PI granted
4/30/2020	Ahlman	C.D. Cal.	Case filed
5/4/2020	Wilson	6th Cir.	Stay application denied
5/11/2020	Swain	11th Cir.	PI stayed

261. *Id.*

262. *Id.* at 1296–97 (citing *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985)).

2021]	WHEN THE CONDITIONS ARE THE CONFINEMENT			35
5/12/2020	Martinez-Brooks	D. Conn.	TRO granted	
5/14/2020	Valentine	Sup. Ct.	Application to vacate stay denied	
5/16/2020	Torres	C.D. Cal.	Case filed	
5/19/2020	Wilson	N.D. Ohio	Motion to enforce granted	
5/26/2020	Wilson	Sup. Ct.	Stay application denied	
5/26/2020	Cameron	6th Cir.	Stay application denied	
5/26/2020	Ahlman	C.D. Cal.	PI granted	
6/1/2020	Wilson	6th Cir.	Renewed stay application denied	
6/4/2020	Wilson	Sup. Ct.	Administrative stay	
6/9/2020	Wilson	6th Cir.	PI vacated	
6/11/2020	Cameron	6th Cir.	Renewed stay application granted	
6/12/2020	Ahlman	9th Cir.	Stay application denied; limited remand	
6/15/2020	Swain	11th Cir.	PI vacated	
6/26/2020	Ahlman	C.D. Cal.	Application to dissolve PI denied	
6/29/2020	Ahlman	9th Cir.	Stay application denied	
7/9/2020	Cameron	6th Cir.	PI vacated	
7/14/2020	Torres	C.D. Cal.	PI granted	
8/5/2020	Ahlman	Sup. Ct.	PI stayed	
9/29/2020	Valentine	S.D. Tex.	Permanent injunction entered	
10/8/2020	Torres	C.D. Cal.	Motion to enforce granted	
10/13/2020	Valentine	5th Cir.	Permanent injunction stayed	
11/16/2020	Valentine	Sup. Ct.	Application to vacate stay denied	

Figure 1. Developments in Key COVID-19 Cases

As this table shows, these cases progressed (generally speaking) from early success in the lower courts to failure on appeal, beginning in May and early June of 2020. If we look at the progression of COVID-19 deaths over roughly the same period,²⁶³ we see that the judicial tide started to turn around the same time as COVID-19 deaths nationally were beginning to bottom out from the first wave.²⁶⁴ Correlation is not causation, of

263. *The COVID Tracking Project*, THE ATLANTIC, <https://covidtracking.com/data/download> (last visited Dec. 30, 2020).

264. I use deaths rather than positive infections given both the slow speed at which testing ramped up and the greater salience of this figure for the stakes involved.

course, and the cases themselves involved significant doctrinal questions on which judges could disagree. This Article turns to those doctrinal questions now.

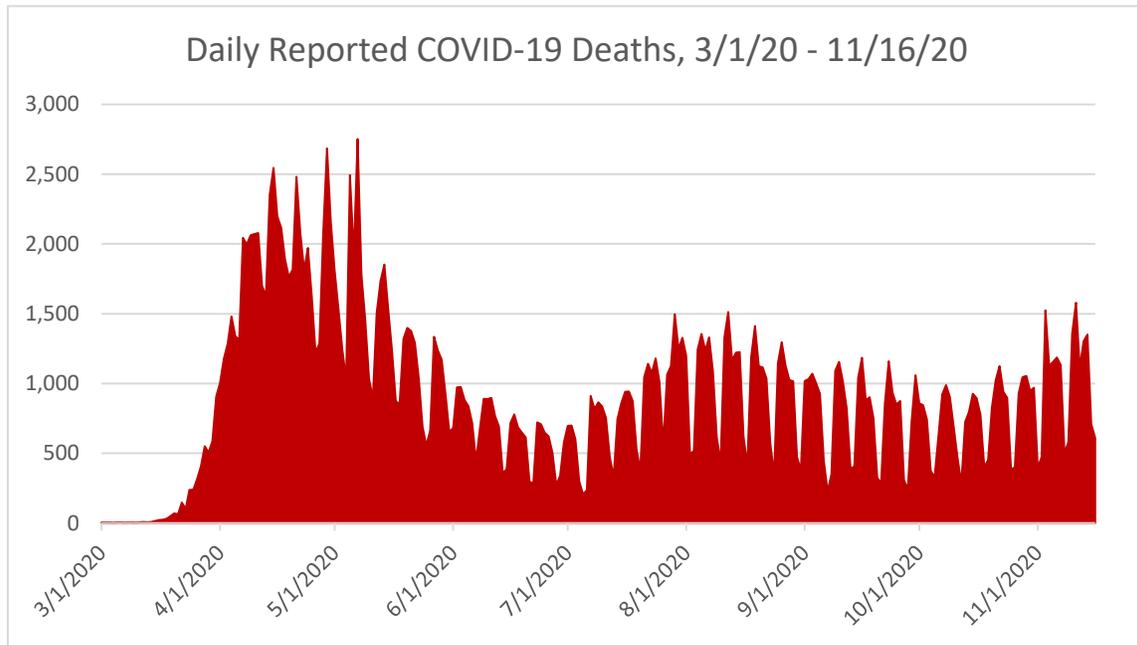


Figure 2. Daily Reported COVID-19 Deaths During Span of Key Litigation

III. KEY TENSIONS IN THE COVID-19 CASES

The major COVID-19 prison and jail cases have a few key things in common: they all brought Eighth Amendment claims (and almost all brought partial habeas claims) to address assertedly unconstitutional conditions of confinement through class-wide (or otherwise representative) litigation in federal court. In some instances, the alleged violations were in state facilities, while in others, the facilities were federal. In the most successful of these time-sensitive cases, litigants and courts wrestled with what appropriate preliminary relief would look like while litigation proceeded. The progression of these cases as a whole reflects larger tensions between rights and remedies, not only in the context of the American carceral state, but also in federal court litigation over asserted constitutional harms more broadly.

This Part discusses a series of related doctrinal tensions that sometimes act as stumbling blocks for courts and litigants: (A) whether these suits could be brought in habeas; (B) the scope of Eighth Amendment “deliberate indifference” doctrine in this context; (C) the availability of class-wide relief; (D) federalism and comity concerns, and how those concerns may have been sourced through exhaustion doctrine; (E) questions of whether temporary release could be ordered as a form of preliminary rather than final relief; and (F) the interplay between rights and remedies.

A. Habeas, Conditions of Confinement, and the PLRA

AEDPA makes a steep road for any prisoner—and especially any state prisoner—seeking to claim that he was convicted or sentenced in violation of federal law.²⁶⁵ But what about a prisoner whose claim has nothing to do with the legality of his conviction or sentence, but who instead—like the hypothetical prisoner in the Introduction whose prison is falling into a sinkhole—asserts that while his sentence may be justified, serving it in this particular prison under the current conditions itself violates federal law? That prisoner, whether state or federal, is certainly not bringing a traditional habeas claim under § 2254 or § 2255. At the same time, however, that prisoner is still arguing that there is something unlawful about his current detention.

The initial complexity of these novel arguments arises from the prisoner claiming the conditions of his confinement make his detention illegal. This alone is common. Take, for example, a prisoner who claims that his current confinement exposes him to dangerous levels of second-

265. See *supra* Section I.A.

hand tobacco smoke, “jeopardizing his health” in violation of the Eighth Amendment.²⁶⁶ This prisoner is asserting that his current detention is unlawful to the extent that it imposes this harm on him.²⁶⁷ Yet no one assumes that the remedy for this state of affairs is “release . . . from custody.”²⁶⁸

The answer in that situation, if the challenged condition is in fact unlawful, is instead to require the prison to remedy that condition—for example, through an injunction requiring prison officials to protect unwilling prisoners from second-hand smoke.²⁶⁹ State prisoners challenging these and other kinds of internally remediable conditions generally bring such claims under § 1983.²⁷⁰ The Supreme Court has repeatedly reserved the question of whether such mine-run conditions-of-confinement claims can be brought via habeas²⁷¹ while the circuit courts have split on this issue.²⁷² Even the circuits that have ruled against prisoners, however, may not have encountered a situation in which assertedly unconstitutional conditions *cannot* practically be remedied inside the prison walls.²⁷³ COVID-19, like the sinking-prison

266. *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 28 (1993).

267. *See id.*

268. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

269. *See, e.g., Helling*, 509 U.S. at 33, 35.

270. Federal prisoners cannot bring such claims under § 1983 because federal prison wardens are not acting “under color of” state law. Nevertheless, they can potentially seek injunctive and declaratory relief under the Eighth Amendment directly via 28 U.S.C. § 1331, given that asserted Eighth Amendment violations in federal prisons necessarily raise federal questions. Section 1331, after all, provides for federal district courts to have “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” And federal courts have long been recognized to have the authority to enjoin unconstitutional acts by federal (and state) officials. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–91 (1949) (federal); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–21 (1912) (federal); *Ex parte Young*, 209 U.S. 123 (1908) (state); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824) (state); *see also Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) (noting that plaintiffs were “challeng[ing] large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners” and that, “[t]o address those kinds of decisions, detainees may seek injunctive relief”). The Eighth Amendment has also been held to provide an implied damages remedy under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), *see Carlson v. Green*, 446 U.S. 14, 17 (1980), these kinds of claims are increasingly difficult to bring successfully, *see Abbasi*, 137 S.Ct. at 1854–63.

271. *See Abbasi*, 137 S.Ct. at 1862–63; *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser*, 411 U.S. at 499. *But see Johnson v. Avery*, 393 U.S. 483, 484, 490 (1969); *Wilwording v. Swenson*, 404 U.S. 249, 249, 251 (1971) (per curiam).

272. *See Aamer v. Obama*, 742 F.3d 1023, 1036–37 (D.C. Cir. 2014) (collecting cases); *see also* Order on Pls. Motion for Prelim. Inj. at 46, *Swain v. Junior*, 457 F. Supp. 3d 1287 (S.D. Fla. Apr. 29, 2020) (No. 20-cv-21457), D.E. 100 (noting split).

273. *Compare, e.g., Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) (“[T]his Court has held that even if a prisoner proves an allegation of mistreatment in prison that amounts to cruel and unusual punishment, he is not entitled to release. The appropriate Eleventh Circuit relief from prison conditions that violate the Eighth Amendment during legal incarceration is to require the discontinuance of any improper practices, or to require correction of any condition causing cruel and unusual punishment.” (citations omitted)), *with* Order on Pls. Motion for Prelim. Inj. at 46–47, *Swain v. Junior*,

hypothetical, makes that problem concrete.

For prisoners such as those in the hypothetical sinking prison, bringing a claim under § 1983 (or directly under the Eighth Amendment via § 1331 jurisdiction) carries a special pitfall: the PLRA. As noted above, the PLRA limits “[p]rospective relief in any civil action with respect to prison conditions”²⁷⁴ in multiple ways.²⁷⁵ Habeas offers a potential pathway around this problem because the PLRA expressly excludes “habeas corpus proceedings challenging the fact or duration of confinement in prison.”²⁷⁶

A prisoner who sues his prison asking for better cleaning supplies does not challenge “the fact or duration of [his] confinement,” but a prisoner who brings a habeas claim alleging that he cannot constitutionally be confined in a given facility (for example, in the COVID-19 or sinkhole scenario) arguably does. This prisoner levels an attack that is “just as close to the core of habeas corpus as an attack on the prisoner’s conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration.”²⁷⁷ From this perspective, seeking relief via habeas corpus (rather than a civil-rights action) is more consistent with the Supreme Court’s guidance on the proper remedial channels.²⁷⁸

One may counter that because the prisoner will likely have to concede that he can constitutionally be confined *somewhere*—for example, a prison that is not sinking into the ground and rapidly filling with water—he is seeking neither immediate release from all custody nor the shortening of his sentence. From this perspective, the prisoner is really just quarreling with the conditions of his confinement—a question that some courts doubt can be considered in habeas at all.²⁷⁹ Such claims have been characterized by some as “Section 1983 conditions-of-confinement

457 F. Supp. 3d 1287 (S.D. Fla. Apr. 29, 2020) (No. 1:20-cv-21457), D.E. 100 (noting that *Gomez* “left open the question of whether habeas would be available in a context where there was no constitutional manner of continued confinement” and observing that other courts have suggested that this is an appropriate reading).

274. 18 U.S.C. § 3626(a)(1)(A).

275. See *supra* Section I.B.

276. 18 U.S.C. § 3626(g)(2).

277. See *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973); cf. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017) (noting that “[a] successful habeas petition would have required [federal] officials to place [a putative class of hundreds] in less-restrictive conditions immediately” without suggesting any of kind of PLRA problem).

278. See *Preiser*, 411 U.S. at 490 (“Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.”).

279. *E.g.*, *Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021).

litigation in disguise,”²⁸⁰ and there is a circuit split over whether habeas relief is available to prisoners who raise such conditions-related claims.²⁸¹ This counterargument sets up a Scylla and Charybdis: go the civil-rights route and face the PLRA; go the habeas route and get told that you’re not really challenging your confinement and that you’re not allowed to raise these kinds of arguments in habeas in the first place.

The natural reply to at least the first problem—the assertion that the prisoner is not really challenging his confinement, but rather quibbling over conditions—is that the habeas claims prisoners brought during the pandemic were different from classic conditions-of-confinement cases in a crucial way: they could be remedied only with the standard habeas remedy of release from present confinement, whereas classic conditions claims can be resolved with realistic intramural reforms.²⁸²

This answer to the counterargument was essentially the theory that the Sixth Circuit adopted in *Wilson*—the subsidiary victory that the prisoners won there. The majority observed that while the BOP had sought to cast the case as a classic conditions-of-confinement challenge, the prisoners were not “arguing that there are particular procedures or safeguards that the BOP should put in place to prevent the spread of COVID-19 throughout Elkton.”²⁸³ Instead, they were claiming “that there were no conditions of confinement sufficient to prevent irreparable constitutional injury at Elkton.”²⁸⁴ In other words, they sought “release,” and circuit precedent confirmed that “where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement.”²⁸⁵

Mathematically, this logic makes sense. Even if a prisoner’s right is to release from only one specific island in the carceral archipelago, that

280. Cf. Kovarsky, *supra* note 1, at 80.

281. See *Rice*, 985 F.3d at 1070 n.2 (acknowledging split with Sixth Circuit’s decision in *Wilson*); see also Garrett & Kovarsky, *supra* note 1, at 27 & n.171.

282. I use the word “realistic” because, in theory, prison officials can solve any problem with enough time, money, and technological advancement. But if the only way to solve the problem is to turn back time, invent a vaccine, or build a new prison, prisoners have a much better argument that those are not real-world “conditions” that prison officials can realistically fix. On the other hand, if the entire problem is remediable with more cleaning supplies, prison officials can presumably defeat habeas jurisdiction by noting the availability of cleaning supplies. (They might expose themselves to civil-rights liability if they failed to do so, but not to a habeas issue.)

283. *Wilson v. Williams*, 961 F.3d 829, 837 (6th Cir. 2020).

284. *Id.* at 838.

285. *Id.*; *accord id.* at 846 (Cole, C.J., concurring in part and dissenting in part); see also *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 433–34 (D. Conn. 2020) (“The Petitioners in this case are challenging the conditions of their confinement but they are also challenging the ‘fact . . . of confinement in prison.’ . . . In short, Petitioners contend that the fact of their confinement in prison itself amounts to an Eighth Amendment violation under these circumstances, and nothing short of an order ending their confinement at FCI Danbury will alleviate that violation.”).

constitutes a decrease (even if a small one) in the government’s overall power to confine him. Decreasing the number of facilities where a government may permissibly incarcerate a person from 100 to 99 is a “quantum change in the level of custody,”²⁸⁶ just as the phrases “you can hold him anywhere” and “you may be able to hold him elsewhere but you can’t hold him there” are not equivalent statements. In the COVID-19 cases, like the sinkhole scenario, the “condition” that violates the Eighth Amendment is the condition of being held in that particular prison, pure and simple. The only solution is release from that prison—a classic habeas remedy, in other words.

The focus on that specific remedy accounts at least for why these kinds of claims properly challenge the “fact or duration of confinement” for purposes of the PLRA.²⁸⁷ But what about circuits where it is blackletter law that conditions-of-confinement claims cannot be brought via habeas?²⁸⁸ An answer to this secondary question is that cases like the COVID-19 cases are not conditions-of-confinement cases “in disguise” at all. Rather, they also qualify as fact-or-duration challenges in an overlapping sense—the sense that the Supreme Court employed when it wrote in *Preiser* that “habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.”²⁸⁹ Specifically, COVID-19 habeas claims should be understood as falling under two established (if not universally accepted) classes of habeas claims, both of which arise under § 2241: (1) challenges to the execution or manner of a sentence or (2) challenges to a place of confinement.

With regard to the first class of habeas claims, many federal circuits recognize that § 2241 may be used to challenge “the execution or manner in which [a] sentence is served.”²⁹⁰ Some (relatively) noncontroversial challenges falling under this rubric include the computation of a prisoner’s sentence or good-time credits or the way that a prison system

286. *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (quoting *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)).

287. 18 U.S.C. § 3626(g)(2).

288. *See Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021); *McIntosh v. United States Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997); *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991); *cf. Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006).

289. *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

290. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001); *see Woodall v. Fed. Bur. of Prisons*, 432 F.3d 235, 241–42 (3d Cir. 2005); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (including conditions); *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000); *Hernandez v. Campbell*, 204 F.3d 861, 864–65 (9th Cir. 2000) (also allowing “conditions” claims); *cf. United States v. Mares*, 868 F.2d 151, 151 (5th Cir. 1989). *But cf. Richmond v. Scibana*, 387 F.3d 602, 605 (7th Cir. 2004) (“The difference between a claim of entitlement to be released, and an opportunity to be considered for release, also affects the choice between § 2241 and a mundane civil action.”).

runs the parole or disciplinary process.²⁹¹ Because they implicate how long a person must be in prison, these examples suggest that execution-or-manner claims are largely a subset of fact-or-duration claims. That said, some courts have understood them to encompass claims that do not directly impact the fact or duration of a prison sentence as well.²⁹² Here, as previously discussed, COVID-19 claims would implicate the fact or duration of confinement.

As for the second category, prisoners in the COVID-19 (or sinkhole) context might also cast their claims as place-of-confinement suits. Such claims have a long vintage—in the 1890s, the Supreme Court addressed two such cases, the more commonly cited of which is *In re Bonner*.²⁹³ In that case, the petitioner, John Bonner, was imprisoned in a state penitentiary in Iowa.²⁹⁴ He had been convicted of violating a federal law that authorized as punishment no more than a \$1,000 fine and “one year” in prison.²⁹⁵ The problem was that separate federal laws provided for imprisonment in a state penitentiary only when the person was convicted of a federal crime and “sentenced to imprisonment for a period longer than one year” or “at hard labor.”²⁹⁶ “It follow[ed] that the court had no jurisdiction to” imprison Bonner in a state penitentiary “when the imprisonment [wa]s not ordered for a period longer than one year or at

291. *E.g.*, *Thompson*, 525 F.3d at 209; *Mares*, 868 F.2d at 151; *Terrell v. United States*, 564 F.3d 442, 446 (6th Cir. 2009) (parole procedures); *Denny v. Schultz*, 708 F.3d 140, 143 (3d Cir. 2013) (good-time credits); *see also Preiser*, 411 U.S. at 487–88 (challenge to good-time credits proper only under habeas, not § 1983).

292. *E.g.*, *Hernandez*, 204 F.3d at 864–65; *Thompson*, 525 F.3d at 209; *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013). The one area where these types of claims are likely be unavailable in habeas is when they seek to challenge a method of capital punishment (or “execution” in a different sense of the word). *See Glossip v. Gross*, 576 U.S. 863, 879 (2015) (stating that a previous case, *Hill v. McDonough*, “held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner’s conviction or death sentence”). *But see Hill v. McDonough*, 547 U.S. 573, 576 (2006) (“The question before us is whether Hill’s claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U.S.C. § 2254, or whether it *may* proceed as an action for relief under 42 U.S.C. § 1983.” (emphasis added)); *id.* at 579; *Nelson v. Campbell*, 541 U.S. 637, 639–640, 643–646 (2004). While some courts have taken this logic to foreclose even method-of-execution suits via habeas that would render the prisoner’s death sentence unconstitutional, *see In re Campbell*, 874 F.3d 454, 465–66 (6th Cir. 2017), there is no reason that this rule should apply outside of the capital-punishment context, given that the motivating rationale was the *Glossip* Court’s death-penalty specific concern “that a state could be left without any lawful means of execution,” *id.* at 462; *see also Glossip*, 576 U.S. at 880–81. Prisoners bringing § 2241 claims in light of COVID-19 are not similarly situated, as there is no likelihood that that their claims could render incarceration *de facto* unconstitutional. For these kinds of claims, cases like *Hill* and *McDonough* still suggest at least the alternate availability of habeas, given that prisoners are challenging their confinement itself, not “merely” its conditions. *See Nelson*, 541 U.S. at 643; *see also id.* at 644–46; *Hill*, 547 U.S. at 580–81; *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020); *Adams v. Bradshaw*, 644 F.3d 481, 482–83 (6th Cir. 2011).

293. 151 U.S. 242 (1894). The other, which *Bonner* discussed, is *In re Mills*, 135 U.S. 263 (1890).

294. *Bonner*, 151 U.S. at 254.

295. *Id.*

296. *Id.*

hard labor.”²⁹⁷ Wherever Bonner could properly be imprisoned, he could not be imprisoned in “one of these institutions.”²⁹⁸

Though the Government conceded that Bonner “should not have been sentenced to imprisonment in the penitentiary,” it argued that “the judgment and sentence [we]re not for that cause void so as to entitle the petitioner to a writ of habeas corpus for his discharge.”²⁹⁹ The Court disagreed. It observed that, according to the Government’s argument, “[i]t would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guardhouse of a fort, or the hulks of a prison-ship, or in any other place not specified in the law.”³⁰⁰ Habeas was therefore proper.³⁰¹

For the potential COVID-19 plaintiff, *Bonner* suggests that even when a person may be permissibly imprisoned under a valid conviction for the full duration of their sentence, they may nevertheless bring a claim via habeas to remove them from imprisonment in a particular place where they may not permissibly serve that sentence.³⁰² The challenge of *Bonner*, meanwhile, is its reliance on the sentencing court’s jurisdiction, as opposed to the constitutional validity of the current confinement.³⁰³ Clearly, a judge who sentenced a plaintiff to incarceration at a place that experienced a runaway COVID-19 outbreak months or years later was not acting without jurisdiction because of that subsequent development.

Nevertheless, federal appellate courts have indicated that *Bonner*’s rationale supports § 2241 jurisdiction in at least some related contexts.³⁰⁴ The Sixth Circuit itself did so in a 1991 case,³⁰⁵ though in *Wilson* the majority stated (in what is technically dicta) that this earlier holding would not extend to permit a court exercising § 2241 jurisdiction to require that a prisoner be transferred to another facility.³⁰⁶ This may

297. *Id.* at 254–55.

298. *Id.* at 255.

299. *Id.* at 256.

300. *Id.*

301. *See id.* at 256, 262.

302. *See id.*

303. *See, e.g., id.* at 256, 259.

304. *See, e.g.,* *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000) (“Montez attacks the execution of his sentence as it affects the fact or duration of his confinement in Colorado. Such an attack, focusing on where his sentence will be served, seems to fit better under the rubric of § 2241.”); *Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009) (“The detainees’ claims are not in the nature of an action barred by § 2241(e)(2) because, based upon longstanding precedents, it is clear they allege a proper claim for habeas relief, specifically an order barring their transfer to or from a place of incarceration.”).

305. *See United States v. Jalili*, 925 F.2d 889, 893 (6th Cir. 1991).

306. *Wilson*, 961 F.3d at 839, 839 n.3. There, the court sought to cabin a prior case, *Jalili*, in which it had previously ruled that a district court had erred in addressing a place-of-confinement challenge under 28 U.S.C. § 2255, holding that “[b]ecause defendant Jalili is challenging the manner in which the sentence was being executed, rather than the validity of the sentence itself, Section 2255 does not apply.” 925 F.2d at 893. The *Wilson* panel noted that “Jalili was not simply requesting transfer to another BOP facility,”

ultimately be a distinction without a meaningful difference: just because a district court cannot order prisoners transferred to another facility does not mean that, if it orders prisoners released because of unconstitutional conditions at their current facility, the prison cannot moot out the case (at least as applied to some of them) by transferring them to other, constitutionally adequate facilities.

In any event, whether cast as execution-or-manner claims or place-of-confinement claims, § 2241 offers specific, well-established analogies to show that a COVID-19 habeas claim challenges the fact or duration of a prisoner's confinement in a particular place. Such a claim does so not only for purposes of avoiding the PLRA, but also for purposes of invoking habeas jurisdiction regardless of whether "conditions" are part of the argument. Consequently, prisoners seeking to avoid the PLRA and invoke habeas jurisdiction may wish to make two overlapping arguments (not currently accepted in all jurisdictions) about why they are challenging the fact or length of their incarceration. Not all jurisdictions currently accept both justifications. But while the government may have the legal authority to imprison the person for a certain period of time *somewhere*, the argument goes, habeas properly comes into play—and the PLRA properly does not—because it does not have the legal authority to imprison that person where it is currently doing so.

B. The Scope of the Eighth Amendment Right

Habeas claims based on the Eighth Amendment also run headlong into the doctrinal hurdles raised by the limited scope of the Cruel and Unusual Punishments Clause.³⁰⁷ As previously explained, because prisoners must challenge the constitutional validity of their confinement itself to fit under habeas and avoid the PLRA, the asserted Eighth Amendment violations must go to the heart of the confinement and not be remediable by any realistic intramural mitigation.³⁰⁸ In other words, the violation must be

but rather "was arguing that he should not be placed in a higher-security facility contrary to the district court's explicit direction that he serve his sentence at a community treatment center." *Wilson*, 961 F.3d at 839 n.3. "This," the *Wilson* court stated, "was properly a challenge to the execution of the district court's sentence and not an invitation for any petitioners seeking transfer to another facility to bring a claim under § 2241." *Id.*

307. In the context of pretrial detainees, whose claims are governed by the Fourteenth rather than the Eighth Amendment, there is an open question (and circuit split) as to whether the same test applies. *See, e.g., Cameron v. Bouchard*, 815 F. App'x 978, 984 (6th Cir. 2020) (collecting cases). Most courts have dodged this question by assuming that the answer is the same regardless of which test they apply and then proceeding to focus on the Eighth Amendment analysis. *E.g., id.* at 984–88; *see supra* note 183. This Article (and, specifically, this Section) focuses on the Eighth Amendment framework accordingly, though it is not clear that this analysis formally applies to people who are incarcerated but have not been convicted.

308. Again, I use the word "realistic" because it is no meaningful answer to say that officials can

intrinsic to the confinement itself at the relevant point in time. COVID outbreaks in prisons illustrate how this can be true: at least in some settings—whether because the nature of a particular facility or because a particular outbreak has gained enough of a foothold—there is no fixing things within the prison walls.

The crux of any Eighth Amendment claim in this context is the allegation that prison authorities have engaged in “deliberate indifference to serious medical needs of prisoners,” which qualifies as a violation of the Eighth Amendment’s proscription against cruel and unusual punishment.³⁰⁹ For there to be a violation, the prisoner need not be actually harmed: authorities may not consciously disregard that someone is imprisoned “under conditions posing a substantial risk of serious harm.”³¹⁰ Such risks include exposure to infectious disease.³¹¹

Eighth Amendment deliberate-indifference claims must satisfy both parts of a two-pronged test: an objective prong and a subjective prong.³¹² First, the plaintiff “must show that he is incarcerated under conditions posing a substantial risk of serious harm.”³¹³ Second, he must show that “the official [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”³¹⁴

What a prison official actually knew, the Supreme Court has explained, “is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence” such as “the very fact that the risk was obvious.”³¹⁵ Willful blindness, accordingly, is not an escape

rectify the conditions internally by doing something unrealistic, such as inventing a vaccine or going back in time to stop COVID-19 from spreading. *See supra* note 282.

309. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *see also* *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — *e.g.*, food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”).

310. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

311. *See* *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Hutto v. Finney*, 437 U.S. 678, 682 (1978); *see also* *Farmer*, 511 U.S. at 832 (noting that while the Constitution “does not mandate comfortable prisons,” it does not “permit inhumane ones,” and thus requires prison officials to “ensure that inmates receive adequate food, clothing, shelter, and medical care” and that their safety is adequately protected (citation omitted)).

312. *E.g.*, *Farmer*, 511 U.S. at 834.

313. *Id.*

314. *Id.* at 837; *see also id.* at 840 (requiring “consciousness of a risk”).

315. *Id.* at 842 (citation omitted).

hatch.³¹⁶ For that reason, litigation itself can put a prison official on notice—but “to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.”³¹⁷

It is hard, in the context of COVID-19, to argue that the objective prong of the test is not satisfied, though that has not stopped some prison authorities from trying.³¹⁸ Courts have almost uniformly rejected these arguments.³¹⁹ The subjective prong is where the tension lies.

Often, in deliberate-indifference cases, the problem with establishing subjective indifference hinges on the need to show “knowledge of a substantial risk of serious harm.”³²⁰ That is because the doctrine “is focused on the individual intent of prison officials.”³²¹ For example, asking whether the prison doctor unconstitutionally denied someone a pain-relieving treatment would mean asking whether she knew that the patient was indeed in pain and that other treatments were not working or would not work. In the COVID-19 scenario, by contrast, the risk was systemic and obvious, and the alleged indifference was “institutional.”³²² The question was whether the institutions did enough to keep the incarcerated people safe against a significant risk that they were plainly aware of.

Litigants have met with very limited success on this question. Where they have made tentative progress in the trial courts, meanwhile, those gains have been reversed by appellate courts. Essentially, the courts have treated some official-sounding “plan”—any plan—as satisfactory, even where there are indications that the response is insufficient or that the institution has not in fact followed its own protocols.

The Elkton case is illustrative: the Sixth Circuit majority credited the BOP’s “six-phase action plan to reduce the risk of COVID-19 spread at

316. *See id.* at 843 n.8 (giving example of prison official who “knows that some diseases are communicable and that a single need is being used to administer flu shots” yet “refuses to listen to a subordinate who he strongly suspects” will discuss the danger).

317. *Id.* at 846; *see id.* n.9 (noting that “prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware” cannot “claim to be subjectively blameless” and that courts “may take such developments into account”).

318. *See, e.g.,* *Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020); *see also* *Garrett & Kovarsky*, *supra* note 1, at 46–47.

319. *E.g.,* *Wilson v. Williams*, 961 F.3d at 840; *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 507 (D.N.J. 2020); *see also* *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (per curiam).

320. *Farmer*, 511 U.S. at 842.

321. *Godfrey*, *supra* note 4, at 155.

322. *Cf. id.* at 154 (noting that “[f]ederal courts have provided little direction in how a prisoner can demonstrate the deliberate indifference of an institution, that is, the deliberate indifference of the prison system that confines him”), *id.* at 186–94 (offering potential sources of proof “to establish institutional knowledge”).

Elkton,”³²³ while the dissenting judge observed that this “phrase sound[ed] good on paper” but that “look[ing] behind the curtain” showed the “plan” was “far less impressive than its title suggests.”³²⁴ Few institutions, meanwhile, have been reckless enough not to have a plan in place, and in fact most seem to have taken at least some steps.³²⁵

Part of the problem, as other scholars have noted, is that subjective indifference has always been a high hurdle, and many federal appellate courts have raised it even higher since the Supreme Court laid out the standard in *Farmer* in 1994.³²⁶ There are good arguments that these approaches are inconsistent with *Farmer*,³²⁷ but these arguments have not gained traction, least of all in the COVID-19 cases. While you might think that prison officials who persist in an approach that they know is doomed to fail are consciously disregarding a serious risk to prisoner wellbeing, the response from appellate courts has been closer to how most professors treat pass/fail classes: so long as you turn in something legible, you pass.³²⁸

To give prison officials fair credit, there is only so much that they could have been expected to do intramurally. COVID-19 is a dangerous and highly communicable disease; it thrives in congregate, indoor environments like nursing homes and especially lower-security prisons, where social distancing is effectively impossible.³²⁹ For that reason, one

323. *Wilson*, 961 F.3d at 841; *see also* *Valentine v. Collier*, 978 F.3d 154, 163–64 (5th Cir. 2020); *Swain v. Junior*, 961 F.3d 1276, 1286–87 (11th Cir. 2020); *Cameron v. Bouchard*, 815 F. App’x 978, 988 (6th Cir. 2020); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1131–32 (N.D. Ill. 2020).

324. *Wilson*, 961 F.3d at 848 (Cole, C.J., dissenting); *see also Cameron*, 815 F. App’x at 991–92 (Cole, C.J., dissenting) (noting indications that prison was simply putting on a show for a court-ordered inspection and meanwhile taking other steps that ran directly contrary to best practices, such as transferring prisoners who raised concerns about prison hygiene or their own symptoms to less hygienic environments).

325. *See, e.g., Dolovich, supra* note 1, at 11 (“For their part, corrections administrators around the country began implementing measures to address the threat. Family visits were canceled, programs were suspended, and lockdowns were instituted for all residents not performing essential labor. A flurry of additional policies were also adopted, including those establishing enhanced cleaning protocols; providing for the distribution of masks, gloves, and cleaning supplies; requiring isolation of the infected; limiting movement and transfers between facilities; and ordering residents to socially distance as much as possible.”).

326. Kovarsky, *supra* note 1, at 71, 79–80, 82.

327. *E.g., id.* at 80 n.50. *Farmer* has also shown itself susceptible to critique, *e.g., Dolovich, supra* note 4, at 895–907, but given this Article’s goals, I take it as a given.

328. *See, e.g., Money*, 453 F. Supp. 3d at 1135 (“The record simply does not support any suggestion that Defendants have turned the kind of blind eye and deaf ear to a known problem that would indicate ‘total unconcern’ for the inmates’ welfare.” (citation omitted)).

329. *See, e.g., Philip D. Sloane, Cruise Ships, Nursing Homes, and Prisons as COVID-19 Epicenters: A “Wicked Problem” With Breakthrough Solutions?*, 21 J. AM. MED. DIR. ASSOC. 958 (2020); Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html>; Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, If Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

can see why officials' multistep plans were destined to be insufficient. But that is the crux of the paradigmatic prisoner's Eighth Amendment COVID-19 habeas claim: the Eighth Amendment requires reasonably *responsive* action, and the only reasonably *responsive* action is release from an environment in which social distancing is impossible. Just as a prison doctor who continued treating a prisoner with a medication known to be ineffective to treat the prisoner's disease would be deliberately indifferent, so too would a warden who continued implementing a multistep "plan" known to be ineffective.³³⁰ This was the upshot of the rulings in the FCI Danbury and FCI Lompoc litigation: where even the Attorney General had recognized that releasing prisoners to home confinement was necessary to stanch the outbreak, not doing so (or doing so in the most recalcitrant way possible) was deliberately indifferent.³³¹ It was like telling a prisoner whose diagnosis required chemotherapy that you had a multiphase plan to ensure he received lots of antibiotics and vitamins. It wasn't *nothing*; it just wasn't the thing that you knew was necessary, either.

Swain v. Junior—the Miami-Dade jail case—illustrates this tension well.³³² On the one hand, the majority that vacated the preliminary injunction could reasonably point to the fact that the jail officials really had taken some decent steps—far more, in fact, than many of their colleagues elsewhere.³³³ They had purchased advanced diagnostic and air-purifying tools, had tested fairly rigorously, and had released nearly 900 detainees, with more evidently to come.³³⁴ That does not mean that the detainees and the dissent were incorrect, however, in observing that these efforts alone were insufficient to reduce the risk: social distancing was still impossible.³³⁵ What COVID-19 made plain was that being locked inside a government compound with a lot of other people can itself pose a substantial risk of harm, and leaving people locked inside there despite knowing that fact can and should give rise to a colorable Eighth Amendment claim.

COVID-19 presents, of course, a novel situation for prison officials, as it has for the world—and no prison to my knowledge has faced the

330. See, e.g., *Darrah v. Krisher*, 865 F.3d 361, 369 (6th Cir. 2017) ("continuing to treat him with Methotrexate after Darrah had been on the drug for several months without any noticeable improvement"); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) ("Intentional failure to provide service acknowledged to be necessary is the deliberate indifference proscribed by the Constitution.")

331. See, e.g., *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 442–46 (D. Conn. 2020); *Torres v. Milusnic*, 472 F. Supp. 3d 713, 740 (C.D. Cal. 2020); *Wilson v. Williams*, 455 F. Supp. 3d 467 (N.D. Ohio 2020), *vacated*, *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020).

332. See *supra* Section II.D.2.

333. See *Swain v. Junior*, 961 F.3d 1276, 1282 (11th Cir. 2020).

334. *Id.*

335. See *id.* at 1283 (acknowledging this argument); *id.* at 1296–97 (Martin, J., dissenting).

sinkhole hypothetical with which this Article began. But the basic scenario—the confinement itself causing the unconstitutional conditions—is not unprecedented. When hurricanes and flooding threaten a particular prison, for example, it is quite possible that continued confinement in that place would violate the Eighth Amendment in a way that no change to the intramural conditions could rectify.³³⁶ Likewise, when Valley Fever menaced prisoners in California, those prisoners too had colorable claims that their continued confinement violated the Eighth Amendment, though the Ninth Circuit ultimately ruled against them on qualified-immunity grounds without addressing the underlying Eighth Amendment question.³³⁷

Of course, as prison officials are quick to remind plaintiffs, “the Constitution does not mandate comfortable prisons.”³³⁸ And appellate courts, including the U.S. Supreme Court, have often treated it as a matter of structural fact—rather than a national (and remediable) disgrace—that “[j]ails are often crowded, unsanitary, and dangerous places.”³³⁹ But COVID-19 offered the first widespread example of a menace that both: (1) alarmed society at large enough to upend daily life; and (2) was demonstrably worsened by incarceration, in the sense that the most effective prophylaxis available (social distancing) was impossible under most conditions of confinement. This was particularly, and paradoxically, true in the dormitory-style prisons (like the geriatric Texas “Pack Unit” pictured below) where the lowest-security prisoners—the people easiest to release without inordinate risk to public safety—are incarcerated.³⁴⁰

336. Cf., e.g., Kalhan Rosenblatt, *Harvey Prompts 5 Texas Prisons to Evacuate Nearly 6,000 Inmates*, NBC NEWS (Aug. 29, 2017, 12:38 PM), <https://www.nbcnews.com/storyline/hurricane-harvey/harvey-prompts-5-texas-prisons-evacuate-nearly-6-000-inmates-n797086>.

337. See *Hines v. Youseff*, 914 F.3d 1218, 1229 (9th Cir. 2019). The *Hines* court based its ruling on the fact that (1) “a federal court supervised the officials’ actions,” and (2) the risks involved did not violate evolving standards of decency “given that millions of free individuals tolerate a heightened risk of Valley Fever by voluntarily living in California’s Central Valley and elsewhere.” *Id.* at 1231. Along the way, the court observed that, given that “the prisoners are confined together, it is especially important that Valley Fever is not contagious.” *Id.* at 1226. Unlike many of the COVID-19 cases discussed here, the prisoners sought money damages under § 1983 rather than release (or transfer) pursuant to a habeas statute. See *id.* at 1226. In *Plata v. Brown*, 427 F. Supp. 3d 1211 (N.D. Cal. 2013), the District Court granted prisoners’ request for an order excluding medically vulnerable prisoners from an area where they were at high risk of contracting Valley Fever. *Id.* at 1229–30. That court also noted the hypothetical of a prison “so dilapidated that no one could predict when the walls would crumble down.” *Id.* at 1223.

338. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

339. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 333 (2012).

340. E.g., *Wilson v. Williams*, 961 F.3d 829, 833, 840 (6th Cir. 2020) (noting Elkton’s status as a low-security, dormitory-style facility and the serious risks posed by dormitory-style housing).



Figure 3. The Texas “Pack Unit”³⁴¹

The federal prisons, and a great many state authorities, had the power to implement that prophylaxis by placing prisoners on home confinement, transferring them to safer facilities, or granting reprieves.³⁴² That their largely insufficient intramural efforts were deemed sufficient to satisfy the Eighth Amendment represents a swerve away from actually requiring liability where an “official acted or failed to act despite his knowledge of a substantial risk of serious harm,”³⁴³ such as “when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease.”³⁴⁴ I return to what may account for this swerve in Section III.F below.

341. *Valentine v. Collier*, 993 F.3d 270, 278 (5th Cir. 2021).

342. *See supra* Section I.C.

343. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

344. *Id.* at 843 n.8; *see also* Kovarsky, *supra* note 1, at 82; Garrett & Kovarsky, *supra* note 1, at 47–49.

C. Class-Wide Adjudication

Another flashpoint that arose in some COVID-19 habeas cases was the use of class-wide adjudication—a question that can arise in either a habeas case or a civil-rights case but is more complicated in the habeas posture.

The threshold issue with regard to habeas cases is that the Supreme Court “has never addressed whether habeas relief can be pursued in a class action” or a similar aggregate format.³⁴⁵ While that is true, many appellate courts have answered that question in the affirmative.³⁴⁶ Furthermore, the Federal Rules that govern Section 2254 and 2255 cases provide that the “Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.”³⁴⁷ Although most COVID-19 habeas claims arise under § 2241 rather than §§ 2254, 2255,³⁴⁸ the same logic holds for § 2241 claims, and authority to apply this same logic likely stems from 28 U.S.C. § 2243, which directs courts sitting in habeas to “summarily hear and determine the facts, and dispose of the matter as law and justice require.”³⁴⁹

Leaving that threshold question aside, in civil-rights cases and, to the extent that Rule 23 is at least applicable by analogy,³⁵⁰ in habeas cases as well, COVID-19-related claims pass at least some of Rule 23’s tests with flying colors. To start, the classes are inherently numerous³⁵¹—prisons usually house thousands of inmates, a significant fraction of whom are older and sicker than the general public.³⁵² Furthermore, there are

345. *Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in part and concurring in the judgment) (citing *Schall v. Martin*, 467 U.S. 253, 256 n.10 (1984)).

346. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010); *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126-27 (2d Cir. 1974) (judiciary has power, without fully importing Rule 23, “to fashion for habeas actions appropriate modes of procedure[] by analogy”); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973); *Bijeol v. Benson*, 513 F.2d 965, 967 (7th Cir. 1975) (“[W]e conclude that while Rule 23, Fed. R. Civ. P., does not apply, a representative action may be maintained in the unusual circumstances of this case, limited to federal prisoners in custody in the district in which the district court sits . . .”).

347. U.S. Courts, *Rules Governing Section 2254 Cases in the United States District Courts and Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 12 (as amended to Dec. 1, 2019) https://www.uscourts.gov/sites/default/files/rules_governing_section_2254_and_2255_cases_in_the_u.s._district_courts_-_dec_1_2019.pdf.

348. *See supra* Section III.A.

349. 28 U.S.C. § 2243. *See also* Fed. R. Civ. P. 81 (“These rules apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions.”).

350. *See, e.g., Bijeol*, 513 F.2d at 967; *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 450 (D. Conn. 2020) (citing *Preiser*, 506 F.2d at 1125).

351. Fed. R. Civ. P. 23(a)(1).

352. *See* Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW TRUSTS

obvious “questions of law and fact common or fact common to the class.”³⁵³ The extent to which prisoners are at risk of catching COVID-19 and the degree to which prison officials have responded adequately to that risk involve “common contention[s]” that, when determined, “will resolve an issue that is central to the validity of each of one of the claims in one stroke.”³⁵⁴

Typicality and adequacy are arguably more difficult to satisfy. Typicality requires that each named petitioner raise claims that are “typical of the claims or defenses of the class.”³⁵⁵ In one sense, this will always be true: petitioners will, like all putative class members, be incarcerated within the same facility under relatively similar conditions, and in the case of a subclass, will be medically vulnerable, whether due to age or pre-existing medical conditions.³⁵⁶ Nevertheless, each prisoner’s suitability for a particular form of relief may vary. Some may be strong candidates for home confinement because of health vulnerabilities, relatively short sentences, solid institutional records, or strong re-entry plans, while others may be poor candidates because of good health, long sentences, significant blemishes in their institutional records, or limited re-entry prospects.

Adequacy—the requirement that named petitioners “fairly and adequately protect the interests of the class”³⁵⁷—follows a similar logic. On one hand, assuming satisfactory legal counsel is involved, the petitioners’ interests should be aligned: all seek relief from assertedly unconstitutional conditions of confinement via some “quantum change in the level of [their] custody.”³⁵⁸ On the other hand, some petitioners

(Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>; Tomoko Udo, *Chronic Medical Conditions in U.S. Adults with Incarceration History*, 38 HEALTH PSYCHOL. 217 (2019), <https://pubmed.ncbi.nlm.nih.gov/30762401/>; Li & Lewis, *supra* note 15.

353. Fed. R. Civ. P. 23(a)(2).

354. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see, e.g., Torres v. Milusnic*, 472 F. Supp. 3d 713, 744 (C.D. Cal. 2020) (“The Court finds all class members have been subjected to significant risk of exposure to COVID-19. Common facts include the process by Respondents in considering Lompoc inmates for home confinement and compassionate release are common to the entire putative class, and common questions exist as to whether Respondents’ failure to make prompt and meaningful use of home confinement and compassionate release in light of the pandemic, and disregard of inmates’ age and medical conditions in determining eligibility for home confinement and compassionate release violate the Eighth Amendment.”); *cf., e.g., Johnson v. Nextel Commc’ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015) (“Common issues—such as liability—may be certified, consistent with Rule 23, even where other issues—such as damages—do not lend themselves to classwide proof.”).

355. Fed. R. Civ. P. 23(a)(3).

356. *See, e.g., Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 452 (D. Conn. 2020) (finding typicality satisfied “because the process at issue is applicable to all inmates, ‘each member’s claim arises from the same course of events’—the establishment and operation of this process—and each class member makes similar legal arguments to prove the defendant’s liability” (citation omitted)).

357. Fed. R. Civ. P. 23(a)(4).

358. *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (quoting *Graham v.*

may have strong incentives to push for the maximal relief (release for everyone, understanding that only the most maximal relief will benefit them), while others may be willing to accept more limited relief (for example, because they are more likely to benefit from even minimal relief).

In addition to Rule 23(a)'s class-action prerequisites, there is potential debate regarding Rule 23(b)'s separate requirement that the putative class action fit into one of three (or four) types of class actions. Rule 23(b)(2) is perhaps the most obvious choice, given that "a common use of Rule 23(b)(2) is in prisoner actions brought to challenge various practices or rules in the prisons on the ground that they violate the constitution."³⁵⁹

To satisfy Rule 23(b)(2), petitioners must show that the relevant officials have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."³⁶⁰ In other words, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"³⁶¹ This test raises the same basic concerns for COVID-19 habeas petitioners that can arise with regard to typicality and adequacy: some individuals will be more suitable for a remedy like release than others.³⁶² The same issue can be said to apply to Rule 23(b)(1) and (b)(3).³⁶³

Broglin, 922 F.2d 379, 381 (7th Cir. 1991)).

359. WRIGHT & MILLER, 7AA FED. PRAC. & PROC. CIV. § 1776.1 (3d ed.); see also Braggs v. Dunn, 317 F.R.D. 634, 667 (M.D. Ala. 2016) ("Rule 23(b)(2) has been liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities.").

360. Fed. R. Civ. P. 23(b)(2).

361. *Dukes*, 564 U.S. at 360 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).

362. See, e.g., *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1128 (N.D. Ill. 2020) ("The imperative of individualized determinations, recognized by both sides in this case, makes this case inappropriate for class treatment."); *Sabata v. Nebraska Dep't of Corr. Servs.*, 337 F.R.D. 215, 270 (D. Neb. 2020) ("The Court believes that any potential differences in separate prosecutions resulting in different outcomes would be attributable to the wide factual variations in individual inmates' medical situations. Further, as in *Dukes*, the Court is concerned that many members of the proposed class and subclasses have no claim for the proposed injunctive relief.").

363. Rule 23(b)(1) applies when "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications . . . that would establish incompatible standards of conduct" for the defendants or "(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members . . . or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). Rule 23(b)(3) requires a court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Courts have observed that "Rule 23(b)(3) requires that common questions predominate, not that the action include only common questions." *Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010).

An answer to this counterargument is that all petitioners seek at least some common relief, likely in the form of a declaratory judgment that the prison officials have violated the Eighth Amendment as well as in the form of injunctive relief in setting up a process that leads to release for some and safer conditions for others.³⁶⁴ This situation will exist in a number of paradigmatic class-action situations, such as where prisoners with a common disease sue for access to a certain medical treatment.³⁶⁵ While they may not all end up qualifying for treatment, they are all claiming at least an entitlement under the Eighth Amendment to be considered for the treatment. The same logic holds in the COVID-19 context: even if some prisoners will not end up qualifying for release, they are all claiming that they have been deprived of the consideration for such release that is due under the Eighth Amendment. And they are likewise all claiming a corresponding constitutional entitlement to be considered for release on terms that comply with the Eighth Amendment.

D. Federalism, Comity, and Exhaustion

Lurking in the background of many of the COVID-19 cases (at least on appeal) has been the concern that federal district courts might unallowably “assume[] the role of ‘super-warden.’”³⁶⁶ These concerns perhaps ring out differently when the facility involved is a state rather than federal facility. In theory, they should not: the Eighth Amendment’s Cruel & Unusual Punishments clause applies equally to the States and to the Federal Government.³⁶⁷ Nevertheless, federalism and comity concerns have arisen when a state facility is under scrutiny.

364. See e.g., *Torres v. Milusnic*, 472 F. Supp. 3d 713, 746 (C.D. Cal. 2020) (“Here, Respondents’ failure to make prompt and reasonable use of home confinement and compassionate release in light of the pandemic which takes into account inmates’ age and medical conditions is applicable to each member of the class so that injunctive relief is appropriate as to the class as a whole. Accordingly, the Court finds Rule 23(b)(2) is satisfied.”); see also *Malam v. Adducci*, 475 F. Supp. 3d 721, 739 (E.D. Mich. 2020), *amended*, No. 20-10829, 2020 WL 4818894 (E.D. Mich. Aug. 19, 2020) (“[T]he class seeks both a determination of whether Defendants’ actions or failures to act in response to COVID-19 amount to violations of civil detainees’ constitutional rights in the aggregate and declaratory relief setting forth the minimum constitutional conditions of confinement. Such a declaration would be universally applicable; an injunction ordering Defendants to reduce the detainee population at the Calhoun County Correctional Facility, if necessary, would also apply to ‘all class members or . . . to none.’” (quoting *Brown v. Plata*, 563 U.S. 493, 502 (2011))).

365. E.g., *Postawko v. Missouri Dep’t of Corr.*, No. 2:16-CV-04219, 2017 WL 3185155, at *14, *aff’d*, 910 F.3d 1030 (8th Cir. 2018).

366. See *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020) (quoting *Pesci v. Budz*, 935 F.3d 1159, 1167 (11th Cir. 2019); *Prison Legal News v. Sec’y, Fla. Dep’t of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018)). Garrett and Kovarsky note the unfortunate echo in legal history that at least some COVID-19 forms of relief “placed [federal] judges in precisely the receivership roles that . . . historically made the Supreme Court uncomfortable,” yielding much of modern prison-conditions doctrine. See Garrett & Kovarsky, *supra* note 1, at 56; see also *id.* at 44 & n.272.

367. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

Sometimes, these concerns may motivate particularly strict enforcement of exhaustion requirements.³⁶⁸ In the late nineteenth century, this doctrine provided that “as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.”³⁶⁹ “Subsequent cases refined the principle that state remedies must be exhausted except in unusual circumstances,” with comity remaining the motivating influence.³⁷⁰ These same principles are reflected (albeit not to the exclusion of other motives) in AEDPA’s provisions for challenging the validity of state convictions and sentences³⁷¹ as well as the PLRA,³⁷² each of which make exceptions when a state-court remedy is not “available.”³⁷³ Remedies are not “available” when they “are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past.”³⁷⁴

There are ample reasons to conclude that state remedies would not be “available” for COVID-19 habeas claims, whether because of a mismatch between slow state processes and a rapidly spreading virus,³⁷⁵ or because state postconviction procedures do not allow for challenging the execution or manner of a sentence in the way that § 2241 does.³⁷⁶ For example, in the litigation over Michigan’s Oakland County Jail, the district court concluded that the Michigan law at issue did not “set forth a remedy for *inmates* to pursue” and thus, even if a few had “obtained relief through this mechanism,” it was not “part of the ‘standard review process’ and [was] not a remedy through which state courts ha[d] ‘provided relief . . . in the past.’”³⁷⁷

368. Garrett and Kovarsky come to a related conclusion, observing that exhaustion requirements arose as a common means for courts to dispatch cases without reaching more charged substantive and remedial questions. See Garrett & Kovarsky, *supra* note 1, at 28–29, 45–46, 52–53.

369. See *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (citing *Ex parte Royall*, 117 U.S. 241, 251 (1886)).

370. *Id.*

371. 28 U.S.C. § 2254(b)(1).

372. 42 U.S.C. § 1997e(a).

373. 28 U.S.C. § 2254(b)(1); 42 U.S.C. § 1997e(a); see also *O’Sullivan v. Boerckel*, 526 U.S. 838, 847–48 (1999) (AEDPA); *Ross v. Blake*, 578 U.S. 632, 643 (2016) (PLRA).

374. *O’Sullivan*, 526 U.S. at 844.

375. See *Valentine v. Collier*, 141 S. Ct. 57, 60 (2020) (Mem.) (Sotomayor, J., dissenting from denial of application to vacate stay) (“Given the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief. In just 116 days, nearly 500 inmates contracted COVID-19, leading to 74 hospitalizations and 19 deaths.”).

376. See also *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 437 (D. Conn. May 12, 2020) (finding “undue prejudice” exception applies in context of suit over federal facility, FCI Danbury).

377. *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 768 (E.D. Mich.), *vacated*, 815 F. App’x 978 (6th Cir. 2020); see also *Cameron v. Bouchard*, No. 20-1469, 2020 U.S. App. LEXIS 16741, at *5 (6th Cir. May 26, 2020). *But see Cameron*, 2020 U.S. App. LEXIS 16741, at *19–21 (Bush, J., dissenting from denial of stay).

Nevertheless, exhaustion requirements have at times proven a significant barrier. Staying the district court's permanent injunction in *Valentine* (the case involving the Texas "Pack Unit"), the Fifth Circuit concluded that "Plaintiffs' failure to exhaust their administrative remedies before filing suit [was] fatal," even though the district court had found that the prison's "grievance process was lengthy and unlikely to provide necessary COVID-19 relief" and that, "[b]y all accounts, the process was suboptimal."³⁷⁸ In *Swain* (the case involving the Miami-Dade jail), the Eleventh Circuit majority concluded that the district court had erred in issuing a preliminary injunction by "refusing to consider the defendants' arguments with respect to PLRA exhaustion."³⁷⁹ As the dissent noted, the majority arrived at this conclusion despite the fact that the prison officials' brief in opposition had "included a scant two paragraphs of argument on administrative exhaustion and no citations to the record" and instead tried to incorporate by reference a lengthy motion "filed on a different briefing schedule" to which the prisoners had not yet been able to respond—a procedural maneuver that the Eleventh Circuit itself would never have countenanced.³⁸⁰

Federalism and comity concerns arose in other doctrinal settings as well. In staying the district court's preliminary injunction in *Valentine*, for example, the Fifth Circuit panel majority chided the district court for mandating intensive intramural measures, stating that while these requirements "may be salutary health measures," their "level of micromanagement, enforced upon threat of contempt, does not reflect the principles of comity commanded by the PLRA."³⁸¹ In staying the preliminary injunction in *Swain*, the majority deemed it irreparable harm that the jail officials would "lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic."³⁸²

In denying a preliminary injunction in *Money*, the Illinois prison-system case, Judge Dow was even more direct while weighing the public-interest factor in the analysis. He wrote that "[t]he public interest also

378. *Valentine v. Collier*, 978 F.3d 154, 162 (5th Cir. 2020). *But see Valentine*, 141 S.Ct. at 60 (Sotomayor, J., dissenting from denial of application to vacate stay) (noting the absurdity of asking prisoners facing COVID-19 risk to exhaust a "160-day grievance process" that "offered no realistic prospect of relief" and pointing out that at least one prisoner, Alvin Norris, had "died before the prison took any steps in response to his grievance").

379. *Swain v. Junior*, 961 F.3d 1276, 1292 (11th Cir. 2020).

380. *Id.* at 1302 (Martin, J., dissenting).

381. *Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020); *see also Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020) (per curiam) (finding irreparable harm to jail officials because, "[a]bsent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic").

382. *Swain*, 958 F.3d at 1090.

commands respect for federalism and comity, which means that courts must approach the entire enterprise of federal judicial intrusion into the core activities of the state cautiously and with humility.”³⁸³ He noted that the prisoners sought “a process that could result in the release of at least 12,000 inmates,” or “almost one-third of the prison population in Illinois.”³⁸⁴

The other side of this observation, of course, was that approximately 12,000 prisoners had “serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19” and were eligible for medical furlough under Illinois law.³⁸⁵ But in the *Money* analysis, the scope of the danger became, at least in part, a weakness rather than a strength for the prisoners’ case.

E. Preliminary vs. Final Relief

A final doctrinal tension in the COVID-19 habeas cases has concerned the nature of the remedy—specifically, whether a district court is being asked to grant (1) a preliminary release while a meritorious habeas case proceeds, or (2) release as an ultimate remedy, vindicating a meritorious habeas claim.³⁸⁶ At the heart of this tension is one of the most noteworthy pieces of non-judicial writing in this set of cases: a declaration by Professor Judith Resnik, discussing the federal courts’ somewhat-forgotten “enlargement” power.³⁸⁷

The Resnik declaration spans fourteen pages. At its core is a discussion of “the availability of provisional remedies,”³⁸⁸ and, specifically, “an aspect of federal judicial power that is less well-known” called “enlargement.”³⁸⁹ The declaration explains enlargement as a term unique to the habeas context (though comparable in many ways to “bail”) that

383. *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1133 (N.D. Ill. 2020).

384. *Id.* at 1134; *see also id.* at 1128–29 (“Plaintiffs’ motion also raises serious concerns under core principles of federalism and the separation of powers, especially given their request for sweeping relief in the form of a mandatory injunction. . . . It is no accident that the federal judiciary only rarely intrudes into the management of state prisons, and only once in history has actually ordered the release of prisoners on a scale anywhere near what Plaintiffs hope to accomplish through this litigation.”).

385. *Id.* at 1115–16.

386. This question is distinct from whether the litigation itself is at the preliminary or final relief stage — a judge can still grant, via a preliminary injunction, the same form of ultimate relief that will become the permanent injunction. *See, e.g., De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945). Separately, as Garrett and Kovarsky note, “much of the early decisional law developed in preliminary procedural postures,” for example in litigation over preliminary injunctions or TROs. *See Garrett & Kovarsky, supra* note 1, at 25.

387. Declaration of Prof. Judith Resnik at 8, *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020) (No. 1:20-cv-02094), ECF No. 24-3 [hereinafter “Resnik Decl.”].

388. *Id.* at 7.

389. *Id.* at 8.

denotes “a provisional remedy that modifies custody by expanding the site in which it takes place.”³⁹⁰ “In some ways,” the declaration continues, “enlargement resembles a prison furlough,” albeit one that “stems from courts’ inherent powers.”³⁹¹ It “provides an opportunity for increasing the safety of prisoners, staff, and their communities while judges consider a myriad of complex legal questions.”³⁹²

This form of relief is not the same as “a release order,” given that the prisoner “remains in custody[,] even as the place of custody is changed and thus ‘enlarged’ from a particular prison to a hospital, halfway house, a person’s home, or other setting.”³⁹³ That distinction should—much as its status as a habeas remedy should—exempt it from the PLRA’s strictures.³⁹⁴

The declaration collects cases from nine federal circuits recognizing this power, along with three others that at least arguably do so.³⁹⁵ Few of these precedents come from the past thirty years; however, some of the more recent cases cabin rather than expand this power. For example, in 1955, in *Johnston v. Marsh*,³⁹⁶ the Third Circuit dealt with a habeas petition from an advanced diabetic hoping to “be admitted to bail pending decision on the merits” because he was quickly going blind.³⁹⁷ The district court granted an enlargement and the Third Circuit affirmed, concluding that the trial court’s jurisdiction over the petition itself gave it the power to act.³⁹⁸ Nearly four decades later, the same appellate court reaffirmed this power, but emphasized that it was “limited” and appropriate only in “extraordinary circumstances.”³⁹⁹

At least a few district courts facing COVID-19 habeas litigation rediscovered this power, though it has at times been ambiguous whether they exercised it toward provisional ends, final ends, or both. In the Elkton litigation, Judge Gwin’s (later-vacated) order granted “a

390. *Id.*

391. *Id.*; see also *id.* at 5, 9 (noting federal courts’ authority to manage habeas cases “as law and justice requires” (quoting 28 U.S.C. § 2243)).

392. Resnick Decl., *supra* note 389, at 8.

393. See, e.g., *id.*

394. See 18 U.S.C. § 3626(a)(3)(A), (g)(2); Resnik Decl. at 8.

395. See *id.* at 10 (primarily citing *Woodcock v. Donnelly*, 470 F.2d 93, 43 (1st Cir. 1972); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992); *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986); *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981); and *Baker v. Sard*, 420 F.2d 1342, 1342-44 (D.C. Cir. 1969), and also citing *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990); *United States v. Perkins*, 53 F. App’x 667, 669 (4th Cir. 2002); and *Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989)).

396. 227 F.2d 528 (3d Cir. 1955).

397. *Id.* at 529.

398. See *id.* at 530–31.

399. *Landano*, 970 F.2d at 1239.

preliminary injunction, in aid of its authority to grant enlargements, ordering Respondents to determine the appropriate means of transferring medically vulnerable subclass members out of Elkton.”⁴⁰⁰ In the Danbury litigation, Judge Shea, responding to counsel’s characterization, treated enlargement as “a process by which inmates would be evaluated promptly for transfer to home confinement, with the urgency reflected in the Attorney General’s April 3 memo.”⁴⁰¹ In the Oakland County Jail litigation, Judge Parker did not explicitly mention enlargement, but instead referred to “bail” and “release on bond” for medically vulnerable inmates.⁴⁰²

To some degree, the two kinds of relief converge on each other, ouroboros-like, in the COVID-19 habeas posture: the paradigmatic petitioner seeks to have his custody enlarged while his meritorious habeas claim proceeds, but his habeas claim is meritorious because he has an Eighth Amendment right to have his custody enlarged. This oddity should not create significant difficulties for petitioners—if such relief is permissible as a provisional remedy, which it undeniably is, then it follows that it must also be permissible as a final remedy.⁴⁰³ Nevertheless, it may cause some doctrinal confusion, and appellate courts may wish to define the nature of this relief more clearly for future petitioners. It would make sense to clarify that enlargement itself, as the Resnik declaration suggests, is a provisional remedy that—in unique and fast-moving contexts like the COVID-19 pandemic—can support the equivalent final remedy of (at least temporary) release.

F. Rights and Remedies

Though never addressed doctrinally, an additional tension that haunts the COVID-19 cases is the long-running war between rights and remedies: a series of battles that almost necessarily operate beneath the surface.⁴⁰⁴ In theory, of course, constitutional law requires judges “to be

400. *Wilson v. Williams*, 455 F. Supp. 3d 467, 474 (N.D. Ohio 2020), *vacated*, *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020).

401. *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 416 n. 1 (D. Conn. 2020); *see also id.* at 416, 430–31 (discussing enlargement more as a final remedy than a provisional one).

402. Order at 6–7, *Cameron*, No. 2:20-cv-10949 (E.D. Mich. May 21, 2020), D.E. 94, *vacated*, *Cameron v. Bouchard*, 815 F. App’x 978 (6th Cir. 2020).

403. *Cf. De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945) (“A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.”).

404. For some of the most prominent entries in this literature, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); and Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). *See also, e.g.,* Owen Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV.

detached from the political arena and to follow processes conducive to reflection and reason.”⁴⁰⁵ This ideal of the judicial role reflects “the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.”⁴⁰⁶ But this aspiration “is always tempered by the reality it serves. . . . [C]ourts read the text illuminated by the world outside judicial chambers.”⁴⁰⁷ If they do not, they will fail to “generate assent to the norms that they affirm, or else life will corrode their interpretations.”⁴⁰⁸

For that reason, rights and remedies are perpetually locked in combat: “The prospect of actualizing rights through a remedy—the recognition that rights are not actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.”⁴⁰⁹ Professor Paul Gewirtz chronicled this struggle in the school-desegregation cases,⁴¹⁰ and Professor Darryl Levinson has done the same for an array of contexts, including prison litigation.⁴¹¹ In the prison-conditions context, Levinson notes the trajectory of courts (especially the Supreme Court) responding to “expansive district court structural reform” in earlier decades by “curtail[ing] the scope of the right,” limiting the scope of the Eighth Amendment such that it is violated in only the most extreme cases.⁴¹²

These challenges become acute in any hot-button context, and the crime-and-punishment context is no exception. The Fourth Amendment

1 (1979); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 481–84 (2004); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 33 (2018); Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1414–21 (1988); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991). Technically, this rights–remedies dyad is an overgeneralization, as scholars have at times focused on the interplay between justiciability and merits, between merits and remedies, or among all three. See Levinson, *supra* (merits and remedies); Gewirtz, *supra* (same); Pierce, *supra* (justiciability and merits); Fallon, *supra* (all three). I invoke it in the general sense closest to Fallon’s, to denote the way in which courts may “adjust or manipulate applicable law,” regardless of its “doctrinal category,” based in part on concerns about ultimate results. See Fallon, *supra*, at 637. Garrett and Kovarsky come to a similar conclusion in this context, observing that judges in COVID-19 cases “often avoided intrusive relief by changing the way crucial rights and remedies were defined and applied,” Garrett & Kovarsky, *supra* note 1, at 44, particularly in the context of habeas suits seeking release, *id.* at 45–46.

405. Gewirtz, *supra* note 404, at 677.

406. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970).

407. Gewirtz, *supra* note 404, at 677.

408. *Id.*

409. *Id.* at 679.

410. *Id.* at 609–28.

411. Levinson, *supra* note 404, at 874–99; see also Garrett & Kovarsky, *supra* note 1, at 44 (noting this same scholarly echo).

412. Levinson, *supra* note 404, at 881 (discussing *Wilson v. Seiter*, 501 U.S. 294, 297 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 338 (1981); and *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

offers a paradigmatic example: looming over every search-and-seizure case in the modern (post-*Mapp v. Ohio*⁴¹³) era is the possibility that “[t]he criminal is to go free because the constable has blundered.”⁴¹⁴ This possibility creates a risk of bias, much like knowledge of an injury risks biasing a jury in a negligence case.⁴¹⁵ The special problem, as Professor William Stuntz pointed out, is that “the ‘injury’ that triggers the suppression hearing makes the claimant inherently unsympathetic.”⁴¹⁶ “One of the prerequisites for the defendant’s fourth amendment claim—the existence of suppressible evidence of crime—tends to suggest that the defendant deserves punishment, not relief.”⁴¹⁷

The same problem emerges in the COVID-19 prison context. Scholars and society-members alike recognize that people confined to congregate environments—whether cruise ships, nursing homes, or prisons and jails—are at higher risk of infectious diseases like COVID-19.⁴¹⁸ But the advisability of taking cruises notwithstanding being trapped in only one of these three environments “makes the claimant inherently unsympathetic.”⁴¹⁹ A prerequisite for being subject to this inordinate risk—being locked in a prison or jail—“tends to suggest that the [petitioner] deserves punishment, not relief.”⁴²⁰

A key difference is that the Eighth Amendment prohibits gratuitous “inflictions of punishment”—the habeas petitioner has already had his punishment meted out, and it is not the warden’s province to add more.⁴²¹ Nevertheless, it does not take a sophisticated public-opinion analysis to recognize that prisoners are not the most popular litigants, and judges might have thought twice before allowing hundreds or even thousands of prisoners to return home as a result of having been incarcerated during a pandemic.⁴²² That courts manifested willingness to grant such relief at all

413. 367 U.S. 643 (1961).

414. See *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).

415. Stuntz, *supra* note 404, at 911–12.

416. *Id.* at 912.

417. *Id.* This problem helps explain, Stuntz argued, the Supreme Court’s emphasis on the ex ante warrant requirement. *Id.* at 915–37, 942.

418. See *supra* note 329.

419. See Stuntz, *supra* note 404, at 912.

420. See *id.*

421. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 841 (1994).

422. It is possible that some judges also considered the specter of future money damages, though to my knowledge the issue never came up in any of the litigation. After all, a ruling that officials had violated the Eighth Amendment could have future issue preclusive—and even nonmutually issue-preclusive—effects. See generally *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 148, 135 S. Ct. 1293, 1303 (2015); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327–33 (1979). A damages action along these lines would almost inevitably trigger questions about the scope of *Heck* bar, at least as sometimes phrased by the Supreme Court, given its practical effect on the “length of” a sentence. See *Nelson v. Campbell*, 541 U.S. 637, 646 (2004) (“[A] § 1983 suit for damages that would ‘necessarily imply’ the invalidity of the fact of an inmate’s conviction, or ‘necessarily imply’ the invalidity of the length of an

speaks both to the value of an independent judiciary, and to the vitality of constitutional norms that protect even the most marginalized.⁴²³

Nonetheless, the overall picture painted by the COVID-19 cases—which unfolded while prisoners contracted the illness at staggering rates, leading to numerous deaths⁴²⁴—is a grim one. As Dolovich notes, only two cases involving prisons or jails ended especially favorably, and even those yielded limited releases.⁴²⁵ The carceral facilities from which litigants had even tentative success, tended to be lower-security facilities,⁴²⁶ civil immigration detention facilities,⁴²⁷ prisons “for the elderly and the infirm,”⁴²⁸ or jails with pretrial detainees (that is, legally innocent petitioners).⁴²⁹ Notably, Garrett and Kovarsky suggest that perceived “safety risk” to society at large may “explain the relative litigation success enjoyed by ICE detainees and the relative failures experienced by those in custody because they were convicted of crimes.”⁴³⁰ Similar concerns may also account for courts’ relative greater willingness “to order individualized release in certain cases,” though this

inmate’s sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence.” (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997))). The language of *Heck* itself, however, suggests that there should be no bar, as these kinds of claims have nothing to do with the underlying criminal judgment. *See Heck*, 512 U.S. at 487 (“[I]f the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.” (footnotes omitted)).

423. *Cf.* RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* 105 (2019) (tracing mass incarceration “to the shift from leaving judgments to professionals to allowing the masses to set policies directly”). *But cf.* Rebecca Goldstein, Book Review, *The Politics of Decarceration*, 129 *YALE L.J.* 446, 448–49 (2019) (arguing that public opinion can by the same token advance reform and decarceration).

424. *See supra* note 12 and accompanying text.

425. *See supra* note 159 and accompanying text.

426. *See, e.g.*, *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 418 (D. Conn. 2020); *Torres v. Milusnic*, 472 F. Supp. 3d 713, 720 (C.D. Cal. 2020). Any correlation here may be a function of carceral architecture, given that such facilities tend to use dormitory-style housing that makes transmission of a disease like COVID-19 especially serious. *See supra* note 340 and accompanying text. It is also possible that it could have stemmed from decisions made by lawyers, who — perhaps figuring on an uphill climb to begin with — could have been unconsciously predisposed to more sympathetic plaintiffs. *Cf.* Marie-Amelie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 *WIS. L. REV.* 503, 559 (2018) (“Movement lawyers choose sympathetic plaintiffs, rather than representative ones, which can sow dissent.”); Daniel Meltzer, *Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 *COLUM. L. REV.* 247, 306 n. 340 (1988) (“Indeed, emphasis upon a traditional plaintiff can focus the court’s attention too sharply on his circumstances rather than on the more general need for relief, as public interest lawyers know when they seek sympathetic plaintiffs for test cases.”).

427. *E.g.*, *Malam v. Adducci*, 475 F. Supp. 3d 721, 728 (E.D. Mich. 2020).

428. *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020).

429. *Swain v. Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020).

430. Garrett & Kovarsky, *supra* note 1, at 59.

willingness was also quite sparing.⁴³¹

Nevertheless, even in the low-security context, the concern remained that courts might just “dump inmates out into the streets.”⁴³² Meanwhile, less sympathetic prisoners were without question also highly menaced by COVID-19, and the nature of their crimes did not go unnoticed. As Judge Dow observed in *Money*:

Plaintiffs seek a process that could result in the release of at least 12,000 inmates. That is almost one-third of the prison population in Illinois. All of them are incarcerated because a jury convicted them of committing crimes, including some of the most serious crimes against our community. Many of them are violent offenders. Compelling a process to potentially release thousands of inmates on an expedited basis could pose a serious threat to public safety and welfare. The risk of recidivism comes into play, as do concerns about victims’ rights. The question is not simply what is best for the inmates—the public has vital interests at stake, too.⁴³³

While none of the litigants had, in fact, asked for the prison gates to be swung open, the tenor of many COVID-19 cases still indicated “a fear of too much justice.”⁴³⁴ There was little epistemic question that the situations were perilous or that truly effective prophylaxis was impossible inside the prison walls; few doubted that a lot of men (and no small number of women) were being left inside to take their chances with death, under the kinds of circumstances that the rest of society was doing everything in its power to avoid.⁴³⁵ Nevertheless, calling that situation a violation of the Eighth Amendment would have triggered a daunting remedial obligation. Instead, the Eighth Amendment receded. Like notable prison cases that preceded them, the COVID-19 cases offered “further examples of remedies driving rights, rather than the other way around.”⁴³⁶

IV. PATHS FORWARD

The classic law review Article introduces a problem; details its roots,

431. *See id.* at 60.

432. *See, e.g.,* *Wilson v. Williams*, 455 F. Supp. 3d 467, 480 (N.D. Ohio 2020) (emphasizing that this was not what petitioners were seeking), *vacated*, *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020).

433. *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1134 (N.D. Ill. 2020); *see also id.* at 1111 (“The named Plaintiffs are ten individuals convicted of a range of felonies, including murder, aggravated kidnapping, and attempted robbery.”); *id.* at 1127 (“it is important to bear in mind that some portion of the incarcerated population has been convicted of the most serious crimes — murder, rape, domestic battery, and so on. Seven of the ten named Plaintiffs in fact are serving time for murder.”).

434. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

435. *Cf. Valentine v. Collier*, 978 F.3d 154, 165 (5th Cir. 2020) (admitting that “[a]s a matter of policy, TDCJ could have done more to protect vulnerable inmates in the Pack Unit” and that “TDCJ’s measures may have been unsuccessful” even if they “were not unconstitutional”).

436. *Levinson, supra* note 404, at 882.

seams, and contours; and then concludes with some fresh, crisp suggestions for a resolution. The COVID-19 cases do not fit well into the final act of that neat procession. There was, after all, authority to release prisoners to safer forms of custody—indeed, Attorney General Barr had encouraged its vigorous use.⁴³⁷ The courts, too, had power.⁴³⁸ Lawyers were available to bring claims. The danger was as well-documented and recognized as a problem could be: for the core period of these lawsuits, the COVID-19 pandemic was practically the only news around. And indeed, the first major story to interrupt the pandemic’s full-saturation of cultural consciousness centered on racial injustice in U.S. law enforcement⁴³⁹—hardly a diminishment of the poignancy of the COVID-19 petitioners’ and putative class members’ plight, given that a disproportionate number of them were people of color struggling within the downstream version of the same criminal-justice system.

Nevertheless, the overall results from the COVID-19 cases suggest that large segments of America’s carceral system failed this stress test.⁴⁴⁰ Despite positive, proactive efforts in some jurisdictions, a lot of prisoners—and a lot of legally innocent pretrial detainees—were left inside facilities where infection was likely and social distancing impossible. In a year in which Americans as a whole fared poorly with COVID-19, prisoners—people whose health and “general well-being” society has assumed additional “responsibility for” by holding them involuntarily behind bars⁴⁴¹—fared worse still.⁴⁴² And the principal deficiency does not appear to have been tools but rather will.

Still, significant improvements could be made to the tools available. The most straightforward improvement, which some state legislatures have been debating,⁴⁴³ would be to institute legislation at the state and federal levels that would empower judges to pause or revisit prison sentences on an individual or class-wide basis when a public-health emergency has been declared at a given facility. Effectively, such a statute would authorize judges to reduce a sentence, grant bail, and/or stay a sentence until the danger has abated. Such legislation would shore up the “enlargement” authority that federal judges, at least in most circuits,

437. See *supra* notes 44–45 and accompanying text.

438. See *supra* Sections I.C, III.A.

439. See generally Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905>.

440. See also Garrett & Kovarsky, *supra* note 1, at 3 (“Every outbreak at a detention center is a public health crisis; together, they represent a national catastrophe that forced courts to consider the health-protective rights of detainees during emergencies. The results are not encouraging.”).

441. See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

442. See *supra* note 12.

443. See generally Ghandnoosh, *supra* note 46.

possess once a meritorious habeas claim has been brought.⁴⁴⁴ Of course, judges themselves could simply acknowledge and act on this power—but explicit statutory authority (and implicit support from a coequal branch of government) would not hurt.

Legislative bodies could also help by making clear that exhaustion is not required—or that administrative remedies are not “available”—in the face of an emergency that urgently threatens the health of incarcerated people.⁴⁴⁵ In addition, as others have noted, they could update their states’ “good time” policies to foster another “simple, equitable way of getting lots of people out of prison safely, rather than continuing to incarcerate them in ever more dangerous and cruel conditions.”⁴⁴⁶

Transparency regarding the actual conditions of incarceration may help too, as Dolovich argues.⁴⁴⁷ Indeed, a video leaked out of Elkton by an unknown prisoner generated significant public attention to the plight of prisoners there, which in turn may have helped spur Ohio Governor Mike DeWine to authorize the Ohio National Guard to provide assistance.⁴⁴⁸ It is possible, as many have suggested, that if the public really knew how bleak things were inside some of these facilities—through mandatory reporting, public oversight bodies, or greater press access—they would immediately demand change.⁴⁴⁹

Certainly, such transparency cannot hurt. We at least ought to know what is actually being done on our behalf. Public officials lock away in government compounds not just the tiny fraction of people who have committed the most heinous offenses we can imagine but also the much larger number of people who have committed all sorts of lesser offenses. These people are locked away in crowded, chaotic, often unsanitary facilities, where social distancing is impossible, because of both institutional design and the sheer number of human beings packed into one space. Such confinement is harmful and unnecessary, and it includes a cruel irony in the pandemic context, which is that the contagion risks are often worst for the lowest-security prisoners—those who, like the prisoners at Elkton, are deemed to pose a low-enough risk that they are

444. See *supra* Sections III.A, III.E.

445. See *supra* Section III.D. Again, as with the enlargement authority, courts could simply recognize these exceptions in existing law.

446. See Emily Widra & Wanda Bertram, *More States Need to Use Their “Good Time” Systems to Get People out of Prison During COVID-19*, PRISON POL’Y INITIATIVE (Jan. 12, 2021), <https://www.prisonpolicy.org/blog/2021/01/12/good-time/>.

447. Dolovich, *supra* note 1, at 30–34.

448. See Ali Gostanian, *Video Shows Inmate Pleading for Help Inside Ohio Federal Prison*, NBC NEWS (Apr. 9, 2020, 3:12 PM), <https://www.nbcnews.com/health/health-news/live-blog/2020-04-08-coronavirus-news-n1178891/ncrd1179476#blogHeader>; see also Dolovich, *supra* note 1, at 10 n.17, 13.

449. Cf. *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring) (“Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”).

warehoused in open-bay dormitories rather than the locked cells that people often see on TV shows.⁴⁵⁰ Many of these prisoners are elderly and infirm,⁴⁵¹ having long aged-out of any propensity to commit crimes.⁴⁵² They remain locked away nonetheless.

While some who advocate on behalf of prisoners do so because they have been “inspired by the notion of a preferential option for the poor,”⁴⁵³ no one in the COVID-19 cases was asking for the prisoners to be more protected from COVID-19 than anyone else. The crux of the cases was that, while being imprisoned in this country is rarely healthful, the nature of incarceration within these facilities during a pandemic like COVID-19 raised the punishment to a level that could not comport with the Eighth Amendment. Prisoners sought relief from the federal courts to blunt a dramatic disparity: conditions making them substantially more likely to die than everyone else.⁴⁵⁴ The relief they sought would have benefited not just them and their families, but also prison staff, who also deserve to work under safe and humane conditions.⁴⁵⁵

Last, but certainly not least, prisoners and lawyers who advocate on their behalf can learn from what happened in 2020. Though the legal precedents that the COVID-19 cases generated are mostly dispiriting, there are possibilities for successful litigation efforts. The ability of prisoners, in at least some jurisdictions, to bring § 2241 habeas claims asserting that “no set of conditions would be constitutionally sufficient”⁴⁵⁶ will allow prisoners to overcome the PLRA’s often-formidable barrier to the courthouse doors. And while class-wide procedures would be efficient for such claims, they are not required: prisoners facing particularly extreme health risks at carceral facilities that are unable to protect them (and their attorneys) could bring these as individual claims as well.

We will likely face another pandemic before too long.⁴⁵⁷ I hope that

450. See *supra* note 340 and accompanying text.

451. See Li & Lewis, *supra* note 15.

452. See, e.g., Miller v. Alabama, 567 U.S. 460, 471–472 (2012); Carl Zimmer, *You’re An Adult. Your Brain, Not So Much.*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html>.

453. Cf. Paul Farmer & Nicole Gastineau, *Rethinking Health and Human Rights: Time for a Paradigm Shift*, 30 J.L. MED. & ETHICS 655, 662 (2002).

454. See *supra* note 12.

455. Cf. Shane Hoover, *Elkton Prison Union Chief Talks Coronavirus [E]ffect on Staff*, TIMESREPORTER.COM (Apr. 9, 2020, 5:32 AM), <https://www.timesreporter.com/news/20200409/elkton-prison-union-chief-talks-coronavirus-affect-on-staff> (quoting union president representing Elkton employees as saying that there was “anger from the staff here,” as well as “angst, anxiety because their story isn’t out there and they feel as if the Bureau of Prisons is doing nothing to help their first-line staff members”).

456. E.g., *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020).

457. E.g., Melissa Davey, *WHO Warns Covid-19 Pandemic Is ‘Not Necessarily the Big One,’* THE

2021]

WHEN THE CONDITIONS ARE THE CONFINEMENT

67

this Article will be helpful to incarcerated people and their advocates in the unhappy event that we do. More importantly, I hope that by then we will have changed our system of criminal adjudication and incarceration enough so that we will not again force the people who live and work in this country's carceral facilities to face so much unnecessary infection and death.

Guardian (Dec. 29, 2020, 1:19 AM), <https://www.theguardian.com/world/2020/dec/29/who-warns-covid-19-pandemic-is-not-necessarily-the-big-one>; Leslie Hook, *The Next Pandemic: Where Is It Coming From and How Do We Stop It?*, FINANCIAL TIMES (Oct. 29, 2020), <https://www.ft.com/content/2a80e4a2-7fb9-4e2c-9769-bc0d98382a5c>.