Extraordinary Punishment: Conditions of Confinement and Compassionate Release

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ABSTRACT

People experience severe forms of harm while incarcerated including medical neglect, prolonged solitary confinement, sexual and physical violence, and a host of other ills. But civil rights litigation under the Eighth Amendment—the most common vehicle through which people seek to redress these harms—presents significant practical and doctrinal barriers to incarcerated plaintiffs. Most notably, the Eighth Amendment's "deliberate indifference" standard asks not whether a person has been harmed, but instead requires plaintiffs to demonstrate a criminally reckless mental state on the part of prison officials. Further, Eighth Amendment remedies are limited to damages or injunctions, which may not adequately redress a specific harm that a person is suffering. For these reasons, the Eighth Amendment has often fallen far short of providing litigants adequate relief.

At the same time, once a person is sentenced, the original sentencing judge generally has no control over whether a harm suffered in prison is remedied. However, since the passage of the First Step Act of 2018, people incarcerated in the federal system have a new vehicle for getting these kinds of claims into court: federal compassionate release. Compassionate release motions are heard by the original sentencing judge, who has the authority to reduce a person's sentence if they can demonstrate, among other

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things, "extraordinary and compelling" reasons (ECRs) that warrant relief.

In April of 2023, the Federal Sentencing Commission adopted amendments to the Federal Sentencing Guidelines that drastically expanded the ECR definition to include claims based on the types of harms have been traditionally litigated under the Eighth Amendment. These changes represent a radical and potentially paradigm-shifting reform to federal sentencing law and give district courts enormous discretion to reexamine federal sentences. Given the challenge of redressing harms under the Eighth Amendment, this Article argues that the expansion of compassionate release ECRs to encompass harmful conditions of confinement makes doctrinal sense and allows for a more appropriate remedy to harms done in prison than traditional civil remedies.

INTRODUCTION

Deplorable conditions of confinement—extraordinary punishments—are sadly common in America's prisons.[1] Extreme sexual and physical abuse is endemic to prison life.[2] Prolonged solitary confinement is widely utilized, even though research has shown that many people held in long-term solitary confinement

[1] Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 440 (2014). ("The case law is replete with examples of prison sentences that impose extreme punishment through unconstitutional prison conditions."); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018) (detailing dozens of examples of extraordinarily severe, cruel, and inhumane treatment and neglect of incarcerated people).

[2] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 734-35 (2002) (incarcerated person was handcuffed to a hitching post for prolonged periods of time without water or breaks while the sun burned his skin and was taunted with water but not provided any); Payne v. Parnell, 246 F. App'x 884, 887 (5th Cir. 2007) (unprovoked electric shock from a cattle prod applied to incarcerated person presented a fact question about whether the officer who used the cattle prod acted maliciously and sadistically); Blake v. Ross, 787 F.3d 693, 695 (4th Cir. 2015), *judgment vacated by* 578 U.S. 632 (2016) (prison official wrapped a key ring around his fingers and then punched Mr. Blake at least four times in the face in quick succession).

develop major psychiatric disorders[3] and even though psychologists have long condemned the practice as a form of state-sanctioned torture.[4] Further, the medical needs of incarcerated people[5] are frequently ignored—often with tragic results.[6]

At the same time, the Supreme Court has held that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[7] This framing is problematic. Under the Eighth Amendment, courts have not asked whether the state has a duty to protect the people whom it incarcerates nor whether a given prison or official has fulfilled that

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[3] *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 354 (2006) ("even those inmate[s] who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged, and especially when the individual experiences this confinement as being the product of an arbitrary exercise of power and intimidation"); *see also* Davis v. Ayala, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) ("the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself").

[4] Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 508-10 (1997) (surveying the literature comparing prolonged solitary confinement to torture).

[5] There is debate in the scholarly literature about whether to refer to people incarcerated in prisons as "prisoners" or "incarcerated people." In this Article, I use the terms "incarcerated people" or "incarcerated individuals" instead of "prisoners." I do this deliberately, although not without some hesitation. There are valid reasons for utilizing the word "prisoner," including the implicit recognition in that word of the oppressiveness and dehumanization that occurs behind prison walls. *See, e.g*. Justin Driver & Emma Kaufman, The Incoherence of Prison Law, 135 HARV. L. REV. 515, 525 (2021); Dolovich, Sharon, *How Prisoners' Rights Lawyers do Vital Work Despite the Courts* (June 12, 2023), UCLA School of Law, Public Law Research Paper No. 23-07, at n.1. Especially because this paper discusses personal stories, the choice to use "incarcerated people" reflects an attempt to recognize the individualized harm that people suffer behind bars and to elevate the experiences of people who have suffered at the hands of the State—the State that has been entrusted with their safety and security.

[6] *See* Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 638 (2010) (describing the serious medical needs of incarcerated people and the Eighth Amendment's shortcomings in ensuring that those needs are met).

[7] Farmer v. Brennan, 511 U.S. 825, 837 (1994).

duty. Instead, in order to obtain relief for the harms[8] that they suffer while incarcerated, people must file burdensome civil lawsuits[9] that ask whether a prison official has "inflicted" punishment in an intentional or criminally reckless manner.[10] But civil remedies for incarcerated plaintiffs are notoriously difficult to obtain. The barriers to getting in the courthouse doors for incarcerated litigants

[8] This Article uses the word "harm" to refer to a host of ills that can occur in the prison setting. This term is used in restorative justice practices, which focuses on repair rather than on retribution. *See, e.g.*, Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020) ("restorative justice emphasizes relational harms"). The term is also utilized within the abolitionist movement to emphasize the value of harm reduction. Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022) ("harm reduction is embedded into abolitionist practice").

[9] Suits against state and local officials or challenging conditions in state custody are brought pursuant to 42 U.S.C. § 1983. A different statute, 28 U.S.C. § 1331, gives federal courts jurisdiction to hear suits against federal officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Because the substance of much Eighth Amendment law applies whether suits are brought against state or federal officials, this Article does not distinguish between the two in its discussion of the substantive rights at issue. In addition, there are many other kinds of constitutional and statutory claims that incarcerated people can bring under the First, Fourth, Fifth, and Fourteenth Amendments as well as under the Religious Freedom Restoration Act (RFRA), Americans with Disabilities Act, and others. Such claims, while potentially relevant here, are beyond the scope of this Article.

[10] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *inflicted*.") (emphasis added); Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("The infliction of punishment is a deliberate act intended to chastise or deter."); *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009) [hereinafter Dolovich, *Cruelty*] ("[P]rison conditions not explicitly authorized by the statute or the sentencing judge qualify as punishment only if some prison official actually knew of and disregarded the risk of harm."); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 385 (2018) [hereinafter Schlanger, *Constitutional Law of Incarceration*] (lamenting the Eighth Amendment's scienter requirement and noting that "the conditions-of-confinement/use-of-force case law … suffers from a glaring doctrinal problem, introduced by Justice Scalia when, in his opinion for the Court in *Wilson*, he centered the entire formal apparatus around a claim that 'punishment' definitionally requires the subjectively culpable intent of a punisher.").

include onerous and technical exhaustion requirements,[11] impediments to obtaining legal counsel,[12] and other problems that come from being incarcerated including access to information, law libraries, and similar tools required to litigate a claim effectively. Further, as noted, to be successful under the Eighth Amendment a litigant must meet the very high bar of showing "deliberate indifference" on the part of prisons or prison officials to "a basic human need" or "substantial risk of serious harm" to establish a claim of unconstitutional conditions[13] or that an official acted "maliciously or sadistically" to establish an excessive force claim.[14] And even if an incarcerated person succeeds in getting into court, available remedies are limited. Finally, the doctrine of qualified immunity—time and again—shields prison officials from individual monetary liability.[15]

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[11] *See, e.g.*, Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153-54 (2015) [hereinafter Schlanger, *Trends in Prisoner Litigation*] (describing onerous exhaustion requirements under the PLRA); Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. (forthcoming 2023) (describing barriers to access to the courts because of onerous pleading requirements under the PLRA).

[12] *See, e.g.*, Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 182-83 (2015).

[13] Farmer v. Brennan, 511 U.S. 825, 842-43 (1994) (requiring plaintiff to show that prison officials were deliberately indifferent to plaintiff's increased vulnerability to sexual abuse in order to establish liability).

[14] Hudson v. McMillian, 503 U.S. 1, 7 (1992) (the question in an excessive force case is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm"); *see also* Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 477 (2018) ("judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win").

[15] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (stating how government officials are protected by qualified immunity from monetary liability in constitutional claims so long as their conduct does not violate a clearly established statutory or constitutional right of which they should have known); *see also, e.g.*, Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79, 81 (2022) (noting that "the qualified immunity doctrine compounds other barriers to asserting legal accountability of prison and jail administrators").

Moreover, once a sentencing has occurred and a federal defendant has been remanded to the custody of the Bureau of Prisons (BOP), the sentencing judge's role in a person's experience of incarceration is over. Even if it may want to, the original sentencing court cannot do anything to remedy prison conditions. Indeed, the Eighth Amendment's treatment of sentencing concerns has traditionally been completely walled off from its treatment of the conditions a person is confined in.[16]

The meaning of the word "punishment" in American jurisprudence also differs depending on the context in which it is used.[17] On the one hand, the Eighth Amendment prohibits certain types of "punishments" meted out at sentencing—for example those that are cruel in the sense of being barbaric and antiquated[18] or those that are grossly disproportionate to the crime as determined by a judge at sentencing.[19] On the other hand, the Eighth Amendment prohibits "punishments" that amount to unduly harsh prison

[16] Alexander A. Reinert, *Release As Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1578 (2012) [hereinafter Reinert, *Release As Remedy*] (noting that the term "punishment" within the Eighth amendment "means different things in different contexts").

[17] Dolovich, *Cruelty*, *supra* note 10, at 884 (distinguishing between punishment's imposition and punishment's administration and explaining that "in the existing system, the crime determines only the length of the prison sentence, not the conditions under which that sentence will be served").

[18] For example, the Supreme Court has noted that the Eighth Amendment prohibits certain antiquated practices such as "[t]he barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like.'" Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (*quoting* O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting)). The Supreme Court has also held that stripping people convicted of crimes of their citizenship as a form of punishment is unconstitutional under the Eighth Amendment. Trop v. Dulles, 356 U.S. 86, 101 (1958) ("use of denationalization as a punishment is barred by the Eighth Amendment").

[19] *See* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (whether a sentence is unconstitutional under the Eighth Amendment requires an analysis of whether sentence is "grossly disproportionate" to the crime); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (discussing the question of whether the death penalty is always disproportionate to the crime for which it is imposed).

conditions or treatment in prison.[20] Although the two jurisprudential strands of the Eighth Amendment derive from the same word—"punishment"—as a practical matter there has been little overlap between punishment-as-sentence and punishment-as-conditions in legal doctrine.[21] In particular, until now there has been no way for a sentencing judge to account for a person's post-sentencing conditions of confinement in adjusting the term of imprisonment or providing other relief.

However, since the passage of the First Step Act of 2018, people incarcerated in the federal system have a new vehicle for getting these kinds of claims into court: filing motions for sentence reductions or early release under 18 U.S.C. § 3582(c).[22] In order to obtain compassionate release, a movant must put forth one or more "extraordinary and compelling" reasons (ECRs) that warrant relief. In the years since the First Step Act was passed, the United States Sentencing Commission responsible for defining the meaning of the phrase "extraordinary and compelling" lacked a quorum and thus was not able to promulgate an ECR definition. The question of what rose to the level of "extraordinary and compelling" was thus largely

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[20] Farmer v. Brennan, 511 U.S. 825, 834 (1994) (explaining that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.").

[21] *See* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 54 (2009) [hereinafter Reinert, *Eighth Amendment Gaps*] (describing how the two meanings of "punishment" within the Eighth Amendment "have increasingly diverged in the past forty years").

[22] Although the statute speaks in terms of "sentence reductions," *see* 18 U.S.C. § 3582(c)(1)(A), motions filed under this section have generally been called "compassionate release" motions. I recognize that the phrase "compassionate release" is somewhat of a misnomer. *See*, *e.g.*, United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) ("It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions. A district court could, for instance, reduce but not eliminate a defendant's prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place."). Although courts and practitioners are moving away from the "compassionate release" terminology, I continue to use this label to describe motions that ask for a reduction in a federal sentence under Section 3582(c) in this Article because of the term's prevalence within case law and commentary from the COVID-19 era and the first few years after the passage of the First Step Act, which I cite extensively.

left to the discretion of district courts.[23] With that discretion, some district courts interpreted the phrase to include circumstances that would have previously been judicially reviewable only as constitutional conditions claims under the Eighth Amendment.[24]

The federal compassionate release statute was also widely utilized during the COVID-19 pandemic to win early release for thousands of individuals suffering from severe COVID-19 comorbidities or who were suffering under pandemic-era prison conditions. These motions, and the judicial decision-making that has emerged from this new area of the law, exposed the artificial divide between punishment-as-sentence and punishment-as-conditions. This era of conditions of confinement litigation also showed—to an alarming degree—the inability of the Eighth Amendment to keep incarcerated people safe.[25]

Partially in response to this groundswell of compassionate release motions, the Sentencing Commission recently adopted amendments to the United States Sentencing Guidelines (USSG) definition of ECRs that include various medical and aging-related conditions, a category for prison assault by BOP officers, and a "catch-all" category that could encompass other kinds of severe conditions-based harms.[26] These watershed amendments create—

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[23] *See, e.g.*, United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); United States v. McCoy, 981 F.3d 271, 276 (4th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020); United States v. Jones, 980 F.3d 1098, 1106 (6th Cir. 2020); *Brooker*, 976 F.3d at 237.

[24] *See, e.g.*, United States v. Olawoye, 477 F. Supp. 3d 1159, 1166 (D. Or. 2020) (granting compassionate release in part because the district court was "very concerned with manner in which defendant has been confined since he was sentenced"); United States v. Mcrae, No. 17 CR. 643 (PAE), 2021 WL 142277, at *5 (S.D.N.Y. Jan. 15, 2021) (releasing person to home confinement and emphasizing that "a day spent in prison under extreme lockdown and in well-founded fear of contracting a once-in-a-century deadly virus exacts a price on a prisoner beyond that imposed by an ordinary day in prison" and "[w]hile such conditions are not intended as punishment, incarceration in such circumstances is, unavoidably, experienced as more punishing").

[25] *See generally* Nicole B. Godfrey, *Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals*, 74 ARK. L. REV. 365 (2021) (describing failures of prison litigation to adequately address the ravages of COVID in prisons).

[26] U.S. SENT'G COMM'N AMENDMENTS TO THE SENTENCING GUIDELINES (FINAL) (Apr. 27, 2023) [hereinafter FINAL AMENDMENTS],

for the first time—an official mechanism by which an incarcerated person can petition a federal court for a sentence reduction or early release based on "extraordinary and compelling" conditions of their confinement.

This Article argues that the Sentencing Commission's expansion of ECR categories to encompass conditions of confinement makes sense for several practical and doctrinal reasons. For example, the remedy of release or sentence reduction for an individual person, rather than damages or injunctive relief against an institution, is often more suited to the kinds of ills suffered behind bars than the remedies traditionally available in the civil context. Similarly, early release or sentencing credit as a remedy is more doctrinally coherent—and frequently more just—than civil remedies. While compassionate release as an avenue for relief presents its own shortcomings, this mechanism for obtaining relief for harms suffered in prison circumvents some of the most onerous challenges litigants face in the civil context.

Accordingly, Part I sets out the many barriers that incarcerated people face when litigating civil rights claims under the Eighth Amendment against prison officials to redress harms that they have suffered. Part II gives an overview of the federal compassionate release process and of the 2023 amendments to the Federal Sentencing Guidelines, which expand the categories of ECRs available to incarcerated people. Part II also explains how COVID-19 exposed many of the Eighth Amendment's limitations in providing relief to incarcerated individuals. Part III takes three broad categories of conditions-based harms that occur in the prison setting—severe medical conditions, long-term solitary confinement, and assault at the hands of prison guards—and compares how a person might seek a remedy for such harms in the Eighth Amendment context as compared with the compassionate release

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https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf, §1B1.13(b)(1)-(5). Congress directed the Commission to promulgate general policy statements regarding the appropriate use of section 3582(c). *See* 28 U.S.C. § 994(a)(2)(C). Technically speaking, the Sentencing Commission's adopted amendments to §1B1.13 are that policy statement. But for ease of reading, this Article will refer to the policy statement as adopted amendments or guideline amendments because they function as such.

context. Finally, Part IV builds upon Part III and argues that, despite challenges that exist for movants under the federal compassionate release framework, the Sentencing Commission's adopted amendments to compassionate release allow for a mechanism of redress for conditions-based harms that should be unequivocally embraced by district judges reviewing such claims.

I. THE LIMITS OF EIGHTH AMENDMENT CIVIL CLAIMS

Harms redressable under the Eighth Amendment can include untreated medical conditions,[27] physical or sexual abuse at the hands of other incarcerated individuals or prison guards,[28] exposure to lengthy periods of time in solitary confinement,[29] extreme overcrowding,[30] and other adverse conditions.[31] But prevailing on an Eighth Amendment claim in federal court is not an easy task. Rather, the pursuit of private rights of action on the part of incarcerated people for redressability of harms done to them in prison can often amount to an empty right without a remedy.[32] Barriers to merits review include onerous exhaustion requirements,[33] strict pleading standards,[34] lack of access to counsel,

[27] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (concluding that "deliberate indifference" to a prisoner's medical needs can violate the Eighth Amendment).
[28] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (requiring plaintiff to show that officials used force "maliciously and sadistically" to establish Eighth Amendment liability).
[29] Hutto v. Finney, 437 U.S. 678, 685 (1978) (noting that being held in an isolation cell "is a form of punishment subject to scrutiny under Eighth Amendment standards").
[30] Brown v. Plata, 563 U.S. 493, 545 (2011) (upholding three-judge lower court decision ordering the release of prisoners to alleviate overcrowding in California's state prisons).
[31] Helling v. McKinney, 509 U.S. 25, 35-36 (1993) (risk of exposure to environmental tobacco smoke (ETS) may support an Eighth Amendment claim).
[32] Shapiro & Hogle, *supra* note 1, at 2022 (lamenting that "a combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start").
[33] *See, e.g.*, Schlanger, *Trends in Prisoner Litigation*, *supra* note 11, at 153-54; Yang, *supra* note 11.
[34] Hill, *supra* note 12, at 213 (describing problems with *Iqbal*'s heightened civil pleading requirement and explaining that "constitutional civil rights claims were

and qualified immunity for federal officials.[35] Furthermore, the standard that governs many Eighth Amendment conditions of confinement claims requires plaintiffs to show "deliberate indifference" (essentially criminal recklessness) on the part of a prison official. Although some individuals eventually prevail under the Eighth Amendment, the available remedies are limited to damages against individual prison officials and injunctive relief against an institution. This section of the Article joins the chorus of scholars[36] who have argued that traditional civil suits are usually wholly inadequate to deal with or account for the suffering that can occur behind prison walls.

While this Article does not attempt a comprehensive examination of these obstacles, it briefly surveys four chief impediments to Eighth Amendment relief: (1) the Prison Litigation Reform Act's exhaustion and other requirements; (2) access to counsel and other structural imbalances that incarcerated plaintiffs face; (3) the inadequacy of civil remedies; (4) and the Eighth Amendment's scienter requirements.

(1) Exhaustion and the Prison Litigation Reform Act (PLRA). The first barrier that litigants face happens immediately following any sort of adverse occurrence in prison, when incarcerated people must navigate a complicated morass of grievance forms, procedures, appeals, and very short deadlines

significantly more likely to be dismissed by district courts after *Iqbal* than under the earlier liberal pleading regime").

[35] *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (explaining that the doctrine of qualified immunity shields federal and state officials from liability for money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct).

[36] Shapiro & Hogle, *supra* note 1, at 2022 ("[A]combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start.); Dolovich, *Cruelty*, *supra* note 10 at 890 (discussing how the Eighth Amendment jurisprudence "rests on a conception of punishment that is inappropriate for the context"); Schlanger, *Constitutional Law of Incarceration*, *supra* note 10 at 360 ("the Court's interpretation of the Eighth Amendment's ban of cruel and unusual punishment, in particular, has radically undermined prison officials' accountability for tragedies behind bars").

imposed upon them by carceral institutions.[37] Grievance processes can differ from institution to institution, and instructions for how to grieve properly are rarely readily available to the aggrieved.[38] Barriers to accessing the grievance process are especially significant for persons being held in isolation or solitary confinement.[39] Indeed, even the purely logistical questions of how to obtain a grievance form and which forms must be used in a given situation can present challenges for those who must obtain forms from the ones incarcerating them.[40]

Because the Prison Litigation Reform Act (PLRA) requires an incarcerated person to exhaust all available administrative remedies before any civil rights action may be brought, incarcerated people must navigate the complex grievance system perfectly or risk having their claims thrown out of court without any consideration of the merits.[41] This system—by design—means that many would-be lawsuits by incarcerated people may never even make it into federal court.[42]

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[37] *See, e.g.*, Amicus Curiae Brief for Jerome N. Frank Legal Services Organization of the Yale Law School in Support of Respondent at 6-13, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 (detailing onerous grievance requirements and appeal processes in various institutions).

[38] *See* Jones v. Bock, 549 U.S. 199, 218 (2007) ("The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.").

[39] *See, e.g.*, Latham v. Pate, No. 1:06-CV-150, 2007 WL 171792, at *2 (W.D. Mich. Jan. 18, 2007) (case dismissed for failure to exhaust despite the fact that incarcerated person was placed in isolation and was not provided with grievance forms).

[40] *See, e.g.*, Annoreno v. Sheriff of Kankakee Cnty., 823 F. Supp. 2d 860, 861, 864(C.D. Ill. 2011) (pretrial detainee's submission of "sick call slip," rather than "inmate grievance form," regarding alleged assault committed upon him by corrections officers, was inadequate to exhaust administrative remedies under PLRA). *But see* Archuleta v. Adams Cnty. Bd. of Comm'rs, No. 07-cv-02515-ZLW-CBS, 2010 WL 1347728, at *1 (D. Colo. Mar. 31, 2010) (explaining how incarcerated person was denied grievance forms but acknowledging that "the PLRA's exhaustion requirement thus may be excused where the prisoner is denied grievance forms.").

[41] *See* 42 U.S.C. § 1997e(a); *see also* Woodford v. Ngo, 548 U.S. 81, 90-91, 93 (2006).

[42] *Woodford*, 548 U.S. at 94.

Moreover, every incarcerated person must "properly"[43] exhaust, no matter the violation or reason for not exhausting. An incarcerated person may not speak English, may suffer from a disability, may be sick or otherwise incapacitated; nonetheless, as scholars have lamented, they must "comply with all time limits, appeal levels, and other procedural requirements."[44] Even a technical or innocent error can doom a claim.[45]

The PLRA narrows the scope of injunctive relief[46] and limits the ability of incarcerated people to sue for money damages if their harms involve "mental or emotional injury suffered while in custody without a prior showing of physical injury."[47] Thus, the PLRA severely curtails the availability of relief to any incarcerated person suffering from debilitating mental illness, addiction, or even intellectual disability that a prison official may be deliberately

[43] *Id*. at 90-91 (describing the concept of "proper" exhaustion as an exacting and precise standard).

[44] Hill, *supra* note 12, at 200. *See also* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 586-67 (2014); Ross v. Blake, 578 U.S. 632, 641-42 (2016) (a court may not excuse a failure to exhaust, even to take "special circumstances" into account).

[45] *See Woodford*, 548 U.S. at 120-22 (Stevens, J., dissenting); Mack v. Klopotoski, 540 F. App'x 108, 113 (3d Cir. 2013) (dismissal upheld where person submitted handwritten copies, rather than photocopies, of required documents during the grievance process). Scholars have likewise lamented the unforgiving exhaustion requirement under the PLRA. *See, e.g.*, Hill, *supra* note 12, at 199-201 (explaining the PLRA's onerous and exacting exhaustion requirement); Shapiro & Hogle, *supra* note 1, at 2044-45 ("[T]he PLRA's exhaustion requirement has been interpreted by many federal courts to require a degree of minute technical compliance that would be challenging for anyone, let alone someone locked in prison. And a single lapse in technical compliance can easily lead to dismissal of a prisoner's otherwise meritorious claim").

[46] 18 U.S.C. § 3626(a)(1)(A) (2012) ("Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.").

[47] 42 U.S.C. §1997e(e). *See also, e.g.*, Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 146 (2008) (noting that "experienced civil rights attorneys hesitate to file suits alleging many serious abuses . . . because they know that corrections officials will argue—and often succeed in arguing—that compensatory damages are barred by the PLRA").

indifferent to.[48] Finally, the PLRA's physical injury requirement has been interpreted by federal courts to require more than de minimis injury, causing an additional hurdle for incarcerated plaintiffs seeking money damages for sometimes degrading and unconscionable treatment while in prison if that treatment doesn't cause a sufficiently serious level of harm.[49]

(2) Access to counsel and other informational imbalances. Additional barriers to having suits heard in the civil context include access to counsel and what scholars have termed "information asymmetry."[50] For a number of reasons, the majority of prison conditions cases are litigated pro se.[51] Although there are many barriers to accessing counsel in prison, including the practical considerations of how an incarcerated person would even find a lawyer to take their case, one main barrier is the cap on fees in prisoner lawsuits.[52] This cap means that many lawyers—who make a living through awards of damages and attorneys' fees—are disinclined to take cases on behalf of incarcerated individuals.

Lack of access to proper research materials and the anemic status of prison law libraries[53] mean that most incarcerated litigants

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[48] *See, e.g.*, Harden-Bey v. Rutter, 524 F.3d 789, 794-95 (6th Cir. 2008) (holding prisoner's mental and emotional injuries, inflicted by years-long, open-ended solitary confinement, were not compensable under PLRA).

[49] Shapiro & Hogle, *supra* note 1, at 2047 (describing instances of grave maltreatment of incarcerated people that courts determined involved *de minimis* injury and thus no remedy was available).

[50] Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 159 (2011) (noting the impact of pleading standards on "cases in which state of mind plays a large role or in which there are large information asymmetries, such as civil rights").

[51] Shapiro & Hogle, *supra* note 1, at 2048 ("Plaintiffs represented themselves in 94.9% of prisoners' civil rights cases litigated in federal court in 2012 (compared to 26.1% for the entire pool of federal cases)." (citing Margo Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U.C. IRVINE L. REV. 153, 166-67, 167 tbl.6 (2015))).

[52] For example, rates for lawyers are limited to 150% of the Criminal Justice Act rates for criminal defense representation. Because this is much lower than the going rate for most civil litigators, the PLRA, by design, creates a disincentive to taking cases on behalf of incarcerated people. 42 U.S.C. § 1997e(d)(3) (citing Criminal Justice Act, 18 U.S.C. § 300A(d)).

[53] *See generally* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L. J. 1171 (2013).

don't have the resources necessary to represent themselves effectively on their own. Scholars have lamented that "[a]lthough prisoners have the right to sue prison officials for violations of the Constitution, they have no corresponding right to the resources necessary to litigate effectively."[54] Thus, even if incarcerated people can access the proper grievance forms, fill them out, and eventually find their way into court, lack of legal representation or even access to the self-help tools necessary to effectively litigate the complex issues that civil rights cases entail means that many if not most incarcerated people who have suffered harm in prison will have no means by which to vindicate their claims.

(3) Inadequacy of the remedy. Available remedies in the civil context can also prove elusive or inadequate to deal with a particular kind of harm.[55] First, money damages cannot redress many constitutional violations that happen behind bars.[56] In fact, damages are a wholly inadequate remedy if the goal is to redress harms such as medical neglect or to treat the psychological trauma from abuse or assault. To be sure, compassionate release will not produce institutional reform, but release or sentence reduction increases the odds that an individual person will be able to access, for example, adequate medical care or mental health treatment services that are either inadequate or wholly unavailable in prison. And because of the doctrine of qualified immunity that insulates prison officials from personal financial liability in many if not most circumstances, a damages remedy is often beyond reach.[57]

The path to obtaining injunctive relief is often long and difficult. For example, in the federal prison system, where transfers are common, injunctions can present mootness problems if a person

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[54] Shapiro & Hogle, *supra* note 1, at 2049.

[55] *See, e.g.*, Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and Covid-19*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 131, 145 (2020) ("The remedy that a civil rights suit can afford usually involves a change to the prison environment but does not allow for early release.").

[56] *See, e.g.*, Reinert, *Release As Remedy*, *supra* note 16, at 1625 ("[C]ourts have long recognized that legal remedies are not a complete remedy for the violation of a constitutional right. This is particularly the case when the violation also involves physical injury or emotional distress.").

[57] Shapiro & Hogle, *supra* note 1, at 2023 (describing the doctrine of qualified immunity in the prison context as "a backstop against the few cases that make it through").

is transferred to a new facility, so meaningful injunctive relief can therefore often be elusive.[58] Once an injunction is obtained, enforceability remains a challenge in many respects.[59] And, in any event, many of the harms suffered by incarcerated people are not proper targets of civil injunctive claims. For example, an injunction against prison officials sexually abusing people would be absurd, and yet this kind of treatment is rampant in many federal facilities.[60] Thus, release or sentence reduction maps more appropriately as a remedy to many of the harms that people suffer in prison, and compassionate release is one of the only available ways in which such a remedy can be achieved.

There is one caveat to this: in some circuits, 28 U.S.C. § 2241 ("Section 2241") provides a possible release remedy if a person is suffering under unconstitutional conditions of confinement.[61] Section 2241 actions are not subject to the same

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[58] *Id.* at 2057 (citing Rendelman v. Rouse, 569 F.3d 182, 186 (4th Cir. 2009) ("[A]s a general rule, a prisoner's transfer or release from a particular prison moots his claims for injunctive and declaratory relief with respect to his incarceration there.")); *see also,* Salahuddin v. Goord, 467 F.3d 263, 272 (2d Cir. 2006) ("[A]n inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility.")); Danielle Jefferis & Nicole Godfrey, Chapman v. Bureau of Prisons*: Stopping the Venue Merry-Go-Round*, 96 DENV. L. REV. F. 9, 11-12 (2018) (describing BOP's ability to move prisoners from one federal district to another all over the country to avoid adjudication). *But see* Aref v. Lynch, 833 F.3d 242, 251 (D.C. Cir. 2016) (transfer did not moot a prisoner's claim for injunctive relief involving a procedure used by the BOP as a whole to assign inmates to units that restrict communication).

[59] *See generally, e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530 (2016) (discussing enforcement of equitable remedies).

[60] *See, e.g.*, STAFF OF S. COMM. HOMELAND SEC. & GOVERNMENTAL AFFS., SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS, at 1 (Dec. 13, 2022).

[61] Although this statute is rarely utilized, advocates turned to this habeas remedy during the COVID-19 pandemic as a potential way to circumvent some of the more onerous requirements that are present in prison litigation. *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) (concluding that prisoners challenging their incarceration during COVID-19 could bring suit under Section 2241 because "where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement"); Denbow v. Me. Dep't of Corr., No. 1:20-cv-00175-JAW, 2020 WL 4004795, at *3 (D. Me. July 15, 2020) (concluding that the prisoners properly brought suit challenging "unconstitutional prison conditions during a deadly pandemic" under 28 U.S.C. § 2241).

exhaustion requirements as actions that are governed by the PLRA.[62] But courts are split as to whether this remedy is available to challenge conditions of confinement.[63] And even this relief avenue is subject to the stringent scienter requirements involved in proving conditions of confinement claims predicated on a prison official's "deliberate indifference."

(4) Eighth Amendment scienter requirements. Finally, incarcerated people face barriers that are built into Eighth Amendment legal standards themselves.[64] In cases that involve prison officials' failure to prevent harm, plaintiffs are required to show "deliberate indifference" to a substantial risk of serious harm or denial of a basic human need.[65] This standard is akin to a criminal recklessness standard: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[66]

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[62] *Compare* 28 U.S.C. § 2254(b)(1)(A) (requiring an applicant exhaust state court remedies before the court grants a writ of habeas corpus) *with* 28 U.S.C. § 2241 (permitting the grant of a writ without exhaustion). *See also* Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 436-37 (D. Conn. 2020) ("Exhaustion in the context of Section 2241 habeas petitions is a judge-made rule subject to judge-made exceptions.").

[63] *Compare* Nettles v. Grounds, 830 F.3d 922, 933-34 (9th Cir. 2016) (holding that conditions-of-confinement claims must brought via a civil rights claim rather than through a federal habeas petition), Spencer v. Haynes, 774 F.3d 467, 470 (8th Cir. 2014) (same), *and* Cardona v. Bledsoe, 681 F.3d 533, 637537 (3d Cir. 2012) (same), *with* Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that it is appropriate for prisoners to challenge the terms of their confinement through a federal habeas petition), Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (providing that prisoners may challenge "prison disciplinary actions, prison transfers, type of detention and prison conditions" under § 2241), *and* Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1997) (allowing prisoners to bring conditions-of-confinement claims through § 2241).

[64] *See* Rovner, *supra* note 14, at 477 (emphasizing that "judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win"); Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323, 368 (2022) (describing problems with the Eighth Amendment's scienter requirements).

[65] Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety").

[66] *Id*.

Eighth Amendment conditions of confinement litigation has a relatively new origin. Until recently, the Eighth Amendment prohibited only certain kinds of punishment deemed "cruel and unusual"[67] because of, for example, the punishment's inherent brutality[68] or because the punishment was disproportionate to a particular crime.[69] In fact, for almost two centuries, courts interpreted the word "punishment" to mean only a criminal sentence—not prison conditions[70]; rather, courts historically took a "hands-off" approach to adjudicating claims related prison conditions, preferring instead to defer to the judgment of prison officials.[71]

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[67] Scholarly attention has also been paid to whether the terms "cruel" and "unusual" have distinct meanings within the Eighth Amendment, but this Article does not address that debate. *See, e.g.*, Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 573 (2010).

[68] *See supra* note 18; *see generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

[69] *See, e.g.*, Weems v. United States, 217 U.S. 349, 365 (1910) (applying Eighth Amendment to disproportionately harsh punishments); O'Neil v. Vermont, 144 U.S. 323, 338-39 (1892) (Fields, J., dissenting) (noting that a term of over 54 years for 307 counts of "selling intoxicating liquor without authority," could be "cruel and unusual" under the Eighth Amendment); Harmelin v. Michigan, 501 U.S. 957, 961, 994 (1991) (upholding a sentence of life without parole for a first-time offender who was found guilty of possessing 672 grams of cocaine).

[70] *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 38-42 (1993) (Thomas, J., dissenting) (describing historical application of the Eighth Amendment). For example, Justice Clarence Thomas maintains that the Eighth Amendment governs *only* sentences and does not apply to prison conditions at all. *See generally* Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV. 829 (2011) (discussing progression of prisoners' rights litigation and Justice Thomas' unique viewpoint regarding conditions of confinement litigation). *See also, e.g.*, *Farmer*, 511 U.S. at 859 (Thomas, J., concurring) ("Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment.").

[71] *See, e,g.*, Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 474 (2012) (describing "hands-off" doctrine"); *see also* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) (describing incarcerated people as "slaves of the state" and holding that "in this state of penal servitude, they must be subject to the regulations of the institution").

Indeed, it wasn't until the 1960s that federal courts began hearing conditions of confinement claims.[72] Against the backdrop of the civil rights movement,[73] prison protests,[74] and because of rampant abuse and poor conditions within the nation's prisons, federal courts[75] started to develop a framework for evaluating "cruel and unusual" punishments that dealt with the *administration* in addition to the *imposition* of a person's sentence.[76]

But while civil rights plaintiffs enjoyed some early success in having their Eighth Amendment claims adjudicated, the Supreme

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[72] *See, e.g.*, Schlanger, *Constitutional Law of Incarceration*, *supra* note 10, at 368 ("[I]t was not until the 1960s . . . that lower courts began to frequently scrutinize conditions of confinement in state prison and local jails, and occasionally to find them unconstitutional under the Cruel and Unusual Punishments Clause."). *See also Helling*, 509 U.S. at 40 (Thomas, J., dissenting) ("it was not until the 1960s that lower courts began applying the Eighth Amendment to prison deprivations") (first citing Wright v. McMann, 387 F.2d 519, 525–26 (2d. Cir. 1967); then citing Bethea v. Crouse, 417 F.2d 504, 507–508 (10th Cir. 1969)).

[73] Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1819 (2012) (noting the impact of the civil rights movement on courts' willingness to hear conditions of confinement prisoner cases); *see also* Monroe v. Pape, 365 U.S. 167, 187 (1961) (recognizing a federal cause of action under 42 U.S.C. § 1983), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (complaint by incarcerated person in state custody alleging that he was denied permission to purchase certain religious publications and denied other privileges solely because of his religious beliefs stated a cause of action).

[74] *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 530 (2021) (describing prison protests at Folsom and Attica as part of the backdrop to the end of the "hands-off" era).

[75] In *Robinson v. California*, the Supreme Court held that a state law which made the "status" of narcotic addiction a criminal offense was unconstitutional under the Eighth Amendment. 370 U.S. 660, 667 (1962). In this case, the Supreme Court incorporated the Eighth Amendment and applied it to states, thereby increasing the availability of an Eighth Amendment remedy to incarcerated people and paving the way for challenges to conditions of confinement in state carceral facilities. *Id.* at 666-67; *see also* Arthur B. Berger, Note, Wilson v. Seiter: *An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 570-71 ("It was not until 1962, when the Supreme Court applied the Eighth Amendment to state action through the Fourteenth Amendment in *Robinson v. California*, that Eighth Amendment litigation began booming.").

[76] Dolovich, *Cruelty*, *supra* note 10, at 884.

Court ultimately articulated legal standards for Eighth Amendment claims that are messy and difficult to meet. The first case in which the Supreme Court set out a standard for assessing the liability of prisons or actors within prisons was *Estelle v. Gamble*, which involved an incarcerated person who claimed that he was given inadequate access to medical care. In that case, the Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[77]

A few years later, the Supreme Court considered another case challenging prison conditions in *Rhodes v. Chapman*, which involved a challenge to the practice of double-celling, or confining two incarcerated individuals in a single cell meant for only one person.[78] In that case, the Supreme Court focused on the objective harms to the incarcerated but concluded that the claimed deprivations were not objectively sufficiently serious to constitute "punishment."[79]

Then, after much confusion among the lower courts as to the meaning of "deliberate indifference"[80] the Supreme Court articulated the standard in its current form. Under *Farmer v. Brennan* plaintiffs are required to prove both an objective and subjective component to prevail on an Eighth Amendment claim based on conditions of confinement.[81] The objective prong asks whether a particular deprivation suffered in prison is "sufficiently serious."[82] The subjective prong asks whether a prison official has consciously disregarded a substantial risk that the deprivation or harm would occur.[83]

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[77] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (internal citations omitted).
[78] Rhodes v. Chapman, 452 U.S. 337, 340 (1981).
[79] *Id.* at 347-48.
[80] Glidden, *supra* note 71, at 1820-21 (describing disagreement among the lower courts after *Estelle v. Gamble* regarding the application of the "deliberate indifference" standard to prison conditions).
[81] Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[82] Sufficiently serious deprivations have been interpreted to include those that "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. For claims involving the failure to prevent harm, an incarcerated person must show that he is incarcerated under conditions "posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834.
[83] *Farmer*, 511 U.S. at 840.

Although this development in the law is relatively recent, the standard articulated in *Farmer* is now the lodestar for assessing the merits of incarcerated peoples' claims of deprivation or harm in prison. Immediately following the Supreme Court's articulation of this standard, commentators recognized the difficulty involved requiring incarcerated plaintiffs to prove the subjective state of mind of prison officials.[84] Two of the concurring opinions in *Farmer* expressed opposition to the "deliberate indifference" standard because of its required subjective component.[85]

Defendants can avoid a finding of deliberate indifference, then, by showing that they did not *subjectively know* that a specific deprivation or risk of harm was occurring.[86] But defendants can also avoid such a finding by showing that they were not indifferent: that they knew of the deprivation or risk of harm and took some kind of corrective action, however minimal, even if that action does not ultimately result in mitigation of the harm or deprivation.[87] Finally, the standard is problematic for incarcerated people seeking to prove institutional (rather than individual) liability—"institutional indifference"—which requires proving a subjective state of mind on the part of a prison or prison system as a whole.[88]

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[84] *See, e.g.*, William N. Eskridge, Jr. et al., *The Supreme Court: 1993 Term*, 108 HARV. L. REV. 23, 235 (1994) ("*Farmer v. Brennan* effectively leaves inhumane prison conditions without constitutional remedy.").

[85] *See Farmer*, 511 U.S. at 858 (Stevens, J., concurring) ("I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation"); *id.* at 851 (Blackmun, J., concurring) ("inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind").

[86] *See, e.g.*, Vega v. Davis, 673 F. App'x 885, 890 (10th Cir. 2016) (courts could not plausibly draw inference that the Warden specifically both knew that Vega was suffering from a mental illness and consciously disregarded the risks condition untreated); *see also* Dolovich, *Cruelty*, *supra* note 10, at 892 (deliberate indifference standard "creates incentives for officers *not* to notice") (emphasis in original).

[87] In this way, the Supreme Court's Eighth Amendment jurisprudence encourages (contrary to the Court's prediction) prison officials to "take refuge in the zone between ignorance of obvious risk and actual knowledge of risks." *Farmer*, 511 U.S. at 842 (internal quotation marks and citations omitted).

[88] *See* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 187 (2020) (describing the problems with the deliberate indifference test as applied to institutional rather than individual defendants). People incarcerated in BOP have

To complicate matters, the Supreme Court articulated an even higher standard for Eighth Amendment use-of-force cases: "whether force was applied in a good faith effort to restore discipline or maliciously and sadistically for the very purpose of causing harm."[89]

The scienter requirement involved in these causes of action thus present an additional, fundamental problem: people suffering in prison—no matter the magnitude of the suffering—can only prevail if they prove that a prison official has acted (or failed to act) with some level of intentionality or criminal recklessness. As a result, the vast majority of incarcerated people who have suffered harm will have no remedy, even if they can show that the harm was objectively "sufficiently serious" to result in the denial of "the minimal civilized measure of life's necessities."[90]

This conception of punishment gets things exactly backwards in many respects. Rather than imposing a duty on prison officials to safeguard the welfare of those imprisoned by the state, Eighth Amendment conditions of confinement jurisprudence instead places the onus on an incarcerated plaintiff to vindicate their own rights even while the state continues to incarcerate them and—in many instances—continues to deprive them of life's necessities.[91] As Justice Stevens has remarked, these scienter requirements "incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution."[92] For this reason as well, the Eighth Amendment as an avenue for redressing some of the worst harms that come to people in prison is often unavailable. And more than that, whether someone is afforded relief depends less on the

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an easier task suing institutional defendants because suits against state entities are subject to constitutional Eleventh Amendment immunity. *Id*. at 176.

[89] Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (internal citation omitted).

[90] Farmer, 511 U.S. at 834 (internal citations omitted).

[91] Estelle v. Gamble, 429 U.S. 97, 109 (1976) (Stevens, J., dissenting) (lamenting that the majority opinion "describes the State's duty to provide adequate medical care to prisoners in ambiguous terms which incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution").

[92] *Id*.

gravity of harm suffered than on whether a person has successfully navigated a maze-like system of legal doctrines.

II. COMPASSIONATE RELEASE, COVID-19, AND PRISON CONDITIONS

Although compassionate release has its own pitfalls, compassionate release gives litigants an avenue for relief that avoids many of the structural barriers explored above in the Eighth Amendment civil context. Moreover, unlike Eighth Amendment claims, compassionate release claims allow litigants to focus on the harm that has come to them, rather than the subjective motivation of a prison official.

This Part of the Article gives a brief overview of compassionate release and how such motions are litigated and analyzed. This Part also outlines some of the weaknesses and drawbacks to compassionate release as a remedy. Finally, this Part of the Article highlights some of the successes that incarcerated litigants had under compassionate release during the COVID-19 pandemic, even while Eighth Amendment lawsuits largely failed.

A. Overview of Federal Compassionate Release

Until very recently, compassionate release in the federal system was nearly impossible to obtain because only officers of the BOP were able to recommend release to a sentencing court—a movant could not ask for relief on their own.[93] The idea of federal compassionate release was first introduced in the context of the Sentencing Reform Act of 1984 (SRA) but was widely regarded as an insufficient measure.[94] Before the First Step Act of 2018, the BOP was charged with deciding whether or not to grant

[93] Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 101, 104-106 (2019).

[94] *See, e.g.*, Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release For Elderly Inmates*, 43 STETSON L. REV. 198, 243 (2013) ("[w]hile compassionate release may have been well-intended, it is not well-executed").

compassionate release to people incarcerated in federal prison.[95] Under the old system, a defendant could only petition the BOP Director for compassionate release, who could then make a motion, at their discretion, to a district court.[96] Unsurprisingly, the BOP rarely did so.[97]

When the SRA was first enacted, Congress delegated to the Sentencing Commission the task of promulgating applicable policy statements describing and defining what constituted "extraordinary and compelling" reasons warranting a sentence reduction.[98] The Commission failed to do so for many years. In 2007, two decades after the passage of the SRA, the Sentencing Commission defined ECRs to include several categories of circumstances such as if a person was suffering from a terminal illness, if a person was elderly and had completed the majority of their sentence, or where the death of a caregiver outside of prison made the incarcerated person the primary candidate to be the caregiver for a child or spouse.[99] A catchall provision further granted the BOP the discretion to determine when an incarcerated individual's case presents "an extraordinary and compelling reason other than, or in combination with" the other enumerated reasons.[100] But while the Sentencing

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[95] *See* BOP PROGRAM STATEMENT 5050.49, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (Mar. 25, 2015).

[96] *See* 18 U.S.C. § 3582(c)(1)(A) (amended 2018).

[97] *See Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); *see also* Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 415-16 (2020) ("The effect [of the Sentencing Reform Act] was to make the BOP the gatekeeper for compassionate release . . . the BOP rarely opened the gate."); Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), https://perma.cc/NQ8Y-YUE6.

[98] *See* 28 U.S.C. § 994(t) (instructing that the Sentencing Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.").

[99] U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENTEN'G COMM'N 2018).

[100] § 1B1.13 cmt. n.1(D) ("Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and

Commission had the authority to define the ECRs, before the passage of the First Step Act, the BOP Director had the "ultimate authority to trigger and set the criteria for sentence reductions."[101]

The First Step Act of 2018 made major reforms to compassionate release, in addition to other areas of federal criminal law.[102] Significantly, the First Step Act changed the compassionate release process to allow incarcerated people to go directly to a sentencing court or judge for relief. Indeed, the biggest change to compassionate release is that, instead of being stymied by the mercy of the BOP Director, incarcerated individuals may instead move a sentencing court for relief even if the BOP opposes or fails to respond to an incarcerated individual's request.[103]

A federal court generally "may not modify a term of imprisonment once it has been imposed."[104] But compassionate release is an exception that allows for early release or sentence reduction if an incarcerated person meets certain requirements.[105] First, the statute authorizes an incarcerated person to file a motion with their sentencing judge after exhausting administrative remedies or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility."[106] In practice, this means that compassionate release motions are "ripe" for review after an incarcerated person makes a request with the warden of his or her facility asking the BOP to move the sentencing court for release—a

compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

[101] Hopwood, *supra* note 91, at 105.

[102] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); CONG. RESEARCH SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019); *see also* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 795 (2019) (describing reforms to federal prison and sentencing contained in the First Step Act, which included increasing available rehabilitation programming within federal prisons, placing incarcerated people within 500 miles of their families, and reducing statutory punishments for those convicted of crack cocaine offenses).

[103] 18 U.S.C. § 3582(c)(1).

[104] Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. § 3582(c)).

[105] 18 U.S.C. § 3582(c)(1)(A).

[106] 18 U.S.C. § 3582(c)(1)(A).

much more lenient exhaustion standard to meet than when filing a prisoner civil claim.

Second, as with the pre-First Step Act framework, movants must still show that "extraordinary and compelling reasons warrant such a [sentence] reduction" and "that such [sentence] reduction is consistent with applicable policy statements issued by the Sentencing Commission.[107] But those ECRs are now presented directly to a sentencing court after the exhaustion period has expired—a movant does not need to have the BOP move the court on their behalf. Finally, the compassionate release framework incorporates by reference the federal sentencing statute and requires a court considering a compassionate release motion to consider "the factors set forth in Section 3553(a) to the extent that they are applicable."[108]

The various "factors to be considered in imposing a sentence" include, for example, "the nature and circumstances of the offense and the history and characteristics of the defendant,"[109] the "seriousness of the offense," and deterrence of criminal conduct,[110] and "the need to avoid unwarranted sentence disparities."[111] Further, a sentencing court must impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of punishment.[112]

B. The Expansion of ECRs in the 2023 Guideline Amendments.

The Federal Sentencing Commission consists of seven voting members and, per statute, requires four members for a quorum to amend the guidelines.[113] From the time that the First Step Act was enacted until the summer of 2022, the Sentencing

[107] 18 U.S.C. § 3582(c)(1)(A)(i)-(ii).
[108] 18 U.S.C. § 3582(c)(1)(A).
[109] 18 U.S.C. § 3553(a)(1).
[110] 18 U.S.C. § 3553(a)(2)(A).
[111] 18 U.S.C. § 3553(a)(6).
[112] 18 U.S.C. § 3553(a). *See also* Gall v. United States, 552 U.S. 38, 49-50 (2007) (listing and explaining factors).
[113] 28 U.S.C. §§ 991(a) (setting forth the number of members), 994(a) (requiring the vote of four members).

Commission did not have a quorum and thus was unable promulgate a post-First Step Act policy statement interpreting the statutory amendments to compassionate release—Section 3582(c)(1)(A)(i)—on what constitutes "extraordinary and compelling" reasons warranting release. Thus, throughout most of the pandemic, district courts, had little guidance on what constituted "extraordinary and compelling reasons" under the statute.[114]

But in early 2023, the Sentencing Commission adopted new amendments to the sentencing guidelines that radically expand the definition of what constitutes an ECR warranting release. This exciting development now gives federal judges broad discretion to review old sentences, including those raising conditions of confinement.

The Sentencing Commission's amendments now codify many of the grounds for release that arose while district courts were in limbo. For example, the medical ECRs already included "terminal illness" and any condition "that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover."[115] But the Sentencing Commission's new amendments include a broader category for when a "defendant is suffering from a medical condition that requires long term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death."[116] In other words, the ECR now includes circumstances in which the BOP is simply not treating or is ignoring a serious medical condition that may or may not be life-threatening. This ECR is notable because it overlaps with many types of conditions that have historically been the subject of Eighth Amendment civil suits. But the new medical ECR also enables a person to ask for release as a remedy based on medical neglect by the BOP (rather than recklessness or a showing of

[114] U.S. SENT'G COMM'N, U.S. SENTENCING COMMISSION TO IMPLEMENT FIRST STEP ACT WITH FOCUS ON COMPASSIONATE RELEASE (2022); *see also Eleventh Circuit Creates Circuit Split by Holding That the First Step Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release*, 135 Harv. L. Rev. 1182, 1184 (2022).

[115] U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT'G COMM'N 2021).

[116] FINAL AMENDMENTS, *supra* note 25, at 5 (§ 1B1.13(b)(1)(C)).

deliberate indifference) or on the basis on the medical condition that a person is suffering can't be treated by BOP staff.

Another new ECR that the Sentencing Commission adopted is for incarcerated people who are the victims of abuse "by or at the direction of" a BOP officer involving either a "sexual act" or resulting in "serious bodily injury."[117] This amendment was a response to several prison sexual assault scandals that have been the subject of both court proceedings and recent senate hearings.[118] Prior to the First Step Act, any claim arising out of such an assault would normally have been cognizable as a civil suit for damages. Now, however, the remedy of release or sentence reduction is available to those incarcerated in federal prison who have been assaulted by the people charged with their protection.

Finally, the Sentencing Commission adopted a "catch-all" provision that would enable district courts wide latitude in deciding what constitutes an ECR that is "similar in gravity" to those already enumerated.[119] The catch-all provision could potentially open the door to other conditions-based arguments such as being held in particularly restrictive conditions or long-term solitary confinement, or other kinds of severe harms experienced in prison. It is this catch-all provision, in particular, that provides litigants, lawyers, and courts with an opportunity to more fully explore the intersection between the conditions based harms a person suffers while incarcerated and the availability—and appropriateness—of release and decarceration.

C. Compassionate Release Challenges

While compassionate release is an attractive and often superior way for incarcerated people to have their claims heard in court, the compassionate release statute is no panacea. Distinct barriers to relief exist within the compassionate release framework, the most significant of which are: (1) that a person's crime of

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[117] *Id.*, § 1B1.13(b)(4).

[118] *See, e.g.*, *Sexual Abuse of Female Inmates in Federal Prisons*: *Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. (2022) (statement of Sen. Jon Ossoff, Chairman, S. Comm. On Homeland Sec. & Governmental Affs.).

[119] FINAL AMENDMENTS, *supra* note 25, § 1B1.13(b)(6).

conviction and other factors will often preclude relief; (2) that the extreme variability and disparity among federal districts means that some people are far better situated than others to bring these kinds of claims; and (3) the fact that a compassionate release remedy will not meaningfully produce systemic change even within a given prison or institution.

In the Eighth Amendment context, consideration of the crime of conviction is largely irrelevant to whether a person is granted relief.[120] No matter the reason for a person's incarceration, the Eighth Amendment is available as a vehicle through which they can seek civil relief. In contrast, Section 3553(a)'s sentencing factors—which are incorporated by reference into the compassionate release analysis—require a district court to consider, among other things, "the nature and circumstances of the offense and the history and characteristics of the defendant."[121]

The Section 3553(a) factors are, in the normal course, the considerations that guide a judge's sentencing determination, after the sentencing guideline range has been calculated, after any objections or legal challenges to the guidelines have been considered and resolved. But in the compassionate release arena, these factors are often used to determine whether and how much of a sentence reduction is appropriate in each case. Thus, the Section 3553(a) factors can function as a backstop for judges when considering whether to grant sentence reductions in cases where a person's ECR may be quite compelling. In other words, a compassionate release movant can satisfy the "extraordinary and compelling" standard for release, by showing that they are suffering from a condition or circumstance that fits into one of the ECR definitions, but a judge can then determine—as a discretionary matter—that the release is still not warranted because of one or more of the sentencing factors. For example, a person's crime of conviction could be so serious in the eyes of a sentencing court (crimes like homicide, terrorism, or crimes involving sexual

[120] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 511, 545 (2011) (permitting the release of people from the California prison system when that system as a whole was deemed unconstitutional under the Eighth Amendment).
[121] 18 U.S.C. § 3553(a)(1).

misconduct, to name a few)[122] that a judge would hardly ever be inclined to grant early release despite that person suffering grave harm while incarcerated. Similarly, a person's BOP disciplinary record may be full of infractions—large or small—that cause a district court to be disinclined to grant any form of relief. That means that, even if a person's conditions of confinement are exceedingly harsh or their ECRs particularly compelling, countervailing considerations will often hinder or prevent relief. Similarly, the new amendments require a judge to determine that a person is not a "a danger to the safety of any other person or to the community."[123] This inquiry will often require a judge to look at a person's criminal history and any disciplinary infractions while in prison, as well as a person's plan for release, and make a determination about whether that person poses a danger.

Incorporation of the Section 3553(a) factors as well as the dangerousness inquiry into a judge's analysis can also have the unintended consequence of inviting judges to view the compassionate release analysis in light of the original sentencing. As one scholar has aptly noted, "[e]arly release advocacy always occurs in the shadow of the original sentencing proceeding."[124] By

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[122] *See* 18 U.S.C. § 3553(a) (listing factors to be considered in imposing a sentence under Federal Sentencing Guidelines); U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021) (Federal Sentencing Guidelines table listing guideline ranges in terms of months). While the crime of conviction is certainly one consideration in the analysis of whether to grant compassionate release, there are a host of problems involved in thinking that a particular crime might bar a person from release no matter what deplorable treatment they have suffered. Although a full discussion of such debates are beyond the scope of this article, abolition theorists have begun to dissect this kind of thinking, and rightly so. *See, e.g.*, Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2021 (2022) (discussing the slippery slope of classifying various crimes—and people—as being particularly harmful or dangerous to society).

[123] *See* §1B1.13(a)(2). Of course, this factor does not recognize the intrinsic lack of safety that people in prison perpetually experience, nor the skewed understanding of what it means to keep communities "safe." *See, e.g.*, Mariame Kaba and Andrea Ritchie, *Reclaiming Safety*, INQUEST (August 30, 2022) (interrogating different interpretations and perspectives on the word "safety" in the criminal legal system).

[124] Renagh O'Leary, *Early Release Advocacy in the Age of Mass Incarceration*, 2021 WIS. L. REV. 447, 456 (2021).

default, motions for sentence reductions go back to the original judge who sentenced a defendant. Often, then, judges will return to the original sentencing transcript, sentencing statements, Presentence Investigation Report (PSR) or other documents and arguments developed at the time of sentencing to see what justified a sentence in the first instance. This means that, even where a person has served a lengthy prison term before applying for retroactive relief, much of that progress can be overridden or undervalued through an easy shorthand: a judge simply looks back to the original sentencing determination without incorporating new information. And because the Section 3553(a) analysis is reviewed on appeal under the highly deferential "abuse of discretion" standard, it is exceedingly rare for denials of compassionate release to get overturned on appeal—even if a person meets the "extraordinary and compelling" definition.[125]

Another notable weakness with utilizing compassionate release as a remedy for harms that have occurred in prison is that release or sentence reduction varies widely depending on the district in which a person was sentenced. Data from the Sentencing Commission indicates that compassionate release, while a hopeful mechanism for relief for many incarcerated people, is still rarely granted. Recent statistics from the Sentencing Commission show that, of the motions filed between October 2019 and September 2022, 16.2% of compassionate release motions were granted.[126] Notably, the grant rates nationwide during the pandemic and before the final amendments were adopted have been extremely variable. According to Sentencing Commission data, some districts granted a much higher percentage of compassionate release motions than others. In fiscal year 2020, for example, the District of Oregon granted 62.3% of compassionate release motions filed. By contrast, the Western District of Oklahoma granted a mere 3.4 % of motions

[125] *See, e.g.*, United States v. Hald, 8 F.4th 932, 942 (10th Cir. 2021) (district courts need not first determine whether person has established "extraordinary and compelling" reasons warranting relief before denying motions based on statutory sentencing factors; denial of relief is reviewed under abuse of discretion standard).
[126] U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT, tbl.1 (Dec. 19, 2022) (compiling data regarding compassionate release motions and outcomes during fiscal years 2020 and 2021).

filed, or three motions out of a total of 89 motions for that year. At least some of this variability could be attributed to whether movants had appointed counsel, either from the various Federal Public Defenders offices or through the Criminal Justice Act. Whether counsel is appointed in compassionate release cases also varies by district.[127] Thus, another challenge with compassionate release motions—like that of civil lawsuits—is access to counsel, depending on the district in which a person was sentenced. But much of this outcome variability is also due to the longstanding variability in judicial attitudes toward sentencing more generally. Where judges are given broad discretion over sentencing, disparities—and sometimes extreme geographic or racial disparities—often result. The grant rate of compassionate release motions and the differences between federal districts is yet another manifestation of this oft-lamented phenomenon.[128]

Finally, compassionate release is unlikely to create meaningful change within a specific prison or institution because relief sought is individualized. Thus, compassionate release will not do anything to remedy, for example, widespread violations of the Eighth Amendment such as extreme prison overcrowding,[129] will not cause the BOP to provide better healthcare system-wide and will not address the systemic harms that come of certain classes of

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[127] *See, e.g.*, D. Colo. General Order 2020-7, "Compassionate release under Section 603(b) of the First Step Act." (Jul. 2020). *But see* D. N.M. Admin. Order, "In re: Compassionate Release Procedures & App't of Counsel," at 2-3 (Aug. 13, 2020) (refusing to authorize appointment of counsel in all compassionate release cases). This variability is reflected in the federal districts' sentencing disparities in general, and their largely self-governed approach to the administration of their dockets and access to counsel. *See, e.g.*, Charles Bethea, *Is This the Worst Place to be Poor and Charged With A Federal Crime?*, THE NEW YORKER (Nov. 5, 2021), https://perma.cc/SV83-SJRE.

[128] Judicial discretion is, indeed, a mixed bag with a checkered history of inequitable and racist sentencing outcomes. See, eg., Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & SOC'Y REV. 733, 761 (2001); David B. Mustard, Racial, *Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001); Mark W. Bennett & Victoria C. Plaut, Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice, 51 U.C. DAVIS L. REV. 745, 773-84 (2018).

[129] *E.g.*, Brown v. Plata, 563 U.S. 493, 502 (2011).

incarcerated people, such as those suffering disabilities or mental health disorders.[130] Unlike some Eighth Amendment class actions, therefore, compassionate release is a remedy that focuses solely on the experience of an individual movant.

D. Prison Conditions Litigation in the Covid-19 Era

COVID-19 took a disproportionately heavy toll on incarcerated people. Over 300 incarcerated people died in BOP custody of COVID-19[131] and countless others were sickened or permanently debilitated by the illness. For this reason, it is impossible to meaningfully understand the impact of the changes to federal compassionate release without discussing the backdrop of COVID-19. The COVID-19 pandemic began just over a year after the First Step Act's changes to compassionate release were signed into law. And that timing meant that the new compassionate release statute was put to the test during the throes of a global health crisis.

As was widely publicized in the press as well as addressed in legal filings (both compassionate release litigation and civil rights lawsuits against the BOP), throughout the pandemic the BOP ignored its responsibility to its vulnerable prison populations, and hundreds of people lost their lives as a result. Unsurprisingly, the Eighth Amendment proved an inadequate vehicle for addressing the concerns and fears of incarcerated people who sought to escape the ravages of COVID-19 in prison.[132]

While the scale of the pandemic was perhaps unforeseeable, it is no secret that prisons were already ill-equipped to deal with many serious medical conditions that incarcerated people face. Even

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[130] *See, e.g.*, Cunningham v. Fed. Bureau of Prisons, No. 12-cv-01570-RPM-MEH, 2016 WL 8786871, at *4 (D. Colo. Dec. 29, 2016) (discussing settlement agreement requiring Bureau of Prisons officials to implement programs and policies to "provide some measure of human dignity to the confinement" for incarcerated people with mental illness).

[131] IOWA COLL. OF LAW FED. CRIM. DEF. CLINIC, *302 Deaths in BOP Custody, An Incalculable Loss* (Jan. 31, 2022), https://perma.cc/Q53S-TN8L.

[132] *See generally* Sharon Dolovich, *The Coherence of Prison Law*, 135 Harv. L. Rev. F. 301 (2022) [hereinafter Dolovich, *Coherence of Prison Law*] (arguing that the Eighth Amendment proved an inadequate tool for addressing widespread failures of prisons and prison officials to contain the COVID-19 virus).

in the early days of the COVID-19 era, prisons officials and the press sounded the alarm about the impending crisis within prison walls.[133] Understaffing, the inability to social distance, and the lack of access to basic items designed to prevent the spread of illness (soap and personal protective equipment like masks or gloves) resulted in a rapid and alarming spread. Moreover, prisons were already overwhelmed with an aging and medically vulnerable population most at risk to develop COVID-19 complications.[134] While much of America was isolating at home, the federal prison population was experiencing the unprecedented horror of being trapped in an infectious disease tinderbox.

Some of the first federal facilities to suffer severe outbreaks were FCI Lompoc and USP Lompoc (Lompoc), located in Santa Barbara County.[135] As a result of the severe conditions and BOP failures to contain outbreaks, the American Civil Liberties Union (ACLU) filed a lawsuit against the Lompoc facility.[136] At the time that the lawsuit was filed, COVID-19 had already resulted in the death of five inmates and illness of some 1,200 others.[137]

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[133] *See, e.g.*, Danielle Ivory, *"We Are Not a Hospital": A Prison Braces for the Coronavirus*, N.Y. TIMES (March 17, 2020), https://perma.cc/X5GY-F9P9 (citing densely populated living conditions, dearth of soap, hand sanitizer, and protective gear, and impossibility of maintaining safe distance between inmates and guards as reasons prisoners are at particular risk of infection); Lisa Freeland et al., *We'll See Many More Covid-19 Deaths in Prisons if Barr and Congress Don't Act Now*, WASH. POST (Apr. 6, 2020), https://perma.cc/U9SL-TH64 (discussing "wholly inadequate medical care" in federal prisons).

[134] Dolovich, *Coherence of Prison Law*, *supra* note 128, at 332 ("American penal institutions are full of people who, whether because of age, medical comorbidities, or both, are among those identified early in the pandemic by the Centers for Disease Control and Prevention (CDC) as disproportionately likely to develop severe complications from Covid.").

[135] *See* Richard Winton, *Coronavirus outbreak at Lompoc prison is the worst in the nation*, L.A. TIMES (Apr. 16, 2020), https://perma.cc/HYF4-EY9J; Ashton McIntyre, *Nearly 100 cases of coronavirus reported at Lompoc Prison, prison officials seek more help*, KSBY NEWS (Apr. 21, 2020), https://perma.cc/27CY-HKN3.

[136] Complaint, ACLU v. Fed. Bureau of Prisons, No. 1:20-cv-03031-RCL (filed Oct. 21, 2020).

[137] Tyler Hayden, *ACLU Settles Lompoc Prison Lawsuit over Botched COVID Response*, SANTA BARBARA INDEP. (July 20, 2022), https://perma.cc/TYT6-9JE5.

Both media outlets and legal filings described the horror of being housed in one of these facilities during COVID-19. Dr. Omid Souresrafil, a biomedical engineer who was convicted of wire fraud, was a first-time offender incarcerated at Lompoc, and reportedly taught GED classes to other people incarcerated there, wrote a sworn declaration in which he explained that he spent 22 days under strict quarantine in a unit reserved for COVID-19 sufferers and that on "every one of the 22 days, [he] could hear the 100+ inmates coughing and calling the guards for help," that "[s]everal collapsed and needed resuscitation before being taken by ambulance to Lompoc Medical Center" and that "[he] thought [he] was going to die, and there were times [he] felt [he] wanted to."[138] Witnesses recounted that at Lompoc one incarcerated man "had been intensely sick the last week and a half, coughing and choking and not being able to breathe,' that other prisoners had 'begged the guards for help, but no one would do anything'…and that guards accused [him] of 'faking it.'"[139]

Similarly horrific stories emerged from other facilities across the country. A cell phone video that went viral showed "men packed together in their cubicles, sleeping and wheezing" at FCI Elkton, a facility in Ohio.[140] At that facility, Michael Bear said he was feeling ill when he saw a doctor in late March, but the doctor said he wasn't sick. He later collapsed and had a seizure, and after being sent to the hospital spent over three weeks in a medically induced coma due to COVID-19 complications.[141]

These concerning reports were indicative of the BOP's overall flawed response to the COVID-19 crisis. In addition to failing to address the debilitating conditions that people suffered during COVID-19, the BOP likewise failed to avail itself of the ability to decarcerate—even though there was significant public

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[138] Tyler Hayden, *22 Days in Lompoc Prison's COVID-19 "Hellhole,"* SANTA BARBARA INDEP. (Jun. 8, 2020), https://perma.cc/NYB5-JUHQ.

[139] Tyler Hayden, *More Suffering and Death at Lompoc Prison Racked with COVID-19*, SANTA BARBARA INDEP. (May 29, 2020), https://perma.cc/D8HM-6YDC.

[140] Keri Blakinger & Keegan Hamilton, *"I Begged Them To Let Me Die": How Federal Prisons Became Coronavirus Death Traps,"* THE MARSHALL PROJECT (June 19, 2020), https://perma.cc/6YEA-CYLE.

[141] *Id.*

health support that advocated reducing the prison population in an effort to quell the spread of the virus.[142] For example, Section 12003(b)(2) of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act specifically allowed the BOP the discretion to allow home confinement and reduce prison populations to accommodate the needs of incarcerated individuals and the BOP during the early days of the pandemic[143]—but the BOP hardly utilized this authority to release people. Similarly, the BOP was still failing to utilize the compassionate release mechanism to release people under its own statutory authority. Even by mid-April of 2020, as the death toll in BOP was rising to dangerous levels, a canvas of all the Federal and Community Public Defender's Offices nationwide engaged in compassionate release work failed to uncover a single BOP-initiated motion for compassionate release (that was not already finalized pre-COVID).[144]

The Eighth Amendment proved to be a mostly unhelpful mechanism to redress the legitimate concerns of incarcerated people during the pandemic. As noted above, courts are split as to whether Section 2241 lawsuits provide a remedy of release to people based on conditions of confinement—seemingly one of the only ways that incarcerated people could avoid exposure to COVID-19.[145] And as

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[142] *See, e.g.*, United States v. Connell, No. 18-CR-00281-RS-1, 2020 WL 2315858, at *5 (N.D. Cal. May 8, 2020) (explaining the lack of response to COVID-based requests for compassionate release to BOP Wardens, and concluding that "the BOP seems to have 'predetermined' the compassionate release issue by its failure to respond to the petitions before it").

[143] *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 136 § 12003(b)(2) (2020).

[144] *See* Amicus Curiae Brief for Ninth Cir. Fed. & Comm. Defender Orgs. in Support of Defendant-Appellant, United States v. Millage, 810 F. App'x 572 (9th Cir. 2020) (No. 20-30086).

[145] *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) (concluding that prisoners challenging their incarceration during COVID-19 could bring suit under Section 2241 because "where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement"); Torres v. Milusnic, 472 F. Supp. 3d 713, 724 (C.D. Cal. 2020) (collecting cases and noting that "[c]ourts are split as to whether claims by prisoners in light of the COVID-19 pandemic are challenges to the fact or duration of confinement properly brought as a habeas claim under Section 2241, or challenges to the conditions of confinement which fall outside the core of habeas corpus").

Professor Sharon Dolovich has shown, even where plaintiffs had some initial success with district courts granting preliminary injunctions or temporary restraining orders directing correctional officials to improve conditions—or even release particularly vulnerable people in Eighth Amendment habeas-based lawsuits, "in virtually every case framed as a constitutional class action, decisions in plaintiffs' favor were eventually overturned on appeal."[146]

For example, in response to the Elkton outbreak, the ACLU of Ohio filed a lawsuit alleging that BOP officials' failure to enable social distancing, including by refusing to move prisoners to home confinement, constitutes "deliberate indifference" in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[147] The lawsuit sought class certification and a preliminary injunction ordering the BOP to identify and release (or transfer) all inmates ages fifty or older and those that are medically vulnerable. It also sought other forms of relief related to COVID-19 outbreak mitigation. But after a federal district court granted a preliminary injunction directing the BOP to do just that, the Sixth Circuit reversed, holding that the petitioners could not establish "deliberate indifference" on behalf of the BOP.[148] Because of the near impossibility of demonstrating "deliberate indifference," most attempts at redressing COVID-19-based harms in prison were similarly unsuccessful.[149] Indeed, as Professor Dolovich points out, in most instances "evidence of *any* affirmative measures on the part of prison officials undertaken in response to Covid was sufficient to rebut deliberate indifference, regardless of whether the defendants knew full well that the danger persisted."[150]

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[146] Dolovich, *Coherence of Prison Law*, *supra* note 128, at 333–34.
[147] Wilson v. Williams, 455 F. Supp. 3d 467, 481 (N.D. Ohio 2020).
[148] Wilson v. Williams, 961 F.3d at 840.
[149] *See, e.g.*, Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020) ("[D]efendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent.").
[150] Dolovich, *Coherence of Prison Law*, *supra* note 128, at 335 (emphasis added). *See also, e.g.*, Danielle C. Jefferis, *American Punishment and Pandemic*, 21 NEV. L.J. 1207, 1220 (2021) (describing appellate courts' overturning of district court pandemic related Eighth Amendment decisions); Cameron v. Bouchard, 815 F. App'x 978, 985 (6th Cir. 2020) (reversing grant of preliminary injunction ordering pretrial detention facility to consider release for people housed there because "the steps that jail officials took to prevent the spread of COVID-19 were reasonable");

This left most incarcerated individuals in BOP custody with only compassionate release through which to bring their COVID-19 claims to court. District courts across the country responded by urgently granting compassionate release motions.[151] Many of these early grants occurred because an incarcerated person was immunocompromised or was otherwise particularly vulnerable to the ravages of COVID-19.[152] In these early days, the 30-day exhaustion waiting period requirement contained in the Section 3582(c) statute was even sometimes suspended by district courts given the exigent nature of some compassionate release requests or the situation of the individual movant.[153]

As the pandemic progressed, and the federal compassionate release statute was utilized by more and more people incarcerated in federal prisons, arguments about what constituted "extraordinary

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Valentine v. Collier, 956 F.3d 797, 802 (5th Cir. 2020) ("the evidence shows that [the prison] has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus.").

[151] Although only 16.2 % of compassionate release motions were granted overall, from April 2020 until February 2021, motions were granted at a rate of over 200 per month nationwide. *See* U.S. SENT'G COMM'N, *supra* note 125, at fig.1; *see also* Miles Pope, W*hat We Have Wrought: Compassionate Release in the Time of Our Plague*, 64 ADVOCATE 20, 23 (2021).

[152] The earliest COVID-19 compassionate release grants were generally based upon dangerous comorbidities of the movant that, when combined with COVID-19, presented a risk of severe illness or death. *See, e.g.*, United States v. Zukerman, 451 F. Supp. 329, 335 (S.D.N.Y. 2020) (granting relief to incarcerated person suffering from diabetes, hypertension, and obesity); United States v. Gonzalez, 451 F. Supp. 1194, 1197-98 (E.D. Wash. 2020) (granting relief to incarcerated person suffering from chronic obstructive pulmonary disease and significant emphysema); United States v. Edwards, 451 F. Supp. 562, 567-68 (W.D. Va. 2020) (granting relief to incarcerated person who was immunocompromised due to brain cancer, chemotherapy, and steroid prescription); United States v. Williams, No. 3:04cr95/MCR, 2020 WL 1751545, at *3 (N.D. Fla. Apr. 1, 2020) (granting relief to incarcerated person suffering from coronary disease, peripheral vascular disease, congestive heart failure, end-stage renal disease, hyperlipidemia, and prediabetes).

[153] *See Gonzalez*, 451 F. Supp. at 1196 (finding a futility exception to the 30-day waiting period where inmate had not been designated to a facility yet and so could not possibly start the compassionate-release process); United States v. Sawicz, 453 F. Supp. 601, 604 (E.D.N.Y. 2020) (district court waived the 30-day wait-or-exhaust period in light of the COVID-19 outbreak in FCI Danbury).

and compelling" reasons warranting release became more nuanced and more varied. Arguments about prison conditions that might have otherwise been considered the purview of civil litigation were increasingly raised in the compassionate release context, and with varying results.[154] Some courts dismissed arguments that poor conditions of confinement—even those related to COVID-19—could be extraordinary and compelling reasons for release, reasoning that these conditions-based arguments were based on perceived constitutional violations which are not appropriate grounds for relief in a compassionate release motion.[155] For example, one Third Circuit panel remarked that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release."[156]

But other courts took a more expansive view. Especially in light of the documented failures of the BOP to contain the virus, as well as appellate courts' resistance to broad pandemic-related injunctions, some district courts specifically considered the severity—and punitive effect—of conditions of confinement under the threat of COVID-19 when determining whether to grant or deny a motion for compassionate release.[157] Writing about an outbreak at

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[154] Skylar Albertson, *Do Prison Conditions Change How Much Punishment A Sentence Carries Out? Lessons from Federal Sentence Reduction Rulings During the Covid-19 Pandemic*, 18 NW. J. L. & SOC. POL'Y 1, 22-29 (2022) (describing different approaches of district courts in adjudicating compassionate release motions that raised issues related to conditions of confinement during the COVID-19 pandemic).

[155] *See, e.g.*, United States v. Numann, No. 3:16-cr-00065-TMB, 2020 WL 1977117, at *3-4 (D. Alaska Apr. 24, 2020) (holding that the court did not have jurisdiction to consider constitutional claims "relating to the manner and conditions of confinement … are not properly brought in a motion for compassionate release"); United States v. Berrelleza-Verduzco, No. CR12-62RSL, 2021 WL 1178189, at *2 n.1 (W.D. Wash. Mar. 29, 2021) (same); United States v. Blanchard, No. CR 18-376 (JEB), 2022 WL 5241879, at *3 (D.D.C. Oct. 6, 2022) (if defendant "wishes to file a suit with a constitutional claim, a motion for compassionate release is not the vehicle to do so").

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

[157] *E.g.*, United States v. Pacheco, No. 12-CR-408 (JMF), 2020 WL 4350257, at *1 (S.D.N.Y. July 29, 2020) (" it denies reality to suggest, let alone hold, that the threat of COVID-19 to those in prison does not qualify as an extraordinary and compelling reason to consider the early release of those in prison"); United States

a low-security facility in Oakdale, Louisiana, for example, one district judge in the Southern District of Mississippi determined that COVID-19 related prison conditions *could* amount to extraordinary and compelling reasons warranting release, even absent other factors. That judge wrote:

> Despite the BOP's efforts, COVID-19 has continued to spread at the facility and more prisoners have died. In fact, almost a quarter of COVID-19-related prisoner deaths reported by the BOP have occurred at Oakdale I.
>
> Given the steadily growing death toll and the apparent continued spread of the disease at Oakdale I, COVID-19 creates an "extraordinary and compelling reason" potentially warranting a reduced sentenced [sic].[158]

In sum, the COVID-19 pandemic tested the efficacy of the Eighth Amendment's framework for handling widespread crises impacting federal prisons—and the Eighth Amendment failed spectacularly. The pandemic also tested the new federal compassionate release statute and provided a vehicle for novel arguments about "extraordinary and compelling" reasons for

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v. Maya Arango, No. 15-CR-104 (JMF), 2020 WL 3488909, at *2 (S.D.N.Y. June 26, 2020) ("as numerous courts have concluded, the threat of COVID-19 to those in prison constitutes an extraordinary and compelling reason for compassionate release"); United States v. Mel, No. TDC-18-0571, 2020 WL 2041674, at *3 (D. Md. Apr. 28, 2020) (holding that release is consistent with Section 3553(a) factors because "the actual severity of the sentence as a result of the COVID-19 outbreak exceeds what the Court anticipated at the time of sentencing").

[158] United States v. Kelly, 3:13-CR-59-CWR-LRA-2, 2020 WL 2104241, at *7-8 (S.D. Miss. May 1, 2020) (granting compassionate release to an individual in his late 20s without health issues where BOP failed to control the outbreak of COVID-19 at his facility) (citing Memorandum from Att'y Gen. to the Director of Bureau of Prisons, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (Apr. 3, 2020). The ACLU's lawsuit against the Oakdale facility for failure to contain COVID-19 proved unsuccessful. *See* Livas v. Myers, 455 F. Supp. 3d 272, 281-82 (W.D. La. 2020) (holding that § 2241 was not the proper vehicle through which to seek relief from unconstitutional conditions of confinement).

release. Remarkably, during COVID-19, incarcerated people began to have success with compassionate release motions where traditional Eighth Amendment lawsuits failed. The pandemic thus further exposed the weaknesses of the Eighth Amendment, and the necessity of compassionate release as an avenue for relief even outside of the COVID-19 context.

III. Comparing Eighth Amendment and Compassionate Release as Vehicles for Litigating Specific Harms

The divergent approaches to conditions of confinement as ECRs that began to take shape during the pandemic—with some courts being willing to grant conditions-based release and others being more hesitant—are representative of compassionate release litigation more generally. Further, after litigants and counsel saw early success with COVID-based compassionate release motions, additional and creative conditions-based arguments for compassionate release began to emerge.

Many courts rejected such arguments. For example, in one case, an incarcerated person argued that he should be released early from federal prison because he was "kept in restrictive housing (pending assignment to a housing unit) at the Federal Correctional Institution in Terre Haute, Indiana longer than necessary because of his race and that he was subjected to deplorable conditions."[159] Although not central to its affirmance of the denial of compassionate release, the Seventh Circuit noted in that case that "[m]istreatment or poor conditions in prison, if proved, might be grounds for relief in a civil lawsuit . . . but untested allegations of this nature are not grounds for a sentence reduction."[160] Similarly, a person claiming his long-term solitary confinement at the ADX-Florence supermax prison in Florence, Colorado was extraordinary and compelling, but the district court denied the motion in part because of its conclusion

[159] United States v. Dotson, 849 F. App'x 598, 601 (7th Cir. 2021).
[160] *Id.* (internal citation omitted).

that a challenge to solitary confinement was properly raised in an Eighth Amendment civil rights action. [161]

But, as discussed in greater detail below, other courts began to grant conditions-based motions for compassionate release for non-pandemic reasons, holding that certain kinds of conditions could rise to the level of "extraordinary and compelling" reasons warranting release or a sentence reduction. Moreover, the adopted amendments to the ECRs in the Guidelines have further open the door to conditions-based claims.

Distinct standards govern the claims made in motions for compassionate release as opposed to civil actions under the Eighth Amendment. And distinct aims flow from the remedies sought in each context. Of course, there are many circumstances in which a person may pursue *both* an Eighth Amendment lawsuit *and* a federal motion for compassionate release. The below graphic summarizes some of the key analytical differences between the two relief avenues—including the legal standard applied, the point of view that a court considers, the remedies, barriers to relief, the form of a pleading, and success rates.

[161] United States v. Shabazz, No. CR12-0033JLR, 2022 WL 5247196, at *4 (W.D. Wash. Oct. 6, 2022).

Figure 1: **Comparison Chart**

	Civil action	**Compassionate release**
Statute or source of law	Eighth Amendment (either through *Bivens* or 28 U.S.C. § 2241)	18 U.S.C § 3582(c)
Legal standard	"Deliberate indifference" on the part of a prison official OR whether official acted "sadistically and maliciously"	Whether "extraordinary and compelling" reasons warrant relief
Whose point of view is considered?	Subjective intent of prison official	Whether harm is "extraordinary and compelling" in eyes of district court + discretion of district court in balancing sentencing factors[162]
Available remedies	Injunction or damages[163]	Immediate release or reduction in sentence
Barriers to relief	- PLRA (exhaustion, physical injury requirement, fees limitations, etc.) - Access to counsel - Qualified immunity - Scienter requirements	- Section 3553(a) factors—crime of conviction - Whether movant is a danger to the community - Disparity between federal districts with access to counsel and willingness to grant relief
Form of pleading	Civil rights lawsuit often spanning years with multiple phases and possibility of interlocutory appeals that delay any ultimate resolution of the case	Single motion to single judge with occasional appeal but deferential standard of review

[162] The ECR standard also raises questions about how to prove something is extraordinary and compelling, whether this is from an objective or a subjective point of view, and what standard of review should be applied to an ECR determination. While these questions are certainly relevant, the case law is so new that very little doctrine has developed around these issues. Accordingly, this Article does not address them here.

[163] Release is also technically available but only in rare circumstances so it is not listed here. *See* Brown v. Plata, 563 U.S. 493, 545 (2011) (upholding lower court decision to release people incarcerated by California prison system to reduce over-crowding).

For example, in the case of a motion for compassionate release, the court's inquiry focuses on the defendant's individual circumstances. Under the Eighth Amendment, a primary focus is on the state of mind or actions of prison officials.[164] Still, there is overlap between Eighth Amendment claims of deliberate indifference and claims involving ECRs under federal compassionate release.[165]

This section thus focuses on three categories of harm that occur frequently in prison, and that have been the subject of both Eighth Amendment and compassionate release litigation: inadequate medical care, violence or sexual abuse in prison, and placement in solitary confinement or other forms of hyper-restrictive custody that causes an experience of incarceration to be more severe—more extremely punitive—than perhaps a sentencing judge intended.

While the unfortunate reality is that most incarcerated people will never be afforded relief for harms that they suffer in prison whether under compassionate release or the Eighth Amendment, as this section discusses, there are important ways in which compassionate release claims can succeed in providing relief under circumstances where the Eighth Amendment falls short.

A. Serious Medical Needs

Much attention has been paid to the widespread failures of prison systems to provide adequate medical care.[166] The failure of

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[164] Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 364 (S.D.N.Y. 2020).

[165] *E.g.*, United States v. D'Angelo, No. 2:13-cr-00114-NT, 2022 WL 10066359, at *5 (D. Me. Oct. 17, 2022) ("Compassionate release motions involving inadequate medical care are similar to Eighth Amendment claims for deliberate indifference to a prisoner's serious medical needs.") (internal citations omitted); United States v. Dimasi, 220 F. Supp. 3d 173, 194 (D. Mass. 2016) (noting the Eighth Amendment standard of deliberate indifference in a compassionate release order granting early release).

[166] William J. Jefferson, *The Special Perils of Being Old and Sick in Prison*, 32 FED. SENT. R. 276, 278 (2020) (describing how "inmate reports of how they feel are discounted and in which respectful attempts to seek more effective diagnosis

prison officials to treat the medical conditions of incarcerated individuals has been the subject of much Eighth Amendment conditions of confinement litigation.[167]

Eighth Amendment medical claims. The standard for proving an Eighth Amendment violation for failure to treat a medical need is a stringent one. The Supreme Court has unequivocally explained that, in such cases, negligence on the part of prisons or prison officials is insufficient to state an Eighth Amendment conditions of confinement claim. As the Court set forth in *Estelle v. Gamble*:

> [A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.[168]

Instead, to state a claim of deliberate indifference to serious medical needs under the Eighth Amendment, a plaintiff must show (1) that the risk of harm was objectively serious, and (2) the official consciously knew of, but disregarded that serious risk of harm.[169] To prove the objective prong of this type of claim, a person must first establish that they have "serious medical needs."[170] They can do so, for example, "by showing that a doctor has diagnosed a condition as requiring treatment or that the prisoner has an obvious problem that any layperson would agree necessitates care."[171] Only

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and treatment may routinely be considered offenses, worthy of resulting in lockups in solitary confinement").

[167] Chapman v. Fed. Bureau of Prisons, 235 F. Supp. 3d 1066, 1067 (S.D. Ind. 2017) (describing incarcerated person's condition suffering from severe Type 1 diabetes that the BOP has systematically failed to adequately treat).

[168] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

[169] Farmer v. Brennan, 511 U.S. 825, 834, 837 (1994).

[170] *Estelle*, 429 U.S. at 106.

[171] Phillips v. Tangilag, 14 F.4th 524, 534 (6th Cir. 2021). *See also, e.g.*, Hoffer v. Sec'y, Fla. Dep't of Corr., 973 F.3d 1263, 1270 (11th Cir. 2020) (an "objectively serious medical need" is one that has been "diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would

grossly or woefully inadequate care—not just care that falls below a professional standard—can be called "cruel and unusual."

It is not difficult to see how this high standard puts near impossible evidentiary burdens on incarcerated plaintiffs. In the first instance, an incarcerated person will need to exhaust administrative remedies before bringing this type of claim. But assuming that a claim is properly in court, for prisoners to prove grossly inadequate care, courts will require them to introduce medical evidence, typically in the form of documents describing their medical needs and in the form of expert testimony.[172] Further, plaintiffs must allege deliberate indifference on the part of *individuals* in the case of a damages suit, which is typically shown through evidence that prison staff received grievances from an incarcerated person that were ignored or disregarded.[173] This can cause additional challenges for plaintiffs if they were treated by a series of prison officials—pinpointing the locus of subjective medical indifference on the part of prison staff may not be an easy task.[174] Finally, while a damages remedy may be beneficial as a supplement to other remedies (e.g.,

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easily recognize the necessity for a doctor's attention," and "if left unattended, poses a substantial risk of serious harm") (internal citations omitted).

[172] Phillips, 14 F.4th at 535.

[173] *See, e.g.*, Perez v. Fenoglio, 792 F.3d 768, 782 (7th Cir. 2015) (noting that a complaint must allege that "named defendants each obtained actual knowledge of [plaintiff's] objectively serious medical condition and inadequate medical care" through "grievances and other correspondences"); Shakka v. Smith, 71 F.3d 162, 167 (4th Cir. 1995) (holding that deliberate indifference could not be shown where there was "no evidence, either direct or circumstantial, to suggest that [individual prison officials] had any knowledge that [plaintiff] was deprived of his wheelchair"). This means that, especially for incarcerated individuals with intellectual disabilities or poor reading and writing skills, or for those whose grasp of English is less than proficient, a claim of medical deliberate indifference can fail simply because indifference of individual officers wasn't adequately shown through the grievance process—there was no "smoking gun."

[174] *See, e.g.*, Anderson v. Bureau of Prisons, 176 F. App'x 242, 244 (3d Cir. 2006) (holding that incarcerated person's complaint failed to state an Eighth Amendment claim for deliberate indifference to his serious medical needs against Bureau of Prisons officials, specifically a warden, a regional director, and an administrator, none of whom were health workers, and none of whom were alleged to have had any direct contact with the inmate regarding his medical care concerns).

treatment), a damages remedy may be inadequate to address severe and acute medical conditions that the BOP has refused to address.

Potentially even more problematic, however, is the Eighth Amendment's inability to capture legitimate medical harms where prison staff has shown *some* attention to a person's condition (and thus is not deliberately indifferent) but a person is still suffering and being inadequately treated. Perversely, the Eighth Amendment's deliberate indifference test acts as a disincentive to the provision adequate medical treatment because it encourages prison medical staff to not know, not test, and not discover incarcerated peoples' legitimate medical concerns.[175]

Compassionate release medical claims. Serious and debilitating medical conditions have always been a possible ground for compassionate release—even under the pre-First Step Act framework. But previously, only the BOP was empowered to identify individuals whose medical needs were sufficiently serious to warrant release. Further, prior to the amendments to the Sentencing Guidelines, only a narrow category of medical needs qualified for compassionate release eligibility. Indeed, historically, compassionate release's primary goal has been to provide "death with dignity" for terminally ill prisoners.[176] Instead, the Sentencing Commission's expansion of ECRs to include a broader category of medical-related motions for compassionate release allows for a broader conception of the historical rationale behind medical-based release: allowing people to *live* with dignity by receiving needed and appropriate medical care. District courts should therefore feel empowered to grant release or sentence reductions based on the failures of the BOP to address the serious medical needs of people incarcerated in federal prison.

Despite the historical availability of medical-based compassionate release, district courts have been inconsistent in their approaches to consideration of medical-related compassionate

[175] Thompson, *supra* note 6, at 642-49 (describing Eighth Amendment's deliberate indifferent test and how it serves to discourage testing, discovery, and consultation about people's medical needs).

[176] Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners-Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 804 (1994).

release claims. On the one hand, some courts have determined that certain aspects of a medical claim—such as the "treatment required or appropriate" in a given circumstance or the "response of the Bureau of Prisons" more generally is not something over which courts have jurisdiction in the context of compassionate release.[177] Other courts, however, have found that BOP's failures can be a part of the analysis.[178] But the Sentencing Commission's specific endorsement of medical claims as ECRs warranting early release should empower district courts to fully embrace the BOP's failure to treat medical claims as a legitimate ground for release or sentence reduction. This is especially true given the adopted language that highlights the BOP's failure to provide timely or adequate treatment. Specifically, the change to the ECR related to medical treatment asks if a defendant

> … is suffering from a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death.[179]

Thus, while this ECR requires an incarcerated person to show that needed care is not being provided by the BOP, and that severe harm could result, there is no heightened requirement to show anything akin to "deliberate indifference" by BOP staff. This standard thus focuses less stringently on the failures of the BOP and instead focuses more squarely on the type of care needed and the type harm

[177] United States v. Gates, No. 18-10374-LTS, 2020 WL 2747851, at *2 (D. Mass. May 27, 2020).

[178] *See, e.g.*, United States v. Beck, 425 F. Supp. 3d 573, 580–82 (M.D.N.C. 2019) (finding extraordinary and compelling reasons for releasing prisoner after the BOP's "gross mismanagement" of medical care involving delaying breast cancer treatments for months); United States v. Almontes, No. 3:05-cr-58 (SRU), 2020 WL 1812713, at *6–7 (D. Conn. Apr. 9, 2020) (finding extraordinary and compelling circumstances when the BOP was indifferent to prisoner's serious spinal issue by delaying treatment and surgery for years); United States v. Robles, No. 19cr4122, 2022 WL 229362, at *2 (S.D. Cal. Jan. 26, 2022) (granting compassionate release where BOP failed to provide urgent medical treatment for incarcerated person's various serious medical conditions including arteriovenous malformations and hereditary hemorrhagic telangiectasia).

[179] FINAL AMENDMENTS, *supra* note 25, § 1B1.13(b)(1)(C).

or risk being suffered. At least on its face, the language of this amendment suggests that incarcerated people will have a much easier time meeting the ECR prong of the compassionate release analysis for medically based harms than they would meeting the "deliberate indifference" standard under the Eighth Amendment.

B. Prolonged Isolation

Solitary confinement[180] is widely utilized—indeed there are between 41,000 and 48,000 people being held in solitary confinement in America's prisons today.[181] While there is some variability in the degree and conditions of solitary confinement, including the length of a person's stay in isolation, solitary confinement in general is characterized by an "inability to leave [a] room or cell for the vast majority of the day, typically 22 hours or more."[182] Further, people in solitary are afforded "only extremely limited or no opportunities for direct and normal social contact with other persons . . . and afforded extremely limited, if any, access to meaningful programming of any kind."[183] In the Bureau of Prisons alone, almost 8,000 people are being held in isolation.[184]

Although the perception is that only the "worst of the worst" end up in solitary confinement, this perception does not reflect reality.[185] For example, solitary confinement was widely used during COVID-19 to isolate people that were exposed or may have

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[180] This Article uses the term "solitary confinement" as opposed to the term "restrictive housing" because it is the more colloquial term for the practice of isolating incarcerated people.

[181] CORRECTIONAL LEADERS ASS'N & ARTHUR LIMAN CTR. FOR PUB. INT. AT YALE L. SCH., *Time-In-Cell: A 2021 Snapshot of Restrictive Housing based on a Nationwide Survey of U.S. Prison Systems*, 60 (Aug. 2022) [hereinafter CORRECTIONAL LEADERS ASS'N].

[182] U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING: EXECUTIVE SUMMARY, 3 (Jan. 2016).

[183] *Id.* at 28-30.

[184] CORRECTIONAL LEADERS ASS'N, *supra* note 178, at 8 tbl.1.

[185] Eleanor Umphres, *Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL ETHICS 1057, 1065 (2017) ("Although solitary confinement is often described as a last-resort measure for the 'worst of the worst,' it is commonly implemented in response to minor infractions like 'disrespect,' which includes simple profanity.").

been exposed to the virus. Solitary confinement is also often used as a punitive measure for minor infractions, to separate incarcerated people for various reasons, or even to monitor people undergoing psychological distress.[186] Solitary confinement also takes a negative toll on a person's physical health.[187]And for those who have pre-existing mental health or psychological issues, solitary confinement almost invariably makes these conditions worse.

The negative effects of prolonged solitary confinement are so severe that the practice has been compared to a form of torture.[188] Although the severe and deleterious effects of prolonged isolation are beyond the scope of this Article, a growing consensus of lawyers, psychologists, and medical professionals uniformly view the practice of prolonged isolation as inhumane. Further, many of the behavioral problems and psychological disorders associated with people who end up in solitary confinement are actually *caused by* isolation.[189] Yet prolonged solitary confinement persists as a penological tool, counterintuitively justified as a tool to promote safety and security in prisons.

Solitary confinement and the Eighth Amendment. Challenges to a person being held in long-term solitary confinement are cognizable under the Eighth Amendment[190] but are still subject

[186] Nicholas Brooks, '*You Shouldn't Have Used the D-Word'*, THE MARSHALL PROJECT (July 8, 2022), https://perma.cc/NR6U-VN92.

[187] Justin D. Strong, et al., *The body in isolation: The physical health impacts of incarceration in solitary confinement*, 15 PLOS ONE, Oct. 9, 2020, at 9.

[188] *E.g.*, Haney & Lynch, *supra* note 4, at 509 (surveying the literature comparing prolonged solitary confinement to torture).

[189] *See e.g.*, Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 219 n.25 (2020) (collecting studies); Terry A. Kupers, *What to Do with the Survivors? Coping with the Long–Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005, 1010 (2008) (describing the cycle of disciplinary problems getting worse rather than better when people are held in segregation); AMERICAN CIVIL LIBERTIES UNION OF TEXAS & TEXAS CIVIL RIGHTS PROJECT, *A Solitary Failure: The Waste, Cost, and Harm of Solitary Confinement in Texas*, 32 (2015) (describing results of a survey finding that ninety-five percent of people in segregation in Texas developed at least one psychiatric symptom due to solitary confinement).

[190] Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.").

to the exacting "deliberate indifference" standard set forth in *Farmer v. Brennan*. A person making an Eighth Amendment solitary confinement claim must prove both the objective prong (that a deprivation or risk of harm is sufficiently serious) and the subjective prong (that prison official has a culpable state of mind, that he or she acts or fails to act with a deliberately indifferent state of mind).[191]

The objective prong in this context is implicated by the infliction of psychological harm. Given the sheer volume of data on the psychological toll that solitary confinement takes on people, it presumably shouldn't be difficult for incarcerated people to meet the objective prong of the *Farmer* analysis. Courts have said that the objective prong in Eighth Amendment solitary confinement cases—the level of deprivation or level of risk of harm—can depend on both the duration and conditions of a person's confinement in solitary.[192] However, in evaluating the necessary duration and conditions of solitary confinement, courts have employed a perverse sleight of hand: they will give "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[193] Thus, the objective prong concerns not just the level of harm that an incarcerated person experiences, but also the

[191] *E.g.*, Farmer v. Brennan, 511 U.S. 825, 836-37 (1994); Wilson v. Seiter, 501 U.S. 294, 297 (1991).

[192] *See, e.g.*, Silverstein v. Fed. Bureau of Prisons, 559 F. App'x 739, 754 (10th Cir. 2014) (the duration and conditions of confinement are relevant in determining whether the infliction of psychological harm is sufficiently serious); Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir.1987) ("[T]he duration of a prisoner's confinement in administrative segregation or under lockdown restrictions is certainly an important factor in evaluating whether the totality of the conditions of confinement constitute cruel and unusual punishment."); Fussell v. Vannoy, 584 F. App'x 270, 271 (5th Cir. 2014) (per curiam) ("decades of extended lockdown have caused the serious mental health problems … and it is clear that such allegation is sufficiently serious to invoke Eighth Amendment concerns").

[193] *Silverstein*, 559 F. App'x at 754 (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)). *See also* Porter v. Clarke, 923 F.3d 348, 362 (4th Cir. 2019) ("[A] legitimate penological justification can support prolonged detention of an inmate in segregated or solitary confinement . . . even though such conditions create an objective risk of serious emotional and psychological harm").

opinion of prison staff and administrators tasked with maintaining security inside a prison.[194]

Similarly, although incarcerated people must also prove the subjective prong under the Eighth Amendment, that a prison official's "'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment,"[195] some courts have essentially eviscerated the deliberate indifference standard by expressly permitting the impingement of constitutional rights if the impingement is "reasonably related to a legitimate penological interest."[196] Thus, prison officials can be not just indifferent, but even intentional, about depriving someone of basic human needs or subjecting them to unconscionable risk of psychological harm if doing so furthers penological goals. In this way, courts' willingness to yield to the deference of prison officials in the use of solitary confinement creates a nearly insurmountable task for litigants seeking to limit the use of solitary confinement in individual cases.[197] Further, as with medical claims, incarcerated people have the same burdens as other Eighth Amendment litigants, including that they file suit against the right defendants in order to show that those defendants were "deliberately indifferent."[198]

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[194] *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 227 (2005) (internal citation omitted) (noting the obligation "to ensure the safety of guards and prison personnel, the public, and the prisoners themselves."); Grenning v. Miller-Stout, 739 F.3d 1235, 1240 (9th Cir. 2014) (stating that "[t]he precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement," but noting that "[t]he existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes").

[195] *Farmer*, 511 U.S. at 828.

[196] *Silverstein*, 559 F. App'x at 755 (internal citations omitted).

[197] *E.g.*, Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 974 (2018) (describing problems with judicial deference in the context of solitary confinement); Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV 1505, 1507-08 (2004) (same).

[198] *See, e.g.*, Hope v. Harris, 861 F. App'x 571, 583 (5th Cir. 2021) ("Hope has not sufficiently pleaded deliberate indifference—with one exception discussed *supra*—because it is unclear from Hope's complaint if any of Defendants [with one exception] was even aware of the conditions of which he complains.").

Solitary confinement and compassionate release. Solitary confinement and the harms that flow from being held in isolation for long periods of time is likely to be the most difficult of the three categories of harms discussed in this Article to redress through compassionate release. First, there is no specific carve-out in the amendments to the Guidelines that encompasses solitary confinement.[199]

Further, there is a perception that solitary confinement is often used to isolate people who the carceral system deems particularly dangerous, unstable, or incapable of rehabilitation.[200] Thus, the very reasons why solitary confinement might be used to inhibit a particular person's movements or ability to associate with other incarcerated people are the same reasons that a sentencing judge may deny a person's release or sentence reduction under either Section 3553(a) or because the person is a danger to the community under Section 3582(c)(1)(A)(a)(2).

One additional barrier to compassionate release relief in this context is that solitary confinement is so commonplace that it may not amount to an "extraordinary and compelling" circumstance. Indeed, as noted above, the use of solitary confinement, administrative segregation, and other forms of isolation is indeed commonplace. For example, one person incarcerated at ADX argued that his prolonged and extreme confinement in solitary was an ECR warranting release.[201] In addition to emphasizing that such a claim was an Eighth Amendment claim not cognizable in the compassionate release context, the district court in that case also concluded that his case was not extraordinary because "a significant number of defendants incarcerated at ADX-Florence, like Mr. Shabazz, are psychologically impacted by the long-term isolation that they experience at ADX-Florence."[202] It is hard to contemplate how the conditions at ADX would not—by themselves—be considered extraordinary. In addition to the near total isolation that

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[199] *See* FINAL AMENDMENTS, *supra* note 25.

[200] *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 229 (2005) (declaring that "[p]rolonged confinement in Supermax may be the State's only option for the control of some inmates").

[201] United States v. Shabazz, No. CR12-0033JLR, 2022 WL 5247196, at *4 (W.D. Wash. Oct. 6, 2022).

[202] *Id.*

people experience there, accounts of the conditions at ADX-Florence have included horrifying stories of people engaging in self-mutilation, eating their own feces, and being put in restraints for prolonged periods of time.[203] However, this district court's conclusion about Mr. Shabazz's experience exposes a weakness with compassionate release generally (and a tragedy on a national scale): although a condition of confinement may be deplorable, inhumane, and tantamount to torture,[204] such conditions are so widespread in American prisons that they may cease to be considered "extraordinary."[205]

Still, some courts have begun to recognize that the effects of solitary confinement are so severe, and that the experience of solitary confinement is so punitive, that sentence reductions may be warranted in certain circumstances based on the experience of solitary confinement.[206] In addition, one of the amendments to the ECRs is a "catch all" provision that would encompass long-term solitary confinement—as well as other extraordinary conditions-

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[203] Mark Binelli, *Inside America's Toughest Federal Prison*, THE NEW YORK TIMES (March 26, 2015), https://perma.cc/BCN7-SDQ9 (describing people incarcerated there who, as a result of psychosis from prolonged isolation, "swallowed razor blades," others who "were left for days or weeks shackled to their beds (where they were routinely allowed to soil themselves)" and one person "who ate his own feces so regularly that staff psychiatrists made a special note only when he did so with unusual 'voracity.'").

[204] Atul Gawande, *Hellhole*, THE NEW YORKER (Mar. 23, 2009), https://perma.cc/QVU5-CMXM.

[205] *See, e.g.,* United States v. Bolden, No. CR16-320-RSM, 2020 WL 4286820, at *7 (W.D. Wash. July 27, 2020) ("[G]eneral conditions that affect inmates indiscriminately throughout the prison are insufficient to support an individual defendant's claim for compassionate release.").

[206] *See, e.g.,* United States v. Kibble, 992 F.3d 326, 336 (4th Cir. 2021) (Gregory, C.J., concurring) ("conditions, [including solitary confinement] not contemplated by the original sentencing court, undoubtedly increase a prison sentence's punitive effect"); United States v. Marshall, 604 F. Supp. 3d 277, 284, 289 (E.D. Pa. 2022) (defendant's unconstitutional state sentence of life without possibility of parole for offense he committed when he was a juvenile, long-term solitary confinement, and significant rehabilitation, taken together, constituted "extraordinary" circumstance supporting compassionate release); United States v. Macfarlane, 438 F. Supp. 3d 125, 127 (D. Mass. 2020) (granting sentence modification in part because the "two-week confinement in solitary quarantine in a higher security facility is the equivalent of two months in the Camp to which he was originally assigned").

based claims. Specifically, a movant may meet the ECR standard if they present a "circumstance or combination of circumstances that, when considered by themselves or together" are "similar in gravity" to the other ECRs discussed herein.[207] Because of the toll that solitary confinement takes on individuals, it is not difficult to imagine a scenario in which a court may determine that a person's experience of solitary confinement, and the harms that such conditions have inflicted, are "similar in gravity" to, for example, severe medical neglect or abuse at the hands of BOP officials. Further, research shows that release may be the only way for many people to move past the trauma that prolonged solitary confinement inflicts, thereby warranting early release as a remedy.[208]

Calls to abolish solitary confinement altogether have been largely ignored by the federal courts. This is so even though there is little evidence, even among some in the correctional community, that solitary confinement is an effective tool for decreasing violence or increasing order in the prison setting.[209] Isolation was also used by the BOP as a tool to contain COVID-19, a practice that was widely-criticized.[210] At the same time, it is undeniable that the punitive effect of prolonged solitary confinement is extreme. In the solitary confinement context, then, district courts should feel empowered to exercise their own discretion and identify people for whom prolonged solitary confinement has had an extraordinary effect—and sometimes grant release or sentence reductions in such cases.

C. Sexual or Physical Abuse by Prison Staff

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[207] *See* FINAL AMENDMENTS, *supra* note 25, §1B1.13(b)(5).

[208] Julian Adler, *Prison Decarceration and the Mental Health Crisis: A Call to Action*, 34 FED. SENT. R. 233, 234 (2022) ("second-look mechanisms like compassionate release may be the only way to meaningfully redress the pathogenic effects of incarceration—be it the exacerbation of preexisting mental illness or the psychological toll of imprisonment, including the extreme harms of solitary confinement").

[209] Amicus Curiae Brief of Former Correction Executives in Support of Petitioner, Johnson v. Prentice, petition for cert. pending, No. 22-693 (filed Jan. 23, 2023).

[210] *See generally* Nicole B. Godfrey & Laura L. Rovner, *COVID-19 in American Prisons: Solitary Confinement Is Not the Solution*, 2 ARIZ. ST. L.J. ONLINE 127 (2020).

Physical and sexual abuse is pervasive within the prison setting. Whether at the hands of prison officials or other incarcerated people, visceral threats to bodily safety are endemic to prison life, and the unfortunate reality is that most of this abuse will never be redressed—indeed, much of it will go unreported. Such abuse can take many forms in the carceral setting. This Article does not address the potential for victims of abuse by other incarcerated people to be granted compassionate release—although there may certainly be such a remedy for those harms under the "catch all" provision. Rather, this Article discusses abuse by prison staff against the people that they are tasked with protecting. In this context in particular, release or sentence reduction may be uniquely appropriate because of the extreme punitive effect of abuse that is inflicted by officials of the State.

Assault under the Eighth Amendment. The Eighth Amendment standards that govern liability for physical abuse depend on whether the abuse was suffered at the hands of prison officials as opposed to other incarcerated individuals. Like medical needs, Eighth Amendment claims of abuse based on the failure to prevent abuse or assault by one incarcerated person against another is governed by *Farmer*'s "deliberate indifference" standard.[211]

With excessive force claims, on the other hand—those alleging assault by a prison official, under the Eighth Amendment—the conduct must be objectively "inconsistent with the contemporary standards of decency."[212] Under the subjective prong the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[213]

To determine whether the amount of force used violates the Eighth Amendment, courts consider the (1) "the extent of injury suffered," (2) "the need for application of force," (3) "the relationship between that need and the amount of force used," (4) "the threat 'reasonably perceived by responsible officials,"' and (5)

[211] Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[212] Whitley v. Albers, 475 U.S. 312, 327 (1986).
[213] *Id.* at 320–21.

"'any efforts made to temper the severity of a forceful response.'"[214] But excessive force claims are, like other kinds of Eighth Amendment claims, viewed in light of the deference given to prison officials.[215] Indeed, as the Court set forth in *Whitley* and reaffirmed in *Hudson*, prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'"[216] Further, claims in this context are particularly vulnerable to the defense of qualified immunity, which protects "all but the plainly incompetent or those who knowingly violate the law."[217]

In addition to the highly deferential standard for excessive force claims, an incarcerated plaintiff must also show that they suffered "physical injury" and that the injury is more than de minimis under the PLRA to state a claim for compensatory damages. As explained *infra*, this stringent requirement dooms many civil suits,[218] and the "physical injury" standard has been interpreted by some courts to include harms that may not seem de minimis.[219]

For sexual assault or abuse claims this requirement is especially salient, as many forms of sexual abuse or harassment do

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[214] Hudson v. McMillian, 503 U.S. 1, 7 (1992) (citing *Whitley*, 475 U.S. at 321). This standard is applied to people who have already been sentenced and differs from the standard applied to pretrial detainees under the Fourteenth Amendment which requires only that force was purposely or knowingly used and was objectively unreasonable under Kingsley v. Hendrickson, 576 U.S. 389 (2015).

[215] *E.g.*, Jackson v. Gutzmer, 866 F.3d 969, 974 (8th Cir. 2017) (describing the malicious and sadistic requirement as a "highly deferential standard" that "requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice") (quoting *Whitley*, 475 U.S. at 322).

[216] *Hudson*, 503 U.S. at 6 (quoting *Whitley*, 475 U.S. at 321–22.)

[217] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[218] *See* Schlanger & Shay, *supra* note 46, at 141 (noting that the physical injury requirement under the PLRA has "obstructed judicial remediation of religious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses").

[219] *See* Shapiro & Hogle, *supra* note 1, at 2047 (discussing one case in which "spraying [a person's] cell with gas, hitting him twice in the face, and pulling back on his fingers" was found to be de minimis injury under the PLRA) (citing Trevino v. Johnson, No. 905CV171, 2005 WL 3360252, at *5 (E.D. Tex. Dec. 8, 2005)).

not result in visible physical injury.[220] Further, courts are split over the effect of the PLRA's physical injury requirement in claims of sexual assault.[221]

All of these barriers to claims of abuse by guards under the Eighth Amendment mean that many—if not most—such claims never result in relief for incarcerated plaintiffs.

Assault under compassionate release. This is one area in which compassionate release claims seeking release—or a sentence reduction—based on abuse by a prison official may be particularly effective. First, the Sentencing Commission has specifically adopted a category of ECR that accounts for abuse by prison officials. As noted, the Sentencing Commission recently adopted a category of ECR that includes when a movant was a victim of "sexual abuse involving a 'sexual act'" or "physical abuse involving 'serious bodily injury'" committed by or at the direction of a prison employee or contractor.[222]

One barrier to relief, however, is that in this ECR category, more than the other categories discussed herein (medical claims or solitary confinement), the proof required to substantiate alleged

[220] *See* Hannah Belitz, *A Right Without A Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L. L. REV. 291, 304-05 (2018) (describing problems with the physical injury requirement under the PLRA in the context of rape and sexual assault); *see also, e.g.*, Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (compensatory damages would be barred under PLRA in case involving forcing a person to "perform sexually provocative acts" during strip search but that the statute does not bar nominal or punitive damages stemming from the constitutional Eighth Amendment violation).

[221] *See, e.g.*, Schlanger & Shay, *supra* note 46, at 144 (noting that some courts have failed to recognize sexual assault as constituting a "physical injury" under the PLRA); Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 39 (2004) (generally arguing that rape should be considered to involve physical injury under the PLRA); *see also, e.g.*, Turner v. Huibregtse, 421 F. Supp. 2d 1149, 1153 (W.D. Wis. 2006) (holding that an inmate must prove that a sexual assault perpetrated by corrections officers resulted in physical injury in order to recover compensatory damages for emotional injury and humiliation under the PLRA).

[222] FINAL AMENDMENTS, *supra* note 25, § 1B1.13(b)(4).

harms may hamper a person's ability to obtain meaningful relief.[223] Indeed the final amendments require that any such misconduct

> …be established by a conviction in a criminal case, a finding or admission of liability in a civil case, or a finding in an administrative proceeding, unless such proceedings are unduly delayed or the defendant is in imminent danger a requirement. [224]

This so-called "substantiation" requirement is problematic for a number of reasons, and could bar relief to many litigants seeking relief. For example, criminal and civil cases usually take months or years before reaching a criminal conviction or civil liability. An administrative finding may be similarly lengthy. And, like the Eighth Amendment, requiring a substantiation of liability on the part of an official would still shift the burden on the litigant to prove misconduct by some outside actor rather than focusing on a litigant's subjective experience.

Still, the Sentencing Commission's concern for victims of assault by prison staff signals that this category of ECR may provide a less burdensome path towards release than under the Eighth Amendment, especially considering that a showing of undue delay can override the substantiation requirement. And a remedy of release would enable victims of institutional sexual violence to seek and receive necessary meaningful treatment—in a safe space outside of prison—more quickly.

IV. Adverse Conditions of Confinement Should Be Embraced as a Subject of Compassionate Release Motions

Many district courts have held that conditions-based claims should not be cognizable in compassionate release motions. In addition, during a recent hearing on the ECR amendments, one

[223] *See, e.g.*, Glen Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, The New York Times (Feb. 22, 2023), https://perma.cc/5CN2-E2Q4 (describing BOP's characterization of documentation of claims of sexual abuse by prison officials at FCI Dublin as insufficient to warrant early release under BOP's internal review).
[224] Final Amendments, *supra* note 25, § 1B1.13(b)(4).

commentator asked about the intersection between the Eighth Amendment and compassionate release—and the role of Eighth Amendment remedies in the context of whether these expansive Guideline Amendments should even be adopted.[225]

But there are several doctrinal and practical benefits to making adverse conditions of confinement redressable through compassionate release. This Part expands upon specific reasons for why utilizing compassionate release to redress harms suffered in prison makes sense—and why district courts should embrace the Sentencing Commission's move toward expanding the categories of ECRs that are cognizable in a compassionate release motion. This Part also begins to address some criticisms of the radical expansion of compassionate release.

A. Exposing Prison Conditions and Humanizing People Who Are Incarcerated

Much of what occurs behind prison walls is invisible to the general public and even to the judges who sentence people.[226] The secrecy surrounding America's prisons doubtless contributes to the horrors that happen inside them.[227] But due to the large number of compassionate release motions filed in the past several years, federal judges have been given much more of a window into what happens to people incarcerated in federal prison.[228] As Professor Lindsey Webb has explained:

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[225] *Hearing on Proposed Compassionate Release-Related Amendments to the Sentencing Guidelines*, at 3 (2023) (statement of Hon. Randolph D. Moss on Behalf of Comm. on Crim. L. of the Jud. Conf. of the U.S.) [hereinafter Statement of Hon. Randolph D. Moss].

[226] M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1187 (2020) ("Life inside U.S. prisons is both the object of fascination and invisible in sentencing policy.").

[227] David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) ("[T]he closed nature of the prison environment and the fact that prisons house politically powerless, unpopular people—creates a significant risk of mistreatment and abuse.").

[228] *See, e.g.*, Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT. R. 76, 81 (2019) ("In reviewing First Step Act motions, judges will also learn more about the realities of prison sentences.").

> [D]espite our system's dependence on incarceration, the conditions of the confinement imposed—which can include violence from staff and other prisoners, lack of medical and mental health care, contaminated food or water, and a host of other ills—are largely invisible. Even when judges sentence individuals to terms of incarceration, they generally do not mention the conditions the convicted person is likely to encounter in prison or jail, the role that those conditions will play in furthering the purported aims of punishment, or the racial implications of differential exposure to harsh conditions of confinement.[229]

Since the 2018 expansion of compassionate release that allowed for motions to be filed directly with a sentencing court, district court judges are now more aware of those conditions that impact incarcerated people. It seems plausible that nearly every federal judge in the country—or at the very least every federal district—was called upon to decide a motion for compassionate release since 2018.[230] And many judges—appalled by what they saw—decided to remedy individuals' suffering or risk of suffering by granting early release.[231]

Scholars have similarly argued that raising conditions of confinement at sentencing should be an important part of the abolitionist project of educating the judiciary (and the public) about what prison is like.[232] In the compassionate release context, judges are required to confront those conditions of confinement explicitly.

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[229] Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 126–27 (2018).

[230] U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC, 3-5 (March 2022) (compiling data regarding compassionate release motions and outcomes during fiscal years 2020 and 2021).

[231] *Id*. at 3 (courts granted sentence reductions to 25.7% of incarcerated people who filed for compassionate release).

[232] *See, e.g*., Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1654 (2019) ("people find it difficult to imagine a world without prisons, yet they are largely unaware of what goes on inside of prison") (citing ANGELA Y. DAVIS, ARE PRISONS OBSOLETE?, 15-16 (2003)).

Education of judges in this way could, in turn, promote the added benefit of judges thinking more critically about how they sentence people in the first place.

There are several lenses through which judges confront conditions of confinement in post-sentencing motions. In the compassionate release context, the primary way is the one that this Article discusses head-on: whether conditions of confinement can rise to the level of "extraordinary and compelling" reasons warranting release. But the compassionate release framework also incorporates the Section 3553(a) sentencing factors. Just as "a sentencing proceeding involves the exercise of reasoned judgment balancing an array of diverse considerations in order to impose a just and effective punishment,"[233] reviewing a compassionate release motion should similarly take into account a wide range of factors, including what a person's life has looked like while they were in prison, since the date that a sentence was imposed.

Thus, it is not only the ECRs that movants present to district courts—it is a whole package or story of a person's life while incarcerated. This will often include positive programming that a person has participated in, including work history, educational courses, or other kinds of service that give judges an idea of who a person is. In this way, compassionate release litigation contributes to the humanization of incarcerated people in a way that other kinds of post-sentencing litigation (such as habeas litigation) does not. Because judges are called upon to reconsider a sentencing determination often after a person has spent a significant amount of time in prison, the educational project of compassionate release extends to the positive aspects of a person's life and development, thus highlighting the complexity, individuality, and dignity of all incarcerated people.[234]

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[233] Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 169 (2014).

[234] *See, e.g.*, United States v. Uram, 2:96-cr-00102-ABJ, ECF No. 503 (D. Wyo. November 2, 2022) (order releasing "a decorated Army veteran who served at the height of the Vietnam War and maintained a near-spotless disciplinary record—spanning more than twenty-five years—while incarcerated."); *see also* Jalila Jefferson-Bullock, *Consensus, Compassion, and Compromise? The First Step Act and Aging Out of Crime*, 32 FED. SENT. R. 70, 70 (2019) (noting that "compassionate release theory draws from a fundamental belief, rooted in human

Thus, the filing of compassionate release motions—even unsuccessful ones—can shed light on some of the most egregious abuses that occur in prison. The amendments are also an opening and an invitation to pursue novel arguments in favor of early release.

Filing compassionate release motions that have little chance of success can still contribute to the overall project of exposing the abuses of power that occur behind prison walls.

B. Release as Remedy

The amendments to the Sentencing Guidelines emerged directly from the pandemic-era motions that were filed—the amendments are at least a partial response to Eighth Amendment's inadequate ability to remedy certain harms during COVID-19 and beyond.[235] In fact, the amendments include an ECR that specifically singles out the existence of a viral pandemic as one of the categories that would potentially warrant sentencing relief.[236] In addition, the expansion of categories of medical-based harms discussed is a response to the largely inadequate provision of medical care to those in custody.

One significant reason that district courts should embrace compassionate release, then, is that the remedy of release or sentence reduction is more appropriate in many circumstances to address the harms suffered in prison than traditional civil remedies.[237] This is especially salient when ongoing harms (psychological trauma or severe health concerns, for example) are

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dignity, that an inmate's altered and unfortunate circumstances may demand early release from incarceration.")

[235] Erica Zunkel, Jaden M. Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 1 FED. SENT. REPT'R. 35, 164–174 (2023) ("The last four years have functioned as proof of concept for why the Commission should codify broad discretion for judges and reject the categorical limitations imposed by various federal circuits in the absence of an updated policy statement.").

[236] FINAL AMENDMENTS, *supra* note 25, § 1B1.13(b)(1)(D).

[237] Adler, *supra* note 204, at 234 ("second-look mechanisms like compassionate release may be the only way to meaningfully redress the pathogenic effects of incarceration—be it the exacerbation of preexisting mental illness or the psychological toll of imprisonment, including the extreme harms of solitary confinement").

not being adequately addressed by prison staff, but where staff hasn't exhibited a wholesale "deliberate indifference" to such needs.

Prison systems have insufficient resources to address the many complex medical or mental health services that incarcerated people require. Such services are far more readily available outside the carceral setting. Compassionate release thus empowers courts to address the equities of certain kinds of harms suffered in prison head-on; they are not hampered by the Eighth Amendment's scienter requirements or the exacting standards of the PLRA. Rather, district judges can consider the experiences that a person has undergone in prison and weigh the fairness and equity of continuing to incarcerate someone based on changed circumstances against the backdrop of that person's entire life both inside and outside of custody.

C. Judicial Efficiency

One potential anxiety about the amendments to the Sentencing Guidelines' ECRs is that a more expansive use of compassionate release as a vehicle for redressing harm also has the potential to open the floodgates to many more compassionate release motions.[238] Judges and criminal scholars are understandably wary of the potential for certain new forms of litigation to overwhelm the federal courts. Currently, the compassionate release statute has no minimum timeframe that a person needs to have been serving their sentence before they are able to move a sentencing court for release. Additionally, the compassionate release statute has no bar on successive motions—which is in contrast to other kinds of postconviction remedies such as federal habeas corpus, which imposes strict limits on the number and circumstances in which a successive motion can be filed.[239]

Thus, two bedrock values of criminal law—finality and judicial efficiency—are implicated by the new compassionate release amendments. Indeed, one potential criticism of compassionate release is that it could alter Congress' sentencing

[238] Statement of Hon. Randolph D. Moss, *supra* note 221, at 3.

[239] *E.g.*, 28 U.S.C § 2255(h) (barring second or successive federal habeas corpus motions unless they are certified by panel of the appropriate court of appeals).

scheme and undermine the finality of sentences. As the Supreme Court has stated, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[240] And yet, there is scant evidence that exceedingly lengthy sentences contribute to higher levels of deterrence of criminal conduct or public safety.[241] Furthermore, the principle of finality is largely concerned with the costs to the judicial system of relitigating complex criminal trials, often years after the fact.[242] But scholars have recognized that finality concerns are less acute in the resentencing context than in the habeas context where a full retrial may be implicated.[243] In this way, finality is even less of a concern in the context of compassionate release where a retrial would never be necessary—nor even a full resentencing.[244]

Further, if one accepts the principle that incarcerated people should be able to pursue meaningful relief for harms done to them in prison, the question is not whether finality will be undermined, but whether preserving the "fetish of finality"[245] is a more important principle in the criminal law than the fair and just treatment of those the criminal law incarcerates. An expansion of compassionate

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[240] Teague v. Lane, 489 U.S. 288, 309 (1989).

[241] Nicholas Turner, *Research Shows that Long Prison Sentences Don't Actually Improve Safety*, VERA INST. JUST., Feb. 13, 2023.

[242] Berman, *supra* note 230, at 169 ("finality concerns are justifiably perceived to be at their apex when a defendant questions or assails the discrete backward-looking historical factual determinations at a trial").

[243] Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 461 (2018) (noting that in cases of legal or sentencing innocence, finality concerns such as deterrence, rehabilitation, and repose are less poignant than in cases of factual or trial innocence) (citing United States v. Brockenborrugh, 575 F.3d 726, 743 (D.C. Cir. 2009) (relying on "the lesser costs to the systemic interests in finality where resentencing, as opposed to retrial, is the appropriate remedy")).

[244] Berman, *supra* note 230, at 166 ("sentence finality concerns should more often take a back seat to concerns about punishment fitness and fairness, especially when legal developments raise new questions about lengthy prison sentences").

[245] The myriad ways in which this "fetish of finality" keep people behind bars despite obvious claims of sentencing and legal innocence are beyond the scope of this article, but are nevertheless worth noting. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1211-14 (2015) (coining the term "fetish of finality" and discussing the barriers to habeas codified in Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)). *See also, e.g., Jones v. Hendrix,* 599 U.S. ___ (2023) (barring habeas relief for federal prisoner with meritorious claim based on AEDPA's finality provision restricting the ability of incarcerated people to file second or successive habeas petition).

release recognizes a moral obligation to consider what happens to people after the moment of conviction and sentencing—and to instead elevate dignity, humanity, and harm reduction above the hollow value of finality.[246]

On the other hand, compassionate release also has the potential to promote judicial efficiency by short circuiting expensive, lengthy, and costly federal civil rights litigation—especially for injunctive claims. Civil litigation against prison systems is exceedingly slow. Litigation against prison systems or prison officials can involve months or years of complex motions practice, probing discovery, and can often cause prison officials, government lawyers, and district judges to spend countless hours resolving such motions or discovery disputes. Interlocutory appeals and other mechanisms can delay the resolution of such cases. Even before a case gets to discovery, district and magistrate judges receive large volumes of prisoner-initiated civil complaints. Thus, there is an argument to be made that compassionate release—which usually only involves the judge, a defense attorney, and one attorney from the government—and can be resolved relatively quickly—is a more judicially efficient way to address certain kinds of conditions-based harms than through civil litigation. To be sure, and as noted above, a grant of compassionate release will not necessarily moot a claim for damages based on harm in prison. And some incarcerated people may choose to pursue compassionate release and civil damages simultaneously. But the benefits of compassionate release to quickly and efficiently adjudicate a claim should not be discounted.

Finally, district court judges—who have spent their careers deferring to prison officials in prison cases or adhering to stringent Eighth Amendment conditions of confinement standards—should welcome the discretion that compassionate release affords. Compassionate release allows judges to exercise discretion over

[246] *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1213 (2015) ("[a]n abolitionist ethic…call[s] into question the marker of conviction as one that properly puts an end to moral (and constitutional) concern and instead exposes the dehumanization at the core of that legal marking practice").

whether the duty to protect an incarcerated person has been violated without regard to the subjective intent of prison staff.[247]

D. Proportionality, Parsimony, and Doctrinal Coherence

Compassionate release eliminates some of the doctrinal (and practical) quagmires present in Eighth Amendment jurisprudence. Indeed, compassionate release permits district courts to look at the bedrock principles of parsimony and proportionality, as well the general purposes of punishment—through a post-sentencing lens.[248] Further, compassionate release litigation permits litigants to request relief based on the actual harm or condition suffered rather than requiring a litigant to prove the subjective mental state of a prison official.

Eighth Amendment proportionality principles could be marshalled in service of early release. In the compassionate release post-sentencing context and the new amendments to the Sentencing Guidelines ECRs in particular, courts have an explicit invitation to "resolve the tension between the meaning of 'punishment' in proportionality and conditions jurisprudence."[249] Indeed, federal compassionate release now opens a new line of inquiry: what punishment—in the sense of conditions of confinement or other adverse harms in prison—warrants early release or sentence reductions as an equitable matter?

The Eighth Amendment "prohibits . . . sentences that are disproportionate to the crime committed."[250] Indeed, the proportionality principle has been a bedrock of Eighth Amendment jurisprudence for over 100 years.[251] The proportionality principle

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[247] Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting) (noting that the Court "improperly attaches significance to the subjective motivation of [prison staff] as a criterion for determining whether cruel and unusual punishment has been inflicted").

[248] Albertson, *supra* note 152, at 29-38.

[249] Reinert, *Eighth Amendment Gaps*, *supra* note 21, at 83.

[250] Solem v. Helm, 463 U.S. 277, 284 (1983).

[251] *Id.* at 286 (first citing 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 83 (Worthington Chauncey Ford ed., 1904) then citing 1 AMERICAN

applies both to the type of punishment (e.g., the death penalty vs. life in prison)[252] and to whether a specific term of years is proportional to a particular criminal violation (can a person be sentenced to life in prison for a parking ticket or other minor nonviolent offenses?).[253] But the concept of proportionality—whether the sentence fits the crime—has not historically been the subject of post-sentencing motions—at least not explicitly.

Professor Alexander Reinert has encapsulated the problem with the proportionality principle being applied pre- and post-sentencing through the following hypothetical:

> [I]magine two prisoners who are subjected to physical abuse by prison officials. One of these prisoners resides in a state where the battery is mandated by statute as part of the criminal sentence. The second prisoner resides in a different state, where the mistreatment is at the hands of a correction officer who has no legitimate reason for striking the prisoner. The first prisoner would likely succeed in claiming that the statute mandating the battery is unconstitutional under a traditional proportionality analysis.[254]

ARCHIVES 700 (4th series 1837) (internal quotations omitted)); *Weems v. United States*, 217 U.S. 349, 385 (1910) ("the court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime").

[252] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169-73 (1976) (Stewart, J., joined by Powell, and Stevens, JJ.); *see also* Granucci, *supra* note 66, at 845-46.

[253] The answer to this question is, unfortunately, not clear. *See, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003) (upholding California's "three-strikes" law); Harmelin v. Michigan, 501 U.S. 957, 996, 1021 (1991) (upholding a sentence of life without parole for a first-time offender who was found guilty of possession of 650 grams of cocaine); Rummell v. Estelle, 445 U.S. 263, 276, 285 (1980) (upholding a sentence of mandatory life imprisonment for obtaining $120.75 by false pretenses under a Texas recidivist statute); Hutto v. Davis, 454 U.S. 370, 371-72 (1982) (per curiam) (upholding a sentence of forty years for possession with intent to distribute nine ounces of marijuana). *But see Solem*, 463 U.S.at 296-97, 303 (finding the Eighth Amendment prohibited imposition of life imprisonment without possibility of parole for a non-violent recidivist whose crimes were minor).

[254] Reinert, *Eighth Amendment Gaps*, *supra* note 21, at 74.

A person challenging the abuse meted out by the corrections officer post-sentencing, on the other hand, would need to show that the officer acted "sadistically and maliciously," and would still have to establish more than a "de minimis" harm.[255] In this example, although the two people have suffered identical harms, the harm meted out as part of sentencing would be declared unconstitutional under the Eighth Amendment proportionality principle while the harm experienced post-sentencing would be subject to an almost insurmountable Eighth Amendment analysis. Professor Reinert's point is that a person could not be subject to assault as part of a sentencing judge's determination but could easily be subject to identical treatment incident to their incarceration—without much recourse.

The Eighth Amendment does not have a singular meaning that spans both the sentencing context (when a judge is meting out punishment as part of sentencing for a criminal conviction) and the post-sentencing prison conditions context under the Eighth Amendment's cruel and unusual punishment's clause.[256] Compassionate release, however, provides judges an avenue through which to decide—as a matter of proportionality—whether continued incarceration after such abuse is still constitutional under the Eighth Amendment given the amount of suffering a person has undergone.[257]

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[255] *Id.* at 74–75 (discussing PLRA requirement that harm be more than de minimis).

[256] Dolovich, *Cruelty*, *supra* note 10, at 884.

[257] In a similar way, compassionate release should also appeal to those jurists and theorists who insist that "punishment" only refers to a criminal sentence—not conditions. One criticism of Eighth Amendment conditions of confinement jurisprudence—particularly from Justice Clarence Thomas—is that the word punishment refers only to a criminal sentence—not to the administration of that sentence. *See, e.g.*, Hudson v. McMillan, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) ("Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."); Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) ("I believe that the text and history of the Eighth

Scholars have previously argued that release should be the remedy for certain Eighth Amendment violations—that if a carceral system is unable to incarcerate people in a constitutional way, it should not be allowed to hold people at all.[258] In fact, this is what happened in *Brown v. Plata*, discussed earlier, in which a court ordered people released from the California prison system based on unconstitutional conditions.[259] The argument, though, hinges on the magnitude of the constitutional violation involved and the inability of prison systems or traditional civil remedies to address the underlying harms.[260]

But although the new amendments do not speak in terms of Eighth Amendment proportionality, one can imagine a sentencing judge deciding that a person's abuse at the hands of a prison guard, for example, or years spent in solitary confinement, were so abhorrent and unconscionable as to warrant immediate release because the person experienced conditions that can no longer be considered proportional to the crime they committed. In other words, the conditions that a person suffered were so egregious that incarceration should no longer be constitutionally permitted. In this way, the Supreme Court's proportionality jurisprudence could be marshalled in service of justifying sentence reductions or early release based on such harms.

Sentencing parsimony is more accurate when conditions of confinement are considered. In a similar vein, the parsimony principle—the idea that the punishment or sentence must be no more severe than is necessary to meet the purposes of sentencing—is implicated by how the new ECRs and compassionate release framework will be implemented. Although parsimony and proportionality are similar concepts, the parsimony principle speaks more to the way a sentence is tailored to an individual person and their circumstances than the proportionality principle.

Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose 'punishment.'").

[258] *See* Reinert, *Release As Remedy*, *supra* note 16, at 1579-80.

[259] Brown v. Plata, 563 U.S. 493, 531-32 (2011) (affirming release of people incarcerated in California's prison system because severe over-crowding led to unconstitutional conditions of confinement).

[260] Reinert, *Release As Remedy*, *supra* note 16, at 1575-76.

Sentencing parsimony, as informed by conditions of confinement, is illustrated by the following hypothetical from Justice Blackmun's concurrence in *Farmer v. Brennan*:

> Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.[261]

Justice Blackmun illustrates the idea that incarceration is experienced very differently for different people; the hypothetical invites the question of how the courts can address disproportionately harsh experiences of punishment that both occur in the post-sentencing context.

At the time of conviction and sentencing, judges are not tasked with considering what a person's experience of incarceration might look like.[262] Judges largely do not need to decide or even conceptualize what institution a person serves their sentence in or what a person's day-to-day experience consists of. Federal judges occasionally consider whether a person is located in a prison near

[261] Farmer v. Brennan, 511 U.S. 825, 855 (1994) (Blackmun, J., concurring).

[262] *See, e.g.*, ASSOC. JUST. ANTHONY KENNEDY, Speech at the ABA Annual Meeting (Aug. 9, 2003), https://perma.cc/2KJA-YLTH ("The focus of the legal profession, perhaps even the OBSESSIVE focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.").

friends or family and can recommend to the Bureau of Prisons (BOP) that a person be designated in a facility with a certain radius, but they don't have ultimate control over whether such a designation will actually materialize.[263] Rather, sentencing judges need only consider whether a punishment is appropriate, and this question is usually answered in the context of how long a person's prison term should be.[264]

Considerable energy is expended on sentencing parsimony in the federal system. A judge's sentencing decision in an individual case determined by a variety of factors and is particularly tailored to a given circumstance by both the Sentencing Guidelines as well as the judge's weighing of the Section 3553(a) factors. Individual judges take care that their sentencing determinations are often reasoned and considered. But if the punitive effect of a given sentence is altered by post-sentencing conditions of confinement, the precision and fairness of the original sentencing is likewise affected. Thus, both the judicial system as a whole and individual district judges should welcome the opportunity to review old sentences if circumstances so warrant. [265] Such a system provides a much more precise and accurate way of tailoring the punitive effect of a sentence to a particular crime. Thus, a judge who sentences a person to 25 years imprisonment, for example, should welcome the opportunity to review and adjust such a sentence if she learns that the sentenced person was subject to sexual or physical abuse at the hands of a prison guard. Using the same parsimony principles that attach at an initial sentencing, it is easy to imagine a scheme (much like the Sentencing Guidelines themselves) that could place a

[263] *See* 18 U.S.C. § 3621(b) (delegating authority over place of person's imprisonment to BOP). Similarly, federal judges can ask the BOP to allow a person to participate in drug treatment while they are incarcerated, but the ultimate decision about whether that happens is up to prison officials. 18 U.S.C. § 3621(e).

[264] *See* 18 U.S.C. § 3553(a) (listing factors to be considered in imposing a sentence under Federal Sentencing Guidelines); U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENTEN'G COMM'N 2018) (table listing guideline ranges in terms of months).

[265] United States v. Dimasi, 220 F. Supp. 3d 173, 194 (D. Mass. 2016) ("[T]here is always a range of reasonable sentences in a particular case. Unforeseen developments may render a sentence that was at an appropriate point on the reasonable range when imposed longer than necessary").

specific value on certain types of harms, and grant sentence reductions in accordance with those values.[266]

CONCLUSION

The Sentencing Commission's recently adopted amendments to the compassionate release statute are a watershed and paradigm-shifting reform to federal sentencing law. By expanding eligibility of early release to so many new categories of harms suffered by incarcerated people, the Sentencing Commission has given district courts an enormous degree of discretion to take a second look at federal sentences and grant sentence reductions or early release—potentially more discretion than they have even at an original sentencing.[267] Courts and prosecutors have already begun to question whether this broad grant of district court discretion is appropriate.[268] But what advocates know—and what the Sentencing Commission has impliedly recognized—is that civil lawsuits generally fail and reform through the civil law is rarely effective or adequate. This is not to suggest that prison litigation is a futile project—to the contrary. Prisoners' rights lawyers must continue to push courts and prison systems to recognize the harms that such systems cause.[269] However, the reality is that the current system is, in the main, unreformable, and other solutions such as broader availability for early release are necessary.

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[266] *See, e.g.*, United States v. Brice, No. 13-cr-206-2, 2022 WL 17721031, at *5-6 (E.D. Pa. Dec. 15, 2022) (granting a 30-month reduction in sentence to a woman who was sexually assaulted by a BOP officer).

[267] The biggest example of this phenomenon is that, in granting compassionate release or motion for sentence reduction, a district court is permitted to resentence a person to below the applicable mandatory minimum sentence that would have attached at an initial sentencing.

[268] *See generally*, *Hearing on Proposed Compassionate Release-Related Amendments to the Sentencing Guidelines*, (Feb. 23, 2023), https://perma.cc/9ZBY-V7RQ.

[269] *See, e.g,* Dolovich, Sharon, *How Prisoners' Rights Lawyers do Vital Work Despite the Courts* (June 12, 2023), UCLA School of Law, Public Law Research Paper No. 23-07 (discussing the critical importance of prisoners' rights lawyers to the protection and advancement of justice by acting as watchdogs and by humanizing the clients that they work for).

Indeed, the horrors that happen to people in prison have been well-documented, often litigated, but rarely adequately addressed. As explained above, structural barriers to conditions-based civil claims mean that civil litigants have been generally unsuccessful in litigating conditions of confinement cases under the Eighth Amendment against prisons and prison systems. The current system of incarceration places individuals in an impossible, tragic, and unconscionable environment with no means to redress harms suffered nor opportunity for reform. Incarcerated litigants found little help under the Eighth Amendment to redress harms suffered in the pandemic era. But in the new amendments to the compassionate release ECR categories, the Sentencing Commission has codified an, albeit imperfect, but in many ways more attainable, way in which individuals can get meaningful relief for harms suffered in prison than under the Eighth Amendment. In so doing, the Commission—at least in part—recognized the inadequacy of our current system and provided courts an avenue to move in the direction of decarceration rather than the faint and elusive promise of institutional reform.