

April 2012

Release as Remedy for Excessive Punishment

Alexander A. Reinert

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 Wm. & Mary L. Rev. 1575 (2012), <https://scholarship.law.wm.edu/wmlr/vol53/iss5/4>

Copyright c 2012 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

RELEASE AS REMEDY FOR EXCESSIVE PUNISHMENT

ALEXANDER A. REINERT*

ABSTRACT

Although the Eighth Amendment's prohibition on "cruel and unusual" punishment means different things in different contexts, it plainly forecloses state and federal actors from choosing ex ante to impose a punishment that is either disproportionate or inconsistent with minimum standards of decency. In other words, the Eighth Amendment mandates that no punishment be imposed if the only other choice on the table is an unconstitutional punishment. Although this principle can be gleaned from the disparate strands of Eighth Amendment jurisprudence, its remedial consequence has not been fully implemented. In this Article, I propose that providing a remedy of release from custody, or a reduction in sentence, for certain kinds of Eighth Amendment violations is the best way to make fully operational this Eighth Amendment principle.

Put simply, the problem is this: there are three different remedial schemes for an Eighth Amendment violation, based on both the type of Eighth Amendment violation challenged and the timing of the violation. When a prisoner challenges a sentence prior to its imposition through proportionality analysis, courts have the power to strike the sentence down and order the release of an offender. When a prisoner challenges conditions of confinement that are ongoing in nature, the court has the power to order the cessation of those conditions or, in extreme cases, to order the release of prisoners. But when a prisoner challenges the infliction of past punishment, the prisoner may obtain only monetary damages.

* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. E-mail: areinert@yu.edu. I owe thanks to Richard Bierschbach, John Bronsteen, Brett Frischmann, Betsy Ginsberg, Kyron Huigens, Adam Kolber, Kevin Lapp, Douglas Laycock, Dan Markel, Jonathan Masur, Max Minzner, Doug Rendleman, Jessica Roth, Tony Sebok, Giovanna Shay, Ekow Yankah, and the Cardozo School of Law Junior Faculty Forum, among others, for thoughtful suggestions regarding the substance of this Article.

This Article argues that if discrete instances of abuse are considered punishment and the Eighth Amendment prohibits the imposition of disproportionate or inhumane punishment, then there is no logical or doctrinal reason to limit the remedy for past violations to damages only. Some punishments, even if inflicted on only one occasion, can be so horrific so as to themselves amount to unconstitutional punishment. To continue to incarcerate an offender in that instance is to subject the prisoner to a total amount of punishment that is unconstitutional. When the State has no legitimate authority to impose additional punishment on the prisoner, the remedy of release, or a commensurate reduction in total length of imprisonment, should be considered.

TABLE OF CONTENTS

INTRODUCTION	1578
I. REVIEW OF CURRENT EIGHTH AMENDMENT	
DOCTRINE	1584
<i>A. Early Sentencing Jurisprudence</i>	1584
<i>B. Modern Sentencing Jurisprudence</i>	1587
<i>C. Remedies for Sentencing Challenges</i>	1593
<i>D. Conditions of Confinement Litigation</i>	1595
II. REMEDIAL CONSEQUENCES OF CURRENT EIGHTH AMENDMENT DOCTRINE	1602
III. RELEASE AS REMEDY THROUGH THE LENS OF PUNISHMENT PHILOSOPHY	1608
<i>A. Conditions of Confinement as "Punishment"</i>	1609
<i>B. Abusive Conditions as Unjust Punishment</i>	1611
<i>C. The "Subjectivist" Debate as Applied to Abusive Conditions</i>	1614
<i>D. Ramifications of Treating Abusive Conditions as Unjust Punishment</i>	1621
IV. EFFECTUATING THE REMEDY OF RELEASE	1622
<i>A. Accounting for the Law of Remedies</i>	1623
<i>B. The Commensurability Problem</i>	1628
<i>C. Practical Considerations</i>	1631
CONCLUSION	1637

INTRODUCTION

The Eighth Amendment prohibits the infliction of “cruel and unusual punishment.”¹ Unsurprisingly, the term means different things in different contexts. Thus, for challenges to conditions experienced within prison—a range of cases that encompasses claims such as overcrowding, excessive use of force, and failure to provide adequate medical care—a prisoner must show that a particular prison official acted with a sufficiently culpable state of mind to deprive the prisoner of an objectively serious need.² If an official has acted with that state of mind, he is thought to have violated minimum standards of civilized treatment.³ But, for challenges to the imposition of criminal sentences, courts conduct a loose proportionality analysis that compares the severity of the sentence with the seriousness of the criminal offense of incarceration.⁴ In both sets of cases, although courts purport to review a “punishment” for its conformity with the Eighth Amendment, different standards are applied to reach an ultimate resolution. I have argued before that there are good reasons to question whether proportionality and conditions of confinement doctrine should be separate strands of analysis as to substantive Eighth Amendment doctrine.⁵ Here, I address a difficult remedial question: whether there should be a stark difference in the available remedies based on the timing and nature of each Eighth Amendment violation.

Take prison rape as an example. It is estimated that 20 percent of prisoners serving life sentences will be sexually assaulted in prison, some by other prisoners and some by staff.⁶ Despite the common-sense intuition that rape in prison is not meant to be part of an offender’s sentence, for many offenders the reality is far from

1. U.S. CONST. amend. VIII.

2. See *infra* text accompanying notes 82-84, 88; *infra* note 100 and accompanying text.

3. See *infra* text accompanying note 88.

4. See *infra* note 58 and accompanying text.

5. See Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009).

6. See Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 125-26 (2007); see also *Chao v. Ballista*, 630 F. Supp. 2d 170, 178 (D. Mass. 2009) (commenting on the widespread awareness of the problem of sexual assault by staff and other prisoners).

ideal. Similarly, individual cases, independent studies, and anecdotal reports are replete with accounts of a range of inhumane treatment—staff beatings, failure to provide medical or mental health care, indifference, or worse, to the daily threat of violence from other offenders—suffered by prisoners as a result of staff misconduct and supervisory malfeasance.⁷ Most challenges to such treatment, however, recognize only the possibility of a damages remedy as compensation for unconstitutional treatment. The remedy of release from custody is a potential remedy only if the State proposes to inflict such punishment in the future through a sentencing proceeding or through ongoing policies, practices, or customs.⁸ This Article argues that, contrary to current practice, offenders should be able to pursue the remedy of release from custody, or a reduction in overall length of sentence, after they have been subjected to abusive treatment.

Under current Eighth Amendment doctrine, such a result would appear to be radical but is, in fact, consistent with basic principles present in discrete strands of Eighth Amendment analysis. Thus, under Eighth Amendment proportionality doctrine, which governs statutorily enacted punishment schemes *before* they are carried out, there would be no room for a sentencing regime that proposed punishing convicted prisoners through, say, sexual assault. Any state that intended to pursue such a punishment regime without

7. Courts, legislators, and others have recognized the problem of sexual assault in prison. *See, e.g.*, Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972 (making findings regarding the problem of sexual abuse in prison); *Daskalea v. District of Columbia*, 227 F.3d 433, 440 (D.C. Cir. 2000) (affirming prisoner's Eighth Amendment claim regarding sexual assault); ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 2 (rev. Apr. 9, 2008), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf>; HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 70 (2001). But many other deleterious conditions of confinement have been documented through litigation and other avenues. *See, e.g.*, *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2407404, at *3 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (making findings of fact regarding unconstitutional conditions of confinement); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887-89 & nn.18-23 (2009) (discussing chronic overcrowding, threats to health and physical well-being, and other recurring problems in prison conditions); Arnold Schwarzenegger, Governor of Cal., Prison Overcrowding State of Emergency Proclamation (Oct. 4, 2006), *available at* <http://gov.ca.gov/news.php?id=4278>.

8. *See infra* Part IV.A.

compromise would be forced to abandon it or forfeit the ability to punish entirely. Eighth Amendment conditions of confinement doctrine, which regulates systemic and *ongoing* conditions of confinement, recognizes that a prison system that systematically exposes prisoners to a high risk of sexual assault from guards or other prisoners must be remedied through injunctive relief, including prisoner release in some cases.⁹ Just as with sentencing challenges, if a state chose to continue to expose prisoners to a high risk of future sexual abuse, it would do so at the risk of losing its ability to punish entirely—at least for a subset of offenders. Even sentencing judges have recognized, albeit not explicitly on constitutional grounds, that criminal defendants who experience extremely harsh conditions of confinement—including sexual abuse—while awaiting sentence should not be sentenced as harshly as prisoners who face typical conditions of confinement.¹⁰ In other words, if the judge knows at the moment of sentencing that a prisoner already has experienced abuse at the hands of the State, it will be translated into an earlier release.¹¹ All of these different areas of jurisprudence establish that a government may not, *ex ante*, affirmatively choose to impose an unconstitutional punishment on an offender. If the State intends to do so, then release is the only remedy that will ensure the enforcement of the Constitution. I argue here that this is so because release is the only remedy that will ensure, when possible, that the punishment received by an offender not amount to inhumane treatment or unconstitutionally excessive punishment.

The question remains as to why the same kind of analysis should not be applied when the extremely harsh and unlawful conduct occurs *after* a sentence has been imposed by a judge but *before* a judge has had an opportunity to reorder the state prison system so that egregious instances of abuse will not happen. In other words, is it sensible to limit the remedy of release to only those situations

9. Indeed, the Supreme Court recently recognized that release from custody may be an appropriate remedy even for prisoners who themselves are not harmed by ongoing unconstitutional conditions of confinement. *See Brown v. Plata*, 131 S. Ct. 1910, 1940 (2011).

10. *See infra* notes 228-31 and accompanying text.

11. As discussed below, even when a presentence detainee is subjected to abuse by a different sovereign than the sentencing sovereign, judges may take that fact into account in arriving at a just sentence. *See infra* notes 235-36 and accompanying text.

in which the unconstitutional conduct will occur in the future or when violations occur prior to sentencing but not to instances in which the Constitution has been violated after sentencing? I argue in this Article that when unconstitutional treatment within prisons is dispensed as a result of governmental policies, customs, or practices,¹² or as a result of discrete instances of abuse, the remedial gap is unjustified and release should be a potential remedy whether the treatment is only threatened in the future or already administered.¹³ Just as in the *ex ante* cases, providing a remedy for release in the *ex post* cases ensures that an offender is not subject to a total amount of punishment that is inhumane or excessive. This approach unites disparate strands of Eighth Amendment analysis to produce a unified approach to limiting punishment by the State.¹⁴

This Article considers for the first time why this unified treatment is necessary. Although the Supreme Court has recognized that abusive treatment at the hands of corrections officers and their supervisors constitutes “punishment” under the Eighth Amendment, even when it is not authorized by law,¹⁵ release has never been embraced as an appropriate remedy for past unconstitutional or excessive punishment by such individuals. As a result, governments that contemplate inflicting unconstitutional punishment in the future, either explicitly by statute or implicitly through policy or practice, are forced to choose between imposing a solely constitutional punishment or imposing no punishment at all.¹⁶ By contrast, states, through their actors, that impose discrete instances of unconstitutional punishment may continue to impose statutorily prescribed punishment even after prisoners have suffered what would be considered excessive punishment under any of the various strands of Eighth Amendment analysis. These states are not forced to make a choice once the punishment has been imposed. Thus, some prisoners are regularly exposed to excessive and unconstitu-

12. Sharon Dolovich has referred to some of these conditions as institutional cruelty. Dolovich, *supra* note 7, at 893.

13. *See infra* Part IV.B.

14. The vast majority of offenders are incarcerated in state prisons, but I use “State” interchangeably with “government” for the purposes of this Article. Whether imposed by federal or state officials, all criminal punishment is regulated by the Eighth Amendment.

15. *See Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

16. *See, e.g., Weems v. United States*, 217 U.S. 349, 382 (1910).

tional punishments and are limited in remedy simply because of the timing and nature of the Eighth Amendment violation.

Not only has this remedial question been overlooked in doctrine, it also has not been the focus of punishment philosophy. Most punishment theorists do not address the question of the proper remedy for unjust or unjustifiable punishment.¹⁷ Some only offhandedly dismiss the possibility of a release remedy as the bogeyman at the bottom of the slippery slope of the “subjectivist” approach to punishment.¹⁸ Similarly, academic commentary on Eighth Amendment jurisprudence has historically focused on tweaking each particular doctrinal area rather than trying to bridge the differences between these strands of Eighth Amendment jurisprudence.¹⁹ In the area of

17. Adam Kolber, for instance, has suggested that consequentialists and retributivists must take account of the fact that prisoners experience prison in subjectively different ways by making front-end modifications to sentences, not by using the Eighth Amendment to provide the remedy of release. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 236 (2009) [hereinafter Kolber, *Subjective Experience*]. In a forthcoming article, Kolber briefly discusses problems with monetary compensation through the lens of distinguishing intentional from unintentional punishment, but he does not focus on the remedial gap that is the focus of this Article. See Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY (forthcoming 2012) [hereinafter Kolber, *Unintentional Punishment*].

18. See David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1650-51 (2010); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 961 (2010). These authors argue that abusive prison conditions do not constitute “punishment” and therefore cannot be the basis for “wholesale punishment discounts.” Dan Markel, Chad Flanders & David C. Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 619-20 (2011). Instead, they argue that such abuse, whether caused by state officials or other prisoners, should be remedied through other means, such as the criminal law. *Id.* at 622. At the same time, however, they accept that prison conditions could be so degrading that a state may forfeit its right to punish a particular offender. *Id.* at 620 n.46; Markel & Flanders, *supra*, at 961 n.193. Below, I explain how these views may be consistent with the remedy proposed in this Article.

19. See Lisa Krim, *A Reasonable Woman’s Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN’S L.J. 85, 105-06 (1995) (arguing that an objective test of the Eighth Amendment deliberate indifference standard should be gender-specific); Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation’s Prisons*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 497-500 (1991) (reviewing possible traditional challenges to overcrowding); Jeffrey Welty, *Restrictions on Prisoners’ Religious Freedom as Unconstitutional Conditions of Confinement*, 48 DUKE L.J. 601, 602 (1998) (arguing that restrictions on the exercise of religious practices should be analyzed under the Eighth Amendment). *But see* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 784 (1994) (arguing that strict scrutiny should apply to criminal statutes that authorize incarceration for offenses); James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court*

sentencing and proportionality, scholars have argued that certain punishments should be considered unconstitutionally disproportionate or that the Court's proportionality analysis itself is flawed.²⁰ And some commentators have argued for particular ways in which sentencing decisions could be informed by nontraditional considerations, without changing the contours of proportionality review.²¹ But no Eighth Amendment commentators have focused on the remedial gap discussed here.

Once one accepts that abusive treatment dispensed by state correctional officials is punishment under the Eighth Amendment,²² and that there are limits to the amount of punishment that may be inflicted by the State, there is no sound justification in doctrine or theory for maintaining the gap. Providing the remedy of release would make for a more coherent Eighth Amendment doctrine and would also have the potential to achieve a level of deterrence from constitutional violations that has not been achieved through compensatory remedies. Although there are doctrinal and practical objections to this proposal,²³ they are insubstantial compared to the cost of maintaining the doctrinal incoherence in current Eighth Amendment analysis.

This Article proceeds in the following manner. Part I reviews current Eighth Amendment doctrine and practice with respect to remedies, establishing that courts provide a remedy of release in those rare instances when the State has chosen to punish solely through unconstitutional means. Part II discusses ways in which providing release as a remedy would ease the significant internal tension that currently exists in remedial Eighth Amendment

and *Prison Rules*, 53 OKLA. L. REV. 161, 193-95 (2000) (arguing for a principle of restorative justice to inform sentencing decisions); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 840-43 (2006) (proposing greater scrutiny of the prosecutors' role in sentencing); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 141-42 (2005) (considering felon disenfranchisement through the proportionality lens).

20. See, e.g., Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 72-74 (2007) (criticizing the Court's reliance on international consensus as normative authority in proportionality analysis).

21. See, e.g., Robertson, *supra* note 19, at 193-95; Stuntz, *supra* note 19, at 840-43. See generally Colb, *supra* note 19, at 821-49.

22. As will be discussed below, although this proposition is well established as a matter of doctrine, it is more controversial as a matter of punishment theory. See *infra* Part III.

23. See *infra* notes 186-91 and accompanying text.

doctrine. Part III shows that the remedy of release is also consistent with retributive and consequentialist principles of punishment philosophy. Having shown that the remedy I propose is consistent with doctrine and theory, Part IV addresses some practical considerations that must be taken into account if the remedy is to be fully enforced. There are some benefits and costs to this proposal, and some difficult questions concerning the law of remedies that must be engaged, but none of the objections suffices to reject out of hand the remedy proposed here. And the benefits that it provides, both practical and doctrinal, are substantial.

I. REVIEW OF CURRENT EIGHTH AMENDMENT DOCTRINE

As this Part will demonstrate, there are three different remedial schemes for an Eighth Amendment violation, depending on both the type of Eighth Amendment violation challenged and the timing of the violation. When a prisoner challenges a sentence prior to its imposition through proportionality analysis, the principal remedy available is striking the sentence down.²⁴ When a prisoner challenges conditions of confinement that are ongoing in nature, a court has power to order the cessation of those conditions or, in extreme cases, order the release of prisoners.²⁵ But, when a prisoner challenges the infliction of harsh treatment that has occurred in the past, whether that treatment is caused by an individual corrections official or by a set of prison policies, customs, or practices, the prisoner may obtain only monetary damages.²⁶ This Part reviews the Eighth Amendment doctrine that leads to this remedial difference, beginning with a discussion of sentencing jurisprudence and moving to conditions of confinement case law.

A. *Early Sentencing Jurisprudence*

Defendants facing a sentence for a criminal offense, whether to a term of years or to a sanction such as the death penalty,²⁷ have a

24. See *infra* notes 68-71 and accompanying text.

25. See *infra* notes 106-15 and accompanying text.

26. See *infra* notes 116-18 and accompanying text.

27. For the most part, states currently punish either through incarceration and monetary

limited ability to challenge the permissibility of such punishments. As a constitutional matter, the Eighth Amendment is the primary limitation on the power of the State to mete out sanctions.²⁸ Of the different aspects of Eighth Amendment jurisprudence, sentencing litigation in the federal courts is the most senior. For almost 200 years, indeed, the only kind of Eighth Amendment litigation involved challenges to sentences, whether to terms of years of imprisonment or to the mode of punishment.²⁹ If seniority has its advantages, however, it is not reflected in Eighth Amendment litigation: of all the different kinds of Eighth Amendment challenges, challenges to sentences have generally been the least successful, particularly with regard to noncapital sentences.³⁰ A

finer, the threat of incarceration (such as probation), or execution. Other modes of punishment, such as whipping, the ducking stool, and the like, have generally been abandoned—in large part as a result of modern conceptions of the role of punishment and the limits of the Eighth Amendment. *See infra* note 40 and accompanying text.

28. The First, Fifth, and Fourteenth Amendments also place some limitations on the state's power to punish. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 515 (2005) (equal protection); *Sandin v. Connor*, 515 U.S. 472, 487 (1995) (procedural due process); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 352-53 (1987) (religious exercise); *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (speech rights). This Article does not address these limitations.

29. *See Wilkerson v. Utah*, 99 U.S. 130, 135 (1878); *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 479-80 (1866).

30. For all of the nineteenth century, the Supreme Court held that the Amendment applied only to national, not state, legislation, and thus the number of sentencing challenges that were justiciable was minimal. *See Pervear*, 72 U.S. (5 Wall.) at 479-80 (1866); *see also O'Neil v. Vermont*, 144 U.S. 323, 332 (1892); *In re Kemmler*, 136 U.S. 436, 448-49 (1890). To the extent that the federal courts decided Eighth Amendment cases, however, sentences were rarely, if ever, found unconstitutional. *See Wilkerson*, 99 U.S. at 135 (1878) (noting that the Eighth Amendment does not prohibit execution by shooting for first-degree murder); *Pervear*, 72 U.S. (5 Wall.) at 480 (“[I]t appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this.”). Since the beginning of the twentieth century, the Supreme Court has found sentences to be unconstitutional in only a handful of noncapital cases. *See Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010); *Solem v. Helm*, 463 U.S. 277, 303 (1983); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 381-82 (1910). The Court generally has held that sentences of terms of years will almost never be unconstitutional. *See Ewing v. California*, 538 U.S. 11, 21, 30-31 (2003) (plurality opinion); *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991); *Hutto v. Davis*, 454 U.S. 370, 373-74 (1982) (per curiam). In capital cases, the Court has recently been more receptive to arguments from offenders—but only when there were specific characteristics of the defendant that rendered the death penalty inappropriate. *See Kennedy v. Louisiana*, 554 U.S. 407, 435-38 (2008) (conviction of a crime that did not involve death); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (age); *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002) (mental retardation).

brief review here is necessary to establish only a few key propositions.

First, early Eighth Amendment cases established that the Eighth Amendment prohibited torture and its ilk³¹ but that judicial deference to legislative judgments about the appropriateness of a particular punishment was nearly insurmountable.³² The same was true of most state courts that interpreted state constitutional analogs³³ to the Eighth Amendment.³⁴ Thus, many state courts upheld punishments that fell within a common understanding of “cruel” or “unusual” or both but that did not meet the more specific requirement of having been rejected at common law.³⁵

Second, beginning with state courts adjudicating state constitutional analogs to the Eighth Amendment³⁶ but eventually moving to federal courts, a *weak* constitutional prohibition on *excessive* punishments, even if administered in terms of years, has emerged.³⁷

31. *Wilkerson*, 99 U.S. at 136; *see also In re Kemmler*, 136 U.S. at 447 (“Punishments are cruel when they involve torture or a lingering death.”). Cases in state courts from the nineteenth century similarly limited state constitutional prohibitions of cruel and unusual punishment to “barbarous” or “torturous” treatment. *See Weems*, 217 U.S. at 375-79 (reviewing state court judgments).

32. *See Pervear*, 72 U.S. at 480 (“The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license ... is wholly within the discretion of State legislatures.”).

33. Many states had adopted the same language from Virginia’s Declaration of Rights, sometimes prohibiting cruel *or* unusual punishment instead of cruel *and* unusual punishment. *See, e.g.*, WYO. CONST. art. I, § 14. Very few state courts placed much reliance on the use of the disjunctive, at least in the nineteenth century. *But see* *People v. Bullock*, 485 N.W.2d 866, 877 (Mich. 1992) (relying on the disjunctive “or” in Michigan’s constitution to justify departure from the Supreme Court’s interpretation of cruel and unusual punishment).

34. *See Reinert*, *supra* note 5, at 58 & n.20 (collecting cases).

35. *See, e.g.*, *People v. Kemmler*, 24 N.E. 9, 11 (N.Y. 1890) (rejecting a challenge under a state constitution to death penalty by electrocution).

36. *See, e.g.*, *Cardillo v. People*, 58 P. 678, 680-81 (Colo. 1899) (holding that a penalty must be “clearly excessive” to violate constitution); *Harper v. Commonwealth*, 19 S.W. 737, 738 (Ky. 1892) (noting that a court can only find a punishment cruel and unusual when “it clearly manifestly so appears” and punishing gambling with imprisonment does not offend this principle); *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899) (conceding the “possib[ility] that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment”); *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892) (stating that “great latitude” must be given to the legislature, and courts should intervene “only when the punishment is so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally”).

37. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 997-1002 (1991) (Kennedy, J., concurring) (articulating a “narrow” proportionality principle).

Before the Supreme Court ever found a sentence excessive as a matter of federal constitutional law, a surprising number of state courts struck down sentences, expressed both as modes of punishment and terms of years in prison, for being excessive. In some of these cases, the punishment at issue was akin to life imprisonment without the possibility of parole.³⁸ In other cases, however, the term of imprisonment was much less.³⁹ And the modes of punishment courts found unconstitutional ranged from lashes and the ducking stool to seizure of property.⁴⁰

B. Modern Sentencing Jurisprudence

To a large extent, this dual understanding of the Eighth Amendment—that it prohibits both punishments inconsistent with prevailing standards of decency and excessive punishments—persists to this day. Courts recognize that sentences may be judged

38. See *State v. Ross*, 104 P. 596, 604-05 (Or. 1909) (holding that life imprisonment for nonpayment of a fine arising from a larceny conviction is cruel and unusual punishment and that a court may declare the sentence excessive “even though within the maximum of the statute”); cf. *Jones v. Territory*, 43 P. 1072, 1074 (Okla. 1896) (suggesting in dicta that the sentence of fifty years for manslaughter might be “cruel and inhuman” if it exceeded “the probable lifetime of the person convicted”).

39. See *State ex rel. Garvey v. Whitaker*, 19 So. 457, 457, 459 (La. 1896) (holding that imprisonment for 2160 days for being in default of paying fines of \$720 violated the state constitution when the trial court imposed a sentence for seventy-two distinct offenses of one city ordinance); *State v. Driver*, 78 N.C. 423, 429 (1878) (holding a sentence of five years imprisonment for assault and battery of defendant’s wife to be unconstitutional under state law, and noting that the power to find a sentence unconstitutional “is there, not so much to draw a fine line close up to which the judges may come, but as a ‘warning’ to keep them clear away from it”); see also *Byrnes v. People*, 37 Mich. 515, 517 (1877) (holding that five years sentence for petit larceny was excessive); *Johnson v. Waukesha County*, 25 N.W. 7, 9 (Wis. 1885) (suggesting in dicta that an antitramp law could be unconstitutional because it made tramping a felony simply by virtue of the location of the crime and because the punishment amounted to fifteen days in jail with a diet of bread and water alone).

40. See *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 438-39 (1863) (holding that a statute providing for seizure of property and slaves of persons engaging in rebellion during the Civil War was unconstitutional); *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh) 70, 74 (1820) (finding a sentence of thirty lashes unconstitutional when applied as a punishment to a “free person of color” who attempted to defend himself against assault by a white person); *James v. Commonwealth*, 2 Serg. & Rawle 220, 230, 1825 WL 1899, at *13-14 (Pa. 1825) (holding that the ducking stool was unconstitutional for punishment of “common scold”); cf. *Thomas v. Kinkead*, 18 S.W. 854, 856 (Ark. 1892) (holding that police officer may not use deadly force to effectuate arrest of a misdemeanor because it would be unconstitutional to punish a misdemeanor with the death penalty).

under two different standards: one that focuses on the need for a sentence to comport with historical and modern understandings of the limits on the State's power to infringe on the offender's dignity and a second that more narrowly asks whether a particular punishment is excessive in relation to a particular offense. Although the first approach was incorporated into the earliest federal decisions concerning the Eighth Amendment, the United States Supreme Court did not embrace the second excessiveness approach until its 1910 decision in *Weems v. United States*, the first time it struck down a sentence under the Punishment Clause.⁴¹

In *Weems*, the Court reviewed a sentence imposed by a court pursuant to a Philippines statute that prohibited falsifying a public document.⁴² The trial court had sentenced the defendant, a Coast Guard official, to fifteen years imprisonment, as well as to an additional punishment known as *cadena temporal*.⁴³ Individuals sentenced to *cadena temporal* were required, pursuant to statute, to engage in "hard labor,"⁴⁴ were chained at the ankle and wrist at all times, and were deprived of certain rights and privileges even after release from prison.⁴⁵ Because the Court viewed the sentence as excessive, especially compared to sentences for more serious crimes, it did not display its typical deference to the legislature's exercise of its prerogative to set an appropriate punishment.⁴⁶

41. 217 U.S. 349, 382 (1910).

42. *Id.* at 381-82. Because the case arose out of the Philippines, which contained a cruel and unusual punishment clause identical to the Eighth Amendment, the issue of incorporation of the Eighth Amendment against the states did not arise.

43. *Id.* at 362-64. The punishment originated in Spain and literally means "temporary chain." *See id.* at 363.

44. The requirement that prisoners engage in hard labor originated in England in the mid-1500s and came into vogue in the United States at the beginning of the eighteenth century on the theory that work was intimately connected to successful rehabilitation. *See* David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 83-85 (1998). The United States also had overlapping economic interests in putting convicts to work, particularly as a substitute for slave labor after the Civil War. *See* Alexis M. Durham III, *Lease System*, in ENCYCLOPEDIA OF AMERICAN PRISONS 277-79 (Marilyn D. McShane & Frank P. Williams eds., 1996).

45. *Weems*, 217 U.S. at 364-66. The additional punishment associated with *cadena temporal* included deprivation of parental rights, the right to dispose of property through a will, the obligation to give authorities notice of any change in domicile, and disqualification to hold public office or to vote. *Id.* at 364-65. As the Supreme Court noted, the only punishments more severe than *cadena temporal* were death or *cadena perpetua*. *Id.* at 364.

46. *Id.* at 380-81 (comparing punishment to punishments for crimes such as homicide,

After *Weems*, the Supreme Court added little to Eighth Amendment jurisprudence for some years, failing to address a substantive Eighth Amendment claim until 1958, almost fifty years later. In *Trop v. Dulles*, the Supreme Court again struck down a punishment as “cruel and unusual,” but this time the Court provided neither a controlling opinion nor agreement as to how best to operationalize the Eighth Amendment in challenges to particular sentences.⁴⁷ The statute invalidated in *Trop* authorized federal courts to impose denationalization as a punishment for military desertion, a penalty that the Court found to be repugnant to Eighth Amendment principles and international law.⁴⁸ The plurality in *Trop*, however, shied away from the excessiveness analysis introduced in *Weems* and instead focused more on the consistency of denationalization with the plurality’s conception of a just punishment.⁴⁹

Instead of reviewing the sentence for disproportionality, the *Trop* plurality asked whether the Eighth Amendment’s guarantee of “civilized treatment” prohibited the penalty.⁵⁰ In so doing, the Justices made clear that the constitutional permissibility of the death penalty did not permit the State to implement “any punishment short of death” but that “evolving standards of decency” were independent restrictions on the government’s power to punish.⁵¹ The plurality identified within the Eighth Amendment a basic concept of protecting dignity⁵² and reasoned that traditional methods of punishment—fines, incarceration, and execution—were constitutionally permissible. Punishment that fell outside these borders would be reviewed with suspicion.⁵³

conspiracy, and forgery).

47. 356 U.S. 86 (1958).

48. *Id.* at 101 (plurality opinion).

49. The four-Justice plurality in *Trop* viewed disproportionality as an invalid basis for finding denationalization unconstitutional for the crime of desertion during war because death was a constitutional punishment for the same crime. *Id.* at 99. It may also have been difficult for the plurality to embrace a principle of proportionality when the sentence was not subject to degrees, such as a term of years.

50. *Id.*

51. *Id.* at 99-101.

52. *Id.* at 100.

53. *Id.* (“[A]ny technique outside the bounds of these traditional penalties is constitutionally suspect.”). On the plurality’s reasoning, denationalization was incompatible with basic standards of dignity because it deprived the individual of the “right to have rights.”

After *Trop*, sentencing jurisprudence has become elusive, with a mix of plurality and majority decisions of the Court providing little guidance.⁵⁴ In cases involving sentences of terms of years, for instance, the Court has hinted—but no majority has explicitly held—that sentences of discrete terms of years will almost never be struck down as being unconstitutional, whether the excessiveness or evolving-standards-of-decency analysis is used.⁵⁵ The only exceptions appear to be those rare instances in which the Court has struck down life sentences, usually without the possibility of parole,⁵⁶ or when the Court has referred to hypothetical punishments that it assumed would be disproportionate, such as incarceration for having a cold or life imprisonment for overtime parking.⁵⁷ In all of these circumstances, whether upholding or striking down a sentence of terms of years, the Court has generally relied on some form of proportionality or excessiveness analysis.⁵⁸

Id. at 101-02.

54. Compare *Solem v. Helm*, 463 U.S. 277, 284-90 (1983) (describing *Weems v. United States*, 217 U.S. 349 (1910) as an example of a case in which a proportionality principle is recognized), *Enmund v. Florida*, 458 U.S. 782, 788-801 (1982) (recognizing proportionality principle), *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (same), *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (same), *Robinson v. California*, 370 U.S. 660, 667 (1962) (same), and *Trop*, 356 U.S. at 100 (same), with *Rummel v. Estelle*, 445 U.S. 263, 273 (1980) (stating that *Weems*' proportionality analysis "cannot be wrenched from the extreme facts of that case").

55. See *Hutto v. Davis*, 454 U.S. 370, 372-73 (1982) (per curiam) (rejecting an Eighth Amendment challenge to a prison term of forty years and a fine of \$20,000 for possession and distribution of approximately nine ounces of marijuana).

56. *Solem*, 463 U.S. at 296-300, 303 (setting aside a sentence of life imprisonment without possibility of parole, imposed under a South Dakota recidivist statute).

57. *Rummel*, 445 U.S. at 274 n.11 ("This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, ... if a legislature made overtime parking a felony punishable by life imprisonment."). In *Hutto*, the content of *Rummel*'s footnote was arguably expanded: *Rummel*'s "not [saying] that a proportionality principle would not come into play" in the fanciful parking example, *id.*, became "not[ing] ... that there could be situations in which the proportionality principle *would* come into play, such as" the fanciful parking example. *Hutto*, 454 U.S. at 374 n.3 (emphasis added). In *Atkins*, the Court cited to *Robinson* for the proposition that even one day in jail as punishment for having the common cold would be deemed excessive and unconstitutional. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (citing *Robinson*, 370 U.S. at 667).

58. In *Solem*, the Court's decision to strike down a life sentence without parole was based on the proportionality principle. 463 U.S. at 296-300, 303. In *Harmelin*, the Court upheld a sentence of life without parole for a first-time offender convicted of possessing 672 grams of cocaine, again based on the proportionality principle. *Harmelin v. Michigan*, 501 U.S. 957, 961, 994-95 (1991). Justice Scalia and Chief Justice Rehnquist wrote separately in *Harmelin* to argue that the proportionality principle applied only to death penalty cases, not to term-of-

On the other hand, in death penalty cases, the Court has generally adhered to *Trop*'s evolving-standards-of-decency framework to find, in certain instances, that the death penalty is unconstitutional because of the particular characteristics of the condemned defendant—his age, mental status, and the like.⁵⁹ A sentence of death is treated differently in this context because of the risk that the State will cross the constitutional line that distinguishes restraint from cruelty and vengeance.⁶⁰ There has been some disagreement in these cases as to whether there is any proper role for courts to determine, in their own judgment, whether a particular sentence is proportionate punishment for a particular offender or particular set of offenders.⁶¹

Despite the formal distinction in analysis between challenges to imprisonment and challenges to the death sentence, the Court has suggested at times that the inquiry into what punishments are considered “excessive” is coterminous with the inquiry into whether

years sentences. *Id.* at 994 (Scalia, J., concurring); *see also* *Ewing v. California*, 538 U.S. 11, 31-32 (2003) (Scalia, J., concurring) (objecting that the proportionality principle is fundamentally a policy judgment, not a legal one). In *Ewing*, the plurality and dissenters applied the proportionality review from Justice Kennedy's concurrence in *Harmelin*. *Id.* at 22-24 (plurality opinion); *id.* at 32-33 (Stevens, J., dissenting) (“[B]y broadly prohibiting excessive sanctions, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment.”); *id.* at 35-37 (Breyer, J., dissenting) (applying Justice Kennedy's proportionality analysis).

59. *See* *Roper v. Simmons*, 543 U.S. 551, 560-64, 574-75 (2005) (finding that the execution of defendants who committed a capital crime while younger than eighteen years old was prohibited by the Eighth Amendment); *Atkins*, 536 U.S. at 311-12 (holding that the death penalty for the mentally retarded is “excessive” because it is inconsistent with evolving standards of decency); *Thompson v. Oklahoma*, 487 U.S. 815, 818-38 (1988) (plurality opinion) (concluding that “civilized standards of decency” prohibit the execution of any offender under the age of sixteen at the time of the crime); *see also id.* at 855, 858-59 (O'Connor, J., concurring) (agreeing that constitutionality of the death penalty is generally measured by conformance with societal standards of decency but finding narrower grounds to hold sentence unconstitutional); *id.* at 873 (Scalia, J., dissenting) (agreeing that appropriate standard is “evolving standards of decency”).

60. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (expressing concern that imposition of the death penalty may “descen[d] into brutality, transgressing the constitutional commitment to decency and restraint”).

61. *Compare, e.g., Thompson*, 487 U.S. at 835-38 (plurality opinion) (endorsing a proportionality analysis based on extent to which the death penalty accomplished deterrent and retributive goals for offenders who were under the age of sixteen), *with* *Stanford v. Kentucky*, 492 U.S. 361, 377-83 (1989) (plurality opinion) (rejecting suggestion that the Court should use its own judgment to determine the constitutionality of the death penalty), *overruled in part by Roper*, 543 U.S. at 551.

society's "evolving standards of decency" prohibit it.⁶² In so doing, the Court has clearly linked concepts of proportionality with the Eighth Amendment's guarantee of dignity to the offender.⁶³ Thus, the Eighth Amendment is said to prohibit excessive punishments, as well as "cruel and unusual punishments that may or may not be excessive."⁶⁴ The implication is that all disproportionate punishments violate evolving standards of decency, but some punishments that violate evolving standards of decency may not necessarily also be disproportionate.

The Court explicitly recognized this connection in its most recent case involving a challenge to the imposition on juvenile offenders of a life sentence without the possibility of parole. The Court applied both proportionality analysis and a dignity-based framework for striking down the sentence.⁶⁵ The former requires courts to look at the particular characteristics of a defendant and his offense, whereas the latter asks whether a particular kind of punishment is prohibited under all circumstances.⁶⁶ Thus, both the "evolving-standards-of-decency" rubric from *Trop* and the more general proportionality analysis from *Weems* are extant in current challenges to sentencing decisions.⁶⁷

62. See *Roper*, 543 U.S. at 560-64 (finding the execution of defendants who committed capital crime while younger than eighteen years old to be unconstitutional); see also *Kennedy*, 554 U.S. at 435-38 (finding the death penalty to be disproportionate punishment for child rape); *Atkins*, 536 U.S. at 321 (finding the death penalty to be unconstitutional when applied to mentally retarded defendants).

63. See *Roper*, 543 U.S. at 560; see also *Kennedy*, 554 U.S. at 420 ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."); *Coker v. Georgia*, 433 U.S. 584, 591 (1977) (plurality opinion) (recognizing that the question in Eighth Amendment cases is whether punishment is "inherently barbaric or an unacceptable mode of punishment for crime; ... [or] disproportionate to the crime for which it is imposed"); cf. *Harmelin*, 501 U.S. at 992 (Scalia, J., concurring) (recognizing that *Weems* contained language that can represent either principle but criticizing proportionality interpretation).

64. *Atkins*, 536 U.S. at 311 n.7; see also *Solem v. Helm*, 463 U.S. 277, 284 (1983).

65. See *Graham v. Florida*, 130 S. Ct. 2011, 2021-23 (2010).

66. See *id.* The Court in *Graham* subdivided proportionality litigation even further, separating cases in which the sentence is noncapital and cases in which the Court has drawn categorical lines in capital cases. See *id.* at 2022.

67. Exactly how to determine when a sentence is disproportionate and when treatment violates evolving standards of decency is beyond the scope of this Article, but as a general matter, the Supreme Court has defined the former with more analytical rigor than the latter. See Reinert, *supra* note 5, at 67-68.

C. Remedies for Sentencing Challenges

A review of the doctrine until now tells us only *how* to decide whether a sentence violates the Eighth Amendment—not what to do after we come to that conclusion. To complete this part of the story, we start once again with *Weems* because, as noteworthy as it is for the doctrine of proportionality that it embraced, it also offers a clue as to the proper remedy in sentencing challenges. Over the vigorous dissent of Justices White and Holmes, the *Weems* majority dismissed the charges against the offender entirely, concluding that the legislation mandated an unlawful sentence and no other source of law provided for an alternative sentence.⁶⁸ As the dissent pointed out, the Court could have separated the legal from illegal portions of the punishment and permitted the imposition of a sentence of a term of years without the accessories that accompanied the *cadena temporal*,⁶⁹ but the majority did not leave this option open to the Philippines upon remand.⁷⁰ Thus, under *Weems*, when the only sentence that could be imposed pursuant to statute was an unconstitutional one, the only appropriate remedy was no punishment at all.⁷¹

In most subsequent cases in which the Court found a penalty unconstitutional, there was an alternative sentence that could have been imposed without violating the Constitution, or the Court remanded to permit the lower or state court to impose a new sentence that did not violate the Eighth Amendment.⁷² In some cases, there was no need to address the remedial difficulty presented in *Weems*.⁷³

68. *Weems v. United States*, 217 U.S. 349, 382 (1910) (“[T]he fault is in the law; and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings.”). The Court declined to consider the fixed imprisonment term of the sentence separately from the conditions of confinement imposed by the *cadena temporal* sentence because they had been imposed pursuant to statute and, therefore, had to be considered jointly as punishment. *Id.* at 381.

69. *Id.* at 412-13 (White, J., dissenting).

70. *Id.* at 382 (majority opinion).

71. It would violate the Ex Post Facto Clause for the legislature to enact a new statute to retroactively impose a punishment that does not violate the Eighth Amendment. *Garner v. Jones*, 529 U.S. 244, 249 (2000).

72. See *Helm v. Solem*, 684 F.2d 582, 587 (8th Cir. 1982) (remanding with directions to issue writ of habeas corpus if offenders could not be resentenced), *aff'd*, 463 U.S. 277, 303 (1983).

73. Take *Trop*, for instance. Albert Trop, the deserter, had already served his prison

But the *Weems* decision reinforced the notion that it is better for the government not to impose punishment at all than to impose an unconstitutional punishment.

In summary, three conclusions can be gleaned from this review of sentencing jurisprudence. First, as a substantive matter, sentences that are either disproportionate to the offense or inconsistent with evolving standards of decency are considered unconstitutional. Relatedly, punishment that is corporal in some sense—the imposition of death or barbarous treatment, such as whipping—is more vulnerable to constitutional challenge than punishment of imprisonment for a term of years. Finally, if the State is willing to impose only an unconstitutional punishment on the offender, then the Eighth Amendment requires that no punishment at all be meted out.⁷⁴

sentence and had been dishonorably discharged from the Army. *Trop v. Dulles*, 356 U.S. 86, 87-88 (1958) (plurality opinion). The penalty of denationalization had been imposed under a separate statute. *Id.* Thus, the Court did not have to determine whether any alternatives to punishment existed under which *Trop* could be properly sentenced. It directed the district court to conduct “appropriate proceedings” in light of its opinion, which presumably were limited to declaring that *Trop* remained a citizen of the United States. *Id.* at 104.

74. The preference that offenders remain free rather than subjected to inhumane treatment is not limited to sentencing challenges. The Supreme Court and many state courts have implicitly accepted the preference that prisoners be free rather than face inhumane conditions of confinement by recognizing a limited defense of necessity or duress in cases in which prisoners seek to escape from intolerable prison conditions. *See United States v. Bailey*, 444 U.S. 394, 409-17 (1980). Under this jurisprudence, courts have approved of necessity instructions when threats of death or physical harm from prison officials were alleged, when threats from other prisoners were made, and when the escapee feared being sexually abused. *See United States v. Lopez*, 885 F.2d 1428, 1431-34 (9th Cir. 1989), *overruled on other grounds* by *Schmuck v. United States*, 489 U.S. 705 (1989); *People v. Lovercamp*, 118 Cal. Rptr. 110, 116 (Ct. App. 1974) (vacating defendant's conviction for escaping from confinement and recognizing that “some conditions excuseth the felony” (internal quotation marks omitted)); *see also People v. Trujillo*, 586 P.2d 235, 237-38 (Colo. App. 1978) (granting prisoner an opportunity to claim that his escape was motivated by duress); *People v. Unger*, 362 N.E.2d 319, 323-24 (Ill. 1977) (allowing a necessity defense for a prison inmate who escaped after receiving alleged threats from other inmates); *Randolph v. State*, 996 A.2d 907, 926-27 (Md. Ct. Spec. App. 2010) (limiting the defense to particularly dangerous circumstances); *People v. Harmon*, 220 N.W.2d 212, 213 (Mich. Ct. App. 1974) (allowing an escapee to claim a defense of duress because of his fear of prison rape); Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 35-36 (2003) (noting that a prisoner who escapes under true necessity has not violated any “substantive norm of the criminal law regime,” even though there is concern that prisoners who learn of exculpation will be more likely to attempt to escape in situations not constituting true necessity); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 647 n.38 (2009) (describing an escape from a burning prison as a situation commonly thought to be a necessity). Granted, these cases only

D. Conditions of Confinement Litigation

Conditions of confinement jurisprudence is closely related to sentencing litigation, in that it also generally rests on basic premises of human dignity. Indeed, *Weems* and *Trop* provided the frame for *Estelle v. Gamble*, the first modern case to conceptualize prison conditions alone, separate and apart from a criminal sentence, as punishment under the Eighth Amendment.⁷⁵ Like the sentencing cases resolving challenges to capital punishment, *Estelle* looked to both *Weems* and *Trop* to establish that the Eighth Amendment applies not only to corporal punishments but also to treatment incompatible with evolving standards of decency or involving the unnecessary imposition of pain.⁷⁶ With these standards in mind, the *Estelle* Court held that the government had some obligation to provide medical care to prisoners, because the absence of such care could cause suffering with no penological purpose.⁷⁷ Such deprivations of medical care that amounted to deliberate indifference to serious medical needs were equivalent, in the Court's view, to unnecessary infliction of pain.⁷⁸

Estelle is also significant for a discussion that is further analyzed later in this Article—it explicitly held that conditions of confinement imposed by prison officials, rather than by statute, can constitute punishment under the Eighth Amendment.⁷⁹ In *Estelle*, the Court

prohibit the imposition of *additional* punishment for escape when prisoners face inhumane conditions of confinement. But they also imply that if every prison exposed the offender to these conditions, continued confinement would be impermissible.

75. 429 U.S. 97, 103-04 (1976).

76. *Id.* at 102-03; *see also* *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002) (linking the Eighth Amendment to dignity and finding that an Eighth Amendment violation was obvious because there was no safety justification for discipline that exposed the prisoner to risk of physical harm); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (noting that the Eighth Amendment prohibits disproportionate punishments and those that are inconsistent with contemporary standards of decency).

77. 429 U.S. at 103.

78. *Id.* at 104. The deliberate indifference standard is the subject of much Eighth Amendment litigation, but it essentially is akin to criminal recklessness. *See Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994) (adopting a subjective recklessness standard as used in criminal law as the test for deliberate indifference under the Eighth Amendment).

79. 429 U.S. at 104-05. It did so with little substantive analysis—an aspect of *Estelle* that has been criticized by Justices Scalia and Thomas, who argue that conditions of confinement imposed by prison officials should never be considered punishment for Eighth Amendment purposes. *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 40-42 (1993) (Thomas, J., dissenting). In so

recognized that early Eighth Amendment cases focused on whether punishments involved torture or other repulsive modes of punishment.⁸⁰ But *Estelle* turned to *Weems*, death penalty jurisprudence, and *Trop* to acknowledge that concepts of human dignity and civilized standards of decency had expanded the categories of punishment deemed prohibited by the Punishment Clause.⁸¹ *Estelle*'s deliberate indifference standard was informed in no small part by an earlier case, *Louisiana ex rel. Francis v. Resweber*, in which Justice Reed's plurality opinion held that a second attempt to electrocute a condemned prisoner did not violate the Eighth Amendment when the pain caused by the first unsuccessful attempt was an accident.⁸² As such, although the prisoner had suffered unnecessary pain, it was not the result of a culpable state of mind so as to be considered "cruel."⁸³ Thus, treatment that resulted in gratuitous imposition of pain could be considered prohibited punishment only so long as the prison official imposing the treatment possessed the requisite state of mind.⁸⁴

The basic principles of *Estelle*—that certain conditions of confinement, when imposed with specified states of mind, can constitute punishment that goes beyond that permitted by the Eighth Amendment—has been extended in many directions. The Supreme Court has held that atmospheric conditions of confinement—overcrowding, lack of sanitation, lack of adequate nutrition—may rise to unconstitutional punishment when they deprive offenders of

doing, however, these dissenters have described *Weems* as a case about a "sentence imposed for the crime of falsifying a document," without adverting to the aspect of *Weems* that addressed the conditions of confinement imposed under *cadena temporal*. *Id.* at 41 n.1. Notably, pre-*Estelle* state and federal court cases that had addressed challenges to conditions of confinement had assumed that barbaric conditions could constitute punishment without much analysis, perhaps because they were brought as habeas actions rather than claims under 42 U.S.C. § 1983. Since *Estelle*, the Court has noted that the Eighth Amendment applies to all those "entrusted with the criminal-law function of government." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); *see also Farmer*, 511 U.S. at 832 (noting that the Eighth Amendment places restraints and imposes duties on prison officials, who must provide humane conditions of confinement to prisoners); *Hutto*, 437 U.S. at 685 (noting that confinement in an isolation cell is punishment under the Eighth Amendment).

80. 429 U.S. at 102.

81. *Id.* at 102-03.

82. 329 U.S. 459, 463-64 (1947) (plurality opinion).

83. *Id.* at 464.

84. *Estelle*, 429 U.S. at 103-05.

basic human needs.⁸⁵ And the use of force by corrections officials—whether during widespread prison unrest or in response to isolated misconduct by prisoners—may constitute excessive punishment when the force is applied to cause harm and not to restore order or for some other legitimate penological purpose.⁸⁶ Overlaying all of these extensions is the Court’s recognition that when prison officials fail to protect offenders from the risk of serious harm—be it occasioned by other offenders, correction officers, medical personnel, or the atmospheric conditions of confinement at issue in *Rhodes v. Chapman*⁸⁷—they can be held liable under the Eighth Amendment, so long as the officials possess the required culpable state of mind.⁸⁸

There are several assumptions at work in the Court’s conditions of confinement precedent that are relevant to this Article’s project. First, as noted above, the Court has made it clear that conditions of confinement, whether imposed by statute, system- or facility-wide prison policies, or individual state officials, are considered punishment.⁸⁹ And when this punishment exceeds the bounds of decency, the Eighth Amendment rights of the offender are violated.⁹⁰ Harsh conditions of confinement may constitute cruel and unusual

85. *Rhodes v. Chapman*, 452 U.S. 337, 347-48 (1981).

86. *E.g.*, *Hudson v. McMillian*, 503 U.S. 1, 5-7 (1992) (noting that the core judicial inquiry when evaluating an accusation of excessive punishment is whether the force was applied in good-faith effort to maintain order, or maliciously to cause harm); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”).

87. 452 U.S. at 340.

88. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994). More recent cases acknowledge that imposing a risk of future harm, even if unaccompanied by actual pain, can in certain circumstances cross the line for Eighth Amendment purposes. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). Thus, in rejecting a challenge to a lethal injection procedure, a plurality of the Court noted that to establish a claim, a condemned prisoner must show that there is an alternative procedure for causing death that is “feasible, readily implemented, and [will] in fact significantly reduce a substantial risk of severe pain.” *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion).

89. *Helling*, 509 U.S. at 32-33, 36 (holding that conditions of confinement that pose a risk of future harm can violate the Eighth Amendment); *Rhodes*, 452 U.S. at 345 (stating that confinement is a form of punishment); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (noting that confinement in an isolation cell is punishment subject to scrutiny under the Eighth Amendment).

90. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

punishment unless such conditions “are part of the penalty that criminal offenders pay for their offenses against society.”⁹¹

Second, the Court has implied that certain conditions of confinement may not be imposed on offenders no matter how serious their crimes. For example, as the Court recognized in *Farmer v. Brennan*, being attacked in prison is not an implied part of the sanctions authorized by criminal statutes.⁹² Thus, the Court has made a distinction between “proper” punishment on one hand and abusive punishment on the other.⁹³

Third, in developing its concept of what constitutes abusive and unconstitutional punishment, the Court has focused on objective criteria, not the subjective experience of prisoners. Objectively, the prisoner must show that the conditions of confinement that he has experienced constitute an “extreme” deprivation of life’s basic necessities, including adequate medical care, food, shelter, or safety.⁹⁴ Even maliciously imposed intentional uses of force, if they are objectively de minimis, do not amount to violations of the Eighth Amendment.⁹⁵ At the same time, force that causes little injury may still be unconstitutional if it is more than de minimis.⁹⁶ The Court explicitly links excessive force standards to the contemporary standards-of-decency rubric precisely because the Eighth Amendment focuses on the objective amount of force used, not the subjective injury suffered by a prisoner.⁹⁷

Fourth, the State can work unconstitutional punishment through the acts of private individuals such as other prisoners, at least when state actors contribute to the violent acts of such offenders.⁹⁸ In this

91. *Rhodes*, 452 U.S. at 347.

92. 511 U.S. at 834 (“Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.” (internal quotation marks omitted)).

93. In *Hudson v. McMillian*, the Court maintained that it requires serious deprivations in conditions of confinement cases because “routine discomfort is ‘part of the penalty that criminal offenders pay for their offenses against society.’” 503 U.S. 1, 8-9 (1992) (citing *Rhodes*, 452 U.S. at 347). By contrast, whenever force is used maliciously or sadistically, it violates contemporary standards of decency because there is never justification for using force with those goals. *Id.*

94. *Id.*

95. *Id.* at 9-10.

96. *Id.*

97. *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177-78 (2010) (per curiam).

98. *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974) (cited with approval in *Rhodes*,

context, courts generally have no difficulty conceptualizing the state-facilitated violence of one prisoner upon another as punishment and recognizing that prison officials have an obligation “to insure that inmates are not subjected to any punishment *beyond that which is necessary* for the orderly administration” of the prison.⁹⁹

Fifth, and relatedly, for conditions or treatment to count as punishment, they must be administered with a required state of mind.¹⁰⁰ The subjective state of mind that must be established depends on the context and ranges from deliberate indifference, which is something akin to criminal recklessness, to intentionality.¹⁰¹ This is because the Court determined that punishment presumes some act intended to meet one of the disparate purposes of punishment.¹⁰² In so doing, the Court has rejected alternative proposals at both extremes: it has declined to adopt a prisoner-protective standard and hold that *all* prison conditions, without regard to officials’ actual or constructive knowledge of them, constitute punishment for purposes of the Constitution,¹⁰³ and it has rejected the minimalist argument that prison conditions, other than those imposed pursuant to statute or by a sentencing judge, never constitute punishment under the Punishment Clause.¹⁰⁴ The Court also has dispelled the contention that there is any significant distinction between discrete

452 U.S. 337) (noting that the Eighth Amendment is violated whether perpetrators of violence are inmates themselves or high-level prison officials, at least when prison officials facilitate the use of violence by other prisoners).

99. *Id.* (emphasis added).

100. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (“The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”).

101. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 842-43 (1994) (requiring that the plaintiff show deliberate indifference when alleging that prison officials failed to protect a prisoner from assault by other detainees); *Hudson*, 503 U.S. at 9 (holding that excessive force is actionable under the Eighth Amendment if the official used force “maliciously and sadistically” to cause harm and not for a legitimate penological reason).

102. *Wilson*, 501 U.S. at 300-01.

103. *Id.* at 301 n.2.

104. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (concluding that deliberate indifference to a prisoner’s medical needs can violate the Eighth Amendment).

instances of abuse, like deprivation of medical care, and more systemic deprivations, such as those at stake in *Rhodes*.¹⁰⁵

As for remedies available for unconstitutional conditions of confinement, judges have exercised the extraordinary power to order release only when there was a threat of ongoing violations.¹⁰⁶ This power was comprehended, at least theoretically, by some lower federal courts in the late 1940s that applied *Weems* to hold that prisoners should be set free rather than returned to experience further cruel and unusual punishment in Georgia's prison system.¹⁰⁷ Other courts hesitated to find otherwise "inexcusable and shocking" conditions of confinement to violate the Eighth Amendment precisely because of the concern that the ramification of doing so would result in the release of all prisoners held within the confines of the particular institution.¹⁰⁸ Thus, after *Weems*, lower courts accepted that there was judicial power to order release as a remedy for *future* Eighth Amendment violations likely to be experienced by a particu-

105. *Wilson*, 501 U.S. at 300, 302-03.

106. *See* *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (upholding lower court's order requiring the release of prisoners to remedy overcrowding in California's state prisons); *Ramos v. Lamm*, 639 F.2d 559, 586 (10th Cir. 1980) (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337 (1981)) (acknowledging the district court's power to order the closure of a prison but remanding for district court to consider the scope of the remedy based on progress made by Colorado on appeal).

107. *See* *Johnson v. Dye*, 175 F.2d 250, 253, 256 (3d Cir. 1949) (ordering that prisoner be released because evidence indicated that Georgia prison officials "treat chain gang prisoners with persistent and deliberate brutality" and that "the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity"); *Harper v. Wall*, 85 F. Supp. 783, 787 (D.N.J. 1949) (following *Johnson* in a case involving a fifteen-year-old escapee from Georgia who had been sentenced to ten years of imprisonment). The Supreme Court reversed and remanded *Johnson*, not on the merits but because the lower court had not required that the petitioner first exhaust his state law remedies prior to filing his federal habeas petition. *Dye v. Johnson*, 338 U.S. 864, 864 (1949) (reversing in light of *Ex parte Hawk*, 321 U.S. 114 (1944)). The Supreme Court, although not passing on the question whether release on a habeas petition was a proper remedy for experiencing cruel and unusual punishment, eventually made clear that state law remedies must be pursued in the state in which the sentence was carried out, and not in the asylum state. *Sweeney v. Woodall*, 344 U.S. 86, 89-90 (1952).

108. *E.g.*, *Ex parte Pickens*, 101 F. Supp. 285, 289-90 (D. Alaska 1951); *see also Ex parte Ellis*, 91 P. 81, 83 (Kan. 1907) ("It must be obvious, however, that we cannot order the petitioner released on account of the condition of the jail. To do so would require us on similar applications to order the release of all prisoners confined there."); *cf. Ex parte Terrill*, 287 P. 753, 755 (Okla. Crim. App. 1930) (declining to entertain a habeas petition alleging that conditions amounted to cruel and unusual punishment when prisoner had not first attempted to pursue state law remedies).

lar prisoner. Of course, as in other areas of constitutional litigation,¹⁰⁹ courts may not order broad equitable remedies, such as release, without first giving prison officials ample leeway to correct violations.¹¹⁰

Courts became more open to exercising the power to release offenders for ongoing Eighth Amendment violations in the 1970s and 1980s, when prison reform litigation was at its peak.¹¹¹ Even so, such orders were rare because of the extreme nature of the remedy. And after passage of the Prison Litigation Reform Act (PLRA) in 1996,¹¹² statutory restrictions were placed on courts' power to enter prisoner release orders.¹¹³ But these limitations are not insuperable, as the Supreme Court recently held in *Brown v. Plata*.¹¹⁴ Indeed, the Supreme Court found that the remedy of release was appropriate in *Plata* even though many of the prisoners benefiting from the release were not contemporaneously experiencing harm caused by prison overcrowding.¹¹⁵

As for past violations that have ceased prior to litigation, the only remedy available to injured parties is damages, even when the past violations were the result of the policy, custom, or widespread practices in a particular facility or correctional system.¹¹⁶ This proposition is so well understood that courts are loath to question its rationale, either because it appears foreclosed by basic remedial doctrine, as discussed below,¹¹⁷ or because of the historic delinkage

109. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (noting that school authorities have the primary responsibility for managing and solving their obligations).

110. *Hutto v. Finney*, 437 U.S. 678, 687 & n.9 (1978) (noting that the power of a district court to order an equitable remedy is broad—but must take into account the opportunities prison officials have to correct violations).

111. See Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 332-33 & n. 22 (2009).

112. Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

113. 18 U.S.C. § 3626(a)(3) (2006).

114. 131 S. Ct. 1910, 1932-44 (2011) (finding that lower court's release order satisfied PLRA's requirements).

115. *Id.* at 1940.

116. See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (reaffirming that a party having "actually suffered" from public officials' unlawful conduct, without a showing of ongoing injury, cannot satisfy Article III's case or controversy requirement in order to seek injunctive relief).

117. See *infra* Part IV.A.

between proportionality jurisprudence and conditions of confinement law.¹¹⁸

II. REMEDIAL CONSEQUENCES OF CURRENT EIGHTH AMENDMENT DOCTRINE

Having reviewed the substantive and remedial differences between proportionality and conditions of confinement litigation, I will now turn to making the ramifications of these differences concrete. Take the following hypothetical: imagine a legislature that passes a criminal statute that, along with announcing terms of imprisonment, also imposes, as a condition of confinement, that one in five prisoners will be randomly selected on a yearly basis to be victims of a sexual assault.¹¹⁹ Concededly, it is difficult to imagine such a statute being passed.¹²⁰ However, if it were, it is also difficult to imagine this sentence actually being imposed on convicted offenders. It would surely be struck down for imposing cruel and unusual punishment, in part, because it is at least disproportionate.¹²¹

118. I have discussed this delinkage at length in earlier work. *See* Reinert, *supra* note 5, at 69-71.

119. It is estimated that 20 percent of prisoners serving life sentences will be sexually assaulted in prison. *See* Nilsen, *supra* note 6, at 125-26. The sexual assault rates are difficult to quantify, in part because of low self-reporting among some prisoners. *See* Pat Kaufman, *Prison Rape: Research Explores Prevalence, Prevention*, NAT'L INST. OF JUST. J., Mar. 2008, at 24, 24, available at <https://www.ncjrs.gov/pdffiles1/nij/221500.pdf>. With sexual assault comes, of course, trauma and the risk of sexually transmitted diseases. *See* Nilsen, *supra* note 6, at 126. Moreover, even those who are not assaulted experience fear and anxiety from the prospect of assault. *Id.* at 123 & n.47. Congress has responded to the reality of sexual assault in prison by passage of the Prison Rape Elimination Act of 2003. 42 U.S.C. § 15601 (2006). This Act provides for information gathering more than anything else. *See id.* §§ 15603-15604.

120. *See* Reinert, *supra* note 5, at 83-84.

121. The example listed in the hypothetical statute is just a sampling of the harms caused by prison conditions that are unfortunately prevalent in many states. For instance, overcrowding has serious consequences that go beyond the effects of spatial limitations to impact medical and programming availability. Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 266-67 (2006). It can make it difficult or impossible to screen or treat mentally ill prisoners. *Id.* at 273. It leads to increased idleness because of the lack of prison jobs, which itself has harmful psychological and behavioral consequences. *Id.* at 274-75 (noting that almost 40 percent of the national prison population has no work assignment). Significant amounts of idle time can contribute to increased incidence of prison rape. *Id.* at 275-76. There is also evidence of an increased risk of death by suicide or violence linked to high prison populations and overcrowding. *See* Terence P. Thornberry & Jack E.

Similarly, if a court was presented with a conditions of confinement challenge in which advocates for prisoners could show that, as a result of overcrowding conditions, a prisoner is subject to a 20 percent annual risk of rape, there is ample authority for a court to order a prison system to relieve the overcrowding or be compelled to release prisoners.¹²²

But that leaves open the question of remedy for a prisoner who already has been subjected to rape, whether by order of a statute or as a result of unconstitutional conduct by a state actor. Currently, the only remedy available to such a prisoner is damages.¹²³ If state-created conditions, whether imposed systemically or in discrete instances of abuse, are “punishment,”¹²⁴ then we should be willing to entertain the thought that some discrete forms of punishment are so horrific that they exhaust the State’s authority or capacity to punish. This is particularly true when the abuse is the result of systematic customs, policies, or practices. From this view, when a prisoner experiences extreme suffering through state-imposed abuse or conditions of confinement, the remedy should be no different than if the State had attempted to impose the punishment *ex ante*. The punishment should be declared disproportionate to the crime committed by the prisoner, and release or a reduction in sentence by some defined term should be a potential remedy.

The flaws of the current remedial approach to Eighth Amendment violations can be illustrated with a simple model. For the purposes of this discussion, let us assume that for any given offender *O* there is a constitutional punishment *P*, representing a term of imprisonment. In addition, let us also suppose that there are a set of unconstitutional conditions, denoted as *C*, which all courts would agree violate the Eighth Amendment’s prohibition on cruel and unusual punishment.

Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 348-50 (1983).

122. See, e.g., 18 U.S.C. § 3626(a)(3)(E)(i) (2006) (“[C]rowding ... [must be] the primary cause of the violation of a Federal right.”); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (setting forth the two-step process for identifying an Eighth Amendment violation in the prison context); see also *supra* notes 111-15 and accompanying text.

123. See *supra* notes 116-18 and accompanying text.

124. See *supra* notes 75-88 and accompanying text.

Let us further assume that there are four different offenders— O_1 , O_2 , O_3 , and O_4 —each of whom violate the same offense and may constitutionally be subject to the same punishment P . Now imagine that O_1 resides in a jurisdiction that has determined by statute to mandate a sentence of $P + C$ for the stated offense. In the statute, the condition C will be imposed at some specified time, T_1 , after the offender begins her sentence. If the offender brings a challenge to the sentence prior to T_1 , it will be adjudicated pursuant to principles of proportionality sentencing litigation.¹²⁵ She will be permitted to argue that the imposition of this sentence is unconstitutional—either because it is disproportionate to her offense or because it violates basic standards of decency. If she is successful, the State will be prohibited from punishing her unless the State agrees solely to punish her by imposition of P . If the State wishes to include C as punishment for her offense, it will be forbidden from punishing her at all.

Offender O_2 resides in the same state as O_1 , but he brings a challenge to his sentence *after* T_1 and therefore after imposition of condition C . Under current doctrine, he would not be able to pursue a remedy of release. Instead, he would be limited to seeking damages for the harm occasioned by imposition of unconstitutional condition C . Thus, under the same statute dispensing the same punishment, O_2 would be subjected to a greater, and constitutionally excessive, amount of punishment, whereas O_1 would not.

Now imagine that O_3 resides in a jurisdiction in which the statute specifying the punishment for the same offense provides a term of imprisonment P . After being sentenced, O_3 is placed by the State's department of corrections in a prison in which, as a result of the deliberate indifference of supervisory officials,¹²⁶ there is a substantial likelihood that, by time T_1 , he will be subjected to condition of confinement C . Perhaps the prison is overcrowded, exceedingly dangerous, or chronically understaffed. Regardless of the cause, so long as it is attributable to the officials' deliberate indifference, O_3 also may bring a legal challenge and ask a judge to require the State to

125. See *supra* notes 63-66 and accompanying text.

126. This standard of culpability has been established by Supreme Court Eighth Amendment jurisprudence. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976).

reduce the likelihood of *C* occurring to a constitutionally acceptable level, or else to release *O*₃ from custody.¹²⁷ If the State ignores the court order and continues to impose condition *C* on *O*₃ without taking any measures to reduce the risk of *C* occurring,¹²⁸ the State may not continue to punish *O*₃, and he must be released.¹²⁹

Finally, imagine that offender *O*₄ resides in the same jurisdiction as *O*₃, and the statute specifying the punishment for the same offense provides a term of imprisonment *P*. *O*₄, however, is placed in a different prison than *O*₃. In this prison, just as for *O*₃, the deliberate indifference of supervisory officials has created a constitutionally unacceptable risk that *O*₄ will experience condition *C*, but no legal challenge has been brought. At time *T*₁, *O*₄ experiences condition *C*—perhaps she is raped or beaten by a correction officer who has a history of such abuse in the past. *O*₄ brings a challenge to the imposition of condition *C* at *T*₁. For precision, we can denote this particular imposition of condition *C* as *C*₁, to distinguish it from future potential impositions of *C*. Pursuant to well-established Eighth Amendment law,¹³⁰ *O*₄ may be able to recover damages for the imposition of *C*₁,¹³¹ but she may not seek release.¹³² Her remedy for the concrete imposition of *C*₁ is limited in a way that *O*₁ and *O*₃'s remedy is not. And because the State may continue to impose

127. There is an important way in which this is oversimplified. *O*₃ does not have a personal right to release in the same way that *O*₁ does. If a court orders a prisoner release because of overcrowding, it usually leaves to the State the decision as to whom to release from which institutions. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910, 1939-41 (2011) (finding that a court order specifying the means of correcting the constitutional violation—prisoner release—was narrowly drawn because, among other things, it allowed the State to ascertain which prisoners to release). Nonetheless, if the State cannot reduce the risk of condition *C* to a sufficient level, theoretically all prisoners, including *O*₃, have a right to release.

128. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (establishing that a prison official may be held liable for an Eighth Amendment violation absent taking “reasonable measures” to address the substantial risk of a constitutional violation).

129. *See Plata*, 131 S. Ct. at 1922 (noting that persistent and uncorrected constitutional violations in a prison context may be appropriately remedied by ordering the release of prisoners to reduce the total prisoner population).

130. *See supra* notes 116-18 and accompanying text.

131. Any claim for damages may be limited by the doctrine of qualified immunity, which protects officials from monetary liability when existing law does not make clear the unlawfulness of their conduct. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

132. Of course, she may challenge the ongoing risk of the imposition of *C*, much like *O*₂, but this is not a remedy for the past imposition of *C*₁; it is a remedy for the potential future imposition of *C*.

punishment after the imposition of C_1 , both O_2 and O_4 are subjected to an unconstitutional amount of punishment that exceeds what either O_1 or O_3 faced. We can summarize the distinctions with the following schematic:

Offender	Statutorily Prescribed Punishment	Time at Which C Is Imposed	Time of Challenge to Imposition of C	Remedy if State Insists on Imposing C	Maximum Potential Punishment
O_1	P+C	T_1	T_0	Release	P
O_2	P+C	T_1	$>T_1$	Damages	P + C_1
O_3	P	T_1	$>T_0, <T_1$	Release	P
O_4	P	T_1	$>T_1$	Damages	P + C_1

We can make this concrete by returning to the example that began this Part—prison rape. As a family member of an incarcerated woman remarked, “[b]eing raped is not part of their sentence She should’ve been the first to come home.”¹³³ Current Eighth Amendment doctrine agrees with this common-sense observation, though only to a point. The doctrine refuses to sanction the use of abusive conditions such as sexual assault as a mode of punishment,¹³⁴ either directly holding or implying that given a choice between imposing an inhumane and disproportionate punishment and imposing no punishment at all, it is preferable not to punish. By contrast, once a prisoner has been subjected *ex post* to the exact mode of punishment that would be condemned *ex ante* as inhumane and illegal, courts do not entertain the prospect of ordering release *ex post*. That is, even though we can agree before the fact that the State lacks authority to impose this particular punishment, once a state actor has imposed such a punishment, courts treat the State’s authority as unchanged.

At least one caveat is in order when comparing these different schemes for remedying violations of the Constitution. The third offender, O_3 , who experiences ongoing conditions of confinement that pose an unconstitutionally high risk of future harm, does not necessarily receive an individualized remedy in the manner of the

133. Kaylee Noborikawa, *Female Inmates to Return to Isles*, HONOLULU STAR-BULLETIN (Aug. 19, 2009), http://archives.starbulletin.com/content/20090819_Female_inmates_to_return_to_isles.

134. See *supra* notes 103-05 and accompanying text.

other offenders. Prisoner release orders are last-gasp options for judges who have given governmental entities every other avenue for coming into compliance with constitutional norms.¹³⁵ Even in the rare instances in which release orders are entered, they are not individualized in the way that the remedies for O_2 and O_4 are. A judge will leave it to the State to determine which prisoners must be released to reduce the risk to a constitutional level.¹³⁶

Despite this caveat, however, the basic flaw remains because the logic of a prisoner release order is that the government must choose between not punishing at all or punishing in a manner consistent with the Constitution. Release orders force this choice on the State, as does proportionality jurisprudence.¹³⁷ It is only for offenders in O_2 and O_4 's situation, however, that the choice need not be made.

Taking these principles into account results in a disparate range of maximum permissible sentences that offenders may experience for the same conduct. For some of these offenders, the total sentence they experience will be unconstitutional, but this will not protect the offender from additional and excessive punishment. The solution proposed here is to recognize that when objectively excessive conditions of confinement are imposed on a prisoner, beyond what is tolerable from the perspective of a civilized society, the State that imposed such conditions should not be free to proceed with punishment apace. This requires some recognition that, in this circumstance, the severity of the offender's sentence has changed. And depending on the seriousness of the constitutional violation, either a release or a reduction in the term of years remaining on the offender's sentence is an appropriate remedy that would provide for a more consistent and coherent Eighth Amendment jurisprudence.

Later in this Article, I address some of the complexities of recognizing a remedy of release—the forum in which it must be raised and the need to determine how to make particular abuse commensurate with particular lengths of confinement. But it is worthwhile to note where we have traveled until now. I have described an Eighth Amendment jurisprudence that both recognizes treatment within prison as “punishment” and, in certain cases, affirms that such

135. See 18 U.S.C. § 3626(a)(3) (2006).

136. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1939-41 (2011).

137. See *supra* notes 58-61 and accompanying text.

punishment may be unconstitutionally excessive or inhumane. At the same time, I have described a remedial scheme that operates to permit the State to impose punishment on some offenders beyond what the Constitution allows, simply because of when that punishment is distributed. Therefore, I have proposed that we strive to treat similarly situated offenders similarly by recognizing that, in some instances, either a release from custody or a shorter period of imprisonment is an appropriate remedy for the imposition of unconstitutional conditions of confinement.

III. RELEASE AS REMEDY THROUGH THE LENS OF PUNISHMENT PHILOSOPHY

To this point, I have focused primarily on how the remedy of release is consistent with, if not mandated by, Eighth Amendment doctrine. This Part discusses why the remedy proposed here also conforms with well-accepted notions of punishment theory. It does so under the assumption that there is some connection between what philosophers or theorists call punishment and what the Eighth Amendment regulates. Some might believe that a condition could be punishment for the purposes of the Eighth Amendment but not for the purposes of theory because the Constitution is addressed to different concerns than is punishment philosophy. But if that is the case, then punishment theory has nothing to say one way or another about the Eighth Amendment remedy I propose here. Absent good reason to suppose such a sharp separation of punishment theory and practice, I assume here that if we call something punishment for the purposes of philosophy, we should assume it also is regulated by the Eighth Amendment, and vice versa.

This raises important questions because although Eighth Amendment doctrine quite clearly contemplates that, for the purposes of the Constitution, abusive treatment of prisoners by corrections officials is punishment under the Eighth Amendment,¹³⁸ philosophers are more ambivalent about whether such treatment truly constitutes punishment.¹³⁹ Theorists seem to agree, or at least

138. *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976).

139. It should not be surprising or upsetting that there is this gap between theory and practice. Lawyers and philosophers have different needs for a theory of punishment—lawyers

assume, that sentencing determinations made by legislatures and judges are properly considered punishment and that confinement is punishment, at least when imposed for the purpose of punishment.¹⁴⁰ But whether the actions of individual corrections officials who administer prisons also constitute punishment remains relatively undertheorized.¹⁴¹ Although doctrine may be clear, the theoretical dispute is nonetheless relevant.¹⁴²

A. Conditions of Confinement as “Punishment”

There is wide agreement that confinement for violations of the criminal law is itself punishment.¹⁴³ One could start with H.L.A. Hart’s classic definition of punishment,¹⁴⁴ which looks to five factors: (1) the imposition of pain or something unpleasant; (2) for an offense contrary to legal rules; (3) on an offender or supposed offender; (4) by a person who intends to administer such punishment; and

need to have one to decide when particular rights are implicated, whereas philosophers need to understand what kind of state power must be justified. See 1 GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 226-27 (2007).

140. See, e.g., Bernard E. Harcourt, *Post-Modern Meditations on Punishment*, 74 *SOC. RES.* 307, 329 (2007) (discussing the virtues of randomization in the criminal system and observing that correctional departments could assign prisoners to security levels based on random draws and provide access to health programs based on randomization); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 *J. CRIM. L. & CRIMINOLOGY* 1293, 1342 (2006) (identifying the drawbacks of retributivism, including the “risk that punitive authority will be abused” and the cost of incarceration on communities from which offenders come).

141. Although not directly addressing the theoretical question, David Garland has called attention to the central role that correctional officials play in penal practice and in redefining the meaning of punishment. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 182-89 (1990). The question of “who” may punish is different than the question of whether punishment must be intentionally imposed, as opposed to knowingly, recklessly, or foreseeably imposed. See Kolber, *Unintentional Punishment*, *supra* note 17. One could accept as a theoretical matter that individual correction officials punish, but only when they act intentionally. Of course, under Eighth Amendment doctrine, officials may inflict punishment through reckless or knowing conduct as well as intentional conduct.

142. Those Justices, including Justice Thomas, who object to the extension of the Eighth Amendment to conditions of confinement make some of the same arguments as those few theorists who have directly addressed this question and found that conditions cannot be punishment. *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 40-42 (1993) (Thomas, J., dissenting).

143. See *Rhodes v. Chapman*, 452 U.S. 337, 345 (1976) (“It is unquestioned that [c]onfinement in a prison is a form of punishment subject to scrutiny under the Eighth Amendment standards.” (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978))).

144. Hart used that word cautiously. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-6 (2d ed. 2008).

(5) within the framework of a legitimate legal authority.¹⁴⁵ Under this understanding of punishment, confinement itself clearly meets the definition. This is so even though incarceration can be “ambiguous”¹⁴⁶ or unjust in particular circumstances.¹⁴⁷

Characterizing the conditions that are imposed during confinement—the treatment of offenders who are incarcerated—is arguably a more difficult question. Popular conceptions of punishment certainly would include the conditions of confinement as well as the confinement itself.¹⁴⁸ Prisons are often thought to play a role in punishment because they are thought to incapacitate.¹⁴⁹ As Nicola Lacey has argued, in the United States there may be a historic tendency toward thinking of punishment as degrading, inasmuch as the history of punishment in the United States is replete with instances of “levelling down of punishment” or a “levelling up of harshness.”¹⁵⁰ Strict conditions of confinement are part of making punishment degrading, at least in popular conception.¹⁵¹

Conditions of confinement also fit loosely within Hart’s conception of punishment. This is easier to see if one starts with the conditions that are expected as part of incarceration—limited privileges, limited movement, limited freedom in exercising daily choices, and literal physical restraint. These conditions easily satisfy the first factor—it is at least unpleasant, if not painful, to be deprived of one’s autonomy. As to the second factor, it depends on whether the imposition “for” violation of a legal rule implies a “but for” causative mechanism—in which case, conditions of confinement, even abusive ones, qualify—or if they require a tighter connection between the violation and the condition. However, at the very broadest level of

145. *Id.* at 4-5. Hart’s version of punishment focuses on objective factors: an offender who commits a crime to obtain shelter and other minimum necessities is still being punished, even if she subjectively experiences confinement as beneficial. FLETCHER, *supra* note 139, at 227-28. This “objectivist” approach to measuring punishment has recently been called into question in literature that I detail in Part III.C, *infra*.

146. It can be intended to punish, provide space for treatment, or incapacitate. FLETCHER, *supra* note 139, at 226.

147. *Id.* at 264. Even if the person being punished is innocent, “then the sanction remains punishment, though unjust punishment.” *Id.* at 231.

148. See *supra* note 88 and accompanying text.

149. Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70-73 (2005).

150. NICOLA LACEY, *THE PRISONER’S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 32-35, 39 (2008).

151. *Id.* at 32-35.

generality, the particular limitations that characterize different prisons are certainly considered to be “for” transgressions of the criminal law, even if conditions are not tailored to precise crimes. The third, fourth, and fifth factors also appear to be readily met for expected conditions of confinement. They are imposed on offenders or supposed offenders by corrections officials who intend to enforce the restrictions inherent to incarceration. And they are administered within a legitimate legal framework. Thus, it is not surprising that many punishment philosophers recognize at least implicitly that conditions of confinement are part of the punishment meted out by the State.¹⁵²

B. Abusive Conditions as Unjust Punishment

Even though conditions of confinement appear consistent with theoretical conceptions of punishment, the question surely arises: In what way can the physical or sexual abuse of a prisoner by a correction officer be considered punishment? For instance, one might argue that when a correction officer beats a prisoner, it is not in “response to” or “because of” a particular violation but a response to the simple fact that the offender is incarcerated and subject to the whims of the officer. To understand why this critique is not dispositive, it is useful to focus on the distinction between just and unjust punishment. Let us imagine a judge who sentences all black offenders to twice as much imprisonment as white offenders. Surely, everyone would agree that this sentence constitutes punishment of the white and black offenders.¹⁵³ But the increased period of

152. See, e.g., JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 100, 118 (1970) (recognizing that “hard treatment” in prison is one aspect of the expressive dimension of punishment); see also E. THOMAS SULLIVAN & RICHARD FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW* 148 (2009) (noting that some discipline in prison is “clearly intended as (further) punishment”); Michael Tonry & Norval Morris, *Interchangeability of Punishments in Principle*, in *THINKING ABOUT PUNISHMENT* 428-32 (Michael Tonry ed., 2009) (pointing out that seeking precise equivalence in punishment is complicated by fact that suffering imposed will differ based on the kind of prison or the attitude of prison administrators).

153. For instance, leaving sentencing entirely to the discretion of a judge may be “lawless” or arbitrary, but no one would deny that imprisonment under such a regime constitutes punishment. See generally Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

sentencing for black offenders cannot be said to be “for” a violation of a legal rule, at least in the close-knit way that would deny the characterization of abusive conditions of confinement as punishment. The judge may exercise discretion in sentencing; when the judge abuses that discretion by acting in a racist manner, he has punished unjustly. It would be incoherent to say, however, that he has not punished.

One could similarly argue that a correction officer who beats a prisoner because the offender has irritated him in some trivial way has punished the prisoner in an unjust way. The fact of confinement contemplates that officers will have to use some amount of force to confine offenders—this is why the Eighth Amendment permits the imposition of de minimis force or force that is reasonable under the circumstances to maintain order and security within the prison walls.¹⁵⁴ But when the officer exceeds that discretion, much like the judge, he has certainly punished unjustly. To deny this connection would be to treat punishment solely as confinement and not as the restraints that are imposed with confinement—the limitation on visits, on recreation, and on freedom of association or speech or movement within the prison.

The foregoing suggests that if confinement and the expected conditions found therein are punishment, then conditions that fall outside of those expectations should also be considered punishment, unjust though it may be. For the most part, however, punishment theorists have not addressed this particular question. This is not for lack of a general interest in determining “who” may punish. Alon Harel and James Q. Whitman, for example, have focused on the distinction between state actors who may inflict sanctions and private actors who, on some accounts, should not be authorized to inflict sanctions.¹⁵⁵ For these theorists, the “State” is an entity composed of all of its actors—legislators, judges, prison officials—to be distinguished from private individuals who have no state agency.

154. See *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992).

155. Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burdens*, 28 *CARDOZO L. REV.* 2629, 2631 (2007) [hereinafter Harel, *Moral Burdens*]; Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 *LEGAL THEORY* 113, 115 (2008) [hereinafter Harel, *Privately Inflicted Sanctions*]; James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1088-89 (1998).

There is no cause, however, for distinguishing between the state actors who may or may not punish.¹⁵⁶ Nothing about Whitman or Harel's skepticism of private actors as punishers suggests that state officials are incapable of punishing via state authority, although some of the same dangers inherent in delegating to private individuals may be present when delegating to individual correction officials.¹⁵⁷ Indeed, Whitman at least seems to accept implicitly that correction officials administer punishment.¹⁵⁸

When theorists do focus on the state apparatus of punishment, most focus their attention on legislators and judges as proper punishers.¹⁵⁹ But if these state agents may punish, it is unclear why executive officials who run prisons may not. It cannot be because of concerns about the potential for arbitrariness when punishment is dispensed by corrections officials, for some of the same concerns of arbitrariness are present with legislators and judges.¹⁶⁰ There is always the risk that those we trust to impose punishment will betray that trust.

More fundamentally, the accepted view that legislators and judges are authorized to distribute punishment, if combined with the view that the executive—through its prison system—is not so authorized, raises the question of what precisely corrections officials are authorized to do. Imagine, for instance, a statute authorized a judge to sentence an offender to a prison term “under such conditions and for so long as the director of the Department of Corrections shall determine appropriate.” Clearly, under these circumstances, we would view the director of the corrections department to have been delegated a punishment role by the legislature.

156. Much of Harel's argument is devoted to exploring the “moral burdens” that are imposed on private individuals who are asked to punish in the name of the State. Harel, *Moral Burdens*, *supra* note 155, at 2637-44. Thus, in some respects, although his argument opposes the role of private actors in punishment, it admits of the possibility that they may be involved in punishment.

157. One difference is that the State retains the power and authority to control the actions of prison officials, at least in theory.

158. Whitman contrasts the lack of state control over privately inflicted sanctions with prisons, “[h]owever monstrous they may have become,” because the State has management duties for which it may be held accountable. Whitman, *supra* note 155, at 1091; *see also id.* at 1092 (finding democratic legitimacy in the fact that state punishment is administered by “criminal justice professionals”).

159. *See, e.g.*, Harel, *Privately Inflicted Sanctions*, *supra* note 155, at 127, 130.

160. *See* Ristroph, *supra* note 140, at 1296.

Frankly, the hypothesized statute is not all that different from sentencing schemes in which executive agencies administer good time or parole determinations, or with indeterminate sentencing.¹⁶¹ In any event, in more common determinate sentencing schemes, the only difference between the hypothesized statute and actual statutes is that the latter specify terms of years. In both circumstances, the legislature is leaving to the executive corrections system the determination of the conditions of detention, and the range both within and without states is quite broad.

C. The “Subjectivist” Debate as Applied to Abusive Conditions

Until now, I have postponed consideration of the debate in punishment theory recently spawned by the important work of Adam Kolber, John Bronsteen, Christopher Buccafusco, and Jonathan Masur, all of whom have focused attention on the experience of punishment. Kolber has elaborated the ways in which different offenders will experience punishment differently, whether via fine or incarceration, and has argued that punishment theorists and policymakers should take these differing subjective experiences into account when determining whether a particular punishment is just.¹⁶² Indeed, Kolber argues that retributive principles of proportionality are undermined if we do not take into account the fact that different offenders will experience precisely the same punishment differently.¹⁶³ There is much more to it than that, but I take it that Kolber would agree that the treatment of offenders by corrections officials constitutes punishment or requires justification by the

161. In traditional indeterminate sentencing schemes, judges are responsible for looking to principles of rehabilitation and incapacitation to determine the appropriate maximum and minimum prison term. Frase, *supra* note 149, at 70-71. Frase recognizes that correction officials and parole boards then take over to assess what treatment or programming is appropriate in prison and when it is safe for the offender to be released. *Id.*

162. See Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1567-69 (2009) [hereinafter Kolber, *Comparative Nature*]; Kolber, *Subjective Experience*, *supra* note 17, at 184.

163. Kolber, *Subjective Experience*, *supra* note 17, at 211.

State.¹⁶⁴ Kolber himself uses the suffering caused by malicious wardens as an example of punishment.¹⁶⁵

In a similar vein, Bronsteen, Buccafusco, and Masur have sparked a renewed debate over the extent to which hedonic adaptation should be incorporated into punishment practice and theory.¹⁶⁶ They focus on the disparate ways in which the length of incarceration affects the subjective well-being of offenders. While in prison, offenders experience the greatest degree of pain at the beginning of their incarceration. They subsequently adapt and—because they have adjusted their baseline level of pleasure—experience less unhappiness as the period of incarceration progresses.¹⁶⁷ At the same time, Bronsteen and his colleagues also argue that after an offender’s sentence has ended, the negative effects of imprisonment linger, but these effects are not necessarily correlated with the length of imprisonment—the metric by which most judge the proportionality of punishment.¹⁶⁸

Distinguishing themselves from Kolber, Bronsteen and his colleagues make what they perceive to be a narrower argument: that the adaptation of offenders to the experience of punishment should be taken into account by legislators and others.¹⁶⁹ Like Kolber, I take it they would agree with the proposition that abusive treatment by corrections officials constitutes punishment or must be justified. Inasmuch as Bronsteen and his colleagues focus on the negative experience of punishment,¹⁷⁰ their understanding of

164. Whether Kolber would formally call treatment by officials “punishment,” or would require that it be justified by the State whether it is punishment or something else, may be up for grabs. In a recent article, he argues that both purposeful punishment and the foreseen consequences of such punishment must be justified by the State, whether the foreseeable consequences are formally considered punishment or something else. See Kolber, *Unintentional Punishment*, *supra* note 17.

165. Kolber, *Subjective Experience*, *supra* note 17, at 197.

166. See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1039 (2009) [hereinafter Bronsteen et al., *Happiness*]; John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1466-67 (2010) [hereinafter Bronsteen et al., *Retribution*].

167. Bronsteen et al., *Happiness*, *supra* note 166, at 1047-48.

168. *Id.* at 1038.

169. Bronsteen et al., *Retribution*, *supra* note 166, at 1464-65.

170. *Id.* at 1469, 1472.

punishment would appear to include abuse by state officials while an offender is in prison.¹⁷¹

Kolber and Bronsteen's conceptions of punishment, construed broadly, focus on the importance of the subjective experience of offenders while in prison. The remedy I propose here rests on a narrower foundation because it requires an underlying finding of an Eighth Amendment violation. Whereas Kolber and Bronsteen would find punishment based solely on the subjective experience of offenders, the Eighth Amendment requires a finding of an objective degree of harm.¹⁷² Whereas those theorists tend to view prison conditions that are the product of intentional and unintentional state action similarly, Eighth Amendment doctrine requires that punitive conditions be the result of the conduct of state officials with a culpable state of mind.¹⁷³ Despite these differences, some of the critics of Kolber and Bronsteen might object to my contention that abusive treatment by corrections officials should be considered "punishment." It is to these critics that I now turn.

Kolber and Bronsteen's propositions have been subject to strident criticism by some retributivists who argue that the subjective experience of offenders has little, if any, role in a retributive account of just punishment, in part because the subjective experience of offenders should not be considered part of punishment.¹⁷⁴ Most notably, Dan Markel, Chad Flanders, and David Gray have argued that although subjective experiences might properly play some limited role in sentencing determinations, subjective experience is irrelevant to the extent that retributive theory relates to the justification for punishment.¹⁷⁵ These authors are somewhat ambivalent, however, about whether corrections officials mete out punishment by their treatment of offenders. On one hand, Markel, Flanders, and Gray argue that abusive treatment that is unauthorized need not be

171. Bronsteen and his colleagues do seek to distinguish their position from Kolber, in some way, by distancing themselves from a "subjective" focus on how individual prisoners experience punishment and instead focusing on how hedonic adaptation operates in a "typical" manner. *Id.* at 1469 n.28.

172. See *supra* text accompanying notes 94-97.

173. See *supra* notes 100-05 and accompanying text.

174. See generally Markel & Flanders, *supra* note 18; Gray, *supra* note 18; see also Markel, Flanders & Gray, *supra* note 18, at 619-20.

175. See Markel & Flanders, *supra* note 18, at 909.

equated with “justified, authorized punishment” so as to adjust the term of imprisonment by early release.¹⁷⁶ Instead, the State can take moral responsibility by providing “compensation, apology, injunctive relief, or administrative reform.”¹⁷⁷

Even as Markel, Flanders, and Gray stake out a position that abusive treatment need not be considered punishment, they seem to accept that some treatment by corrections officials may be so excessive and so abusive so as to interfere with the expressive purpose of punishment and violate the offender’s dignity.¹⁷⁸ And at least at the extremes, they appear ready to deny the State the power to inflict further punishment on an individual who has suffered abuse that violates the Eighth Amendment and is the result of systemic cruelty.¹⁷⁹ Thus, Markel, Flanders, and Gray might accept that in some cases release is an appropriate remedy for discrete Eighth Amendment violations.

There appear to be two strands of criticism emanating from Markel, Flanders, and Gray regarding “who” may punish. First, there is a claim that abusive, malicious, or sadistic treatment cannot be punishment because it is unauthorized and hence unjustified.¹⁸⁰ On this view, it is simply “unjust treatment” and not punishment.¹⁸¹ This critique is in conflict with Eighth Amendment jurisprudence, a minor point if one accepts that the Eighth Amendment’s definition of punishment may depart from philosophical

176. See Markel & Flanders, *supra* note 18, at 960-61; see also Gray, *supra* note 18, at 1651 (arguing, for example, that prison rape is not punishment because it is not inflicted by the “right person” for the “right reason”); Markel, Flanders & Gray, *supra* note 18, at 619-20.

177. See Markel & Flanders, *supra* note 18, at 961; see also Gray, *supra* note 18, at 1652 (treating suffering caused by a sadistic warden as criminal because to do otherwise would “deny claims for protection from those who suffer at the hands of sadistic officials as long as they are released when their suffering thresholds are reached”); Markel, Flanders & Gray, *supra* note 18, at 620.

178. Markel & Flanders, *supra* note 18, at 957-58; see also Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 95-96, 104, 115 (2010) (describing abusive prison conditions and suggesting that under some retributive theories, humiliating and degrading prison conditions result in unjust punishment); David Gray & Jonathan Huber, *Retribution for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 164 (2010) (acknowledging that degrading prison conditions are harsh and therefore “disproportionate or otherwise unjustified”).

179. Markel & Flanders, *supra* note 18, at 961 n.193; Markel, Flanders & Gray, *supra* note 18, at 620 n.46.

180. See Markel & Flanders, *supra* note 18, at 961; Gray, *supra* note 18, at 1651.

181. Gray, *supra* note 18, at 1649.

conceptions of punishment. On the other hand, if the critique is that abusive treatment is not punishment because it is not “proper,” “just,” or “justified” punishment, that is a different matter entirely.¹⁸² For it seems uncontradicted that punishment, imposed by whomever, can be “unjust treatment” precisely because it is without justification or, in other words, not “proper” punishment.¹⁸³ Otherwise, it is unclear that we could ever say that a particular punishment is unjustified or improper—the test certainly cannot be whether a “theory of punishment needs to or should aspire to justify” a particular treatment.¹⁸⁴ This is, after all, exactly what we are trying to determine: what punishment can, or should, be justified and what punishment cannot.

The second criticism appears to be a remedial one. Markel and Flanders assert, with some caveats, that the proper remedy for abusive treatment is not an adjustment of sentencing period but other measures such as criminal prosecution, damages, injunctive relief, and reform.¹⁸⁵ To the extent that Markel and Flanders are claiming that these remedies are inconsistent with an adjustment of the period of punishment, there is no obvious reason as a matter of theory for this to be so. Instead, if they mean to say that those other remedies are preferable to early release, this would presumably depend on case-specific determinations. It may also be that their argument is tied to their critique of the subjective account of punishment offered by Kolber and Bronsteen. But because the Eighth Amendment violations I address here do not depend on subjective experience of prison conditions, and because I am arguing for tailored, not broad, punishment reductions, it may be that the objections raised by Markel, Flanders, and Gray (in their collective work) do not apply here.

182. See Markel, Flanders & Gray, *supra* note 18, at 620 (stating that even if the state is responsible for abusive treatment, the harm caused to prisoners need not be justified by retributivist theories of punishment).

183. *Id.* (stating that if abusive treatment experienced in prison is actionable under the Constitution, then it should be remedied “not because these harms are punishment but precisely because they are not”).

184. Markel & Flanders, *supra* note 18, at 1649; Markel, Flanders & Gray, *supra* note 18, at 620.

185. See Markel & Flanders, *supra* note 18, at 969.

Gray's remedial critique is slightly different. He claims that if we call abusive treatment by corrections officials punishment, offenders will be left without traditional remedies like tort claims or other compensatory schemes, and the officials who mete out such abuse will be immune from prosecution from criminal acts because they are immunized as punishers.¹⁸⁶ Gray never explains why this must be so—why one who inflicts unjustified punishment may not be held personally accountable for their actions. No court has ever suggested that those who inflict punishment on behalf of the state take on the cloth of sovereign immunity as a result. Legislators, prosecutors, juries, and judges have different kinds of immunity based on their function within our liberal democracy, but their role as punishers has not been an articulated justification.¹⁸⁷ Gray's thesis, by contrast, permits the State to pay rent to continue punishing a prisoner who has been punished by state officials more than the State could ever have imposed *ex ante*.

Gray also seems to reject the proposition made here—that those who experience unjustified and excessive punishment be released earlier than their original sentence calls for—because it implies that release makes the offender whole and therefore the offender abandons any claim “that abuse at the hands of other prisoners should be stopped, much less prosecuted.”¹⁸⁸ But this assumption is questionable. First, based on controlling standing doctrine, the offender will have a very difficult time seeking injunctive relief that stops abuse, even if the offender stays within the prison walls.¹⁸⁹ As for abandoning any “personal” claim that the rapist be prosecuted, there is no such thing—victims of crime have no personal claim that can mandate the prosecution of a perpetrator.¹⁹⁰ In any event, it is not obvious, as has been discussed above,¹⁹¹ that early release from prison would make such an offender whole. Therefore, there may be no inconsistency at all with permitting offenders to retain their

186. Gray, *supra* note 18, at 1650-51.

187. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 341-43 (2009) (reviewing the bases for absolute immunity).

188. Gray, *supra* note 18, at 1651.

189. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

190. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005).

191. See *supra* note 188.

personal claims even as the State is prohibited from punishing them beyond what they deserve.

To some extent, Markel, Flanders, and Gray's objections reflect their retributivist-informed definition of punishment. Individually and collectively, they have described punishment variously as (1) deprivations "justified, measured, and described solely in objective or perhaps intersubjective terms by reference to the offender's culpability in a crime" but not "excessive" or "incidental" suffering;¹⁹² (2) "those intended, coercive condemnatory deprivations inflicted against persons in response to their crimes and by state officials who are authorized to inflict those deprivations;"¹⁹³ or (3) hardship "authorized, intentionally imposed, and proximately caused by the state."¹⁹⁴ If these definitions exhaust our concept of punishment, however, then it is hard to see how there is any space for unjustified punishment, except perhaps for excessively harsh or lenient prison sentences or prison conditions specifically imposed by statute.¹⁹⁵

At this point, it is well to recall Hart's caveat to his five factors of punishment. For even Hart acknowledged that although these factors were elements of the "standard" case of punishment, there were other examples of punishment that did not fit within the definition, including punishment of persons "who neither are in fact nor supposed to be offenders" and "decentralised sanctions ... for breaches of legal rules imposed or administered otherwise than by officials."¹⁹⁶ Hart felt it necessary to acknowledge these as examples of punishment to avoid what he called the "definitional stop" in

192. Gray, *supra* note 18, at 1670, 1692-93.

193. Markel, Flanders & Gray, *supra* note 18, at 619-20.

194. *Id.* at 618.

195. See Markel, Flanders & Gray, *supra* note 18, at 615 (arguing that the key for defining punishment is a connection to democratic processes of decision making). There may be some room here for debate among these authors. Flanders, for instance, has acknowledged that brutal prison conditions could be considered part of punishment but also has suggested that proportionality analysis is appropriate only for challenging sentence length, not conditions. See Chad Flanders, *Can Retributivism Be Progressive? A Reply to Professor Gray and Jonathan Huber*, 70 MD. L. REV. 166, 169 (2010). And Markel has argued that retributivist principles should inform the Eighth Amendment by providing a remedy when an innocent person is punished. See Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1219 (2009).

196. HART, *supra* note 144, at 5.

debates about theories of punishment.¹⁹⁷ He recognized that in the debate about why punishment is justified, it is too easy to rest on definitions because it avoids the difficult question of why we have chosen “a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence.”¹⁹⁸ For Hart, “[n]o account of punishment can afford to dismiss this question with a definition.”¹⁹⁹ David Garland has made a similar critique of punishment theory, noting that it does not concern itself with punishment as practiced because it is not part of the “oversimplified conception of ‘punishment’ that philosophers conventionally use.”²⁰⁰ In the end, whether Gray, Markel, and Flanders’ objections invoke the definitional stop that Hart was so wary of, they are insufficient to demonstrate that treatment of offenders can never be considered punishment, whether just or unjustified.

D. Ramifications of Treating Abusive Conditions as Unjust Punishment

If one accepts that treatment within prison is punishment, it seems that whatever one’s account for why punishment is justified, the treatment previously described may not be deemed proper punishment. Recall that treatment may violate the Eighth Amendment if it is disproportionate or inconsistent with basic principles of dignity.²⁰¹ For retributivists, punishment that is so excessive as to be disproportionate under the Eighth Amendment cannot be just.²⁰² Nor can a theory of punishment that rests on the moral desert of the offender embrace the application of a punishment that is outside the bounds of accepted social conceptions of decency—whether one views retributivism as establishing the floor, the ceiling, or the exact amount of punishment.²⁰³

197. *Id.*

198. *Id.* at 6.

199. *Id.*

200. David Garland, *Sociological Perspectives on Punishment*, 14 CRIME & JUST. 115, 118-19 (1991).

201. *See supra* Part I.B.

202. *See supra* notes 180-82 and accompanying text.

203. As many commentators have noted, Eighth Amendment jurisprudence most likely

Of course, principles of proportionality and dignity are relevant to consequentialists as well, as Richard Frase has argued.²⁰⁴ Thus, when the burden and cost of a particular punishment to an offender outweigh the benefit to society, it might be said to violate a principle of “ends disproportionality.”²⁰⁵ And if a punishment less burdensome to the defendant may achieve the same goals for the public as a more severe punishment, it might be said to violate a principle of “means proportionality.”²⁰⁶ Here again, the punishments that are so extreme as to be disproportionate or inconsistent with basic moral judgments will generally impose a very high burden on the offender that will not be parsimonious in the least and will rarely produce a benefit sufficient to outweigh the significant costs to the offender. For utilitarians, then, the abusive punishment described above would be unjustified in almost every instance.²⁰⁷

In sum, the remedy I propose here is consistent with principles of both doctrine and theory. It would serve to equalize treatment between objectively similarly situated offenders and would be consistent with a range of justifications for punishment. What remains is to discuss in some detail how courts might effectuate this remedy, and some of the practical costs and benefits that have yet to be considered.

IV. EFFECTUATING THE REMEDY OF RELEASE

Although this remedy may be conceptually straightforward, it would surely be complex in execution. It may be difficult to determine the forum in which such a request for release should be made

reflects a commitment to limited retributivism—in which principles of retributivism guide the outermost limits of punishment. See Frase, *supra* note 149, at 77-78; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 707-08 (2005); Ristroph, *supra* note 140, at 1302. But retributivism can also be thought of as providing the basis for judging what the minimum amount of punishment should be or assessing what precise amount of punishment is appropriate. *E.g.*, Lee, *supra*, at 711-12.

204. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 592-93, 628 (2005).

205. *Id.* at 592-94.

206. *Id.* at 596.

207. Frase, for instance, recognizes that overcrowding of prisons can undermine consequentialist goals—prisoners might leave prison more dangerous than when they entered—and may also violate principles of humane treatment. Frase, *supra* note 149, at 73.

and how to equate particular deprivations with a specific remedy. Courts might rely on a framework similar to the Federal Sentencing Guidelines so that particular kinds of mistreatment are associated with different levels of reductions in sentences.²⁰⁸ Courts may also have difficulty determining whether proportionality principles or evolving standards of decency should guide remedial determinations, although it is worth recognizing that disproportionate sentences can be said to implicitly violate evolving standards of decency.²⁰⁹ It may also become necessary to distinguish between conditions of confinement that are the result of systemic customs, practices, or policies and those conditions that are imposed by individual corrections officers acting without any facilitation from senior corrections officials. In the former case, the disjunction between remedies discussed above is more prominent.²¹⁰ Indeed, it might be said that the best way to equalize the treatment of the hypothetical offenders described above is to limit the remedy of release to offenders who experience unconstitutional conditions that are closely tied to official custom, policy, or practice.

This Article cannot address all of these complexities, but addresses some of the most prominent ones as follows: First, I discuss how the law of remedies relates to the proposal described here. Then, I show that the basic task of a court in adjudicating this right will not be so different from what courts do on an everyday basis in criminal sentencing. Finally, I consider some of the practical costs and benefits that accompany this remedy.

A. Accounting for the Law of Remedies

One might be willing to accept all of the foregoing propositions but still be convinced that release is not the proper remedy for past Eighth Amendment violations for reasons having nothing to do with punishment doctrine or theory. To the extent we view release from custody as equitable in nature, there are longstanding principles that treat equitable remedies as available only as a last resort,

208. See 18 U.S.C. § 3553(a)(2)(A) (2006) (listing factors to be considered in imposing a sentence under Federal Sentencing Guidelines).

209. See *supra* notes 62-64 and accompanying text.

210. See *supra* Part II.

essentially when damages cannot provide sufficient compensation. Legal remedies, or damages, are taken to be the presumption and the grant of equity is a matter of discretion for a court to consider when damages remedies are inadequate. The Supreme Court recently described the discretionary standard as follows:

A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.²¹¹

Each of these requirements can be notoriously difficult to meet, in large part because of the Supreme Court's jurisprudence.²¹² Most prominent is standing doctrine, which under *City of Los Angeles v. Lyons* requires a plaintiff injured by past practices to show a likelihood of future injury before permitting the awarding of equitable relief.²¹³ The Court's decision in *Lyons* is one of the most difficult injunctive cases for plaintiffs to overcome because it has raised such difficult standards for proving standing in civil rights cases.²¹⁴ But for the remedial proposal made here, standing does not appear to be

211. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

212. The Court is not the only institutional actor to create barriers to injunctive relief. Congress has done so in particular contexts, with the Prison Litigation Reform Act one of the most notable examples. 18 U.S.C. § 3626(a)(2).

213. 461 U.S. 95, 111 (1983).

214. David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1237. There is no need to recount the numerous cases in which *Lyons* has been applied to bar injunctive relief. *See, e.g.*, *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (dismissing plaintiff's civil rights claim because it was "barred by the standing limitations described in *City of Los Angeles v. Lyons*"). It is not, however, an impossible barrier to overcome. *See Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1163-1164 (11th Cir. 2008) (finding standing when "the injuries are foreseeable and the expected results of unconscious and largely unavoidable human errors"). Even the Supreme Court has minimized the reach of *Lyons* in recent cases involving "reverse-discrimination" equal protection claims. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-719 (2007) ("The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed."); Rudovsky, *supra*, at 1237-38 (noting that standing doctrine appeared to be liberalized in *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

a serious barrier because continuing to punish the prisoner *after* she has experienced disproportionate or unjustified punishment is to engage in an ongoing injury of constitutional dimension. For some prisoners who have experienced serious abuse, an additional day in prison will only compound the constitutional injury. By the same token, the imposition of additional punishment in the future would clearly qualify as irreparable injury sufficient to justify the provision of equitable relief.

Instead, what most prominently stands in the way of the relief proposed here is the principle that, when damages are adequate, injunctive relief should be denied.²¹⁵ There are several reasons that this objection can be overcome as well. First, courts have long recognized that legal remedies are not a complete remedy for the violation of a constitutional right.²¹⁶ This is particularly the case when the violation also involves physical injury or emotional distress. Damages simply cannot purchase the right of the individual to be free from the treatment described here.²¹⁷ Second, depending on how one conceptualizes the injury here, it may be that the remedy of release is the *only* remedy that will come close to fully addressing the past unconstitutional abuse. If one believes that an abusive condition, in addition to the time already spent in prison, has imposed a total punishment that is disproportionate to an offender's crime of conviction, then the remedy of release is necessary not only to remedy the prior imposition of the abusive condition but also to prevent any further punishment. Additional punishment beyond that which is already disproportionate would quite clearly constitute a distinct constitutional injury that can be most directly remedied by release. Analogously, if someone is shown to be wrongly incarcerated, no barrier exists to providing him compensation for the years of unjust punishment he experienced and also ordering his

215. See *MercExchange, L.L.C.*, 547 U.S. at 391 (setting forth a four-factor test that a plaintiff must satisfy in order to obtain injunctive relief).

216. See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1326 (2001).

217. See *id.* at 1328-30 (noting that when constitutional injuries are noneconomic and therefore incapable of being fully remedied by damages, courts usually find that plaintiffs have met the irreparable injury prong for injunctive relief); see also JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 241 (1979) (comparing the relative ease of compensating individuals for wrongful imprisonment with the difficulty of compensating for torture or other deprivations of dignity).

release to prevent the imposition of any further unjust punishment.²¹⁸

Moreover, even if we think of the injury as a violation of conceptions of human dignity and the minimum requirements of a civil society, subjecting an offender to inhumane treatment may also justify release in addition to the awarding of damages, depending on the nature of the treatment. In this respect, we might be more concerned about injuries that are caused by systemic deficiencies rather than an individual bad actor, especially if we are willing to attribute those deficiencies to the State.²¹⁹

Finally, there will be many cases in which the availability of damages will simply not provide an adequate remedy. In some cases, money damages will not be available because of immunities, most prominently qualified immunity.²²⁰ Sovereign immunity also may play a role in barring relief in some instances.²²¹ In fact, the Supreme Court has recently highlighted the availability of injunctive relief as a reason to be less concerned about the unavailability of monetary damages due to the immunity doctrine.²²² Indeed, in some sense the unavailability of damages relief under the Eleventh Amendment heightens the need for injunctive relief because it creates an “economically” irreparable injury to the plaintiff.²²³

There may also be statutory limitations on damages that make injunctive relief a more appropriate remedy. The PLRA and its state analogs, for instance, have provisions limiting the availability of damages in prisoners’ rights litigation.²²⁴ Most notable is the

218. See, e.g., *Tyler v. State*, 28 Ill. Ct. Cl. 90, 91, 98 (1972) (releasing the plaintiff and awarding him \$6000 in compensation for wrongful incarceration).

219. See *supra* text accompanying note 213.

220. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 245 (2009).

221. See *Karlan, supra* note 216, at 1317.

222. Cf. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (finding that sovereign immunity did not leave injured individuals with “no federal recourse against discrimination” because injunctive relief was still available and United States could bring damages claims); *Alden v. Maine*, 527 U.S. 706, 756-57 (1999) (referring to availability of injunctive and declaratory relief against state officers and ability to proceed against municipal or local entities as an “important limit to the principle of sovereign immunity”).

223. *Karlan, supra* note 216, at 1313-14 (“My basic premise is that there is a paradox at the heart of the Court’s Eleventh Amendment jurisprudence: The very mechanism by which the Court seeks to enhance federalism and state autonomy may in fact channel litigation into a form that imposes greater constraints on state action.”).

224. 42 U.S.C. § 1997e (2006). For a state analog, see, for example, LA. REV. STAT. ANN. § 15:1184 (2011).

“limitation on recovery” provision of the PLRA, which states that “[n]o Federal civil action may be brought by a prisoner ... for mental or emotional injury suffered while in custody without a prior showing of physical injury.”²²⁵ Many courts have interpreted this provision to require some physical injury before damages are awarded for emotional injuries.²²⁶ And in the context of sexual abuse, some courts have suggested that “isolated” instances of abuse do not constitute “physical injury” under the PLRA.²²⁷ Thus, although there is a general preference for damages over injunctive remedies, both common law and statutory limitations on damages in prisoners’ rights litigation will make injunctive relief more appropriate in at least some instances.

All of this suggests that, although one must grapple with the law of remedies to effectuate the proposal I make here, it does not make the remedy of release unavailable. If anything, it merely calls for a narrow scope for my proposal. In particular, the law might suggest, consistent with previous discussion, that the remedy of release be limited to those circumstances in which abusive treatment is the product of widespread customs, practices, and not simply the isolated misconduct of an individual corrections officer. In these instances, an injunction calling for release will be properly directed to state authorities who bear some responsibility both for administering punishment and eliminating abusive conditions. Such a law might also call for a limited remedy of release—essentially a framework for deciding when abuses are serious enough that they warrant a reduction in sentence in addition to whatever compensation an offender may receive. Finally, these considerations may also suggest that there be some relationship between any financial compensation an offender has received and any reduction in sentence that might be ordered by a court.

225. 42 U.S.C. § 1997e(e).

226. *See, e.g.*, *Hutchins v. McDaniels*, 512 F.3d 193, 196 (5th Cir. 2007); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003); *Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002).

227. *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (holding that an officer’s solicitation of manual masturbation does not satisfy § 1997e(e)); *Maxwell v. Talley*, No. 4:07CV00669 SWW/BD, 2010 WL 3270757, at *2 (E.D. Ark. July 12, 2010).

B. The Commensurability Problem

Even if a damages remedy is inadequate in certain contexts and a court were to consider release as a potential remedy, there remains a question concerning the circumstances in which release would be appropriate. This implicates a different question than that of the adequacy of damages and the presence of irreparable injury. Instead, it requires some consideration of commensurability: How does one measure the amount of imprisonment that equates to a particular unconstitutional treatment? A prison rape, for instance, might be “worth” X years imprisonment, whereas a physical beating might equate to Y.

I will not purport to propose precisely how to balance these considerations here, but it is important to note that courts are familiar with the task. At sentencing, many courts will take into account the offender’s prior treatment and reduce the sentence of imprisonment. Under this analysis, courts have reduced sentences when a defendant faced a high risk of abuse while in prison,²²⁸ actual abusive conditions of confinement,²²⁹ extremely restrictive conditions of confinement,²³⁰ or sexual assault while awaiting sentencing.²³¹

Several aspects of these cases are notable. First, courts have reduced sentences for abusive pretrial conditions of confinement even when the sovereign dispensing the punishment was not the

228. In *Koon v. United States*, the Supreme Court expressly recognized that a sentencing court may consider “susceptibility to abuse” in prison as a factor for a downward departure in extraordinary or unusual circumstances. 518 U.S. 81, 111 (1996); *see also* *United States v. Wilke*, 156 F.3d 749, 754 (7th Cir. 1998) (holding that district court could consider defendant’s sexual orientation and demeanor in considering a downward departure); *United States v. Lara*, 905 F.2d 599, 601-02 (2d Cir. 1990) (granting a downward departure when defendant alleged that “while incarcerated an incident occurred in which ‘two tough male ... inmates were attempting to coerce defendant by threats into becoming a male prostitute’”); *United States v. Ruff*, 998 F. Supp. 1351, 1360 (M.D. Ala. 1998) (holding that vulnerability to victimization justifies downward departure, based on defendant’s particular circumstances).

229. *United States v. Francis*, 129 F. Supp. 2d 612, 619-20 (S.D.N.Y. 2001).

230. *United States v. Pressley*, 345 F.3d 1205, 1219 (11th Cir. 2003) (remanding for district court to consider a downward departure of two and a half years due to “extraordinary” facts: individual spent five years in twenty-three-hour-a-day lockdown and had not been outside in five years).

231. *United States v. Rodriguez*, 213 F. Supp. 2d 1298, 1303 (M.D. Ala. 2002) (holding that the rape of a prisoner while in presentencing confinement by a correction officer justified a downward departure).

sovereign who maintained custody of the defendant before sentencing. Federal courts have done so when the defendant was held in a county or state correctional facility²³² and even in the custody of a foreign sovereign.²³³ Second, the standard that lower courts appear to use when deciding whether to reduce sentences for past abusive conditions is very similar to the Eighth Amendment standard for conditions of confinement challenges.²³⁴ Although courts do not

232. *United States v. Hernandez-Santiago*, 92 F.3d 97, 101 n.2 (2d Cir. 1996) (noting that the district court granted a downward departure of three levels based on defendant's twenty-two month incarceration in a state facility, which was a "harsher incarceration"); *Francis*, 129 F. Supp. 2d at 616, 619-20.

233. *United States v. Carty*, 264 F.3d 191, 196-97 (2d Cir. 2001) (holding that conditions of pretrial confinement in a foreign country could be considered for a downward departure under the Sentencing Guidelines).

234. *United States v. Pearson*, No. 08-1129, 2009 WL 434843, at *2 (7th Cir. Feb. 20, 2009) (stating that the conditions of pretrial confinement are not required to be considered, although accepting the possibility that "extraordinarily harsh conditions of confinement might justify a lowered sentence"); *Pressley*, 345 F.3d at 1218-19; *United States v. Mateo*, 299 F. Supp. 2d 201, 208 (S.D.N.Y. 2004) (noting that a downward departure may be appropriate "where the conditions in question are extreme to an exceptional degree and their severity falls upon the defendant in some highly unique or disproportionate manner"); *Francis*, 129 F. Supp. 2d at 616-18 (granting a downward departure for "qualitatively different" conditions, which included overcrowding, inadequate hygiene, spoiled and unsanitary food, an attempted stabbing, loss of weight, prevalence of weapons, gang activity and dominance, and threats from other inmates); *United States v. Pacheco*, 67 F. Supp. 2d 495, 498 (E.D. Pa. 1999) (requiring that conditions be worse than those of other inmates at a facility to be considered for a downward departure); *United States v. Bakeas*, 987 F. Supp. 44, 50 (D. Mass. 1997) (deeming a downward departure appropriate when "an unusual factor makes the conditions of confinement contemplated by the guidelines either impossible to impose or inappropriate"); *United States v. Sutton*, 973 F. Supp. 488, 493-94 (D.N.J. 1997), *aff'd*, 156 F.3d 1226 (3d Cir. 1998) (recognizing that although pretrial detention is not punishment in the constitutional sense, "pretrial detention in substandard conditions can have a punitive effect not contemplated by the Guidelines.... [U]nusual pretrial confinement, however, in either length or severity of condition, can properly be considered by the sentencing court"). The *Sutton* Court went on to refuse a downward departure when the defendant failed to show that the conditions were "atypical" as compared to other institutions. 973 F. Supp. at 494-95; *see also Andujar v. United States*, No. 1:05cr-00422, 2009 WL 2169163, at *4-5 (M.D. Pa. July 16, 2009) (finding that failure to raise conditions of confinement was not ineffective assistance of counsel because there were no allegations of physical harm and there was no evidence that conditions were "qualitatively or quantitatively worse than those experienced by other defendants"); *United States v. Valdes*, No. CR.A. 01-068-JJF, Civ.A. 03-764-JJF, 2004 WL 234648, at *2 (D. Del. Feb. 2, 2004) ("Moreover, those courts that have recognized the authority to depart have only done so when the conditions of confinement are atypical or extraordinary. Conditions of confinement that impact all defendants facing incarceration are insufficient to warrant a downward departure."); *United States v. Brown*, 95 F. Supp. 2d 277, 280 (E.D. Pa. 2000) (refusing to grant a downward departure when the "court cannot conclude either that the length of time Mr. Brown spent in the various jails or the nature of the

make an explicit connection to the Eighth Amendment, they appear to be acting on the intuition that when offenders suffer treatment that is beyond the bounds of constitutional permissibility, imposing on the offender the same sentence as someone who did not suffer such treatment would be improper. Finally, courts have recognized that imposing this cost, even on a different sovereign, may create an incentive to improve and monitor conditions of pretrial and pre-sentencing detainees.²³⁵ One court explained the reasoning as follows:

Given the character of the prison population, and the strict regimen and tensions under which it is housed, the penal system must accommodate, within fair limits, tolerance for a normal level of shortcomings in the quality of certain services, as well the vulnerability of some individuals to incidental inmate-to-inmate and guard-to-inmate victimization that is not uncommon in a custodial environment. The concept of what is “just punishment” thus contemplates a prospective, empirical assessment, necessarily imprecise, of the accumulation of reasonably foreseeable, ordinary hardships and suffering that any given offender is likely to experience in the typical case during the course of a particular range of imprisonment.... Under the preceding standards, occasional shoves and knocks arising from necessary disciplinary encounters may fall within the realm of the warranted physical contacts an inmate may expect to suffer at the hands of prison guards during the ordinary course of presentence confinement. However, a rape is not.²³⁶

Commensurability is a complex problem, but it is not impossible to resolve judicially. Courts might decide that some instances of abuse are so extreme that they justify immediate release, whereas others will result in a modest reduction in sentence. There will be problems of uniformity and consistency, but these problems are not unique to this proposal.

conditions were so extraordinarily bad as to warrant a lesser sentence”); *United States v. Miranda*, 979 F. Supp. 1040, 1044-45 (D.N.J. 1997) (stating that one hundred days of confinement in “troublesome” conditions, although not enough to justify a downward departure, were enough to question whether federal prisoners should continue to be housed in a county facility).

235. *Francis*, 129 F. Supp. 2d at 619-20.

236. *Mateo*, 299 F. Supp. 2d at 210-11.

C. Practical Considerations

If one accepts that the doctrinal and theoretical objections to the remedy proposed here can be overcome, some benefits from adopting the remedy are worth considering. The current approach to remedying past Eighth Amendment violations has accomplished little in terms of reducing the frequency of such violations.²³⁷ The principal remedy is monetary. But even for prisoners who can overcome the sometimes substantial barriers of qualified and sovereign immunity, the remedy they obtain is often minimal and rarely imposes any cost on either the individual officer or the particular prison system.²³⁸ If part of the purpose of an Eighth Amendment remedy is to deter the commission of such violations, a remedy of release may prove to be a far more effective deterrent for prison systems and, arguably, individual officers.

This is not to say that Eighth Amendment litigation has been unsuccessful in preventing some extreme violations of offenders' rights. Conditions of confinement litigation has alleviated some of the most extreme overcrowding and medical inadequacies,²³⁹ assisted in the development of correctional norms and standards,²⁴⁰ and contributed to the internalization of these norms through a professional corrections staff.²⁴¹ Conditions of confinement litigation has been successful for numerous reasons, including its potential to expose officials to negative publicity, the increased funding that normally accompanies court orders in institutional reform litigation, and the availability of highly competent counsel.²⁴²

There are, however, limits to conditions of confinement litigation—in large part because of the hesitance of courts to interpret the

237. Cf. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 724 (1993) (discussing the difficulties of eliminating illegal conditions even after institutions are found liable).

238. Cf. Karlan, *The Irony of Immunity*, *supra* note 216, at 1329 (discussing the extent to which injunctions are more intrusive and costly than damages remedies for the state).

239. See Sturm, *supra* note 237, at 670-73 & nn.135-46 (collecting cases); see also Morales Feliciano v. Roselló González, 13 F. Supp. 2d 151, 212-14 (D.P.R. 1998) (addressing inadequate medical care).

240. Sturm, *supra* note 237, at 662.

241. *Id.* at 663-66.

242. *Id.* at 681-83. As evidence of how prison administrators view public attention as a threat, Human Rights Watch has always experienced significantly more difficulty obtaining access to prisons in the United States as compared with other countries. *Id.* at 692.

Eighth Amendment to provide more than prisoners' basic needs.²⁴³ And even after the explosion of prisoners' rights litigation in the 1970s and 1980s, when federal courts were accused of taking too interventionist a stance with respect to state prisons, conditions in prisons were far from optimal.²⁴⁴ Even in 1993, for instance, forty states and the District of Columbia, Puerto Rico, and the Virgin Islands were under court supervision for overcrowding or other conditions of confinement.²⁴⁵ One-quarter of all jails in the United States were supervised for crowding issues in 1990, with 30 percent of jails under court order related to conditions of confinement.²⁴⁶ By 1995, there were thirty-three prison systems under court supervision regarding overcrowding or general prison conditions, and even prison systems that were not under court order were "significantly overcrowded."²⁴⁷

In addition, many barriers to litigating prison conditions cases have sprung up in the last decade. So although arguments have been made in favor of judicial involvement in reforming prisons,²⁴⁸

243. *Id.* at 675 ("Courts have not interpreted the Eighth Amendment to invalidate outdated institutions that warehouse inmates, even if levels of violence are predictably higher in those institutions, as long as inmates receive the basic necessities of life.")

244. *See, e.g., id.* at 687-88 nn.216-19 (citing cases throughout the country from the 1980s and 1990s in which prison officials failed to respond to tuberculosis outbreak and were held in contempt for noncompliance with consent decrees, correctional institutions were condemned as unsanitary and dangerous, food services were determined to present a health risk, medical services were found inadequate, psychiatric services were deemed nonexistent, heating and cooling equipment was found insufficient, and the safety of inmates was threatened by recurrent violence). Recently, prisons have faced potentially deadly outbreaks of MRSA, due in part to unsanitary conditions. *See, e.g.,* Centers for Disease Control and Prevention, *Methicillin-Resistant Staphylococcus aureus Infections in Correctional Facilities—Georgia, California, and Texas, 2001-2003*, 52 MORBIDITY & MORTALITY WKLY. REP. 992 (2003) (reporting on investigations of transmission among Georgia, California, and Texas prisoners); Mark Spencer, *State Probe of MRSA Cases at Prison Requested*, HARTFORD COURANT, Sept. 10, 2008, at B6 (reporting on dozens of prisoners infected with MRSA in Connecticut state prisons); Ann Coppola, *Super-Scary Superbugs*, CORRECTIONS.COM (Mar. 3, 2008), <http://www.corrections.com/news/article/17883> (reporting on outbreak of MRSA in Tulsa, Oklahoma, jail); Kelly Virella, *Releasing the Disease*, CHI. READER (Oct. 11, 2007), <http://www.chicagoreader.com/chicago/releasing-the-disease/Content?oid=926087> (reporting on MRSA outbreak in Cook County Jail).

245. Sturm, *supra* note 237, at 641.

246. *Id.* at 641-42. As of 1993, the problems in jails had not received as much attention as the problems in prisons, even though jails probably had more serious problems. *Id.* at 697-98.

247. Haney, *supra* note 121, at 268-69 (citing figures from the ACLU's National Prison Project).

248. *E.g.,* Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial*

those arguments appear to have less force in the face of the PLRA, which limits the power of federal courts to enter remedial orders.²⁴⁹ The result has been a turn to individual damages actions, in some instances, and a decline in broad institutional reform litigation in favor of more precise and tailored conditions litigation.²⁵⁰ With the relatively limited recent success of prison conditions litigation, it is worth asking whether there are alternative ways to obtain relief for prisoners who continue to experience debilitating conditions of confinement.

The remedy of release may be one such approach, especially if focused on those cases in which abusive conditions of confinement are the result of widespread practices, policies, and customs. In the federal system and many state systems, the funds used to pay damages claims come from a general appropriation that does not have any impact on the prison system's overall budget—defendant prison officials rarely pay damage awards directly.²⁵¹ Thus, the availability of monetary damages may provide little deterrent effect in the prison context.²⁵² But if prisoners are awarded release when

Intervention in Prisons, 138 U. PA. L. REV. 805, 846-47 (1990) (arguing that courts are well-positioned to be involved in significant intervention because they are independent from political influences, provide external norms, possess the power to distribute rewards and penalties to prison officials, have the potential to expose prison systems to public scrutiny, and can give well-intentioned, reform-minded participants cover to make change).

249. 18 U.S.C. § 3626 (2006). State analogs to the federal PLRA have been passed as well. *See, e.g.*, ARK. CODE ANN. §§ 16-106-201 to -204 (2011); LA. REV. STAT. ANN. §§ 15:1181-1191 (2011); MICH. COMP. LAWS §§ 600.5501-.5531 (2009); OKLA. STAT. ANN. tit. 57, § 566.4 (West 2011).

250. *See generally* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 555 (2006) (describing this change and arguing that it is a result of a more conservative federal bench, a shift in the attitude toward causation generally, and a rise of the large-firm approach to litigation). Some of the decline may be attributable to greater judicial deference to prison administrators, the inculcation of the norms established in the first wave of litigation, and the need to devote resources to monitoring the litigation that has been successful to date. *See* Sturm, *supra* note 237, at 699-706, 711-12, 724-28. This is not to say that institutional reform litigation is no longer effective. Litigators have had more success, for instance, challenging inadequate medical and psychiatric care in recent years. Litigation ranges from wholesale challenges in California, *see* Plata v. Schwarzenegger, 556 F. Supp. 2d 1087, 1087-88 (N.D. Cal. 2008), to specific challenges to the provision of treatment for Hepatitis C in Oregon, *see, e.g.*, Release & Settlement Agreement at 2-3, Anstett v. Oregon, No. 3:01-cv-1619-BR (D. Or. August 21, 2007) and New York, *see* Hilton v. Wright, 235 F.R.D. 40, 44, 54-55 (N.D.N.Y. 2006).

251. *See, e.g.*, Spain v. Mountanos, 690 F.2d 742, 743-44 (9th Cir. 1982) (describing payment from state treasury).

252. *See generally* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1680-83

a prison system as operated causes their inhumane treatment, the pressures on high-level prison officials to avoid such release orders would be intense. High-level prison officials are likely to have a greater stake in the institutional reputation of the corrections system, and release of offenders because of system-wide policies threatens that reputation. Thus, in certain extreme cases, release is an appropriate remedy that may better accomplish the deterrent goals of damages litigation than monetary damages.

One might fear that the remedy of release is so drastic that courts would not only hesitate to provide it; they would rather cut back on the reach of Eighth Amendment doctrine in all cases—even those in which release was not on the table—because of the concern for the remedial consequences. Yet John Jeffries has suggested the reverse: that courts are more willing to award forward-looking injunctive relief than backward-looking damages, precisely because damages litigation is personal to the governmental defendant.²⁵³ Needless to say, it is difficult to predict whether judges would take the remedial consequences into account when announcing Eighth Amendment doctrine, even in cases in which release was not an available remedy. But it is fair to say that because release is already a remedy in some Eighth Amendment contexts, it is not obvious that doctrine will be marginally affected by expanding the areas in which the remedy is available.

There also may be some practical problems to consider in effectuating the remedy of release. There is a more specific law of remedies associated with *Preiser v. Rodriguez*,²⁵⁴ *Heck v. Humphrey*,²⁵⁵ and their progeny that applies in constitutional cases brought by prisoners and also must be addressed. Under this jurisprudence, it is well established that a prisoner must use a

(2003) (arguing that although correctional agencies feel some deterrent effect of publicized litigation and damage awards, officials are likely to be “influenced by litigation’s incentives only when liability reduction coincides with professional norms”); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1026-30 (2010) (demonstrating that law enforcement agencies rarely internalize information documented through damages lawsuits).

253. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 289-90 (2000); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

254. 411 U.S. 475, 488-99 (1973).

255. 512 U.S. 477, 480-87 (1994).

habeas challenge instead of § 1983 when a prisoner seeks injunctive relief that calls into question the fact of conviction or the length of sentence.²⁵⁶ Challenges to conditions of confinement, by contrast, may be brought pursuant to § 1983.²⁵⁷ Section 1983 literally would apply to a claim for equitable relief, but its general language might yield to habeas in situations like those presented here.

The Supreme Court has not considered the *Preiser-Heck* issue in light of the remedial proposal made here, and the Court's holdings and reasoning are clearly in tension. In *Wilkinson v. Dotson*, the Court summarized the relevant cases and concluded that § 1983 is inappropriate "if success in that action would necessarily demonstrate the invalidity of confinement or its duration."²⁵⁸ The live question, then, is whether a § 1983 action seeking the remedy proposed here falls within this category of cases in which habeas relief is the exclusive remedy. Several reasons counsel against such a conclusion. First, success would not "necessarily" demonstrate the invalidity of the original sentence. Indeed, under the remedy proposed here, the original sentence would remain valid and the question would be how to best effectuate that original sentence given the intervening post-sentence unconstitutional treatment. Release as a remedy for unconstitutional conditions of confinement would not invalidate the sentence, and thus the comity and federalism concerns at the heart of the *Preiser-Heck* line would not be implicated.²⁵⁹ Second, there will at least be certain circumstances when, as proposed, release will be a remedy only if the plaintiff is unable to obtain money damages, continued confinement is deemed disproportionate to the crime of conviction, or the constitutional mistreatment is a result of governmental policy, custom, or practice. Not every claim of an Eighth Amendment violation will necessarily fall into these categories.

The Court has recognized that the line between cases challenging conditions of confinement and cases that fall within the core of habeas is gray. In *Nelson v. Campbell*, the Court treated a challenge

256. *Preiser*, 411 U.S. at 489; *see also* *Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

257. *Nelson*, 541 U.S. at 643; *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam); *Preiser*, 411 U.S. at 498-99.

258. 544 U.S. 74, 81-82 (2005).

259. *E.g.*, *Preiser*, 411 U.S. at 491-92; Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1167 & n.182 (2005).

to a specific means of effectuating a death sentence as falling on the § 1983 line because it “does not *directly* call into question the ‘fact’ or ‘validity’ of the sentence itself.”²⁶⁰ The Court reasoned that even though a declaration that a particular means of execution is unconstitutional affects the power of the State to carry out the sentence in a timely fashion and imposes additional burdens on the State, the State could still choose to effectuate the ultimate sentence in a different way.²⁶¹ Like in *Nelson*, an action seeking the remedy of release does not challenge the validity of the original sentence, but merely asks the court to recognize that the sentence itself has changed by virtue of the treatment the offender has received while in prison. Challenging this treatment by asking for release does not undermine the validity of the original conviction or sentence; it just confirms that the State may not carry out that sentence in an unconstitutional fashion.

If, by contrast, the State indicated that it would not operate its prison system in any way but an unconstitutional one or would only carry out the sentence in an unconstitutional way, then habeas might be more appropriate.²⁶² But when the administration of a challenged sentence—much like the method of execution—is not mandated by statute or regulation, the State presumably could carry it out in a different way.²⁶³

Very few lower court cases have addressed the particular problem raised here, and almost all have arisen in the context of the potential for future harm. Many have considered § 1983 to be the appropriate vehicle for raising such a challenge.²⁶⁴ Some lower

260. *Nelson*, 541 U.S. at 644 (emphasis added).

261. *Id.*

262. *Id.* at 645.

263. *Id.* at 646.

264. See *Walker v. Lockhart*, 713 F.2d 1378, 1383 (8th Cir. 1983) (adjudicating claim that Arkansas prisons posed undue risk to safety under § 1983). *Walker* has been read by many courts to support a § 1983 claim for transfer when a prisoner could establish a high risk of threat of injury from officers or other prisoners. See, e.g., *Moore v. Hoeven*, No. 3:08-cv-50, 2008 WL 4844130, at *5 (D.N.D. Nov. 5, 2008) (noting that removal from prison to another facility “would be available only in rare and extreme circumstances, where there is unusually high risk of physical danger to an inmate”); see also *Abbott v. Petrovsky*, 717 F.2d 1191, 1192 (8th Cir. 1983) (concluding that in view of the difficulties in dealing with a high profile prisoner, the Bureau of Prison’s consideration of alternatives and decision to transfer him to a particular prison was not unreasonable) (“If future developments demonstrate that Abbott is not adequately protected at Marion, or if better alternatives become available, prison

courts, on the other hand, have suggested that a request for a transfer from one prison to another should be considered under habeas, even when the request is to remedy previous unconstitutional violations.²⁶⁵ Even if lower courts consider habeas to be the most appropriate procedural device by which to enforce the remedy of release, however, this changes the form, but not the function, of the remedy. It still will have the potential to have a deterrent effect and it still will function, in some cases, to better equalize the treatment of offenders subjected to unconstitutional punishment. There may be difficult *res judicata* questions to consider if a prisoner wants to pursue both a damages remedy and the remedy of release, but courts will not have to create new doctrine to police those lines.

CONCLUSION

The remedy proposed here for discrete Eighth Amendment violations—release or a reduction in total period of confinement—has never been seriously considered by courts or advocates, for insufficient reasons. If it is ultimately adopted, it may have limited application. It might properly be narrowly applied to those instances in which prisoners are subjected to abuse as a result of systemic

officials should reevaluate his situation.”); *Streeter v. Hopper*, 618 F.2d 1178, 1181-82 (5th Cir. 1980) (holding in a § 1983 case that the district court properly ordered plaintiff prisoners removed from a prison where they faced a serious threat of injury from officers and other prisoners; defendants were given latitude to select the prison to which plaintiffs were transferred “where their safety could be assured”); *Kidd v. Perry*, No. 9:10cv57, 2010 WL 2990942, at *1, *3 (E.D. Tex. July 23, 2010) (finding that a transfer under the authority of *Streeter* was not in order because “the Court cannot say at this juncture that all options within the Texas prison system have been exhausted and that nothing remains other than a transfer to another system” where safety could be assured).

265. See, e.g., *Boudin v. Thomas*, 732 F.2d 1107, 1112 (2d Cir. 1984) (finding that when a prisoner sought to be transferred to remedy previous constitutional violations, the claim for relief sounded in habeas corpus); *Abdul-Hakeem v. Koehler*, No. 89 Civ. 3142 (MBM), 1989 WL 85173, at *2-3 (S.D.N.Y. July 21, 1989) (distinguishing *Walker* and *Streeter* and holding that “any prisoner who seeks or wishes to avoid transfer from one form of confinement to another should have his suit treated as a petition for a writ of habeas corpus, especially where the government defendants request it”). *But see* *Fisher v. Goord*, 981 F. Supp. 140, 168 (W.D.N.Y. 1997) (holding in a § 1983 case that when a prisoner alleged that officers had raped and sexually abused her, the prisoner “must establish irreparable harm and a clear or substantial likelihood of success on the merits” to obtain an order of transfer to a federal prison or to another prison in New York or elsewhere).

policies, customs, or practices. It might also be limited by courts' ability to determine the commensurability of particular abusive treatment and particular lengths of confinement. Although radical on its face, the remedy of release is consistent with both Eighth Amendment precedent and punishment theory, and it should be considered part of the menu of choices for courts and advocates struggling with the difficult task of enforcing Eighth Amendment norms within prisons.