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THE HORROR CHAMBER: UNQUALIFIED IMPUNITY IN PRISON

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The federal courts have been open to prisoners' constitutional claims for half a century, but to this day, the availability of federal litigation has not stopped prisoners from being tortured, maimed, killed, or otherwise made to suffer chilling abuse. The failure of litigation as a deterrent is due in part to a confluence of legal and situational factors—doctrinal deference, statutory hurdles, and the many difficulties associated with litigating a civil rights case against one's jailers—that make prison-conditions cases virtually impossible to win. We call this combination of factors "practical immunity." Practical immunity amounts to a formidable barrier against successful prison-conditions cases. When practical immunity is combined with the well-known doctrine of qualified immunity, it makes the threat of a money judgment against prison defendants almost empty. The Supreme Court's failure to take stock of practical immunity may help to explain why the landscape is so skewed against prisoners, and why prison officials enjoy a legal regime so forgiving that it borders on de facto absolute immunity.

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INTRODUCTION

In October 2017, it came to light that guards at Spring Creek Correctional Center in Alaska forced male prisoners to strip naked, handcuffed them, attached them to a "dog leash," and paraded them outdoors in front of female staff.[1] Prisoners were then placed in frigid cells without clothing or blankets; the walls of these cells were smeared with blood and feces.[2] A state investigation substantiated the prisoners' complaints, characterizing their treatment as "humiliat[ing] and degrad[ing]."[3] Similar horrors—and more serious ones—are far too common in American prisons and jails. Prison staff have held prisoners down in boiling water until their skin peeled off, shocked prisoners with cattle prods, left prisoners catatonic and covered in urine in telephone-booth-sized cages, compressed prisoners in restraint chairs to the point of squeezing out their intestines, kneed pregnant female prisoners in the stomach, and allowed prisoners to rot to death from gangrene.[4]

The law no longer condones such abuse. During the civil rights era, American courts rejected the "slave of the state" theory of incarceration, which had long denied prisoners any constitutional right to humane conditions.[5] "There is no iron curtain drawn between the Constitution and the prisons of this country," the Supreme Court of the era famously declared.[6] But this shift, and subsequent prisoners' rights litigation, has failed to contain the torture: the inhumane treatment of prisoners goes on. Why?

Part of the explanation, we propose, is that a combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start. The legal barriers are both doctrinal and statutory—they include: (1) constitutional doctrine that is extremely deferential to prison defendants, especially the standards by which courts evaluate prisoners' claims under the First and Eighth Amendments;[7] and (2) the Prison Litigation Reform Act, especially its administrative-exhaustion and physical-injury requirements.[8] The situational barriers are products of the prison environment—they include: (1) the difficulty of finding counsel to represent prisoners; (2) the difficulty of conducting legal research and collecting evidence while incarcer-

1 STATE OF ALASKA OMBUDSMAN, EXECUTIVE SUMMARY, OMBUDSMAN COMPLAINT A2013-1560 (2017); Jonah Engel Bromwich, *Guards Paraded Alaska Inmates Naked on a 'Dog Leash,' Report Finds*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/us/alaska-inmates-stripped-naked.html.

2 STATE OF ALASKA OMBUDSMAN, *supra* note 1, at 3; Bromwich, *supra* note 1.

3 STATE OF ALASKA OMBUDSMAN, *supra* note 1, at 10.

4 *See infra* Part I.

5 Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (quoting Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871)).

6 Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

7 *See infra* subsection II.A.1.

8 42 U.S.C. § 1997e (2012).

ated; (3) procedural and doctrinal minutiae that act as traps for even the most well-prepared prison litigants; and (4) prisoners' vulnerability to retaliation from correctional staff.

Together, these legal and situational barriers clothe prison officials in what we call "practical immunity."[9] Practical immunity is not a formal exemption from suit, but it might as well be: the legal and situational barriers constituting practical immunity make it all but impossible for a prisoner to establish a prison official's liability for abuse.[10] Indeed, practical immunity insulates prison defendants from liability at least as much as qualified immunity. Yet because it derives from a complex interaction of doctrinal, statutory, and situational factors, practical immunity is even less subject to scrutiny than qualified immunity.

Practical immunity operates as a largely unacknowledged screening mechanism for prison-conditions cases, turning qualified immunity into a backstop against the few cases that make it through. The multilayered regime of practical and qualified immunity makes money judgments against prison officials so vanishingly rare that in reality, prison officials enjoy a kind of unqualified impunity. Is it any wonder, then, that the threat of litigation has not shielded our prison population from degrading mistreatment?

This Article consists of three parts. Part I examines horrifying abuse in American prisons and jails. Part II illustrates how the legal and situational barriers constituting practical immunity make most prison-conditions cases unwinnable. Part III argues that the present liability regime, which borders on de facto absolute immunity, cannot serve as a credible check on individual or systemic abuse in prisons and jails.

We conclude by suggesting that the current jurisprudence fails to take stock of the combined effects of the various obstacles that incarcerated plaintiffs confront in litigation. In calibrating the balance between liability for misconduct and protection from suit, courts generally fail to account for the effects of practical immunity; as a result, they develop standards that overprotect prison officials.

A more balanced approach to prison-conditions cases would acknowledge both practical and qualified immunity, viewing them as two components of an overarching system of civil liability for prisoner abuse. Given that broader field of view, a court might conclude, for example, that qualified immunity is unwise and unnecessary in the prison context because practical immunity already provides sufficient protection against unwarranted liability for good-faith mistakes.

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9 *See* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 979 (2016). Of course, the legal/situational distinction is not absolute.

10 The standard definition for "immunity" encompasses an "exemption from . . . liability." *Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

I. THE HORROR CHAMBER

Abuse by staff in American prisons and jails is rampant. Correctional officers frequently assault and otherwise grievously injure incarcerated men and women. Nearly half a century ago, a federal judge declared incarceration to be "as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational."[11] More recently, another federal court described the Texas prison system as a "culture of sadistic and malicious violence,"[12] while a Mississippi judge characterized a youth facility as "a picture of such horror as should be unrealized anywhere in the civilized world."[13]

The problem is not attributable to a scattered handful of sadists. Experts in law,[14] psychology,[15] prisoners' rights litigation,[16] human rights,[17] and

11 Morales v. Schmidt, 340 F. Supp. 544, 548–49 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973).

12 Ruiz v. Johnson, 154 F. Supp. 2d 975, 986 (S.D. Tex. 2001) (quoting Ruiz v. Johnson, 37 F. Supp. 2d 855, 929 (S.D. Tex. 1999)).

13 Order Approving Settlement at ¶ 10, DePriest v. Epps, No. 3:10-cv-00663 (S.D. Miss. Mar. 26, 2012).

14 Sharon Dolovich has observed that:

> [E]ven those prison officials who in their private lives would be regarded as "normal, morally upright . . . people," may [in the prison context] come to treat inmates in ways that even the officers themselves would previously have viewed as repugnant and inhumane. In this way, the institution itself creates the conditions for cruel treatment and the violation of the state's carceral burden. To some extent, the desensitization of prison officials to the suffering of prisoners may be an "adaptive" mechanism, necessary if the officers are to be able to do their jobs. But the fact remains that, for a combination of reasons, prison officials often develop an extremely dismissive attitude toward the people in their charge. And over time, those officers who do so will likely become less troubled by the possibility of prisoners' suffering and may even cease to see prisoners as fellow "persons to whom one owes moral obligations at all."

Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 933–34 (2009) (footnotes omitted) (first quoting PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 307 (2007); and then quoting KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 230 (1988)).

15 Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 126 (2011) (explaining that prisons "impos[e] institutional practices and employ[ ] personnel that categorize, regard, and treat [prisoners] as if they were utterly interchangeable, devoid of the unique needs, concerns, or talents that make each of us individuals").

16 Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J.L. & POL'Y 125, 134 (2006) ("[T]he lessons of the last few decades of court intervention and academic research have demonstrated that the amount of violence in a prison is a function of its culture, the effectiveness of its management, and, at times, the political reality that excuses the mistreatment of prisoners.").

17 Jamie Fellner et al., *Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in US Jails and Prisons*, HUM. RTS. WATCH (May 12, 2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and

organizational theory[18] have endorsed the view that structural characteristics of the prison environment increase the likelihood of staff either abusing prisoners or permitting abuse to go on under their watch. The most well-known—and perhaps most controversial—example is the Stanford Prison Experiment, in which researchers randomly divided a group of college students into guards and prisoners and had them carry out their assigned roles in a simulated prison context. The results were disturbing and may help to explain why prisoners face such frequent and wide-ranging abuses:

> The most hostile guards on each shift moved spontaneously into the leadership roles of giving orders and deciding on punishments. They became role models whose behavior was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as more subtle and "creative" forms of aggression manifested, increased in a spiralling [sic] function. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those "good" guards who did not get as drawn into the power syndrome as the others respected the implicit norm of *never* contradicting or even interfering with an action of a more hostile guard on their shift.[19]

Whatever the etiology of prison abuse, reports by federal agencies bear out its pervasiveness. A study funded by the Office of Justice Programs and the National Institute of Mental Health found that 6964 general population male prisoners surveyed reported 1466 incidents of staff-on-prisoner physical assault over a six-month period—meaning that approximately one of every

("In some correctional facilities, a culture of violence develops in which staff routinely, maliciously, and even savagely abuse inmates, including inmates with mental health problems, using force, fear, reprisal, and retaliation to control them. All levels of staff become complicit, actively or passively, in the widespread physical abuse.").

18 Ifeoma Ajunwa, *"Bad Barrels": An Organizational-Based Analysis of the Human Rights Abuses at Abu Ghraib Prison*, 17 U. PA. J.L. & SOC. CHANGE 75, 78 (2014) (analyzing the U.S. military's abuses of prisoners at Abu Ghraib through the lens of organizational theory and arguing that guard-on-inmate abuse in the United States is at least significantly attributable to structural and cultural characteristics of U.S. prisons).

19 Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIM. & PENOLOGY 69, 94 (1973). To be sure, the experiment has not been without its critics. *See, e.g.*, Ali Banuazizi & Siamak Movahedi, *Interpersonal Dynamics in a Simulated Prison: A Methodological Analysis*, 30 AM. PSYCHOLOGIST 152, 156 (1975) (critiquing the methodology of the Stanford Prison Experiment and offering alternative explanations for the subjects' behavior, including subjects' exposure to "strong social stereotypes of how guards and prisoners act" and "numerous cues" in the experimental context "pointing to the experimental hypothesis"); Thomas Carnahan & Sam McFarland, *Revisiting the Stanford Prison Experiment: Could Participant Self-Selection Have Led to the Cruelty?*, 33 PERSONALITY AND SOC. PSYCHOL. BULL. 603, 604 (2007) (suggesting that the outcome of the Stanford Prison Experiment was at least partially attributable to self-selection among volunteers); Maria Konnikova, *The Real Lesson of the Stanford Prison Experiment*, NEW YORKER (June 12, 2015), https://www.newyorker.com/science/maria-konnikova/the-real-lesson-of-the-stanford-prison-experiment (summarizing criticisms of the Stanford Prison Experiment).

five prisoners reported suffering such abuse.[20] Statistics on reported sexual violence committed by staff are similarly grim. According to the Bureau of Justice Statistics, "[a]n estimated 1.2% of former [state] prisoners reported that they unwillingly had sex or sexual contact with facility staff."[21] If that rate were to remain constant for the nation's entire incarcerated population—roughly 2.2 million people[22]—it would amount to 26,000 incidents of staff sexual abuse in a period of just over six months. These numbers are necessarily inexact, but at the very least, they strongly suggest that assault is an ever-present danger to the millions of people locked up in the United States.

Statistics, no matter how shocking, cannot fully convey the nightmares to which prisoners in this country have been, and continue to be, subjected. Below, we provide a relatively small cross section of abuses that make it clear why we so urgently need increased accountability in American prisons and jails.

A. T.R. v. South Carolina Department of Corrections

A South Carolina prisoner named Jerod Cook was "placed in a restraint chair" after cutting his own arm; officers kept him there for four hours, even as his blood pooled on the floor and he begged for medical care.[23] Another prisoner at the same facility, Baxter Vinson, was placed in a restraint chair for two hours after cutting his own abdomen; a video recording of the incident showed that Vinson was "eviscerating, with his intestine coming out of the

20 Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58, 62, 64, 65, 76 (2009).

21 ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 8 (2012). It is important to note that these numbers are based on self-reports, which makes them imperfectly reliable. Some prisoners may have exaggerated their claims; others who were abused may have denied it out of shame or fear. The number of sexual abuse incidents in state prisons substantiated by internal investigation is lower than the self-reported number, but it remains deeply troubling: the Bureau of Justice Statistics has found that "[s]tate prison administrators reported 537 substantiated incidents of sexual victimization in 2011 . . . . About 52% of substantiated incidents of sexual victimization in 2011 involved only inmates, while 48% of substantiated incidents involved staff with inmates." ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SPECIAL REPORT: SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009–11, at 1 (2014); *see also* Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 119, 132–33 (2009) ("Many researchers have noted that rather than viewing prison rape as a crime that requires intervention, prison staff members at times see rape as a means of deterring other forms of violence in the prison.").

22 DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016).

23 Order Granting Judgment in Favor of Plaintiffs at 19, T.R. v. S.C. Dep't of Corr., No. 2005-CP-40-2925 (S.C. Ct. C.P. Jan. 8, 2014).

abdominal wall."[24] Guards could be seen "tightening the restraints, thereby putting additional pressure on [Vinson's] abdomen."[25]

B. Borum v. Swisher County

Terry Borum had once "attempted to commit suicide with a shotgun," which "destroyed significant portions of [his] face."[26] "As a result," Borum "could not speak clearly, had difficulty breathing, and was blind in one eye. He also could not eat solid food and instead required a liquid diet, which was administered through a feeding tube sewn inside his stomach."[27] Borum was arrested and "detained in Swisher County jail," where, over the course of several days, he "received no medical care of any kind, despite the fact that he began hallucinating, behaved erratically, and was likely suffering from delirium tremens . . . a severe form of alcohol withdrawal that causes tremors and other changes to the nervous system."[28] Jail officers "failed to provide" Borum the liquid diet he needed and fed him only "a mixture of honey and orange juice, which was the County's standard method of 'treating' inmates experiencing alcohol withdrawal symptoms."[29] As Borum's "physical and mental condition continued to deteriorate, jail officials placed him in a detox cell, where he spent the night screaming incoherently, talking to invisible friends, and trying to pull an imaginary person out of the toilet."[30] And yet no one called an ambulance, a doctor, or 911 until much later, when Borum "collapsed . . . struck his head, and was knocked unconscious."[31] He later died at the hospital.[32]

C. In re Death of Bradley Ballard

Bradley Ballard was a thirty-nine-year-old man suffering from mental illness; he died while imprisoned at Rikers Island.[33] According to a report issued by the New York State Commission of Correction, Ballard "was keep-locked in his cell for six days prior to his death and was denied access to his life-supporting prescribed medications, denied access to medical and psychiatric care, denied access to essential mandated services such as showers and

24 *Id.*

25 *Id.*

26 Borum v. Swisher Cty., No. 2:14-CV-127-J, 2015 WL 327508, at *1 (N.D. Tex. Jan. 26, 2015).

27 *Id.*

28 *Id.* at *2.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 Benjamin Weiser, *City to Pay $5.75 Million over Death of Mentally Ill Inmate at Rikers Island*, N.Y. TIMES (Sept. 27, 2016), https://www.nytimes.com/2016/09/28/nyregion/rikers-island-lawsuit-bradley-ballard.html.

exercise periods, and denied running water for his cell."[34] Ultimately, he "was discovered . . . lying in his cell naked, unresponsive, covered with urine and feces, and in critical condition."[35] The Commission concluded that if Ballard had "received adequate and appropriate medical and mental health care and supervision and intervention when he became critically ill, his death would have been prevented."[36]

D. Payne v. Parnell

Dale Parnell, a Texas prisoner, was outside working his prison job when a guard, "without provocation," approached him from behind and "shocked him in the back with a cattle prod."[37] Parnell tried to run, fleeing into a bathroom; the guard followed him and tried to shock him again by using the door handle as a conductor.[38]

E. Nunez v. City of New York

In 2014, the U.S. Department of Justice issued a findings letter on the treatment of detainees at Rikers Island.[39] The letter documents a litany of abuses, including an episode in which officers "forcibly extracted" two mentally ill prisoners from their cells, transported them to the medical clinic, "restrained" them, and beat them so badly that one prisoner was still "spitting up blood . . . more than a month later."[40]

F. Castro v. County of Los Angeles

Jonathan Castro, a detainee at a West Hollywood police station who "was too intoxicated to care for himself," spent a full minute "pounding on his cell door" after an "enraged and combative" arrestee, Jonathan Gonzalez, was placed in the cell with him.[41] Jail video showed that the supervising officer, Christopher Solomon, "remained unresponsive, seated at a desk nearby" the entire time.[42] Twenty minutes later, an "unpaid community volunteer" walked by the cell and saw Gonzalez touching Castro's thigh in an inappro-

34 N.Y. STATE COMM'N OF CORR., IN THE MATTER OF THE DEATH OF BRADLEY BALLARD, AN INMATE OF THE ANNA M. KROSS CENTER, FINAL REPORT OF THE NEW YORK STATE COMMISSION OF CORRECTION 2 (2014).

35 *Id.*

36 *Id.*

37 Payne v. Parnell, 246 F. App'x 884, 885 (5th Cir. 2007) (per curiam).

38 *Id.*

39 Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Bill de Blasio, Mayor of New York (Aug. 4, 2014), https://www.prisonlegalnews.org/media/publications/DOJ%20Report%20on%20CRIPA%20Investigation%20of%20Rikers%20Island%2C%202014.pdf.

40 *Id.* at 14.

41 Castro v. County of Los Angeles, 833 F.3d 1060, 1065, 1073 (9th Cir. 2016) (en banc). One of the authors of this Article, David Shapiro, was counsel for a group of amici curiae in *Castro*.

42 *Id.* at 1073.

priate manner.[43] The volunteer reported this to Officer Solomon, but Solomon waited six minutes to respond.[44] By that point, Gonzalez was "stomping on Castro's head," and Castro was "lying unconscious in a pool of blood."[45] Castro spent a month in a hospital and four years in a care center, and suffered long-term cognitive impairments.[46]

G. Ross v. Blake

Shaidon Blake, a Maryland prisoner, was assaulted by two guards while being moved from his cell.[47] One of the guards began to shove Blake, who was handcuffed.[48] When Blake protested, one guard held "Blake against the wall, [while the other guard] wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession. [The guard] paused briefly, then punched Blake in the face again."[49] The two guards "then took Blake to the ground by lifting him up and dropping him. [One guard] dropped his knee onto Blake's chest, and he and [the other guard] restrained Blake until other officers arrived."[50] Blake "was later diagnosed with nerve damage."[51]

H. Madrid v. Gomez

Vaughn Dortch, a "mentally ill inmate" of California's Pelican Bay State Prison, "suffered second-and third-degree burns over one-third of his body" when a group of correctional officers held him, handcuffed, in a bathtub filled with "scalding" water.[52] During the incident, which took place in the prison infirmary, a nurse heard one of the officers say, "looks like we're going to have a white boy before this is through . . . his skin is so dirty and so rotten, it's all fallen off."[53] The nurse observed that "from just below the buttocks down, [Dortch's] skin had peeled off and was hanging in large clumps around his legs, which had turned white with some redness."[54] The officers "made no effort to seek any medical assistance or advice"; one of them declared that Dortch "had been living in his own feces and urine for three months, and if he was going to get infected, he would have been already."[55]

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43 *Id.* at 1065.
44 *Id.*
45 *Id.*
46 *Id.*
47 Ross v. Blake, 136 S. Ct. 1850, 1855 (2016).
48 *Id.*
49 Blake v. Ross, 787 F.3d 693, 695 (4th Cir. 2015), *vacated*, 136 S. Ct. 1850.
50 *Id.*
51 *Id.*
52 Madrid v. Gomez, 889 F. Supp. 1146, 1166 (N.D. Cal. 1995).
53 *Id.* at 1167.
54 *Id.*
55 *Id.*

Arturo Castillo, another Pelican Bay prisoner, was huddled beneath his mattress when guards sought to extract him from his cell.[56] Though Castillo was "small in stature" and "made no verbal threats or aggressive gestures," correctional officers fired "two rounds from a 38 millimeter gas gun" into his cell; shot him "in the chest and stomach" with a Taser; and "hit him on the top of his head with the butt of the gas gun, knocking him unconscious."[57] When Castillo "regained consciousness, he was on the floor with his face down. An officer was stepping on his hands and hitting him on his calves with a baton, at which point Castillo passed out a second time."[58] The next time he regained consciousness, "he was dragged out of the cell face down; his head was bleeding, and a piece of his scalp had been detached or peeled back."[59] The incident report falsely stated that Castillo "sustained his head injury when he fell and accidentally hit his head on the toilet."[60]

Pelican Bay guards dragged yet another prisoner, Martinez, from his cell in handcuffs.[61] They threw him against a wall, and, having knocked him unconscious, kicked him in the "head, face, neck and shoulders."[62] Martinez "lost four teeth, received a 1.5 inch laceration to the back of his head, and suffered abrasions to the head, face, back, neck, chest and both legs."[63]

I. Clark-Murphy v. Foreback

According to a complaint filed by his estate, Jeffrey Clark, a Michigan prisoner, collapsed in the cafeteria line while the prison was on "heat alert."[64] He was taken to an "observation cell," a type of cell that "gives officers an opportunity to observe a prisoner more closely than would be possible if the prisoner were in the general prison population."[65] After he was placed in the observation cell, Clark began "barking like a dog [and] screaming at the top of his lungs."[66] Prison staff repeatedly turned off the water to his cell over the course of several days, during which Clark asked for water and was seen drinking from the toilet.[67] He "died of dehydration."[68]

J. Hadix v. Caruso

Michigan prisoner T.S., "a psychotic man with apparent delusions" who was "screaming incoherently," was left by correctional officers "in chains on a

56 *See id.* at 1162.
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *See id.* at 1164.
62 *Id.*
63 *Id.* at 1165.
64 Clark-Murphy v. Foreback, 439 F.3d 280, 283 (6th Cir. 2006).
65 *Id.*
66 *See id.* at 283–85.
67 *See id.*
68 *Id.* at 285.

concrete bed over an extended period of time with no effective access to medical or psychiatric care and with custody staff telling him that he would be kept in four-point restraints until he was cooperative."[69] T.S. was restrained in this manner for approximately four days, two of which were "designated 'heat alert' days with heat index readings around 100 degrees."[70] A federal judge noted that "[f]or many hours of [his] restraint, T.S. was naked and [lay] in his own urine."[71] Staff finally removed T.S. from restraints after a period of "prolonged 'sleeping.'"[72] A minute after the restraints were removed, "T.S. fell face first onto the concrete floor."[73] He then fell off a toilet and could not get up on his own, at which point a nurse checked both of T.S.'s arms and found only a "faint" pulse.[74] And yet, "neither custody staff (who checked on T.S. on regular intervals), nor psychological and nursing staff (who all saw T.S. in a state of decline) took any action to summon emergency care when the need to do so was obvious."[75] Staff summoned an ambulance only later, when the same nurse who had checked T.S.'s pulse returned and "found T.S. not breathing."[76] T.S. was taken to the hospital and pronounced dead.[77]

K. United States v. Erie County

Before the start of litigation in *United States v. Erie County*,[78] the U.S. Department of Justice issued a findings letter stating that "during the booking process," law enforcement deputies "struck a pregnant inmate in the face, threw her to the ground, and kneed her in the side of her stomach."[79] When told she was pregnant, "the deputies allegedly replied that they thought she was fat, not pregnant. The inmate lost her two front teeth as a result of the assault."[80]

L. DePriest v. Epps

In *DePriest v. Epps*, a Mississippi federal court concluded that conditions at Walnut Grove, a youth prison, "far exceeded mere breaches of the United

69 Hadix v. Caruso, 461 F. Supp. 2d 574, 578 (W.D. Mich. 2006).

70 *Id.* at 579.

71 *Id.* at 577.

72 *Id.* at 579.

73 *Id.*

74 *Id.*

75 *Id.* at 580.

76 *Id.*

77 *Id.*

78 724 F. Supp. 2d 357 (W.D.N.Y. 2010).

79 Letter from Loretta King, Acting Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Chris Collins, Erie Cty. Exec. 18 (July 15, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie_findlet_redact_07-15-09.pdf.

80 *Id.*

States Constitution."[81] The court noted that "staff of the [prison] and those responsible for overseeing and supervising the youth engaged in sexual relationships with the youth [and] exploited them by selling drugs in the facility."[82] Additionally, the detained youth were "frequently subjected to chemical restraints for the most insignificant of infractions and [were] denied necessary medical care. And although many of the offenders [had] been ordered to finish their education, 'the facility prevent[ed] most youth from accessing even the most basic education services.'"[83] The court found "'brazen' staff sexual misconduct and brutal youth-on-youth rapes."[84]

M. Jones v. Gusman

E.S., a Louisiana prisoner, was gang raped by ten to fourteen other inmates.[85] The assailants tore off E.S.'s clothes and hog-tied him with "strips of fabric."[86] Once he was tied up, E.S.'s attackers stuck fingers, a tongue, a toothbrush, and toothpaste in his anus.[87] They wrapped a blanket around his face and beat him.[88] They "tied him to a post," and "four to six inmates began punching him repeatedly."[89] They "threw hot water and possibly urine on [him], and beat him so severely with a mop stick that the skin was ripped from his back and buttocks."[90] "At some point [while E.S. was tied to the post], a guard performed a routine check, but he did not walk far enough down the hall to notice E.S., naked, bound, and beaten."[91] It took almost a year for E.S. to receive medical care.[92]

N. Hope v. Pelzer

While Larry Hope was imprisoned in Alabama, "guards twice handcuffed him to a hitching post."[93] In the second instance, "the guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin."[94] Hope was shackled to the post for seven hours, during which "he was

81 DePriest v. Epps, No. 3:10-cv-00663, 2012 BL 443032, at *2 (S.D. Miss. Mar. 26, 2012).

82 *Id.*

83 *Id.* at *2–3.

84 *Id.* at *4.

85 Jones v. Gusman, 296 F.R.D. 416, 437 (E.D. La. 2013).

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.* at 438. In another incident documented in the same decision, a deputy did not investigate when he "heard what he believed to be inmates fighting on a tier, as well as statements like 'stick your finger in his butt and piss on him.'" *Id.* at 432.

93 Hope v. Pelzer, 536 U.S. 730, 733 (2002).

94 *Id.* at 734–35.

given water only once or twice and was given no bathroom breaks."[95] A guard, knowing Hope was thirsty, "taunted" him: the guard "first gave water to some dogs, then brought the water cooler closer to [Hope], removed its lid, and kicked the cooler over, spilling the water onto the ground."[96] The Supreme Court concluded that "Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."[97]

O. Lippert v. Godinez

In *Lippert v. Godinez*, a court-appointed medical expert documented numerous instances of sickening medical treatment provided by the Illinois Department of Corrections and its healthcare contractor.[98] At one prison, a patient "presented with classic signs and symptoms of lung cancer from the time he arrived in IDOC, yet these were ignored by health care staff for three months. By the time he was finally diagnosed, the only treatment he was eligible for was palliative radiation, which he declined."[99] Nine days later the patient died.[100] The report also found that another patient "had a history of cirrhosis and was admitted to the infirmary with recurrent active GI bleeding. Despite evidence of substantial blood loss, the patient was not sent to the hospital until the following day; he died at the hospital two days later."[101]

P. United States v. Cook County

John S., a detainee at Illinois's Cook County Jail, was "tapping on the wall" while being strip searched.[102] He did not stop when an officer instructed him to.[103] In response, the officer "slammed him on top of a cart and against the wall," after which "John was pulled into the hallway[,] where other officers started to beat him. He was hit in the face, dragged by his hair, choked, and beaten."[104]

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95 *Id.* at 735.

96 *Id.*

97 *Id.* at 745.

98 Final Report of the Court Appointed Expert, Lippert v. Godinez, No. 1:10-cv-4603 (N.D. Ill. May 19, 2015).

99 *Id.* at 7.

100 *Id.*

101 *Id.* at 32.

102 *See* Letter from Grace Chung Becker, Acting Assistant Att'y Gen., U.S. Dep't of Justice, and Patrick J. Fitzgerald, U.S. Att'y, U.S. Dep't of Justice, to Todd H. Stroger, President, Cook Cty. Bd., and Thomas Dart, Sheriff, Cook Cty. 13 (July 11, 2008), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/13/CookCountyJail_findingsletter_7-11-08.pdf.

103 *See id.*

104 *Id.*

Q. Hudson v. McMillian

Keith Hudson, a Louisiana prisoner, was kept "in handcuffs and shackles" while a guard beat him "in the mouth, eyes, chest, and stomach."[105] Another guard "held [Hudson] in place and kicked and punched him from behind."[106] Meanwhile, the guards' supervisor "watched the beating but merely told the officers 'not to have too much fun.'"[107]

R. Riker v. Gibbons

According to a class-action complaint filed in federal court, Patrick Cavanaugh, a Nevada prisoner suffering from diabetes, hypertension, congestive heart failure, and gangrene, "received almost no treatment for his illnesses, so his slow, painful death in the [prison's] infirmary was virtually assured."[108] Considering "the profound and unmistakable smell of putrefying flesh, there can be no question that every medical provider and correctional officer in that infirmary was acutely aware of Patrick Cavanaugh's condition."[109] An outside doctor who reviewed dozens of prisoners' medical records reported that treatment at the prison "amount[ed] to the grossest possible medical malpractice, and the most shocking and callous disregard for human life and human suffering," that he had "ever encountered in [his] 35 years of practice."[110]

S. Valarie v. Michigan Department of Corrections

Anthony McManus suffered from psychosis, including schizophrenia and bipolar disorder.[111] He was locked in a Michigan prison that had no resources for treating psychiatric illnesses,[112] where, over the course of four months, "[h]e received so little food and water that he finally succumbed to death."[113] When a "chemical agent" was applied to McManus in an effort to remove him from his cell, a nurse claimed that McManus was in "[n]o apparent distress," even though, as the court stated:

> [V]ideo footage of the application of the chemical spray demonstrates a very emaciated, naked individual who appears to be in great discomfort, who is verbalizing in an incoherent manner, and who eventually makes repeated clear requests for water and help. Mr. McManus' skeletal structure is clearly

105 Hudson v. McMillian, 503 U.S. 1, 4 (1992).

106 *Id.*

107 *Id.* (citation omitted).

108 Amended Class Action Complaint for Declaratory and Injunctive Relief at 8–9, Riker v. Gibbons, No. 3:08-cv-0115, 2009 WL 910971 (D. Nev. Mar. 29, 2009), ECF No. 15.

109 *Id.*

110 Ashley Powers & Henry Weinstein, *Poor Medical Care at Nevada Prison*, L.A. TIMES (Dec. 6, 2007), http://articles.latimes.com/2007/dec/06/nation/na-ely6.

111 *See* Valarie v. Mich. Dep't of Corr., No. 2:07-cv-5, 2009 WL 2232684, at *5 (W.D. Mich. July 22, 2009).

112 *See id.* at *1.

113 *Id.* at *18

> seen protruding from the skin. During the taped footage, no one provides Mr. McManus with any water.[114]

In an affidavit, an "expert prison official" stated that "[a]nimals in animal shelters are generally given more attention and better care than was afforded to McManus."[115]

T. Brown v. Plata

In *Brown v. Plata*, the Supreme Court summarized cases of horrific medical and mental health abuse in California prisons.[116] For instance, the Court observed that suicidal prisoners were "held for prolonged periods in telephone-booth-sized cages without toilets," and "[a] psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic."[117] According to a correctional officer, "in one prison, up to 50 sick inmates may be held together in a 12-by 20-foot cage for up to five hours awaiting treatment."[118] The Court also recognized instances in which prisoners had died following "significant delays in access to care," including

> [a] prisoner with severe abdominal pain [who] died after a 5-week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain [who] died after an 8-hour delay in evaluation by a doctor; and a prisoner [who] died of testicular cancer after a "failure of MDs to work up for cancer in a young man with 17 months of testicular pain."[119]

U. Reid v. Florida

In *Reid v. Florida*, the plaintiff alleged that while she was held in a Florida prison, she was raped multiple times by "a male prison guard," "as result [of which] . . . [she] became pregnant."[120] The guard allegedly threatened her with punishment if she ever reported the rapes or asked for help.[121]

V. Disability Rights Florida, Inc. v. Crews

Guards at Florida's Dade Correctional Institution abused mentally ill prisoners by, among other things, locking them in a specially modified shower stall and leaving them there to burn beneath "scalding" water.[122] Darren Rainey, a prisoner with schizophrenia, died after guards left him in

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114 *Id.* at *4 (citations omitted).

115 *Id.* at *8 (alteration in original) (citation omitted).

116 Brown v. Plata, 563 U.S. 493, 503–06 (2011).

117 *Id.* at 503–04.

118 *Id.* at 504.

119 *Id.* at 505 (quoting KENT IMAI, CAL. PRISON HEALTH CARE RECEIVERSHIP CORP., ANALYSIS OF CDCR DEATH REVIEWS 2006, at 6–7 (2007)).

120 Reid v. Florida, No. 07-21764-CIV, 2008 WL 2780991, at *1 (S.D. Fla. July 16, 2008).

121 *Id.*

122 Complaint at 9–10, Disability Rights Fla., Inc. v. Crews, 14-cv-23323 (S.D. Fla. Sept. 9, 2014).

the stall for ninety minutes.[123] When he was discovered, 90% of his body was burned, and "his skin fell off at the touch."[124] In photographs, "[e]ntire swaths of [Rainey's] skin . . . are shown missing, bunched up at the edges of wounds or hanging loosely at the edges of wounds."[125]

W. Christie v. Scott

Nick Christie was a sixty-two year-old man with "asthma, chronic obstructive pulmonary disorder (COPD), and diabetes."[126] He also suffered from depression, and "the doctor who was treating him had recently moved," leaving "no one to manage Christie's spiraling emotional state, and no one to control the possible side effects of his medication."[127] During a trip to Florida to visit his brother, he began acting erratically, and his hotel asked him to leave; when he did not, the hotel called the police, who arrested Christie and placed him in jail.[128] There, sheriff's deputies sprayed him "more than 12 times with pepper spray," strapped him "naked in a restraint chair," pulled a "'spit mask' over his nose and mouth" without removing the pepper spray from his body, and left him in the restraint chair "for more than five hours" without food or water, "forcing him to soil himself."[129] "During this time," Christie "was not given any of his prescribed medication."[130] Christie "went into respiratory distress" and was taken to the hospital, where he "suffer[ed] multiple heart attacks over the next two days"; when doctors declared him brain-dead, his body was still coated in pepper spray.[131]

II. Practical Immunity

Prisoners in the United States face immense barriers to civil rights litigation; the existence and effectiveness of these barriers may help to explain why prisoners continue to be subjected to chilling abuse. First, prisoners'

123 *Id.*

124 Eyal Press, *Madness*, New Yorker (May 2, 2016), https://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners; *see also* Derek Hawkins, *An Inmate Died After Being Locked in a Scalding Shower for Two Hours. His Guards Won't Be Charged.*, Wash. Post (Mar. 20, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/20/an-inmate-died-after-being-locked-in-a-scalding-shower-for-two-hours-his-guards-wont-be-charged/?utm_term=.fb401b479c54 (reporting on same story).

125 Matt Ferner, *Autopsy Photos of Inmate Allegedly 'Boiled' to Death Raise Questions About State's Report*, Huffington Post (Aug. 4, 2017, 12:54 PM), https://www.huffingtonpost.com/entry/darren-rainey-miami-dade-shower-death-autopsy-photos_us_5983f3f7e4b041356ebeedb5 (containing graphic photographs of Darren Rainey's burned flesh).

126 Christie v. Scott, 923 F. Supp. 2d 1308, 1314 (M.D. Fla. 2013); *see also* Radley Balko, *Death in the Devil's Chair: Florida Man's Pepper Spray Death Raises Questions About Jail Abuse*, Huffington Post (Dec. 6, 2017), https://www.huffingtonpost.com/2012/01/11/jail-abuse-nick-christie-pepper-spray-florida_n_1192412.html.

127 *See* Balko, *supra* note 126.

128 *See Christie*, 923 F. Supp. 2d at 126; *see also* Balko, *supra* note 126.

129 *Christie*, 923 F. Supp. 2d at 1314, 1317–18.

130 *Id.* at 1314.

131 *See* Balko, *supra* note 126.

vital constitutional protections have been attenuated by caselaw that is extremely deferential to prison officials. Second, the Prison Litigation Reform Act has established substantive and procedural requirements that make it very easy to dismiss a prisoner's complaint on the basis of a technicality. Third, prisoners' limited access to legal resources and vulnerability to retaliation from correctional officers make bringing a lawsuit extraordinarily difficult and, in far too many cases, dangerous. Taken together, these barriers provide prison officials with practical immunity from liability. The conjunction of practical immunity with the well-known doctrine of qualified immunity makes it so difficult for prisoners to win damages cases that prison staff have almost nothing to fear from civil rights litigation.

A. Legal Barriers

1. Deference to Defendants

The legal standards governing prisoners' constitutional claims are highly deferential to prison officials. In the decades since it opened the federal courts to prisoner litigation,[132] the Supreme Court has been loath to permit judges or juries to question the decisions of guards, wardens, doctors, or other prison personnel.[133] Judicial deference to prison staff manifests in virtually every standard for constitutional claims arising from official misconduct in prisons and jails, and it often hinders the vindication of prisoners' constitutional rights.[134]

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132 *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 255 n.2 (2012) (identifying Cooper v. Pate, 378 U.S. 546 (1964) (per curiam), as the first case in which the Supreme Court held that a state prisoner could pursue a claim in federal court under § 1983).

133 *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (explaining that although the protections of the Constitution extend to prisoners, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform"; questions of institutional competence and the separation of powers counsel "a policy of judicial restraint" when it comes to prisoners' rights), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 411, 413 (1989); *see also Thornburgh*, 490 U.S. at 414 (overruling *Procunier* because it could be read as extending *too little* deference to prison administrators); Turner v. Safley, 482 U.S. 78, 84–85 (1987) (confirming that while prisoners have some constitutional rights, the Court balances those rights against substantial deference to prison administrators when it formulates and applies legal doctrines); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 640 n.251 (2009) (noting that in *Bell*, "the Supreme Court began a concerted effort to end the expansion of prisoners' rights by espousing a policy of deference to prison staff").

134 *See, e.g.*, Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans with Disabilities Act*, 98 MICH. L. REV. 482, 487 (1999) ("[T]he Court [has] clearly stated that infringements on prisoners' constitutional rights should be subject to loose judicial scrutiny that gives great deference to the

In *Turner v. Safley*, the Supreme Court established the test governing prisoners' First Amendment claims.[135] The *Turner* Court held that even if a prison regulation intrudes on a prisoner's right to free speech, the regulation "is valid if it is reasonably related to legitimate penological interests."[136] This standard, even if not intended as a rubber stamp, leaves remarkable room for deference in application.[137] *Turner* (1) holds that a prison regulation may infringe on prisoners' constitutional rights so long as the regulation passes a reasonableness test, and (2) instructs judges to defer to prison administrators in applying the reasonableness test.[138] In some cases, *Turner* deference has

decisions of prison administrators."); *see also* Dolovich, *supra* note 14 ("Judicial deference to prison officials is perhaps the strongest theme to emerge from a historical survey of prisoners' rights litigation in the federal courts."); Dolovich, *supra* note 132, at 245 ("[The] imperative of restraint—aka deference—has emerged as the strongest theme of the Court's prisoners' rights jurisprudence."); Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1010 (1993) ("[E]ntrusting trained chimps to paste up cliches from [Supreme Court decisions regarding prisoner speech] above the word 'denied' would achieve roughly the same result as seeking redress from the federal judiciary.").

135 *See Turner*, 482 U.S. at 89. While *Turner* dealt with regulations restricting prisoners' speech, *see id.* at 91, the Court almost immediately went on to apply its reasonableness test to regulations restricting prisoners' right to free exercise. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). Soon after, the Court stated that *Turner* governs "all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment." Washington v. Harper, 494 U.S. 210, 224 (1990) (applying *Turner* to prisoner's due-process claim). Notwithstanding the strength of that formulation, the Court later clarified that *Turner*'s reasonableness test applies "*only* to rights that are 'inconsistent with proper incarceration.'" Johnson v. California, 543 U.S. 499, 510 (2005) (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)). Thus, where a constitutional right *must* be abrogated to some extent in order to incarcerate a person, the reasonableness test applies. *Id.* But the reasonableness test does not apply to claims of racial discrimination brought under the Equal Protection Clause or to claims of cruel and unusual punishment brought under the Eighth Amendment. *Id.* at 510–11; *see also* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 105–07 (2006) (discussing inconsistent application of the *Turner* test to prisoners' constitutional claims); Tasha Hill, Comment, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 219 (2015).

136 *Turner*, 482 U.S. at 89.

137 *See id.* at 89–91; *see also* Shapiro, *supra* note 9, at 988 (arguing that "*Turner* is not meant to be toothless, but . . . decisions by the lower federal courts sometimes render it so"); *cf.* Dolovich, *supra* note 132, at 246 ("[T]he *Turner* Court's elaboration of each of [the factors underlying the reasonableness standard] leaves no doubt that the test is intended to be extremely deferential, and provides language for lower courts to draw on to frame this deference as a legal mandate.").

138 It is quite easy for a court to hold that an infringement on prisoners' constitutional rights is reasonable under *Turner*. In assessing reasonableness, the reviewing court must examine "whether there are alternative means of exercising the right" asserted by the plaintiff prisoner; if such means exist, judges "should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" *Turner*, 482 U.S. at 90 (omission in original) (quoting Pell v. Procunier, 417

been taken to absurd extremes, such as when the Seventh Circuit upheld a Wisconsin prison's ban on the fantasy game *Dungeons & Dragons*, reasoning that it could promote gang activity.[139]

Courts look differently—but no less deferentially—at claims challenging prison officials' use of force and the conditions of prisoners' confinement. Such claims arise under the Eighth Amendment.[140] In the Eighth Amendment context, doctrinal deference to prison administrators generally takes the form of exacting mens rea elements: to make out a claim, a prisoner must produce evidence not only that she suffered objectively inhumane treatment or conditions, but that the prison officials responsible had malign intent or failed to remedy known risks.[141]

For instance, to prevail on a claim for excessive use of force, a prisoner must show that a prison official, in using force, acted not "in a good faith effort to maintain or restore discipline," but "maliciously and sadistically for the very purpose of causing harm."[142] Thus, it is not enough for a prisoner to show that a guard injured her using force that was neither necessary nor reasonable.[143] She must also show that when the guard injured her, the

U.S. 817, 827 (1974)). The court must also consider whether accommodating the prisoner's asserted right "will have a significant 'ripple effect' on fellow inmates or on prison staff"—in which case, again, the Court admonishes that judges "should be particularly deferential to the informed discretion of corrections officials." *Id.* Finally, the court will look to whether the plaintiff prisoner can point to a "ready"—that is, an "obvious, easy"—alternative to the challenged regulation; if not, the court will take it as evidence that the regulation is reasonable and therefore valid. *Id.* at 90–91. The Court carefully points out that "this is not a 'least restrictive alternative' test." *Id.* at 90; *cf. Thornburgh*, 490 U.S. at 414 (overturning an earlier decision involving a prisoner's First Amendment claim because it could be read as permitting lower courts to apply a "least restrictive means" test to some First Amendment cases; such a test would be insufficiently deferential to prison administrators).

139 *See* Singer v. Raemisch, 593 F.3d 529, 531 (7th Cir. 2010).

140 *See* Wilson v. Seiter, 501 U.S. 294, 299 (1991).

141 *See id.* (noting that the Court's Eighth Amendment cases "mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment"); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003) ("Even in the relatively expansive Eighth Amendment jurisprudence, which governs incarceration-specific constitutional claims, current doctrine directs judges and juries to focus less on the actual conditions inmates face and more on the prison officials' mental culpability—a more difficult standard to meet, especially for unsophisticated litigants." (footnote omitted)); Dolovich, *supra* note 132, at 246 (observing that *Whitley* imposes an "extremely high (and extremely deferential) mens rea standard" on claims challenging use of force against prisoners).

142 Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)); *see also* Hudson v. McMillian, 503 U.S. 1, 6 (1992).

143 *See Whitley*, 475 U.S. at 319 ("The infliction of pain in the course of a prison security measure . . . does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense."). This subjective element of excessive-force claims—an element centered not on what the defendant did, but on what *motivated* him to do it—is of a piece with the Court's deferential approach to prison cases.

guard had a "sufficiently culpable state of mind."[144] For the Court, a neutral factfinder's conclusion as to whether a prison guard's use of force was reasonable or appropriate is not dispositive: what is dispositive is whether the prisoner can produce evidence that the guard was *driven by* unacceptable motives.[145] A prison official's poor decision to use force is not to be questioned unless it was made in bad faith; if the defendant could have "plausibly" thought it was necessary to use the challenged force, then the prisoner's claim may be dismissed.[146]

Claims involving conditions of confinement are similarly dependent on the prison officials' states of mind. To prevail on a claim involving conditions of confinement—such as freezing or sweltering temperatures, rotten food, insufficient clothing, failure to protect from violence, or poor medical care—a prisoner must show that prison officials acted with "deliberate indifference."[147] Without a showing of deliberate indifference, proof of "inhumane conditions of confinement" cannot trigger liability under the Eighth Amendment—no matter how miserable the conditions might be.[148]

See id. at 321–22 (quoting *Bell*'s admonition of deference in explaining why consideration of prison administrators' subjective is so important).

144 *Wilson*, 501 U.S. at 294.

145 *Whitley*, 475 U.S. at 322. According to the Court, the subjective prong of the excessive-force standard:

> requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict in a case such as this, courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

Id. Notice two things about this passage. First, a dispute over reasonableness is not enough to sustain a cause of action for excessive use of force; a prisoner who can point to evidence that the force used against her was unreasonable may still lose at the summary judgment stage. Second, there is no mention of the defendant's burden to produce evidence of a good faith motive. Even when a factfinder could conclude that a guard used more force—and caused greater injury or inflicted greater pain—than called for, the key question remains whether the *prisoner* has produced evidence of malicious intent.

146 *Id.* at 321. A prisoner is, of course, free to argue that "the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," is enough for the court (or a jury) to infer that the defendant was motivated by wantonness or maliciousness. *Id.* (alteration in original) (quoting *Glick*, 481 F.2d at 1033). But the defendant's motivation remains the crux of the matter. Even if the prisoner's injury is terribly severe and the force exerted on her was utterly unnecessary, her claim will fail if the court concludes that the evidence supports only an inference of poor judgment, not an inference of maliciousness.

147 *Wilson*, 501 U.S. at 303.

148 *Id.*; *see also* Farmer v. Brennan, 511 U.S. 825, 838 (1994) ("In *Wilson v. Seiter*, we rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions."); *id.* at 839–40 (expressly rejecting an objective test for deliberate indifference in

The deliberate indifference standard limits the Eighth Amendment's power as a check against suffering. For instance, although the Eighth Amendment requires the state to provide prisoners with medical care,[149] a prisoner's claim will fail under the deliberate indifference standard if she shows that she received medical care that was merely incompetent or negligent—no matter how badly she was harmed.[150] In other words, the prisoner may show that, objectively, her treatment amounted to medical malpractice, but doing so will not be enough for her to press a constitutional claim.[151] She must marshal further evidence that the defendants acted with a culpable mens rea.

In the same way, although the Eighth Amendment requires prison officials "to protect prisoners from violence at the hands of other prisoners," such as beatings or sexual assaults, the deliberate indifference standard means that a prison official may be liable for failure to protect a prisoner from harm only when he "knows of and disregards an excessive risk to inmate health or safety."[152] To meet this standard, a prisoner must prove (1) that the defendant knew of facts from which he could infer that there was a substantial risk of serious harm, and (2) that the defendant, being aware of the

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prisoners' Eighth Amendment claims and stating that "*subjective* recklessness as used in the criminal law is a familiar and workable standard . . . and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment" (emphasis added)).

149 Estelle v. Gamble, 429 U.S. 97, 103 (1976) (acknowledging that "elementary principles" of the Eighth Amendment establish "the government's obligation to provide medical care for those whom it is punishing by incarceration").

150 *Id.* at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); *see also Wilson*, 501 U.S. at 297 (to prevail on an Eighth Amendment claim, it is not enough for an inmate to establish that he received inadequate medical care; he must also establish that the defendant had a "sufficiently culpable state of mind").

151 *See Estelle*, 429 U.S. at 106; *see also* Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014) (en banc) ("[E]ven if medical care is so inadequate as to satisfy the objective prong, the Eighth Amendment is not violated unless prison administrators also exhibit deliberate indifference to the prisoner's needs. For purposes of this subjective prong, deliberate indifference 'defines a narrow band of conduct' and requires evidence that the failure in treatment was purposeful. . . . While deliberate indifference may . . . be exhibited by a 'wanton disregard' to a prisoner's needs, such disregard must be akin to criminal recklessness, requiring consciousness of 'impending harm, easily preventable.'" (citation omitted) (first quoting Feeney v. Corr. Med. Servs., Inc., 464 F.3d 158, 162 (1st Cir. 2006); then quoting Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011); and then quoting Watson v. Caton, 984 F.2d 537, 540 (1st Cir 1993) (per curiam))); Smith v. Carpenter, 316 F.3d 178, 183–84 (2d Cir. 2003) ("This standard [for medical-care claims under the Eighth Amendment] incorporates both objective and subjective elements. The objective 'medical need' element measures the severity of the alleged deprivation, while the subjective 'deliberate indifference' element ensures that the defendant prison official acted with a sufficiently culpable state of mind.").

152 *Farmer*, 511 U.S. at 833 (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988)); *see also id.* at 828 ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.").

relevant facts, *actually drew* the necessary inference.[153] It is not enough for the prisoner to show that the defendant *could* have known the prisoner was at risk of serious harm; nor is it enough to show that the risk of serious harm was objectively obvious.[154] The prisoner's lawsuit will move forward only if she can prove that the defendant was *subjectively aware* of the risk of serious harm.[155] The prisoner who meets this state-of-mind bar faces the additional hurdle of reasonableness: a prison official who responds "reasonably" to a known risk of serious harm may avoid liability even if the response proves inadequate.[156] This standard is, again, intentionally deferential: in the Court's words, it "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'"[157]

2. The Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) places further barriers between prisoners and the courts. Here, we focus on two: first, the PLRA's administrative exhaustion provision, which requires prisoners to exhaust an institution's internal grievance procedure before filing in court;[158] and second, the PLRA's physical-injury requirement, which prohibits prisoners from recovering compensatory damages for mental or emotional injury unless they also suffered a physical injury.[159]

The PLRA states that a prisoner cannot bring federal suit "with respect to prison conditions" until she has already exhausted all the "administrative remedies" that the prison makes "available" to her.[160] Accordingly, a violation of a prisoner's civil liberties does not, in the first instance, give her the right to file suit in federal court. She must first submit a grievance to prison

153 *Id.* at 837 (stating that to be liable under the Eighth Amendment, a prison 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").

154 *Id.* at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."); *see also id.* at 844 (noting that prison officials can avoid Eighth Amendment liability by proving "that they were unaware even of an obvious risk to inmate health or safety").

155 *See id.* at 838.

156 *Id.* at 844; *see also id.* at 845 (explaining that "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause," even if their "reasonable" actions failed to avert harm to a prisoner).

157 *Id.* at 845 (quoting Spain v. Procunier, 600 F.2d 189, 193 (9th Cir. 1979)).

158 42 U.S.C. § 1997e(a) (2012) ("No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

159 § 1997e(e) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . . .").

160 § 1997e(a).

officials and follow the prison's internal grievance procedure to the very end of the line. And she must do so without a slipup. In *Woodford v. Ngo*, the Supreme Court held that the PLRA requires "proper exhaustion," which entails "using all steps that the [prison] holds out, and doing so *properly*."[161] Consequently, if a prisoner attempts to follow the prison's internal grievance procedure but makes a technical error along the way, the court can dismiss her case, regardless of its strength on the merits.[162]

State and local correctional systems get to craft their own rules for handling prisoners' grievances.[163] The Supreme Court has confirmed that these rules "need not meet federal standards" or be "plain, speedy, and effective."[164] It is not altogether surprising, then, that prisons' internal grievance regimes are often multilayered and exceedingly complex—after all, "non-exhaustion confers immunity from liability on prison staff."[165]

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161 Woodford v. Ngo, 548 U.S. 81, 84, 90 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)); *see also* Porter v. Nussle, 534 U.S. 516, 524 (2002) ("Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit.").

162 *Woodford*, 548 U.S. at 122–23 (Stevens, J., dissenting); *see also* Hill, *supra* note 135, at 199–201 (discussing the PLRA's administrative exhaustion requirement).

163 Schlanger, *supra* note 141, at 1650 ("[T]he PLRA imposes no constraints on the structure or rules of any grievance processing regime. The administrative review scheme can, for example, have as short a deadline for inmates and as many layers of review . . . as the incarcerating authority chooses. Essentially, then, the sky's the limit for the procedural complexity or difficulty of the exhaustion regime." (footnote omitted)).

164 *Porter*, 534 U.S. at 524; *see also* Schlanger, *supra* note 141, at 1627 (observing that before the PLRA was passed, federal courts could require prisoners to exhaust internal prison remedies only in relatively narrow circumstances, including when the federal government had certified the prison's internal procedures as "plain, speedy, and effective").

165 Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 582 (2014); *see also* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 12 (2009) ("A basic structural problem with the exhaustion requirement is that prison officials themselves . . . typically design the grievance system that prisoners must exhaust before filing suit. This creates obvious incentives for prison officials to design grievance systems with short deadlines, multiple steps, and numerous technical requirements."); Mikkor, *supra*, at 583–85 (cataloging evidence that corrections departments have increased the complexity and strictness of their grievance procedures in recognition of the proper exhaustion requirement); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 149 (2008) (arguing that the PLRA incentivizes prisoner administrators to "fashion ever higher procedural hurdles in their grievance processes. . . . [because] the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit"); *id.* at 141 (explaining that the PLRA's administrative exhaustion requirement "obstructs rather than promotes constitutional oversight" of prison conditions because the law's application "strongly encourages prison and jail authorities to come up with ever-higher procedural hurdles in order to foreclose subsequent litigation"); Shapiro, *supra* note 9, at 1019 (observing that prison grievance procedures can be difficult to navigate even for someone with the benefit of a law degree and years of experience in prison litigation); Hill, *supra* note 135, at 200 ("The exhaustion requirement incentivizes prison and jail officials to conjure up ever higher and more com-

A complex bureaucratic regime, combined with tight deadlines, invites technical errors. And given *Woodford*'s proper exhaustion standard, a technical error is enough to keep a prisoner out of court.[166] Indeed, the Supreme Court has held that "special circumstances," such as a "reasonable mistake about the meaning of a prison's grievance procedures," cannot excuse a prisoner's failure to properly exhaust.[167] Even trivial mistakes can be fatal to a prisoner's suit: submitting handwritten copies, rather than photocopies, of required documents during the grievance process can lead to dismissal for nonexhaustion (even if the prison's photocopier was broken).[168] So can sending a required form to the "Inmate Appeals Branch" instead of the "appeals coordinator,"[169] submitting a carbon copy of a document instead of the original,[170] or placing multiple grievances in a single envelope instead of separately mailing each one.[171] Thus, the PLRA's exhaustion requirement has been interpreted by many federal courts to require a degree of minute technical compliance that would be challenging for anyone, let alone some-

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plex procedural hurdles in order to foreclose subsequent constitutional litigation. Deadlines . . . are often very short, such as two to five days, and the number of administrative appeals required can be very large." (footnote omitted)).

166 *Woodford*, 548 U.S. at 90–91; *see also* Richardson v. Spurlock, 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to meet PLRA's exhaustion requirement when he filed an "administrative" appeal rather than a "disciplinary" appeal); Williams v. Burgos, No. CV206-104, 2007 WL 2331794, at *3 (S.D. Ga. Aug. 13, 2007) (ruling that prisoner's claim may be dismissed for failure to exhaust when a prisoner mails the required form before deadline but form is never received by administrators); HUMAN RIGHTS WATCH, *supra* note 165, at 14 ("[U]nder the PLRA, it is common for courts to conclude that prisoners have failed to exhaust because they made minor technical errors in the grievance process."); Schlanger & Shay, *supra* note 165, at 148 ("[I]f prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days, a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination." (footnote omitted)).

167 Ross v. Blake, 136 S. Ct. 1850, 1858 (2016). The strictness of the total-exhaustion rule has produced truly stupefying decisions. For instance, in *Parker v. Adjetey*, 89 F. App'x 886, 887 (5th Cir. 2004) (per curiam), a prisoner appealed when his complaint was dismissed for nonexhaustion, arguing that he could not have exhausted the prison's administrative remedies because he was hospitalized and in a coma when the grievance deadline passed. The Fifth Circuit affirmed dismissal of the complaint, reasoning that the prisoner should have filed a grievance after waking from the coma and being released from the hospital, even though the prison's deadline had already passed and any attempt to submit a grievance would have been "futile." *Id.* at 887–88.

168 Mack v. Klopotoski, 540 F. App'x 108, 112–13 (3d Cir. 2013).

169 *See* Chatman v. Johnson, No. CIV S-06-0578, 2007 WL 2023544, at *6 (E.D. Cal. July 11, 2007); *see also* Hamilton v. Lara, No. 1:08-cv-01967, 2011 WL 2457934, at *3 (E.D. Cal. June 16, 2011).

170 *See* Fischer v. Smith, No. 10-C-870, 2011 WL 3876944, *2 (E.D. Wis. Aug. 31, 2011) (granting defendant's motion for summary judgment because prisoner failed to exhaust when he sent required grievance form to wrong prison administrator).

171 *See* Freeland v. Ballard, No. 2:14-cv-29445, 2017 WL 337997, at *6–7 (S.D.W. Va. Jan. 23, 2017).

one locked in prison. And a single lapse in technical compliance can easily lead to dismissal of a prisoner's otherwise meritorious claim.[172]

The administrative exhaustion requirement is especially onerous for prisoners suffering from mental illness or psychological trauma.[173] The sole limitation on the exhaustion requirement is whether a prison's internal grievance procedures were available to the prisoner during the relevant time period; a prisoner's suit cannot be dismissed for nonexhaustion if there were no procedures available for her to exhaust.[174] At present, it is unclear whether a prisoner's failure to exhaust is excusable when her mental illness or psychological trauma makes otherwise available grievance procedures *unavailable to her*. Analyzing the question, one federal court recently concluded that practical unavailability due to mental illness cannot excuse a failure to exhaust because the Supreme Court has "rejected the inward-looking inquiry concerned with is perceived to be available by a prisoner."[175]

The PLRA also prohibits prisoners from recovering compensatory damages for mental or emotional injuries in the absence of a physical injury.[176] This prohibition makes it exceedingly difficult for prisoners to recover for types of abuses that are not typically accompanied by physical harm (such as infringements of First Amendment rights). It also gives federal courts cover

172 *See, e.g.*, Cleave v. O'Brien, No. 1:14-cv-0349, 2015 WL 4041533, at *1, *3 (S.D. Ind. July 1, 2015) (granting summary judgment to defendants when prisoner failed to properly exhaust, in case where prisoner's leg was amputated); Richardson v. Stock, No. 13-cv-00606, 2015 WL 160949, at *7–8 (D. Colo. Jan. 13, 2015) (dismissing claim against doctor for nonexhaustion because prisoner made technical error in grievance process; doctor's interference with diabetic care led to amputation of prisoner's leg below the knee); *id.* at *7 n.6 ("It is not the Court's position . . . to impose its desire for administrative bodies to substantively address issues as opposed to their relying on technical formalities.").

173 *See Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1147–48 (2008) [hereinafter *The Law of Mental Illness*] ("Many grievances arise during acute psychotic breaks or other periods of decompensation, when inmates may be temporarily incapable of complying with grievance procedures. Additionally, drawn-out grievance procedures may produce months-long gaps in care before an inmate can seek an injunction to compel treatment." (footnote omitted)). Relatedly, some grievance procedures require prisoners who suffer rape or other forms of assault to come forward and make an official report within days—an unrealistic and potentially damaging expectation. *See* HUMAN RIGHTS WATCH, *supra* note 165, at 21–22 ("[A] person goes into a very dysfunctional state right after the trauma [of a sexual assault]. What we generally find is a dysregulation of emotions and cognition that lasts for many days. . . . And in that state a person is unable to carry out an organized task. And that happens to be the same timeline as the deadline for the internal grievances." (quoting Telephone Interview Terry Kupers, Psychiatrist (Nov. 14, 2008)) (internal quotation marks omitted)); Hannah Brenner et al., *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881, 902–03 (2017).

174 Ross v. Blake, 136 S. Ct. 1850, 1858 (2016) ("An inmate . . . must exhaust available remedies, but need not exhaust unavailable ones.").

175 Galberth v. Washington, No. 14 Civ. 691, 2017 WL 3278921, at *10 (S.D.N.Y. July 31, 2017).

176 42 U.S.C. § 1997e(e) (2012).

for dismissing cases in which the physical injury alleged by the prisoner is not—in the court's view—serious enough to justify recovery.[177]

Today, the federal circuits are split on whether injuries to prisoners' First Amendment interests are compensable under the PLRA. Six circuits have concluded that First Amendment injuries are not "mental or emotional injuries" within the meaning of the PLRA, and therefore, prisoners bringing First Amendment claims can recover compensatory damages absent a showing of physical injury.[178] In contrast, five circuits have concluded that the PLRA's physical-injury requirement covers prisoners' First Amendment claims, essentially equating First Amendment violations with mental or emotional injuries.[179] The law of the latter circuits denies prisoners any right to recover compensatory damages when prison officials deprive them of liberties widely considered fundamental—such as the ability to worship in accordance with one's faith. This denial comes about not because First Amendment violations are not serious, but because they do not produce a physical injury.

Even cases that allege a physical harm may be barred by the physical-injury requirement when the court views the harm as too minor to justify recovery. There is general agreement among federal courts that to satisfy the PLRA, a physical injury "must be more than de minimis, but need not be significant."[180] Yet there is little agreement on what it takes to pass the de minimis bar.[181] Courts have dismissed cases for failing to meet the physical-injury requirement even when they involved physical hardships that would probably strike most people as greater than de minimis. For instance, in *Watkins v. Trinity Service Group*, a prisoner alleged that he "experienced diarrhea, vomiting, cramps, nausea, and head aches from eating spoiled [maggot-ridden] food"; the court concluded that the prisoner had suffered only de minimis physical injuries because his symptoms did not last long and because the same symptoms "would not require a free world person to visit an emergency room, have a doctor attend to, give an opinion on, diagnosis [sic], or

177 HUMAN RIGHTS WATCH, *supra* note 165, at 24 (noting that "many courts have ruled that injuries they deem minor do not qualify" as physical injuries under the PLRA).

178 *See, e.g.*, Wilcox v. Brown, 877 F.3d 161, 169–70 (4th Cir. 2017); Aref v. Lynch, 833 F.3d 242, 265 (D.C. Cir. 2016); King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015); Toliver v. City of New York, 530 F. App'x 90, 93 n.2 (2d Cir. 2013); Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

179 *See, e.g.*, Al-Amin v. Smith, 637 F.3d 1192, 1196 (11th Cir. 2011); Geiger v. Jowers, 404 F.3d 371, 374–75 (5th Cir. 2005) (per curiam); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Searles v. Van Bebber, 251 F.3d 869, 875–76 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 250–51 (3d Cir. 2000).

180 Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (emphasis omitted); *see also* JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 625 (4th ed. 2010).

181 *See* BOSTON & MANVILLE, *supra* note 180, at 625–30 (noting disagreement among courts as to what makes a prisoner's physical injury more than de minimis, and exhaustively cataloging illustrative cases); Hill, *supra* note 135, at 201 ("[C]ourts frequently differ on what constitutes de minimis physical injury.").

prescribe medical treatment for the injury."[182] In *Trevino v. Johnson*, a prisoner sued officers for spraying his cell with gas, hitting him twice in the face, and pulling back on his fingers; the court concluded that the prisoner had alleged de minimis physical injuries because his only "visible" injury was an abrasion on the head.[183] In *Alexander v. Tippah County*, two prisoners sued after being forced to remain in a cell that had no toilet and a clogged floor drain, which caused the cell to become flooded with urine, feces, and—after the stench made one of the prisoners nauseous—vomit. The Fifth Circuit held that the prisoners had failed to satisfy the PLRA's physical-injury requirement.[184] And in *Hancock v. Payne*, a district court held that a group of prisoners failed to meet the PLRA's physical-injury requirement when they "[did] not make any claim of physical injury beyond the bare allegation of sexual assault" by a prison guard.[185]

Not all courts set the de minimis bar so high.[186] But in many cases, the PLRA's physical-injury requirement has "obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses."[187]

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182 Watkins v. Trinity Serv. Grp. Inc., No. 8:05-cv-1142-T-24., 2006 WL 3408176, at *4 (M.D. Fla. Nov. 27, 2006); *see also* Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997) ("Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of [the PLRA physical-injury requirement].").

183 Trevino v. Johnson, No. 905CV171, 2005 WL 3360252, at *5 (E.D. Tex. Dec. 8, 2005).

184 Alexander v. Tippah County, 351 F.3d 626, 631 (5th Cir. 2003) (per curiam).

185 Hancock v. Payne, No. 103CV671, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006). In this case, the court did not view sexual assault as a de minimis physical injury so much as it concluded that the prisoners, despite alleging that they had been sexually assaulted, failed to allege a physical injury *at all*. *See* Schlanger & Shay, *supra* note 165, at 144 (discussing *Hancock* and observing that "in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury"). Notably, the relevant section of the PLRA, 42 U.S.C. § 1997e(e), was revised in 2013 to permit an award of compensatory damages when a prisoner alleges *either* a physical injury *or* "the commission of a sexual act." Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1101(a), 127 Stat. 54, 134 (codified as amended at 42 U.S.C. 1997e(e)). The fact that this revision was necessary speaks volumes about the difficulty of meeting the physical-injury requirement.

186 *See* BOSTON & MANVILLE, *supra* note 180, at 626 ("A number of courts have dismissed identifiable traumatic injuries as *de minimis*. Others, however, have held that relatively superficial traumatic injuries are actionable under [the PLRA]." (footnote omitted)).

187 Schlanger & Shay, *supra* note 165, at 141. The PLRA may prevent prisoners from recovering compensatory damages for grave psychological injuries inflicted on them by prolonged solitary confinement or malicious correctional officers. *See, e.g.*, Harden-Bey v. Rutter, 524 F.3d 789, 794–95 (6th Cir. 2008) (holding prisoner's mental and emotional injuries, inflicted by years-long, open-ended solitary confinement, were not compensable under PLRA); *see also* Darvie v. Countryman, No. 9:08-CV-0715, 2008 WL 2725071, at *7 (N.D.N.Y. July 10, 2008) (noting physical-injury requirement not satisfied by "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, [or] weight loss," which are "essentially *emotional* in nature"); *The Law of Mental Illness*, *supra* note 173, at 1151 (noting prisoners' claims involving psychological injuries "have

B. Situational Barriers

Deferential legal standards and statutory requirements make prison-conditions cases hard to win, but they are only part of the story. Prisoners face other, situational barriers to successful litigation—that is, barriers inherent in the reality of the prison environment. These include a scarcity of counsel, low rates of literacy and educational attainment, limited access to evidence and witnesses, and a paucity of legal materials. Meanwhile, the law governing prisoners' rights is complex, and even in the face of their practical disadvantages, incarcerated litigants must navigate a treacherous doctrinal landscape. Pitfalls abound. Successful litigation will require a prisoner to tackle decades of precedent on standing, capacity to be sued, prudential limits on federal court jurisdiction, summary judgment procedure, statutory interpretation, and supervisory liability—to name just a few of the theories that tend to converge, and may prove dispositive, in a prison-conditions suit. A handful of sophisticated "jailhouse lawyers" can get the job done. But for experienced attorneys, litigating against most prisoners is like shooting fish in a barrel. In short, there is a mismatch between the disadvantages faced by incarcerated litigants and the complex and technical legal issues they must navigate, and this mismatch contributes significantly to the insulating effects of practical immunity.

1. Access to Counsel

Prison-conditions cases are overwhelmingly and disproportionately litigated pro se.[188] Plaintiffs represented themselves in 94.9% of prisoners' civil rights cases litigated in federal court in 2012 (compared to 26.1% for the entire pool of federal cases).[189] The prisoner civil rights category of federal litigation has a higher pro se rate than any other type of case.[190] The next-highest pro se rate (88.8%) is for a category that consists of habeas cases and

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been made even harder by courts that disregard the fact that severe mental distress has a physical substrate and deny that at least some kinds of mental suffering constitute physical injuries in and of themselves" (footnote omitted)). The ramifications of this rule are memorably illustrated by the following hypothetical, quoted by a federal court in Maryland:

> [I]magine a sadistic prison guard who tortures inmates by carrying out fake executions—holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.

Siggers-El v. Barlow, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006) (alteration in original) (quoting Plaintiff's Brief at 14, *Siggers-El*, 433 F. Supp. 2d 811).

188 Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 166–67, 167 tbl.6 (2015).

189 *Id.* at 167 tbl.6.

190 *See id.*

other "quasi-criminal" cases.[191] From there, it drops to 35.4% (for immigration cases).[192]

There are multiple reasons for prisoners' difficulty in finding counsel. First, attorneys have few financial incentives to take prisoners as clients. Most prisoners cannot afford to pay counsel except through contingent fees, and the low damages value of prison conditions cases make the cases unattractive to lawyers who work on contingent fees.[193] Many of the legal doctrines described above, combined with qualified immunity, limit the chances of success on the merits and recovery of fees, making it less likely that a lawyer will take a given case.[194] And the PLRA imposes drastic limits on attorneys' fees that exacerbate the access to counsel problem.[195]

Second, attorneys are hard to find and harder to meet with. The United States incarcerates more people than any other country on Earth—2.2 million men and women.[196] In comparison, there are very few public interest lawyers who litigate prison cases. Compounding the problem, prisons are generally located far from the urban centers where attorneys are concentrated, which makes it more difficult for attorneys to meet both clients and prospective clients.[197]

Third, prisoners cannot count on the government for assistance with getting a lawyer. Courts rarely appoint counsel,[198] and organizations that receive federal funding to provide legal aid are prohibited from litigating prison-conditions cases.[199]

2. Access to Law and Evidence

Although prisoners have the right to sue prison officials for violations of the Constitution,[200] they have no corresponding right to the resources necessary to litigate effectively.[201] As a result, prisoners' constitutional right to file lawsuits does relatively little to help them protect their own civil liberties. This is to be expected: bringing a successful lawsuit is challenging for a pro se

191 *Id.*

192 *Id.*

193 *See* Shapiro, *supra* note 9, at 1016 (noting the low average damages awarded in prison cases litigated to judgment and stating that "[f]or private attorneys who earn a living by winning cases and receiving both contingent fees and statutory fee awards in constitutional cases, the average prison conditions case is economically unattractive").

194 *Id.* at 1016–18.

195 42 U.S.C. § 1997e(d)(2), (d)(3) (2012).

196 KAEBLE & GLAZE, *supra* note 22, at 1.

197 *See, e.g.*, John M. Eason, *Prison Building Will Continue Booming in Rural America*, SALON (Mar. 15, 2017), https://www.salon.com/2017/03/15/why-prison-building-will-continue-booming-in-rural-america_partner/ (highlighting that between 1970 and 2000, the number of prisons in the United States increased by more than 1000—and "roughly 70 percent" of prisons constructed during that time were in rural areas).

198 Shapiro, *supra* note 9, at 1016.

199 *Id.* at 1015.

200 Bounds v. Smith, 430 U.S. 817, 821 (1977).

201 Lewis v. Casey, 518 U.S. 343, 354 (1996).

litigant under any circumstances, and it is all the more challenging for someone who, despite a "right" to file suit, is confined to a cell with scant ability to conduct research or gather evidence.

In *Bounds v. Smith*, the Supreme Court held that "prisoners have a constitutional right of access to the courts."[202] At first, this right was construed broadly.[203] Prisons were required to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[204] But in *Lewis v. Casey*, decided nearly two decades after *Bounds*, the Court narrowed its vision. *Lewis* holds that the right of access to the courts requires prisons to provide no more than the tools necessary for prisoners to (a) attack their sentences or (b) "present claimed violations of fundamental constitutional rights to the courts."[205] Thus, prisoners seeking redress for constitutional violations have no right to legal assistance beyond that necessary to file a complaint.[206] Prisons may provide said assistance via a law library or some other means.[207] Yet they have no constitutional obligation to enable prisoners to "discover grievances" or "litigate effectively once in court."[208] If a prisoner has some means of filing a complaint,[209] then she has "meaningful access to the courts," and the prison has discharged its constitutional duty[210]—never mind that a successful lawsuit, even one involving a flagrant constitutional violation, may require hundreds of pages of motions and briefs

202 *Bounds*, 430 U.S. at 821.

203 *Id.*

204 *Id.* at 828.

205 *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825); *see also* Barbour v. Haley, 410 F. Supp. 2d 1120, 1129 (M.D. Ala. 2006) ("*Lewis* explained that the right of access established in *Bounds* is not nearly so generous as the *Bounds* Court seemed to imply."), *aff'd*, 471 F.3d 1222 (11th Cir. 2006).

206 *See Lewis*, 518 U.S. at 351; *see also* Payne v. Neb. Dep't of Corr. Servs., 848 N.W.2d 597, 603 (Neb. 2014) ("[T]he state is required only to allow the prisoner the opportunity to bring to court a grievance."); Hill, *supra* note 135, at 197 ("After *Casey*, the right of meaningful access is simply a right to file the initial papers with the court . . . ."); John Matosky, Note, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 298 (1998) ("[S]tates need not assist, in any way, either an inmate's ability to discover claims or his ability to litigate effectively beyond the pleading stage.").

207 *Lewis*, 518 U.S. at 351–53. The *Lewis* Court encouraged experimentation by prisoner administrators in finding modes of legal assistance best suited to prisoner populations, *id.*, which may be viewed as its own form of judicial deference. *See* Matosky, *supra* note 206, at 298 ("The right of access is not a *per se* right to legal libraries or assistance. It is left largely to prison officials to determine which method of compliance will best suit the access needs of their prisoners.").

208 *Lewis*, 518 U.S. at 354 (emphasis omitted).

209 *Id.* at 352 (such as "some minimal access to legal advice and a system of court-provided forms").

210 *Id.* at 351.

in response to complex legal arguments brought by experienced attorneys.[211]

Vindicating even this modest right of access to the courts is an uphill battle, because cutting a prisoner off from legal assistance is not a constitutional violation in and of itself.[212] To make out a claim for denial of access to the courts, a prisoner must (a) specify an independent, underlying cause of action that could have been successful if she had had sufficient access to legal assistance, and (b) show that by denying her access to legal assistance, the prison prejudiced her ability to pursue her underlying cause of action.[213] Hence, a prisoner cannot state a claim merely by showing that a prison's law library or other form of legal assistance is grossly inadequate, or that her efforts to access said resources were obstructed by prison officials.[214] She

211 *See, e.g.*, Shapiro, *supra* note 9, at 1005 (describing a prisoner's First Amendment suit in which "altering an indefensible policy required full-blown litigation and major expenditures: full discovery, expert witnesses, the intervention of the United States Department of Justice, and hundreds of thousands of dollars of attorney time"); Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 343, 349 (2016) ("The self-taught jailhouse lawyer toiling in an inadequate law library in an extremely dangerous environment is somehow credited with the ability to master and comply with the abstruse mazes of post-conviction procedures that should, but often do not, open courthouse doors."); Matosky, *supra* note 206, at 307 ("Prison *pro se* litigants constantly face opposition from highly trained and resourced state attorneys.").

212 *Lewis*, 518 U.S. at 351 ("Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, [a prisoner] cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." The prisoner "must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.").

213 In *Christopher v. Harbury*, 536 U.S. 403, 415 (2002), the Supreme Court stated that right of access to the courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." That being so, "the underlying cause of action . . . is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation." *Id.* Although *Harbury* did not involve a suit brought by a prisoner, it did involve a claim that government officials impeded family members' ability to bring litigation on behalf of a prisoner, and it interpreted *Lewis*. *Id.* at 414–15. Its holdings, therefore, "would seem to be applicable to prison cases governed by *Lewis*." BOSTON & MANVILLE, *supra* note 180, at 231 n.427.

214 *Lewis*, 518 U.S. at 351; *see also* Gray v. Zatecky, 865 F.3d 909, 913 (7th Cir. 2017) (holding no reversible error when district court refused to toll one-year statute of limitations on prisoner's habeas petition, even though the state waited nearly four months to turn over vital documents and the prison was repeatedly placed on lockdown for months at a time, during which the plaintiff had no access to the law library); Johnson v. Barczak, 338 F.3d 771, 773 (7th Cir. 2003) (per curiam) (affirming dismissal of prisoner's access-to-courts claim when prisoner alleged that prison officials had caused his appeals process to be delayed by over a year, because "a delay becomes an injury only if it results in 'actual substantial prejudice to specific litigation'" (quoting Gentry v. Duckworth, 65 F.3d 555, 559 (7th Cir. 1995))); Ali v. District of Columbia, 278 F.3d 1, 8 (D.C. Cir. 2002) (holding prisoner had no standing to sue for denial of access to the courts when he did not allege that he "actually lost any otherwise valid legal claim" or "that he [was] unable to raise such a

must "go one step further" and specify in her complaint an "arguably actionable" claim that was hampered in some concrete and substantial way.[215]

Today's anemic version of the right of access to the courts leaves even the most legally sophisticated and well-informed prisoners at a severe evidentiary disadvantage.[216] Prisoners overwhelmingly lack the money and freedom of movement necessary to gather evidence and place it in the record.[217] Consequently, prisoners with meritorious claims—claims for which concrete evidence likely exists—may well be forced to navigate both summary judgment and trial with nothing but their own testimony to counter the prison's version of events.[218]

The absence of any constitutional right to robust legal assistance in prison is especially significant given the prevalence of illiteracy and mental illness in the prison population. According to the U.S. Department of Educa-

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claim in any other proceeding"; prisoner's allegation that his "'open case' in the District of Columbia Superior Court" had been "set back" by prison officials was not enough to state a claim (some internal quotation marks omitted)); Akins v. United States, 204 F.3d 1086, 1090 (11th Cir. 2000) (stating that prisoner's right of access to the courts was not violated when his prison was on lockdown for several months, during which time he was prevented from visiting the law library and the statute of limitations on his postconviction motion expired; court reasoned that because the prisoner could have filed his motion *before* the months-long lockdown, his inability to access the law library did not cause an "actual injury"); Jackson v. Wiley, 352 F. Supp. 2d 666, 679 (E.D. Va. 2004) ("A prisoner has not been denied his right of access to the courts simply because an institution's library is inadequate or because a prisoner's access to that library has been restricted in some way.").

215 *Lewis*, 518 U.S. at 351.

216 Billman v. Ind. Dep't of Corr., 56 F.3d 785, 790 (7th Cir. 1995) (recognizing that "it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so," even when the prisoner knows the law well, "because he is not able to investigate before filing suit").

217 *See* Schlanger, *supra* note 141, at 1611 ("Inmates are unable to conduct most kinds of informal investigations; they cannot interview most witnesses, for example. And they cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners. Even in a very strong case, inmates have no cash and little access to credit, so they cannot fund litigation expenses (for example, deposition costs or expert fees) on the expectation of an eventual judgment or settlement." (footnotes omitted)); *see also* Strutin, *supra* note 211, at 355 ("For those niceties of practice that lawyers take for granted, inmates must contend with prison rules, inadequate libraries, and unresponsive or uncooperative information sources in the outside world. Thus, meeting a deadline, obtaining a witness affidavit, consulting with an expert, or acquiring a hard to find piece of research is wellnigh impossible.").

218 *See* Schlanger, *supra* note 141, at 1615 ("[B]ecause inmates are unable to run investigations of their cases in order to get documentary or testimonial support for their claims, oftentimes at trial the best an inmate can do is turn the case into a swearing contest."); *see also* Shapiro, *supra* note 9, at 1010–11 (describing the tremendous difficulty of obtaining evidence in a First Amendment suit even when plaintiff prisoners were represented by the ACLU). Additionally, the few pro se prisoners who claw their way to the damages phase of a trial are confronted with a paradox: they "have the nearly impossible task of simultaneously conducting effective litigation and trying to demonstrate to the court or jury just how devastating their injury was." Schlanger, *supra* note 141, at 1612.

tion, many prisoners are unable to "cycle through or integrate two or more pieces of information based on criteria; compare and contrast or reason about information requested in the question; or navigate within digital texts to access and identify information from various parts of a document."[219] It is difficult to imagine such a prisoner bringing—much less winning—a civil rights suit in federal court without substantial legal assistance, no matter how egregiously the prison violates the Constitution.

Estimates vary on the prevalence of mental illness among prisoners, but there is widespread agreement that the rate is disproportionately high.[220] Although there are many varieties of mental illness, some of which may impede pro se litigants more than others, it is reasonable to assume that mental illness makes it harder for a prisoner to successfully file and pursue a meritorious claim. This is deeply troubling in light of research showing that prisoners who report symptoms of mental illness are more likely than other prisoners to report being sexually abused while incarcerated.[221]

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219 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS 6, B-3 (2016), https://nces.ed.gov/pubs2016/2016040.pdf (reporting that twenty-nine percent of prisoners assessed in national survey lacked key reading comprehension skills); *see also* Matosky, *supra* note 206, at 301–02 (discussing a 1994 study of literacy among the prison population).

220 *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf (reporting that in 2005, "56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates" had "a mental health problem"); Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVS. 862, 866 (2014) (concluding, from meta-analysis of scholarly literature on mental illness in prison, that despite the "wide variation in prevalence [of mental illness] found among even the more robust studies," the "current and lifetime prevalence of numerous mental illnesses is higher among incarcerated populations than in nonincarcerated populations, sometimes by large margins"); Dahlia Lithwick, *Prisons Have Become America's New Asylums*, SLATE (Jan. 5, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/prisons_have_become_warehouses_for_the_mentally_ill.html. Briefly surveying research on mental illness among prisoners, Edward P. Mulvey and Carol A. Schubert, of the University of Pittsburgh School of Medicine, have written that:

> Once mentally ill people are arrested, the dynamics of criminal justice processing contribute to their high prevalence rates in jails and prisons. People with serious mental illness, compared with others charged with similar offenses, stay longer in jail. They are less likely to be placed on probation or other forms of community-based supervision. Mentally ill prison inmates are more likely to be involved in assaults while there and more likely to be assault victims. Perhaps not surprisingly, mentally ill inmates are less likely to be granted parole at an early date and are more likely to serve out their maximum sentences. They are also more likely once released to violate parole conditions and be returned to prison as a result.

Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231, 236–37 (2017) (citations omitted).

221 ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, at 7 (2013), https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf ("[I]nmates with serious psychological distress reported higher

3. Traps for the Unwary

Prisoners' rights litigation is a complicated and technical area of law. Effective practice requires a grasp of constitutional law under the First, Fourth, Fifth, and Eighth Amendments; the law of immunities; civil procedure; standing; supervisory liability; administrative exhaustion; various doctrines unique to § 1983 litigation; prudential limitations on federal court procedure; and a variety of federal statutes, including the PLRA, the Americans with Disabilities Act, and the Religious Land Use and Institutionalized Persons Act.

The complexity of the doctrine creates a minefield for prisoners litigating without counsel and enhances the practical immunity of prison officials. A few examples of doctrines that trip up pro se litigants include:

Sovereign Immunity. Prisoners quite naturally name as defendants entities such as the prison in which they are incarcerated, the department of corrections of their state, or the state itself. A case naming only such parties, however, will be dismissed on the basis of sovereign immunity.[222]

Capacity to Be Sued. Detainees in county jails often name the jail or the sheriff's department running the jail as defendants. While these municipal entities do not enjoy sovereign immunity, suits naming such parties have nonetheless been dismissed where state law deems jails and sheriff's departments to be components of county governments—not separate defendants with the capacity to be sued.[223] Even if a detainee is savvy enough to name a proper county defendant—the county itself, or the sheriff in her official capacity, for example—the detainee may not know that policy and practice allegations are necessary to state a claim under *Monell*.[224]

Supervisory Liability. Prisoners might assume that a warden is legally responsible for what happens in her prison, or that a lieutenant is liable for what happens in her division. Not so. Section 1983 suits against supervisors

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rates of inmate-on-inmate sexual victimization than inmates without mental health problems."); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 158–74 (2013); Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates with and Without Mental Disorders*, 58 PSYCHIATRIC SERVS. 1087, 1093 (2007) (noting that persons with "mental disorder[s]" are "more likely than their counterparts without mental disorders to experience sexual victimization inside prison").

222 *See, e.g.*, Parks v. Reans, 510 F. App'x 414, 415 (6th Cir. 2013) (per curiam) (affirming dismissal of federal prisoner's *Bivens* action on basis of sovereign immunity); Fields v. Ohio Dep't of Rehab. & Corr., No. 2:15-cv-1271, 2015 WL 6755310, at *4 (S.D. Ohio Nov. 4, 2015) (dismissing state prisoner's claim against Ohio Department of Rehabilitation and Correction on basis of sovereign immunity).

223 FED. R. CIV. P. 17(b) (capacity to be sued is determined by state law); *see, e.g.*, Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992) (affirming dismissal of pro se plaintiff's claim against sheriff's department because sheriff's department lacked capacity to be sued under state law, noting that "[s]heriff's departments and police departments are not usually considered legal entities subject to suit").

224 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

require a showing of personal involvement by the supervisor and cannot be premised on a theory of respondeat superior.[225]

Diffusion of Responsibility. In prisons and jails, responsibility for a calamity may be diffused among many actors. For example, a group of doctors, nurses, and officers may each commit mistakes in noticing and treating symptoms that result in a severe and preventable medical injury. It is logical enough for a prisoner to think that these officials should be held collectively liable because they are collectively responsible for the wrong. But if none of the officials' acts or omissions individually constitute deliberate indifference, all of them will escape liability.[226]

Administrative Exhaustion. Prisoners may not realize that insignificant mistakes in exhausting administrative remedies can doom their civil rights suits. Courts have dismissed federal cases based on administrative exhaustion mistakes such as failing to attach copies of documents to a grievance or mailing multiple grievance appeals in a single envelope.[227]

Summary Judgment Evidence. It is probably not obvious to most people that a single sentence can make the difference between winning and losing on summary judgment—but it can. When a prisoner signs and dates her complaint or statement and writes "I declare under penalty of perjury that the foregoing is true and correct," the complaint or statement is considered "verified," and the prisoner can use it as evidence to establish a dispute as to material fact. (Provided that the facts in the complaint or statement are based on the prisoner's personal knowledge.) In contrast, a complaint or statement containing exactly the same content but lacking the magic quoted words generally will not suffice to create a dispute as to material fact.[228]

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225 Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009); *see also* Duffield v. Jackson, 545 F.3d 1234, 1239 (10th Cir. 2008) ("[S]upervisor status is not sufficient to create § 1983 liability.").

226 *See, e.g.*, Dang *ex rel.* Dang v. Sherriff, Seminole Cty., 871 F.3d 1272 (11th Cir. 2017); Shields v. Ill. Dep't of Corr., 746 F.3d 782 (7th Cir. 2014); Mikell v. Folino, No. 17-1049, 2018 WL 834200, at *1 (3d Cir. Feb. 13, 2018) (per curiam).

227 *See supra* notes 174–76 and accompanying text.

228 28 U.S.C. § 1746 (2012) (permitting an unsworn declaration or statement to stand in for a sworn affidavit when the person making the statement signs it and certifies it as true under penalty of perjury); FED. R. CIV. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials . . . ."); *see* Hart v. Hairston, 343 F.3d 762, 765 (5th Cir. 2003) (per curiam) ("On summary judgment, factual allegations set forth in a verified complaint may be treated the same as when they are contained in an affidavit."); Munz v. Michael, 28 F.3d 795, 798–99 (8th Cir. 1994) ("For summary judgment purposes, we must believe the allegations in [plaintiff prisoner's] verified complaint as they are evidence to the same extent as statements in a sworn affidavit."); Lelieve v. Oroso, 846 F. Supp. 2d 1294, 1299 n.2 (S.D. Fla. 2012) (ruling that facts alleged in prisoner's verified original complaint were evidence for purposes of summary judgment, but facts alleged in prisoner's unverified amended complaint were not).

Heck *Bar*. Prisoners can shorten their period of incarceration by earning "good time" for their behavior, but they can also lose good time (and incur other punishments) for disciplinary violations. Prisoners may think they have a federal claim for disciplinary sanctions imposed without due process, but *Heck v. Humphrey* and its progeny prevent prisoners from challenging in federal court a state disciplinary punishment that increases the duration of confinement.[229]

Mootness. Corrections systems often transfer prisoners from one prison to the next. A prisoner who suffers from lack of medical treatment or denial of religious access at one prison may assume that a claim for injunctive relief remains live after transfer to another prison, especially if similar wrongs occur at the new facility. But when a prisoner is transferred, a court is likely to view her claims for injunctive relief as moot.[230]

4. Retaliation

For prisoners, suing correctional officials is not only difficult, but dangerous.[231] Guards and administrators wield extraordinary power over prisoners' lives; when prisoners try to vindicate their rights, they are vulnerable to retaliatory punishment.[232] A prisoner who files a grievance or a lawsuit may be beaten, raped, placed in solitary confinement, denied medical care, transferred to a new facility far from loved ones, verbally abused, or labeled a snitch.[233] Prisoners know these risks, and know that they are not remote:

229 Edwards v. Balisok, 520 U.S. 641 (1997); Heck v. Humphrey, 512 U.S. 477 (1994).

230 *See, e.g.*, Rendelman v. Rouse, 569 F.3d 182, 186 (4th Cir. 2009) ("[A]s a general rule, a prisoner's transfer or release from a particular prison moots his claims for injunctive and declaratory relief with respect to his incarceration there."); Salahuddin v. Goord, 467 F.3d 263, 272 (2d Cir. 2006) ("[A]n inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility."). A prisoner may, however, overcome a mootness defense if she challenges a policy implemented across an entire prison *system*. *See, e.g.*, Carter v. Fleming, 879 F.3d 132, 138–39 (4th Cir. 2018) (holding that prisoner's transfer did not moot claim for injunctive relief involving systemwide policy that regulated participation in religious meal program); Aref v. Lynch, 833 F.3d 242, 251 (D.C. Cir. 2016) (applying voluntary cessation exception to defense of mootness and also noting that transfer would not moot a prisoner's claim for injunctive relief involving a procedure used by the Bureau of Prisons to assign inmates to "communications management units").

231 Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 283 (2010) ("Not only do inmates face procedural difficulties in complying with prison administrative grievance policies, but prisoners may also fear retaliation from prison officials for filing grievances.").

232 John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 n.7 (2001) (collecting cases and stating that "[o]ne of the dirty secrets of American corrections is the persistence of covert threats and retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory").

233 *See, e.g.*, Ziemba v. Wezner, 366 F.3d 161, 162 (2d Cir. 2004) (per curiam) (plaintiff prisoner filed "emergency grievance requesting that prison officials protect him from his cell mate," prison officials "took no measures to protect him," and his cellmate stabbed

retaliation is part and parcel of prison life.[234] Naturally, then, some prisoners choose not to file grievances regarding constitutional violations, because doing so will make them into targets.[235] If they later file suit, their case will be dismissed for failure to exhaust administrative remedies, unless they can convince the court that the threat of retaliation rendered those remedies unavailable.[236] Prisoners "are at the mercy of their keepers,"[237] and they know that if they try to assert their constitutional rights, they can be made to suffer.[238]

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him; shortly thereafter, plaintiff was transferred to a "stripped segregation cell," where officers threatened him and denied him medical care; he was then brought to an empty shower room, where officers beat him, "intimidated him with police dogs," and pepper sprayed him in the eyes and mouth before returning him to segregation, where he was placed in four-point restraints); Atkinson v. Taylor, 316 F.3d 257, 260 (3d Cir. 2003) (affirming denial of summary judgment to prison officials when prisoner alleged that in retaliation for filing lawsuit, prison officials placed him in solitary confinement, withheld his legal documents, denied him his one hour of recreation, took notes about his case from his cell and read them over the intercom, and prevented him from making telephone calls to his attorney); Toolasprashad v. Bureau of Prisons, 286 F.3d 576, 581 (D.C. Cir. 2002) (reversing dismissal of retaliation claim when prisoner alleged that to punish him for filing grievances, prison officials transferred him to a facility far from his seriously ill parents and had him reclassified as a "special offender" who was ineligible for higher-paying prison jobs); Penrod v. Zavaras, 94 F.3d 1399, 1404 (10th Cir. 1996) (per curiam) ("[Prisoner] specifically alleged that the defendants forced him to choose between hygiene items and pursuing grievances and legal actions, seized his legal materials and transferred him into administrative segregation in retaliation for bringing suit against prison officials, and threatened him with further retaliation if he did not stop complaining."); *see also* Marissa C.M. Doran, Note, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1028 (2013) (collecting cases and stating that "[r]etaliation against prisoners can take many forms: officials might send prisoners to solitary confinement, deny essential services, construct false weapons charges, or subject prisoners to beatings, verbal abuse, or rape, all as punishment for attempting to communicate with the world outside the prison").

234 Robertson, *supra* note 133, at 613 ("Correctional officers who retaliate against inmates cannot be regarded as rogue actors.").

235 Woodford v. Ngo, 548 U.S. 81, 117–19 (2006) (Stevens, J., dissenting) (repeatedly observing that prisoners with meritorious claims might well choose not to file grievances out of fear of retaliation); Robertson, *supra* note 133, at 644 ("Grievance-motivated retaliation deters inmates from filing grievances and itself generates litigation . . . ."); *id.* ("[R]etaliation against [inmates who file grievances] acquires a functional quality, to wit, the prospect of deterring the target from filing suit and deterring other inmates from filing grievances.").

236 Ross v. Blake, 136 S. Ct. 1850, 1860 (2016) (noting that failure to exhaust may be excused when prison officials "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation"); *see also id.* at 1860 n.3 (collecting appellate cases to the same effect).

237 Inmates of Attica Corr. Facility v. Rockefeller, 453 F.2d 12, 23 (2d Cir. 1971).

238 "[T]he very architecture of incarceration gives prison officials, in a practical sense, enormous power over the incarcerated. . . . [P]rison life render[s] prisoners deeply vulnerable to those officers whose actions, whether from malice, caprice, or simple indifference, transgress the legal bounds of their authority." Dolovich, *supra* note 14, at 904. Given

III. UNQUALIFIED IMPUNITY

In combination, practical and qualified immunity provide prison and jail officials with an ironclad defense in nearly every case. Prison officials' de jure immunity from suit may be qualified, but their de facto immunity borders on absolute. For individual officers, especially, the threat of direct pecuniary loss as a result of prisoner litigation is so remote that it cannot rationally lead to behavior modification. There are two main reasons for this. First, prisoners almost never win money judgments against individual officers, and when they do, the judgments are not large. Second, even when prisoners do win money judgments against individual officers, the officers are likely to be indemnified, so that they never pay anything out of their own pockets. Taken together, these factors eviscerate suits for damages as a meaningful check on individual officers' behavior.

As Margo Schlanger has demonstrated, victories in prison cases are rare, and when prisoners do win, the judgments awarded to them are relatively minor. In fiscal year 2012, prisoners won their cases only fifty-seven times, and the total damages for all prison conditions cases litigated to judgment in fiscal year 2012 barely broke $1 million.[239] The average award was $20,815 and the median was $4185.[240] By way of comparison, consider police misconduct cases. Between 2004 and 2014, the Chicago Police Department *alone* averaged $66 million in *yearly* payouts.[241] The comparison is far from perfect, because the nationwide prison and jail total includes only verdicts, whereas the Chicago Police Department total includes both verdicts and settlements. Nevertheless, the immense disparity is suggestive of something that experienced attorneys (those who represent prisoners and those who represent prisons) know well: "when prisoners do litigate all the way to victory, they tend to win pretty small."[242]

In the unusual instance of a prisoner wining a suit for damages, the chance of a correctional officer paying out of pocket approaches zero. Joanna Schwartz's meticulous empirical work has exposed the "personal liability" of law enforcement officers as a legal fiction: law enforcement agencies indemnify their officers against monetary judgments and settlements, and it is exceedingly rare for officers to pay a damages award out of their own pocket.[243] Although Schwartz's research focuses on police officers, not cor-

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these circumstances, a prisoner's attempt to assert her rights "may only provoke renegade officers to even greater aggression." *Id.*

239 Schlanger, *supra* note 188, at 168 tbl.7.

240 *Id.*

241 *How Chicago Racked up a $662 Million Police Misconduct Bill*, CRAIN'S CHI. BUS. (Mar. 20, 2016), http://www.chicagobusiness.com/article/20160320/NEWS07/160319758/how-chicago-racked-up-a-662-million-police-misconduct-bill.

242 Schlanger, *supra* note 188, at 168.

243 *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–15 (2014).

rectional officers as such, there is reason to believe that personal liability is just as mythical in prison cases as it is in police cases.[244]

Admittedly, indemnification alone does not erase all individual deterrents to abuse. For instance, a prison guard might be aware that a large civil judgment can negatively affect her credit, even if she is indemnified.[245] She might be concerned that an adverse verdict or settlement will lead to professional discipline, loss of a promotion, or termination.[246] Or her behavior might be reined in by a strict, conscientious superior who wants to avoid passing liability onto taxpayers.[247]

But when indemnification is layered atop the other barriers to suit described in this Article, it is all but impossible to believe that the present regime of civil liability has any significant effect on individual officers' behavior. Recall that doctrinal and situational obstacles to prisoner litigation drastically reduce the likelihood of a correctional officer ever being subject to an adverse judgment. Officers are therefore shielded not only against the direct monetary costs of liability, but from all the collateral effects that might flow from an adverse judgment. And when a prisoner *does* win, indemnification almost invariably kicks in, shielding the liable officer against pecuniary loss. Because the probability of an adverse judgment and the probability of direct loss in the event of an adverse judgment are both very low, paying individually for a constitutional violation committed in a prison or jail is analogous to getting hit by lightning twice.[248]

Along with reducing the effectiveness of civil liability as a check on individual officers' behavior, the barriers to prisoner litigation discussed in this Article undercut the role of money damages as an incentive for policymakers to prevent abuse. The courts have long maintained that the threat of damages "encourage[s] those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[249] Damages, imposed directly or indirectly, are "particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials."[250] Thus, the theory

244 Fifteen of the eighty-one law enforcement agencies in Schwartz's study were sheriff's departments with responsibilities that included operating a county jail. *Id.* at 905. According to Margo Schlanger, "in nearly all inmate litigation, it is the correctional agency that pays both litigation costs and any judgments or settlements, even though individual officers are the nominal defendants." Schlanger, *supra* note 141, at 1676.

245 Schlanger, *supra* note 141, at 1675 n.389.

246 Schwartz, *supra* note 243, at 941.

247 *Id.*

248 This is not to say that prisoners never prevail. For example, in some of the egregious cases described in Part I, plaintiffs were able to overcome qualified immunity. The point is that the barriers to victory for prisoners are extremely high, while the barriers to immunity or indemnification for correctional officers are extremely low.

249 Owen v. City of Independence, 445 U.S 622, 652 (1980).

250 *Id.*

goes, indemnification encourages policymakers to enact systemic reforms by shifting the costs of injuries to government entities.[251]

But this justification for indemnification loses force in the prison context, where barriers to litigation make indemnification a last resort. Practical immunity does not shift liability—it defeats it. And the prisoner lawsuits that make it through the practical/qualified-immunity screen to trigger indemnification are too few, and their judgments too small, to have an appreciable effect on policy decisions. Consequently, the cost-shifting function of indemnification protects individual officers from loss while exerting little to no deterrent influence on policymakers.

On the whole, the sheer inhumanity of the abuse that regularly occurs in our prisons and jails suggests that neither the threat of liability nor other potential deterrents are doing enough to modify correctional officers' behavior. We do not know the marginal effect of liability as a deterrent—that is, we do not know how much *worse* it might be if correctional officers were, say, entitled to absolute immunity as a matter of formal doctrine. That said, when a so-called deterrent fails to prevent the types of hideous episodes cataloged throughout this Article, it is not working the way it must.

CONCLUSION

This Article has shown, we hope, that the practical realities insulating correctional officers from suit add up to a regime of overkill. The "balance" between holding officers accountable and shielding them from liability for excusable mistakes is not really a balance at all.

The jurisprudence may have developed this way in part because the Supreme Court makes qualified immunity law principally in police cases, even though the same doctrine has an enormous impact on prison cases. Over the past twenty years, only 17% of qualified immunity cases decided in the Supreme Court arose from events in a prison or jail. A far higher proportion—64%—involved police functions outside of prisons and jails. There were nearly four times as many police cases as prison cases. (Cases in neither category accounted for the remaining 19%.) The predominance of police cases may help to explain why the doctrine of qualified immunity is so ill-suited to prison-conditions litigation.[252] The law is made in police cases, but

251 Although the Court recognized the role of damages in deterring unconstitutional state and local policies in *Owen*, 445 U.S. at 652, it has rejected damages as a check on unconstitutional federal policies. The Supreme Court recently stated that a suit for damages is not an appropriate means of altering institutional policies set by high-level federal officials. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017) ("[I]t must be noted that a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001))).

252 In the past twenty years, the Supreme Court has decided a qualified immunity issue in thirty-five cases. We divided those cases into three categories—prison cases, police cases, and other cases. We show the result in the Appendix. Prison cases consist of the qualified immunity decisions arising from events that occurred in a prison or jail. Police cases consist of qualified immunity decisions arising from police functions that occur

then transsubstantively applied to prison cases with little attention to the difference in context.

As we note above, a more context-sensitive approach to prison cases would have courts consider deferential legal standards, the PLRA, situational barriers, and qualified immunity not as discrete systems unto themselves, but as components of an overarching regime of civil liability for prisoner abuse. The Supreme Court has never considered the combined effect of practical and qualified immunity on the landscape of prison officials' liability. This is a problem. If a doctrine (i.e., qualified immunity) is crafted to give state actors the "right" level of protection from liability, but it fails to account for other factors that *also* protect the same state actors from liability, then the overall regime for liability will be skewed toward overprotection of state actors and against vindication of federal rights.

Of course, this contextual approach should have limits. For example, a court that tried to soften a procedural provision of the PLRA in order to account for the deference accorded to prison officials under the Eighth Amendment would undermine Congress's intent to limit prisoner suits by enacting the PLRA. In other circumstances, however, a more holistic analysis would be not only permissible, but preferable to the status quo, in which courts all but eliminate liability by piling up one obstacle to litigation after another.

The case for a contextual approach to the system of liability for prison misconduct is strongest in lawsuits that involve multiple doctrines that aim to balance individual liberties against a government interest. Take a suit for damages under the First Amendment for violation of a prisoner's religious freedom. The court will analyze the prisoner's claim under the deferential standard established in the *Turner/ O'Lone* line of cases, which requires balancing the constitutional liberties retained by the prisoner against the government's interest in prison security. The defendant official may also assert qualified immunity, which, like *Turner*, is designed to strike a balance between imposing liability for misconduct and providing insulation to state actors. Current law requires the two forms of deference to be stacked atop one another. But such deference stacking may not achieve the balance for which both *Turner* and qualified immunity were designed. Instead of stacking the *Turner* test on top of the qualified immunity test in a formalistic manner, the better question for the court to consider may be: in this case, what overall level of deference best achieves the purposes of both qualified immunity and the substantive constitutional standard?

There is a glimmer of this approach in the Supreme Court's most recent decision on the constitutional standards that apply to conditions of confinement. In *Kingsley v. Hendrickson*, the Court held that pretrial detainees are entitled to a more protective constitutional standard in excessive force cases

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outside prisons and jails (such as performing a search, managing political protesters, chasing fleeing suspects, or shooting people perceived as dangerous). The final category comprises every other Supreme Court decision on qualified immunity—cases brought against prosecutors, public school principals, and other government employees.

than convicted prisoners whose excessive force claims are subject to the "malicious and sadistic" standard.[253] Writing for the majority, Justice Breyer asserted that even given a less deferential constitutional standard for pretrial detainees, "an officer who act[ed] in good faith" would have sufficient insulation from suit—in part because of the availability of qualified immunity.[254] Thus, in *Kingsley*, qualified immunity and deference in a substantive constitutional standard were considered not in isolation, but in overall effect.[255] The Court recognized, in a limited and implicit manner, that the interaction of the two doctrines ought to be calibrated to accomplish a function: providing correctional officers in jails with adequate, but not excessive, insulation from suit.[256]

This is a good starting point, and it suggests additional questions that courts should consider in evaluating the liability regime for violations of federal rights in America's prisons and jails. Given the high level of deference baked into the relevant constitutional standards, can qualified immunity be justified at all in prison and jail cases? Conversely, does the existence of qualified immunity weaken the case for deference in the substantive standards? Should the situational factors that protect prison officials from liability inform the level of deference they receive through both qualified immunity and substantive constitutional law?

This much is clear: conditions in American prisons and jails call out for much greater accountability than damages litigation can provide in its present state.

253 Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).

254 *Id.* at 2474–75.

255 *Id.*

256 *Id.*; *see also* Dolovich, *supra* note 132, at 252 ("[I]t is . . . possible that even a Court ordinarily inclined to adopt deliberative strategies sympathetic to defendant prison officials may hesitate to do so in cases where the applicable law already features both highly deferential substantive standards and a host of procedural rules rewritten to be more onerous for prisoners than for other § 1983 plaintiffs.").

Appendix

Case Name	*Reporter*	*Year*	*Classification*
Richardson v. McKnight	521 U.S. 399	1997	Prison
Hope v. Pelzer	536 U.S. 730	2002	Prison
Ashcroft v. Iqbal	556 U.S. 662	2009	Prison
Ortiz v. Jordan	562 U.S. 180	2011	Prison
Taylor v. Barkes	135 S. Ct. 2042	2015	Prison
Ziglar v. Abbasi	137 S. Ct. 1843	2017	Prison
Wilson v. Layne	526 U.S. 603	1999	Police
Hanlon v. Berger	526 U.S. 808	1999	Police
Saucier v. Katz	533 U.S. 194	2001	Police
Chavez v. Martinez	538 U.S. 760	2003	Police
Groh v. Ramirez	540 U.S. 551	2004	Police
Brosseau v. Haugen	543 U.S. 194	2004	Police
Muehler v. Mena	544 U.S. 93	2005	Police
Scott v. Harris	550 U.S. 372	2007	Police
L.A. County v. Rettele	550 U.S. 609	2007	Police
Pearson v. Callahan	555 U.S. 223	2009	Police
Ashcroft v. al-Kidd	563 U.S. 731	2011	Police
Ryburn v. Huff	565 U.S. 469	2012	Police
Messerschmidt v. Millender	565 U.S. 535	2012	Police
Reichle v. Howards	566 U.S. 658	2012	Police
Stanton v. Sims	571 U.S. 3	2013	Police
Plumhoff v. Rickard	134 S. Ct. 2012	2014	Police
Wood v. Moss	134 S. Ct. 2056	2014	Police
Carroll v. Carman	135 S. Ct. 348	2014	Police
City & Cty. of San Francisco v. Sheehan	135 S. Ct. 1765	2015	Police
Mullenix v. Luna	136 S. Ct. 305	2015	Police
Hernandez v. Mesa	137 S. Ct. 2003	2017	Police
White v. Pauly	137 S. Ct. 548	2017	Police
Kisela v. Hughes	138 S. Ct. 1148	2018	Police
Conn v. Gabbert	526 U.S. 286	1998	Other
Hartman v. Moore	547 U.S. 250	2006	Other
Wilkie v. Robbins	551 U.S. 537	2007	Other
Safford Unified Sch. Dist. No. 1 v. Redding	557 U.S. 364	2009	Other
Camreta v. Greene	563 U.S. 692	2011	Other
Filarsky v. Delia	566 U.S. 377	2012	Other
Lane v. Franks	134 S. Ct. 2369	2014	Other