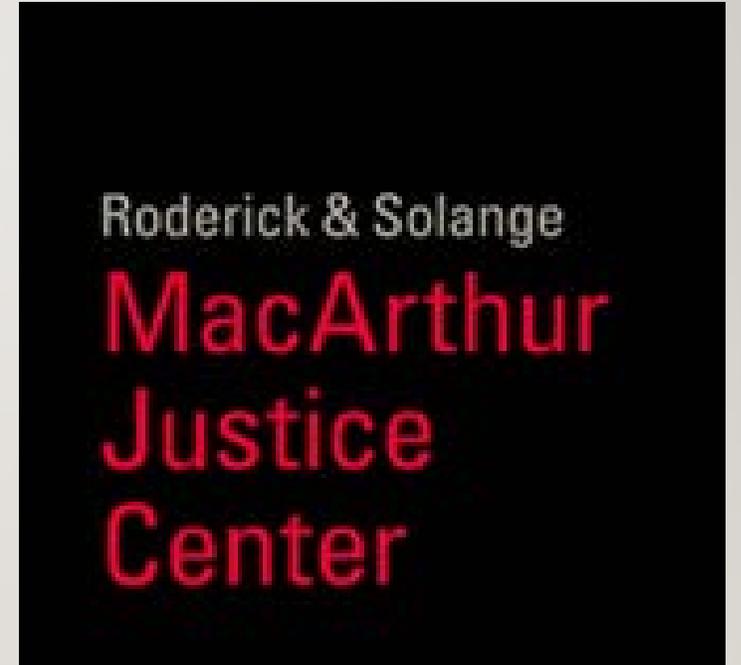


# ***Court Web: New Developments in the Law of Incarceration***

**Federal Judicial Center**

May 7, 2019

David M. Shapiro,  
Director of Appellate Litigation,  
Roderick and Solange MacArthur Justice Center  
Clinical Associate Professor of Law,  
Pritzker Northwestern School of Law



# ***SOLITARY CONFINEMENT***

“Courts and corrections officials must . . . remain alert to the clear constitutional problems raised by keeping prisoners in ‘near-total isolation’ from the living world.”

**Apodaca v. Raemisch, 139 S. Ct. 5, 9 (2018)  
(Sotomayor, J., statement respecting denial of certiorari)**

In “a case that presented the issue” the judiciary should “determine whether workable alternative systems for long-term [solitary] confinement exist, and, if so, whether a correctional system should be required to adopt them.”

*Davis v. Ayala* 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

# ***PRETRIAL DETAINEES***

---

Different constitutional standards for pretrial detainees versus convicted prisoners?

Supreme Court: **Kingsley v. Hendrickson**

Ninth Circuit: **Castro v. County of Los Angeles**

Second Circuit: **Darnell v. Piniero**

Seventh Circuit: **Estate of Miranda v. County of Lake**

# **ROSS V. BLAKE**

---

[W]e note as relevant here three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. Given prisons' own incentives to maintain functioning remedial processes, we expect that these circumstances will not often arise. But when one (or more) does, an inmate's duty to exhaust “available” remedies does not come into play.

First . . . an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates.

# **ROSS V. BLAKE**

(CONTINUED...)

---

Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it.

And finally, the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.

*Ross v. Blake*, 136 S.Ct. 1850, 1859–60 (2016)

# PRO SE FORMS THAT CAN CAUSE REVERSAL ON APPEAL

I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C Yes  No . If your answer is “Yes”, briefly describe how relief was sought and the results. If you answer is “No”, briefly explain why administrative relief was not sought.

---

---

---

---

---

*Lax v. Corizon Medical Staff, 2019 WL 1223312, at \*2 (10th Cir. Mar. 15, 2019)*

The prohibition in Jones “against requiring prisoners to affirmatively plead exhaustion” naturally “encompass[es] questions in ‘form complaint[s]’ issued by district courts that are designed to elicit ‘information about [a prisoner’s] exhaustion of administrative remedies.’”

*McDonald v. Cain*, 426 F.App’x 332, 333 (5th Cir. 2011).

The district court sua sponte ordered Custis to “submit documentation of administrative exhaustion,” and stated that Custis “may show exhaustion of administrative procedures by submitting copies of the grievances filed, of all levels of appeal, and of all responses to the grievances and appeals.” Custis complied by submitting his prior grievances, rejections, and medical order. The district court then dismissed his claim for failure to exhaust administrative remedies because he failed to follow the prison's grievance procedure timeline.

*Custis v. Davis*, 851 F.3d 358, 360–61 (4th Cir. 2017)

“[I]t is possible to have a functional and effective form complaint that does not ask about exhaustion.”

Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 Wash. U. L. Rev. 899, 943 (2017).

# ***DAMAGES UNDER RFRA, RLUIPA, AND THE FIRST AMENDMENT***

---

RFRA creates an individual-capacity damages remedy against federal officials.

Second Circuit: *Tanvir v. Tanzin*

Third Circuit: *Mack v. Warden, Loretto FCI*

D.D.C: *Patel v. Bureau of Prisons*

Not to be confused with.....

Suits against the federal government

RLUIPA suits against state governments

RLUIPA suits against state prison officials sued in their individual capacity

# QUALIFIED IMMUNITY

---

## *Kisela v. Hughes*

Police shooting case

Very fact-specific in its approach to qualified immunity

Justice Sotomayor's dissent: "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."

---

## *Ziglar v. Abassi*

Post-9/11 detention and discrimination

Another reversal based on qualified immunity

Significant implications for *Bivens* liability as well, including in federal prison

---

## *Sause v. Bauer*

Police do not allow plaintiff to pray during a seizure

The *Anti-Kisela*

*Sause* summarily reverses a court of appeals decision granting qualified immunity

Whereas as *Kisela* and the other recent qualified immunity decisions suggest a growing need for specific precedents to defeat qualified immunity, *Sause* denies QI without citing a single case!

---

*Ziglar v. Abbasi* (Thomas, J., concurring in part and concurring in the judgment)

“In an appropriate case, we should reconsider our qualified immunity jurisprudence.”

---

*Kisela v. Hughes* (Sotomayor, J., dissenting) (citations omitted)

As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.”

# LIABILITY OF PRISON CONTRACTORS

---

The courts to consider the question hold that *respondeat superior* liability does not extend to private companies that are sued under Section 1983. *E.g., Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982),

But it has been argued that this view is incorrect. *See Shields v. Illinois Dept. of Corrections*, 746 F.3d 782 (7th Cir. 2014)

# 2010 AMENDMENT TO RULE 56

---

- (e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by [Rule 56\(c\)](#), the court may:
  - **(1) give an opportunity to properly support or address the fact;**
  - **(2) consider the fact undisputed for purposes of the motion;**

- 
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
  - (4) issue any other appropriate order.
  - Committee Notes on 2010 Amendment: “Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court’s preferred first step.”

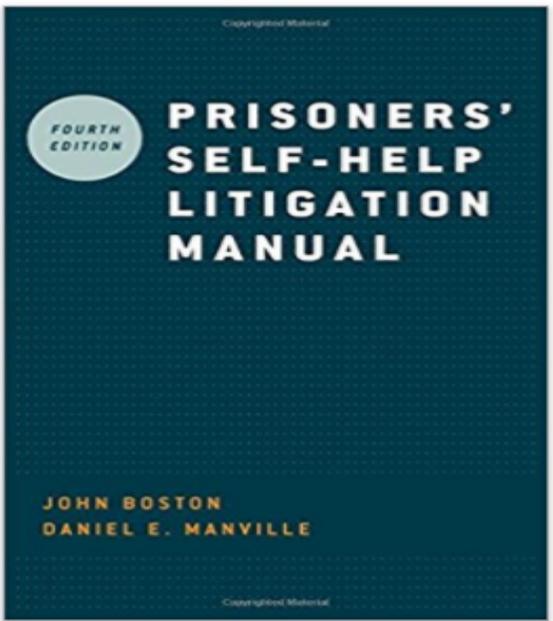
# GET THE PRISONERS' SELF-HELP LITIGATION MANUAL

## Prisoners' Self-Help Litigation Manual 4th Edition

by [John Boston](#) (Author), [Daniel E Manville](#) (Author)

★★★★★ 54 customer reviews

[Look inside](#)



ISBN-13: 978-0195374407

Kindle from \$23.99	Hardcover \$40.00	<b>Paperback</b> \$27.88 - \$31.67	Other Sellers See all 7 versions
------------------------	----------------------	---------------------------------------	-------------------------------------

Buy used \$27.88

**Buy new** **Prime \$31.67**

**In Stock.**  
Ships from and sold by Amazon.com. Gift-wrap available.  
**Prime** | FREE One-Day  
Delivered tomorrow for FREE with qualifying orders over \$35. [Details](#)

**Get it tomorrow, May 18.** Order within **19 hrs 35 mins** and choose **One-Day Shipping** at checkout. [Details](#)

List Price: ~~\$41.95~~ Save: \$10.28 (25%)  
24 New from **\$31.67**

**Add to Cart**

[Turn on 1-Click ordering](#)

**Ship to:**  
David Shapiro- Chicago - 60616

**More Buying Choices** 47 used & new from \$31.67

24 New from **\$31.67** | 23 Used from **\$27.88** [See All Buying Options](#)