COVID-19, PHYSICAL INJURY, AND THE EIGHTH AMENDMENT IN FEDERAL PRISONS

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Prisons and jails across the country are "petri dishes" of COVID-19. Yet, prisons and jails have an obligation to provide for their inmates' basic human needs. As the pandemic has raged inside of federal prisons, it has become clear that indigent inmates face the brunt of COVID-19. While Donald Trump's former personal lawyer, Michael Cohen, was able to negotiate his release from prison, indigent inmates with underlying conditions like George Reagan were forced to remain in prison, leaving them more at risk of contracting this deadly disease.

The question then becomes, what are inmates like George Reagan supposed to do without high-powered lawyers to negotiate their release? Even worse, if the prison fails to implement the Bureau of Prisons and Centers for Disease Control and Prevention guidance to reduce the spread of the virus, thus aiding its spread, what remedies are available to those inmates?

Inmates often sue for unconstitutional conditions of confinement under the Eighth Amendment, but there is an obstacle that remains even if the inmate can prove an Eighth Amendment violation: The Prison Litigation Reform Act's physical injury requirement, codified under 42 U.S.C. § 1997e(e). The physical injury requirement bars compensatory damages for inmates who only allege mental and emotional injuries. If the physical injury requirement cannot be overcome, then inmates are barred from receiving compensatory damages and potentially left with long-term health problems and uncertainty as to their future health and safety.

This Article proposes a solution that would allow inmates to receive compensatory damages for contracting COVID-19 due to the failure of the prison to implement the guidelines set forth by the Bureau of Prisons and Centers for Disease Control and Prevention: Contracting COVID-19 is automatically sufficient to satisfy the physical injury requirement, regardless of whether one evinces symptoms at the time of contracting the virus.

This Article proceeds in three parts. First, it maps the physical injury requirement in federal courts and argues that COVID-19 is a physical injury. Second, it analyzes the requirements to sue prisons and its officials under the Eighth Amendment, specifically when one alleges unconstitutional confinement conditions. Finally, it combines the two Parts and applies them to current prison litigation, finding that inmates should be able to receive compensatory damages for contracting COVID-19 if prison

officials ignore governmental guidance to reduce the spread of the virus.

INTRODUCTION

Michael Cohen, Donald Trump's former personal lawyer and 53-year-old federal inmate, left prison in May 2020, about a year and a half before his scheduled release date.[1] He was serving his sentence for various campaign finance violations.[2] Just before leaving prison in April 2020, Mr. Cohen was placed in quarantine for 35 days after COVID-19 infected the Otisville federal prison in upstate New York.[3] Shortly thereafter, due to Mr. Cohen's "health concerns," his lawyers were able to negotiate a release on furlough from federal prison, likely allowing Mr. Cohen to serve the remainder of his three-year sentence under home confinement.[4] In a different federal prison in Seagoville, Texas, federal inmate George Reagan, a 55-year-old Black man who is in the fourth year of a more than five-year drug sentence, had his plea for home confinement rejected, despite his heart disease and that he will "likely be eligible to go to a halfway house later this year."[5] In early July, while Mr. Cohen was at his home in Manhattan, Mr. Reagan was sharing a cell with an inmate who contracted COVID-19.[6] Not long after, he called his wife to tell her he had lost his sense of taste.[7] Mr. Reagan then tested positive for COVID-19.[8] As of mid-July 2020, Mr. Reagan's condition was improving, but some of his fellow inmates were not so lucky.[9] Indeed, according to the Federal Bureau of

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[1] Benjamin Weiser et al., *Michael Cohen, Ex-Trump Lawyer, Leaves Prison Early Because of Virus*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/05/20/nyregion/michael-cohen-coronavirus-prison-release.html ("Mr. Cohen's projected release date was November 2021, according to the bureau's website, but he had sought to be released sooner because of medical issues and the risk that they would be exacerbated by the virus's spread at the prison.").

[2] *Id.*

[3] *Id.* This is more than double the required 14-day quarantine period. *Id.*

[4] *Id.*

[5] Casey Tolan et al., *Inside the Federal Prison Where Three out of Every Four Inmates Have Tested Positive for Coronavirus*, CNN (Aug. 8, 2020, 8:07 AM), https://www.cnn.com/2020/08/08/us/federal-prison-coronavirus-outbreak-invs/index.html. This is made worse by the fact that "higher incarceration rates are not associated with lower violent crime rates, because expanding incarceration primarily means that more people convicted of nonviolent, 'marginal' offenses (like drug offenses and low-level property offenses) and 'infrequent' offenses are imprisoned. *Study Finds Increased Incarceration Has Marginal-to-Zero Impact on Crime*, EQUAL JUST. INITIATIVE (Aug. 7, 2017), https://eji.org/news/study-finds-increased-incarceration-does-not-reduce-crime/.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Kevin Reece, *Federal Prison in Seagoville Reports First COVID Death as Infections Soar*, WFAA ABC (July 17, 2020, 7:24 PM),

Prisons ("BOP"), there have been 251 COVID-related inmate deaths in federal prisons as of August 11, 2021.[10]

In a 2012 TED Talk, the founder of the Equal Justice Initiative, Bryan Stevenson, said, "Wealth, not culpability, shapes outcomes."[11] Mr. Stevenson was speaking specifically about being convicted of a crime, but as the disparate treatment of Michael Cohen and George Reagan shows, that refrain remains true after conviction. The distortion of our justice system around race and poverty is only exacerbated by this global pandemic. And it begs the following questions: What happens to the vast majority of inmates who do not get the Cohen treatment? If inmates become ill due to a prison's failure to protect them from this virus, can they sue? Unfortunately, the answer to the latter question is almost always: No. The courts and Congress have put in place rules that make it very difficult for inmates to sue for inadequate medical care or adverse confinement conditions, and they have made it nearly impossible to recover compensatory damages.[12]

The statutory culprit that poses the greatest obstacle to inmates seeking compensatory damages for contracting COVID-19 is the Prison Litigation Reform Act's ("PLRA") "physical injury requirement."[13] Congress codified the physical injury requirement in 42 U.S.C. § 1997e(e), which states, "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury[.]" How courts interpret this physical injury requirement is addressed in Part I of this paper, but suffice it to say, the requirement severely limits the scope of injuries suffered by inmates that are actionable in federal court.[14]

Because of the limiting nature of the physical injury requirement, this Article argues for a novel theory of liability for inmates who have contracted COVID-19 in federal custody: Contracting COVID-19 alone, whether asymptomatic or riddled with symptoms, constitutes physical injury. As of August 2021, infectious disease experts know that contracting

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https://www.wfaa.com/article/news/health/coronavirus/federal-prison-in-seagoville-reports-first-covid-death-as-infections-soar/287-8687438d-777a-44d1-8cce-83ddd14d748d ("The Federal Bureau of Prisons says Sandra Kincaid, 69, tested positive for COVID-19 on July 6 and was transported to a hospital on July 12. After being placed on a ventilator, she died three days later.").

[10] *COVID-19 Coronavirus: COVID-19 Cases*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus/index.jsp (last visited Aug. 11, 2021). The BOP oversees about 131,000 inmates, and over 42,000 inmates have recovered from COVID-19. *Id.* In privately managed prisons, there have been 9 deaths out of about 10,000 inmates. *Id.*

[11] TED, *We Need to Talk About an Injustice | Bryan Stevenson*, YOUTUBE (Mar. 5, 2012), https://www.youtube.com/watch?v=c2tOp7OxyQ8&feature=emb_title.

[12] *See infra* Parts I–II.

[13] *See* 42 U.S.C. § 1997e(e).

[14] *See infra* Part I.

COVID-19 can have long-term effects.[15] Even for young people and those who have mild symptoms, COVID-19 can cause long-term damage to the heart, lungs, and brain, and it can make individuals more susceptible to blood clots and blood vessel damage.[16] Perhaps even worse, health experts are still unsure whether there are additional long-term effects of the disease; consequently, "researchers recommend that doctors closely monitor people who have had COVID-19 to see how their organs are functioning after recovery."[17] With the physical injury requirement *per se* satisfied by contracting COVID-19, inmates should be able to sue under the Eighth Amendment for unconstitutionally maintained prison facilities—such as those lacking social distance protocols and adequate access to soap.

This Article proceeds in three Parts, ultimately mapping out how inmates could hold federal prisons and jails liable if they contract the disease. First, the Article examines how courts interpret the PLRA's physical injury requirement and why COVID-19 must be considered a physical injury. Second, the Article examines the history of prison litigation, tracing the evolution of prisoners' rights, and it lays out the constitutional cause of action under which inmates can sue, analyzing what inmates must allege to proceed in federal court. Finally, the Article applies Parts I and II to specific facts alleged in prisons that are failing to protect their inmates from the threat of COVID-19. This Article provides a blueprint for inmates who have contracted COVID-19, and if it goes unaccepted by federal courts, then indigent inmates like George Reagan will be without redress in a global pandemic.

I. THE PLRA'S PHYSICAL INJURY REQUIREMENT

Congress passed the PLRA in 1995 "to spare federal courts from frivolous damages lawsuits while preserving the rights of prisoners subjected

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[15] *COVID-19 (coronavirus): Long-Term Effects*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351 (last visited Aug. 11, 2021); *Update on Clinical Long-Term Effects of COVID-19*, WORLD HEALTH ORG., https://www.who.int/docs/default-source/coronaviruse/risk-comms-updates/update54_clinical_long_term_effects.pdf?sfvrsn=3e63eee5_8 (last updated Mar. 26, 2021); *Long-Term Effects of COVID-19*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last updated Aug. 11, 2021).

[16] *COVID-19 (coronavirus): Long-Term Effects*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351 (last visited Aug. 11, 2021); *Long-Term Effects of COVID-19*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last updated July 12, 2021) ("The risk of heart damage may not be limited to older and middle-aged adults.").

[17] *COVID-19 (coronavirus): Long-Term Effects*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351 (last visited Aug. 11, 2021).

to constitutional abuses."[18] In addition to the physical injury requirement, the PLRA requires inmates to exhaust administrative remedies before bringing a lawsuit,[19] limits recoverable attorney's fees,[20] and disallows indigent inmates from bringing suit *in forma pauperis*[21] if the inmate has had three claims dismissed.[22] The results have been staggering. In the decades preceding the passage of the PLRA, inmate court filings lingered around 22 filings per 1,000 prisoners; after the PLRA, "the number of filings went from 23.3 per 1,000 prisoners to 10.2 filings per 1,000 prisoners."[23]

However, regarding the physical injury requirement, the Supreme Court has yet to define what constitutes a physical injury, and circuit courts apply varying frameworks to determine physical injury. Thus, this Part proceeds first by mapping out how circuit courts have defined physical injury for PLRA purposes, and second, why COVID-19 must be considered a physical injury.

A. Mapping Courts' Interpretations of Physical Injury

The physical injury requirement of the PLRA bans inmates from filing suit in federal court for mental or emotional injuries suffered while in federal custody "without a prior showing of physical injury."[24] However, the drafters failed to define what constitutes a physical injury, how severe a physical injury must be, and whether the physical injury must "have a nexus to the mental or emotional injury suffered[.]"[25] Indeed, as attorneys Maggie Filler and Daniel Greenfield point out, Section 1997e(e) "may well present the highest concentration of poor drafting in the smallest

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[18] Maggie Filler & Daniel Greenfield, *A Wrong Without a Right? Overcoming the Prison Litigation Reform Act's Physical Injury Requirement in Solitary Confinement Cases*, 115 NW. L. REV. 257, 260 (2020).

[19] 42 U.S.C. § 1997e(a).

[20] 42 U.S.C. § 1997e(d).

[21] *In forma pauperis* means "in the manner of a pauper," and it allows an inmate to file a claim without prepayment of court and filing fees. *In Forma Pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[22] 28 U.S.C. § 1915(g).

[23] Samuel B. Reilly, *Where Is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 EMORY L.J. 755, 762 (2021) (citing Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 157 tbl.1 (2015)). Ironically, in trying to reduce inmate litigation, Congress was battling a problem of its own making. Inmate filings per prisoner had not changed significantly; instead, it was the prison population that quadrupled since 1980 due to mass incarceration. *Id.* at 760.

[24] 42 U.S.C. § 1997e(e).

[25] Filler & Greenfield, *supra* note 18 (internal quotation marks omitted).

number of words in the entire United States Code."[26] Because of poor drafting, and in the absence of a Supreme Court decision defining physical injury for PLRA purposes, circuit courts are split as to (1) what type of severity is required, and (2) when an injury is considered ripe. Each general approach must be addressed to determine how COVID-19 can be considered a physical injury under the Statute.

All circuit courts require an alleged physical injury to be "more than *de minimis*, although it need not be significant."[27] This very broad standard comes from *Hudson v. McMillan*, where the Supreme Court held that "routine discomforts" are *de minimis* and thus are not "sufficiently grave to form the basis of an Eighth Amendment violation [for cruel and unusual punishment]."[28] However, the *de minimis* standard does not solve the circuit splits regarding both severity and ripeness.

1. Severity

While it is not possible to determine with certainty how a circuit court would answer what injury is considered "severe" enough to satisfy the physical injury requirement, generally the two approaches either define physical injury narrowly or broadly. On the one hand, the narrow approach—as it has been applied by the Fifth, Eighth, and D.C. Circuits—has a higher bar for the severity of the physical injury, finds more temporary injuries to be *de minimis*, and does not consider injuries stemming from emotional or mental harm to be physical. On the other hand, the broader approach includes injuries that are less severe, finds temporary injuries to be *de minimis*, and permits emotional and mental injuries to be considered physical.

The narrower approach finds minor injuries to be "routine discomforts" under Section 1997e(e). In *Williams v. Hobbs*, the Eighth Circuit found no physical injury for an inmate who was held in solitary confinement for 14 years, had his shoulder dislocated by a correctional officer when he was being handcuffed, and suffered "assorted injuries . . . as

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[26] *Id.* (citing Aref v. Lynch, 833 F.3d 242, 263 (D.C. Cir. 2016) (quoting John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 434 (2001))).

[27] Thompson v. Smith, 805 F. App'x 893, 901 (11th Cir. 2020) (internal quotation marks and citations omitted); *see also* Hudson v. McMillan, 503 U.S. 1, 9–10 (1992) ("The Eighth Amendment's prohibition of 'cruel and unusual' punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" (internal citation omitted)).

[28] *Hudson*, 503 U.S. at 9 (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). However, quite presciently, Justice Harry Blackmun argued that psychological pain should be considered more than *de minimis*, concluding, "I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today." *Id.* at 17 (Blackmun, J., concurring).

[correctional officers] transported him down a stairwell[.]"[29] The Ninth Circuit also found *de minimis* injury when an inmate alleged "severe back and leg pain" resulting from staying in a 174 square foot cell with 18 other prisoners, where he "had to sleep on hard floors, [was] not provided with bed linens, had to drink out of unsanitary faucets, and [was] bothered by the 24–hour overhead lighting and excessive air conditioning."[30]

This narrow approach also does not consider injuries that are more temporary to be a physical injury for PLRA purposes. In *Sublet v. Million*, the Fifth Circuit ruled that "temporary pain stemming from numbness and tenderness in [an inmate's] left hand and arm" after handcuffs were applied too tightly was *de minimis*.[31] Additionally, in *Siglar v. Hightower*, when hearing a case where an inmate was thrown up against the wall, had his arm wrenched behind his back, and his ear twisted, the Fifth Circuit found, a "sore, bruised ear lasting for three days" to be a *de minimis* injury.[32]

Finally, the narrow approach finds injuries that are physical manifestations of mental or emotional injuries to be *de minimis*. In *Davis v. District of Columbia*, correctional officers opened and revealed to others an inmate's medical records, divulging that the inmate "was dying of HIV."[33] Despite a signed affidavit from a psychiatrist stating that the inmate had "experienced weight loss, appetite loss, and insomnia after the disclosure of his medical status," the D.C. Circuit found no physical injury, because the requirement "preclude[s] reliance on the somatic manifestations of emotional distress."[34] Similarly, in *Isby-Israel v. Wynn*, while the District Court for the Southern District of Indiana found that an inmate had "obvious" mental and emotional injuries resulting from 11 years of solitary confinement, there was no physical injury upon which to win compensatory damages.[35]

On the other hand, the broader approach has a lower bar for severity, does not consider temporary injuries to be *de minimis*, and allows manifestations of emotional and mental injuries to be considered physical. Beginning with the severity of an injury, the Eleventh Circuit reversed the

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[29] Williams v. Hobbs, 662 F.3d 994, 1011 (8th Cir. 2011).

[30] Oliver v. Keller, 289 F.3d 623, 625 (9th Cir. 2002).

[31] Sublet v. Million, 451 Fed. Appx. 458, 458–59 (5th Cir. 2011).

[32] Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

[33] Davis v. District of Columbia, 158 F.3d 1342, 1345 (D.C. Cir. 1998).

[34] *Id.* at 1349.

[35] Isby-Israel v. Wynn, No. 2:12-cv-00116-JMS-MJD, slip op. at 1 (S.D. Ind. Dec. 19, 2018), available at https://www.clearinghouse.net/chDocs/public/PC-IN-0026-0001.pdf. In solitary confinement, the inmate was "allowed outside for just one hour a day of recreation, alone. On those occasions when he did leave his cell, he was handcuffed behind the back and his legs were shackled. He was permitted to shower just three times a week. He ate his meals alone in his cell. His cell was constantly illuminated by a security light that stayed on twenty-four hours a day. He could not touch or hug people when they visited him." Filler & Greenfield, *supra* note 18, at 260–61 (citing *id.*).

grant of summary judgment in favor of defendant correctional officers when the district court found no physical injury.[36] The inmate sued for compensatory damages after he was pepper sprayed in the eyes.[37] In the district court, the officers argued successfully that pepper spraying was *de minimis*.[38] The Eleventh Circuit reversed and refused to hold pepper spraying *de minimis*, because in this case, after being pepper sprayed, the inmate had to sit "with the chemical agents on him for nearly twenty minutes, [was] forced to take an extended shower to allow the chemicals to run into sensitive crevices of his body, and [was] returned to a cell contaminated with pepper spray for the rest of that day and part of the following day."[39]

While not explicitly mentioned by the court, under the broader approach, temporariness of an injury will not bar an inmate from recovering compensatory damages for lack of physical injury. For example, the District of Massachusetts[40] heard a case where an inmate alleged that correctional officers purposefully turned off the heat in his cell for one night, thus aggravating his arthritis.[41] The court found that there was a genuine issue of material fact about whether there was a physical injury for PLRA purposes, thus allowing the suit to continue.[42]

Finally, the broader approach takes a more liberal view as to which types of injuries can be construed as physical. In *Mitchell v. Horn*, an inmate claimed that he was "placed . . . in a cell unfit for human habitation," and as a result, he suffered "emotional trauma, fear, and shock, and lost his [non-disciplinary] status and any chance of commutation."[43] The parties disagreed on whether deprivation "of food, drink, and sleep for four days" constituted a physical injury.[44] The correctional officers argued that it was not physical, whereas the inmate argued that "physical injury—including starvation, dehydration, unconsciousness, pain, and hypoglycemia—follow inevitably from the conditions."[45] The Third Circuit held that the inmate must have an opportunity to amend his complaint to determine whether physical injuries followed from the deprivations.[46]

2. Ripeness

There is an additional inconsistent application in circuit courts as to whether an injury that is not evident, but may become evident, constitutes

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[36] Thompson v. Smith, 805 Fed. App'x 893, 902 (11th Cir. 2020).
[37] *Id.* at 901.
[38] *Id.*
[39] *Id.*
[40] The First Circuit has still yet to define "physical injury."
[41] Skandha v. Savoie, 811 F. Supp. 2d 535, 537–39 (D. Mass. 2011).
[42] *Id.* at 539.
[43] Mitchell v. Horn, 318 F.3d 523, 528 (3d Cir. 2003).
[44] *Id.* at 534.
[45] *Id.*
[46] *Id.*

physical injury. On the one hand, the narrow approach—as applied most frequently by the Seventh Circuit—holds that an injury must be shown at the time of litigation. On the other hand, the broad approach—as applied most frequently by the Second Circuit—allows an inmate to allege physical injury if it is likely to ripen into a physical injury. Each approach is addressed in turn.

The narrow approach is exemplified by the Seventh Circuit, whereby an inmate must be able to show "proof of resulting disease or other adverse physical effects."[47] In *Zehner*, the plaintiff-inmates worked in a kitchen, "where they were deliberately exposed over a period of at least two years to friable asbestos."[48] The defendant prison officials "knew of the presence of asbestos, the dangers of asbestos, and plaintiffs' exposure to it," and their policy barred inmates from refusing a work assignment.[49] The court held that Section 1997e(e) barred their claim because if the physical injuries were to occur, the injuries would not manifest for "20 to 30 years after the emotional harm was done."[50]

In *Robinson v. Page*, an inmate alleged that there was "lead in the prison's drinking water, that the defendant prison personnel know this and refuse to do anything about it, that the lead is dangerous to the plaintiff's health, and that the defendants' conduct is a violation of the cruel and unusual punishments clause of the Eighth Amendment[.]"[51] The *Robinson* Court found that the inmate's claim was unclear as to whether the inmate was currently suffering from lead poisoning or "*will* suffer from it some day[.]"[52] Thus, because the court refused to find future harm as a "physical injury" under Section 1997e(e), it remanded the claim to determine the "precise character" of the inmate's claim.[53]

The Second Circuit takes the broader approach, relying on *Helling v. McKinney*, a Supreme Court case that was decided before the passage of the PLRA. In *Helling*, an inmate alleged an Eighth Amendment claim because he "was assigned to a cell with another inmate who smoked five packs of cigarettes a day."[54] The inmate claimed health problems caused by exposure to second-hand smoke.[55] The prison officials argued that the inmate must be able to prove a current, palpable injury, but the Court disagreed: "That the Eighth Amendment protects against future harm to inmates is not a novel proposition."[56] Indeed, the Court expressed that an

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[47] Zehner v. Trigg, 952 F. Supp. 1318, 1323 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459, 462 (7th Cir. 1997).

[48] *Id.* at 1321.

[49] *Id.*

[50] *Id.* at 1322.

[51] Robinson v. Page, 170 F.3d 747, 747–48 (7th Cir. 1999).

[52] *Id.* at 748.

[53] *Id.* at 749.

[54] Helling v. McKinney, 509 U.S. 25, 28 (1993).

[55] *Id.*

[56] *Id.* at 33.

inmate "need not await a tragic event" to allege a physical injury.[57] While the Seventh Circuit found that the PLRA superseded *Helling*, "the Second Circuit has continued to apply *Helling* following [S]ection 1997e(e)'s enactment."[58]

The bulk of cases from the Second Circuit that allow inmates to recover compensatory damages for serious risk of a *future* physical harm concern health hazards that are likely to result in sickness, like exposure to asbestos or radiation, exposure to second-hand smoke, and deliberate refusal to follow a drug regimen. In *Crawford v. Artuz*, the Southern District of New York found that Section 1997e(e) did not bar an inmate's claim that he had "been exposed to asbestos for a period [of] six years . . . [and] *will be* rendered sick, sore, lame[,] and disabled."[59] Similarly, in *Rahman v. Schriro*, the Southern District of New York allowed an inmate's claim to proceed past the motion to dismiss stage because of "the increased risk of future health effects caused by radiation exposure."[60] Finally, in *Smith v. Carpenter*, an inmate alleged that "he had been deprived of HIV medication on two separate occasions for several days at a time."[61] While there was no current physical injury resulting from the misapplied medicine, the inmate alleged that it could lead to "deterioration of his immune system," which could cause the progression of HIV and ultimately death.[62] After the trial court ruled against the inmate, the Second Circuit granted his motion for new trial, and in regard to the lack of present physical injury, the court stated, "actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation."[63]

B. COVID-19 Is a Physical Injury for PLRA Purposes

This Article argues for a novel theory of liability: Contracting COVID-19—whether the inmate is asymptomatic or suffers its worst symptoms—is a physical injury for PLRA purposes. In some cases, the physical injury will be apparent, and courts, regardless of whether they use a broad or narrow approach to severity and ripeness, will have no problem finding physical injury. However, in cases where the patient is asymptomatic or only has temporary and mild symptoms, courts may erroneously decide not to consider contracting COVID-19 a physical injury under Section 1997e(e). A decision to bar federal inmates from alleging physical injury when their symptoms from COVID-19 are either mild or

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[57] *Id.*

[58] Enigwe v. Zenk, No. 03-CV-854, 2006 WL 2654985, at *5 (E.D.N.Y. Sept. 15, 2006) (citing Smith v. Carpenter, 316 F.3d 178 (2d Cir. 2003); Davis v. New York, 316 F.3d 93, 101 (2d Cir. 2002)).

[59] Crawford v. Artuz, No. 98-CV-0425, 1999 WL 435155, at *6 (S.D.N.Y. June 24, 1999) (emphasis added).

[60] Rahman v. Schriro, 22 F. Supp. 3d 305, 318 (S.D.N.Y. 2014).

[61] Smith v. Carpenter, 316 F.3d 178, 181 (2d Cir. 2003).

[62] *Id.*

[63] *Id.* at 188.

nonexistent is particularly dangerous because inmates are disproportionately predisposed to having underlying medical conditions. This section proceeds in two subsections. First, it examines the general health of those currently incarcerated. Second, it analyzes the various symptoms and long-term health effects of COVID-19—for both asymptomatic carriers and those who showed symptoms—arguing that both should be considered physical injuries for PLRA purposes.

1. Health of Inmates

Inmates in the United States, compared to the general population, are predisposed to be most affected from contracting COVID-19. Inmates are less healthy, more prone to chronic and underlying medical conditions, and receive both less frequent and lower quality healthcare than the general population. Each of these exacerbating factors are addressed in turn, and all weigh in favor of finding contracting COVID-19 as a physical injury for PLRA purposes.

Social determinants of health ("SDH") are conditions into which people are born and live that affect health outcomes, and inmates face significant disparities associated with SDH. SDH are organized into five domains by the Office of Disease Prevention and Health Promotion: (1) economic stability, (2) education, (3) health and healthcare, (4) neighborhood and environment, and (5) social and community context.[64] In all five categories, inmates are more likely to be adversely affected. High rates of incarceration plague racial and ethnic minorities, who are less likely to be as economically stable as their white peers.[65] Additionally, inmates are more likely to lack a high school diploma or GED.[66] Finally, inmates disproportionately come from neighborhoods with "higher rates of crime, poverty, and unemployment."[67] Even upon entry to prison, these health effects are exacerbated "through malnutrition, overcrowding, limited access to basic health services, and inhumane attitudes and practices of custodial officers toward inmates[.]"[68] These factors, both when

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[64] *Incarceration*, OFF. DISEASE PREVENTION & HEALTH PROMOTION, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration (last visited Aug. 11, 2021).

[65] *Id.*; *see* Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RSCH. CTR. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ ("In 2016, the median wealth of white households was $171,000. That's 10 times the wealth of black households ($17,100) — a larger gap than in 2007 — and eight times that of Hispanic households ($20,600), about the same gap as in 2007.").

[66] *See Incarceration*, *supra* note 64.

[67] *Id.*

[68] Sara Mazzilli, *Prison as a Social Determinant of Health*, ISGLOBAL (May 24, 2019), https://www.isglobal.org/en/healthisglobal/-/custom-blog-

separated and taken together, result in a greater likelihood that one will become seriously ill if they contract COVID-19.[69]

Inmates are likely more prone to the long-term consequences of contracting COVID-19. The CDC has warned that people with underlying conditions, such as obesity, heart conditions, weakened immune systems, hypertension, asthma, and diabetes, could be at an increased risk for severe illness due to COVID-19.[70] Half of the inmates in the United States have a chronic health condition.[71] In particular, inmates are more likely than the general population to have diabetes, hypertension, HIV, and asthma.[72] This predisposition to the severe consequences of COVID-19, combined with the unknown and long-term effects of the virus,[73] make inmates more at risk than the general population.

Finally, issues regarding access and quality of healthcare adversely affect inmates. Despite being the only group of people in the country who have a Court-mandated right to healthcare, inmates have less access to medical care, and the care that inmates do receive is lower quality than the care most would receive outside of the prison.[74] Even before COVID-19, studies showed that "each year in prison takes [two] years off an individual's life expectancy."[75] For federal inmates, about 14% have persistent medical problems that go unexamined by medical personnel.[76] Furthermore, about 21% of federal inmates who were taking prescription medication for an active medical problem when they were first incarcerated

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portlet/prison-as-a-social-determinant-of-health/5083982/10102#:~:text=The%20increased%20prevalence%20of%20communicable,and%20for%20the%20general%20population.&text=Following%20release%2C%20prisoners%20face%20problems,cautious%20attitude%20by%20civil%20society.

[69] Wyatt Koma et al., *Low-Income and Communities of Color at Higher Risk of Serious Illness if Infected with Coronavirus*, KAISER FAM. FOUND. (May 7, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/.

[70] *Medical Conditions in Adults*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#immunocompromised-state (last updated May 13, 2021).

[71] *Healthcare in Jails*, CMTY. ORIENTED CORR. HEALTH SERVS., https://cochs.org/ (last visited Aug. 11, 2021).

[72] Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 669 tbl.2 (2009).

[73] *See supra* notes 15–17.

[74] *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976); *Health*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/health.html (last visited Aug. 11, 2021).

[75] Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ (citing Evelyn Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 523 (2013)).

[76] Wilper et al., *supra* note 72, at 670, tbl.3.

were no longer being prescribed that medication during their incarceration.[77] Each of these three factors—disparities in SDH, chronic and underlying conditions, and inadequate access to and quality of healthcare—creates an increased likelihood that contracting COVID-19 will result in serious illness for inmates in the United States.

2. COVID-19 & Its Effects

Individuals who contract COVID-19 not only potentially face death, but also debilitating short-term symptoms and long-term health effects. Perhaps worse, many of the long-term effects of contracting COVID-19 are still unknown to physicians and researchers. Some of the short-term symptoms and effects can be extremely detrimental to one's health. Further, while some individuals can contract the virus and remain asymptomatic, long-term effects may still manifest; the unknown nature of the virus makes it all the more dangerous to those who become infected. Therefore, the physical injury requirement of the PLRA should not bar inmates from receiving compensatory damages, even if the inmate is asymptomatic and even if the court has adopted the narrower approaches to the physical injury requirement. This subsection discusses the various ways in which COVID-19 could be considered a physical injury, even when symptoms do not manifest themselves, at least in the short term.

Apart from death, COVID-19 can result in serious physical damage to one's heart, respiratory, vascular, renal, and neurological systems. Take, for example, Boston Red Sox starting pitcher Eduardo Rodríguez. Rodríguez tested positive for the virus in July 2020, and he was struck with all of the major short-term symptoms: fatigue, headaches, and nausea.[78] The symptoms eventually subsided, but when he attempted to complete a bullpen session, he lasted only twenty pitches before having to stop due to fatigue.[79] The Boston Red Sox were confident Rodríguez would return shortly, but after only a week, Rodríguez was diagnosed with myocarditis[80]—a disease that inflames and weakens the heart, making it "harder to circulate blood and oxygen throughout the body."[81] As a result, Rodríguez was sidelined for the entirety of the 2020 season.[82]

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[77] *Id.*

[78] Zach Kram, *Complications from COVID-19 Have Ended Eduardo Rodríguez's Season*, RINGER (Aug. 3, 2020, 11:11 AM), https://www.theringer.com/mlb/2020/8/3/21352545/eduardo-rodriguez-covid-19-boston-red-sox.

[79] *Id.*

[80] *Id.*

[81] *About Myocarditis*, MYOCARDITIS FOUND., https://www.myocarditisfoundation.org/about-myocarditis/ (last visited Aug. 11, 2021).

[82] Alex Speier, *A Closer Look at Red Sox Pitcher Eduardo Rodriguez's Struggle with Myocarditis*, BOS. GLOBE (Oct. 10, 2020, 2:38 PM), https://www.bostonglobe.com/2020/10/10/sports/closer-look-red-sox-pitcher-eduardo-rodriguezs-struggle-with-myocarditis/. Researchers are now calling this "long COVID-19," whereby someone experiences "a wide range of new, returning, or

In addition to its damage to the heart, COVID-19 wreaks havoc on one's respiratory, vascular, and renal systems. The virus infiltrates the lungs, multiplying itself and shutting down gas exchange, resulting in a blood-oxygen level drop and shortness of breath.[83] This can also lead to pneumonia, which can scar the lungs, resulting in long-term breathing problems.[84] As to the vascular and renal systems, researchers now know that COVID-19 can make blood clots more likely[85] by "warp[ing] a critical piece of our vascular infrastructure: the single layer of cells lining the inside of every blood vessel[.]"[86] Dr. William Li, a researcher and vascular biologist, likens the damage to the blood vessel lining to "the ice *after* a hockey game,"[87] which results in reduced blood flow in the body, contributing "to potentially long-lasting problems with the liver and kidneys."[88]

Finally, COVID-19 can have lasting neurological and psychiatric effects. The National Institutes of Health recently noted that "[h]igh rates of anxiety and depression have been reported[,]" particularly for younger patients.[89] It was further noted that "headaches, vision changes, hearing loss, loss of taste or smell, impaired mobility, numbness in extremities, tremors, myalgia, memory loss, cognitive impairment, and mood changes" may continue for up to three months after contracting the virus.[90] One study has even found that in some of the worst cases of the virus, "mental decline equivalent to the brain ageing by 10 years" can result.[91]

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ongoing health problems" four or more weeks after being infected. *Long-Term Effects of COVID-19*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last updated Aug. 11, 2021). In another high-profile case, Lewis Hamilton, a seven-time Formula One champion, stated he suspects that he is suffering from long COVID-19 as his symptoms have lingered almost nine months since contracting the virus. Reuters, *Lewis Hamilton Suspects He Has Long COVID-19 After Dizzy Symptoms at Hungarian GP*, ESPN (Aug. 1, 2021), https://www.espn.com/f1/story/_/id/31936050/lewis-hamilton-suspects-long-covid-dizzy-symptoms-hungarian-gp.

[83] Ariel Bleicher & Katherine Conrad, *We Thought it Was Just a Respiratory Virus*, 9 U. CAL. S.F. MAG. (Summer 2020), https://www.ucsf.edu/magazine/covid-body.

[84] *See* MAYO CLINIC, *supra* note 15.

[85] *Id.*

[86] Will Stone, *Clots, Strokes and Rashes. Is COVID-19 a Disease of the Blood Vessels?*, NPR (Nov. 5, 2020, 12:02 PM), https://www.npr.org/sections/health-shots/2020/11/05/917317541/clots-strokes-and-rashes-is-covid-19-a-disease-of-the-blood-vessels.

[87] *Id.*

[88] *See* MAYO CLINIC, *supra* note 15.

[89] *Clinical Spectrum of SARS-CoV-2 Infection*, NIH (Apr. 21, 2021), https://www.covid19treatmentguidelines.nih.gov/overview/clinical-spectrum/.

[90] *Id.*

[91] Kate Kelland, *COVID's Cognitive Costs? Some Patients' Brains May Age 10 Years*, REUTERS (Oct. 27, 2020), https://www.reuters.com/article/health-coronavirus-brains-int-idUSKBN27C1RN.

However, those symptoms or effects are not limited to those who express them at the onset of contracting the virus. Even those who are asymptomatic are at risk of negative, long-term health effects. While Red Sox pitcher Eduardo Rodríguez had a whole host of symptoms before being diagnosed with myocarditis, there exists new research that while "[p]atients with myocarditis often experience symptoms like shortness of breath, chest pain, fever[,] and fatigue . . . some have no symptoms at all."[92] Another infamous example of the virus occurred on the *Diamond Princess* cruise ship, which returned to Japan on February 3, 2020.[93] According to a study done in the Annals of Internal Medicine, there were 331 passengers who tested positive, but were asymptomatic.[94] However, after taking CT scans of 76 of those asymptomatic passengers, researchers found that 54% had "lung opacities," which is a lung abnormality seen in symptomatic COVID-19 patients.[95] Ultimately, however, more research needs to be done to determine the long-term effects of lung opacities.[96]

All these symptoms and long-term effects are accompanied by a factor that is potentially more dangerous: mystery. On its website, the Mayo Clinic states, "Much is still unknown about how COVID-19 will affect people over time."[97] The same sentiment is echoed by the CDC on its website: "The long-term significance of these . . . effects . . . are unknown."[98] As a result, "[R]esearchers recommend that doctors closely monitor people who have had COVID-19 to see how their organs are functioning after recovery."[99]

Inmates are already more susceptible to severe illness as a result of contracting COVID-19, and that makes them particularly in need of medical supervision. However, medical monitoring is costly, and without compensatory damages being available to inmates who have contracted the disease, they may not be financially capable of having future health effects treated either on time or at all. Thus, COVID-19 should automatically satisfy the physical injury requirement of Section 1997e(e) of the PLRA, regardless of whether courts take the narrow approach as to severity and ripeness, because COVID-19 poses uncertain and long-term health effects that require continued medical attention.

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[92] Carolyn Barber, *COVID-19 Can Wreck Your Heart, Even if You Haven't Had Any Symptoms*, SCI. AM. (Aug. 31, 2020), https://www.scientificamerican.com/article/covid-19-can-wreck-your-heart-even-if-you-havent-had-any-symptoms/.

[93] Daniel Oran & Eric J. Topol, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, 173 ANNALS OF INTERNAL MED. 362, 362–63 (2020).

[94] *Id.*

[95] *Id.*

[96] *Id.* at 365.

[97] MAYO CLINIC, *supra* note 15.

[98] CDC, *supra* note 15.

[99] MAYO CLINIC, *supra* note 15.

II. CONSTITUTIONAL CAUSE OF ACTION

Even if inmates can automatically satisfy the physical injury requirement of the PLRA by contracting COVID-19, there are still legal hurdles that must be cleared before successfully filing suit. Generally, to make an Eighth Amendment claim,[100] inmates must allege unconstitutionally maintained prison facilities. Because prisoners have a right to both state-provided shelter and food[101] and state-provided healthcare,[102] they can sue if those needs are not met, particularly alleging cruel and unusual punishment. However, inmates have not always had cognizable rights in federal courts. Thus, before one can understand why inmates can sue in federal court, it is necessary to examine how federal courts evolved on the question of prisoners' rights.

This Part proceeds in three sections. First, it traces the evolution of prisoners' rights. Second, it analyzes the requirements necessary to allege an Eighth Amendment violation for unconstitutionally maintained prison facilities, examining the requirements and how COVID-19 fits into those requirements. Third, it applies Eighth Amendment standards to COVID-19 in prisons.

A. The History of Prison Litigation

Prisoners have not always had judicially recognized rights. Indeed, prisoners used to have no rights that the government was bound to protect. In one of the earliest cases involving prisoners' rights—*Ruffin v. Commonwealth* in 1871—the Supreme Court of Appeals of Virginia made a pronouncement on the rights of prisoners that seems draconian by today's standards: "[D]uring his term of service in the penitentiary, [a prisoner] is in a state of penal servitude to the State. He has . . . not only forfeited his liberty, but all his personal rights . . . . He is for the time being the slave of the State. He is *civiliter mortuus*."[103] Thus, according to the court, inmates are civilly dead because "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons."[104]

However, 70 years later, the Supreme Court changed course. The two earliest cases in which the Supreme Court granted rights to inmates were *Ex Parte Hull* (1941) and *Cooper v. Pate* (1964). In *Ex Parte Hull*, an inmate attempted to file a writ of habeas corpus, but was prevented from doing so by the warden of the prison.[105] For the first time on behalf of an inmate, the Court stepped in and declared that only a federal court can determine "whether a petition for writ of habeas corpus . . . is properly

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[100] *See* U.S. CONST. amend. VIII.
[101] *See infra* Part II.B.
[102] *See infra* Part II.B.
[103] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).
[104] *Id.*
[105] *Ex parte* Hull, 312 U.S. 546, 548–49 (1941).

drawn[.]"[106] This step was still minimal because the Supreme Court was yet to intervene to protect inmates from what was then inhumane, brutal conditions of confinement. For example, in 1884—the convict-leasing era in Louisiana—if an inmate was leased to work for Samuel L. James, a former Confederate Major who was awarded the lease of Louisiana State Penitentiary's convicts, he "was more likely to die than he would have been as a slave."[107]

In *Cooper v. Pate*, the Supreme Court changed course again and stepped in to protect the rights of prisoners,[108] marking the first time the Court authorized a prisoner to seek relief for prison conditions in federal courts, just one year after the Eighth Amendment was incorporated against the states.[109] In *Cooper*, an inmate sued for relief under the Civil Rights Act after the inmate "was placed in solitary confinement because he insisted upon obtaining a Muslim bible."[110] The Seventh Circuit affirmed the district court's dismissal, giving great deference to the penal institution, stating, "prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. . . . Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts."[111] The Supreme Court reversed the decision in a single paragraph, finding that the inmate had "stated a cause of action and it was error to dismiss it."[112]

Finally, in *Jackson v. Bishop*, then-Judge Harry Blackmun laid out what would serve as the foundation of Eighth Amendment jurisprudence for inmates.[113] In *Jackson*, an Arkansas penitentiary was using a leather strap to whip inmates "on the bare buttocks," at the sole discretion of the

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[106] *Id.* at 549.

[107] SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 129 (2018). In "the most detailed account of a convict labor camp," it was recounted that prisoners were "provided neither food nor shelter." *Id.* at 126. Some of the punishments employed by the convict labor camp included "'stringing up,' in which a cord was wrapped around the men's thumbs, flung over a tree limb, and tightened until the men hung suspended[.]" *Id.* Indeed, as Bauer writes, "[s]ome American camps were far deadlier than Stalin's [Soviet gulags]," as the death rate for convicts leased in South Carolina was about 45% a year from 1877 to 1879. *Id.* at 130.

[108] *See* Cooper v. Pate, 378 U.S. 546, 546 (1964).

[109] Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) ("The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.") (internal citations omitted).

[110] Cooper v. Pate, 324 F.2d 165, 166 (7th Cir. 1963), *rev'd*, 378 U.S. 546 (1964).

[111] *Id.* at 167 (quoting United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105, 107 (7th Cir. 1953)).

[112] *Cooper*, 378 U.S. at 546.

[113] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

warden, and often the whippings were done by inmates.[114] Judge Blackmun stated that "[t]he scope of the [Eighth] Amendment is not 'static.' It 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[115] Judge Blackmun then conducted an intensive, fact-based inquiry to determine that using the strap was unconstitutional as applied.[116]

Today, of course, the Supreme Court has declared that the Constitution does apply to inmates, thus allowing them to sue for poor conditions[117] or inadequate medical care.[118] However, these rights are complicated—and limited—by the fact that courts give jails and prisons wide deference in the operation of their facilities, thus making it very difficult to successfully allege an Eighth Amendment violation. After all, as the Supreme Court has noted on many occasions, "the Constitution does not mandate comfortable prisons[.]"[119]

B. Unconstitutionally Maintained Prison Facilities

One of the most frequently used Eighth Amendment claims against prisons and prison officials is for unconstitutionally maintained prison facilities that add up to cruel and unusual punishment: "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."[120] That standard promises inmates that their conditions of confinement must provide for their "basic human needs."[121] When subjecting confinement conditions to Eighth Amendment standards, courts do not examine the conditions "in a vacuum."[122] Rather, they conduct a fact-intensive inquiry to determine whether the practices contravene constitutionally mandated standards.[123] However, the standard of what type of confinement is constitutionally mandated is unclear, evolving, and only serves to meet one's basic human needs. Confinement conditions are examined together "when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."[124]

As a result, courts have adopted a two-step inquiry to determine whether confinement conditions are unconstitutionally inadequate. First, the court must examine the alleged conditions to determine "whether the

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[114] *Id.* at 574–75, 579.
[115] *Id.* at 579 (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)).
[116] *Id.* at 579–81.
[117] *See* Hutto v. Finney, 437 U.S. 678 (1978).
[118] *See* Estelle v. Gamble, 429 U.S. 97 (1976).
[119] Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
[120] *Hutto*, 437 U.S. at 685.
[121] *Chapman*, 452 U.S. at 347.
[122] *Hutto*, 437 U.S. at 685.
[123] *Chapman*, 452 U.S. at 347.
[124] Wilson v. Seiter, 501 U.S. 294, 304 (1991).

adverse conditions complained of were 'sufficiently serious,' such that the acts or omissions of prison officials giving rise to these conditions deprived the prisoner of a 'minimal civilized measure of life's necessities.'"[125] If the first question is answered in the affirmative, then courts "consider whether prison officials were deliberately indifferent to the adverse conditions."[126] Each step of the analysis is addressed in turn, using case examples to elucidate how each standard is applied.

1. Conditions Depriving an Inmate of a Life Necessity

First, courts examine the inmate's complaint and identify if the conditions at issue deprive the prisoner—either when considered together or in isolation—of a life necessity. However, as Justice Scalia made clear, examining conditions together does not mean that "all prison conditions are a seamless web for Eighth Amendment purposes."[127] Thus, Courts must determine: (1) what is considered a life necessity, and (2) whether the conditions deprive the inmate of that life necessity. Generally, courts consider sanitation, exercise, sleep, and basic utilities to be "life necessities" in confinement conditions claims.[128] Then, to determine whether the inmate is being deprived of that necessity, courts look to "the 'circumstances, nature, and duration' of the challenged conditions."[129] As an example, the *Hutto* Court stated, "[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months."[130]

Courts are particularly cognizant of claims involving unsanitary conditions. In *DeSpain v. Uphoff*, the Tenth Circuit—in their analysis of whether deprivation of a human need rises to the level of an Eighth Amendment violation—noted, "[w]hile no single factor controls the outcome of these cases, the length of exposure to the conditions is often of prime importance."[131] The inmate in *DeSpain* alleged a deprivation of sanitary conditions for "only thirty-six hours," thus the circumstances and nature would need to be significant to constitute an Eighth Amendment violation.[132] The inmate alleged that the toilets were not working, and it led to such disastrous sewage flooding that he was exposed "to other inmates' urine and feces via the standing water and also to close

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[125] Rice *ex rel.* Rice v. Corr. Med. Servs., 675 F.3d 650, 664–65 (7th Cir. 2012) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994); *Chapman*, 452 U.S. at 347).

[126] *Id.* (citing *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 302–04).

[127] *Wilson*, 501 U.S. at 305.

[128] *See infra* notes 133–45 and accompanying text.

[129] DeSpain v. Uphoff, 264 F.3d 965, 974 (10th Cir. 2001) (quoting Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)).

[130] Hutto v. Finney, 437 U.S. 678, 686–87 (1978).

[131] *DeSpain*, 264 F.3d at 974.

[132] *Id.*

confinement with the odor of his own accumulated urine."[133] The court found in favor of the inmate.[134]

Additionally, denial of personal hygiene items can rise to the level of a constitutional violation. In *Board v. Farnham*, an inmate "was denied toothpaste for three to three-and-a-half weeks," ultimately resulting in the extraction of multiple teeth from the inmate.[135] The court held for the inmate, stating that deprivation of toothpaste is a violation of the constitutional right "to receive necessary and proper personal hygiene items as preventative of future medical and physical harm."[136] However, once again, the court leaned heavily on the duration of the deprivation, stating that "ten days is not sufficient to state an Eighth Amendment claim," but found three weeks to be sufficient.[137] Other circuits have held that prison officials must provide hygienic materials: the Fifth Circuit held that an inmate having to do laundry in the sink or toilet was a constitutional violation.[138]

Courts also have found the "denial of fresh air and regular outdoor exercise and recreation" can constitute an Eighth Amendment violation.[139] The Ninth Circuit found for inmates who spent "virtually 24 hours every day in their cells with only meager out-of-cell movements and corridor exercise. Their contact with other persons was minimal . . . [with little] hope for their transfer[.]."[140] However, the Fourth Circuit found that lack of outdoor exercise and fresh air was not an Eighth Amendment violation for inmates who have access to a "day room" for 18 hours a day, which could be used "for walking, running in place, sit-ups and other individual exercises."[141]

Lacking the ability to sleep due to confinement conditions can often amount to an Eighth Amendment violation, especially if it is compounded by a lack of basic utilities. In *Gillis v. Litscher*, the court ruled for an inmate who was forced to sleep "naked on the concrete floor or on the concrete slab that [was] the bed."[142] Additionally, it was so cold in his cell that he tried to sleep next to the heating vent in his cell, but the vent was producing cold air.[143] The inmate alleged that "he was so cold that he had to walk around his small cell some 14 hours a day trying to stay warm. He claim[ed] he developed sores on his feet from pacing and on his body from

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[133] *Id.*
[134] *Id.*
[135] Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005).
[136] *Id.* at 482.
[137] *Id.*
[138] Green v. Ferrell, 801 F.2d 765, 771 (5th Cir. 1986).
[139] Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979).
[140] *Id.*
[141] Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980).
[142] Gillis v. Litscher, 468 F.3d 488, 490 (7th Cir. 2006).
[143] *Id.*

sleeping on the concrete."[144] On other occasions, the inmate alleged that he had to sleep "huddled with a roommate, sleeping between two mattresses," or he "tore open the mattress and slept inside it."[145]

2. Deliberate Indifference

The second step of a court's analysis to determine whether an Eighth Amendment claim exists is "[to] consider whether prison officials were deliberately indifferent to the adverse conditions."[146] The Supreme Court defined "deliberate indifference" as "a state of mind more blameworthy than negligence," but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[147] Put differently, "[a]n official is deliberately indifferent when he is subjectively aware of the condition or danger complained of, but consciously disregards it."[148] Therefore, for purposes of this analysis, the reasoning of various courts is harder to classify than identifying a deprived human need because the facts at issue involve a subjective component to the analysis. Additionally, in their analysis, courts must also consider "the constraints facing the official."[149] So, courts both must find subjective knowledge, and then balance that knowledge against the specific constraints of the prison official. To find subjective knowledge on behalf of prison officials, courts have consistently looked to two factors as evidence: (1) both public reports and internal prison documents or conversations, and (2) the duration of the condition. Subjective knowledge and the balancing are addressed in turn.

Public reports can serve as evidence of subjective knowledge. In *Williams v. Griffin*, the inmate alleged that prison officials were aware of the overcrowding in the prison and failed to remedy it.[150] In ruling for the inmate, the court pointed to "several published reports by the Governor of North Carolina and the North Carolina Legislature regarding the deplorable condition of North Carolina prisons."[151] Additionally, in the reports, there were specific factual allegations that supported the assertion of a deprivation. For example, it was documented "that the floors, walls, and ceilings continued to need repair. . . . these conditions were never repaired, but rather were allowed to worsen[.]"[152] The court also implicitly balanced the conditions against the constraints of the officers, and finding

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[144] *Id.* at 490–91.

[145] *Id.* at 493.

[146] Rice *ex rel.* Rice v. Corr. Med. Servs., 675 F.3d 650, 664–65 (7th Cir. 2012) (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 304 (1991)).

[147] *Farmer*, 511 U.S. at 835.

[148] *Rice* ex rel. *Rice*, 675 F.3d at 665.

[149] *Wilson*, 501 U.S. at 303 (emphasis omitted).

[150] Williams v. Griffin, 952 F.2d 820, 826 (4th Cir. 1991).

[151] *Id.*

[152] *Id.*

none, the court found for the inmate, writing: "once prison officials become aware of a problem with prison conditions, they cannot simply ignore the problem, but should take corrective action when warranted."[153]

Courts also consider internal prison documents or conversations as evidence of subjective knowledge, though both are rarely dispositive. In *Saunders v. Sheriff of Brevard County*, an inmate attempted to use his internal grievance written to the prison system as evidence of subjective knowledge.[154] However, the Eleventh Circuit ruled for the prison officials, because the grievance focused on a lack of medical attention, not the sanitary conditions.[155] In *McClure v. Haste*, an inmate's alleged conversations with prison officials complaining—on multiple occasions—of the conditions, created a material issue of fact.[156]

The longer a condition persists, the more likely courts are to find subjective knowledge. In *Alberti v. Sheriff of Harris County*, the Fifth Circuit heard a case concerning an overcrowded prison in Texas.[157] The prison had been supervised by courts for almost 15 years, including when the backlog of prisoners increased exponentially in the three years leading up to the case.[158] Thus, the court quoted *Wilson*, writing, "the 'long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent[,]'"[159] and held in favor of the inmates by remanding back to the lower court.

If the courts can establish that the prison officials were deliberately indifferent to the deprivation, then they will consider the constraints on the officials. Oftentimes, this is a simple inquiry. In *LaFaut v. Smith*, the Fourth Circuit considered a three-month delay by prison officials who were asked to fix an inmate's toilet.[160] The court found "no reason or excuse [that] was offered for this delay."[161] However, the inquiry is not always that simple. In *Alberti*, prison officials blamed "legislative refusal to fund" the prison, but the court ruled for the plaintiff, stating, "inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement."[162]

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[153] *Id.* (citing Shrader v. White, 761 F.2d 975, 982 (4th Cir. 1985)).

[154] Saunders v. Sheriff of Brevard County, 735 F. App'x 559, 569 (11th Cir. 2018).

[155] *Id. But see Williams*, 952 F.2d at 826 ("[The inmate] also pointed to the grievances that he and other prisoners had filed regarding the complained-of prison conditions, and the failure of the Prison Officials to take action, as demonstrating deliberate indifference.").

[156] McClure v. Haste, 820 F. App'x 125, 129 (3d Cir. 2020).

[157] Alberti v. Sheriff of Harris County, 937 F.2d 984, 998 (5th Cir. 1991).

[158] *Id.* at 998–1000.

[159] *Id.* at 998 (quoting Wilson v. Seiter, 501 U.S. 294, 300 (1991)).

[160] LaFaut v. Smith, 834 F.2d 389, 393 (4th Cir. 1987).

[161] *Id.*

[162] *Alberti*, 937 F.2d at 999–1000 (quoting Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980)). *See also* Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986)

3. Applying the Standard to COVID-19 in Prison

This analysis can be successfully applied to a hypothetical prison. Later, the Article discusses actual inmate litigation concerning COVID-19 and prisons, but as those cases are not directly on point,[163] it is necessary to go through the steps that an inmate must follow before receiving compensatory damages. First, for the purposes of COVID-19 analysis, it is necessary to pinpoint the "single, identifiable need" of which inmates are being deprived. In this case, the need is for sanitation and health, which is considered a basic human need in prisons.[164] Indeed, the CDC[165] and the BOP[166] have issued guidelines for federal prisons to follow to reduce the spread of COVID-19, and failure to follow those guidelines deprives an inmate of health and sanitation.

Second, the court would then determine whether prison officials are "deliberately indifferent" to the deprivation of sanitation and inmate health. Here, two factors weigh strongly in favor of finding deliberate indifference: (1) public reports, and (2) the duration of the pandemic. First, multiple governmental organizations, both at the federal and state level, have issued guidance to prisons.[167] Public health officials have warned that prisons and jails are "petri dishes[,]" whereby "COVID-19 would spread rapidly and then boomerang back out to the surrounding communities with greater force than ever before."[168] Additionally, most prisons and jails have already begun immediate releases for low-level felony and misdemeanor offenders.[169] Orange County, California, for example, has

("Budgetary constraints…do not justify cruel and unusual punishment."); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983).

[163] The cases concerning COVID-19 have all been for preliminary injunctions. *See infra* Part III.

[164] *See supra* Part II.B.1.

[165] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last updated June 9, 2021).

[166] *BOP Modified Operations*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus/covid19_status.jsp (last updated Nov. 25, 2020).

[167] *See supra* notes 165–66.

[168] Emily Widra & Dylan Hayre, *Failing Grades: States' Responses to COVID-19 in Jails & Prisons*, PRISON POL'Y INITIATIVE (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html.

[169] *See Criminal Justice Responses to the Coronavirus Pandemic*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/virus/virusresponse.html (last updated May 18, 2021).

reduced its jail population by 45%, whereas DeKalb County, Georgia, has only reduced its population by 7%.[170]

The most difficult part of this analysis, as is explained in Part III, is whether the constraints of prison officials generate enough countervailing interests that courts will rule in favor of the prisons. This is a fact-intensive inquiry, and the timing of when an inmate contracted the virus will play into the analysis. Early in the pandemic, there was an understandable shortage of Personal Protective Equipment ("PPE"), testing, and prison population reductions had yet to take effect. However, as the pandemic has gone on, failure to provide PPE, tests, and now vaccines has become less excusable. Therefore, the deliberate indifference balancing inquiry will likely be the most contested part of prison litigation concerning the spread of COVID-19.

III. ANALYSIS & IMPLICATIONS

Prison litigation has already reached federal courts concerning how prisons have handled the COVID-19 pandemic. However, its procedural posture and claims for relief are slightly different than what has been laid out in this Article. Most cases that have reached circuit courts have only dealt with inmates seeking preliminary injunctions against prisons that have failed to implement basic procedures to reduce the spread of the virus.[171] While different, those cases are instructive as to how courts will adjudicate Eighth Amendment claims for unconstitutional confinement conditions. However, there is yet to be a case concerning an inmate that is seeking to recover compensatory damages for contracting COVID-19, which means that courts are yet to deal with the PLRA's physical injury requirement.[172] Throughout this analysis, it must be assumed that contracting the virus is a physical injury for PLRA purposes. This section analyzes how federal courts have dealt with Eighth Amendment claims based on COVID-19. First, it addresses whether courts consider protection from COVID-19 to be a human need that prisons must provide. Second, it examines how courts have approached the deliberate indifference prong, both when prisons have implemented or failed to implement COVID-19 precautions. Finally, it discusses how the PLRA inhibits these claims.

A. COVID-19 & Prison Conditions

The first step of an Eighth Amendment claim is whether there is a human need that prisons are required to protect. Regarding the protection of inmates from contracting COVID-19, courts and even prison officials unanimously answer in the affirmative. In *Plata v. Newsom*, the Northern District of California quickly disposed of the first step of an unconstitutional confinement claim, stating that "[t]he Court need not analyze this

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[170] *Id.*

[171] *See infra* notes 173–97 and accompanying text.

[172] 42 U.S.C. § 1997e(e).

issue in detail" because even the prison officials admitted that COVID-19 poses a sufficient risk to its inmates.[173] Similarly, in *Valentine v. Collier*, the prison did "not dispute that COVID-19 poses a substantial risk of serious harm[.]"[174] Therefore, it is not in dispute that courts find protection from COVID-19 to be a human need of which inmates cannot be deprived.

Prisons and jails that implement the guidelines set forth by the BOP and CDC are likely not liable under the Eighth Amendment. In *Chunn v. Edge*, six inmates at the Metropolitan Detention Center challenged the institution's COVID-19 response.[175] However, by the time the case reached the Eastern District of New York, three of the plaintiff-inmates "were granted compassionate release[,]" and two were transferred, indicating the prison's commitment to stopping the spread of the virus.[176] According to the court's findings of fact, the prison had "been following the BOP's COVID-19 Action Plan" starting in January 2020.[177] The prison "suspended virtually all legal and social visitation and started new entry screenings for staff and prisoners . . . staggered meal and recreation times . . . [and] required inventories of cleaning, sanitation, and medical supplies, among other steps."[178] Finally, the prison instituted a 14-day lockdown, allowing "exceptions for essential activities."[179] As a result, by the time the case was handed down, there were no deaths and only a single, one-day hospitalization—in the midst of what was then "the epicenter of America's COVID-19 outbreak."[180] The court detailed 19 pages of COVID-19 precautions taken by the prison,[181] and ultimately held for the prison, refusing to grant a preliminary injunction.[182]

Prisons and jails that fail to implement BOP guidance are likely to be liable under the Eighth Amendment. In *Valentine*, plaintiff-inmates at a "state geriatric prison, allege that [the prison and its officials] have failed to reasonably protect the inmates . . . from the spread of the COVID-19 pandemic."[183] The prison argued that it had adopted precautions "before the first positive test," but the first lockdown at the prison happened three days after the prison saw its first COVID-related death.[184] Furthermore, the plaintiffs "presented unrebutted evidence . . . [that] post-pandemic procedures for cleaning common areas resemble their pre-pandemic

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[173] Plata v. Newson, 445 F. Supp. 3d 557, 562 (N.D. Cal. 2020).
[174] Valentine v. Collier, 455 F. Supp. 3d 308, 321–22 (S.D. Tex. 2020).
[175] Chunn v. Edge, 465 F. Supp. 3d 168, 172 (E.D.N.Y. 2020).
[176] *Id.* at 172–73.
[177] *Id.* at 179.
[178] *Id.*
[179] *Id.*
[180] *Id.* at 180. The Metropolitan Detention Center is in Brooklyn, New York.
[181] *Id.* at 179–98.
[182] *Id.* at 206.
[183] Valentine v. Collier, 455 F. Supp. 3d 308, 311 (S.D. Tex. 2020).
[184] *Id.* at 322.

procedures."[185] Inmate janitors' supplies were "almost depleted by mid-afternoon," and the janitors had to share gloves.[186] The prison also refused "to provide paper towels and hand sanitizer," arguing that "disposable towels could be used to start fires or clog toilets."[187] Myriad evidence provided by the plaintiffs made it clear to the court that the prison and its officials were deliberately indifferent to inmate concerns, thus the preliminary injunction was granted.[188]

Presumably, however, most cases are not so easy to determine. For example, in *Swain v. Junior*, the Eleventh Circuit—in a split decision—overturned a district court ruling that prison officials were deliberately indifferent to the risk of COVID-19.[189] The district court found that inmates' "beds [were] placed so close together [that] they can reach out and touch neighboring bunks."[190] Showers, toilets, and telephones "are shared by up to 60 people," and the inmates found it impossible to clean because they were not provided with cleaning supplies.[191] The masks provided were "soft, rip a lot, and get really dirty," and not everyone wears them because inmates were "not always provided with replacements . . . and [were] chastised or threatened with disciplinary action if they request a new one."[192] Inmates were still required to be counted, forcing them to "line up shoulder-to-shoulder, less than three feet apart," and their exercise time is spent "with people from quarantined cells."[193] The dissent argued that "the repeated failures to enact adequate social distancing measures documented in these declarations are sufficient to demonstrate a systemic, institutional pattern of deliberate indifference."[194] The majority disagreed, finding that "the district court erred in relying on the increased rate of infection" and "in concluding that the defendants' inability to ensure adequate social distancing constituted deliberate indifference."[195] The majority pointed to "tape on the floor to encourage social distancing in lines, that bunks are staggered with head to foot configuration . . . and that patients are staggered and appropriately distanced when going to medical."[196] Thus, seemingly usurping the district court's authority as fact finder, the majority held: "Whatever deliberate indifference is, the defendants' conduct here doesn't show it."[197]

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[185] *Id.* at 323.
[186] *Id.*
[187] *Id.*
[188] *Id.* at 330.
[189] Swain v. Junior, 961 F.3d 1276, 1289 (11th Cir. 2020).
[190] *Id.* at 1300 (Martin, J., dissenting).
[191] *Id.*
[192] *Id.* (internal quotation marks omitted).
[193] *Id.* at 1301 (internal quotation marks omitted).
[194] *Id.*
[195] *Id.* at 1287.
[196] *Id.* at 1288 (internal quotation marks omitted).
[197] *Id.* at 1289.

Aside from overzealous appellate judges, inmates must also face procedural hurdles set forth by the PLRA, including its physical injury[198] and exhaustion requirements.[199] This Article has already argued that COVID-19 automatically satisfies the physical injury requirement.[200] But, the exhaustion requirement states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[201] Generally, this means that the inmate must go through the prison's internal grievance and appeals process before making a claim in federal court.[202] For example, in *United States v. Credidio*, an inmate's claim for compassionate release due to COVID-19 was rejected because her motion did not "mention the administrative exhaustion requirement, let alone chronicle any steps [the inmate] has taken to obtain potential administrative remedies."[203] The majority in *Swain* also found that the district court "erred in refusing to consider the defendants' arguments with respect to PLRA exhaustion."[204]

Inmates already must meet high evidentiary thresholds to successfully allege an Eighth Amendment claim. The PLRA implemented additional hurdles that inmates must meet to even get into court, let alone receive compensatory damages. In short, inmates have the deck stacked against them, and only by essentially waiving the physical injury requirement can inmates ensure that prisons and jails will be held accountable for failing to protect them against the COVID-19 pandemic.

CONCLUSION

Bryan Stevenson's proclamation that "wealth, not culpability, shapes outcomes,"[205] takes on an even more desperate connotation when applied to inmates in the time of COVID-19. On the one hand, Michael Cohen—like other well-off, white-collar inmates—was able to deputize his high-powered lawyers to make him first in line for an early release from federal prison, shortly after a longer-than-usual time spent in isolation for health issues.[206] On the other hand, George Reagan, a non-violent offender with heart disease—who was even closer to his actual release date—was forced to stay in prison, where he contracted COVID-19. Mr. Reagan,

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[198] 42 U.S.C. § 1997e(e).

[199] 42 U.S.C. § 1997e(a).

[200] *See supra* Part I.B.

[201] 42 U.S.C. § 1997e(a).

[202] *See* Jones v. Bock, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.").

[203] United States v. Credidio, No. 19 CR. 111 (PAE), 2020 WL 1644010, at *2 (S.D.N.Y. Apr. 2, 2020).

[204] Swain v. Junior, 961 F.3d 1276, 1292 (11th Cir. 2020).

[205] *See* TED, *supra* note 11.

[206] *See supra* notes 1–4.

fortunately, recovered, but as researchers have shown, that does not mean that Mr. Reagan is in the clear.[207] Long-term effects of COVID-19 are common, and researchers are uncertain whether there could be other effects that they are yet to discover. Thus, inmates like Mr. Reagan are not only left in danger inside of the "petri dish" that is a federal prison, but even after contracting the virus, they could be without redress.

The Prison Litigation Reform Act (PLRA) has already disallowed many meritorious claims from proceeding in federal court, and the physical injury requirement poses a serious threat to what is certain to be a flood of litigation from inmates seeking compensatory damages and medical monitoring after contracting the virus. Inmates already face the high standard of deliberate indifference to successfully allege an Eighth Amendment claim, and the physical injury requirement must not allow jails and prisons to escape liability for failing to protect inmates' health and safety. Thus, contracting COVID-19 must automatically satisfy the physical injury requirement, thereby allowing inmates to allege cruel and unusual punishment perpetrated by the prison and its officials. If inmates are unable to do so, they will face long-term health effects and uncertainty without the means to protect themselves.

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[207] *See supra* notes 5–10.