ARTICLES

EXTRAORDINARY PUNISHMENT: CONDITIONS OF CONFINEMENT AND COMPASSIONATE RELEASE

*Meredith B. Esser**

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

In November of 2023, the U.S. Sentencing Commission amended the Federal Sentencing Guidelines and drastically expanded the ECR definition to include claims based on the types of harms that have been traditionally litigated under the Eighth Amendment. These changes represent a watershed reform to federal sentencing law and give district courts enormous discretion to reexamine federal sentences. Given the challenge of redressing harms

* Assistant Professor and Director of the Defender Aid Clinic, University of Wyoming College of Law. I wish to thank Hon. Veronica Rossman and Josh Lee, as well as University of Denver College of Law Professors Nancy Leong, Tamara Kuennen, Laura Rovner, and Lindsey Webb, for invaluable insights and contributions to this Article. I also wish to acknowledge the significant research support I received from Kaity Tuohy and Kate Berry.

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 develop major psychiatric disorders[3] and even though psychologists have long condemned the practice as a form of state-sanctioned

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) (describing an incarcerated person being handcuffed to a hitching post for prolonged periods of time without breaks while the sun burned his skin and being taunted with water but not provided any); Payne v. Parnell, 246 F. App'x 884, 887 (5th Cir. 2007) (holding that an unprovoked electric shock from a cattle prod applied to an 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) (describing how a prison official wrapped a key ring around his fingers and then punched an incarcerated person at least four times in the face in quick succession), *vacated*, 578 U.S. 632 (2016).

3. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 354 (2006) ("[E]ven 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) ("[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.").

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 duty. Instead, to obtain relief for the harms[8] suffered while incarcerated, people must file burdensome civil lawsuits[9] that consider whether a prison official has "inflicted" punishment in an intentional or criminally reckless manner.[10] But civil remedies for incarcerated plaintiffs

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 occur behind prison walls. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021); Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. ST. THOMAS L.J. 435, 435 n.1 (2023). Especially because this Article 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).

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 focus 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 ("[R]estorative justice emphasizes relational harms."). The term is also used within the abolitionist movement to emphasize the value of harm reduction. *See* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022) ("[H]arm 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 entertain suits against federal officials under *Bivens v. Six Unknown Named Agents of Federal 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 of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated as applied to state and local laws by* City of Boerne v. Flores, 521 U.S. 507 (1997), (RFRA); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.); and others. Such claims, although potentially relevant here, are beyond the scope of this Article.

10. *See* 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

are notoriously difficult to obtain. The barriers to getting in the courthouse doors for incarcerated litigants include onerous and technical exhaustion requirements,[11] impediments to obtaining legal counsel,[12] and other problems stemming from incarceration, including access to information, law libraries, and similar tools required to litigate a claim effectively.[13] 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[14] or that an official acted "maliciously or sadistically" to establish an excessive force claim.[15] Even if an incarcerated person succeeds in getting into court, available remedies are limited.[16] Finally, the doctrine of qualified immunity shields prison officials time and again from individual monetary liability.[17]

---

chastise or deter."); *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009) ("[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) (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").

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) (describing onerous exhaustion requirements under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of the U.S.C.), (PLRA)); Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145 (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. *See generally* Lewis v. Casey, 518 U.S. 343 (1996) (holding that incarcerated people's constitutional right to access the courts is not violated when a prison lacks legal research facilities or legal assistance, unless those individuals are substantially harmed by these deficiencies).

14. 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).

15. Hudson v. McMillian, 503 U.S. 1, 7 (1992) (holding that 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) ("[J]udicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win.").

16. *See infra* notes 65–66 and accompanying text.

17. *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 Federal Bureau of Prisons (BOP), the sentencing judge's role in a person's experience of incarceration is over.[18] Even if it may want to, the original sentencing court cannot do anything to remedy prison conditions via the original criminal proceeding.[19] 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.[20]

The meaning of the word "punishment" in American jurisprudence also differs depending on the context in which it is used.[21] 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[22] or those that are grossly disproportionate to the crime as determined by a judge at sentencing.[23] On the other hand, the Eighth Amendment prohibits "punishments" that amount to unduly harsh prison conditions or treatment in prison.[24] 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.[25] In particular, until now, there has been no way for a sentencing judge to account for a

18. *See* 18 U.S.C. § 3582(c) ("[T]he court may not modify a term of imprisonment once it has been imposed . . . .").

19. *See, e.g.*, Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1578 (2012) (questioning why "proportionality and conditions of confinement doctrine [are] separate strands of analysis").

20. *Id.* (noting that the term "punishment" within the Eighth Amendment "means different things in different contexts").

21. *See* Dolovich, *supra* note 10, at 885 (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").

22. 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. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("[U]se of denationalization as a punishment is barred by the Eighth Amendment.").

23. *See* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (noting that whether a sentence is unconstitutional under the Eighth Amendment requires an analysis of whether the 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).

24. *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994) (explaining that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment").

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

person's post-sentencing conditions of confinement in adjusting the term of imprisonment or providing other relief.[26]

However, since the passage of the First Step Act of 2018,[27] 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 the relevant provision of the First Step Act, 18 U.S.C. § 3582(c).[28] In order to obtain compassionate release, a movant must demonstrate one or more "extraordinary and compelling" reasons (ECRs) that warrant relief.[29] In the years since the First Step Act was passed, the U.S. 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.[30] The question of what rose to the level of "extraordinary and compelling" was therefore largely left to the discretion of district courts.[31] 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.[32]

---

26. *See, e.g.*, Reinert, *supra* note 19, at 1578 (explaining that Eighth Amendment challenges to adverse conditions of confinement have traditionally only been remediable through civil claims).

27. Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of the U.S.C.).

28. 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. *See, e.g.*, United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020). I recognize that the phrase "compassionate release" is somewhat of a misnomer. *See, e.g.*, *id.* ("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 18 U.S.C. § 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.

29. 18 U.S.C. § 3582(c)(1)(A).

30. *See infra* notes 152–53 and accompanying text.

31. *See, e.g.*, United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021) (holding that the Sentencing Commission had not yet issued a policy statement "applicable" to § 3582(c)(1)(A) motions filed by a defendant); United States v. McCoy, 981 F.3d 271, 276 (4th Cir. 2020) (noting that Congress expanded the "discretion [of the courts] to consider leniency" by creating an avenue for defendants to seek relief directly from the courts (quoting *Brooker*, 976 F.3d at 237)); United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020) (explaining that the Sentencing Guidelines Manual lacks an applicable policy statement, so § 3582(c)(1)(A) does not curtail a district judge's discretion); United States v. Jones, 980 F.3d 1098, 1106 (6th Cir. 2020) (holding that Congress's use of "may" in § 3582(c)(1)(A) dictates that the compassionate release decision is discretionary, not mandatory).

32. *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 [the] manner in which [the] defendant has been confined since he was sentenced"); United States v. Mcrae, No. 17-CR-643, 2021 WL 142277, at *5 (S.D.N.Y. Jan. 15, 2021) (releasing a 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

The federal compassionate release statute was also widely used during the COVID-19 pandemic to win early release for thousands of individuals suffering from severe COVID-19 comorbidities or suffering under pandemic-era prison conditions.[33] 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.[34] This era of conditions of confinement litigation also showed—to an alarming degree—the inability of the Eighth Amendment to keep incarcerated people safe.[35]

Partially in response to this groundswell of compassionate release motions, the Sentencing Commission expanded the Federal Sentencing Guidelines' definition of ECRs to 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.[36] These watershed amendments create—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.[37]

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, 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.[38] Similarly, early release or sentencing credit as a remedy is more doctrinally coherent—and frequently more just—than civil remedies.[39] Although 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.[40]

---

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").

33. *See infra* Part II.D.

34. *See infra* Part II.D.

35. *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 the COVID-19 pandemic in prisons).

36. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)–(5) (U.S. SENT'G COMM'N 2023). Congress directed the Sentencing Commission to promulgate general policy statements regarding the appropriate use of § 3582(c). *See* 28 U.S.C. § 994(a)(2)(C). Technically speaking, the Sentencing Commission's amendments to § 1B1.13 of the manual are that policy statement. But for ease of reading, this Article will refer to the policy statement as guideline amendments because they function as such.

37. *See* 18 U.S.C. § 3582(c)(1)(A).

38. *See infra* Part IV.B.

39. *See infra* Part IV.D.

40. *See infra* Part III.

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 the COVID-19 pandemic 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 context. Finally, Part IV builds on Part III and argues that, despite challenges that exist for movants under the federal compassionate release framework, the Sentencing Commission's 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,[41] physical or sexual abuse at the hands of other incarcerated individuals or prison guards,[42] exposure to lengthy periods of time in solitary confinement,[43] extreme overcrowding,[44] and other adverse conditions.[45] But prevailing on an Eighth Amendment claim in federal court is not an easy task.[46] 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.[47] Barriers to merits review include onerous exhaustion requirements,[48] strict pleading standards,[49] lack

41. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (concluding that "deliberate indifference" to a prisoner's medical needs can violate the Eighth Amendment).

42. Hudson v. McMillian, 503 U.S. 1, 9 (1992) (holding that "malicious[] and sadistic[]" use of force establishes Eighth Amendment liability).

43. 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").

44. Brown v. Plata, 563 U.S. 493, 545 (2011) (upholding a three-judge lower court decision ordering the release of incarcerated people to alleviate overcrowding in California's state prisons).

45. Helling v. McKinney, 509 U.S. 25, 35–36 (1993) (holding that a risk of exposure to environmental tobacco smoke may support an Eighth Amendment claim).

46. *See* 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").

47. *See id.*

48. *See, e.g.*, Schlanger, *supra* note 11, at 153–54; Yang, *supra* note 11, at 1159–60.

49. Hill, *supra* note 12, at 213 (describing problems with the heightened civil pleading requirement established in Ashcroft v. Iqbal, 555 U.S. 1030 (2008), and explaining that "constitutional civil rights claims were significantly more likely to be dismissed by district courts after *Iqbal* than under the earlier liberal pleading regime").

of access to counsel,[50] and qualified immunity for federal officials.[51] 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.[52] 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.[53] This section of the Article joins the chorus of scholars 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.[54]

Although this Article does not attempt a comprehensive examination of these obstacles, it briefly surveys four chief impediments to Eighth Amendment relief: (1) the requirements of the Prison Litigation Reform Act of 1995[55] (PLRA), particularly the exhaustion requirement; (2) access to counsel and other structural imbalances that incarcerated plaintiffs face; (3) the inadequacy of civil remedies; and (4) the Eighth Amendment's scienter requirements.

A. Exhaustion and the Prison Litigation Reform Act

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 imposed on them by carceral institutions.[56] Grievance processes can differ from institution to institution, and instructions for how to properly file a grievance are rarely readily available to the aggrieved.[57] Barriers to accessing the grievance process are especially significant for persons being

50. *See infra* notes 70–72.

51. *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).

52. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

53. *See infra* Figure 1.

54. Shapiro & Hogle, *supra* note 1, at 2022 ("[A] combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start."); Dolovich, *supra* note 10, at 890 (discussing how Eighth Amendment jurisprudence "rests on a conception of punishment that is inappropriate for the context"); Schlanger, *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 . . . .").

55. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of the U.S.C.).

56. *See, e.g.*, Brief for the Jerome N. Frank Legal Srvs. Org. of the Yale L. Sch. as Amicus Curiae Supporting Respondent at 6–13, Woodford v. Ngo, 548 U.S. 81 (2006) (No. 05-416) (detailing onerous grievance requirements and appeal processes in various institutions).

57. *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.").

held in isolation or solitary confinement.[58] 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 institutions incarcerating them.[59]

Because the 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.[60] This system—by design—means that many would-be lawsuits by incarcerated people may never even make it into federal court.[61]

Moreover, every incarcerated person must "properly" exhaust, no matter the violation or reason for not exhausting.[62] An incarcerated person may not speak English, may suffer from a disability, and may be sick or otherwise incapacitated; nonetheless, as scholars have lamented, incarcerated people must "comply with all time limits, appeal levels, and other procedural requirements."[63] Even a technical or innocent error can doom a claim.[64]

The PLRA narrows the scope of injunctive relief[65] 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

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

59. *See, e.g.*, Annoreno v. Sheriff of Kankakee Cnty., 823 F. Supp. 2d 860, 861, 864 (C.D. Ill. 2011) (holding that the pretrial detainee's submission of a "sick call slip," rather than an "inmate grievance form," regarding the alleged assault committed by corrections officers was inadequate to exhaust administrative remedies under the PLRA). *But see* Archuleta v. Adams Cnty. Bd. of Comm'rs, No. 07-CV-02515, 2010 WL 1347728, at *1 (D. Colo. Mar. 31, 2010) (explaining how an 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").

60. *See* 42 U.S.C. § 1997e(a); *see also Woodford*, 548 U.S. at 90–91, 93.

61. *See Woodford*, 548 U.S. at 94.

62. *Id.* at 90–91 (describing the concept of "proper" exhaustion as an exacting and precise standard).

63. 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, 586–87 (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).

64. *See Woodford*, 548 U.S. at 120–22 (Stevens, J., dissenting); Mack v. Klopotoski, 540 F. App'x 108, 113 (3d Cir. 2013) (upholding a dismissal where a 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.").

65. 18 U.S.C. § 3626(a)(1)(A) ("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.").

physical injury."[66] 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 indifferent to.[67] 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 does not cause a sufficiently serious level of harm.[68]

B. 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."[69] For a number of reasons, the majority of prison conditions cases are litigated pro se.[70] 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.[71] 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.[72]

Lack of access to proper research materials and the anemic status of prison law libraries mean that most incarcerated litigants don't have the resources necessary to represent themselves effectively.[73] Scholars have lamented that

66. 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").

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

68. 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).

69. 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").

70. Shapiro & Hogle, *supra* note 1, at 2048 ("Plaintiffs represented themselves in 94.9 [percent] of prisoners' civil rights cases litigated in federal court in 2012 (compared to 26.1 [percent] 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, 167 tbl.6 (2015))).

71. For example, rates for lawyers are limited to 150 percent of the rates for criminal defense representation under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. *See* 42 U.S.C. § 1997e(d)(3) (citing 18 U.S.C. § 3006A(d)). 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. *See* Schlanger, *supra* note 70, at tbl.7 (calculating that the average damages awarded for a prison conditions case in 2012 was $20,815).

72. Shapiro & Hogle, *supra* note 1, at 2049.

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

"[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."[74] 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.[75]

C. Inadequacy of the Remedy

Available remedies in the civil context can also prove elusive or inadequate to deal with a particular kind of harm.[76] First, money damages cannot redress many constitutional violations that happen behind bars.[77] 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. Although compassionate release will not produce institutional reform, 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.[78] And because the doctrine of qualified immunity insulates prison officials from personal financial liability in many if not most circumstances, a damages remedy is often beyond reach.[79]

Furthermore, 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 is transferred to a new facility, so meaningful injunctive relief can therefore often be elusive.[80] Once an injunction is obtained, enforceability remains a

74. Shapiro & Hogle, *supra* note 1, at 2049.

75. *See id.*

76. *See, e.g.*, Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and Covid-19*, 27 WASH. & LEE J. C.R. & 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.").

77. *See, e.g.*, Reinert, *supra* note 19, 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.").

78. *See infra* notes 200–02.

79. 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").

80. *Id.* at 2057 ("[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." (quoting Rendelman v. Rouse, 569 F.3d 182, 186 (4th Cir. 2009))); *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 the BOP's ability to move incarcerated people 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) (holding that a transfer did not moot a prisoner's claim for injunctive relief involving a procedure used by the BOP to assign inmates to units that restrict communication).

challenge in many respects.[81] In any event, harms suffered by incarcerated people are not always 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.[82] Thus, releases and sentence reductions are more appropriate remedies for 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.[83]

There is one caveat to this: in some circuits, 28 U.S.C. § 2241 provides a possible release remedy if a person is suffering under unconstitutional conditions of confinement.[84] Section 2241 actions are not subject to the same exhaustion requirements as actions that are governed by the PLRA.[85] But courts are split as to whether this remedy is available to challenge conditions of confinement.[86] 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."[87]

D. Eighth Amendment Scienter Requirements

Finally, incarcerated people face barriers that are built into Eighth Amendment legal standards themselves.[88] In cases that involve prison

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

82. *See, e.g.*, SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS 1 (2022).

83. *Id.*

84. Although 28 U.S.C. § 2241 is rarely used, 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 incarcerated people challenging their incarceration during the COVID-19 pandemic could bring suit under 28 U.S.C. § 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. 20-CV-00175, 2020 WL 4004795, at *3 (D. Me. July 15, 2020) (concluding that the incarcerated people properly brought suit challenging "unconstitutional prison conditions during a deadly pandemic" under 28 U.S.C. § 2241).

85. *Compare* 28 U.S.C. § 2254(b)(1)(A) (requiring that 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.").

86. *Compare* Nettles v. Grounds, 830 F.3d 922, 933–34 (9th Cir. 2016) (holding that conditions-of-confinement claims must be brought via a civil rights claim rather than through a federal habeas petition), *and* Spencer v. Haynes, 774 F.3d 467, 470 (8th Cir. 2014) (same), *and* Cardona v. Bledsoe, 681 F.3d 533, 537 (3d Cir. 2012) (same), *with* Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that it is appropriate for incarcerated people 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 incarcerated individuals 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).

87. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

88. *See* Rovner, *supra* note 15, at 477 (emphasizing that "judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win");

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.[89] 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."[90]

Eighth Amendment litigation concerning conditions of confinement is relatively new. Until recently, the Eighth Amendment prohibited only certain kinds of punishment deemed "cruel and unusual"[91] because of, for example, the punishment's inherent brutality[92] or because the punishment was disproportionate to a particular crime.[93] In fact, for almost two centuries, courts interpreted the word "punishment" to mean only a criminal sentence—not prison conditions.[94] Rather, courts historically took a "hands-off" approach to adjudicating claims related to prison conditions, preferring instead to defer to the judgment of prison officials.[95]

Indeed, it was not until the 1960s that federal courts began hearing conditions of confinement claims.[96] Against the backdrop of the civil rights

---

Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323, 368 (2022) (describing problems with the Eighth Amendment's scienter requirements).

89. *Farmer*, 511 U.S. at 837 ("[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.").

90. *Id.*

91. 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).

92. *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969).

93. *See, e.g.*, Weems v. United States, 217 U.S. 349, 365 (1910) (applying the 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 fifty-four 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).

94. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 38–42 (1993) (Thomas, J., dissenting) (describing the 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 the 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.").

95. *See, e.g.*, Derek Borchardt, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 474 (2012) (describing the "'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").

96. *See, e.g.*, Schlanger, *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

movement[97] and prison protests[98]—and because of rampant abuse and poor conditions within the nation's prisons—federal courts[99] 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.[100]

But even though civil rights plaintiffs enjoyed some early success in having their Eighth Amendment claims adjudicated, the Supreme Court ultimately articulated legal standards for Eighth Amendment claims that are messy and difficult to meet.[101] 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*,[102] which involved an incarcerated person who claimed that he was given inadequate access to medical care.[103] 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."[104]

Clause."); *see also Helling*, 509 U.S. at 40 (Thomas, J., dissenting) ("[I]t was not until the 1960s that lower courts began applying the Eighth Amendment to prison deprivations." (citing Wright v. McMann, 387 F.2d 519, 525–26 (2d. Cir. 1967); Bethea v. Crouse, 417 F.2d 504, 507–508 (10th Cir. 1969))).

97. *See* 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 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) (holding that a complaint by an 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).

98. *See* Driver & Kaufman, *supra* note 5, at 530 (describing prison protests at Folsom State Prison and Attica Correctional Facility as part of the backdrop to the end of the "hands-off" era).

99. In *Robinson v. California*, the Supreme Court held that a state law that made the "status" of narcotic addiction a criminal offense was unconstitutional under the Eighth Amendment. 370 U.S. 660, 667 (1962). In that 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. *See 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.").

100. *See* Dolovich, *supra* note 10, at 884.

101. *See* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (holding that the Eighth Amendment proscribes "deliberate indifference" to a an incarcerated person's serious illness or injury); Rhodes v. Chapman, 452 U.S. 337, 347–48 (1981) (holding that a practice does not violate the Eighth Amendment when it does not increase violence among incarcerated persons and does not deprive them of food, medical care, or sanitation); Farmer v. Brennan, 511 U.S. 825, 834, 837, 840 (1994) (requiring Eighth Amendment claimants to prove that (1) a deprivation suffered in prison is sufficiently serious and (2) the prison official consciously disregarded a substantial risk that the deprivation would occur).

102. 429 U.S. 97 (1976).

103. *See id.*

104. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

A few years later, the Supreme Court considered another case challenging prison conditions in *Rhodes v. Chapman*,[105] which involved a challenge to the practice of double-celling, or confining two incarcerated individuals in a single cell meant for only one person.[106] In that case, the Supreme Court focused on the objective harms to the incarcerated people but concluded that the claimed deprivations were not objectively sufficiently serious to constitute "punishment."[107]

Then, after much confusion among the lower courts as to the meaning of "deliberate indifference" the Supreme Court articulated the standard in its current form.[108] Under *Farmer v. Brennan*,[109] plaintiffs are required to prove both an objective and subjective component to prevail on an Eighth Amendment claim based on conditions of confinement.[110] The objective prong asks whether a particular deprivation suffered in prison is "sufficiently serious."[111] The subjective prong asks whether a prison official has consciously disregarded a substantial risk that the deprivation or harm would occur.[112]

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.[113] Immediately following the Supreme Court's articulation of this standard, commentators recognized the difficulty involved in requiring incarcerated plaintiffs to prove the subjective state of mind of prison officials.[114] Two of the concurring opinions in *Farmer* expressed opposition to the "deliberate indifference" standard because of its required subjective component.[115]

Defendants can avoid a finding of deliberate indifference, then, by showing that they did not *subjectively know* that a specific deprivation or risk

105. 452 U.S. 337 (1981).

106. *Id.* at 340.

107. *Id.* at 347–48.

108. Glidden, *supra* note 97, at 1820–21 (describing disagreement among the lower courts after *Estelle v. Gamble* regarding the application of the "deliberate indifference" standard to prison conditions).

109. Farmer v. Brennan, 511 U.S. 825 (1994).

110. *Id.* at 837.

111. *Id.* at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). 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.

112. *Farmer*, 511 U.S. at 837, 840.

113. *See id.* at 840.

114. *See, e.g.*, William N. Eskridge, Jr., Philip P. Frickey & Lani Guinier, *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 231, 235 (1994) ("*Farmer v. Brennan* effectively leaves inhumane prison conditions without constitutional remedy.").

115. *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) ("[I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind.").

of harm was occurring.[116] 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.[117] 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.[118]

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."[119]

The scienter requirement involved in these causes of action thus presents 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.[120] 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."[121]

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.[122] As Justice John Paul Stevens remarked, these scienter

116. *See, e.g.*, Vega v. Davis, 673 F. App'x 885, 890 (10th Cir. 2016) (holding that the court could not plausibly infer that the warden both knew that the claimant suffered from a mental illness and consciously disregarded the risks of leaving the condition untreated); *see also* Dolovich, *supra* note 10, at 892 (noting that the deliberate indifference standard "creates incentives for officers *not* to notice" (emphasis added)).

117. 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 (citation omitted).

118. *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 an easier task when it comes to suing institutional defendants because suits against state entities are subject to Eleventh Amendment immunity. *See id.* at 176.

119. Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

120. *See supra* note 117 and accompanying text.

121. Farmer, 511 U.S. at 834 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

122. 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").

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."[123] 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.[124] And more than that, whether someone is afforded relief depends less on the gravity of harm suffered than on whether a person has successfully navigated a maze-like system of legal doctrines.[125]

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.[126] 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.[127]

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 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.[128] The idea of federal compassionate release was first introduced in the context of the Sentencing Reform Act of 1984[129] (SRA) but

123. *Id.*

124. *See supra* notes 116–23.

125. *See supra* notes 56–75, 80 and accompanying text.

126. *Compare supra* notes 56–64 (identifying onerous exhaustion requirements that serve as barriers to Eighth Amendment review), *with* 18 U.S.C. § 3582(c)(1)(A) (explaining that incarcerated persons may file compassionate release motions directly with the sentencing judge).

127. *Compare* Farmer v. Brennan, 511 U.S. 825, 837, 840 (1994) (requiring that movants show that the prison official consciously disregarded a substantial risk that the harm would occur in Eighth Amendment claims), *with* 18 U.S.C. § 3582(a) (requiring that movants show that an extraordinary and compelling reason warrants sentence reduction in compassionate release claims).

128. *See, e.g.*, Christopher J. Merken & Barnett J. Harris, *Damn the Torpedoes!: An Unprincipled, Incorrect, and Lonely Approach to Compassionate Release*, 44 CARDOZO L. REV. 477, 484–85 (2022).

129. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of the U.S.C.).

was widely regarded as an insufficient measure.[130] Before the First Step Act, the BOP was charged with deciding whether to grant compassionate release to people incarcerated in federal prison.[131] Under the old system, a defendant could only petition the Director of the Bureau of Prisons ("BOP Director") for compassionate release, who could then make a motion, at their discretion, to a district court.[132] Unsurprisingly, the BOP rarely did so.[133]

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.[134] The Sentencing 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 when the death of a caregiver outside of prison made the incarcerated person the primary candidate to be the caregiver for a child or spouse.[135] A catch-all 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.[136] But even though the Sentencing Commission had the authority to define the ECRs, before the passage of the First Step Act, the BOP Director was the reluctant "gatekeeper of compassionate release" with the exclusive authority to move courts for sentence reductions.[137]

The First Step Act made major reforms to compassionate release, in addition to other areas of federal criminal law.[138] Significantly, the First Step

130. *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) ("While compassionate release may have been well-intended, it is not well-executed . . . .").

131. *See* Fed. Bureau of Prisons, Program Statement No. 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), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf.

132. *See* 18 U.S.C. § 3582(c)(1)(A).

133. *See, e.g.*, Michael E. Horowitz, Inspector General, Dep't of Justice, Remarks at the Public Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n 81 (Feb. 17, 2016); *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 . . .[, but] 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://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html [https://perma.cc/K7LN-KTQZ].

134. *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.").

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

136. *Id.* § 1B1.13 cmt. n.1(D) ("As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

137. United States v. Long, 997 F.3d 342, 348 (D.C. Cir. 2021).

138. Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of the U.S.C.); CONG. RESEARCH SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW

Act changed the compassionate release process to allow incarcerated people to petition directly to a sentencing court or judge for relief.[139] 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.[140]

A federal court generally "may not modify a term of imprisonment once it has been imposed."[141] But compassionate release is an exception that allows for early release or sentence reduction if an incarcerated person meets certain requirements.[142] First, the statute authorizes an incarcerated person to file a motion with their sentencing judge after exhausting administrative remedies or after "the lapse of [thirty] days from the receipt of such a request by the warden of the defendant's facility."[143] In practice, this means that compassionate release motions are "ripe" for review after an incarcerated person makes a request with the warden of their facility asking the BOP to move the sentencing court for release—a much more lenient exhaustion standard to meet than when filing a prisoner civil claim.[144]

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 [a sentence] reduction is consistent with applicable policy statements issued by the Sentencing Commission."[145] 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.[146] Finally, the compassionate release framework incorporates by reference the federal sentencing statute and requires a court entertaining a compassionate release motion to consider "the factors set forth in Section 3553(a) to the extent that they are applicable."[147]

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,"[148] the "seriousness of the offense" and deterrence of criminal conduct,[149] and "the need to avoid unwarranted

---

1 (2019). Other reforms to federal prison and sentencing contained in the First Step Act include 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.

139. 18 U.S.C. § 3582(c)(1).

140. *Id.*

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

142. 18 U.S.C. § 3582(c)(1)(A).

143. *Id.*

144. *Compare id.* (authorizing an incarcerated person to file a compassionate release motion thirty days after they request that the warden ask the BOP to move the sentencing court for release), *with supra* notes 56–64 and accompanying text (detailing onerous exhaustion requirements for Eighth Amendment review).

145. 18 U.S.C. § 3582(c)(1)(A)(i)–(ii).

146. *Id.* § 3582(c)(1)(A).

147. *Id.*

148. *Id.* § 3553(a)(1).

149. *Id.* § 3553(a)(2)(A).

sentence disparities."[150] Further, a sentencing court must impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of punishment.[151]

B. The Expansion of ECRs in the 2023 Guideline Amendments

The Sentencing Commission consists of seven voting members and, per statute, requires four members for a quorum to amend the Sentencing Guidelines.[152] From the time that the First Step Act was enacted until the summer of 2022, the Sentencing Commission did not have a quorum and thus was unable to promulgate a post–First Step Act policy statement interpreting the statutory amendments to compassionate release—18 U.S.C. § 3582(c)(1)(A)(i)—on what constitutes "extraordinary and compelling" reasons warranting release.[153] Thus, throughout most of the pandemic, district courts had little guidance on what constituted "extraordinary and compelling reasons" under the statute.[154]

But in early 2023, the Sentencing Commission amended the Sentencing Guidelines to expand the definition of what constitutes an ECR warranting release.[155] This development now gives federal judges broad discretion to review old sentences, as well as reviewing conditions of confinement.[156]

The Sentencing Commission's amendments now codify many of the grounds for release that arose while district courts were in limbo.[157] 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."[158] 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."[159] In other words, the ECR now includes circumstances in which the BOP is simply not

150. *Id.* § 3553(a)(6).

151. *Id.* § 3553(a); *see also* Gall v. United States, 552 U.S. 38, 49–50 (2007) (listing and explaining factors).

152. 28 U.S.C. § 991(a) (setting forth the number of members); *id.* § 994(a) (requiring the vote of four members).

153. Press Release, U.S. Sent'g Comm'n, "Back In Business": U.S. Sentencing Commission Acts to Make Communities Safer and Stronger (April 5, 2023), https://www.ussc.gov/about/news/press-releases/april-5-2023 [https://perma.cc/JJ2E-UBNN].

154. Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission to Implement First Step Act with Focus on Compassionate Release (Oct. 28, 2022), https://www.ussc.gov/about/news/press-releases/1390ctober-28-2022 [https://perma.cc/2RL3-GASQ]; *see also* Recent Case, *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).

155. Press Release, U.S. Sent'g Comm'n, *supra* note 153.

156. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).

157. *Id.*

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

159. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(C) (U.S. SENT'G COMM'N 2023).

treating or is ignoring a serious medical condition that may or may not be life-threatening.[160] This ECR is notable because it overlaps with many types of conditions that have historically been the subject of Eighth Amendment civil suits.[161] 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 deliberate indifference) or based on the contention that the medical condition that the person is suffering from cannot be treated by BOP staff.[162]

Another new ECR that the Sentencing Commission endorsed is for incarcerated people who are the victims of abuse "by, or at the direction of" a BOP officer either involving a "sexual act" or resulting in "serious bodily injury."[163] This amendment was a response to several prison sexual assault scandals that have been the subject of both court proceedings and recent Senate hearings.[164] 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.[165] 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.[166]

Finally, the Sentencing Commission included 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.[167] 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 Barriers

Although 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

160. *Id.*

161. *Compare id.* (specifying untreated medical conditions that may or may not be life-threatening as ECRs), *with* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (identifying untreated medical conditions as harms redressable under the Eighth Amendment).

162. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(C) (U.S. SENT'G COMM'N 2023).

163. *Id.* § 1B1.13(b)(4).

164. *See, e.g.*, *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Permanent Subcommittee on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. 45–46 (2022) (statement of Sen. Jon Ossoff, Chairman, S. Comm. on Homeland Sec. & Governmental Affs.).

165. *See id.* at 6.

166. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2021).

167. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023).

a person's crime of conviction and other factors can preclude relief;[168] (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;[169] and (3) that a compassionate release remedy will not meaningfully produce systemic change even within a given prison or institution.[170]

In the Eighth Amendment context, consideration of the crime of conviction is largely irrelevant to whether a person is granted relief.[171] No matter the reason for a person's incarceration, the Eighth Amendment is available as a vehicle through which they can seek civil relief.[172] In contrast, § 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."[173]

The § 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 and after any objections or legal challenges to the guidelines have been considered and resolved.[174] But in the compassionate release arena, judges must consider these factors to determine whether and how much of a sentence reduction is appropriate in each case.[175] Thus, the § 3553(a) factors can function as a backstop for judges when considering whether to grant sentence reductions in cases in which a person's ECR may be quite compelling.[176] 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.[177] 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 misconduct, to name a few)[178] that a judge would

168. *See infra* notes 173–86 and accompanying text.

169. *See infra* notes 187–99 and accompanying text.

170. *See infra* notes 200–03 and accompanying text.

171. *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).

172. *Compare* Whitley v. Albers 475 U.S. 312, 320–21 (1986) (requiring a convicted person to satisfy objective the prong of the Eighth Amendment to prove an excessive force claim), *with* Kingsley v. Hendrickson, 576 U.S. 389 (2015) (requiring only objective unreasonableness for pretrial detainees).

173. 18 U.S.C. § 3553(a)(1).

174. *Id.*

175. *Id.* § 3582(c)(1)(A).

176. United States v. Hald, 8 F.4th 932, 945 (10th Cir. 2021) (endorsing a system in which a district court judge could decline to decide whether a person has met the extraordinary and compelling standard but would nonetheless deny a compassionate release motion based solely on the statutory sentencing factors).

177. *See id.*

178. *See* 18 U.S.C. § 3553(a) (listing factors to be considered in imposing a sentence under the 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

not 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 can hinder or prevent relief.[179] The new amendments also require a judge to determine that a person is not "a danger to the safety of any other person or to the community."[180] This inquiry will often require a judge to look at a person's criminal history and any disciplinary infractions that they committed while in prison, as well as a person's plan for release, and determine whether that person poses a danger.[181]

Incorporation of the § 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.[182] As one scholar has aptly noted, "[e]arly release advocacy always occurs in the shadow of the original sentencing proceeding."[183] By default, motions for sentence reductions go back to the original judge who sentenced a defendant.[184] Often, judges will return to the original sentencing transcript, sentencing statements, the presentence investigation report, or other documents and arguments developed at the time of sentencing to see what justified a sentence in the first instance.[185] This means that, even when 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

months). Although 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 is 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).

179. *See supra* notes 176–78.

180. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(a)(2) (U.S. SENT'G COMM'N 2023). 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 & Andrea J. Ritchie, *Reclaiming Safety*, INQUEST (Aug. 30, 2022), https://inquest.org/reclaiming-safety/ [https://perma.cc/2WF3-YDAD] (interrogating different interpretations and perspectives on the word "safety" in the criminal legal system).

181. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(a)(2) (U.S. SENT'G COMM'N 2023).

182. Renagh O'Leary, *Early Release Advocacy in the Age of Mass Incarceration*, 2021 WIS. L. REV. 447, 456.

183. *Id.*

184. *See, e.g.*, United States v. Keefer, 832 F. App'x 359, 363 (6th Cir. 2020) (describing the "common scenario" in which "a district court will *already* have considered and balanced the § 3553(a) factors the first time around at the original sentencing").

185. *Cf. id.* ("[W]hen the district judge who sentenced the defendant is the same judge who considers the defendant's reduction-of-sentence motion . . . [the] district court will *already* have considered and balanced the § 3553(a) factors the first time around at the original sentencing.").

determination without incorporating new information. And because the § 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.[186]

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.[187] Data from the Sentencing Commission indicates that compassionate release, although a hopeful mechanism for relief for many incarcerated people, is still rarely granted.[188] Recent statistics from the Sentencing Commission show that, of the motions filed between October 2019 and September 2022, 16.2 percent of compassionate release motions were granted.[189] Notably, the grant rates nationwide during the pandemic and before the final amendments were adopted have been extremely variable.[190] According to the Sentencing Commission data, some districts granted a much higher percentage of compassionate release motions than others.[191] In fiscal year 2020, for example, the U.S. District Court for the District of Oregon granted 62.3 percent of compassionate release motions filed.[192] By contrast, the U.S. District Court for the Western District of Oklahoma granted a mere 3.4 percent of motions filed, or three motions out of a total of eighty-nine motions for that year.[193] 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 of 1964.[194] Whether counsel is appointed in compassionate release cases also varies by district.[195] Thus, another

186. *See, e.g.*, United States v. Hald, 8 F.4th 932, 942 (10th Cir. 2021) (stating that district courts need not first determine whether a person has established "extraordinary and compelling" reasons warranting relief before denying motions based on statutory sentencing factors, and that denial of relief is reviewed under the abuse of discretion standard).

187. *See* U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT tbl.1 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf [https://perma.cc/P7VE-WYCV] (compiling data regarding compassionate release motions and outcomes during fiscal years 2020 and 2021).

188. *See id.*

189. *Id.*

190. *See id.* at tbl. 2.

191. *See id.*

192. *Id.*

193. *Id.*

194. *See* 18 U.S.C. § 3006A.

195. *Compare* Dist. Ct. Gen. Ord., *In re* Compassionate Release Under § 603(b) of the First Step Act, No. 2020-7 (D. Colo. Apr. 21, 2020) (authorizing the appointment of counsel in all compassionate release cases), *with* Admin. Ord., *In re* Compassionate Release Procedures & App't of Counsel, No. 20-MC-00004-30, at 2–3 (D.N.M. 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?*, NEW YORKER (Nov. 5, 2021),

challenge with compassionate release motions—like that of civil lawsuits—is access to counsel, depending on the district in which a person was sentenced.[196] But much of this outcome variability is also due to the longstanding variability in judicial attitudes toward sentencing more generally.[197] When judges are given broad discretion over sentencing, disparities—and sometimes extreme geographic or racial disparities—often result.[198] The grant rate of compassionate release motions and the differences between federal districts is yet another manifestation of this oft-lamented phenomenon.[199]

Finally, compassionate release is unlikely to create meaningful change within a specific prison or institution because the relief sought is individualized.[200] Thus, compassionate release will not do anything to remedy, for example, widespread violations of the Eighth Amendment such as extreme prison overcrowding,[201] will not cause the BOP to provide better healthcare system-wide, and will not address the systemic harms that come of certain classes of incarcerated people—such as those suffering from disabilities or mental health disorders.[202] Unlike some Eighth Amendment class actions, therefore, compassionate release is a remedy that focuses solely on the experience of an individual movant.[203]

D. Prison Conditions Litigation in the COVID-19 Era

COVID-19 took a disproportionately heavy toll on incarcerated people.[204] Over 300 incarcerated people died of COVID-19 in BOP custody and

---

https://www.newyorker.com/news/us-journal/is-this-the-worst-place-to-be-poor-and-charged-with-a-federal-crime [https://perma.cc/P7TX-AG9G].

196. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 51, 95 (1974) (arguing that the ability to hire attorneys—regardless of the rightness of the cause—permits represented parties to prevail more often than unrepresented parties).

197. *See* SIGFREID L. SPORER & JANE GOODMAN-DELAHUNTY, DISPARITIES IN SENTENCING DECISIONS, SOCIAL PSYCHOLOGY AND PUNISHMENT OF CRIME 379 (2009).

198. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (noting that "[a]pparent disparities in sentencing are an inevitable part of the criminal justice system").

199. Judicial discretion is, indeed, a mixed bag with a checkered history of inequitable and racist sentencing outcomes. *See, e.g.*, Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 760–61 (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).

200. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2023).

201. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 502 (2011).

202. *See, e.g.*, Cunningham v. Fed. Bureau of Prisons, No. 12-CV-01570, 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).

203. *See supra* notes 200–02.

204. *See* UNIV. OF IOWA COLL. OF L. FED. CRIM. DEF. CLINIC, 302 DEATHS IN BOP CUSTODY, AN INCALCULABLE LOSS (2022), https://law.uiowa.edu/sites/law.uiowa.edu/files/20

countless others were sickened or permanently debilitated by the illness.[205] 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.[206] 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 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.[207] 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.[208]

Although 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.[209] Even in the early days of the COVID-19 era, prisons officials and the press sounded the alarm about the impending crisis within prison walls.[210] Understaffing, the inability to social distance, and the lack of access to basic items designed to prevent the spread of illness—such as soap and personal protective equipment like masks or gloves—resulted in a rapid and alarming spread.[211] Moreover, prisons were already overwhelmed with an aging and medically vulnerable population most at risk to develop COVID-19 complications.[212] At a time when many Americans were isolating at home, the federal prison population

---

22-02/They%20Are%20Human%20Too%20-%201-31-22.pdf [https://perma.cc/YN78-DKFL].

205. *See id.*

206. On March 13, 2020, President Donald J. Trump declared the COVID-19 pandemic to be a national emergency. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

207. *See infra* notes 215–30 and accompanying text.

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

209. *See id.* at 332.

210. *See, e.g.*, Danielle Ivory, *"We Are Not a Hospital": A Prison Braces for the Coronavirus*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html [https://perma.cc/23DN-WBUR] (citing densely populated living conditions; a dearth of soap, hand sanitizer, and protective gear; and the impossibility of maintaining a safe distance between inmates and guards as reasons why prisoners are at particular risk of infection); Lisa Freeland, David Patton & Jon Sands, *We'll See Many More Covid-19 Deaths in Prisons if Barr and Congress Don't Act Now*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders/ [https://perma.cc/32VC-KFML] (discussing the "wholly inadequate medical care" in federal prisons).

211. *See* Ivory, *supra* note 210.

212. Dolovich, *supra* note 208, 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.").

was experiencing the unprecedented horror of being trapped in an infectious disease tinderbox.[213]

Some of the first federal facilities to suffer severe outbreaks were Federal Correctional Institution, Lompoc and United States Penitentiary, Lompoc, located in Santa Barbara County, California.[214] As a result of the severe conditions and BOP failures to contain outbreaks, the American Civil Liberties Union (ACLU) filed a lawsuit against the BOP.[215] 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.[216]

Both media outlets and legal filings described the horror of being housed in one of these facilities during COVID-19.[217] Dr. Omid Souresrafil, a biomedical engineer who was convicted of wire fraud, was a first-time offender incarcerated in Lompoc and reportedly taught GED classes to other people incarcerated there.[218] In sworn declaration, Dr. Souresrafil explained that he spent twenty-two days under strict quarantine in a unit reserved for COVID-19 sufferers and that on "every one of the [twenty-two] days, [he] could hear the 100+ inmates coughing and calling the guards for help."[219] "Several collapsed and needed resuscitation before being taken by ambulance to Lompoc Medical Center," and Dr. Souresrafil "thought [he] was going to die," and at times "wanted to."[220] 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

213. *See id.*

214. *See* Richard Winton, *Coronavirus Outbreak at Lompoc Prison Is the Worst in the Nation*, L.A. TIMES (Apr. 16, 2020, 1:40 PM), https://www.latimes.com/california/story/2020-04-16/coronavirus-outbreak-at-lompoc-federal-prison-is-worst-in-nation-with-69-inmates-25-staff-infected [https://perma.cc/5GH8-TBG5]; Ashton McIntyre, *Nearly 100 Cases of Coronavirus Reported at Lompoc Prison, Prison Officials Seek More Help*, KSBY NEWS (Apr. 21, 2020, 7:45 AM), https://www.ksby.com/news/coronavirus/nearly-100-cases-of-coronavirus-reported-at-lompoc-prison-prison-officials-seek-more-help [https://perma.cc/V6BK-BRZW].

215. *See* Porter Wells, *ACLU Sues Federal Bureau over Covid-19 Management Records*, BLOOMBERG L. (Oct. 21, 2020, 7:15 PM), https://news.bloomberglaw.com/coronavirus/aclu-sues-federal-prison-bureau-over-covid-19-management-records [https://perma.cc/6R6P-CXD3]; Complaint, Am. Civ. Liberties Union v. Fed. Bureau of Prisons, No. 20-CV-03031 (D.D.C. Oct. 21, 2020), ECF No. 1.

216. *See* Tyler Hayden, *ACLU Settles Lompoc Prison Lawsuit over Botched COVID Response*, SANTA BARBARA INDEP. (July 20, 2022, 12:45 PM), https://www.independent.com/2022/07/20/aclu-settles-lompoc-prison-lawsuit-over-botched-covid-response/ [https://perma.cc/8XYK-92B2].

217. *See, e.g.*, Tyler Hayden, *22 Days in Lompoc Prison's COVID-19 "Hellhole"*, SANTA BARBARA INDEP. (June 8, 2020, 6:55 PM), https://www.independent.com/2020/06/08/22-days-in-lompoc-prisons-covid-19-hellhole/ [https://perma.cc/D5EQ-KHQD] (describing an incarcerated person who contracted COVID-19 being quarantined in an eight foot by eight foot cell in which toilets and sinks leaked, insects crawled, and officers denied him a shower for nine days); Complaint at 4–5, Yonnedil v. Louis, No. 20-CV-04450 (C.D. Cal. May 16, 2020), ECF No. 1 (describing incarcerated people going without basic supplies like soap, hand sanitizer, and face masks; being denied testing and treatment when presenting COVID symptoms; and being put into solitary confinement when testing positive).

218. Hayden, *supra* note 217.

219. *See id.*

220. *See id.*

prisoners had 'begged the guards for help, but no one would do anything'. . . [and] that guards accused [him] of 'faking it.'"[221]

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 Federal Correctional Institution, Elkton, a facility in Ohio.[222] At that facility, Michael Bear, a sixty-seven-year-old incarcerated there, said he was feeling ill when he saw a doctor in late March, but the doctor said he wasn't sick.[223] 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.[224]

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 health support that advocated reducing the prison population in an effort to quell the spread of the virus.[225] For example, § 12003(b)(2) of the Coronavirus Aid, Relief, and Economic Security Act[226] 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[227]—but the BOP hardly utilized this authority to release people.[228] Similarly, the BOP was still failing to use the compassionate release mechanism to release people under its own statutory authority.[229] 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).[230]

---

221. Tyler Hayden, *More Suffering and Death at Lompoc Prison Racked with COVID-19*, SANTA BARBARA INDEP. (May 29, 2020, 4:38 PM), https://www.independent.com/2020/05/29/more-suffering-and-death-at-lompoc-prison-wracked-with-covid-19/ [https://perma.cc/5ZZQ-X62Z].

222. Keri Blakinger & Keegan Hamilton, *"I Begged Them to Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, MARSHALL PROJECT (June 19, 2020, 7:00 AM), https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps [https://perma.cc/KE9M-E8P2].

223. *See id.*

224. *See id.*

225. *See, e.g.*, United States v. Connell, No. 18-CR-00281, 2020 WL 2315858, at *5 (N.D. Cal. May 8, 2020) (describing the BOP wardens' lack of response to COVID-19-based requests for compassionate release to BOP wardens, and concluding that "the BOP seem[ed] to have 'predetermined' the compassionate release issue by its failure to respond to the petitions before it").

226. Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of the U.S.C.).

227. *See* 18 U.S.C. § 3521.

228. *See* Brief for Ninth Cir. Fed. & Comm. Def. Orgs. as Amicus Curiae Supporting Defendant-Appellant at 12, United States v. Millage, 810 F. App'x 572 (9th Cir. 2020) (No. 20-30086).

229. *See id.*

230. *See id.*

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 § 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.[231] And as Professor Sharon Dolovich has shown, even when 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."[232]

For example, in response to the Elkton outbreak, the ACLU of Ohio filed a class action lawsuit on behalf of persons incarcerated there alleging that BOP officials' failure to enable social distancing, including by refusing to move prisoners to home confinement, constituted "deliberate indifference" in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[233] 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."[234] It also sought other forms of relief related to COVID-19 outbreak mitigation.[235] But after a federal district court granted a preliminary injunction directing the BOP to do just that, the U.S. Court of Appeals for the Sixth Circuit reversed, holding that the petitioners could not establish "deliberate indifference" on behalf of the BOP.[236] Because of the near impossibility of demonstrating "deliberate indifference," most attempts at redressing COVID-19-based harms in prison were similarly unsuccessful.[237] 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."[238]

---

231. *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020); 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").

232. Dolovich, *supra* note 208, at 333–34.

233. *See* Wilson v. Williams, 455 F. Supp. 3d 467, 481 (N.D. Ohio 2020), *vacated by* 961 F.3d 829 (6th Cir. 2020).

234. *Wilson*, 961 F.3d at 840.

235. *See id.*

236. *See id.* at 840.

237. *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.").

238. Dolovich, *supra* note 208, at 335; *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

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.[239] Many of these early grants occurred because an incarcerated person was immunocompromised or was otherwise particularly vulnerable to the ravages of COVID-19.[240] In these early days, the thirty-day exhaustion waiting period requirement contained in § 3582(c) was even sometimes suspended by district courts given the exigent nature of some compassionate release requests or the situation of the individual movant.[241]

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 and compelling" reasons warranting release became more nuanced and more varied.[242] 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.[243] Some courts dismissed arguments that poor conditions of confinement—even those related to COVID-19—could be extraordinary and compelling reasons for release,

---

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"); Valentine v. Collier, 956 F.3d 797, 802 (5th Cir. 2020) ("[T]he 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.").

239. Although only 16.2 percent 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 187, at fig.1; *see also* Miles Pope, *What We Have Wrought: Compassionate Release in the Time of Our Plague*, ADVOC., Feb. 2021, at 20, 23 (2021).

240. The earliest COVID-19-related compassionate release grants were generally based on 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. 3d 329, 335 (S.D.N.Y. 2020) (granting relief to an incarcerated person suffering from diabetes, hypertension, and obesity); United States v. Gonzalez, 451 F. Supp. 3d 1194, 1197–98 (E.D. Wash. 2020) (granting relief to an incarcerated person suffering from chronic obstructive pulmonary disease and significant emphysema); United States v. Edwards, 451 F. Supp. 3d 562, 567–68 (W.D. Va. 2020) (granting relief to an incarcerated person who was immunocompromised due to brain cancer, chemotherapy, and steroid prescription); United States v. Williams, No. 04-CR-95, 2020 WL 1751545, at *3–5 (N.D. Fla. Apr. 1, 2020) (granting relief to an incarcerated person suffering from coronary disease, peripheral vascular disease, congestive heart failure, end-stage renal disease, hyperlipidemia, and prediabetes).

241. *See Gonzalez*, 451 F. Supp. 3d at 1196 (finding a futility exception to the thirty-day waiting period during which 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. 3d 601, 604 (E.D.N.Y. 2020) (district court waived the thirty-day wait-or-exhaust period in light of the COVID-19 outbreak in Federal Correctional Institution Danbury).

242. *See infra* notes 243–45 and accompanying text.

243. 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).

reasoning that these conditions-based arguments were based on perceived constitutional violations, which are not appropriate grounds for relief in a compassionate release motion.[244] For example, one U.S. Court of Appeals for the 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."[245]

But other courts took a more expansive view.[246] 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.[247] Writing about an outbreak at 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.[248] 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].[249]

---

244. *See, e.g.*, United States v. Numann, No. 16-CR-00065, 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 . . . [that] are not properly brought in a motion for compassionate release"); United States v. Berrelleza-Verduzco, No. CR12-62, 2021 WL 1178189, at *2 n.1 (W.D. Wash. Mar. 29, 2021) (same); United States v. Blanchard, No. CR-18-376, 2022 WL 5241879, at *3 (D.D.C. Oct. 6, 2022) (stating that if a defendant "wishes to file a suit with a constitutional claim, a motion for compassionate release is not the vehicle to do so").

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

246. *See infra* notes 247–49 and accompanying text.

247. *See, e.g.*, United States v. Pacheco, No. 12-CR-408, 2020 WL 4350257, at *1 (S.D.N.Y. July 29, 2020) ("[I]t 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 v. Maya Arango, No. 15-CR-104, 2020 WL 3488909, at *2 (S.D.N.Y. June 26, 2020) ("[A]s 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 18 U.S.C. § 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").

248. United States v. Kelly, No. 13-CR-59, 2020 WL 2104241, at *7–8 (S.D. Miss. May 1, 2020).

249. *Id.* (citing Memorandum from Att'y Gen. to the Dir. of Bureau of Prisons (Apr. 3, 2020), https://www.justice.gov/file/1266661/download [https://perma.cc/JB6E-RGDB]) (granting compassionate release to an individual in his late twenties without health issues

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.[250] The pandemic also tested the new federal compassionate release statute and provided a vehicle for novel arguments about "extraordinary and compelling" reasons for release.[251] Remarkably, during COVID-19, incarcerated people began to have success with compassionate release motions where traditional Eighth Amendment lawsuits failed.[252] 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.[253] Further, after litigants and counsel saw early success with COVID-19-based compassionate release motions, additional and creative conditions-based arguments for compassionate release began to emerge.[254]

Many courts rejected such arguments.[255] 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."[256] Although not central to its affirmance of the denial of compassionate release, the U.S. Court of Appeals for 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."[257] Similarly, an incarcerated person claimed that his long-term solitary

because BOP failed to control the outbreak of COVID-19 at his facility). The ACLU's lawsuit against the Oakdale Federal Correctional Institutions for failure to contain the spread of the COVID-19 virus proved unsuccessful. *See* Livas v. Myers, 455 F. Supp. 3d 272, 281–82 (W.D. La. 2020) (holding that 28 U.S.C. § 2241 was not the proper vehicle through which to seek relief from unconstitutional conditions of confinement).

250. *See supra* notes 231–38.

251. *See supra* notes 239–41.

252. *See supra* notes 246–49.

253. *Compare Kelly*, 2020 WL 2104241, at *7–8 (releasing the movant because of COVID-19-based conditions of confinement), *with* United States v. Numann, No. 16-CR-00065, 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 . . . [and] not properly brought in a motion for compassionate release").

254. *See, e.g.*, United States v. Dotson, 849 F. App'x 598 (7th Cir. 2021); United States v. Shabazz, No. CR12-0033, 2022 WL 5247196 (W.D. Wash. Oct. 6, 2022).

255. *See, e.g.*, *Dotson*, 849 F. App'x 598; *Shabazz*, 2022 WL 5247196.

256. *Dotson*, 849 F. App'x at 601.

257. *Id.*

confinement at the U.S. Penitentiary, Administrative Maximum Facility ("ADX") in Florence, Colorado was extraordinary and compelling, but the district court denied the motion in part because of its conclusion that a challenge to solitary confinement was properly raised in an Eighth Amendment civil rights action.[258]

But, as discussed in greater detail below, other courts began to grant conditions-based motions for compassionate release for reasons unrelated to the pandemic, holding that certain kinds of conditions could rise to the level of "extraordinary and compelling" reasons warranting release or a sentence reduction.[259] Moreover, the amendments to the ECRs in the Sentencing Guidelines have further opened the door to conditions-based claims.[260]

Distinct standards govern the claims made in motions for compassionate release as opposed to civil actions under the Eighth Amendment.[261] Furthermore, distinct aims flow from the remedies sought in each context.[262] Of course, there are many circumstances in which a person may pursue *both* an Eighth Amendment lawsuit *and* a federal motion for compassionate release.[263] 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, the barriers to relief, the form of a pleading, and success rates.

Figure 1. Comparison Chart

	Civil Action	**Compassionate Release**
Statute or source of law	Eighth Amendment (either through *Bivens*[264] 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

258. *See Shabazz*, 2022 WL 5247196, at *4.
259. *See, e.g.*, *infra* note 337 and accompanying text.
260. *See supra* Part II.B.
261. *See infra* Figure 1.
262. *See infra* Figure 1.
263. For example, some women currently or formerly incarcerated at the women's federal prison, Federal Correctional Institution, Dublin, are pursuing federal compassionate release claims for institutional sexual abuse, as well as civil remedies against the BOP because of the rampant culture of abuse that existed in that facility. Complaint at 4–5, Cal. Coal. for Women Prisoners v. U.S.A. Fed. Bureau of Prisons, No. 23-CV-04155 (N.D. Ca. Aug. 16, 2023), ECF No. 1.
264. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Whose point of view is considered?	Subjective intent of prison official	Whether harm is "extraordinary and compelling" in eyes of district court and discretion of district court in balancing sentencing factors
Available remedies	Injunction or damages[265]	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

For example, in the case of a motion for compassionate release, the court's inquiry focuses on the defendant's individual circumstances.[266] Under the Eighth Amendment, a primary focus is on the state of mind or actions of prison officials.[267] Still, there is overlap between Eighth Amendment claims of deliberate indifference and claims involving ECRs under federal compassionate release.[268]

This part 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;[269] violence or sexual abuse in prison;[270] and placement in solitary confinement or other

265. 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).

266. *See* 18 U.S.C § 3582(c).

267. *See* Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 364 (S.D.N.Y. 2020).

268. *E.g.*, United States v. D'Angelo, No. 13-CR-00114, 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."); 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).

269. *See infra* Part III.A.

270. *See infra* Part III.C.

forms of hyper-restrictive custody that causes an experience of incarceration to be more severe—more extremely punitive—than perhaps a sentencing judge intended.[271]

Although 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 in which the Eighth Amendment falls short.[272]

A. Serious Medical Needs

Much attention has been paid to the widespread failures of prison systems to provide adequate medical care.[273] The failure of prison officials to treat the medical conditions of incarcerated individuals has been the subject of much Eighth Amendment litigation concerning conditions of confinement.[274]

1. Eighth Amendment Medical Claims

The standard for proving an Eighth Amendment violation for failure to treat a medical need is a stringent one.[275] 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 claim regarding conditions of confinement.[276] 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."[277]

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) that the official consciously knew of but disregarded that serious risk of harm.[278] To prove the objective prong of this type of claim, a person must first establish that they have "serious medical needs."[279] They can do so, for example, "by showing that a doctor has

---

271. *See infra* Part III.B.

272. *See infra* Parts III.A–C.

273. William J. Jefferson, *The Special Perils of Being Old and Sick in Prison*, 32 FED. SENT'G REP. 276, 278 (2020) (describing "inmate reports of how they feel . . . discounted and . . . [how] respectful attempts to seek more effective diagnosis and treatment may routinely be considered offenses, worthy of resulting in lockups in solitary confinement").

274. *See* Chapman v. Fed. Bureau of Prisons, 235 F. Supp. 3d 1066, 1067 (S.D. Ind. 2017) (describing incarcerated person suffering from severe Type 1 diabetes whose condition the BOP had systematically failed to adequately treat).

275. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976).

276. *See id.*

277. *Id.*

278. *See* Farmer v. Brennan, 511 U.S. 825, 834, 837 (1994).

279. *Estelle*, 429 U.S. at 106.

diagnosed a condition as requiring treatment or that the prisoner has an obvious problem that any layperson would agree necessitates care."[280] Only grossly or woefully inadequate care—not just care that falls below a professional standard—can be called "cruel and unusual."[281]

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.[282] But assuming that a claim is properly in court, courts will require prisoners to prove grossly inadequate care through the introduction of medical evidence, typically in the form of documents describing their medical needs and in the form of expert testimony.[283] 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 they ignored or disregarded.[284] 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.[285] Finally, although a damages remedy may be beneficial as a supplement to other remedies (e.g., 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 when prison staff have shown *some* attention to a person's condition (and thus were not deliberately

280. 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 easily recognize the necessity for a doctor's attention," and "if left unattended, poses a substantial risk of serious harm" (quoting Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003))).

281. *Phillips*, 14 F.4th at 535.

282. *See Farmer*, 511 U.S. at 834, 837.

283. *See Phillips*, 14 F.4th at 535.

284. *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 if there was "no evidence, either direct or circumstantial, to suggest that [individual prison officials] had any knowledge that [the 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 was not adequately shown through the grievance process—there was no "smoking gun."

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

indifferent) but a person is still suffering and being inadequately treated.[286] Perversely, the Eighth Amendment's deliberate indifference test acts as a disincentive to the provision of adequate medical treatment because it encourages prison medical staff to not know, not test, and not discover incarcerated peoples' legitimate medical concerns.[287]

2. 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.[288] But previously, only the BOP was empowered to identify individuals whose medical needs were sufficiently serious to warrant release.[289] Further, prior to the amendments to the Sentencing Guidelines, only a narrow category of medical needs qualified for compassionate release eligibility.[290] Indeed, historically, compassionate release's primary goal has been to provide "death with dignity" for terminally ill prisoners.[291] 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.[292] 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 release claims.[293] 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—are not something over which courts have jurisdiction in the context of compassionate release.[294] Other courts, however, have found that BOP's failures can be part of the analysis.[295] But the Sentencing Commission's specific endorsement of

286. Thompson, *supra* note 6, at 642–49.

287. *Id.* (describing the Eighth Amendment's deliberate indifferent test and how it serves to discourage testing, discovery, and consultation about people's medical needs).

288. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(a)(4) (U.S. SENT'G COMM'N 2023).

289. *See* Merken & Harris, *supra* note 128, at 484–85.

290. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2021).

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

292. *See supra* notes 157–62 and accompanying text.

293. *Compare* United States v. Gates, No. 18-10374, 2020 WL 2747851 (D. Mass. May 27, 2020) (holding that courts do not have jurisdiction over the response of the BOP in compassionate release cases), *with* United States v. Beck, 425 F. Supp. 3d 573 (M.D.N.C. 2019) (holding that compassionate release can be appropriate when the BOP grossly mismanages an incarcerated person's medical care).

294. *Gates*, 2020 WL 2747851, at *2.

295. *See, e.g.*, *Beck*, 425 F. Supp. 3d at 580–82 (finding extraordinary and compelling reasons for releasing an incarcerated person after the BOP's "gross mismanagement" 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 amendment language that highlights the BOP's failure to provide timely or adequate treatment.[296] 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."[297] Thus, although 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.[298] 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 or risk being suffered.[299] 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.[300]

B. Prolonged Isolation

Solitary confinement[301] is widely utilized—indeed there are between 41,000 and 48,000 people being held in solitary confinement in America's prisons today.[302] Although 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

medical care involving delaying breast cancer treatments for months); United States v. Almontes, No. 05-CR-58, 2020 WL 1812713, at *6–7 (D. Conn. Apr. 9, 2020) (finding extraordinary and compelling circumstances when the BOP was indifferent to an incarcerated person's serious spinal issue by delaying treatment and surgery for years); United States v. Robles, No. 19-CR-4122, 2022 WL 229362, at *2 (S.D. Cal. Jan. 26, 2022) (granting compassionate release when BOP failed to provide urgent medical treatment for incarcerated person's various serious medical conditions including arteriovenous malformations and hereditary hemorrhagic telangiectasia).

296. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(C) (U.S. SENT'G COMM'N 2023).

297. *Id.*

298. *See id.*

299. *See id.*

300. *Compare id.* (requiring a showing that needed care is not being provided by the BOP and severe harm could result), *with* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (requiring a showing that the BOP acted with "deliberate indifference" to a prisoner's serious illness or injury).

301. 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.

302. 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 (2022).

more."[303] Further, people in solitary are afforded "only extremely limited or no opportunities for direct and normal social contact with other persons" and "extremely limited, if any, access to meaningful programming of any kind."[304] In the BOP alone, almost 8,000 people are being held in isolation.[305]

Although the perception is that only the "worst of the worst" end up in solitary confinement, this view does not reflect reality.[306] For example, solitary confinement was widely used during COVID-19 to isolate people that were exposed or may have been exposed to the virus.[307] 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.[308] Solitary confinement also takes a negative toll on a person's physical health.[309] And for those who have preexisting mental health or psychological issues, solitary confinement almost invariably makes these conditions worse.[310]

The negative effects of prolonged solitary confinement are so severe that the practice has been compared to a form of torture.[311] 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.[312] Further, many of the behavioral problems and psychological disorders associated with people who end up in solitary confinement are actually *caused by* isolation.[313] Yet prolonged solitary confinement persists

303. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING: EXECUTIVE SUMMARY 2 (2016).

304. TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 1 (2017).

305. *See* CORRECTIONAL LEADERS ASS'N, *supra* note 302, at 8 tbl.1.

306. *See* 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.").

307. SOLITARY WATCH, SOLITARY CONFINEMENT IS NEVER THE ANSWER 1 (2020).

308. *See* Nicholas Brooks, *'You Shouldn't Have Used the D-Word'*, MARSHALL PROJECT (July 8, 2022), https://www.themarshallproject.org/2022/07/08/you-shouldn-t-have-used-the-d-word [https://perma.cc/YG8J-N4HK].

309. Justin D. Strong, Keramet Reiter, Gabriela Gonzalez, Rebecca Tublitz, Dallas Augustine, Melissa Barragan, Kelsie Chesnut, Pasha Dashtgard, Natalie Pifer & Thomas R. Blair, *The Body in Isolation: The Physical Health Impacts of Incarceration in Solitary Confinement*, PLOS ONE, Oct. 2020, at 1, 9.

310. *See* Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 227–29 (2020).

311. *E.g.*, Haney & Lynch, *supra* note 4, at 508–09 (surveying the literature comparing prolonged solitary confinement to torture).

312. *See id.* at 510.

313. *See, e.g.*, Haney, *supra* note 310, at 219 n.25 (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); AM. C.L. UNION OF TEX. & TEX. C.R. PROJECT, A SOLITARY FAILURE: THE WASTE, COST, AND HARM OF SOLITARY CONFINEMENT IN TEXAS 24 (2015), https://www.aclutx.org/sites/default/files/field_do

as a penological tool, counterintuitively justified as a tool to promote safety and security in prisons.[314]

1. Solitary Confinement and the Eighth Amendment

Challenges to a person being held in long-term solitary confinement are cognizable under the Eighth Amendment[315] but are still subject to the exacting "deliberate indifference" standard set forth in *Farmer v. Brennan*.[316] A person making an Eighth Amendment solitary confinement claim must prove both the objective prong (that a deprivation or risk of harm was sufficiently serious) and the subjective prong (that the prison official had a culpable state of mind in that they acted or failed to act with a deliberately indifferent state of mind).[317]

The objective prong in this context is implicated by the infliction of psychological harm.[318] Given the sheer volume of data on the psychological toll that solitary confinement takes on people, it presumably should not be difficult for incarcerated people to meet the objective prong of the *Farmer* analysis.[319] Courts have said that in Eighth Amendment solitary confinement cases, the objective prong—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.[320] 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."[321] Thus, the objective prong concerns not just the level of harm that an incarcerated person experiences,

---

cuments/SolitaryReport_2015.pdf [https://perma.cc/SK4J-BXWM] (describing results of a survey finding that 95 percent of people in segregation in Texas developed at least one psychiatric symptom due to solitary confinement).

314. *See* Haney, *supra* note 310, at 213.

315. 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.").

316. *See* 511 U.S. 825, 836–37 (1994).

317. *See id.* at 837; *see also* Wilson v. Seiter, 501 U.S. 294, 297 (1991).

318. *See supra* note 313 and accompanying text.

319. *See supra* note 313 and accompanying text.

320. *See, e.g.*, Silverstein v. Fed. Bureau of Prisons, 559 F. App'x 739, 754 (10th Cir. 2014) (explaining that 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) ("[D]ecades 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.").

321. *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, 362–63 (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.").

but also the opinion of prison staff and administrators tasked with maintaining security inside a prison.[322]

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"[323]—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."[324] 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.[325] 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.[326] 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."[327]

2. Solitary Confinement and Compassionate Release

In light of the harms that flow from being held in isolation for long periods of time, solitary confinement 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 Sentencing Guidelines that encompasses solitary confinement.[328]

Further, there is a perception that solitary confinement is often used to isolate people whom the carceral system deems particularly dangerous,

---

322. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 227 (2005) (highlighting 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").

323. Farmer v. Brennan, 511 U.S. 825, 828 (1994).

324. *Silverstein*, 559 F. App'x at 755.

325. *See supra* notes 323–24.

326. *See, 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).

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

328. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(C) (U.S. SENT'G COMM'N 2023).

unstable, or incapable of rehabilitation.[329] 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 § 3553(a) or because the person is a danger to the community under § 3582(c)(1)(A)(a)(2).[330]

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.[331] For example, one person incarcerated at ADX argued that his prolonged and extreme confinement in solitary was an ECR warranting release.[332] In addition to emphasizing that such a claim was an Eighth Amendment claim not cognizable in the compassionate release context, the district court 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."[333] 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 people experience there, accounts of the conditions at ADX have included horrifying stories of people engaging in self-mutilation, eating their own feces, and being put in restraints for prolonged periods of time.[334] 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,[335] such conditions are so widespread in American prisons that they may cease to be considered "extraordinary."[336]

---

329. *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").

330. *See* 18 U.S.C. § 3553(a); *see also id.* § 3582(c)(1)(A)(a)(2).

331. *See supra* note 302 and accompanying text.

332. *See* United States v. Shabazz, No. CR12-0033, 2022 WL 5247196, at *4 (W.D. Wash. Oct. 6, 2022).

333. *Id.*

334. *See* Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html [https://perma.cc/U9AQ-9A6D] (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.'").

335. *See* Atul Gawande, *Hellhole*, NEW YORKER (Mar. 23, 2009), https://www.newyorker.com/magazine/2009/03/30/hellhole [https://perma.cc/JZP6-2WLK].

336. *See, e.g.*, United States v. Bolden, No. CR16-320, 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.").

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.[337] 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-based claims.[338] 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.[339] 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.[340]

Calls to abolish solitary confinement altogether have been largely ignored by the federal courts.[341] This is so despite the fact that 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.[342] Isolation was also used by the BOP as a tool to contain COVID-19, a practice that was widely criticized.[343] At the same time, the punitive effect of prolonged solitary confinement is extreme.[344] In the solitary confinement context, then, district courts should feel empowered to

337. *See, e.g.*, United States v. Kibble, 992 F.3d 326, 336 (4th Cir. 2021) (Gregory, C.J., concurring) ("[C]onditions, [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) (holding that a defendant's unconstitutional state sentence of life without possibility of parole for an offense that he committed when he was a juvenile, long-term solitary confinement, and significant rehabilitation, taken together, constituted "extraordinary" circumstances 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").

338. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(5) (U.S. SENT'G COMM'N 2023).

339. *See id.*

340. *See* Julian Adler, *Prison Decarceration and the Mental Health Crisis: A Call to Action*, 34 FED. SENT. R. 233, 234 (2022) ("[S]econd-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.").

341. *See, e.g.*, N.Y. State Corr. Officers & Police Benevolent Ass'n v. Hochul, 607 F. Supp. 3d 231, 246 (N.D.N.Y. 2022) (dismissing a solitary confinement law challenge because a potential risk is insufficient to repeal a law).

342. *See* Brief for Former Corr. Execs. as Amici Curiae in Support of Petitioner & Reversal of Seventh Cir., Johnson v. Prentice, 144 S. Ct. 11 (2023) (No. 22-693).

343. *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).

344. *See supra* notes 309–13 and accompanying text.

exercise 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

Physical and sexual abuse is pervasive within the prison setting.[345] 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.[346] Such abuse can take many forms in the carceral setting.[347] 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.[348] 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.

1. Assault Claims 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.[349] Like claims involving unmet medical needs, Eighth Amendment claims based on the failure to prevent abuse or assault by one incarcerated person against another is governed by *Farmer*'s "deliberate indifference" standard.[350]

With excessive force claims under the Eighth Amendment, on the other hand—those alleging assault by a prison official—the conduct must be objectively "inconsistent with contemporary standards of decency."[351] 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."[352]

To determine whether the amount of force used violates the Eighth Amendment, courts consider: (1) "the extent of injury suffered"; (2) "the

345. *See* SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., *supra* note 82, at 1.

346. *See* EMILY D. BUEHLER, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., SUBSTANTIATED INCIDENTS OF SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018, at 10 (2023) (reporting that only about a quarter of staff sexual misconduct incidents were reported by the victim and nearly 20 percent of the substantiated incidents were uncovered during an investigation or monitoring).

347. *See id.* at 2.

348. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(5) (U.S. SENT'G COMM'N 2023).

349. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

350. *Id.*

351. Whitley v. Albers, 475 U.S. 312, 327 (1986) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)).

352. *Id.* at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

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) "any efforts made to temper the severity of a forceful response."[353] But excessive force claims are, like other kinds of Eighth Amendment claims, viewed in light of the deference given to prison officials.[354] Indeed, as the Supreme Court set forth in *Whitley v. Albers*[355] and reaffirmed in *Hudson v. McMillian*,[356] 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."[357] 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."[358]

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 in order to state a claim for compensatory damages.[359] As explained below, this stringent requirement dooms many civil suits,[360] and the "physical injury" standard has been interpreted by some courts to include harms that may not seem de minimis.[361]

For sexual assault or abuse claims this requirement is especially salient, as many forms of sexual abuse or harassment do not result in visible physical

353. Hudson v. McMillian, 503 U.S. 1, 7 (1992) (quoting *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 per *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

354. *See, 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)).

355. 475 U.S. 321 (1986).

356. 503 U.S. 1 (1992).

357. *Id.* at 6 (quoting *Whitley*, 475 U.S. at 321–22).

358. Malley v. Briggs, 475 U.S. 335, 341 (1986).

359. *See* Shapiro & Hogle, *supra* note 1, at 2047.

360. *See* Schlanger & Shay, *supra* note 66, 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").

361. *See* Shapiro & Hogle, *supra* note 1, at 2046–47 (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. 905-CV-171, 2005 WL 3360252, at *5 (E.D. Tex. Dec. 8, 2005))).

injury.[362] Further, courts are split over the effect of the PLRA's physical injury requirement on claims of sexual assault.[363]

All of these barriers to claims of abuse by guards under the Eighth Amendment mean that claims may never result in relief for incarcerated plaintiffs.[364]

2. Assault Claims 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 specifically included a category of ECR that accounts for abuse by prison officials when a movant was a victim of "sexual abuse involving a 'sexual act'" or "physical abuse resulting in 'serious bodily injury'" committed by or at the direction of a prison employee or contractor.[365]

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 harms may hamper a person's ability to obtain meaningful relief.[366] 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."[367] This so-called "substantiation" requirement is problematic for a number of reasons and could bar relief to many litigants. For example, criminal and civil cases usually take months or

362. *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) (explaining that although compensatory damages would be barred under the PLRA in a case involving forcing a person to "perform sexually provocative acts" during a strip search, the statute does not bar nominal or punitive damages stemming from the constitutional Eighth Amendment violation).

363. *See, e.g.*, Schlanger & Shay, *supra* note 66, 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) (arguing that rape should generally 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).

364. *See supra* notes 354–63 and accompanying text.

365. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

366. *See, e.g.*, Glenn Thrush, *Justice Dept. Struggles to Carry Out Early Release Program for Abused Inmates*, N.Y. TIMES (Feb. 22, 2023), https://www.nytimes.com/2023/02/22/us/politics/federal-prisons-inmate-abuse.html [https://perma.cc/7KNN-V2H4] (describing the BOP's characterization of documentation of claims of sexual abuse by prison officials at Federal Correctional Institution, Dublin as insufficient to warrant early release under the BOP's internal review).

367. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

years before resulting in a criminal conviction or civil liability.[368] An administrative proceeding may be similarly lengthy and complex.[369] And, like the Eighth Amendment, requiring a substantiation of liability on the part of an official would still shift the burden to the litigant to prove misconduct by some outside actor rather than focusing on a litigant's subjective experience.[370]

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 toward release than under the Eighth Amendment, especially because a showing of undue delay can override the substantiation requirement.[371] And a remedy of release would enable victims of institutional sexual violence to seek and receive necessary and meaningful treatment—in a safe space outside of prison—more quickly.[372]

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.[373] In addition, during a recent hearing on the ECR amendments, one commentator asked about the intersection between the Eighth Amendment and compassionate release, as well as about the role of Eighth Amendment remedies in the context of whether these expansive Sentencing Guideline amendments should even be adopted.[374]

But there are several doctrinal and practical benefits to making adverse conditions of confinement redressable through compassionate release. This part expands on specific reasons for why utilizing compassionate release to redress harms suffered in prison makes sense—and why district courts should

368. A comprehensive study from the Institute for the Advancement of the American Legal System at the University of Denver concluded that the average time to resolve a civil rights case in the District of Colorado was 423.61 days from the time of filing to the time of disposition. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 28 tbl.3 (2009), https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf [https://perma.cc/U96F-GT4J]. This statistic would include cases that settled, meaning that some cases that did not resolve in settlement would last far longer than that. *Id.* "The median time from filing of proceedings to termination for criminal defendants was 9.8 months." *U.S. District Courts — Judicial Business 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021 [https://perma.cc/8J66-MTAZ] (last visited Feb. 9, 2024).

369. *See, e.g.*, SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., *supra* note 82, at 15–17 (describing multistep process for administrative investigation of sexual abuse allegations at Federal Correctional Institution, Dublin).

370. *See supra* note 127 and accompanying text.

371. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(4) (U.S. SENT'G COMM'N 2023).

372. *See* Thompson, *supra* note 6, at 638 (noting that the medical needs of incarcerated people are frequently ignored).

373. *See supra* notes 294, 332, 333 and accompanying text.

374. Hon. Randolph D. Moss, Chairman, Comm. on Crim. L. of the Jud. Conf. of the U.S., Remarks at Hearing on Proposed Compassionate Release-Related Amendment to the Sentencing Guidelines, at 81 (2016).

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 expansion of compassionate release.

A. Exposing Prison Conditions

Much of what occurs behind prison walls is invisible to the general public and even to the judges who sentence people.[375] The secrecy surrounding America's prisons doubtlessly contributes to the horrors that happen inside of them.[376] But due to the large number of compassionate release motions filed in the past several years, federal judges have been given a greater window into what happens to people incarcerated in federal prison.[377] As Professor Lindsey Webb has explained:

> [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.[378]

Ever since the 2018 expansion of compassionate release allowed for motions to be filed directly with a sentencing court, district court judges are now more aware of the conditions that impact incarcerated people.[379] It seems plausible that nearly every federal judge in the country—or at the very least every federal district court—has been called upon to decide a motion for compassionate release since 2018.[380] And many judges—appalled by what they saw—decided to remedy individuals' suffering or risk of suffering by granting early release.[381]

Scholars have similarly argued that raising conditions of confinement at sentencing should be an important part of the abolitionist project of educating

---

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

376. 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.").

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

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

379. *See supra* notes 139–40 and accompanying text.

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

381. *Id.* at 3 (noting that, in 2020, courts granted sentence reductions to 25.7 percent of incarcerated people who filed for compassionate release).

the judiciary (and the public) about what prison is like.[382] In the compassionate release context, judges are required to confront those conditions of confinement explicitly.[383] 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 addresses 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 § 3553(a) sentencing factors.[384] 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,"[385] reviewing a compassionate release motion should similarly account for 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.

Movants often present district courts not just with information supporting ECRs, but also with a whole story of a person's life while incarcerated.[386] This often includes positive programming that a person has participated in, such as work history, educational courses, or other kinds of service that give judges an idea of who a person is.[387] In this way, compassionate release litigation can shed light on the stories of incarcerated people in a way that other kinds of post-sentencing litigation (such as habeas litigation) does not. Because judges are often called upon to reconsider a sentencing determination 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 incarcerated people.[388]

---

382. *See, e.g.*, Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1654 (2019) ("[P]eople 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))).

383. *See supra* notes 156–66.

384. 18 U.S.C. § 3553(a).

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

386. *See, e.g.*, Brief for Defendant at 11–12, United States v. Bernhardt, No. 96-CR-00203 (D. Colo. Oct. 28, 2022) (discussing rehabilitation while in prison); United States v. Brown, 457 F. Supp. 3d 691, 694 (S.D. Iowa 2020) (discussing defendant's exemplary rehabilitation and programming while in BOP custody).

387. *See, e.g.*, Brief for Defendant, *supra* note 386, at 12 (discussing the defendant taking numerous courses, practicing woodworking, mentoring others, and volunteering); *Brown*, 457 F. Supp. 3d at 694 (describing how the defendant taught and mentored other incarcerated people).

388. *See, e.g.*, Ord. Granting Defendant's Unopposed Motion for Sentence Reduction & Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A), United States v. Uram, No. 96-CR-00102 (D. Wyo. Nov. 2, 2022), ECF No. 503 (ordering the release of "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*

Thus, the filing of compassionate release motions—even unsuccessful ones—can shed light on some of the most egregious abuses that occur in prison and contribute to the overall project of exposing abuses of power that occur behind prison walls.[389] The amendments are also an opening and an invitation to pursue novel arguments in favor of early release.[390]

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.[391] 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.[392] 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.[393]

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.[394] This is especially salient when ongoing harms (psychological trauma or severe health concerns, for example) are not being adequately addressed by prison staff, but the staff has not exhibited a wholesale "deliberate indifference" to such needs.[395]

Prison systems have insufficient resources to address the many complex medical or mental health services that incarcerated people require.[396] Such services are far more readily available outside the carceral setting.[397] 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.[398] Rather, district judges can consider the experiences that a

Aging Out of Crime, 32 FED. SENT'G REP. 70, 70 (2019) (noting that "compassionate release theory draws from a fundamental belief, rooted in human dignity, that an inmate's altered and unfortunate circumstances may demand early release from incarceration").

389. *See supra* Part III.

390. *See supra* Part III.

391. Erica Zunkel & Jaden M. Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 1 FED. SENT'G REP. 164, 164–74 (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.").

392. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(1)(D) (U.S. SENT'G COMM'N 2023).

393. *See supra* notes 157–60 and accompanying text.

394. Adler, *supra* note 340, at 234 ("[S]econd-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.").

395. *See supra* notes 278–79, 315–17 and accompanying text.

396. Thompson, *supra* note 6, at 642–49.

397. *See id.*

398. *See supra* notes 11, 14, 15 and accompanying text.

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.[399]

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. Judges and criminal scholars are understandably wary of the potential for certain new forms of litigation to overwhelm the federal courts.[400] 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.[401] 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 of successive motions that can be filed and under what circumstances.[402]

Thus, two bedrock values of criminal law—finality and judicial efficiency—are implicated by the new compassionate release amendments.[403] Indeed, one potential criticism of compassionate release is that it could alter Congress's sentencing 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."[404] And yet, there is scant evidence that exceedingly lengthy sentences contribute to higher levels of deterrence of criminal conduct or public safety.[405] 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.[406] But scholars have recognized that finality concerns are less acute in the resentencing context than in the habeas context, in which a full retrial may be implicated.[407] In this way, finality is even less of a concern in the context

399. *See supra* Part III.A.

400. *See generally, e.g.*, Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223 (2014) (discussing nervousness by courts about the potential for an employment law decision to open floodgates to new kinds of employment-related litigation).

401. *See* 18 U.S.C. § 3582(c)(1)(A).

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

403. Teague v. Lane, 489 U.S. 288, 308, 332 (1989) (recognizing the Court's interest in finality and efficiency).

404. *Id.* at 309.

405. Nicholas Turner, *Research Shows That Long Prison Sentences Don't Actually Improve Safety*, VERA INST. JUST. (Feb. 13, 2023), https://www.vera.org/news/research-shows-that-long-prison-sentences-dont-actually-improve-safety [https://perma.cc/V74C-HVA8].

406. Berman, *supra* note 385, at 169 ("[F]inality 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.").

407. 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

of compassionate release in which a retrial would never be necessary—nor even a full resentencing.[408]

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" is a more important principle in the criminal law than the fair and just treatment of those the criminal law incarcerates.[409] An expansion of compassionate 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.[410]

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.[411] Litigation against prison systems or prison officials can involve months or years of complex motions practice and probing discovery, and it can often cause prison officials, government lawyers, and district judges to spend countless hours resolving such motions or discovery disputes.[412] Interlocutory appeals and other mechanisms can delay the resolution of such cases.[413] Even before a case gets to discovery, district and magistrate judges receive large volumes of prisoner-initiated civil complaints.[414] Thus, compassionate release—which usually only involves the judge, a defense attorney, and one attorney from the government and can be resolved relatively quickly—is arguably a more judicially efficient way to address certain kinds of conditions-based harms

---

deterrence, rehabilitation, and repose are less poignant than in cases of factual or trial innocence).

408. Berman, *supra* note 385, at 166 ("[S]entence 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.").

409. The myriad ways in which this "fetish of finality" keeps 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 relief that are codified in Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.), (AEDPA)). *See also, e.g.*, Jones v. Hendrix, 599 U.S. 465 (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 petitions).

410. *See, e.g.*, McLeod, *supra* note 409, at 1213 ("An 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.").

411. *See supra* note 368.

412. *See supra* note 368.

413. 28 U.S.C. § 1292(b) (allowing for the use of interlocutory appeals when a district judge thinks that an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

414. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1575 (2003) (noting the high volume of prisoner-initiated civil rights litigation in federal courts and including a comprehensive study of prisoner-initiated civil rights cases).

than 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, so some incarcerated people may choose to pursue compassionate release and claims for civil damages simultaneously.[415] 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 whether the duty to protect an incarcerated person has been violated without regard to the subjective intent of prison staff.[416]

D. Proportionality, Parsimony, and Doctrinal Coherence

Compassionate release eliminates some of the doctrinal (and practical) quagmires present in Eighth Amendment jurisprudence.[417] 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.[418] 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.[419]

1. Eighth Amendment Proportionality Principles Could Be Marshalled in Service of Early Release

In the compassionate release post-sentencing context, and in 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."[420] 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."[421] Indeed, the proportionality principle has been a

415. *See, e.g.*, Complaint at 4–5, Cal. Coal. for Women Prisoners v. U.S.A. Fed. Bureau of Prisons, No. 23-CV-04155 (N.D. Ca. 2023), ECF No. 1.

416. 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").

417. Albertson, *supra* note 243, at 29–38.

418. *Id.*

419. *See supra* note 127 and accompanying text.

420. Reinert, *supra* note 25, at 83.

421. Solem v. Helm, 463 U.S. 277, 284 (1983).

bedrock of Eighth Amendment jurisprudence for over 100 years.[422] The proportionality principle applies both to the type of punishment (e.g., the death penalty versus life in prison)[423] 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?).[424] 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.[425]

Professor Alexander A. 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.[426]

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.[427] 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 whereas the harm experienced post-sentencing would be subject to an almost insurmountable Eighth Amendment analysis.[428] Professor Reinert's point is that a person could not be subject to assault as part of a

422. *Id.* at 286; Weems v. United States, 217 U.S. 349, 385 (1910) ("[T]he 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.").

423. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169–73 (1976); *see also* Granucci, *supra* note 92, at 845–46.

424. 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 672 grams of cocaine); Rummel v. Estelle, 445 U.S. 263, 276, 285 (1980) (upholding a sentence of mandatory life imprisonment under a Texas recidivist statute for obtaining $120.75 by false pretenses); 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 nonviolent recidivist whose crimes were minor).

425. *See* Reinert, *supra* note 25, at 73.

426. *Id.* at 74.

427. *Id.* at 74–75 (discussing the PLRA requirement that a harm be more than de minimis).

428. *See id.*

sentencing judge's determination but could easily be subject to identical treatment incident to their incarceration—without much recourse.[429]

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 prohibition of cruel and unusual punishment.[430] 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.[431]

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.[432] In fact, this is what happened in *Brown v. Plata*,[433] in which a court ordered people released from the California prison system based on unconstitutional conditions.[434] 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.[435]

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 or years spent in solitary confinement, for example, 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 that they committed.[436] In other words, the conditions that a person suffered were so egregious that incarceration should no longer be constitutionally permitted.[437] In this way, the Supreme Court's proportionality jurisprudence could be marshalled in

429. *See id.*

430. Dolovich, *supra* note 10, at 884.

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

432. *See* Reinert, *supra* note 19, at 1579–80.

433. 563 U.S. 493 (2011).

434. *Id.* at 531–32 (affirming release of people incarcerated in California's prison system because severe over-crowding led to unconstitutional conditions of confinement).

435. Reinert, *supra* note 19, at 1575–76.

436. *See supra* Part III.

437. *See supra* Part III.

service of justifying sentence reductions or early release based on such harms.

2. 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.[438] Although parsimony and proportionality are similar concepts, the parsimony principle can speak more to the way that a sentence is tailored to an individual person and their circumstances than the proportionality principle.[439]

Sentencing parsimony, as informed by conditions of confinement, is illustrated by the following hypothetical from Justice Harry A. 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.[440]

Justice Blackmun illustrates the idea that incarceration is experienced very differently for different people; the hypothetical invites the question of how courts can address disproportionately harsh experiences of punishment within in the post-sentencing context.[441]

At the time of conviction and sentencing, judges are not tasked with considering what a person's experience of incarceration might look like.[442] 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.[443] Federal judges occasionally consider whether a person is located in a prison near friends or family and can recommend to the BOP that

---

438. *See* 18 U.S.C. § 3553(a) (commanding judges to craft sentences that are "sufficient, but not greater than necessary, to comply with" the enumerated sentencing purposes).

439. *See* Albertson, *supra* note 243, at 20, 30; *see also* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

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

441. *See id.*

442. *See, e.g.*, Assoc. Just. Anthony Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) ("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 [a]way, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.").

443. *See id.*

a person be designated to serve their sentence at a facility within a certain radius, but they do not have ultimate control over whether such a designation will actually materialize.[444] 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.[445]

Considerable energy is expended on sentencing parsimony in the federal system. A judge's sentencing decision in an individual case is determined by a variety of factors and is particularly tailored to a given circumstance by both the Sentencing Guidelines and the judge's weighing of the § 3553(a) factors.[446] Individual judges take care that their sentencing determinations are well-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.[447] Thus, both the judicial system as a whole and individual district judges should welcome the opportunity to review old sentences if circumstances so warrant.[448] Such a system provides a much more precise and accurate way of tailoring the punitive effect of a sentence to a particular crime. Therefore, a judge who sentences a person to twenty-five 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 specific value on certain types of harms and grant sentence reductions in accordance with those values.[449]

CONCLUSION

The Sentencing Commission's amendments to the compassionate release statute are a 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

444. *See* 18 U.S.C. § 3621(b) (delegating authority over the place of a person's imprisonment to the 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. *See id.* § 3621(e).

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

446. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2023); 18 U.S.C. § 3553.

447. *See supra* Part III; Hanan, *supra* note 375, at 1206 ("Prison's cruelties are relevant to determining the parsimony of a punishment . . . .").

448. 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.").

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

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.[450] Courts and prosecutors have already begun to question whether this broad grant of district court discretion is appropriate.[451] 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.[452] However, the reality is that the current system is, for the most part, unreformable, and other solutions, such as broader availability for early release, are necessary.

Indeed, the horrors that happen to people in prison have been well-documented and often litigated but are rarely adequately addressed. As explained above, structural barriers to conditions-based civil claims mean that civil litigants have been generally unsuccessful in litigating cases contesting conditions of confinement against prisons and prison systems under the Eighth Amendment. The current system of incarceration places individuals in an impossible, tragic, and unconscionable environment with neither means to redress harms suffered nor opportunity for reform. Incarcerated litigants found little help under the Eighth Amendment to redress harms suffered in the COVID-19 pandemic era. But in the new amendments to the compassionate release ECR categories, the Sentencing Commission has codified a way in which individuals can get meaningful relief for harms suffered in prison. This solution may be imperfect, but it is in many ways more attainable than the relief sought under the Eighth Amendment. In so doing, the Sentencing Commission—at least in part—recognized the inadequacy of our current system and provided courts with an avenue to move in the direction of decarceration rather than the faint and elusive promise of institutional reform.

450. 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. *See, e.g.*, United States v. Lii, 528 F. Supp. 3d 1153, 1167 (D. Haw. 2021) (permitting compassionate release of a person serving a mandatory life sentence for drug-related offenses); United States v. Rodriguez, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (permitting compassionate release of a defendant who was in year seventeen of a twenty-year mandatory-minimum sentence for drug distribution and unlawful firearm possession); United States v. Ramsay, 538 F. Supp. 3d 407, 410 (S.D.N.Y. 2021) (reducing a mandatory minimum life sentence to thirty years—time served).

451. *See generally USSC Public Hearing – February 23 – Day 1*, YOUTUBE (Feb. 23, 2023), https://www.youtube.com/watch?v=ELmrnESRMm4 [https://perma.cc/W5PC-WKMJ].

452. *See, e.g*, Sharon Dolovich, *supra* note 5 (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).