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Habeas Corpus Unbound

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Chapter Seventeen

Habeas Corpus Unbound[1]

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I. Introduction

One could teach all of administrative law through the lens of prison law, for incarceration is constituted not simply by walls, nor by a single triggering legal order, but by a web of decisions made by officials—from security classifications and transfers, to institutional discipline, to use of force and isolation, to apportioning access to phones, visits, health care, exercise, nutritious food, spiritual practices, and parole. Prison is the administrative state in miniature. Of course, while prisons may serve as concentrated illustrations of administrative law in action, they are also exceptional spaces. Rationalized as mechanisms of justly apportioned deprivation of liberty, they sit at the sharpest point of the state, where law is most apt to take expression as violence: strip searches, "pain compliance,"[2] use of weapons, solitary confinement, and more. To be sure, prisons are not the only sites of incarceration in the contemporary administrative state. Immigration detention centres and secure psychiatric wards are obvious examples of other places where state-backed deprivation of liberty, and attendant subjection to authorized and unauthorized violent incapacitation, occurs.[3] To these, we may add an array of institutions troubling the borders of control and care[4] and sometimes also the borders of

[1] The title borrows from Part III ("*Habeas Corpus*: Bound and Unbound") of Paul D Halliday's *Habeas Corpus: From England to Empire* (London: Belknap Press, 2010). Thanks to Dylan Gogan for sharing his inside knowledge of *habeas corpus* with me over the summer and fall of 2020. See El Jones, "A Prisoner on Prisons: *Habeas Corpus* in a Nutshell" (29 October 2017), online: *Halifax Examiner* \<https://www.halifaxexaminer.ca/featured/a-prisoner-on-prisons-habeas-corpus-in-a-nutshell\> (describing a 2017 *habeas corpus* workshop led by Gogan and concluding with a poem he wrote on his experiences as a self-represented applicant.) I hope that readers will pay close attention to the judgments bearing Gogan's name herein and think on his and other prisoners' accomplishments under the most challenging circumstances. This chapter is dedicated to him. Thanks also to research assistants Audrey Axten and Zach Geldert, and to my colleagues at East Coast Prison Justice Society, Elizabeth Fry Societies (NS Mainland and Cape Breton) and the Canadian Prison Law Association from whom I am always learning.

[2] West Coast Prison Justice Society & Prisoners' Legal Services*, Damage/Control: Use of Force and the Cycle of Violence and Trauma in BC's Federal and Provincial Prisons* (Law Foundation of BC, 2019) at 10. [West Coast Prison Justice Society, "Damage/Control"].

[3] Laura Johnston, "*Operating in Darkness": BC's Mental Health Act Detention System* (Vancouver: Community Legal Assistance Society, 2017); C Tess Sheldon, Karen R Spector, & Mercedes Perez, "Re-Centring Equality: The Interplay Between Sections 7 and 15 of the Charter in Challenges to Psychiatric Detention (2016) 35:2 NJCL 193.

[4] Sheldon et al, *ibid*; L Ben-Moshe, C Chapman and AC Carey, eds, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave, 2014).

public and private action—for instance, residential care facilities, nursing homes, and group homes.[5]

Sites of incarceration present stress tests to our theories and practices of administrative law. They yield insights, too, into how law distributes power across the administrative state. While studying administrative law as prison law reveals certain distinctions between the law that rules in prisons and everyday administrative state operations, it also reveals continuities—for instance, between the surveillance and control characterizing prisons and the routine surveillance and control that police, child welfare, social assistance, mental health, and public health authorities concentrate upon Indigenous, Black, disabled, and poor people in ways that produce and reproduce subordination and disproportionate incarceration.[6] We begin to see that deprivation of liberty behind prison walls is continuous with patterns of social control and material deprivation distributed across populations in systematically unequal ways. The question is, what if any resources does administrative law have to respond?

This chapter offers a glimpse of how lawyers may use their skills in contexts of carceral administration. Building on Cristie Ford's introduction to administrative and judicial review remedies,[7] its focus is the "great writ" of *habeas corpus*: "the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful."[8] *Habeas corpus* is designed to provide swift access to judicial oversight of the legality of detention and to deliver an effective remedy: release from the illegal detention. For prisoners, access to justice (albeit narrowly conceived) often means access to *habeas corpus*. Yet one need not be embroiled in battling the carceral state to get something out of *habeas corpus*. For the student simply seeking review of basic principles of administrative law, *habeas corpus* provides an opportunity for reinforcement of essential features of doctrine, including procedural fairness and substantive legality.

II. Prisons: Plenty of Rules, not Much Rule of Law[9]

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[5] *Ibid*.

[6] See e.g. Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point NS: Fernwood, 2017); Amy Alberton et al, "Intersection of Indigenous Peoples and Police: Questions About Contact and Confidence" (2019) 61:4 Can J Criminology and Criminal Justice 101; Ontario Human Rights Commission, *A Disparate Impact: second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2020); Fiona Kouyoumdjian et al, "Interactions between Police and Persons Who Experience Homelessness and Mental Illness in Toronto, Canada: Findings from a Prospective Study" (2019) 64:10 Can J Psychiatry 718.

[7] See Cristie Ford, Chapter 2.

[8] *Mission Institution v Khela*, 2014 SCC 24 at para 29 [*Khela*].

[9] I am borrowing the title of a panel hosted by now-Senator Kim Pate, "Prisons: Lots of Rules, Not Much Rule of Law" Sallows Fry Conference, University of Saskatchewan (College of Law), Saskatoon, (May 2015) online (video): \<https://www.youtube.com/watch?v=qiNEGbK6qwM\> (panelists Lisa Neve, Yvonne Johnson, Sheila Wildeman) ["Not Much Rule of Law"]. The panel was in turn inspired by statements of Louise Arbour (*Commission of Inquiry into certain events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) [*Arbour Report*] at part 3.1.2, describing the culture of force and impunity at the Prison for Women: "The rule of law is absent, although rules are everywhere."

Let us begin with the context from which most Canadian *habeas corpus* law originates: incarceration due to criminalization. In Canada, federal prisons[10] confine persons sentenced to two years or more while provincial-territorial jails hold those sentenced to under two years and persons remanded pre-trial. (Up to 75 percent of those in provincial-territorial jails are there pre-trial, a statistic explained in part by judicial interim release conditions ensuring the most marginalized are "set up to fail."[11]) Persons subject to immigration detention may be held in dedicated detention centres or provincial-territorial jails.[12]

Demographically, imprisonment correlates with several indicia of social subordination—Indigeneity, racialization,[13] mental health disability,[14] poverty, homelessness, low educational and employment attainment, the list goes on.[15] These (often interlocking) oppressions are especially concentrated among incarcerated women.[16] To offer but one example of relentlessly dispiriting statistics, while Indigenous people made up 4.5 percent of the Canadian population in 2018-2019, 29 percent of federally sentenced persons—and a full 41 percent of federally sentenced women—were Indigenous. In Manitoba and Saskatchewan, where 16 percent and 14 percent of the population, respectively, are Indigenous, 75 percent of those in provincial custody are Indigenous.[17] Canada's prisons, like those other colonial state mechanisms—reserves and residential schools—work together with other institutions, policies, and cultural norms to

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[10] While technically "prison" designates the federal domain, at times I use it colloquially herein.
[11] Abby Deshman & Nicole Myers, *Set up to Fail: Bail and the Revolving Door of Pre-Trial Detention,* (Toronto: Canadian Civil Liberties and Education Trust, 2014).
[12] In 2019-2020, 8,825 people were in immigration detention in Canada, with 1/3 in provincial jails, RCMP lockup, or other prison settings, and the rest in Immigration Holding Centres. See Canada Border Services Agency, "Annual Detention, Fiscal Year 2019 to 2020" (2020), online: \<https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2019-2020-eng.html\>; Stephanie J Silverman & Petra Molnar, "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada" (2016) 35:1 Refugee Survey Q 109.
[13] Correctional Investigator of Canada, *Annual Report 2014-2015* (Ottawa: Office of the Correctional Investigator, 2015) [*OCI Annual Report, 2014-2015*] at 2-3. ("The federal incarceration rate for Blacks is three times their representation rate in general society").
[14] Correctional Service Canada, *Prevalence of Mental Health Disorders Among Incoming Federal Offenders: Atlantic, Ontario, & Pacific Regions* (Ottawa: CSC, 2013); *National Prevalence of Mental Disorders among Federally Sentenced Women Offenders: In Custody Sample* (Ottawa: CSC, April 2018) [*Mental Disorders Among Federally Sentenced Women*].
[15] See, e.g., Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016) 62 Can Fam Physician 215.
[16] See e.g. *Mental Disorders Among Federally Sentenced Women*, *supra* note 14; *OCI Annual Report, 2014-15, supra* note 13 at 3; C Bodkin et al, "History of Childhood Abuse in Populations Incarcerated in Canada: A Systematic Review and Meta-Analysis" (2019) 109:3 Am J Public Health E1; Shoshana Pollock, *Locked In, Locked Out: Imprisoning Women in the Shrinking and Punitive Welfare State* (Waterloo: Wilfred Laurier University, 2008).
[17] Statistics Canada, *Adult and Youth Correctional Statistics 2018/2019*, by Jamil Malakieh (2020), online: \<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm\>.

systematically subject Indigenous people to forced dislocation, deprivation of the social determinants of health, and attacks on the foundations of political identity and authority.[18]

Linking population-wide patterns of incarceration to colonialist and other social-structural violence[19] is fundamental to the study and practice of prison law–which, like all administrative law, should start with an assessment of whether or how law's proposed solutions respond to a given problem. To further orient ourselves to the subject of incarceration we must turn to the conditions and treatment experienced behind bars. We start with an observation from Lisa Kerr:[20] courts embrace the principle that a custodial sentence consists of a rationally apportioned period of social separation, yet this misses the qualitative dimension and its variability.[21] In reality, confinement differs both among and within prisons, and among prisoners. That is, in practice, the penal sentence is meted out in degrees: from assignment to a shared or single cell, to subjection to official or unofficial force (beatings, rape[22]), to exposure to filth or extreme heat or cold, to isolation with or without a mattress or clothes. Overseeing these qualitative dimensions falls not to judges but to other officials. Yet while prison administration has attracted utmost deference from judges on review,[23] successive independent inquiries suggest chronic problems punctuated by episodic events of spectacular brutality.

Among the persistent concerns expressed by oversight bodies are: 1) practices of prolonged and indeterminate isolation;[24] 2) use of force not justified in the circumstances[25] (what justification means in prisons is, as we will see, vexed); 3) lack of

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[18] N Macdonald, "Canada's Prisons Are the New Residential Schools," *Macleans* (2016), online: \<www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools\>; Remarks of Yvonne Johnson, "Not Much Rule of Law," *supra* note 9 at mins 11:20–19:00, 1:04:14–1:06:50.

[19] See Zinzi D Bailey et al, "How Structural Racism Works—Racist Policies as a Root Cause of US Racial Health Inequities" (2021) 384:8 New Eng J Med 768. Theauthors' definition of "structural racism" (at 768) assists:

> [R]acism is not simply the result of private prejudices held by individuals, but is also produced and reproduced by laws, rules, and practices, sanctioned and even implemented by various levels of government, and embedded in the economic system as well as in cultural and societal norms"

Structural "violence" is a term that centres moral responsibility for the suffering, debilitation, and death that results from structural inequality. See e.g. Paul Farmer, "An Anthropology of Structural Violence" (2004) 45:3 Current Anthropology 305 at 307-09, 317.

[20] Lisa Kerr, "How the Prison Is a Black Box in Punishment Theory" (2018) 69:1 UTLJ 85; "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:3 CJLS 187 at 200.

[21] *Solosky v The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 at 839 [*Solosky*].

[22] Correctional Investigator of Canada, Press Release, "2019-20 Annual Report of the Correctional Investigator of Canada Tabled in Parliament Report Shines Light on Sexual Coercion and Violence behind Bars" (27 October 2020), online: \<https://www.oci-bec.gc.ca/cnt/comm/press/press20201027-eng.aspx\>.

[23] Lisa Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483.

[24] Solitary confinement—and the continuing effort to eradicate it through law and litigation—is discussed below and again at various points in the chapter.

[25] West Coast Prison Justice Society, "Damage/Control" *supra* note 2; Correctional Investigator of Canada, *2018-2019 Annual Report* (Ottawa: Office of the Correctional Investigator, 2019) at 38–39; André Marin, *The Code*, (Ontario: Office of the Ombudsman, June 2013).

access to health care;[26] 4) overcrowding, lack of hygiene and of privacy;[27] and 5) evasion of public and legal accountability for all of the above.[28] To return to the theme of inequitable distribution, prisoners who are Indigenous or Black, and those who have serious mental health conditions, are disproportionately subject to use of force and isolation in prisons,[29] while gender/gender identity (including rigid norms of dominant masculinity) further shapes and channels the pathways of institutional violence.[30]

Carceral studies scholars suggest that these are inevitable outcomes of "carceral logics"[31]—reliance on confinement and control to shore up gross material and social inequality while effecting self-righteous legitimation of the existing order. Carceral logics provoke resistance and respond by intensifying and justifying restrictions. The endpoint

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[26] Correctional Investigator of Canada, *2019-20 Annual Report* (Ottawa: Office of the Correctional Investigator, 2020) at 51-66; Adam Miller, "Prison Health Care Inequality" (2013) 185(6) CMAJ 249.
[27] See e.g. Correctional Investigator of Canada, "Priority: Conditions of Confinement" and list of reports: online \< https://www.oci-bec.gc.ca/cnt/priorities-priorites/confinement-eng.aspx\>; Auditor General of Ontario, *Annual Report 2019*, vol 3, Ch 1 at 16-20 (Ontario: Queen's Printer, 2019); *R v Persad,* 2020 ONSC 188; *R v Summers*, 2014 SCC 26 at para 2. These problems have been magnified by COVID-19: see Adelina Iftene, "COVID-19 in Canadian Prisons: Policies, Practices and Concerns" in Colleen Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: U Ottawa Press, 2020).
[28] See e.g. Jane Sprott & Anthony Doob, "Solitary Confinement, Torture, and Canada's Structured Intervention Units" (2021), online: \<https://johnhoward.ca/drs-doob-sprott-report\>; Ontario Human Rights Commission, "Statement: OHRC files motion to address Ontario's breach of legal obligation to keep prisoners with mental health disabilities out of segregation" online: /<http://www.ohrc.on.ca/en/news_centre/statement-ohrc-files-motion-address-ontario%E2%80%99s-breach-legal-obligation-keep-prisoners-mental-health>/; Correctional Investigator of Canada, *Fatal Response: An Investigation into the Preventable Death of Matthew Hines* (Ottawa: Office of the Correctional Investigator, 2017).
[29] Tom Cardozo, "Bias Behind Bars: A Globe Investigation Finds a Prison System Stacked Against Black and Indigenous Inmates." *Globe and Mail* (Oct 24, 2020); Interim Report of the Standing Senate Committee on Human Rights, *Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being* (Ottawa: Senate, 2019) at 50-56 ["Senate Interim Report"]; Mandy Wesley, *Marginalized: The Aboriginal Women's Experience in Federal Corrections* (Ottawa: Public Safety Canada, 2012); Correctional Investigator of Canada, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (Ottawa: Office of the Correctional Investigator, 2014); *Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women* (Ottawa: Office of the Correctional Investigator, 2013); Laura Dellazizzo et al, "Is Mental Illness Associated with Placement into Solitary Confinement in Correctional Settings? A Systematic Review and Meta-analysis" (2020) 29:4 Int'l J Mental Health Nursing 576; John Howard Society Fact Sheet 31 (2017): "Solitary Confinement" online: \<https://johnhoward.on.ca/wp-content/uploads/2017/02/Solitary-Confinement-FactSheet-Final-1.pdf>\.
[30] See Wesley, *ibid*; *Risky Business*, *ibid*; Yvonne Boyer et al, "First Nations, Metis, and Inuit Prisoners' Rights to Health within the Prison System: Missed Opportunities" (2019) 13:1 McGill J L & Health 27; Heather Lawson, *Decriminalizing Race: The Case for Investing in Community and Social Support for Imprisoned Racialized Women in Canada* (Canadian Centre for Policy Alternatives, Sept 2020); Yvonne Boyer et al, "Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System" (2019) 31 CJWL 386.
[31] Michelle Brown & Judith Schept, "New abolition, criminology and a critical carceral studies" (2017) 19:4 Punishment & Society 440; Debra Parkes, "Solitary Confinement, Rights Litigation and the Possibility of a Prison Abolitionist Lawyering Ethic" (2017) 32:2 CJLS 165 ["Abolitionist Lawyering"] at 179.

is solitary confinement. This is defined as isolation for 22 hours or more per day without meaningful social interaction. Prolonged solitary confinement for 15 days or more constitutes torture, according to international human rights bodies.[32] The Court of Appeal for Ontario has ruled that "administrative segregation," a federal regime of prolonged and indeterminate solitary confinement, was cruel and unusual treatment contrary to s 12 of the Canadian Charter of Rights and Freedoms.[33] Both the Ontario and BC Courts of Appeal have held that this regime infringed s 7.[34] In these judgments and others, courts have accepted that prolonged solitary confinement—and solitary confinement for any period for those with mental health conditions exacerbated by the practice—poses "significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide."[35] The response of the correctional service to these rulings has been a restructuring that has left the underlying practices significantly intact, continuing solitary under other names.[36]

This context must inform our study of *habeas corpus* and, more generally, our understanding of Canada's administrative state and its fit with the rule of law. In its most concentrated form, the rule of law reduces to the idea that the exercise of public power must find its source in law.[37] *Habeas corpus* epitomizes a Diceyan vision of the rule of law, which regards the administrative branch with suspicion (particularly where individual liberties are at stake) and vindicates the right of subjects to access the ordinary law in the ordinary courts. In contrast, Canadian administrative law has embraced an anti-Diceyan rule of law ideal of a culture of justification fostered by all three branches—including state officials understood to be able and willing to exercise discretion in ways that are responsive to the public they serve.[38]

It is far from clear that any model of the rule of law can co-exist with, or survive, the culture of militarized authority governing life in Canada's prisons and jails, where state coercion most demands law's legitimation. Four critiques internal to the rule of law come

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[32] United Nations, *Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess, UN Doc A/Res/70/175 (2015), [Mandela Rules] rules 43-45.
[33] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]; *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 [*CCLA*] at paras 82-126. In *Francis v Ontario*, 2020 ONSC 1644, Perell J held that any period of administrative segregation of persons with serious mental illness constitutes cruel and unusual treatment under s 12, not saved by s 1 (at paras 313-15, 327-47); upheld in *Francis v Ontario*, 2021 ONCA 197.
[34] *CCLA, ibid*; *British Columbia Civil Liberties Association v Canada (AG)*, 2018 BCSC 62 [*BCCLA (SC)*], var'd 2019 BCCA [*BCCLA (CA)*].
[35] *BCCLA (SC)*, *ibid* at paras 180 & 247.
[36] See Sprott & Doob, *supra* note 28; Justice David Cole, *Final Report of the Independent Reviewer on the Ontario Ministry of the Solicitor General's Compliance with the 2013 "Jahn Settlement Agreement" and the Terms of the Consent Order of January 16, 2018 Issued by the Human Rights Tribunal of Ontario* (Ontario, February 25, 2020): "[P]rolonged segregation (15 days or longer) remains a routine practice for individuals with mental health and/or suicide risk alerts on file," at Table 8, online: \<https://www.mcscs.jus.gov.on.ca/english/Corrections/JahnSettlement/FinalReportIndependentReviewer.html#background\>.
[37] *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 at para 71.
[38] On the rule of law as conceived by Albert Venn Dicey, Lon Fuller and others, with special attention to the implications for administrative law, see Chapter 3 by Mary Liston.

to mind, to be revisited at the chapter's end. The first draws on administrative law's rule-of-law ideal of public justification. Prisons resist this—or rather, they play on risk rationalization and dominant sentiments of "just deserts" to legitimize discretionary deprivation and force.[39] The second is a related idea, from Lon Fuller: the rule of law demands congruence between law on the books and law's application. In this regard, the historical record suggests ongoing defiance and recalcitrance from prison administration. The third draws on the principle of equality before the law—interpreted for our purposes as substantive equality. Prisons are vectors of state brutality disproportionately done to Indigenous, Black, poor and disabled persons with special compounded harms based on gender/gender identity. Fourth and last, while the foundation of the democratic rule of law in the social contract tradition is popular consent, prisons perpetuate the violence, dislocation, and deprivation of colonialist rule. For Indigenous People living in—or in the shadow of—prison, the rule of law (as Yvonne Johnson, a Cree woman serving a life sentence, put it), is "bullshit."[40]

The critical foundational question for prison law is: how much evidence of chronic and systematic betrayal of the rule of law (or of professed rule-of-law values) is needed before an institution loses its claim to legitimacy and thereby its claim to the respect and obedience of legal subjects? Indeed, how much does it take for an institution to delegitimize the state as a whole? It is with this question in mind that we take up the great writ: its origins, functions, and limitations.

III. A Too-Brief History of *Habeas Corpus*

While the foundations of *habeas corpus* may be traced to the Magna Carta,[41] it was not until the 17th century that it assumed its form as a remedy that prisoners might use against the state.[42] In 1627 in *Darnel's Case*,[43] five nobles detained for refusal to pay a forced loan to Charles I used the writ to challenge their detention. They were unsuccessful, but the case prompted parliamentary action confirming that deprivation of liberty must be justified in law.[44] *Habeas corpus* migrated to Canada with settlement and the passing of inherent jurisdiction to Canada's superior courts.

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[39] Kelly Hannah-Moffat, "Criminogenic Need and the Transformative Risk Subject: Hybridizations of Risk/Need in Penality." (2004) 7(1) Punishment and Society 2; Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 589.

[40] Statements of Yvonne Johnson in "Not Much Rule of Law," *supra* note 9 at 11:20–19:00; 1:04:14–1:06:50; see also Yvonne Johnson (with Rudy Wiebe), *Stolen Life: The Journey of a Cree Woman* (Toronto: Alfred Knopf, 1998).

[41] On the "brilliant sleight of hand" through which *habeas corpus* and the Magna Carta were "fused … together for the purposes of political argument," see Halliday, *supra* note 1 at 15-18.

[42] Judith Farbey & Robert Sharpe, Simon Atrill, *The Law of Habeas Corpus,* 3rd ed (London: Oxford UP, 2011) at 2-3; see also *Khela*, *supra* note 8 at para 27; Halliday, *supra*, note 1 at 29 ff.

[43] (1627) 3 St Tr 1, 59 (KB). See Linda Popofsky, "*Habeas Corpus* and 'Liberty of the Subject': Legal Arguments for the Petition of Right in the Parliament of 1628" (1979) 41:2 *The Historian* 257.

[44] Farbey et al, *supra* note 42 at 8-12.

The contemporary foundation of *habeas corpus* law in Canada is wedded to the prison context, specifically the principle that prisoners are entitled to maximum liberty consistent with their sentence, stated in case law in 1980[45] and later codified in the *Corrections and Conditional Release Act*.[46] Two Supreme Court of Canada *certiorari* cases are foundational. In 1978, *Nicholson v Haldimand-Norfolk Regional Police Commissioners* introduced a context-sensitive duty of procedural fairness reaching further into the administrative state than had older models of "natural justice,"[47] and soon thereafter *Martineau v Matsqui Disciplinary Board* affirmed that this duty applied to prison discipline.[48] On this point, Dickson CJ in concurrence stated that where a prisoner is committed to "a 'prison within a prison' … elementary justice requires some procedural protection." He added: the "rule of law must run within penitentiary walls."[49]

Two years later, *habeas corpus* was constitutionalized in s 10(c) of the Charter: "Everyone has the right on arrest or detention … to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."[50]

Cases have since recognized that s 10(c) interacts with at least three further rights: s 7 (not to be deprived of liberty except in accordance with the principles of fundamental justice), s 9 (no arbitrary detention or imprisonment), and s 12 (no cruel and unusual treatment or punishment).[51] The writ also functions as a s 24(1) remedy.[52]

The modern law on *habeas corpus* in Canada was launched with the *Miller* trilogy of 1985.[53] These cases involved federal prisoners seeking *habeas corpus* in provincial superior courts. The *Federal Courts Act*[54] assigns the Federal Court exclusive jurisdiction to issue *certiorari* in respect of "a federal board, commission or other tribunal"[55]—but no power to issue *habeas corpus* except in certain contexts involving the Canadian Forces. When a decision involving deprivation of liberty is made by a prison official, an application for *certiorari* in Federal Court is an avenue to attack that decision (and have it quashed). But is it the only avenue? A central question in the trilogy was whether provincial superior courts could issue *habeas corpus*[56] in respect of federal correctional

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[45] Solosky, *supra* note 21 at 839.
[46] SC 1992, c 20, [*CCRA*], ss 4(d) & 28.
[47] [1979] 1 SCR 311, 1978 CanLII 24 [*Nicholson*].
[48] [1980] 1 SCR 602, 1979 CanLII 184 [*Martineau*].
[49] *Ibid* at 622.
[50] Charter, *supra* note 33, s 10(c).
[51] See *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 21 [*Chhina*]; *R v Gamble*, [1988] 2 SCR 595, 1988 CanLII 15 [*Gamble*] at para 74.
[52] *Gamble, ibid* at paras 64-66 & 81.
[53] *R v Miller*, [1985] 2 SCR 613, 1985 CanLII 22 [*Miller*], *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 1985 CanLII 23 [*Cardinal*], and *Morin v Shu Review Committee*, [1985] 2 SCR 662, 1985 CanLII 24.
[54] RSC 1985, c F-7.
[55] *Ibid*, s 18(1)(a).
[56] More fully stated, what was in issue was the ability of the superior courts to grant federal prisoners *habeas corpus* with "*certiorari* in aid." In this context, the latter phrase denotes a demand to deliver up the record, not the remedial power to quash and remit for reconsideration. See *Miller*, *supra* note 53, at paras 13-14; *Khela*, *supra* note 8 at paras 35-38.

officials. *Miller* affirmed that the superior courts did have this power and that extrinsic evidence might be brought in support.[57] Further, it affirmed that prisoners may use *habeas corpus* to test restrictions on their "residual liberties."[58] That is, *Miller* recognized that "there may be significant degrees of deprivation of liberty within a penal institution"—for instance, confinement in a designated restrictive unit—and that these differences in degree may be enough to trigger *habeas corpus.* The remedy was stated as release from the unlawful detention "into normal association with the general inmate population."[59]

A second case in the trilogy, *Cardinal v Director of Kent Institution*,[60] applied *habeas corpus* to a superintendent's decision to maintain the applicants in segregation despite a review board's recommendation they be released. The judgment gave specificity to the context-sensitive duty of fairness articulated in *Nicholson* and *Martineau* and voided the applicants' segregation based on lack of notice or a right to respond.

Yet there was a setback following a 1990 Supreme Court decision, *Steele v Mountain Institution*.[61] There, the Court granted *habeas corpus* to an applicant held on an indeterminate sentence for 37 years, on the basis that the Parole Board had misapplied statutory criteria such that Steele remained incarcerated "far beyond the time he … should have been properly paroled"; this was cruel and unusual punishment under s 12 of the Charter. However, the Court concluded by observing that if not for the age of the applicant and his prolonged journey through the courts, it would have insisted on his seeking *certiorari* in the Federal Court (in turn requiring exhaustion of internal appeals) instead of *habeas corpus*, for it "would be wrong to sanction the establishment of a costly and unwieldly [*sic*] parallel system for challenging a Parole Board decision."[62] That statement was amplified in rulings circumscribing the availability of *habeas corpus* in matters reaching well beyond parole for the next 15 years.[63]

In 2005, *May v Ferndale Institution* reversed this trend.[64] It revived the reasoning from the trilogy, consolidating a set of justifications for recognizing the jurisdiction of the superior courts to deal with *habeas corpus* in matters also amenable to review in Federal Court. These included the importance of giving prisoners their choice of forum, the comparative timeliness of access to *habeas corpus*, and the shift in the onus of proof to prison authorities (discussed below).[65] The Supreme Court again affirmed the importance of access to *habeas corpus* nine years later, in *Mission Institution v Khela*—adding that

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[57] *Miller, ibid* at paras 23-26.
[58] *Ibid* at paras 32-35.
[59] *Ibid* at paras 32-33.
[60] *Supra* note 53.
[61] [1990] 2 SCR 1385, 1990 CanLII 50.
[62] *Ibid* at 1412, 1418.
[63] See Debra Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012) 36:1 Man LJ 351 at 355-56; Allan Manson, "The Effect of Steele on *Habeas Corpus* and Indeterminate Confinement" (1990) 80 Criminal Reports (3d) 282.
[64] 2005 SCC 82 [*May*].
[65] *Ibid* at paras 66-72. See also *Khela*, *supra* note 8 at paras 43-49. However, courts continue to regard the parole regime as unsuitable for *habeas corpus* challenge; see section IV.A, below.

habeas corpus may be sought on grounds of unreasonableness (in addition to the traditional bases of proving illegality, namely lack of jurisdiction or procedural unfairness).[66] Some worried that this would weaken *habeas corpus* given the harnessing of reasonableness to deference (see Chapters 11 and 12). However, we will see below that reasonableness opens new terrain for prisoner challenges—particularly, post-*Canada (Minister of Citizenship and Immigration) v Vavilov*.[67] Recently, in *Chhina*, the Court further narrowed the already-slim bases for judicial discretion not to deal with *habeas corpus*.[68] Thus, it appears that since 2005 *habeas corpus* has been on the upswing in terms of increasing prisoner access to the courts.[69]

IV. *Habeas Corpus*: Doctrine

A. *Preliminaries*

Habeas corpus offers advantages over other common law writs, including: 1) rapid access to the courts,[70] 2) near absence of judicial discretion to refuse relief, 3) a prisoner-friendly onus of proof, and 4) a robust remedy. On the first point, *habeas corpus* takes priority over other court business. Once the application is filed, court rules typically require a hearing within seven days (this may, for instance, be a motion for directions), with any subsequent hearings to be convened with dispatch.[71]

On the second point, while judges may decline to issue *habeas corpus* on grounds of mootness, they lack the discretion they enjoy on judicial review to refuse to deal with a matter based on failure to exhaust alternatives.[72] Once the prisoner meets the first step of the test (discussed below), the court must proceed, with two narrow exceptions:

> where (1) a statute such as the Criminal Code … confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or

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[66] *Khela*, *ibid* at para 72.
[67] 2019 SCC 65, [*Vavilov*].
[68] *Chhina*, *supra* note 51.
[69] See, however, the remedies section at the chapter's end on recent efforts of some courts to curtail applications, for instance through vexatious litigant status and the awarding of costs.
[70] See *Chhina*, *supra* note 51 paras 66-67. But see e.g. *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras 157-58 [*Brown*]:

> a cursory review of Federal Court jurisprudence with respect to detention review demonstrates that applications for judicial review are often heard and disposed of in the Federal Court on an urgent basis. … I agree with my colleague, Justice Stratas […] that the "factual spin and speculation about the procedural flexibility, innovative capability and remedial effectiveness of the Federal Courts … [is] false and unsupported."

Citing *Teksavvy Solutions Inc v Bell Media Inc*, 2020 FCA 108 at para 22). See also Paul Daly, "Waiting for Godot: Canadian Administrative Law in 2019" (2020) 33 *Can J Admin L & Prac* 1 at 26-28.
[71] *Khela*, *supra* note 8 at para 46, noting that per "Rule 4 of the *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, a hearing of a *habeas corpus* application requires only six days' notice." and that in the Federal Court, "if the parties take the full time allotted to them at each step of the procedure, the request that a date be set for the hearing of the application will be filed 160 days after the challenged decision."
[72] See Cristie Ford, Chapter 2.

(2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.[73]

The first exception restricts challenges to a conviction or sentence to the ordinary mechanisms of appeal. It also preserves bail decisions from *habeas corpus* except in "extraordinary circumstances."[74] The second exception has been applied mainly in the immigration context, but also parole[75] and civil psychiatric detention (in Ontario, specifically).[76] It has recently been narrowed. As refined in *Chhina*, the question is now whether there is an administrative process "at least as broad and advantageous as *habeas corpus* regarding the specific challenges to the legality of the detention raised by the *habeas corpus* application."[77] If the regime "fails entirely to include the grounds set out in the application," it is not "as broad or advantageous."[78] If the grounds *are* contemplated by the administrative regime, the court must assess the relative advantageousness of *habeas corpus* versus the administrative-regime-plus-judicial-review. Factors of relevance (from the case law since *May*) include placement of the onus of proof, timeliness and responsiveness of remedy, and more.[79]

The analysis applied to the immigration detention regime in *Chhina* is instructive. The grounds alleged in the *habeas corpus* application were lengthy and indeterminate detention and illegal conditions in breach of ss 7 and 9 of the Charter.[80] The majority determined, first, that legality of conditions was not a consideration under the statutory scheme, so *habeas corpus* brought on this ground could not be declined. In reaching this conclusion, it refrained from interpreting the statute as a field of discretion wherein decision-makers are presumed to take account of Charter values (the approach of Abella J in dissent[81]). As to lengthy and indeterminate duration, while this was contemplated as a

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[73] *Khela*, *supra* note 8 at para 42, citing *May*, *supra* note 64 at para 50. Jared Will asks why these common law exceptions to a Charter-protected right are permitted absent a s 1 analysis: J Will, "Sidestepping the Charter, Again: Muting the Right to *Habeas Corpus* in *Canada (Public Safety and Emergency Preparedness) v Chhina*" (2021) 100 SCLR (2d) 143 at paras 24-32.

[74] *R v Pearson*, [1992] 3 SCR 665, 1992 CanLII 52 [*Pearson*]; *Khadr v Bowden Institution*, 2015 ABQB 261, upheld in *Bowden Institution v Khadr,* 2015 ABCA 159.

[75] *John v National Parole Board*, 2011 BCCA 188 at paras 32-42; *R v Latham*, 2009 SKCA 26 at paras 18-25; *R v Graham*, 2011 ONCA 138 at para 10-18; *Ewanchuk v Canada (Parole Board)*, ABCA 2017 145 at paras 18-22. But see *DG v Bowden Institution*, 2016 ABCA 52 (following a negative decision of the Parole Appeal Board, one can seek *habeas corpus* rather than judicial review in the Federal Court).

[76] *Capano v CAMH*, 2010 ONSC 1687 [*Capano*]; but see also *Abbass v The Western Health Care Corporation*, 2017 NLCA 24 [*Abbass*] at paras 29-54.

[77] *Chhina*, *supra* note 51, at para 6, emphasis added.

[78] *Chhina*, *ibid* at paras 43, 37.

[79] *May*, *supra* note 64 at paras 65-72. *Chhina*, *supra* note 51 at paras 54-68. The factors used in *May* to guide analysis of whether the superior court had jurisdiction to deal with *habeas corpus* were: "(1) the choice of remedies and forum; (2) the expertise of provincial superior courts; (3) the timeliness of the remedy; (4) local access to the remedy; and (5) the nature of the remedy and the burden of proof." (*May* at para 65).

[80] The foundation for the analysis of arbitrary detention under the regime is found in *Chaudhary v Canada (Public Safety and Emergency Preparedness),* 2015 ONCA 700 [*Chaudhary*] at para 81.

[81] *Chhina*, *supra* note 51. Abella J in dissent affirmed a Charter-informed reading of the authority and responsibility of the Immigration Division to deal with indeterminate detention and other matters

factor of relevance in the detention review regime, that regime was unlikely to deal with this ground in a manner as advantageous as *habeas corpus*. This was due, *inter alia*, to the speed and onus advantages of the great writ[82] and evidence that the administrative process was "susceptible to self-referential reasoning."[83] In short, the majority took a hard look at the detention review regime in light of evidence of its functioning and saw an impenetrable, Kafkaesque[84] bureaucracy inured to the seriousness of indefinite and/or otherwise illegal detention. Its answer was to open a *habeas corpus* escape hatch, previously sealed to immigration detainees in deference to legislative intent and administrative design.

Chhina has relevance to contexts beyond immigration. For instance, review of conditions of confinement (including segregation or seclusion) is not among the powers accorded administrative regimes of review of civil psychiatric detention.[85] *Habeas corpus* should be available to fill this gap. Another example involves parole. Prisoners have argued, so far unsuccessfully, that the administrative regime for appealing revocation or denial of parole is slow and unresponsive.[86] Courts have been firm in refusing to create a judicial mechanism of collateral attack on the statutory regime—although one appellate decision held that *habeas corpus* is available following an internal appeal, to avoid the further delays and complexity of seeking review in the Federal Court.[87] The analysis in *Chhina* might conceivably revive arguments about jurisdictional gaps or chronic delays—reopening rifts between Dicey's and, let us say, Abella J's vision of the administrative state and rule of law.

Back to the advantages of *habeas corpus*: the third, the onus on authorities to demonstrate legality once certain threshold conditions are met,[88] reflects the priority assigned liberty and the prisoner's constrained ability to access evidence and assemble argument.[89] Finally, the remedy—release—provides a straightforward through-line from the applicant's plight to the jailer's obligation. *Habeas corpus* is in this way a close

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touching fundamental rights—buttressed by ordinary processes of judicial review. See Paul Daly, "To Have the Point: *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29." (June 5, 2019, online: (blog) Administrative Law Matters \<https://www.administrativelawmatters.com/blog/2019/06/05/to-have-the-point-canada-public-safety-and-emergency-preparedness-v-chhina-2019-scc-29/\>

[82] *Chhina*, *supra* note 51 at paras 66-67; but see *Brown*, *supra* note 70 at paras 118-35.

[83] *Chhina*, *supra*, note 51, at para 62.

[84] See *Scotland v Canada (AG)*, 2017 ONSC 4850 [*Scotland*] at para 2.

[85] Isabel Grant & Peter Carver, "*PS v Ontario*: Rethinking The Role of the Charter in Civil Commitment"(2016) 53(3) Osgoode Hall LJ 999 at 1026-28.

[86] For argument in support of *habeas corpus* jurisdiction in the parole context, see Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019) at 209-13 [*Punished*]. Cases determining the parole regime complete and comprehensive according to pre-*Chhina* case law include those cited at *supra*, note 75.

[87] *DG v Bowden Institution (Warden)*, 2016 ABCA 52. See also *R v Bird*, 2019 SCC 7 at paras 57-61 (noting, at para 59, "realistic concerns about the timeliness and accessibility of relief in the Federal Court. When someone's liberty is at stake, efficiency and timeliness take on greater significance.")

[88] See e.g. *Khela*, *supra* note 8 at para 30.

[89] Judicial notice of these constraints is taken in *Pratt v Nova Scotia (AG)*, 2020 NSCA 39 at paras 56-57 [*Pratt*]

cousin to *mandamus* (mandating action on the part of government), rarely ordered on judicial review in keeping with principles of judicial restraint.[90] The remedial capacities of *habeas corpus* are further enhanced by its constitutionalization through s 10(c) of the Charter, which lends it an integral connection to other Charter rights and to s 24(1) remedies, a topic to which we return near the chapter's end.

B. *The Test*

The test for *habeas corpus* is succinctly stated in *Khela*:

> First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.[91]

A low threshold is to be applied in assessing whether the applicant has met the two parts of the test for which they bear the onus.[92] We address each element in turn.

1. Deprivation of Liberty

Deprivation of liberty has not been (and authorities concur, must not be) exhaustively defined in *habeas corpus* law.[93] The writ has been used in many contexts beyond prisons: for instance, involuntary psychiatric hospitalization,[94] detention in a secure facility under the putative authority of adult protection[95] or adult guardianship law,[96] and deprivation of legal capacity and related detention under "incompetent persons" law.[97] Historically, the writ was used to challenge the detention of fugitive slaves, opening a forum for

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[90] See *Chhina*, *supra* note 51 at para 65. But note the increased willingness to use *mandamus* in the Federal Court in certain circumstances: *D'Errico v Canada (AG)*, 2014 FCA 95 at paras 15-21.
[91] *Khela*, *supra* note 8 at para 30, citing Farbey et al, *supra* note 42 at 84-85; *May*, *supra* note 64 at paras 71, 74).
[92] *Toure v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 ONCA 681 [*Toure*] at para 51; *Wang v Canada*, 2018 ONCA 798 [*Wang*] at para 25.
[93] *Gogan v Canada (AG)*, 2017 NSCA 4 (overturning an unreported decision of Hunt J) [*Gogan* NSCA] at para 27.
[94] *Abbass, supra* note 76. But see *Capano*, *supra* note 76. BC's psychiatric detention law codifies the right to *habeas corpus*: *Mental Health Act*, RSBC 1996, c 288, s 33 (2) and (3). On uses of *habeas corpus* in the context of Part XX.1 of the Criminal Code see Janet Leiper, "Cracks in the Façade of Liberty: The Resort to *Habeas Corpus* to Enforce Part XX.1 of the *Criminal Code*" (2009) 55 CLQ 134 and SE Fraser, "Hospital Knows Best: Court and Unfit Accused at the Mercy of Hospital Administrators: The Case of *R v Conception*" (2015) 71 SCLR 301 at 319-22.
[95] *ZB v Provincial Director of Adults in Need of Protective Intervention*, 2020 NLCA 17.
[96] *AH v Fraser Health Authority*, 2019 BCSC 227 [*AH v Fraser Health*]. (Indigenous woman held in secure settings and subject to restraints and coerced medication under "purported" authority of Adult Guardianship law for nearly a year).
[97] *Habeas corpus* was used to challenge Nova Scotia's former *Incompetent Persons Act*, RSNS 1989, c 218 in proceedings eventuating in *Webb v Webb*, 2016 NSSC 180 (government conceded Charter breach).

disrupting the purported property rights of slaveowners.[98] Facility-based detention is not required.[99] In England, the writ has been used to challenge conditions of release from psychiatric hospital and in Canada, to review "virtual house arrest"[100] imposed by immigration officials. Neither is the writ necessarily confined to challenging public action (despite that being its primary application today and our focus herein). Historically, it was used to challenge restraint upon enslaved persons beyond prison-based confinement,[101] and in child custody and apprenticeship disputes.[102] In recent times it has been used in the United Kingdom to challenge restraint of "vulnerable adults" in private dwellings,[103] even in extra-territorial contexts.[104]

While scholars have argued for,[105]and courts have sometimes contemplated,[106] an enlarged conception of liberty within *habeas corpus*—for instance, reflecting the integral interconnectedness of liberty with security of the person[107] and/or equality[108]—the doctrine continues to be anchored in *spatial* restriction. The Quebec Court of Appeal recently firmly rejected a *habeas corpus* challenge to COVID-19 public health orders in part because the applicant did not establish detention but rather grounded his claims in fundamental freedoms including association, religion, conscience, and more.[109]

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[98] Barry Cahill, "*Habeas Corpus* and Slavery in Nova Scotia: *R v Hecht Ex Parte Rachel, 1798*" (1995) 44 UNBLJ 179.
[99] *Wang*, *supra* note 92.
[100] *Wang*, *ibid* at para 6.
[101] *Somerset v Stewart* (1772) 98 ER 499. And see Halliday, *supra* note 1 at 120-21.
[102] See Farbey et al, *supra* note 42 at 188-92.
[103] *Re SA (Vulnerable Adult with Capacity: Marriage),* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 cited in Farbey et al, *supra* note 42 at 189-90. At 183-95, the authors discuss "quantitative" as well as "qualitative" forms of restraint that have in various jurisdictions been amenable to *habeas corpus.*
[104] *Re SK*, [2004] EWHC 3202, [2006] 1 WLR 81 (Fam), discussed in Farbey et al, *ibid* at 190.
[105] Linda Steele, "Troubling Law's Indefinite Detention: Disability, the Carceral Body and Institutional Injustice" (2021) 30:1 Soc & Leg Stud 80 at 81-82. Steele's point is not precisely about *habeas corpus* but rather indefinite detention (which is encompassed by *habeas corpus*). She examines practices of detention and control proceeding from multiple sources of authority focused on the *carceral body* of the Indigenous disabled woman in her case study. The example "exceeds conventional liberal legal understandings of indefinite detention which are linked to the legal indeterminacy of one legally ordered period of confinement in a legislated closed environment" and illustrates how "control of Indigenous people's lives and bodies is facilitated and legitimated not only through race but also through the legal prisms of disability and health" (at 81-83). See also E Manning & MT O'Shaughnessy, "AIDS Quarantine, Treatment as Prevention in British Columbia, and Possibilities for Critical Clinical Social Work" in Catrina Brown & Judy E MacDonald, eds, *Critical Clinical Social Work Practice* (Toronto: Canadian Scholars, 2020).
[106] See the obiter comments in *Brewer v Her Majesty the Queen*, 2020 NSSC 308 [*Brewer*] at para 33.
[107] *Brewer, ibid*. The requirement that the being suffering deprivation of liberty be a human has long been considered not to require explicit mention. However, in recent years *habeas corpus* applications have been brought in some countries (not yet in Canada) seeking to end the liberty deprivation of members of other species—most commonly chimpanzees held in zoos or research facilities. While there has been some success, notably in Argentina and Colombia, the conclusion of the New York Court of Appeals that *habeas corpus* is available only for humans likely portends the result of any similar Canadian venture: *Nonhuman Rights Project v Lavery*, 100 NE 3d 846 (NYCA 2018).
[108] Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 JL & Equality 127.
[109] *Racicot c Procureure générale du Québec*, 2020 QCCA 656, affirming *Racicot c Procureure générale du Québec*, 2020 QCCS 1322. See also *Lévesque c Procureur général du Québec*, 2021 QCCS 489.

The primary doctrinal frame on point comes from *Dumas v Leclerc Institute*, where the Supreme Court of Canada articulated three categories of liberty deprivation engaging *habeas corpus*: the initial deprivation, a substantial change amounting to a further deprivation, and a continuation of the deprivation (exceeding initial legality).[110]

a. Initial Deprivation (Category 1)

The first *Dumas* category is subject to the qualification that *habeas corpus* is unavailable to challenge a criminal sentence; again, for that, one must appeal. In other contexts, *habeas corpus* may be a permissible—and perhaps the only—means of attacking an initial decision to detain. For instance, some civil psychiatric detention regimes fail to contemplate release based on the illegality of the initial detention, focusing instead on whether detention prerequisites are met at the time of a tribunal hearing weeks later.[111] *Habeas corpus* may be available to challenge the initial detention in such situations.

b. Change Amounting to Further Deprivation (Category 2)

As noted, *Miller* expanded *habeas corpus* to include decisions affecting residual liberties. It is clear that confining a prisoner to a special-purpose restrictive unit is a category 2 deprivation.[112] So too is "transfer to a higher security institution."[113] However, the reduction in residual liberties must be "significant."[114] In some cases, complained-of restrictions are deemed insubstantial: "trivial, intermittent, [or] transient";[115] affecting mere privileges;[116] normal aspects of prison life;[117] or interference with interests that, while significant, are unrelated to liberty.[118] On the last point, courts struggle to categorize claimed liberty deprivations (cuffs, restricted communications, an environment saturated with threats and acts of violence) other than confinement to a specific institutional space.[119]

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[110] [1986] 2 SCR 459, 1986 CanLII 38 at para 11 [*Dumas*].
[111] See *Abbass*, *supra* note 76 at paras 40-48.
[112] *Khela, supra* note 8 at para 34. Placement in a "Structured Intervention Unit" [SIU] (the regime crafted in response to constitutional invalidation of "administrative segregation"—see CCRA, *supra* note 46, ss 31-37) has been recognized as a further deprivation: *Leslie v Edmonton Institution*, 2020 ABQB 430 at paras 18-19 (however, no illegality there); *Raju v Warden of Kent Institution,* 2020 BCSC 894 (gov't concession on this point).
[113] *Khela, ibid.*
[114] *Miller*, *supra* note 53 at para 35.
[115] *Hamm v Canada (AG)*, 2019 ABQB 247 [*Hamm* (2019)]; *Cunningham v Canada*, [1993] 2 SCR 143, 1993 CanLII 139 at 151; and see *Ewanchuk v Canada (AG),* 2017 ABQB 237 [*Ewanchuk*] at paras 39-41.
[116] *Miller*, *supra* note 53 at para 35.
[117] *Ewanchuk, supra* note 115 at para 41 (reference is to a claim of 70 days of lockdowns; it is not clear how long in cell per day; see paras 39-42, 66).
[118] Again see *Ewanchuk*, *ibid* at para 45.
[119] See *Leslie v Edmonton Institution*, 2020 ABQB 430 at para 25.

Miller adds that the further deprivation should be "distinct and separate from that imposed on the general inmate population."[120] Some courts have used this to refuse *habeas corpus* on the basis that complained-of restrictions are not unique to the applicant or a designated space—for instance, in the case of institution-wide "lockdowns."[121] Others reject that reasoning and hold that as long as an institution-wide increase in restrictions has significant individualized effects, it should qualify. This was the reasoning in a case recognizing COVID-19 measures that applied to all prisoners in a federal facility as engaging *habeas corpus* jurisdiction.[122] Yet depending on the circumstances, it may be difficult to establish the baseline against which to assess significant change/further deprivation, as neither correctional statutes nor common law articulates the daily time out of cells the general population of prisoners may expect. As noted below, an alternative approach would be to rely on *Dumas* category 3, initially valid detention that becomes illegal: the category into which prolonged and indeterminate detention fits.

Miller further describes *Dumas* category 2 deprivation as requiring "a new detention … purporting to rest on its own foundation of legal authority."[123] This raises a question: May a restrictive security classification assigned upon incarceration qualify as a deprivation of liberty? This is particularly important for Black and Indigenous prisoners, who are disproportionately likely to be classified maximum security and may wish to use *habeas corpus* to challenge the legality of the assessment (for instance, as perpetuating systemic discrimination).[124] Some courts have concluded that the initial classification cannot constitute a *further* deprivation as there is no previous, lower level of liberty deprivation to compare it to—and because the authority on which the detention rests is simply the (appealable) judicial sentence.[125] The Nova Scotia Court of Appeal disagreed, or at least held that this reasoning did not apply to the facts before it.[126] It determined that, since the reception unit in which the disputed security classification took place was classed as partway between medium and maximum security, and the disputed classification designated the prisoner as maximum (meaning he was said to require higher security than the reception facility accommodated), the maximum classification and transfer constituted a further deprivation. Whether, outside those circumstances, an initial maximum security designation might be a deprivation of liberty is something the Court did not decide. Courts are in clear agreement, however, that solitary confinement upon incarceration (including at a reception unit) constitutes a further deprivation of liberty.[127]

An unresolved question is whether transfer from one facility to another with the same security designation may amount to a "further" deprivation. A transfer might take one far from family and disrupt program participation. Effects of dislocation on Indigenous prisoners, and those with deep roots in local racialized/marginalized communities, may

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[120] *Miller, supra* note 53 at para 35.
[121] *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at paras 88-89.
[122] *Cyr c Pilon*, 2020 QCCS 1645 at paras 27-31 [Cyr].
[123] *Miller, supra* note 53 at para 35.
[124] See sources cited *supra* note 29.
[125] *LVR v Mountain Institution (Warden)*, 2016 BCCA 467 at paras 36-42.
[126] *Gogan* NSCA, *supra* note 93.
[127] *Gogan* NSCA, *ibid* and *Wilcox v Alberta*, 2020 ABCA 104 [*Wilcox*] at para 41.

be particularly severe.[128] While some cases recognize that lateral transfers may result in deprivation of liberty,[129] others reject this.[130] Absent a formal elevation in institutional security level, judges may be reluctant to recognize that a transfer intensifies isolation through community dislocation, or that some facilities constrain residual liberties more than others (given overcrowding, staff shortages, lockdowns—and/or, during the pandemic, presence of COVID-19 in the surrounding community). Related problems may affect one's ability to establish liberty implications of transfers among provincial jails, which tend to lack formal security classifications. However, courts may be willing to look beyond labels. This was acknowledged of a transfer to a unit inside a Saskatchewan facility not formally designated as more restrictive but which, on the facts, clearly was.[131] Similarly, in *Gogan v Nova Scotia,* the Court adopted the applicants' position that "segregation is not a place": while the two prisoners were not in a designated "close confinement unit," they were in conditions of solitary confinement.[132]

A last case of note is one the judge suggested satisfied *Dumas* category 2 while adding that deprivation of liberty should not have to fit categorical boxes. In it, the judge recognized as a further deprivation of liberty a trans woman's experience of harassment and vulnerability to sexualized violence in a men's prison (following denial of her request for transfer to a women's prison), causing her to self-isolate in a mental health unit.[133] While self-isolation does not commonly engage deprivation of liberty,[134] here it was precipitated by a substantial change in conditions—the shift in the applicant's expressed gender identity and/or the consequent liberty-restrictive effects of a men's prison upon her.[135]

c. Continuing Deprivation (Which Has Become Illegal) (Category 3)

The obvious category 3 case would be detention beyond the term of sentence or after parole has been granted.[136] Speaking to the immigration detention context, *Chhina*

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[128] See *Gray v Canada (AG),* 2020 FC 1037 (not *habeas corpus* but related arguments used to obtain interlocutory injunction re proposed transfer of Indigenous/Black Nova Scotian woman with close community connections).
[129] *Bonamy v Correction Service Canada (Commissioner),* 2000 SKQB 385 at paras 20-21 (transfer far from friends and family intensifies isolation contrary to legislative purposes); *R v Campbell*, 2010 ONSC 6619 (freedom of movement more restricted despite same security level); *R v Green*, 2009 ABQB 233 (The question "is not to be determined on the basis of an analysis of labels" (at para 18); however, "loss of ready access to family visits" (at para 33) does not qualify). See also *Dodd v Isabel McNeill House*, 2008 ONCA 654; *Ewert v Lalande*, 2020 QCCA 1141.
[130] *Firbank v Canada (AG),* 2016 ONSC 6592.
[131] *Mercredi v Saskatoon Provincial Correctional Centre*, 2019 SKCA 86 at para 35 (more than double the time locked in cell in the proposed unit).
[132] *Gogan v Nova Scotia (AG),* 2015 NSSC 360 [*Gogan 2015*] at para 40.
[133] *Boulachanis c Thibodeau,* 2020 QCCS 1020 [*Boulachanis*] at paras 90-105.
[134] See e.g. *Gagné c Directeur du pénitencier de Donnacona,* 2021 QCCS 511 at para 53.
[135] *Boulachanis*, *supra* note 133 at para 83. As noted below, illegality was not established.
[136] *Dumas*, *supra* note 110, at para 12.

indicates that this category also encompasses "extended detentions or detentions of uncertain duration, which may engage ss 7 and 9 of the Charter."[137]

An unsettled question is whether failure to transfer down (for example, from medium to minimum security), or grant enhanced liberties such as temporary absences, may be included within category 3. The argument for inclusion rests on the right to the least restriction on liberty consistent with the sentence.[138] If a prisoner requests a lower level of security and the request is denied, why should *habeas corpus* not be accessible, the way it is with an involuntary transfer "up"?[139] There is case law on both sides.[140] The challenge is identifying when precisely deprivation of liberty is engaged. In part this is a question of judicial economy (and once again, deference to the legislature's institutional designs). The answer may require the prisoner to make a *prima facie* case of entitlement. Lisa Kerr gives an example: where a Case Management Team recommends acceptance of a prisoner's request for transfer down, but the warden denies it, *Dumas* category 3 is arguably engaged.[141] In the example, the Team's recommendation is enough to raise a reasonable doubt about whether detention at the current security level satisfies the least restriction principle. In other cases, where there is nothing comparable to a recommendation, it may be that making a *prima facie* case means "raising a reasonable doubt about legality" (the next analytical step in the *habeas corpus* "test").[142]

Beyond these examples are frontiers of liberty deprivation yet to be fully explored. *Dumas* category 3 calls into question just what kinds of harsh conditions and treatment should render continuing detention invalid in the sense of unhinging liberty deprivation from its stated purpose—potentially even subverting the purpose or integrity of the underlying criminal sentence. We return to this at the chapter's end. The point for now is that without cracking open *habeas corpus* to accommodate every kind of prisoner complaint, there are matters beyond spatial restrictions that have strong claims to impingement on prisoner liberty at this threshold stage. These include situations where deprivation of liberty is fundamentally bound up with systematic inequality (on grounds such as Indigeneity, race, disability, gender, and/or gender identity). For instance, where a pregnant prisoner is prevented from accessing abortion or devising a birth plan, obstruction of this choice is arguably a deprivation of liberty (both mobility and the right to make choices of fundamental personal importance) magnified by gender inequality. Where an Indigenous or a disabled prisoner experiences pressure to undergo sterilization, or is deprived of contact with dependent children, the decisions of prison administration impacting autonomy might be further connected to Canada's long legacies of cultural genocide and/or eugenics to strengthen the case for *habeas corpus*. Further, why should *habeas corpus* be unavailable when prisoner complaints bleed into the life and security of

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[137] *Chhina*, *supra* note 51, at para 23. Illegality rests on whether detention is "no longer necessary to further the machinery of immigration control" *Chaudhary, supra* note 80 at para 81.
[138] CCRA, *supra* note 46, s 28. Lisa Kerr, "The Right to Maximum Prison Liberty?" (2016) 26 Crim Reports 245.
[139] *Musitano v Canada (AG)*, 2006 CanLII 9151 at para 2, [2006] OJ No 1152 (QL) (Ont Sup Ct).
[140] Cases in support are cited in *R v Dorsey*, 2020 ONSC 6297 at para 15; cases against, at para 16.
[141] Kerr, "Maximum Liberty?" *supra* note 138 at 248.
[142] See D'Arcy Leitch, "The Constitutionality of Classification: Indigenous Overrepresentation and Security Policy in Canadian Federal Penitentiaries" (2018) 41:2 Dal LJ 411 at 435-39.

the person elements of s 7, bearing close enough relationship to liberty to reside in the same formal rights-space? Why is the "great writ" not available to alert the courts to extraordinary deprivations of food, warmth, or essential health care? Contemporary conceptions of liberty recognize that freedom is impossible without an environment of supports, starting with the necessities of life.

A recent Nova Scotia judgment shows a tentative willingness to contemplate such frontiers.[143] Those nervous at this prospect may draw on the Alberta Court of Appeal's caution that *habeas corpus* should not become "a legal Swiss Army knife" available for any kind of prisoner grievance lest it lose its coherence and priority on the docket.[144]

2. Legitimate Ground

The second part of the *habeas corpus* test requires the prisoner to raise a legitimate ground challenging the legality of the deprivation of liberty. Since *Khela*, these include lack of jurisdiction,[145] procedural unfairness and unreasonableness.[146] Unconstitutionality is clearly a legitimate ground.[147] Again, a "low threshold"[148] applies. The applicant need only "raise an arguable issue"[149] or show "there is a cause to doubt the legality of [their] detention."[150] *Khela* confirms: "the matter *must* proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful."[151]

3. Legality (Onus on Authorities)

Legality is dealt with extensively in Chapters 6 and 9 by, respectively, Kate Glover Berger and Laverne Jacobs (procedural fairness, independence and impartiality); Chapters 11 and 12 by, respectively, Audrey Macklin and Paul Daly (substantive review); and Chapters 7 and 15 by Evan Fox-Decent and Alexander Pless (Charter/administrative law crossovers). What follows are select examples of analysis of legality in *habeas corpus* cases and themes arising therein. Recall that in order to reach this point, the prisoner has crossed the threshold of deprivation of liberty and raised a ground on which to test the legality of the deprivation. The onus now shifts to the respondent.

What are the implications of this? Ordinarily, judicial review, whatever the standard of review, places the onus on the applicant all the way through.[152] The shift in onus in

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[143] *Brewer, supra* note 106 at para 33.
[144] *R v Latham*, 2018 ABCA 308 at para 7.
[145] *Khela*, *supra* note 8 at para 52 citing *R v G (JP),* 2000 CanLII 5673 (ONCA).
[146] *Ibid*
[147] *Wilcox*, *supra* note 127 at para 73.
[148] *Toure*, *supra* note 92 at para 51.
[149] Farbey et al, *supra* note 42 at 53.
[150] *May, supra* note 64 at para 71. Per *Toure, supra* note 92, this is equivalent to raising a "reasonable or probable ground" of illegality (para 51).
[151] *Khela*, *supra* note 8 at para 41, citing *May*, *supra* note 64 at paras 33, 71.
[152] There are live questions as to whether this is or should be the case in evaluating the proportionality analysis mandated by *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], discussed in Chapter 15.

habeas corpus requiring authorities to justify detention on a balance of probabilities is essential to the writ's accessibility. Prisoners are absolved from assembling the evidence and argument ordinarily required to succeed on review. Yet it is not always clear just how the shift in onus interacts with a principle that has long anchored judicial review of prison administration: deference. A question this raises is whether the specialness of *habeas corpus*—the halo of its Magna Carta pedigree, its enshrinement in the Charter, its locus at the sharp end of the state, its deployment by the most marginalized—gives rise to any discernible difference in judicial conceptualizations or expressions of illegality. In this specific sense, is there anything that special about *habeas corpus*? We pause to consider this at a few points. However, the cases in this section are mostly illustrative of principles covered elsewhere in this book. At the very least, they remind us of how deeply evaluation of legality is inflected by context—here, the prison context.

To be clear, one should be cautious in seeking verification of the specialness of *habeas corpus* on the face of judicial decisions (on legality or otherwise) alone. This may miss implicit effects upon judicial dispositions flowing from the onus shift and more generally the elevated status and urgency of the writ. Moreover, it may miss broader sociological effects that the writ and its insistence on justification may have inside places of detention. The presence of a stack of *habeas corpus* forms to be distributed by guards on request (one of many arguable institutional obligations not invariably observed) and the ever-present prospect of being hauled off to court so that prisoners may cross-examine wardens and guards may well inject a modicum of caution or fear of legal intervention into these closed spaces that the remote prospect of lawyer-led judicial reviews (not only infrequent but unlikely to require a response until long after a prisoner is released or transferred) do not.

At the very least, we can assume that the effect of the onus in *habeas corpus*—as in judicial review generally—is not simple. The onus necessarily interacts with the imperative of context-sensitivity informing review of both procedural and substantive legality. Here, a prominent theme in *habeas corpus* cases on both fairness and reasonableness emerges: namely, deep tensions between deference to the expertise of and discretion conferred on prison administration on the one side and responsiveness to liberty deprivation on the other. Managing those tensions is at the heart of the analysis of legality in *habeas corpus*. As with judicial review generally, there are signs that courts are increasingly responsive to the significance of the interest and insistent on robust justification. However, there are also instances in which judges appear to revert to the idea that prisons are exceptional places where force and authority rule.

a. Procedural Fairness/Principles of Fundamental Justice

Prisoner *habeas corpus* cases frequently allege procedural unfairness. It is less common than one might expect that s 7 of the Charter is argued as a throughway to fairness as a principle of fundamental justice, raising a critical question—why? Why not (apart from lack of legal representation) raise s 7 where liberty deprivation is in view? Of course, if

what is challenged is a statutory provision circumscribing fairness in some respect, s 7 is essential.[153]

As noted, one element distinguishing *habeas corpus* from conventional judicial review is the onus on authorities to establish legality/fairness. At the same time, evaluation of fairness is to reflect contextual considerations—specifically, those given non-exhaustive expression in *Baker v Canada (Minister of Citizenship and Immigration)*.[154] It is not invariably the case that *habeas corpus* judgments addressing unfairness reference the *Baker* factors. Regardless, two (sometimes three) tend to inform analysis in a way that cross-cuts specific process rights. These are "the significance of the interest at stake" and "the choices of procedure made by the agency itself and its institutional constraints."[155] Typically, these are contradictory—the more significant the interest, the higher the expectation of procedural protections; the more procedural discretion conferred on and exercised by the decision-maker, the less inclined the court will be to interfere. Other factors deemed to be reflective of legislative intent and institutional design may come into play: for instance, the informal versus formal or inquisitorial versus adjudicative nature of decision-making forums.

As to the weight accorded the interest at stake, in *habeas corpus* cases the applicant has already established deprivation of liberty, associated with (not the same as establishing breach of) at least three Charter rights beyond s 10(c). Regarding *Baker* factor five (agency choices), judicial deference to prison administration continues to animate prisoner rights cases in and beyond *habeas corpus*.[156] This reflects the broad discretion accorded to wardens and other prison authorities to set policies and make on-the-spot decisions.[157] It also arguably reflects something more: a residual attachment to a culture of authority in certain islands or pockets of the administrative state, which also happen to be the places where multiply subordinated legal subjects unwillingly reside.

i. Notice and the Right to Respond

The path of contemporary procedural fairness law in negotiating these tensions traces back to *Cardinal*.[158] Again, *Cardinal* arose from solitary confinement on the warden's instructions. A Segregation Review Board recommended release. The warden declined, without sharing his reasons with the prisoners or giving them an opportunity to respond. The Supreme Court of Canada's granting of *habeas corpus* in *Cardinal* is important in

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[153] An example of statutory invalidation as a remedy framed as ancillary to *habeas corpus* is *Way c Commission des libérations conditionnelles du Canada,* 2014 QCCS 4193 [*Way* SC] at para 2, aff'd *Canada (Procureur général) c Way*, 2015 QCCA 1576, [*Way* CA], discussed below.
[154] [1999] 2 SCR 817, 1999 CanLII 699 [*Baker*]. See Chapter 6.
[155] *Baker*, *ibid* at paras 25 & 27.
[156] A forthright statement of the deference judges have shown prison administration is in *Re Howard and Inmate Disciplinary Court*, 1985 CanLII 3083, [1984] 2 FC 642 (CA) [*Re Howard*], MacGuigan J in concurrence: "Order is both more necessary and more fragile [in prisons] than in even military and police contexts, and its restoration, when disturbed, becomes a matter of frightening immediacy" (para 79).
[157] *Ibid*.
[158] *Supra* note 53.

and beyond prisons for three reasons: 1) it articulated the leading statement on the reach of procedural fairness (encompassing administrative decisions "not of a legislative nature" which affect "the rights, privileges or interests of an individual");[159] 2) it stated the minimal expectations of a fair hearing—notice and a right to respond;[160] and 3) it limited the judicial impulse to discount fairness-based illegality on grounds of deference.

The last point merits expansion. A unanimous Court opined that the fairness-based expectations of notice and a right to respond were "fully compatible with the concern that … prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate procedural requirements."[161] The Court then articulated the strongest affirmation of the value of fairness in the jurisprudence on point:

> [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[162]

The statement is in some tension with the openness to remedial discretion recently signaled in *Vavilov*,[163] yet it returns us to first principles: fair process has inherent as well as instrumental value, particularly in situations of profound power imbalance.

A contemporary *habeas corpus* case illustrates the writ flexing its constitutional muscles to vindicate the right to a hearing. In *Canada (AG) v Way* the question was whether legislation removing the prisoner's right to an oral hearing following revocation of parole breached s 7 of the Charter.[164] The Quebec Superior Court positioned its analysis amidst a line of Charter-based case law affirming the right to a hearing on parole suspension/revocation. It observed that at post-suspension hearings issues of credibility are central—a recognized basis for affording an oral hearing. In all of this, the key factor was the importance of the interest affected.[165] The Court added that the financial considerations motivating the reforms were neither pressing and substantial nor did they satisfy the other elements of s 1.[166] It granted *habeas corpus* and ancillary remedies,

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[159] *Ibid* at para 14.
[160] *Ibid* at para 21.
[161] *Ibid* at para 22.
[162] *Ibid* at para 23.
[163] See Paul Daly, Chapter 12.
[164] *Way SC*, *supra* note 153 aff'd *Way* CA , *ibid*.
[165] *Way SC, ibid* at paras 67-73, 83-85
[166] *Ibid* at paras 98-101*;* and see *Way* CA*, ibid* at para 78, citing *Singh v Ministry of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65 at 218-19.

including invalidation of the offending provisions pursuant to s 52 of the Charter. The Court of Appeal affirmed.[167]

ii. Disclosure

A second prominent procedural fairness concern is disclosure. The 2005 blockbuster *habeas corpus* case *May* centred on whether Correctional Service of Canada [CSC] officials had complied with disclosure obligations in circumstances of transfer to a higher security facility. The five applicants had been transferred to medium-security prisons following reassessment of those serving life sentences in minimum-security facilities. The reassessments involved application of a computerized assessment tool (the Security Reclassification Scale) which increased the security level of persons in the applicants' position who had failed to complete a violent offender program. The Court held that while the reclassification scheme was not as such illegal, CSC had failed to meet its obligations under s 27(1) of the CCRA,[168] which requires timely disclosure of "all the information to be considered in the taking of the decision or a summary of that information." Specifically, CSC had withheld information on the "scoring matrix" or algorithm on which the tool's recommended classification was based. Lack of access to this information, including the weight accorded factors of relevance, meant that the prisoners were unable to fully test the case against them.

In *Khela*, the Supreme Court again dealt with statutory disclosure obligations under the CCRA in circumstances of transfer. Beyond confirming the obligations stated in *May*, *Khela* elaborated a process whereby authorities withholding information pursuant to s 27(3) of the CCRA (on bases such as security) must submit a sealed affidavit so that the court may determine whether the decision to withhold is justified.[169] *Khela* adds that where this process is followed, officials will be granted deference as they are in the "best position to determine whether such a risk could in fact materialize."[170]

In *Cyr c Pilon*,[171] the Quebec Superior Court determined that officials at a federal prison failed to meet disclosure obligations under s 27(1) of the CCRA when imposing a facility-wide COVID-19 lockdown protocol; however, the Court declined to issue *habeas corpus*—taking inspiration from case law on the (slim) potential for s 1 justification of s 7 breach in emergencies.[172] Turning to provincial-territorial correctional law, these statutes often lack the specificity given procedural obligations in the CCRA. Yet judges have drawn on federal law to inform fairness obligations, including disclosure. In *Lambert v Nova Scotia (AG)*,[173] the prisoner's *habeas corpus* application failed; however, the judge cited *Khela*, along with an imperative to facilitate access to *habeas corpus*

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[167] *Way CA*, *ibid*.
[168] *Supra*, note 46.
[169] *Khela*, *supra* note 8 at paras 87-88. For an instructive application, see *Richards v Springhill Institution*, 2014 NSSC 121 [*Richards*], appeal dismissed 2015 NSCA 40.
[170] *Khela supra* note 8 at para 89.
[171] *Cyr*, *supra* note 122.
[172] *Ibid* at paras 35-37, citing *Re BC Motor Vehicle Act,* [1985] 2 SCR 486, 1985 CanLII 81 [*BC Motor Vehicle*] at 518.
[173] 2020 NSSC 282 [*Lambert*] at paras 45-51.

through the superior courts' inherent powers,[174] to fashion a comparable regime for reviewing information withheld from provincial prisoners.

iii. Counsel

The common law right to counsel has been confirmed in prison contexts, including in *habeas corpus* cases, though it is not absolute and depends on the gravity of the liberty deprivation and capacity of the prisoner to self-represent.[175] There is as yet no recognition of a right to *state-funded* counsel in matters of prison administration engaging liberty or other fundamental rights. There is, however, precedent on which the argument may be attempted. In *New Brunswick (Minister of Health and Community Services) v G(J)*,[176] the Supreme Court affirmed a right to state-funded counsel for an impoverished claimant facing removal of her children. This was grounded in security of the person and (for the concurrence) also equality and liberty. *G(J)* articulates a contextual analysis for deciding when legal aid is essential in child apprehension contexts. This and *Trial Lawyers Association of British Columbia v British Columbia (AG)*[177]—which reanimates s 96 of the *Constitution Act, 1867* to support a (so far, narrow) right of access to the superior courts—may provide a basis for challenging legal aid schemes that do not adequately fund prison law matters.[178]

iv. Reasons

A right to reasons in cases of deprivation of liberty might seem like a no-brainer, yet, particularly in provincial corrections where statutory duties are often thin, authorities sometimes rely on policies or continuously cycling emergencies to supplant individualized justification, particularly in written form. Recent judgments[179] seek support for this practice by quoting from *Vavilov* (in turn paraphrasing *Baker*) for the point that "[i]n many cases … neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all."[180] The question is how informal reasons can be when deprivation of liberty is at issue. The decisions noted followed a violent incident in a jail that, together with staffing and other institutional constraints (including inability to transfer incompatible prisoners during COVID-19), was said to justify holding the applicants in a "behavioural unit" featuring highly restricted periods out of cell for upwards of 30 days at a time.[181] For some of this period, the time in cell

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[174] *Ibid* at paras 50-51, citing *Pratt, supra* note 89 at para 90. See also *Pratt, supra* note 89 at paras 54-58.
[175] *Re Howard, supra* note 156 at paras 32-33. See also CCRA, *supra* note 46, s 97(2) & (3).
[176] [1999] 3 SCR 46, 1999 CanLII 653 [*G(J)*].
[177] 2014 SCC 59 [*BC Trial Lawyers Association*].
[178] For more on the s 96 angle, see Chapter 19 by Peter Carver.
[179] *Cox v Nova Scotia (AG),* 2020 NSSC 81 [*Cox* 1]; *Nagle-Cummings v Nova Scotia (AG),* 2020 NSSC 188 at para 67 [*Nagle-Cummings*]; *Crawley v Nova Scotia (AG),* 2020 NSSC 221 at para 9.
[180] *Nagle-Cummings*, *ibid* at para 62, citing *Vavilov, supra* note 67 at para 136; *Cox* 1, *ibid* at para 36 citing *Vavilov, ibid* at paras 136-137.
[181] These and other prisoners were shifted among restrictive units through a series of distinct yet related and compounded decisions. This recalls Jennifer Raso's work on the fractured and fluid realities of frontline decision-making in the social benefits context. See "Unity in the Eye of the

met the definition of solitary confinement. The judges concluded that written reasons were not required and deduced the reasoning primarily from institutional records and affidavits.[182] The suggestion that reasons may be reconstructed in this manner and satisfy procedural fairness, other than in rare cases of quasi-legislative rule-making or the immediate aftermath of an emergency, sits uneasily with the centring of reasons in *Vavilov* and in *Baker* where significant interests are at stake.[183]

v. Institutional Independence and Bias

It is important to note the potential for application of s 7 principles protecting against institutional bias and lack of independence where liberty-restrictive decisions (including but not limited to solitary confinement) are involved. This was a central basis of the successes in the BC and Ontario litigation challenging federal "administrative segregation"[184] and a prior win against Alberta corrections that altered its disciplinary regime thereafter.[185] Provincial-territorial regimes beyond Alberta have yet to fall into line on this point.[186]

b. Reasonableness

Vavilov has redirected judicial energies from formalistic mantras about administrative expertise to whether decision-makers have been responsible and responsive in exercising their authority. As noted, *Khela* confirmed that the reasonableness standard applies where *habeas corpus* is used to challenge the substantive legality of liberty deprivation. This was motivated, in part, by a concern for deference:

> To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the Courts. … Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.[187]

However, *Khela* adds that

> the traditional onuses associated with the writ will remain unchanged. Once the inmate has demonstrated that there was a deprivation of liberty and casts doubt on

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Beholder? Reasons for Decision in Theory and Practice in the Ontario Works Program" (2019) 70:1 UTLJ 1.

[182] *Nagle-Cummings, supra* note 179 at paras 32-44.

[183] See Chapter 6 by Kate Glover Berger and Chapter 12 by Paul Daly.

[184] *Supra* notes 33 and 34.

[185] *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858.

[186] But see, e.g., recent revisions to Yukon's *Corrections Act, 2009*, SY 2009, c 3, ss 19.08, 26-27.

[187] *Khela, supra* note 8 at paras 75-76.

> the reasonableness of the deprivation, the onus shifts to the respondent authorities to prove that the transfer was reasonable in light of all the circumstances.[188]

Any tensions between deference and the shift in onus have not been noted or explored in *habeas corpus* cases applying reasonableness review. Yet perhaps those tensions are not so great with the refreshed orientation to *demonstrated* expertise in *Vavilov*. Below we consider examples of how *Vavilov*'s robust reasonableness standard may inform (and is already informing) *habeas corpus* in prison contexts. These suggest that the new ethos of justification—in particular, *Vavilov*'s guidance on legal and factual constraints on reasonable administration—has potential to breathe life into prisoner litigation while modulating the troubling legacy of judicial deference to prison authority.

i. Internal Incoherence

In *habeas corpus* cases, as in all instances of judicial review, the analysis of reasonableness is to be anchored in attention to the decision-maker's reasoning. The judge is to have an open mind, attentive to the possibility that the decision-maker has sector-specific insights or institutional know-how the judge lacks. However, deference does not mean submissiveness, and the judge does not purport to be a know-nothing—particularly where fundamental rights are involved. It is counsel's job to accentuate the positive or negative in the administrator's reasons, guided by *Vavilov*'s roadmap.

The first of two flaws that may vitiate a decision on reasonableness review is internal incoherence: "a failure of rationality internal to the reasoning process."[189] It may sometimes be a toss-up as to whether a decision is better classed as lacking a reasonable basis in law or evidence (the second kind of fundamental flaw) or incoherent on its face—particularly where the problem is gaps in reasoning. In any case, this ground may assist in calling out the "exercise of public power without a cogent case to support such power" in prison contexts.[190]

A pre-*Vavilov habeas corpus* example straddling incoherence and insufficient evidence was *Nguyen v Mission Institution (Warden)*.[191] Nguyen was subject to an involuntary transfer based on his alleged role in institutional gang activity and drug dealing. The primary evidence, information on a phone found on another prisoner, was deemed by the judge to be unreasonably flimsy. Yet "the institution continued to swaddle a small amount of evidence in clouds of justification, much of which, paradoxically, repeated what had been acknowledged to be unreliable."[192] Among the proffered supports were opinions that Nguyen's good behaviour was simply a ruse ("impression management") cultivated "while secretly holding a pro-criminal value system."[193] The judge concluded that it was

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[188] *Ibid* at para 77.
[189] *Vavilov*, *supra* note 67, at para 101.
[190] Ian Davis, "Taking Prisoners' Rights Seriously on Substantive *Habeas Corpus* Review" (2019) 8:1 Can J Hum Rts 29.
[191] 2012 BCSC 103.
[192] *Ibid* at para 63.
[193] *Ibid* at paras 61, 59.

> not possible on the record before the court to discern a reliable path to the conclusions drawn by the institution, given the institution's manifest failure to discriminate between the evidence it had and the hypothetical consequences it attributed to the applicant throughout.[194]

ii. Lack of Justification

The second fundamental flaw from *Vavilov* is lack of justification in light of legal and factual constraints. We begin with cases focused on the facts.

Failure to Justify in Light of the Evidence

Vavilov affirms that administrative decisions must be justified in light of the evidence. Many *habeas corpus* cases since *Khela* concentrate on this; indeed it was the sole example of unreasonableness offered in that judgment: liberty deprivation "absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion."[195] *Khela* adds that while deference will be shown to determinations "that evidence is reliable … authorities will nonetheless have to explain that determination."[196]

A pre-*Vavilov* example where *habeas corpus* was granted based on unreasonable misapprehension of evidence is *Hennessy v Warden of Kent Institution*.[197] The prisoner was transferred to a higher security facility on allegations of assaulting another prisoner. The evidence centred on video of the applicant entering the victim's cell. However, the applicant pointed out that the video also showed him leaving the cell with the other individual a few seconds after, something unexplained in the institutional account. The judge noted that if "such apparently significant evidence is to be given no weight, some explanation is required."[198] As Ian Davis points out, this case and other post-*Dunsmuir* prisoner rights cases illustrate a further important feature of reasonableness review: the expectation that decision-makers be responsive to parties' submissions, including prisoners' rejoinders on key facts.[199]

There are numerous other examples of unreasonably thin or misapprehended evidence cases, some of which also illustrate the responsiveness principle. In *Hamm v Attorney General of Canada (Edmonton Institution)*,[200] the judge determined that there was no reasonable basis in the evidence to hold the applicants in solitary—a ruling that also implicitly engaged proportionality, as the judge further accepted that even if the facts alleged had been established, less restrictive responses were available.[201] A further case

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[194] *Ibid* at para 63.
[195] *Khela* at, *supra* note 8 at para 74.
[196] *Ibid*.
[197] 2015 BCSC 900.
[198] *Ibid* at para 18.
[199] See Davis, *supra* note 190 at 55-64. See also *Vavilov*, *supra* note 67 at paras 127-28.
[200] 2016 ABQB 440 [*Hamm* 2016].
[201] *Ibid* at para 10.

arguably qualifying both as lacking a reasonable foundation in evidence and lacking proportionality, as it turned on the weight accorded a small infraction, is *Antinello v Warden of Dorchester Institution*.[202] There the prisoner succeeded in challenging involuntary transfer to a higher security institution based on failure to return a gospel music device on time. Of course, many cases go the other way. In a recent decision, the prisoner's *habeas corpus* challenge to transfer on the argument that the evidence was weak was denied with a reminder that the standard required of authorities is not proof beyond a reasonable doubt.[203]

Decisions on reasonableness of factual foundations or responsiveness to prisoner submissions are trickier where the rationale for liberty restriction is not individual wrongdoing but rather institutional constraints—for instance, staff shortages, overcrowding, or COVID-19. In one case, a prisoner challenged his placement on a COVID-19 quarantine unit following an escorted temporary absence, arguing, *inter alia*, that conditions were unduly restrictive and that his absence to attend his daughter's funeral had been comparable to accompanied court or medical visits not requiring quarantine.[204] The application failed. The judge declined to second-guess the evidentiary supports for the quarantine protocols designed in consultation with public health.[205] In another case a prisoner brought *habeas corpus* to challenge four months in an intensive security unit because of a breakdown of control systems in the unit to which he was initially assigned.[206] That initial unit (the SIU) had entitled him to four hours out of cell daily while the new one afforded far less (the applicant argued just one hour) and lacked a common area.[207] The prisoner challenged the rationale for the move—alleging staff sabotage, which the judge rejected—and argued that the restrictive transfer was made without justification including disclosure of supporting information and a right to respond.[208] The application was dismissed for failing even to raise a reasonable doubt about legality, including reasonableness, on the facts or law. The institution had statutory authority to suspend SIU entitlements in emergencies, full stop.[209] The court added that the restrictions had since been eased and, to the extent the applicant was self-isolating for his own protection, he was the "architect of his own misfortune."[210]

These judgments, and others,[211] show deference to administration on the reasonableness of unit- or institution-wide measures that administration claims are necessary for

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[202] 2018 NBQB 9.
[203] *Rivest v Gardien du Pénitencier de Dorchester*, 2020 NBQB 12.
[204] *Cox v Nova Scotia (AG),* 2020 NSSC 253 [*Cox 2*].
[205] *Cox 2*, *ibid* at paras 30-32, 45-46. See also *Cyr, supra* note 171 at paras 45-46 (pandemic threat and duty to protect health and safety made quarantine protocol which applicant argued to be 23 hours in-cell per day the only reasonable decision in the circumstances.)
[206] *Lévesque-Gervais v Directeur du pénitencier de Donnacona*, 2021 QCCS 239 [*Lévesque-Gervais*].
[207] A decision-maker under the SIU regime concluded that administrations' statutory obligations to enable the applicant to leave his cell and access social interaction had not been met (at paras 12-13).
[208] *Ibid* at paras 18-21. The right to a hearing is not addressed in the judgment.
[209] *Ibid* at paras 51-53.
[210] *Ibid* at para 56.
[211] See also *Cox 1, supra* note 179 (Four prisoners in "rotational lockdown" unit following violent incident "endured days of restricted time including up to 23 hours per day due to safety and security concerns." (para 78). Evidence in support plus plan to increase out-of-cell time = reasonable.)

institutional safety and security. Each case raises different circumstances. Yet a common theme (with rare exceptions) is absence of judicial probing or express consideration of whether less-impairing alternatives were available (something we return to with proportionality, below).

A recent decision on unreasonableness cuts through factual claims about intractable institutional constraints and recentres the seriousness of liberty deprivation. In *Downey and Gray v AG (Nova Scotia)*,[212] the applicants were two young Black Nova Scotian men remanded to jail pre-trial. They used *habeas corpus* to challenge confinement in a Health Segregation Unit, barely distinguishable from disciplinary segregation cells. There they were allowed out of cells for 1-2.5 hours per day. They had been under these or similar restrictions (sometimes disciplinary, sometimes safety based) for 201 and 267 days respectively.[213] The judge recounted the institution's position: "In essence, the Respondents argue that the present placement is reasonable because there are no other available options. In other words, it is the best it can do in the circumstances."[214]

An important feature of the judgment is its recognition of a sustained pattern of solitary confinement where the evidence might otherwise have yielded a set of disjointed placements and as many rationales. Further, on the institution's position that it was the applicants' incompatibility with or vulnerability to others that was the problem—a matter of hard facts, not the institution's decisions—the judge stated:

> It is too easy to suggest that the Applicants have created this situation and, as such, have no standing to complain. In other words, they are responsible for their own misfortune. This is a misguided theory and this Court must guarantee that penal institutions do not adopt such an attitude.[215]

The deciding factor for the judge was the length and indefinite duration of segregation. Evidence of lack of institutional options together with anticipated COVID-19 delays to upcoming court dates did not excuse the indefinite pre-trial detention, but rather unhinged it from lawful (reasonable) authority. In stating this conclusion, Coady J indicated that he was "affording [the institution] considerable deference." While the judge did not cite specific Charter rights (reflecting the sparseness of the applications),[216] he quoted a scholar[217] for the point that Charter values are integral to reasonableness, later observing that segregating the applicants "indefinitely offends the principles of *habeas corpus* and the *Charter of Rights and Freedoms*."[218]

Constraining Discretion With Law

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[212] 2020 NSSC 213 [*Downey and Gray*].
[213] *Ibid* at paras 1 & 6.
[214] *Ibid* at para 6.
[215] *Ibid* at para 10.
[216] The grounds stated in the prisoners' applications are reproduced as submitted, *ibid* at paras 2 & 3.
[217] *Ibid* at para 12, quoting Tim Quigley, College of Law, University of Saskatchewan.
[218] *Ibid* at para 21. The unconventional remedy assigned is discussed in Part IV.C, below.

Following the trend of reasonableness review in *habeas corpus* law since *Khela*, we started with cases impugning decisions as unreasonably unhinged from the facts. The last case noted (*Downey and Gray*) showed a court piercing alleged factual intractability to reveal a decision unhinged from lawful authority.

Vavilov suggests that analysis of justification should begin with the governing statutory scheme.[219] Correctional law tends to confer ample discretion to restrict liberty on the basis of order or security. The question for the detainee is how to constrain that discretion. Apart from norms of statutory interpretation, *Vavilov* reminds us of legal sources beyond the governing statute that may act as constraints, such as human rights statutes, common law precedents, and international law.

Vavilov does not include the Charter among the "legal and factual constraints" it recites as pertinent to justification. It expressly declines to discuss the *Doré* model of unreasonable decision-making based in failure to proportionately balance statutory mandates and Charter rights,[220] yet beyond this, it does not give even passing mention to the conventions around using the Charter to inform statutory interpretation.[221] While *habeas corpus* cases rarely address statutory interpretation—likely reflecting the realities of self-representation plus the pervasiveness of fact-intensive discretion in prison administration—it is worth recalling the imperative of grounding interpretation in the rights and values recognized in Canada as supreme law.[222]

Perhaps *Vavilov*'s central contribution to review of legality in prison contexts is its acknowledgement that, even when not statutorily implemented, "international treaties and conventions … can help to inform whether a decision was a reasonable exercise of administrative power."[223] Many international norms of importance to prisoners are located in soft law—not treaties, but standards often reflecting the participation of multiple nations.[224] The Mandela Rules,[225] recognized by Canadian courts to authoritatively define solitary confinement and to inform Charter standards on point,[226] are an example. Even before recent public interest litigation resulting in constitutional invalidation of the federal regime of administrative segregation, those rules (and other international legal norms) assisted in *habeas corpus* cases arguing the unreasonableness[227] and/or Charter non-compliance[228] of prolonged solitary.

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[219] V*avilov*, *supra* note 67 at paras 108-110.
[220] *Doré*, *supra* note 152; *Vavilov*, *ibid* at para 57.
[221] Like *Doré* proportionality, the role of the Charter in statutory interpretation is contentious and reasonableness review adds a further (deferential) twist. See John Mark Keyes & Carol Diamond, "Constitutional Inconsistency in Legislation—Interpretation and the Ambiguous Role of Ambiguity" (2017) 48:2 Ottawa LR 315.
[222] *Ibid* at 319, 324-25.
[223] *Vavilov*, *supra* note 67 at para 114. This was of course already confirmed in *Baker, supra* note 154.
[224] On the crafting of the Mandela Rules, see Jennifer Peirce, "Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards" (2018) 43:2 Queen's LJ 263.
[225] *Supra* note 32.
[226] *CCLA CA, supra* note 33 at paras 28-29; *BCCLA CA*, *supra* note 34 at para 168. See also *Brazeau v Canada (AG),* 2020 ONCA 184 at paras 71, 82.
[227] *Hamm* 2016, *supra* note 200 at paras 10, 91–95.

Other Mandela Rules may assist in establishing that a once-legal detention has become illegal. These include rules against double-bunking, rules on access to health care and the role of health care staff, and more. The Bangkok Rules[229] establish minimum standards of women's incarceration. They mandate gender-specific health care, alternatives to strip searches and invasive body searches, a rule against using restraints on women during labour and birth, and rules around accommodation of relationships with children. On the latter point, the best interests of the child are regularly subordinated to other considerations in criminal justice sentencing.[230] This is a point that demands revisiting;[231] at any rate, however, the principle should, in accordance with *Baker*, receive serious weight in administrative decisions restricting prisoners' liberties in ways that affect their relationships with their children, including involuntary transfers, parole, and subjection to intensive in-cell time affecting access to telephones or visits.

Where Indigenous persons and the integrity of their families and communities are affected by decisions involving deprivation of liberty, The *UN Declaration on the Rights of Indigenous Peoples*[232] may assist in recentring those decisions in light of state-to-state obligations and Indigenous-led alternatives to incarceration.[233] It is already clear that *Gladue* principles and the mandate of reconciliation must be central to analysis of legality in decisions touching upon Indigenous incarceration. *Twins v Canada (AG)* [234] established the unreasonableness of a decision to revoke Joey Twins's[235] parole on the basis that the tribunal failed to properly apply *Gladue* principles. While not a *habeas corpus* case, *Twins* illustrates use of *Gladue* to spur decision-makers to take responsibility for redressing the dislocation and systemic discrimination that have produced high Indigenous incarceration rates, and to promote alternatives.

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[228] *Bacon v Surrey Pretrial Services Centre (Warden),* 2010 BCSC 805 [*Bacon*] at paras 272-90 (drawing on the precedent document to the *Mandela Rules* along with other international norms).
[229] United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules), GA Res 65/229, UNGAOR, 65th Sess, Supp No. 49, UN Doc A/RES/65/229 (2010) [Bangkok Rules].
[230] *Canadian Foundation for Children, Youth and the Law v Canada (AG),* 2004 SCC 4 at para 10.
[231] See, e.g. Hayli Millar & Yvon Dandurand, "The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities" (2018) 29 Crim LF 227.
[232] GA Res 61/295, UNGAOR, 2007, art 21.1 [*UNDRIP*]; Yvonne Boyer et al, "First Nations, Métis, and Inuit Prisoners' Rights to Health within the Prison System: Missed Opportunities" (2019) 13:1 McGill JL & Health 27 at 56-7.
[233] See CCRA, ss 81 & 84, and discussion in the Senate Interim Report, *supra* note 29 at 54-56. On potential use of *habeas corpus* to challenge security classification and attendant refusal of an application for release to a Healing Lodge or Indigenous community, see Leitch, *supra* note 142.
[234] *Twins v Canada (AG)*, [2017] 1 FCR 79, 2016 FC 537 [*Twins*]. See *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679. And see
Germa c Tremblay, 2019 QCCS 1764 at paras 87-99 (transfer upheld despite challenge on *Gladue* prin- ciples), appeal dismissed on other grounds in *Snooks c Procureur général du Canada,* 2020 QCCA 586.
[235] Office of the Correctional Investigator, Press Release, "Ms Joey Twins Receives the *2020 Ed McIsaac Human Rights in Corrections Award* (10 December 2020), online: \<https://www.oci-bec.gc.ca/cnt/comm/press/press20201210-eng.aspx#:~:text=Joey%20Twins%20is%20the%202020,Zinger\>

Because *habeas corpus* offers an opportunity to raise international law to challenge the reasonableness/legality of detention, it is essential that counsel be apprised of (even creative with) these resources. Yet it is also important that relevant international standards be available to prisoners, who are often unassisted when they make their applications. In recent consultations on reproductive justice convened by the Elizabeth Fry Societies in federal women's prisons, prisoners showed interest in learning more about international human rights,[236] particularly UNDRIP. Accessible guides to the Mandela Rules, Bangkok Rules, UNDRIP, and other international standards—as well as the Charter—should be available to prisoners and reviewed by staff on a mandatory basis.[237] This marks a concrete opportunity to facilitate the democratic rule of law ideal of "constituting fundamental values"[238] at the point of law's administration—although one anticipates that growing awareness of the standards in question will more likely further destabilize than legitimize prison administration.

Seriousness of Impact

The *Vavilov* majority writes that

> if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.[239]

In *habeas corpus*, deprivation of liberty is in play, and so the consequences are almost certainly harsh. But it is uncommon for judges to oversee the reasoning of prison administrators in the way described—that is, requiring acknowledgement of the seriousness of effects and explanations of why those are necessary according to law. Prison lawyers should argue per *Vavilov* that administration must take account of effects on individuals in a substantive and not merely *pro forma* way.

The required attention to impact may be further elaborated to urge responsiveness to structural injustice expressed through individualized decisions, including consequences of liberty deprivation extending over time across disproportionately affected communities. This was the approach taken in the pre-*Vavilov* case noted above, *Twins*, which required more of the tribunal than a box-ticking of *Gladue* considerations. A post-*Vavilov* example is *Downey v Nova Scotia (AG)*.[240] While neither a *habeas corpus* nor a

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[236] Martha J Paynter, *Reproductive (In)justice in Canadian Federal Prisons for Women* (Canadian Association of Elizabeth Fry Societies, 2021).
[237] See *ibid*, Recommendation 7 at page 44. An excellent example of a resource designed to assist prisoners with DIY applications is Hanna Garson's *Habeas Corpus in Nova Scotia: An Accessible Guide* (Halifax: East Coast Prison Justice & Elizabeth Fry Societies Mainland NS & Cape Breton, 2017). This and other user-friendly resources, online: \<https://efrymns.ca/home/resources/\>.
[238] David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 at e.g. 501-02.
[239] *Vavilov*, *supra* note 67 at para 133.
[240] 2020 NSSC 201. To be clear, not the same as *Downey & Gray*, discussed earlier. See also Paul Daly's discussion of the case in Chapter 12.

prison case, in *Downey* the judge appealed to *Vavilov* on the requisite responsiveness to impact and then expressly linked the harm done to the individual property interests of the applicant (an African Nova Scotian man denied access to a land title remediation regime) to the wider harms of anti-Black racism restricting African Nova Scotians' access to land title over hundreds of years.[241] Anti-Black racism is also at the root of disproportionate policing and incarceration.[242] As illustrated in *Twins*, acknowledging systematic racial oppression by and through the administrative state is essential to the reparative work required of both courts and administrative agencies in prison law cases and is essential to attaining the true measure of impact.[243]

Doré Proportionality

As noted, *Vavilov* does not touch *Doré* proportionality. Therefore, the controversial doctrine for dealing with Charter challenges to administrative decisions (discretion exercised under an imprecise grant of authority[244]) remains. *Doré* asks whether "the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives."[245] A margin of appreciation (deference) is applied—similar, we are told, to what occurs under s 1 of the Charter. However, unlike conventional Charter analysis where the onus is on the applicant to establish breach and then on government to justify, *Doré* places the onus on applicants to show both engagement/breach of the right *and* lack of proportionality.[246]

Much ink has been spilled on whether *Doré* marks an indefensible dilution of Charter rights, the inception of a People's Charter, or old wine in new bottles. But there is nothing on its place in *habeas corpus*—including whether it is even possible to integrate *Doré* with the doctrinal peculiarities of the great writ. Since *Khela* integrates reasonableness review into *habeas corpus*, one would expect *Doré* to be part of the package. However, there are as yet no reported *habeas corpus* cases in which *Doré* is applied. It is an uneasy fit. *Doré*, as noted, places the burden on applicants to show both breach and disproportionality, while with *habeas corpus* the burden of justification for liberty deprivation lies with the depriver. Moreover, while *Oakes* and *Doré* are said to work the same "justificatory muscles," the comparison loses cogency where s 7 (inclusive

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[241] *Ibid* at paras 37-38, referencing the further historical and contextual analysis in the decision of Bodurtha J in *Beals v Nova Scotia (AG)*, 2020 NSSC 60. See also African Nova Scotian Affairs, "Land Titles Initiative" at https://ansa.novascotia.ca/landtitles.

[242] Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (NS Human Rights Commission, 2019); Francis Campbell, "Nova Scotia 'doubling down' on justice system disparities, says DPAD coalition member," *Chronicle Herald* (2 March 2021), online: \<https://www.thechronicleherald.ca/news/provincial/nova-scotia-doubling-down-on-justice-system-disparities-says-dpad-coalition-member-558832\>.

[243] See Maria C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders," (2020) 43:1 Dal LJ 103 at 153-54 (on the duty to take anti-Black systemic discrimination and structural injustice into account in and beyond sentencing contexts in a manner comparable to the expansion of *Gladue* considerations).

[244] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 1989 CanLII 92.

[245] *Doré*, *supra* note 152 at para 7.

[246] In *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, McLachlin and Rowe JJ write concurring opinions suggesting that the onus shift can and does occur within the *Doré* frame.

of principles of fundamental justice) is breached.[247] In such cases, Charter case law tells us that space for s 1 justification shrinks—and tolerance for "administrative expediency" is at an all-time low.[248] In short, there seems to be little room for "balancing" a s 7 breach in or beyond *habeas corpus* law.

To be clear, *habeas corpus* cases can and do—and arguably, more often should[249]—centre on Charter breach. *Chhina* confirms that the constitutionalized writ is integrally interconnected with ss 7 (liberty), 9 (arbitrary detention), and 12 (cruel and unusual treatment), and there are examples of successes on each of these grounds.[250] Yet s 1 is seldom applied as a means of justifying liberty deprivation (of note, the vast majority of these cases challenge decisions versus laws).[251] That said, proportionality assessment is often discernible in *habeas corpus* judgments whether or not Charter rights are expressly engaged. For instance, in *Gogan* (2015), decided on reasonableness review with no distinct Charter analysis, the reasons authorities offered for segregation did not meet expectations of justification because they "depreciate[d] the severity of solitary confinement and the gravity of the prisoner's constitutionally protected interest in residual liberty."[252] One rationale in particular, overcrowding, drew from the judge a statement expressive of proportionality analysis together with a rejection of administrative expediency as justification:

> It is unreasonable to make prisoners pay for overcrowding, whether it results from fiscal restraint or minimum sentences or both, by making them submit to the agony of solitary confinement. All prisoners are forced to pay for the government's choice of overcrowding by being housed in overcrowded jails and prisons. To compound that with solitary confinement when on remand is unreasonable because it is so unfair.[253]

A similar caution against reliance on expediency in a context of prolonged solitary confinement is found in *Bacon v Surrey Pretrial Services Centre,* where breach of ss 7 and 12 of the Charter was confirmed (s 1 was not applied).[254] Anticipating the judgment noted above, *Downey and Gray,*[255] (as much a proportionality case as one piercing the factual claim that solitary was the applicants' only option), the judge in *Bacon* states that the position of correctional authorities

> seems to be that keeping [the applicant] "safe" requires an either/or choice between physical safety and psychological integrity. If that is true because

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[247] *Doré*, *supra* note 152 at para 5. I thank Paul Quick and John Conroy for discussion on this point.
[248] *BC Motor Vehicle, supra* note 172 at para 85; *Canada (AG) v Bedford*, 2013 SCC 72 at paras 124-29.
[249] See Iftene, *Punished*, *supra* note 86 at 201-13.
[250] *Chhina*, *supra* note 51 at para 21. And see e.g. *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6.
[251] Section 1 is applied in *Way SC*, *supra* note 153, which resulted in a declaration of constitutional invalidity.
[252] *Gogan* 2015, *supra* note 132 at para 30.
[253] *Ibid* at para 32.
[254] *Bacon, supra* note 228. .
[255] *Supra* note 212.

> resources are lacking, it simply means that the government has to do better. Discretion over expenditures stops where treatment falls below a constitutional minimum.[256]

Other *habeas corpus* cases, in other circumstances, conclude that liberty deprivation is Charter compliant because reasonable/proportional in light of statutory objectives. In *Boulachanis*, noted above, a trans woman was denied transfer to a prison for women on the basis that her escape risk/security level was too high.[257] She alleged breach of ss 7 and 12, citing serious harms including self-isolation arising from her confinement in a men's prison where she "constantly feels on the verge of being raped, whether by fellow inmates or by certain guards."[258] The court acknowledged the suffering of the applicant but concluded that denial of transfer was reasonable and Charter compliant as authorities had accommodated her as far as possible in light of her security classification.[259] In this and other cases, proportionality is always already weighted with seemingly impenetrable institutional risk and security assessments.

With the renewed focus in *Vavilov* on constraints on discretion, it would be surprising not to see a new focus on Charter illegality in *habeas corpus* cases. This may include use of s 15 to challenge liberty deprivation as exacerbating pre-existing disadvantage on grounds of Indigeneity, race, gender, gender identity, disability, or other grounds[260]—whether in contexts of involuntary transfer, solitary confinement, or less-conventional situations in which valid detention becomes invalid, as contemplated in *Boulachanis*. Yet while it appears judges already factor proportionality into analysis of legality in *habeas corpus* cases, it is not clear that there is space in the great writ for public interest-style justification "saving" detention shown to breach ss 7, 9 or 12, or for that matter s 15 —let alone the reversal of onus contemplated by *Doré*.

C. *Remedies and Rule of Law Redux*

Among the advantages of *habeas corpus* already mentioned is its swift and powerful remedy: release from illegal detention. Authorities are not permitted to re-detain on authority of the original order.[261] However, depending on the circumstances, renewed detention on other grounds is possible—as in *Khela*, where, by the time the case hit the

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[256] *Bacon, supra* note 228 at para 318.
[257] *Boulachanis*, *supra* note 133. See also the precedent decision of Grammond J granting an interlocutory injunction based in a *prima facie* case of discrimination: *Boulachanis v Canada (AG)*, 2019 FC 456; stayed by the Federal Court of Appeal in *Attorney General of Canada* v *Boulachanis,* 2019 FCA 100 (noted in *Boulachanis*, *supra* note 133 at para 14).
[258] *Ibid* at para 39 [translated by author using Google translate].
[259] *Ibid* at paras 136-54.
[260] See sources cited at note 29, *supra*, & Leitch, *supra* note 142. And see Tom Cardoso, "Proposed Class-Action Suit Against Ottawa Suggests Inmates Face Systemic Bias in Risk Assessments," *Globe and Mail* (12 January 2021) /<https://www.theglobeandmail.com/canada/article-proposed-class-action-suit-against-ottawa-suggests-inmates-face/>.
[261] *Ogiamien v Ontario (Community Safety and Correctional Services),* 2017 ONCA 839 [*Ogiamien* 2] at para 44, Sharpe J, citing *Attorney-General for Hong Kong v Kwok-a-Sing* (1873), LR 5 PC 179, at 202 (PC).

Supreme Court of Canada, the applicant had long since been returned to the maximum-security prison he had been released from on the *habeas corpus* application in issue.[262]

This raises the question again: how great is the great writ? The answer requires attention to consequences—not only the immediate effects for individual prisoners but also systemic effects that *habeas corpus* may have on prison administration and the court system. On this point, Ian Davis argues that *Khela*'s injecting reasonableness review into *habeas corpus* has produced a tool more fit for purpose than ever—seeding the rule of law in dark places. He writes:

> [E]ffective corrections need not be based on a fundamental imbalance of power. Rather, the key to acquiring legitimate correctional authority may be 'respect, fairness, courtesy, empathy, and a willingness to listen.' Reasonableness review encourages these virtues.[263]

The argument is that correctional authority can be reformed by undergoing short sharp shocks of reasonableness via *habeas corpus*. However, this misses the depth of the challenges posed to correctional legitimacy—indeed state legitimacy and/as the rule of law—by the facts of incarceration presented earlier. The optimism shown leans on values of public justification and congruence between law on the books and in action. But it underplays the intransigence of extraordinary coercion and violence in Canada's prisons, and with this, the institutional genius shown for evading accountability.[264] More fundamentally, the theoretical connectivity of public reason and legitimate correctional authority risks covering over the deeper illegitimacy of prisons in cementing gross social-structural inequality and colonialist subordination.

Is it possible to practice administrative law in (and beyond) prisons in a way that resists and seeks alternatives to, rather than strengthens or legitimizes the carceral state?[265] This is, in part, a question of remedies. *Khela* states:

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[262] *Khela, supra* note 8 at para 13.

[263] Davis, *supra* note 190 at 65, citing Michael Weinrath, *Behind the Walls: Inmates and Correctional Officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016) at 157.

[264] For instance, while the new SIU regime (see note 112, *supra*) was held out as an alternative to solitary confinement, it has been shown to produce prolonged solitary meeting the standard of cruel and unusual treatment in 1 in 10 placements (Sprott and Doob, *supra* note 28). Moreover, while the system builds in independent oversight, these "external reviews do not take place in the usual course of events until a prisoner has spent 90 days in SIU—well over the recognized time-period of 15 days when individuals are likely to suffer negative effects of isolation." West Coast Prison Justice Society and Prisoners' Legal Services, *Solitary By Another Name: The Ongoing Use of Isolation in Canada's Federal Prisons* (West Coast PJS, Nov 2020) at 51-52. online (pdf): <https://prisonjustice.org/wp-content/ uploads/2020/11/Solitary-by-another-name-report.pdf>.

[265] On anti-carceral remedies see Parkes, "Abolitionist Lawyering," *supra* note 31; Sheila Wildeman, "Disabling Solitary: An Anti-Carceral Critique of Canada's Solitary Confinement Litigation" in *The Legacies of Institutionalisation: Disability, Law and Policy in the 'Deinstitutionalised' Community*, Claire Spivakovsky, Linda Steele and Penelope Weller, eds (Oxford Hart, 2020). On the related subject of anti-colonialist institutional transformation, see Angelique EagleWoman, "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2019) 56:3 Alberta LR 669; Linda

> In the Federal Court, a wide array of relief can be sought in an application for judicial review of a CSC decision. ... But all a provincial superior court can do [on *habeas corpus*] is determine that the detention is unlawful and then rule on a motion for discharge.[266]

The point is a jurisdictional one: in federal matters, *certiorari* and other judicial review remedies are in the exclusive jurisdiction of the Federal Court. The BC Court of Appeal states the point more emphatically: "remedies such as *mandamus* or declaratory relief are not available to supplement the jurisdiction of the court" on *habeas corpus*.[267] The principle is given even more expansive articulation in a New Brunswick decision:

> a provincial superior court issuing a *habeas corpus* order is not quashing nor can it quash the impugned decision and direct a re-consideration by the correctional authorities (*certiorari*) or make an independent decision as to the proper security classification level (*certiorari*) or compel the authorities to make a decision (*mandamus*) or otherwise make a declaration (declaratory order) or stop the correctional authorities from taking such other steps as they decide over the inmate (injunction).[268]

The point requires narrowing. First, the proposed jurisdictional constraint does not arise where provincial courts are dealing with *habeas corpus* in provincial corrections—where it is common to have multiple claims combined (and remedies sought).[269] Second, the strict approach taken in these cases undercuts "the inherent powers of the Superior Court to ensure that its orders are effective," and its responsibility to ensure that *habeas corpus* "remains a flexible and effective remedy."[270] Whether the decision can be quashed "is purely academic [as once a prisoner is] released on *habeas corpus*, the effect of the detention order [is] exhausted."[271] Beyond this, precedents, including from the Supreme Court of Canada, reflect judicial discretion to grant ancillary remedies in *habeas corpus*, including in matters arising from the federal jurisdiction.[272] For instance, conditions of release ancillary to *habeas corpus* have been ordered (in parole and immigration detention contexts, and historically, in contexts of bail) where "outright or unconditional release would be inappropriate but where incarceration is not justified."[273] Further, some judges have issued directions—for instance, on what is required of

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Mussell, "Intergenerational Imprisonment: Resistance and Resilience in Indigenous Communities" (2020) 33 J L & Soc Pol'y 15.

[266] *Khela, supra* note 8 at para 39.

[267] *Chambers v Daou*, 2015 BCCA 50 at para 56.

[268] *Wood v Canada (Atlantic Institution)*, 2014 NBQB 135 at para 28.

[269] *AH v Fraser Health Authority*, *supra* note 96 at para 136.

[270] From *Ogiamien 2*, *supra* note 261 at para 47. The statement quoted is in response to a narrower claim, that courts cannot order that release be granted on certain conditions.

[271] *Ibid* at para 44.

[272] Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book, 2012) 9.1970. *Gamble*, *supra* note 51.

[273] *Ogiamien 2*, *supra* note 261 at paras 48-49, citing e.g. Farbey et al, *supra* note 42 at 148, 153-56; *Ali v Canada (AG)*, 2017 ONSC 2660 at para 40 and *Scotland, supra* note 84 at paras 78-79.

correctional officials to comply with procedural fairness.[274] Indeed, wherever discretion is exercised to deal with a matter that is moot,[275] courts resolve questions of legality in ways that resemble declarations.

All of this must be understood in light of the constitutional status of *habeas corpus*. Superior courts may order Charter remedies where *habeas corpus* is the basis for taking jurisdiction.[276] Section 24(1) provides authority to grant remedies over matters within jurisdiction that are "appropriate and just in the circumstances." The Supreme Court has observed that it is wrong for courts "to pre-empt or cut down this wide discretion."[277] What is appropriate will depend on the facts, including what is required for meaningful vindication of the right in issue, considering the legitimate scope of judicial powers and fairness to those against whom the order is made.[278] A court may also issue a declaration of constitutional invalidity under s 52 of the *Constitution Act, 1982* in proceedings initiated in an application for *habeas corpus*.[279]

In *Gamble,* a successful *habeas corpus* involving breach of s 7 in the federal context, the remedy was "a declaration of parole eligibility in aid of [the court's] *habeas corpus* jurisdiction." This was framed in terms of the "creativity and flexibility" required "in adapting the traditional remedy of *habeas corpus* to its new role … as Charter remedy," and with reference to the discretion under s 24(1).[280]

Courts often deal with *habeas corpus* and Charter arguments in a single proceeding.[281] Yet the Ontario Court of Appeal has cautioned against this (particularly where the right is s 12 cruel and unusual treatment)[282] and stated in *obiter* that Charter damages should not be entertained on *habeas corpus*. The worry is that these demand evidence and argument unsuited to the timeliness and efficacy of the writ.[283] However, the foundational principle remains that courts have a duty to remediate illegal detention through *habeas corpus*, and (other) Charter rights are often inextricably implicated.

Where illegal detention is particularly egregious, responsive s 24(1) remedies might potentially extend to reduction in the underlying sentence. Already, sentencing law allows that a contemplated sentence may be reduced by harsh conditions in pre-trial

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[274] *Charlie v British Columbia (AG)*, 2016 BCSC 2292 at para 34; *Lambert*, *supra* note 173 at paras 45-51.
[275] *Borowski v Canada (AG)*, [1989] 1 SCR 342 at 64, 1989 CanLII 123; *Khela, supra* note 8 at para 14.
[276] *Gamble, supra* note 51 at para 81.
[277] *Vancouver (City) v Ward*, 2010 SCC 27 at paras 17-18, citing *Mills v The Queen*, [1986] 1 SCR 863, 1986 CanLII 17.
[278] *Ward, ibid* at para 20, citing *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*] at paras 55-58.
[279] *Way SC & CA, supra* note 153. See also *Pearson*, *supra* note 74.
[280] *Gamble*, *supra* note 51 at para 81.
[281] See e.g. *Bacon, supra* note 228 (*habeas corpus*, s 24(1) declaratory relief, and judicial review remedies granted); and *AH v Fraser Health Authority*, *supra* note 96 at paras 172-85.
[282] *Toure, supra* note 92 at paras 78-80.
[283] *Brown v Canada (Public Safety)*, 2018 ONCA 14 at paras 52–56.

custody—whether Charter rights have been infringed[284] or not.[285] However, so far there has been little uptake of the so-called "Arbour remedy," advanced in a 1996 report by then-Justice Louise Arbour on incidents of abuse and compounded illegalities at Kingston's Prison for Women: "If illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court, a reduction in the period of imprisonment may be granted."[286]

The leading (perhaps only) example of the Arbour remedy in action to reduce a pre-existing custodial sentence is *R v MacPherson*,[287] a judgment issued April 2, 1996, the day after the Arbour report was released (although neither the report nor Arbour's specific proposition is mentioned). MacPherson, on sentence in a New Brunswick jail, had been banging on his cell door and requesting a lawyer—after 40 days of being denied access to one. He was forcibly restrained, strapped to a board and left there for over two hours in extreme distress. He brought a *habeas corpus* application alleging breach of Charter rights under ss 9, 12, and 10(b). Video of the incident was presented to the Court and described extensively in the judgment. In addition, other prisoners gave evidence from which the judge concluded "that other inmates in the Madawaska jail have also been strapped to the stretcher for hours," and that on a separate occasion "an inmate with mental difficulties whose initials are AB was beaten by a guard" in the cell next to MacPherson's. The judge determined breach of ss 9 and 12, and his s 24(1) order included the unprecedented move of reducing the sentence to time served (a reduction of three months), as well as requests to the provincial Attorney General to consider taking steps to make legal aid available to prisoners in jails and to expand videotaping inside jails.[288]

A recent, more modest—but still important—example of remedial responsiveness is *Downey and Gray*,[289] which, as discussed, involved prolonged and indeterminate solitary confinement pre-trial. While the application and remedy were framed strictly as *habeas corpus* and made no express reference to s 24(1), Coady J implicitly built into his order elements of *certiorari* (quash and return) and *mandamus* (mandating a legal duty), stating: "I order that if a solution is not found within 14 days of this decision, Mr Downey and Mr Gray are to be brought before this Court for a Criminal Code review of their detention."[290]

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[284] *R v Prystay*, 2019 ABQB 8. See also *R v MacPherson*, 1995 CanLII 3849, NBJ No 277 (QL) (CA): appellant arrested on a weekend and deprived of timely access to a judge in breach of Criminal Code and s 9 of the Charter. A s 24(1) remedy was awarded on appeal from sentence: reduction of six-month sentence by three months. MacPherson's further challenge a few months later, using *habeas corpus* to challenge incidents of ill treatment post-sentence on a separate conviction, is described below.

[285] *R v Nasogaluak*, 2010 SCC 6. ("state misconduct which does not amount to a Charter breach but which impacts the offender may also be a relevant factor in crafting a fit sentence" at para 2).

[286] *Arbour Report*, *supra* note 9, at Part 3.2.2. Michael Jackson, *Justice Behind the Walls* (Vancouver: Douglas & McIntyre, 2002) at 583-86, gives examples of how the Arbour Remedy might be used where full release would be unlikely.

[287] *R v MacPherson*, 1996 CanLII 10188, 177 NBR (2d) 1 (QB) [*MacPherson*].

[288] *MacPherson*, *ibid* at paras 50, 51.

[289] *Supra* note 212.

[290] *Ibid* at para 21.

That is, if authorities do not find an alternative, the judge will revisit bail.

As judges already employ ancillary remedies to effectuate release from detention, it is worth considering how far they might go to fashion terms necessary to sustain release—on the idea that liberty may in some cases require responsive supports.[291] Laying a foundation for such a remedy might be assisted by establishing a s 15 (equality) breach in addition to the ss 7, 9, or 12 infringements more typically engaged by illegal detention. That is, establishing that race, Indigeneity, disability, gender, or gender identity has functioned as a vector of oppression, concentrating restrictions and force on the body of the *habeas corpus* applicant with special intensity, may help signal the need for a remedy responsive not simply to ephemeral liberty restriction but sustained structural inequality.

In important cases not involving *habeas corpus*, s 24(1) has been used to grant creative *mandamus*-like remedies in the face of state recalcitrance—even, following *Doucet-Boudreau*, maintaining an oversight function for the judge.[292] A recent judgment from the Ontario Court of Appeal—not *habeas corpus* but rather a statutory appeal of a decision of the Ontario Criminal Code Review Board—is also instructive. *Shortt (Re)* involved a man held in forensic hospital for six years beyond the point conditional release would have been possible had funded community supports been offered. The Court determined a breach of s 7 liberty and ordered as s 24(1) remedy a further Review Board hearing and, assuming conditional release, that Ontario provide Shortt with supportive housing.[293] That the remedial order engaged the budget of a government ministry not directly responsible for administration of the detention order is of special note to those litigating (or languishing) at the corrections/community services divide.[294]

Of course, a *habeas corpus* application is not a public inquiry. It is designed for swift justice. But where the writ threatens to be more like a revolving door than a gateway to release—or where the actions complained of are fundamentally corrosive of the stated purposes of the underlying sentence/detention order—then it is time to revisit remedies. With that in mind, jurisdictional qualms should not preclude innovations like those ordered in *MacPherson, Downey and Gray*, and even (though this non-*habeas* case is a further stretch) *Shortt (Re)*. That said, *habeas corpus* has limits: doctrinal, procedural, conceptual—structural. Prisoners perceived as pushing too hard have provoked intense judicial anxieties about the integrity of the writ and the efficient and orderly functioning of both prison and court systems. In Alberta, judges of the Queen's Bench have decried the "tsunami"[295] of *habeas corpus* applications received since *Khela* and devised a paper-based screening process specific to *habeas corpus*, now subsumed in a broader process

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[291] There is always the danger, however, that the supports will be as bad as (or, very bad but in a different way than) the restraints. See Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Abingdon: Routledge, 2020).
[292] *Doucet-Boudreau, supra* note 278 paras 66-71.
[293] *Shortt (Re)*, 2020 ONCA 651.
[294] *Ibid* at paras 16-24: "There is no onus on a *Charter* claimant to identify from what budget their requested remedy should come" (at para 23).
[295] *Hamm v Canada (AG)*, 2019 ABQB 247[*Hamm* 2019] at para 108.

for dealing with Apparently Vexatious Litigants.[296] Prisoners whose applications stray too far from the proper scope of the writ (or the judge's view of that) may be hit with costs[297] and prohibited from further applications "in any proceeding, except with leave of the Court."[298] These are developments to watch. An alternative system-level response concerned with both judicial economy and facilitation of meritorious (including, potentially, limit-pressing) claims would ensure funding for prison law legal aid in jurisdictions where such assistance is not available or widely accessible.

V. Conclusion

To learn administrative law through prison law—indeed, to squeeze it into the frame of *habeas corpus*—is to be immersed in contradictions. Most basic is the contradiction between the culture of authority and force in prisons (disproportionately populated by Indigenous, Black, poor, and disabled persons and expressive of heteropatriarchal subordination) and the stories law tells of a culture of justification. In order to perform its constitutionally protected function as an escape hatch from illegal detention, *habeas corpus* has an integrity critically distinct from ordinary judicial review—yet it is also, in key ways, judicial review. The core elements examined in this chapter reflect the writ's distinctiveness: timely access to the courts, a strict curtailment of judicial discretion to deny prisoners their remedy, a profoundly prisoner-friendly onus of proof, and a guaranteed baseline remedy of release. Each element reflects the value that the liberal legal tradition has placed on liberty and the practical impossibility of amassing evidence and argument while locked up by one's adversary. At the same time, *habeas corpus* draws on the same well of basic principles for evaluating legality as judicial review. Last, to sum up a theme woven throughout this chapter, for all its venerated antiquity the Great Writ leaves space for shifting conceptions of liberty and of the gravest constraints upon it—a facet of the writ that increasingly brings it into contact with concepts of structural injustice and substantive equality.[299]

Those setting out to dismantle the carceral state using *habeas corpus* are likely to be disappointed; that is like trying to drive a bus through a keyhole. However, lawyers can use the writ pragmatically, even creatively—counting themselves successful if they help just one person out of a tight spot while making a record of institutional decisions and actions that may otherwise remain publicly invisible. It is one tool in the remedial tool

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[296] Court of Queen's Bench of Alberta Civil Practice Note 7 (Sept 4, 2018) [Civil Practice Note 7]. And see Amy Matychuk "Alberta Court of Queen's Bench Introduces the Accelerated *Habeas Corpus* Review Procedure" (9 February 2018), online (blog): ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_AM_Habeas_Corpus.pdf ("inmates often identify very real problems with prison conditions and possible breaches of *Charter* rights" but "the Alberta courts have repeatedly responded to their allegations by noting that *habeas corpus* is an inappropriate means of addressing these problems.").

[297] See e.g. *Johnsrud v Fader*, 2021 ABQB 88 at para 9; *Hamm* 2019, *supra* note 295 at para 271. See also Jonnette Watson Hamilton, "Alberta Courts of Appeal Restores Access to *Habeas Corpus*" (April 7, 2020), online (blog): ABlawg, \<http://ablawg.ca/wp-content/uploads/2018/07/Blog_JWH_Wilcox.pdf\>

[298] Civil Practice Note 7, *supra* note 296.

[299] Parkes, *supra* note 108.

box. For some, *habeas corpus* may become part of a wider lawyering practice, or ethic,[300] dedicated not simply to vindicating the rights of prisoners but to reimagining and redesigning (and making space for others to reimagine and redesign) the administrative state in accordance with an emancipatory—anti-colonialist and anti-carceral[301]—conception of administrative justice.

[300] Parkes, *supra* note 31.
[301] See the sources cited at note 265, *supra*, and see Chapter 5 by Janna Promislow and Naiomi Metallic.