



Fall 2020

## Habeas Corpus, Conditions of Confinement, and COVID-19

Allison Wexler Weiss

Washington and Lee University School of Law, aweiss@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and COVID-19*, 27 Wash. & Lee J. Civ. Rts. & Soc. Just. 131 (2020).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol27/iss1/5>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Habeas Corpus, Conditions of Confinement, and COVID-19

Allison Wexler Weiss\*

## *Table of Contents*

I. Introduction.....	131
II. Initial State and Federal Conditions and Responses to COVID-19.....	136
III. Types of Petitions Requesting Release or Improved Conditions of Confinement .....	140
A. Compassionate Release, 18 U.S.C. § 3582(c) .....	141
B. Civil Rights Cases .....	143
C. Habeas Petitions filed under 28 U.S.C. § 2254 and § 2255 .....	146
D. 28 U.S.C. § 2241 .....	150
IV. The Substantive Eighth Amendment Claim of Cruel and Unusual Punishment .....	153
V. Conclusion .....	156

## *I. Introduction*

Phillip Hill is serving a twenty-eight-year sentence for conspiracy and fraud.<sup>1</sup> He has served over half of his sentence

---

\* Allison Wexler Weiss teaches legal writing and prison law at Washington and Lee University School of Law. She worked for a number of years as a staff attorney in the Federal District Court for the W.D. Va. on the prisoner docket and as an appellate attorney at the Federal Public Defenders for the W.D.N.C.

1. *Inmates Share What Life is Like Inside Prison During the Coronavirus Pandemic*, CBS NEWS (May 20, 2020, 12:58 PM), <https://www.cbsnews.com/news/coronavirus-pandemic-prison-inmates-voices-from-inside-05-20-2020> (last visited Oct. 1, 2020) [perma.cc/5Z6Q-MERM].

already, but in May 2020, his experience inside prison became much more perilous.<sup>2</sup> He is incarcerated at FCI Oakdale I, a federal correctional facility that, as of October 23, 2020, had had 225 confirmed cases of COVID-19, the disease resulting from the novel coronavirus 2019-nCoV, and seven ensuing deaths.<sup>3</sup> In describing his current reality, Hill explained, “There is no one here [in FCI Oakdale I] that was sentenced to a death sentence by their judge, yet we are living as if we have a death sentence.”<sup>4</sup>

In late 2019, COVID-19 began to spread around the world.<sup>5</sup> In January 2020, doctors diagnosed the first case of COVID-19 in the United States,<sup>6</sup> and by October 23, 2020, there were over 8,494,000 confirmed cases of COVID-19 in this country.<sup>7</sup> The global pandemic has caused wide-spread suffering, resulting in illness, death, and economic hardship.<sup>8</sup> Nowhere, however, have

---

2. See *id.* (comparing his stay to a war zone).

3. See *COVID-19 Coronavirus*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Oct. 23, 2020) (providing the following statistics at FCI Oakdale I: There is currently one incarcerated individual with COVID-19, 217 incarcerated individuals who have recovered from COVID-19, and 7 incarcerated individuals who have died from COVID-19) [perma.cc/GS5H-AEBZ].

4. *Inmates Share What Life is Like Inside Prison During the Coronavirus Pandemic*, *supra* note 1.

5. See *Timeline: WHO’s COVID-19 Response*, WORLD HEALTH ORG., [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=EAIaIQobChMIjbG2gYuh6wIVGG6GCh3dpQZzEAAYASAAEgLrpPD\\_BwE#event-26](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=EAIaIQobChMIjbG2gYuh6wIVGG6GCh3dpQZzEAAYASAAEgLrpPD_BwE#event-26) (last updated July 23, 2020) (last visited Oct. 1, 2020) (providing a timeline of the global spread of the virus, from Dec. 31, 2019, when the WHO received a media statement about cases of “viral pneumonia” in Wuhan, China, to the present) [perma.cc/6FZY-S747].

6. *Id.*

7. Johns Hopkins University & Medicine, Coronavirus Resource Center, *COVID-19 Dashboard*, JOHNS HOPKINS U., <https://coronavirus.jhu.edu/map.html> (last updated Oct. 23, 2020) (last visited Oct. 23, 2020) [perma.cc/36L4-E59R].

8. President Trump declared the pandemic a national emergency on March 13, 2020, recognizing the threat the disease posed to people’s health and the potential to overrun the health care system. Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020). The economic ramifications have also been extremely dire, as cities have imposed lock-down orders, businesses have remained closed, and people have lost their jobs; Russell Berman, *The Economic Devastation Is Going to Be Worse Than You Think*, THE ATLANTIC (Mar. 21, 2020), <https://www.theatlantic.com/politics/archive/2020/03/covid-19s-devastating-effects-jobs-and-businesses/608461/> (last visited Aug. 16, 2020) (explaining the economic consequences of the coronavirus) [perma.cc/2XSA-LEW9].

COVID-19's health concerns been more pronounced than in the country's correctional facilities.<sup>9</sup>

As of October 23, 2020, at least 152,955 incarcerated people<sup>10</sup> in state and federal prisons had tested positive for COVID-19.<sup>11</sup> Even more alarming, since that time, there have been at least 847 incarcerated individuals who have died of COVID-19-related causes.<sup>12</sup>

Philip Hill described the toll of living in prison with the threat of the virus always present:

I have never been in a war zone before, until now. This has been a most devastating, destructive thing—as you can't see the enemy but you know that it is always around. From every cough that you hear, the sneeze that you see is like a gun firing, at war, you cringe and run to your bunker.<sup>13</sup>

Hill's comparison of life behind bars to a war zone is apt based on our current understanding of the virus.<sup>14</sup> Health officials have provided clear directives for stopping the spread of COVID-19: Social distance, wear face masks, and sanitize.<sup>15</sup> These preventive

9. See Kelly Davis, *Coronavirus in Jails and Prisons*, THE APPEAL (Aug. 3, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-37/> (last visited Aug. 25, 2020) (“[O]vercrowded, aging facilities lacking sanitary conditions and where medical care is, at best, sparse; too many older prisoners with underlying illnesses; regular flow of staff, guards, healthcare workers in and out of facilities—would leave detention facilities, and their surrounding communities, vulnerable to outbreaks.”) [perma.cc/RQB8-3NJA].

10. The nomenclature used to discuss people in prison is hotly debated. See, e.g., Lynn S. Branham, *Eradicating the Label “Offender” from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53 (2019) (describing the term “offender” as a “harm inflicting label”); see also Blaire Hickman, *Inmate. Prisoner. Other. Discussed*, THE MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed> (last visited Aug. 16, 2020) (discussing “the best way to refer to people behind bars”) [perma.cc/L5YL-VRQH].

11. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (Oct. 23, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated Oct. 23, 2020, 5:45 PM) (last visited Oct. 24, 2020) (collecting data on COVID-19 infections in both state and federal prisons) [perma.cc/87RR-9N7M].

12. *Id.*

13. *Inmates Share What Life is Like Inside Prison During the Coronavirus Pandemic*, *supra* note 1.

14. See *id.* (comparing life in prison to a war zone).

15. In order to avoid the spread of COVID-19, the Center for Disease Control recommends avoiding close contact with others, and maintaining six feet of

measures are impossible to follow in our correctional facilities.<sup>16</sup> The number of confirmed cases and deaths of incarcerated individuals bears this out.<sup>17</sup>

Incarcerated individuals, worried about contracting the disease in prison without adequate healthcare and often serious health risks, have filed lawsuits challenging their incarceration in the age of COVID-19.<sup>18</sup> Overall, very few have been successful.<sup>19</sup> This virus has changed our world and the reality for those in prison.<sup>20</sup> The traditional legal avenues available to incarcerated individuals to challenge their continued confinement are often ill-equipped to allow for comprehensive and expedited review.<sup>21</sup>

---

distance between people at all times, washing hands often, cleaning and disinfecting frequently, and covering your mouth and nose with a face cover. *How to Protect Yourself and Others*, CTNS. FOR DISEASE CONTROL & PREVENTION (Aug. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Oct. 1, 2020) [perma.cc/KYV7-EZSZ].

16. See Joan Stephenson, *COVID-19 Pandemic Poses Challenge for Jails and Prisons*, JAMA NETWORK (Apr. 7, 2020), <https://jamanetwork.com/channels/health-forum/fullarticle/2764370> (last visited Aug. 16, 2020) (“In addition to physical vulnerability, overcrowding and sanitation issues in many jail and prison settings heighten the risk of disease spread and are in stark contrast to the recommendations of public health officials for social distancing, frequent handwashing, and other practices for COVID-19 prevention.”) [perma.cc/9HLC-QXD8].

17. See *A State-by-State Look at Coronavirus in Prisons*, *supra* note 11. (showing data on infection rates in prisons).

18. See *infra* Part II (discussing the types of suits that incarcerated individuals have filed to gain relief due to Covid-19, including compassionate release suits, civil rights suit, and state and federal habeas suits)

19. See Ariane de Vogue, *Covid-19 Cases Concerning Prisoners' Rights Hit the Supreme Court*, CNN, <https://www.cnn.com/2020/05/21/politics/covid-19-supreme-court-prisoners-rights/index.html> (last updated May 21, 2020, 7:01 AM) (last visited Aug. 28, 2020) (explaining two instances where courts ruled against prisoners) [perma.cc/4BZB-482K].

20. See Stephenson, *supra* note 16 (noting that the Federal Bureau of Prisons could impact inmate access to mental, health, and educational services); see also The Editorial Board, *The Coronavirus Crisis Inside Prisons Won't Stay Behind Bars*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html> (last visited Aug. 28, 2020) (“The situation inside the nation’s jails and prisons amid the Covid-19 pandemic has become the stuff of nightmares.”) [perma.cc/J33D-U4ST].

21. See Damini Sharma et. al., *Prison Populations Drops By 100,000 During Pandemic But Not Because of Covid-19 Releases*, THE MARSHALL PROJECT (Jul. 16, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic> (last visited Oct. 24, 2020) (noting

I argue that during these unprecedented times, courts should recognize that the “duty to defend the Constitution” requires them to grant motions for habeas corpus by the most vulnerable prisoners—those who are elderly or suffer from certain medical pre-existing conditions—and that “a public health emergency does not absolve [courts] of that responsibility.”<sup>22</sup> To the contrary, the pandemic has underscored the necessity of courts to step into and embrace their roles as protectors of those who are currently unconstitutionally incarcerated.<sup>23</sup>

Part I of this article will address the current conditions in federal and state prisons, and the limited number of prisoner releases that have occurred in response to the pandemic thus far. Part II will address the types of suits that incarcerated individuals have filed in federal courts to address their plight during COVID-19, including compassionate release requests,<sup>24</sup> civil rights lawsuits,<sup>25</sup> federal and state habeas petitions, and habeas

---

that a significant decrease in prison population during the summer of 2020 was not due to the release of vulnerable individuals from prison due to Covid-19, but rather due to fewer individuals entering the prisons due to sentencing delays and reduced parole violation determinations) [perma.cc/NCC6-AZV2]; see also Taryn A. Merkl & Brooks Weinberger, *What’s Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. FOR JUST. (Jul. 22, 2020), <https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19> (last visited Aug. 28, 2020) (“Procedural hurdles and tough legal standards are preventing incarcerated people from going to federal court for pandemic relief.”) [perma.cc/CXP2-NJ62].

22. *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 WL 4251360, at \*1 (U.S. July 24, 2020).

23. See Joshua Matz, *The Coronavirus Is Testing America’s Commitment to People’s Constitutional Rights*, THE ATLANTIC (April 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216/> (last visited Oct. 1, 2020) (“Where jailers violate the Constitution, courts can and should enter injunctions requiring improved safety protocols, regular public reporting, inspections by third-party experts, and, if necessary, progress toward releasing enough detainees to meet baseline constitutional standards.”) [perma.cc/HV6A-GBW2].

24. See KATHARINA PISTOR, *LAW IN THE TIME OF COVID-19*, 14 (2020) (e-book) (discussing the requirements for bringing compassionate release cases under 18 U.S.C. § 3582(c)(1)(A)).

25. See Carolyn Casey, *Dozens of Prisons Now Face COVID-19-Related Civil Rights Lawsuits*, EXPERT INSTITUTE <https://www.expertinstitute.com/resources/insights/dozens-of-prisons-now-face-covid-19-related-civil-rights-lawsuits/> (last updated June 25, 2020) (last visited Aug. 28, 2020) (“Correctional facilities across the country are facing civil rights lawsuits for their negligent management of the health crisis and resulting harm

petitions filed under the general habeas statute, 28 U.S.C. § 2241.<sup>26</sup> Part III of the article will consider the substantive Eighth Amendment claim raised in these petitions—that prison conditions during the pandemic are inhumane. Finally, I conclude that incarcerated individuals most vulnerable to COVID-19 within the prison system due to age or health factors raise compelling substantive claims of cruel and unusual punishment. “The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and . . . the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”<sup>27</sup>

## *II. Initial State and Federal Conditions and Responses to COVID-19*

A number of factors increase the risks of both catching COVID-19 and having serious health complications from the virus for individuals in correctional facilities.<sup>28</sup> Many people incarcerated have significant underlying health problems.<sup>29</sup> In addition, COVID-19 disproportionately affects older people, and prisons currently house a large number of older prisoners; almost

---

suffered by inmates.”) [perma.cc/SK8K-9Z75].

26. See Tom W. Bell, *COVID-19 Lockdown Orders Must Get Habeas Corpus Review*, LAW.COM (April 22, 2020), <https://www.law.com/therecorder/2020/04/22/covid-19-lockdown-orders-must-get-habeas-corpus-review/> (last visited Aug. 29, 2020) (“The constitutional right of habeas corpus gives those confined under color of law the right to have a court review the reasons for and conditions of confinement. If not satisfied, the court must order the confinement to end.”) [perma.cc/9YT8-4A7F]

27. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations omitted).

28. Stephenson, *supra* note 16.

29. See Michael Massoglia & Brianna Remster, *Linkages Between Incarceration and Health*, PUBLIC HEALTH REPORTS (MAY 6, 2019), <https://journals.sagepub.com/doi/epub/10.1177/0033354919826563> (last visited Aug. 16, 2020) (concluding that incarcerated and formerly incarcerated people have an elevated risk of a host of chronic health conditions and a higher mortality rate than nonincarcerated people) [perma.cc/4ABJ-UTK8]; see also Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, NEW YORKER (March 14, 2020), <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> (last visited Oct. 1, 2020) (“Jails and prisons are full of people who are at higher risk than the general public. We have filled them up with people who have high rates of serious health problems.”) [perma.cc/AS74-MATJ].

12% of federal prisoners<sup>30</sup> and more than 10% of state prisoners<sup>31</sup> are over fifty-five years of age. Many prisons and jails are also overcrowded, making it impossible for most incarcerated individuals to engage in social distancing.<sup>32</sup> Finally, sanitation in prisons is notoriously limited.<sup>33</sup> In a comprehensive study reviewing the steps that prisons have taken in all fifty states to minimize the spread of COVID-19, the American Civil Liberties Union and Prison Policy Initiative concluded that “state responses ranged from disorganized or ineffective, at best, to callously nonexistent at worst.”<sup>34</sup>

Shortly after the pandemic began to spread, state and federal executive officers recognized the potential calamitous health risks that COVID-19 presented for incarcerated individuals.<sup>35</sup> Michael Carvajal, the director of the Federal Bureau of Prisons issued

---

30. The Federal Bureau of Statistics provides that over 18,600 people in federal prisons are over the age of fifty-five. See *Inmate Age*, FED. BUREAU OF STATS., [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp) (last updated Aug. 22, 2020) (last visited Aug. 29, 2020) [perma.cc/SVD6-9NXM].

31. The Prison Policy Initiative provides that over 144,000 people in state correctional facilities are over the age fifty-five. See Emily Widra, *Since You Asked, How Many People Aged 55 or Older are in Prison?*, PRISON POLY INITIATIVE (May 11, 2020), <https://www.prisonpolicy.org/blog/2020/05/11/55plus/> (last visited Oct. 1, 2020) [perma.cc/9N5B-CJWD].

32. The U.S. Department of Justice has calculated that,

at year-end 2018, the prison custody population in 12 states [including Virginia] and the BOP was equal to or greater than their prisons' maximum rated, operational, and design capacity, and 25 states [including Virginia] and the BOP had a total number of prisoners in custody that met or exceeded their minimum number of beds across the three capacity measures: design, operational, and rated capacity.

E. Ann Carson, *Prisoners in 2018*, BULL. JUST. STATS., at 25 (Apr. 2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf> (last visited Aug. 16, 2020) [perma.cc/RR4Z-TQFW].

33. Stephenson, *supra* note 16.

34. Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, ACLU (June 25, 2020), <https://www.aclu.org/report/failing-grades-states-responses-covid-19-jails-prisons> (last visited Aug. 16, 2020) [perma.cc/396K-2UVY].

35. *Hearing on Examining Best Practices for Incarceration and Detention During COVID-19 Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Michael D. Carvajal, Director, and Dr. Jeffrey Allen, Medical Director, Federal Bureau of Prisons).



written directives regarding prison policy, including limiting social and legal visitations, limiting supplier and contract visits to essential business and deliveries, and instituting lock-downs for weeks at a time.<sup>36</sup> On March 26, 2020, Attorney General William Barr issued a Memorandum directing Carvajal to “prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic.”<sup>37</sup> Shortly thereafter, on March 27, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, into law which loosened restrictions on home confinement, potentially allowing more incarcerated individuals in federal prison to serve part of their sentences at home.<sup>38</sup> Barr issued another Memorandum soon after, capitalizing on the CARES Act and directing Carvajal to expand home confinement eligibility to include “all at-risk inmates.”<sup>39</sup> However, even in light of these directives, the number of federal incarcerated individuals released from prison has been low: 7,504 people out of a prison population of 158,838—about 4%.<sup>40</sup>

Many state governments have similarly issued directives regarding the potential release of state prisoners in response to COVID-19.<sup>41</sup> While many governors and state corrections

---

36. *Id.*

37. Memorandum from William P. Barr, U.S. Att’y Gen., to Michael Carvajal, Director of the Federal Bureau of Prisons 1 (March 26, 2020) (on file with Office of the Attorney General).

38. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-36, § 12003(a)(2), (b)(2), 134 Stat. 281, 515–16 (2020) (providing the Attorney General with the power to increase home confinement eligibility). Under normal circumstances, the BOP has the authority to transfer incarcerated people who have less than a year remaining in their sentence to home confinement for a maximum of six months. 18 U.S.C. § 3624(c)(2)).

39. Memorandum from William P. Barr, U.S. Att’y Gen., to Michael Carvajal, Director of the Federal Bureau of Prisons 2 (Apr. 3, 2020) (on file with Office of the Attorney General).

40. See *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/faq.jsp> (last visited Aug. 16, 2020) (providing statistics for COVID-19-related issues in federal prisons) [perma.cc/7ZNE-SF4S]; see also *Population Statistics*, FED. BUREAU OF PRISONS, [https://www.bop.gov/mobile/about/population\\_statistics.jsp](https://www.bop.gov/mobile/about/population_statistics.jsp) (last visited Aug. 16, 2020) (providing general statistics on incarceration rates) [perma.cc/TTN5-QHZ2].

41. See *Criminal Justice System Responses to COVID-19*, NCLS (Aug. 20,

departments have recognized the need to reduce the prison population to limit the spread of COVID-19, relatively few state prisoners have been released.<sup>42</sup> For instance, in Virginia, as of July 21, 2020, the Virginia Department of Corrections had granted early release to 360 individuals out of a prison population of over 27,000.<sup>43</sup>

Incarcerated individuals, unwilling to rely on the trickle of releases that have resulted from the federal directives and state corrections departments' plans when the conditions in prisons are so dangerous, have turned to the federal courts to challenge their continued confinement in the age of COVID-19.<sup>44</sup>

---

2020), <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx> (last visited Aug. 30, 2020) (indicating state corrections departments are implementing strategies to release people from jails and prisons) [perma.cc/29E6-CDUK].

42. See Emily Widra & Peter Wagner, *While Jails Drastically Cut Populations, State Prisons Have Released Almost No One*, PRISON POL'Y INITIATIVE (May 1, 2020), <https://www.prisonpolicy.org/blog/2020/05/01/jails-vs-prisons/> (last visited Aug. 16, 2020) (noting that state prisons across the country have released very few incarcerated individuals) [perma.cc/N69T-K923]. However, local jails, which generally house people pretrial or those serving sentences less than one year, have drastically reduced their populations in order to curtail the spread of COVID-19. See *id.* (showing that some local jails have reduced their population by up to 66%). The Prison Policy Initiative has calculated that many jails have “reduced the number of people in jail by 25% or more, recognizing that the constant churn of people and the impossibility of social distancing in jails make them inevitable hotbeds of viral transmission.” See also *Responses to COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, (Aug. 6, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Sept. 11, 2020) (last visited Aug. 16, 2020) (tracking which state and local governments are taking meaningful steps to protect incarcerated people) [perma.cc/9GVF-SK87].

43. See *Exclusive: VDOC Data on Prison Release and COVID-19 Response in Virginia*, ACLU VA., <https://acluva.org/en/COVID19PrisonData> (last visited Aug. 16, 2020) (providing data from the Virginia Department of Corrections on the number of people tested for COVID-19, and those reviewed for, approved, granted, and denied early release) [perma.cc/F5KY-GA3R]; see also VA. DEP'T. OF CORR., MONTHLY POPULATION SUMMARY MAY 2020 2 (2020), <https://vadoc.virginia.gov/media/1567/vadoc-monthly-offender-population-report-2020-05.pdf> (calculating that the number of incarcerated individuals in Virginia correctional facilities in May 2020—the last month for which statistics are available—was 27,871) [perma.cc/R9Z2-5MC7].

44. See de Vogue, *supra* note 19 (indicating the Supreme Court and courts across the country will see an increasing number of pandemic related disputes).

### III. Types of Petitions Requesting Release or Improved Conditions of Confinement

With the pandemic worsening and prison officials slow to grant relief, incarcerated individuals began to file suits in federal court against government officials to challenge their confinement.<sup>45</sup> Those suits have largely fallen into four categories, (1) compassionate release requests, filed under 18 U.S.C. § 3582(c)(1)(A);<sup>46</sup> (2) civil rights lawsuits filed under 42 U.S.C. § 1983;<sup>47</sup> (3) habeas petitions filed under 28 U.S.C. §§ 2254 and 2255;<sup>48</sup> and (4) habeas petitions filed under 28 U.S.C. § 2241.<sup>49</sup> These lawsuits, for the most part, have been unsuccessful as courts often dismiss them on procedural grounds.<sup>50</sup> Each statute has limitations that make filing a successful suit difficult.<sup>51</sup> Nonetheless, courts do have jurisdiction to consider many of these suits, especially those petitions brought under 28 U.S.C. § 2241.

---

45. See *Civil Rights Litigation Clearinghouse, Special Collection Covid-19 (novel coronavirus)*, U. MICH. L. SCH., <https://clearinghouse.net/results.php?searchSpecialCollection=62> (last visited Oct. 24, 2020) (collecting cases challenging the conditions posed by Covid-19) [perma.cc/3FSC-RZ7M].

46. See PISTOR, *supra* note 24, at 14 (discussing compassionate release).

47. See *Felder v. Casey*, 487 U.S. 131, 139 (1988) (“Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority.”).

48. See *infra* note 88 (explaining an incarcerated individual in federal custody can rely on 28 U.S.C. § 2255(a) to challenge a sentence imposed in violation of the Constitution and request the court to set aside or correct the sentence).

49. See Peter Hack, *The Road Less Traveled: Post Conviction Alternatives and The Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 180–81 (2003) (discussing the differences between post-conviction suits filed under § 2254, § 2255, and § 2241).

50. See *e.g.*, *Civil Rights Litigation Clearinghouse*, *supra* note 45 (compiling a list of Covid-19 cases and their resolutions).

51. See Merkl & Weinberger, *supra* note 21 (discussing the difficulties incarcerated individuals have in even getting their suits heard on the merits in federal court).

*A. Compassionate Release, 18 U.S.C. § 3582(c)*

The First Step Act, passed in December 2018, was a bipartisan criminal justice bill aimed at reducing the federal prison population.<sup>52</sup> One of its provisions allows for compassionate release for some incarcerated individuals.<sup>53</sup> The First Step Act was passed before COVID-19 swept the world, but the compassionate-release provision is, theoretically, an appropriate avenue for obtaining relief in the midst of the pandemic.<sup>54</sup>

A court is generally without jurisdiction to modify a sentence once it has been imposed.<sup>55</sup> However, the First Step Act permits a court to reduce a defendant's sentence if "extraordinary and compelling reasons warrant such a reduction."<sup>56</sup> In addition, a court must also consider whether "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," as well as a host of other factors, including the nature and circumstances of the offense and the kinds of sentences available.<sup>57</sup> However, a court can grant compassionate release only if a defendant exhausts all administrative remedies within the prison first.<sup>58</sup> This provision requires that a defendant request relief from prison officials first, before turning to the courts.<sup>59</sup>

---

52. See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019) ("The act was the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.").

53. *Id.* at 18.

54. See *id.* ("The amendments made by the act allow the court to reduce a prisoner's sentence under Section 3582(c)(1)(A) upon a petition from BOP . . .").

55. See *Dillon v. United States*, 560 U.S. 817, 819 (2010) ("A federal court generally 'may not modify a term of imprisonment once it has been imposed.'" (quoting 18 U.S.C. § 3582(c))).

56. 18 U.S.C. § 3582(c)(1)(A)(i).

57. *Id.*

58. See *id.* (requiring that a prisoner exhaust all administrative rights to appeal, stemming from the Bureau of Prisons' failure to file a motion on the prisoner's behalf, before a court may grant relief).

59. See *id.* ("[T]he defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of thirty days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier . . .").

COVID-19 has created unprecedented hardships for those incarcerated.<sup>60</sup> It would seem that if ever an “extraordinary and compelling reason[]” existed to grant relief, a worldwide pandemic would qualify.<sup>61</sup> However, most petitions for compassionate release filed in courts by incarcerated individuals are denied.<sup>62</sup> Often, the reason relied on by the court is the defendant’s failure to exhaust administrative remedies.<sup>63</sup>

For example, in *United States v. Rankins*,<sup>64</sup> Michael Rankins filed a motion for compassionate relief under 18 U.S.C. § 3582(c).<sup>65</sup> He is incarcerated at the Federal Correctional Institution in Terre Haute, Indiana and suffers from various chronic health conditions, including cardiovascular disease.<sup>66</sup> As required by statute, he requested relief from prison officials on two separate occasions.<sup>67</sup> The warden denied both requests.<sup>68</sup> The district court concluded that although Rankins had requested relief twice and been denied both times, he had failed to appeal those decisions within the prison system, and so had failed to exhaust his administrative remedies.<sup>69</sup> Accordingly, the court concluded that dismissal was appropriate without needing to reach the merits of Rankins’

---

60. See Davis, *supra* note 9 (reviewing the sanitation and crowding issues in prisons, which makes the facilities susceptible to Covid-19 outbreaks and unable to adequately respond to them).

61. 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

62. See Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> (last visited Oct. 24, 2020) (noting that of the 10,940 federal prisoners requesting compassionate release, more than 1,6000 have been released, most following suit in federal court) [perma.cc/U4AK-KWXD].

63. *Id.*

64. See No. 2:14-CR-3-FL-1, 2020 WL 2497952, at \*1 (W.D.N.C. May 14, 2020) (denying a prisoner’s motion for compassionate release under the First Step Act).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *id.* (finding that Rankins failed to exhaust all administrative remedies between the filing of his first compassionate release claim on November 10, 2019, which was denied two weeks later, and the filing of his second on March 26, 2020, which was denied on April 23).

claim.<sup>70</sup> Nonetheless, the court further opined that even if Rankins had exhausted his administrative remedies, he would not be entitled to relief because he had not shown that the prison in Terre Haute was suffering from a COVID-19 outbreak and even if it were, the warden's denial of relief should be given deference.<sup>71</sup> Accordingly, between the administrative requirements a defendant faces and deference courts grant to prison officials, petitions for compassionate release are most often denied.<sup>72</sup>

### B. Civil Rights Cases

In addition to requests for compassionate release, incarcerated individuals have also filed civil rights claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*.<sup>73</sup> Under a civil rights claim, prisoners can challenge the circumstances of their incarceration, but not the validity of their sentences or convictions.<sup>74</sup>

Courts have concluded that civil rights suits are an appropriate means by which state incarcerated individuals can

---

70. See *id.* (determining that the administrative exhaustion requirement was a *sine qua non* for a court to grant a prisoner compassionate release under 18 U.S.C. § 3582(c)).

71. See *id.* at \*32 (“[I]n the event that COVID-19 spreads to FCI-Terre Haute, the [Federal Bureau of Prisons] is better positioned to determine in the first instance whether [Rankins’] medical conditions and the spread of the virus justify compassionate release . . .”).

72. See Blankinger, *supra* note 62 (noting that the number of federal prisoners granted compassionate release was a fraction of those requesting relief).

73. See Preiser v. Rodriguez, 411 U.S. 475, 498 (1973) (confirming the right of state prisoners to bring federal civil rights to challenge their conditions of confinement); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (recognizing the right of those whose constitutional rights are infringed by federal officers to bring suit for redress in federal court).

74. See Preiser 411 U.S. at 499 (“[A] § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.”); see also Standifer v. Ledezma, 653 F.3d 1276, 1280 (10th Cir. 2011)

It is well-settled law that prisoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, must do so through civil rights lawsuits filed pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)—not through federal habeas proceedings.

challenge the conditions in prisons during the COVID-19 pandemic:

The Court notes that challenges to conditions of confinement, threats to safety or health based on inmate population density, exposure to the COVID-19 virus, lack of medical testing and medical staff, or unsanitary conditions are properly raised in a civil rights action pursuant to 42 U.S.C. § 1983.<sup>75</sup>

However, like claims for compassionate release, civil rights suits are subject to procedural limitations which make it difficult for incarcerated individuals to pursue such cases in certain circumstances.<sup>76</sup> Civil rights suits must comply with the Prison Litigation Reform Act (PLRA), which imposes an administrative exhaustion requirement on litigants before they can bring suit to challenge prison conditions in federal court.<sup>77</sup> This procedural gatekeeping is generally “mandatory,” but the PLRA does have a “built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not ‘available.’”<sup>78</sup> At this time, when COVID-19 is flaring uncontrollably in this country and within prison systems, courts should consider the PLRA’s exhaustion requirements as unavailable.<sup>79</sup> Prisoners are required to file grievances within the prison system in lengthy, often multi-step processes.<sup>80</sup> Such a system is not, functionally, “capable

---

75. *Fahr v. Arizona*, No. CV 20-08114-PCT-DGC(DMF), 2020 WL 3791535, at \*3 (D. Ariz. July 7, 2020); *see also* *Wilson v. Ponce*, No. CV204451MWFMRWX, 2020 WL 3053375, at \*9 (C.D. Cal. June 8, 2020) (noting in a case brought by federal prisoners that a challenge to conditions of confinement must generally be brought “pursuant to a civil rights statute, such as § 1983 or *Bivens*”).

76. *See* *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (noting, in a § 1983 case brought by a state prisoner, that “a court may not excuse a failure to exhaust” and must instead dismiss such actions).

77. *See* 42 U.S.C. § 1997e(a) (2018) (“No action shall be brought with respect to prison conditions under section 1938 of this title . . . by a prisoner . . . until such administrative remedies as are available are exhausted.”).

78. *See* *Ross*, 136 S. Ct. at 1858 (“Under § 1997e(a), the exhaustion requirement hinges on the ‘availab[ility]’ of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones.”).

79. *See* *Youngblood v. Williams*, No. 20-cv-00707, 2020 WL 4903904 (S.D. Ill. Aug. 20, 2020) (refusing to dismiss a suit brought by a prisoner raising *Bivens* and § 1983 claims challenging his confinement due to Covid-19 even though he had not exhausted his administrative remedies because the prisoner alleged that “the grievance process [was] unavailable”).

80. *See* 28 C.F.R. §§ 542.14–542.18 (2010) (outlining the necessary

of use” during a pandemic when time is of the essence as incarcerated individuals continue to get sick and die.<sup>81</sup> As Justice Sotomayor recently explained in a dissent to a denial to vacate a stay:

[I]f a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like COVID-19, the procedures may be ‘unavailable’ to meet the plaintiff’s purposes, much in the way they would be if prison officials ignored the grievances entirely.<sup>82</sup>

Another inherent problem with bringing § 1983 and *Bivens* suits highlighting the safety and health concerns posed by COVID-19 in prison, is the remedy available. The remedy that a civil rights suit can afford usually involves a change to the prison environment but does not allow for early release.<sup>83</sup> Recognizing the limited ability that prisons have to impose social distancing requirements and the limited access to hygiene and disinfectant products, and healthcare, incarcerated individuals are, for the most part, requesting early release, home confinement, or confinement to a halfway house.<sup>84</sup> As a result, courts have dismissed § 1983 suits, concluding that such suits should be brought as habeas petitions.<sup>85</sup> For instance in a recent case, the District Court for the Southern District of Illinois held that a proposed class action § 1983 complaint filed by incarcerated

---

procedures for prisoners wishing to file a complaint within the federal Administrative Remedy Program).

81. See *Ross*, 136 S. Ct. at 1859 (noting that when the administrative requirements “operate[] as a simple dead end,” such that the procedures are not “capable of use for the pertinent purpose,” the exhaustion requirement may be waived).

82. *Valentine v. Collier*, 140 S. Ct. 1598, 1600–01 (2020).

83. See *Seth v. McDonough*, No. 8:20-cv-01028-PX, 2020 WL 2571168, at \*8 (D. Md. May 21, 2020) (concluding that prisoners challenging their conditions of confinement during Covid-19 had correctly brought an action under § 1983 because the relief sought focused on the prison’s failure to provide protective gear, housing and medical care, which the court noted could be remedied without resorting to release).

84. See *Bacon v. Core Civic*, No.: 2:20-cv-00914-JAD-VCF, 2020 WL 3100827, at \*6 (D. Nev. June 10, 2020) (dismissing a prisoner’s *Bivens* petition challenging Covid-related conditions because the remedies sought were unavailable, including release to home confinement or a halfway house).

85. See *id.*



individuals in federal prison, which sought release due to health concerns resulting from COVID-19, had not sought a remedy available in a civil rights suit and that:

A petition for a writ of habeas corpus is the proper route if a prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation.<sup>86</sup>

*C. Habeas Petitions filed under 28 U.S.C. § 2254 and § 2255*

While civil rights suits brought under 42 U.S.C. § 1983 and *Bivens* arguably do not allow for the types of remedies necessary to combat COVID-19 in prisons, the alternative of bringing a traditional habeas suit under either 28 U.S.C. § 2254 or § 2255 is also fraught with problems.<sup>87</sup> These statutes allow a court to vacate or set aside an incarcerated individual's sentence if it was imposed in violation of the Constitution or federal law.<sup>88</sup>

---

86. *Parmeley v. Trump*, No. 20-cv-00370-JPG, 2020 U.S. Dist. LEXIS.73246, at \*2 (S.D. Ill. Apr. 27, 2020)

87. *See, e.g., Tripathy v. Schneider*, No. 20-CV-6366-FPG, 2020 WL 4043042 (W.D.N.Y. July 17, 2020) (dismissing a § 2254 suit brought by a petitioner challenging his confinement due to Covid-19 for failing to exhaust administrative remedies).

88. An incarcerated individual in federal custody can rely on 28 U.S.C. § 2255(a), which provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (2018).

An incarcerated individual in state custody, after exhausting all remedies in state court, can file suit in federal court challenging a sentence under 28 U.S.C. § 2254, which provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws

Incarcerated individuals have filed habeas petitions claiming that their sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment because of the health risks associated with COVID-19, and exacerbated by the prison setting.<sup>89</sup> In other words, the way that their sentences are being executed, not the imposition of the sentence in the first instance, is unconstitutional. These suits, largely, have been unsuccessful.<sup>90</sup>

Incarcerated individuals in state custody are also subject to strict statutory exhaustion requirements.<sup>91</sup> A federal court cannot consider a petition from an individual in state custody unless the prisoner has sought review by the state courts first.<sup>92</sup> This multi-layer review can take years to conclude, which makes it particularly ineffective at a time when COVID-19 is sweeping through the prison systems at an alarming rate.<sup>93</sup> As a result, courts have dismissed many petitions from state prisoners challenging their confinement as unconstitutional because of the harm they face due to COVID-19, on exhaustion grounds.<sup>94</sup>

---

or treaties of the United States.

28 U.S.C. § 2254(a) (2018).

89. See *Tripathy*, 2020 WL 4043042 (“Petitioner primarily asserts that the ongoing COVID-19 pandemic has rendered the conditions of his confinement unconstitutional under the Eighth Amendment of the United States Constitution.”).

90. See, e.g., *Wilson*, 2020 WL 3053375, at \*10 (noting that “several courts” have concluded that petitioners challenging their circumstances in prison due to Covid-19 “were not raising cognizable habeas claims because their claims were ultimately premised on the conditions of confinement” and that the nature of the relief requested was not available under either §2254 or § 2255).

91. See 28 U.S.C. § 2254(c) (2018) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.”).

92. *Id.*

93. See, e.g., *Vance v. People*, 408 F. Supp. 3d 288, 289 (W.D.N.Y. 2018) (discussing the case's procedural posture in that petitioner was originally sentenced in 2012, with the district court ruling on his § 2254 motion in 2018).

94. *Fahr v. Arizona*, No. CV 20-08114-PCT-DGC-DMF, 2020 WL 3791535, at \*2–3 (D. Ariz. July 7, 2020) (dismissing a § 2254 petition alleging claims related to COVID-19 for failure to exhaust the issues first in state court); *Williams v. Reiser*, 17-CV-1040, (JLS) (HBS), 2020 WL 3097181, at \*2–3 (W.D.N.Y. June 11, 2020) (same); *Griffin v. Cook*, No. 3:20-cv-589 (JAM), 2020 WL 2735886, at \*5 (D. Conn. May 26, 2020) (noting that dismissal on exhaustion grounds was “consistent with the rulings of many federal courts nationwide that have

While incarcerated individuals in federal custody do not have the same exhaustion requirement as those in state custody before challenging their sentences as unconstitutional in federal court, petitions from federal prisoners are no more likely to be granted than those filed by state prisoners.<sup>95</sup> There have been relatively few petitions filed under 28 U.S.C. § 2255, raising COVID-19-related challenges, as many federally incarcerated individuals have focused on obtaining compassionate release under 18 U.S.C. § 3582(c).<sup>96</sup> Moreover, § 2255 has a strict one-year statute of limitations that could work to bar relief for incarcerated individuals whose sentences became final more than one year before the pandemic began.<sup>97</sup> As one court explained regarding a petition to obtain COVID-19 relief under a § 2255 petition, “any motion pursuant to § 2255 would appear to be untimely.”<sup>98</sup>

---

addressed similar petitions by sentenced state prisoners in response to the COVID-19 pandemic”). However, state prisoners are turning to the federal courts for a reason, presumably because state courts, too, are refusing to grant habeas petitions.

95. See 28 U.S.C. § 2255(e) (2018) (“An application for a writ of habeas corpus . . . shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief . . .”).

96. See Fern L. Kletter, Annotation, *COVID-19 Related Litigation: Effect of Pandemic on Release from Federal Custody*, 54 A.L.R. Fed. 3d Art. 1 (2020) (discussing cases in which federal detainees have petitioned for release from custody due to the COVID-19 pandemic).

97. 28 U.S.C. § 2255(f) provides the following very strict statute of limitations:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f) (2018).

98. *United States v. Matera*, 02-CR-743-6 (JMF), 2020 WL 1700250, at \*1

More broadly, many courts have rejected habeas claims from both state and federal prisoners challenging their continued confinement during the pandemic, concluding that these petitions challenge conditions of confinement in prison, and are not cognizable under those habeas statutes.<sup>99</sup> The Supreme Court has explained that habeas petitions usually challenge, “the very fact or duration of [an incarcerated individual’s] physical imprisonment, and the relief that [the petitioner] seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment[.]”<sup>100</sup> While recognizing that habeas is traditionally used as a means to challenge the imposition of an unconstitutional sentence, the Supreme Court has also suggested, without deciding, that habeas could be used to challenge prison conditions.<sup>101</sup> “When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal.”<sup>102</sup>

There is a circuit split on whether habeas claims can raise challenges to conditions of confinement, with most circuits concluding that they cannot.<sup>103</sup> And courts in those jurisdictions have dismissed cases filed under § 2254 and § 2255, concluding that, at their core, these petitions challenge prison conditions,

---

(S.D.N.Y. Apr. 8, 2020).

99. See, e.g., *Rodriguez v. Ratledge*, 714 F. App’x 261, 266 (4th Cir. 2017) (“[C]ourts have generally held that a § 1983 suit or a *Bivens* action is the appropriate means of challenging conditions of confinement, whereas § 2241 petitions are not.”).

100. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

101. See *id.* at 499 (“This is not to say that habeas corpus may not also be available to challenge such prison conditions.” (citing *Johnson v. Avery*, 393 U.S. 483 (1969))).

102. *Id.*

103. See *Wilborn v. Mansukhani*, 795 F. App’x 157, 163 (4th Cir. 2019) (compiling cases); *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, 469–70 (8th Cir. 2014) (same), *Cardona v. Bledsoe*, 681 F.3d 533, 637 (3d Cir. 2012) (same), with *Aamer v. Obama*, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that it is appropriate for prisoners to challenge the terms of their confinement through a federal habeas petition), *Jiminian v. Nash*, 245 F.3d 144, 146–47 (2d Cir. 2001) (providing that prisoners may challenge “prison disciplinary actions, prison transfers, type of detention and prison conditions” under § 2241), and *Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1997) (allowing prisoners to bring conditions-of-confinement claims through § 2241).

which are not cognizable under habeas: “As the Defendant is challenging the conditions of his confinement—namely, the potential spread of COVID-19—§ 2241 and § 2255 are not the appropriate vehicles for his petition.”<sup>104</sup>

Accordingly, many prisoners find themselves in a catch-22: Compassionate release claims are often denied due to exhaustion requirements; civil rights suits do not allow for the necessary remedy of release; and habeas suits under either § 2254 or § 2255 may not allow for a challenge to the conditions within prisons.<sup>105</sup> However, there is an additional statute under which prisoners have brought challenges to their prison circumstances, and which has the most flexibility to address them, 28 U.S.C. § 2241.

#### *D. 28 U.S.C. § 2241*

Incarcerated individuals have also asserted habeas claims under 28 U.S.C. § 2241, a separate habeas statute within the federal statutory scheme that allows for relief for unconstitutional sentences.<sup>106</sup> The general habeas provision under 28 U.S.C. § 2241, which is not explicitly limited to exclusive use by either state or federal prisoners, provides for relief when an incarcerated individual “is in custody in violation of the Constitution or laws or treaties of the United States.”<sup>107</sup> Section 2241 allows a prisoner to challenge the constitutionality of his sentence, like § 2254 and § 2255 do, but it differs from those statutes in important ways.<sup>108</sup> Section 2241 is a fallback measure, when other forms of habeas are unavailable.<sup>109</sup> It explicitly allows a remedy for federal prisoners

---

104. *United States v. Johnson*, Crim. Action No. CR RDB-14-0441, 2020 WL 1663360, at \*5 (D. Md. Apr. 3, 2020).

105. *See* cases cited *supra* notes 73, 84, 103 and accompanying text (representing the various issues prisoners face when bringing a compassionate release claim, a civil rights claim, or a federal habeas petition).

106. *See Torres v. Milusnic*, Case No.: CV 20-4450-CBM-PVC(x), 2020 WL 4197285, at \*23–24 (C.D. Cal. July 14, 2020) (granting a preliminary injunction and provisional class certification in a putative class action brought by federal prisoners seeking habeas and injunctive relief for alleged unconstitutional conditions of confinement brought on by a risk of severe illness or death from COVID-19).

107. 28 U.S.C. § 2241(c)(3) (2018).

108. *See generally* 28 U.S.C. §§ 2241, 2254, 2255 (2018).

109. *Id.*

in situations where § 2255 is “inadequate or ineffective” to test the legality of confinement.<sup>110</sup> Some courts have allowed state prisoners, too, to bring habeas claims under § 2241 challenging the executions of their sentences.<sup>111</sup>

Because prisoners have recourse under § 2254 and § 2255, courts allow petitions to proceed under § 2241 in limited circumstances.<sup>112</sup> Nonetheless, the current pandemic has created a situation in which § 2241 is the most appropriate vehicle to challenge confinement.<sup>113</sup> This is true for a number of reasons. First, as discussed above, habeas suits can be used to challenge current conditions in prisons during the pandemic.<sup>114</sup> The Supreme Court has suggested that habeas can be used to remedy conditions of confinement that are unconstitutional, but lower courts have split over whether to allow such suits to proceed.<sup>115</sup>

---

110. 28 U.S.C. § 2255(e) (2018) provides, in total:

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e) (2018).

111. See *Davis v. Roberts*, 425 F.3d 830, 833 (10th Cir. 2005) (noting that a state prisoner’s “challenge to the execution of a sentence should be brought under 28 U.S.C. § 2241); *Denbow v. Me. Dep’t of Corr.*, No. 1:20-cv-00175-JAW, 2020 WL 4004795, at \*4 (D. Me. July 15, 2020) (allowing a petition by state prisoners challenging their continued confinement during COVID-19 to proceed in federal court under § 2241).

112. See, e.g., *United States v. Harris*, 12 F.3d 735, 736 (7th Cir. 1994) (concluding § 2241 was the appropriate means by which to challenge the prison disciplinary action of segregation); *Ilina v. Zickenfoose*, 591 F. Supp. 2d 145, 150 (D. Conn. 2008) (concluding that 28 U.S.C. § 2241 is the proper vehicle for a challenge to inadequate medical care as a condition of confinement).

113. See, e.g., *Malam v. Adducci*, 452 F. Supp. 3d 643, 649 (E.D. Mich. 2020) (concluding that § 2241 was a proper avenue for prisoners to seek ““immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of [the prisoner’s] her case”).

114. See, e.g., *Davis*, 425 F.3d at 833 (10th Cir. 2005) (noting that prisoners can challenge the execution of their sentence).

115. See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (“[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment,

Nonetheless, vulnerable incarcerated individuals who are left without the ability to properly social distance or adequate access to sanitation products are challenging the “very fact” of their imprisonment; there are no adjustments that prison officials could make to ensure the safety of prisoners who are housed in densely populated and compact facilities.<sup>116</sup>

But whereas the traditional habeas statutes are often unavailable due to procedural and exhaustion stumbling blocks, § 2241 allows for more expansive filings.<sup>117</sup> It does not have statutorily imposed timeliness restrictions, successive-petition limitations, or exhaustion requirements.<sup>118</sup> While courts impose procedural restrictions for § 2241 petitions, they are “judicially crafted instrument[s] which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement.”<sup>119</sup> Courts have the power to waive judicially-created procedural requirements, and do.<sup>120</sup> While § 2241 petitions should not be used to circumvent the procedural requirements that § 2254 and § 2255 impose, there is no more pressing time to recognize that these statutes create insurmountable barriers, especially during the pandemic, and are, therefore, “inadequate [and] ineffective” means of bringing habeas

---

and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.”); *see also supra* note 103 (discussing the circuit split over whether condition of confinement cases are cognizable through habeas petitions).

116. *See Preiser*, 411 U.S. at 499 (explaining the distinction between challenging the conditions and the very fact of confinement).

117. *Compare* 28 U.S.C. § 2254(b)(1)(A) (2018) (requiring an applicant exhaust state court remedies before the court grants a writ of habeas corpus), *with* 28 U.S.C. § 2241 (2018) (permitting the grant of a writ without exhaustion).

118. *See Cradle v. U.S. ex rel. Miner*, 290 F.3d 536, 538 (3d Cir. 2002) (noting that § 2241 does not have a “one-year statute of limitations” or “stringent gatekeeping requirements”); *see also, Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350, at \*18 (D. Conn. May 12, 2020) (“Exhaustion in the context of Section 2241 habeas petitions is a judge-made rule subject to judge-made exceptions.”).

119. *See Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (describing the exhaustion doctrine).

120. *See United Farm Workers of Amer. v. Ariz. Agric. Emp’t. Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982) (noting that procedural requirements may be waived when they are “inadequate, inefficacious, or futile, [or] where pursuit of them would irreparably injure the plaintiff . . .”).

claims.<sup>121</sup> Because § 2241 petitions impose fewer procedural hurdles and allow for release from prison as a remedy, these suits theoretically could provide incarcerated individuals with a more accessible avenue for relief.<sup>122</sup>

#### *IV. The Substantive Eighth Amendment Claim of Cruel and Unusual Punishment*

Thus far, this article has considered the various statutory bases that incarcerated individuals have used in order to open the courthouse doors.<sup>123</sup> The challenges of getting past the motion to dismiss phase of proceedings are daunting, without even considering the prisoners' substantive claims of constitutional violations.<sup>124</sup> Although prisoners have highlighted the many life-threatening health risks they face, the limited number of federal courts reviewing petitions on the merits are often reluctant to find in favor of the prisoners on their substantive claims.<sup>125</sup>

In considering a "cruel and unusual punishment claim," under the Eighth Amendment, and whether an incarcerated individual's right to humane conditions of confinement has been violated, a court must apply a two-part test.<sup>126</sup> First, "the alleged deprivation

---

121. See generally 28 U.S.C. § 2255(e) (2018).

122. See, e.g., *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) (concluding that prisoners challenging their incarceration during Covid-19 could bring suit under §2241 because "where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement"); *Denbow v. Me. Dep't of Corr.*, No. 1:20-cv-00175-JAW, 2020 WL 4004795, at \*4 (D. Me. July 15, 2020) (concluding that the prisoners properly brought suit challenging "unconstitutional prison conditions during a deadly pandemic" under 28 U.S.C. § 2241).

123. See *supra* sections III.0, III.0, III.0. (discussing 28 U.S.C. §§ 2241, 2254, 2255 (2020)).

124. See *supra* sections III.0, III.0. (discussing compassionate release and the Civil Rights Cases).

125. See, e.g., *Wilson*, 961 F.3d at 833 (6th Cir. 2020) (concluding that the petitioners correctly brought suit under § 2241, but could not establish that they were entitled to relief on their Eighth Amendment claim because they were not likely to establish that the prison was deliberately indifferent to their medical needs).

126. See *id.* at 839–40 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).



must be, objectively, sufficiently serious.”<sup>127</sup> Second, prison officials must have acted with a “sufficiently culpable state of mind,” and “deliberate indifference to inmate health or safety.”<sup>128</sup>

The objective component of the test requires that prisoners establish that they are being incarcerated in conditions that pose “a substantial risk of serious harm.”<sup>129</sup> This objective prong cannot seriously be contested.<sup>130</sup> With over 95,000 positive COVID-19 cases in prisons in the United States and approximately 847 resulting deaths, this pandemic poses a very real and terrifying risk of serious harm to vulnerable populations.<sup>131</sup> I am not suggesting that the nature of COVID-19 would allow every incarcerated individual to make a legitimate claim for relief. But those who are older or have serious health problems are at increased risk of dying from this disease—a fact that is well documented<sup>132</sup>—which satisfies the objective prong of the analysis.<sup>133</sup>

Subjectively, incarcerated individuals must establish that prison officials knew “that inmates face[d] a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it.”<sup>134</sup> Prison officials all know of the health crisis brought on by COVID-19.<sup>135</sup> As discussed in the beginning of this article, following Attorney General Barr’s directives and the CARE Act, federal prison officials started reviewing whether incarcerated individuals should serve the

127. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

128. *Id.*

129. *Id.*

130. *See Malam*, 452 F. Supp. 3d at 659–60 (granting a temporary restraining order and ordering release of an incarcerated individual after concluding that the objective prong of the test was satisfied because “[t]he ever-growing number of COVID-19 outbreaks in prisons and detention facilities, despite a range of precautionary measures, demonstrates that the risk of a COVID-19 outbreak in Respondent’s facility is significant”).

131. *See supra* notes 11–17 and accompanying text.

132. *People Who are at Increased Risk for Severe Illness*, C.D.C., <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html> (last updated Sept. 11, 2020) (last visited August 25, 2020) (noting that people who are have an increased risk of severe illness are older adults and people with underlying medical conditions) [perma.cc/32AT-MB8C].

133. *See Farmer*, 511 U.S. at 834 (describing the two-prong analysis).

134. *Id.* at 847.

135. *Supra* notes 11–17 and accompanying text.

remainder of their sentences outside of prison.<sup>136</sup> In addition, state prison officials, following directives from governors and prison boards, have made similar determinations.<sup>137</sup> In addition, prisons have attempted to impose health measures to limit the spread of COVID-19 within facilities, with limited success due to the lack of space, cleaning, and hygiene products.<sup>138</sup> Some courts, relying on the measures that prisons are taking or attempting to take, have concluded that prisoners cannot establish deliberate indifference: “Here, while the harm imposed by COVID-19 on inmates at [the prison] ultimately [was] not averted, the BOP [] responded reasonably to the risk and therefore has not been deliberately indifferent to the inmates’ Eighth Amendment rights.”<sup>139</sup>

This analysis is fundamentally flawed.<sup>140</sup> The response by prison officials in both state and federal facilities has not been reasonable.<sup>141</sup> Under the CARES Act, federal prison officials have the authority to place “all at-risk” prisoners on home confinement and Attorney General Barr has directed them to do so.<sup>142</sup> State prison officials, through directives from governors and state legislation, also have been given wide latitude to release

---

136. *Supra* notes 37–39 and accompanying text.

137. *Supra* notes 41–43.

138. *See, e.g., FAQs for Correctional and Detention Facilities*, C.D.C. <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html> (last updated Sept. 11, 2020) (last visited August 25, 2020) (recommending that prisons ensure adequate hygiene, cleaning, and medical supplies, systems to safely house and transfer prisoners, and creating testing plans, among others) [perma.cc/LF4Y-HUFZ]; Keri Blakinger and Beth Schwartzapfel, *Soap and Sanitizer Can Keep Coronavirus at Bay, But Many Prisoners Can’t Get Them*, USA TODAY (Mar. 9, 2020), <https://www.usatoday.com/story/news/investigations/2020/03/07/prison-policies-inmates-best-coronavirus-practices/4978412002/> (last visited August 25, 2020) (describing that many prisons lack the cleaning supplies to comply with CDC guidelines and that some supplies, such as hand sanitizer, are contraband) [perma.cc/896V-M6ZT].

139. *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (internal quotation marks omitted).

140. *Farmer v. Brennan*, 511 U.S. 825, 827 (1994) (describing the objective and subjective requirements of analysis).

141. *See* Widra & Wagner, *supra* note 42 (providing data that state prisons reduced populations by up to 7.9%, except for Vermont that has a combined system for prisons and jails).

142. Memorandum from William P. Barr, *supra* note 37.

vulnerable prisoners.<sup>143</sup> But neither federal nor state prison officials have embraced this authority, and relatively few prisoners have been released.<sup>144</sup> As a result, as of June 2020, the five largest known clusters of the virus have occurred inside correctional facilities<sup>145</sup> and the number of COVID-19 cases in correctional facilities was 5.5 times higher than in the general public<sup>146</sup>. Finally, there have been approximately 847 COVID-19-related deaths in state and federal prisons as of August 11, 2020.<sup>147</sup> The conditions in prisons are becoming only more dire.<sup>148</sup> Prison officials have refused to grant compassionate release even though they have the authority to do so, resulting in wide-spread positive COVID-19 rates, sickness and death in prisons: That should be sufficient evidence for prisoners to establish a disregard for serious risks.<sup>149</sup> Courts should take this opportunity to recognize the unconstitutional ramifications of this pandemic and to allow the power of habeas claims to rectify them.

## V. Conclusion

---

143. See *Responses to COVID-19 Pandemic*, *supra* note 42 (listing the different measures by governors and state legislatures, such as a directive by the Arkansas governor to consider early release).

144. See Widra & Wagner, *supra* note 42 (describing how few prisoners state prisons have released).

145. Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. TIMES (Jun. 16, 2020), <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>. (last visited August 25, 2020) [perma.cc/2H2X-PZDA].

146. Brendan Saloner, Kalind Parish & Julie A. Ward, *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA NETWORK (Jul. 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249?resultClick=1>. (last visited Nov. 10, 2020) [perma.cc/XX6Q-725A].

147. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (Sept. 18, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Nov. 10, 2020) [perma.cc/FMW7-N3SJ].

148. See *id.* (tracking increases in cases and deaths from coronavirus in state and federal prisons).

149. See *Banks v. Booth*, 459 F. Supp. 3d 143, 158 (D.D.C. 2020) (concluding prisoners established a likelihood of success in showing deliberate indifference where they provided evidence the defendants “are aware of the risk that COVID-19 poses to [prisoners’] health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus”).

Philip Hill, incarcerated in federal prison, recognized that serving time in a correctional facility during the COVID-19 pandemic could be tantamount to a death sentence.<sup>150</sup> This is especially true for those who are older or have underlying health issues.<sup>151</sup> Federal courts have the jurisdiction to hear such cases and can most readily reach the merits of such claims when they are brought pursuant to 28 U.S.C. § 2241.<sup>152</sup> It is a constitutional violation to subject especially vulnerable incarcerated individuals to inhumane conditions of confinement.<sup>153</sup> The current health crisis in prisons is both objectively serious and being met with deliberate indifference from prison officials.<sup>154</sup>

As Justice Kennedy recognized, incarcerated individuals are easy to forget: “Prisoners are shut away—out of sight, out of mind.”<sup>155</sup> But now, prisoners subjected to COVID-19 are dying.<sup>156</sup> Courts have an obligation to right unconstitutional wrongs, and the current situation in prisons throughout the country is both cruel and unusual.<sup>157</sup> Justice Sotomayor has admonished that “a

---

150. See *Inmates Share What Life is Like Inside Prison During the Coronavirus Pandemic*, *supra* note 1 (describing the conditions of confinement where prisoners only get a few minutes of fresh air each day).

151. See, e.g., Massoglia & Remster, *supra* note 29 (concluding that incarcerated and formerly incarcerated people have an elevated risk of a host of chronic health conditions and a higher mortality rate than nonincarcerated people).

152. See, e.g., *Denbow v. Me. Dep’t of Corr.*, No. 1:20-cv-00175-JAW, 2020 WL 4004795, at \*4 (D. Me. July 15, 2020) (explaining that the petitioner’s claims were most appropriately brought under a § 2241 habeas petition).

153. See *supra* Part 0 (discussing substantive Eighth Amendment claims related to COVID-19).

154. *Torres v. Milusnic*, No. CV 20-4450-CBM-PVC(x), 2020 WL 4197285, at \*18 (C.D. Cal. July 14, 2020) (concluding that incarcerated individuals had established a likelihood of success on their Eighth Amendment claim in a preliminary injunction proceeding based on the warden’s failure to take reasonable measures to ensure their safety during the pandemic).

155. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

156. See *Saloner, Parish & Ward*, *supra* note 146 (tracking incidences of and deaths from coronavirus in state and federal prisons); see also *Williams, Seline & Griesbach*, *supra* note 145 (noting that between mid-May 2020 and June 30, 2020 that prison deaths tied to coronavirus had risen by 73%); see also THE MARSHALL PROJECT, *supra* note 11 (displaying data about COVID-19 effects on incarcerated individuals in both state and federal prisons).

157. See *Parish & Ward*, *supra* note 146 (tracking deaths from coronavirus in state and federal prisons).

society's worth can be judged by taking stock of its prisons.<sup>158</sup> That is all the truer in this pandemic . . . ."<sup>159</sup> It is up to courts to stand up for the rights of those most marginalized in our society—the sick, the elderly, the imprisoned—and provide much-needed relief.<sup>160</sup>

---

158. *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020).

159. *Id.*

160. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (“The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and . . . the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”) (internal citations omitted).