Are Lawyers the Answer?: Compassionate Release as Case Study

ANDREA ROTH*

I. INTRODUCTION

In "Importance of Counsel in Compassionate Release Cases," Amanda Rogers makes a persuasive and poignant case – based on her novel nationwide review of post-First Step Act (FSA) district court rulings, as well as her own practice experience – that federal courts should presumptively appoint counsel to indigent prisoners filing motions for compassionate release under the FSA. As Rogers notes, many petitioners have righteous claims to relief, and many surely would have had more success with the help of a lawyer. Indeed, her own innovative clinic at Georgetown has helped numerous incarcerated people achieve release, through tireless efforts at seeking records, letters, and affidavits; consulting experts; and researching and analyzing novel legal issues.

Rogers ultimately offers federal judges a workable seven-part "interests of justice" test for when to appoint counsel. Her test is not simply a progressive wish list. Instead, it identifies the key circumstances where the need for counsel is highest, which she demonstrates through case examples and practices in districts that appoint counsel. Even law-and-order fiscally conservative policymakers should be persuaded by Rogers' cogent arguments that counsel should be appointed when the following factors, viewed together, weigh overall in the movant's favor: (1) the presence of counsel would serve judicial economy; (2) the movant has made a prima facie case for relief, i.e., the allegations if true would merit relief and there are no procedural bars to hearing the claim; (3) a *pro se* movant would have difficulty accessing the necessary records, affidavits, and letters to support the claim; (4) the claims raised in the motion likely require the help of expert witnesses to resolve; (5) the claim involves a novel issue of law; (6) the movant, if *pro se*, would be hindered by physical, mental, or cognitive limitations; and (7) the movant, if *pro se*, would face potential retaliation from prison officials or other actors whose interests are adverse to granting relief based on the claims presented. Indeed, where the

* Professor of Law and Barry Tarlow Chancellor's Chair in Criminal Justice, UC Berkeley School of Law. Thank you to Amanda Rogers for taking on this critical work, and to the Ohio State Law Journal's wonderful editorial staff.

totality of these factors suggests appointment of counsel, there would seem to be a strong argument (one Rogers does not make, but could) that a judge violates due process by denying counsel, given some of the other contexts in which civil litigants and incarcerated people have such a right.

Rogers' repeated and pragmatic focus on how the presence of lawyers can enhance judicial economy is notable, and suggests she seeks a big tent to garner support for a right to counsel in FSA motions. Her pragmatism is also evident in how her proposed test borrows from existing general orders that work well. In a highly polarized political moment in which people agree on so little, the undesirability of unnecessary incarceration seems to have somehow remained a point of bipartisan agreement. The FSA was passed during the first Trump administration, after all, and the "Right on Crime" movement is alive and well.[1]

And yet, whenever a reform expands procedural rights, the potential arises for difficult line-drawing decisions and unintended consequences. In terms of line-drawing, there is the question of who else should be entitled to a lawyer, and why these cases merit priority among so many others in which people would benefit from counsel but are not entitled to it.[2] In terms of unintended consequences, some scholars have argued that expanding procedural rights for those in the carceral net only legitimizes an overly punitive system. Others have argued that adding lawyers to the mix in criminal or quasi-criminal proceedings might inspire prosecutors to require waivers of the right as a condition of pleas, or inspire judges to be more, not less, punitive.[3] These critiques in turn raise critical empirical questions, such as whether lawyers make a difference in the mine run of cases.

In the parts that follow, I explore these potential concerns with appointing lawyers in more compassionate release cases. I also suggest some possible answers, as well as areas of future empirical research for legal scholars based on Rogers' important study and analysis. At the very least, this study should both inspire a broader research agenda and persuade districts as a matter of common sense to allow discretionary appointments of counsel.

II. WHERE TO DRAW THE RIGHT-TO-COUNSEL LINE

Any argument for expansion of the right to appointed counsel at taxpayer expense should prompt the question: why *these* cases, and not others? If we offer free lawyers to people with potentially meritorious compassionate release claims, we are either raising taxes or taking money from somewhere else. We are also prioritizing compassionate release movants above other indigent litigants whose liberty interests are at stake but who do not get a lawyer. So it is

[1] *See, e.g.*, *Parole and Reentry*, RIGHT ON CRIME, https://rightoncrime.com/initiatives/parole-and-re-entry/ [https://perma.cc/4KRQ-QD5F] (arguing for expanded, evidence-based parole and reentry opportunities to reduce unnecessary incarceration).

[2] *See* discussion *infra* at II.

[3] *See* discussion *infra* at III.

worth taking a moment to see the full picture of who gets a lawyer now, and how Rogers' reforms would fit into that existing rights landscape.

A. Who Else Is Denied a Lawyer?

Even some criminal defendants, some facing jury trials against federal and state prosecutors, are routinely denied lawyers.

[5] Oddly, although the Sixth Amendment says that in "all criminal prosecutions" the accused shall enjoy the right to counsel,[6] the Supreme Court has interpreted the right as extending only to prosecutions where the defendant receives jail time, either initially or as a result of a probation revocation.[7] Thus, under existing law, even a person accused of a felony who simply wants their private counsel to represent them at trial has no constitutional right to counsel unless and until he is sentenced to jail time.[8] Likewise, a corporation charged with involuntary manslaughter and facing a $2 billion criminal fine has no constitutional right to the assistance of their private counsel. Defendants' statutory rights to counsel are also limited, depending on the jurisdiction.[9] In federal cases, the statutory right mirrors the *Scott* "actual incarceration" line.[10] And while some states ostensibly have a statutory right to counsel in all criminal prosecutions, even many of these states routinely allow *pro se* defendants to negotiate plea deals with prosecutors and plead guilty without ever having spoken with an attorney.[11]

Moreover, even a defendant convicted of a crime and sentenced to life in prison or the death penalty has no constitutional right to counsel in discretionary

---

[5] *See generally* Erica J. Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019 (2013) (noting frequent violations of right to counsel in misdemeanor cases).

[6] U.S. CONST. amend. VI.

[7] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (denying lawyer in jury-demandable case in which defendant received only a fine as a sentence); Alabama v. Shelton, 535 U.S. 654, 657–58 (2002) (holding that defendant cannot constitutionally be denied a lawyer if they eventually get backup jail time as a result of probation revocation). This right extends to juvenile cases as well, because of their similarity (in the modern era) to criminal prosecutions. *See* In re Gault, 387 U.S. 1 (1967).

[8] *See generally* Andrea Roth, *The Embarrassing Sixth Amendment*, 112 Cal. L. Rev. 55 (2024) (noting that *Scott* applies to felonies, federal court, and retained counsel as well).

[9] *Compare* CAL. PENAL CODE § 987 (statutory right to counsel in non-capital criminal cases) *with* Hashimoto, *supra* note 5, at 1025–31 (noting lack of provision for counsel in various states).

[10] *See* FED. R. CRIM. P. 58(a)(2) (providing that in petty misdemeanors "for which no sentence of imprisonment will be imposed," other rules need not be followed, e.g., Rule 44's requirement of counsel).

[11] *See, e.g.*, Andrea Roth, "*Spit and Acquit": Prosecutors as Surveillance Entrepreneurs*, 107 CAL. L. REV 101, 139 (2019).

appeals[12] or habeas corpus proceedings.[13] To be sure, federal habeas petitioners in capital cases have a statutory right to counsel.[14] But in non-capital cases, federal habeas petitioners have a statutory right to counsel only in two limited circumstances: (1) a judge allows the petitioner to conduct discovery and finds that counsel is "necessary for effective discovery";[15] and (2) if the judge determines that an "evidentiary hearing is warranted" and allows the petitioner to offer evidence.[16] Additionally, although federal criminal defendants later accused of violating federal probation or supervised release have a statutory right to appointed counsel at their revocation hearing,[17] state defendants facing a probation or parole revocation hearing have a due process right to counsel only on a case-by-case basis, depending on the complexity of the case and whether there is a viable claim of factual innocence or mitigation.[18]

Other litigants facing serious consequences also have either a limited right to counsel or no right at all. Indeed, in cases involving liberty interests other than incarceration, such as parental termination hearings,[19] the Court has embraced a presumption *against* requiring counsel as a matter of due process.[20] Not even a civil contempt litigant facing incarceration for failure to pay child support is automatically entitled to a lawyer.[21] And litigants in federal immigration proceedings facing removal have only a statutory right to retained counsel, nothing more.[22] Likewise, people incarcerated in federal prisons, determined in a disciplinary hearing to merit the sanction of solitary

---

[12] *See* Douglas v. California, 372 U.S. 353, 357–58 (1963) (recognizing an equal protection and due process right to appointed counsel on first appeal as of right); Ross v. Moffit, 417 U.S. 600 (1974) (limiting *Douglas* to first appeal as of right, and limiting reasoning to due process).

[13] *See* Pennsylvania v. Finley, 481 U.S. 551, 555, 559 (1987) (no right in state habeas cases); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (no right in state capital habeas cases). *But see* Coleman v. Thompson, 501 U.S. 722, 755–57 (1991) (holding no constitutional right to counsel on federal habeas, though leaving open whether there is a right for claims that can only be raised in the first instance on habeas).

[14] *See* 18 U.S.C. § 3599(a)(2).

[15] RULES GOVERNING § 2254 PROCEEDINGS IN THE U.S. DISTRICT COURTS 6(a); RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DISTRICT COURTS 6(a).

[16] RULES GOVERNING § 2254 PROCEEDINGS IN THE U.S. DISTRICT COURTS 8(c); RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DISTRICT COURTS 8(c).

[17] *See* FED. R. CRIM. P. 32.1(b)(2)(D).

[18] *See* Gagnon v. Scarpelli, 411 U.S. 778,790–91 (1973).

[19] Although termination of parental rights is generally a state matter, some have called for the federal government to require counsel as a condition of federal funds. *See generally* Vivek S. Sankaran, *Moving Beyond* Lassiter*: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1 (2019) (arguing for a federally enforced right to counsel in parental rights termination cases).

[20] Lassiter v. Dep't of Soc. Servs, 452 U.S. 18, 25–31 (1981).

[21] Turner v. Rogers, 564 U.S. 431, 435 (2011).

[22] *See* 8 U.S.C. § 1362 (right to retained counsel not at government expense).

confinement, have no right to counsel,[23] nor do people losing homes, critical medical care, and other basic needs.

B. What Makes Compassionate Release Special?

Given the number of federal litigants facing significant deprivations of liberty who have no right to appointed counsel, why should compassionate release movants be prioritized?

One way to answer that question would be to consider the test the Supreme Court uses in other non-criminal contexts to determine whether a litigant has a right to counsel as a matter of due process. Under *Mathews v. Eldridge*,[24] a court considers (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."[25] While Rogers does not make an explicit due process argument for counsel, the *Mathews* test seems a good baseline by which to compare this context to those discussed in the previous section.

In terms of the private interest at stake, FSA movants, as Rogers shows, often are facing a life-or-death situation or have needy loved ones who are facing such a situation.[26] If one goal of FSA compassionate release motions is to relieve physical suffering,[27] these movants seem to have a greater liberty interest even than people facing misdemeanor charges, those losing housing benefits, or habeas petitioners already incarcerated and otherwise healthy. Then again, those facing long term solitary confinement, loss of life-saving medical care, or deportation to a country where they will face oppression also seem to have a similarly strong "physical suffering" argument. In addition, some FSA movants' claims are not based on health issues, but on nonretroactive changes in the law that, if applicable, would significantly reduce the movant's sentence.[28] But the same is true of claims of federal habeas petitioners who might stand a better chance with a lawyer who could persuasively argue for retroactive application of a new decision[29] or, for that matter, relief on the merits.

---

[23] Wolff v. McDonnell, 418 U.S. 539, 569–72 (1974).

[24] *See generally* Matthews v. Eldridge, 424 U.S. 319 (1976).

[25] *Id.* at 335.

[26] Amanda Rogers, *Importance of Counsel in Compassionate Release Cases*, 86 OHIO ST. L.J. 443, 447–48 (2025).

[27] *See id.* at 451 (explaining that FSA's target is "cruel" and "senseless" imprisonment and detailing categories of circumstances triggering relief).

[28] *See id.* at 470–74 (explaining the new "unusually long sentence" category).

[29] New decisions are not retroactively applied on habeas unless they are either applications of an "old" rule, or are a "new" rule that is either substantive rather than procedural, or involve a "watershed" procedural rule (a category the Supreme Court has state includes only *Gideon v. Wainwright*). *See* Teague v. Lane, 489 U.S. 288, 311 (1989).

Moreover, one might argue that counsel is more urgently needed when the government seeks to *impose* a liberty deprivation on a defendant (such as a misdemeanor conviction and sentence of a significant fine or restitution, or deportation) than when a defendant seeks relief from an *already imposed* restriction (such as a reduction of a sentence). For example, the Supreme Court has limited the right to counsel on discretionary appeal in part on grounds that the defense is typically the one haling the government into court in that context, rather than vice versa.[30] Then again, appellants have a constitutional right to counsel in their first appeal as of right, even though the conviction has typically already occurred and the defense is typically bringing the appeal.[31]

In terms of the risk of erroneous deprivation absent a right to counsel, Rogers offers compelling anecdotal evidence throughout her article of sympathetic movants whose claim likely only succeeded because they had an attorney.[32] But one cannot tell from the court data alone how many petitioners who meet Rogers' criteria would win.[33] And in terms of comparing the compassionate release context to habeas, immigration, benefits termination, or imposition of solitary confinement, one would think that litigants who meet the equivalent of Rogers' criteria in those other contexts should also be entitled to counsel, either as a matter of due process or just prioritizing costly discretionary grants of counsel. None of Rogers' criteria, after all, is specific to compassionate release; prisoners in disciplinary hearings surely face retaliation, habeas petitioners might need experts, people subject to removal proceedings might have significant cognitive limitations. And in all these other contexts, a well-prepped representative of the government is present as an adversary.[34]

One might also ask whether a non-attorney helper could fill some of the gaps Rogers identifies.[35] For example, while incarcerated people have difficulty obtaining records, a non-attorney could presumably do so. On the other hand,

---

[30] *See* Ross v. Moffitt, 417 U.S. 600, 610 (1974).

[31] *See* Douglas v. California, 372 U.S. 353, 357 (1963).

[32] *See generally* Rogers, *supra* note 26.

[33] Rogers' data explain the circumstances under which courts appoint counsel. *See id.* at 475–83. But they do not indicate what the base rate of success would be if all movants were appointed counsel.

[34] The government is represented in removal hearings by the Department of Homeland Security. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, § 4.2, available at https://www.justice.gov/eoir/reference-materials/ic/chapter-4/2. The U.S. Attorney's Office handles habeas proceedings brought by federal prisoners. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, § 9-37.000, available at https://www.justice.gov/jm/jm-9-37000-federal-habeas-corpus#:~:text=A%20Section%202255%20motion%20must,in%20the%20Criminal%20Appellate%20Section. In prison disciplinary hearings, the government is typically represented by a reporting officer who files the incident report. *See generally* Nkechi N. Erondu, *Doubling Down on Due Process: Toward a Guaranteed Right to Legal Counsel in Jail Disciplinary Proceedings*, 123 COLUM. L. REV. 101 (2023) (describing the many correctional officers involved in DHO hearings to determine solitary confinement).

[35] *See generally* Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013) (critiquing expansions of *Gideon*).

there may be a benefit to an attorney drafting an affidavit, depending on the case. For example, some affidavits presumably need to be crafted with the governing legal standard in mind, such as establishing that the movant is the "only available caregiver" for an "incapacitat[ed]" person who is legally the movant's "spouse or registered partner."[36] Likewise, attorneys surely know better how to fill out expert witness vouchers and research novel legal claims.[37] Then again, plenty of novel legal claims arise in criminal trials that do not end in incarceration, where there is not even a limited federally recognized constitutional right to counsel.[38]

Finally, the primary countervailing interests of the state in the compassionate release context are presumably cost and public safety. In terms of public safety, the American Conservative Union Foundation (ACUF), founded by William F. Buckley, reports that prisoners granted compassionate release have a 3.5% recidivism rate, compared to a 41% overall rate for federal prisoners.[39] Then again, prisoners who are not released have a 0% recidivism rate (not counting offenses committed in prison), so the relatively lower offense rate of compassionate release grantees still presumably has some marginal public safety cost. In terms of costs, Rogers points out, the average yearly cost of incarcerating an elderly person in federal prison is over $50,000,[40] and it's true that $50,000 a year could buy quite a bit of attorney and court time. But that claim of savings assumes that the represented movant will be released. If a represented movant is not released, then the government pays for both an attorney and for incarceration. In assessing costs, it would be helpful to know what percentage of represented movants in districts that assign counsel win, at least among those who meet Rogers' criteria.

Even if we think a right to counsel in compassionate release cases is costly but worth its price, a related concern is *opportunity cost.* When my (typically pro-defendants'-rights) students at Berkeley scoff at old opinions in which justices express concern over the cost of procedural rights for state governments, I ask them to consider what their view would be if, say, Alabama had to decide between giving all misdemeanor defendants appointed counsel and funding a robust Head Start program. Or if appointing the federal public defender to a

---

[36] U.S. SENT'G COMM'N, 2024 GUIDELINES MANUAL, § 1B1.13(b)(3).

[37] The form for requesting expert witness funds requires the applicant to explain, among other things, why the expert is "necessary for adequate representation" of the defendant. *See* CJA Form 21, *Authorization and Voucher for Expert and Other Services*, available at https://www.uscourts.gov/forms-rules/forms/authorization-and-voucher-expert-and-other-services.

[38] *See Scott v. Illinois*, 440 U.S. at 373–74 (1979); *Alabama v. Shelton*, 535 U.S. at 657–58; *In re Gault*, 387 U.S. at 1.

[39] *See* United States Department of Justice, Office of the Inspector General, Statement of Michael E. Horowitz before the United States Sentencing Commission hearing concerning "Compassionate Release and the Conditions of Supervision," (2016), https://oig.justice.gov/news/testimony/statement-michael-e-horowitz-inspector-general-us-department-justice-us-sentencing [https://perma.cc/8H9A-9EJC].

[40] *See* Rogers, *supra* note 26, at 486.

higher number of compassionate release (or non-capital habeas) cases might reduce the time they have for other clients.[41]

The takeaway of this section, I hope, is not that compassionate release movants should not be given appointed counsel under the circumstances suggested by Professor Rogers. On the contrary, Rogers makes a strong case for lawyers in those circumstances and could even make a case for requiring lawyers as a matter of due process. The takeaway should instead be that if we are going to grant lawyers in these circumstances, we need to be ready to explain why that money – on a state level, at least is not better spent elsewhere (such as on Head Start), and why compassionate release movants are prioritized over other federal litigants with an arguably equal need for attorneys.

III. COULD LAWYERS MAKE THINGS WORSE?

The next potential objection to offering appointed lawyers to compassionate release movants is that lawyers could make matters worse for movants in the long run. This argument could take a few forms. First, requiring counsel in more cases will make the compassionate release process more expensive and time-consuming for the government, further encouraging prosecutors to require compassionate release waivers as a condition of lenience in plea agreements, diversion programs, and the like. Second, injecting defense counsel into the process might lead prosecutors and judges, consciously or otherwise, to be more punitive or exacting in their dealings with incarcerated people. Third, advancing any argument for appointed counsel that sounds in due process might risk inspiring the Supreme Court to revisit the basic constitutional entitlement to appointed counsel. Finally, an expanded right to counsel might risk masking substantive injustices that should lead to expanded substantive rights (through legislative reform or agency regulation changes), not simply expanded procedural rights.

On the first point, some commentators have long argued that the increased cost and complexity of trials, because of expanded procedural rights and litigation, has inspired prosecutors to try to avoid these burdens through plea bargaining and attendant waivers of rights, and inspired legislatures to pass more punitive laws to give prosecutors leverage in encouraging waivers.[42] In the

---

[41] *See generally, e.g.*, Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (noting that the Sixth Amendment's enforcement relies on funding realities and that limited funding should be rationed in a way that privileges the factually innocent and serious cases).

[42] *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 802 (2006) (arguing that increased legislative punitiveness since the 1960s is in part a result of the Warren Court's establishment of new procedural rights that render trials expensive, creating an incentive to give prosecutors more leverage in plea bargaining); *See generally* ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003) (arguing that plea bargaining is the "ugly stepchild" of "adversarial legalism," an American focus on rights and adversarial litigation over rights rather than substantive outcomes).

compassionate release context, we know that prosecutors have already insisted on FSA compassionate release waivers as a condition of guilty pleas, including under the Biden administration.[43] While Biden's Department of Justice temporarily ended the practice in 2022 in response to judicial and community outrage,[44] the second Trump administration presumably could begin it again. In turn, the government's incentive to require such waivers (and thus avoid compassionate release litigation) would surely be much stronger with an expanded right to counsel, especially if that right were effective – i.e., led to more contested motions being granted.

The second concern is that judges will be less lenient in ruling on compassionate release claims if movants have counsel. Various justices have predicted in cases like *In re Gault* (expanding right to counsel for juveniles)[45] and *Gagnon* (recognizing a limited right to counsel in parole and probation revocation hearings)[46] that injecting counsel into the mix would lead judges to stop giving movants the benefit of the doubt, and act in a more hostile, adversarial way towards them. The counterargument is that, in most of these contexts in the modern era, unrepresented defendants and movants are already treated in a sufficiently hostile and adversarial fashion that any marginal negative effect of counsel's presence on a judge's inherent sympathies or tone is outweighed by the greater likelihood of success on the merits.[47] This theory has been empirically tested by at least one scholar, Erica Hashimoto, who studied a sample of federal misdemeanors from 2000 to 2005 and concluded that *pro se* defendants had better outcomes than represented ones.[48] Other

---

[43] *See, e.g.*, United States v. Osotro, 445 F. Supp. 3d 103, 105 (N.D. Cal. 2020) (Breyer, J.) (refusing to enforce compassionate release waiver condition, calling it "unconscionable").

[44] *See, e.g.*, Letter from Kevin Ring, FAMM President, and Martin Sabelli, NACDL President, to Lisa Monaco, Deputy Attorney General (Feb. 15, 2022) available at https://famm.org/wp-content/uploads/2022/03/Letter-DAG-Plea-Agmt_2.15_FAMM.NACDL_FINAL17.pdf (noting public pressure on DOJ to stop the practice); Carrie Johnson, *Justice Department ends limiting compassionate release in plea deals after NPR story*, NPR (Mar. 11, 2022) https://www.npr.org/2022/03/11/1086140965/justice-department-ends-limiting-compassionate-release-in-plea-deals-after-npr-s [https://perma.cc/F6RA-F9RC] (same).

[45] *See* In re Gault, 387 U.S. 1, 79–80 (1967) (Stewart, J., dissenting) (expressing concern that providing counsel will transform juvenile delinquency proceedings into more punitive criminal proceedings akin to pre-reform days, citing nineteenth century practices).

[46] *See* Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (declining to recognize a constitutional right to counsel in all probation and parole revocation hearings, and noting that once counsel is injected into such hearings, judges "may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation").

[47] *See, e.g.*, *id.* ("In some cases," the risks of increased punitiveness after providing counsel "must be endured and the costs borne because . . . the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate."); *In re Gault*, 387 U.S. at 21 (responding to dissent's concern by insisting that juvenile court is already quite punitive and that "the claimed benefits of the juvenile process should be candidly appraised").

[48] *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489–90 (2007).

scholars have suggested serious data and methodological limitations of the study and noted that the study does not account for the confounding variable that, given the *Scott* "actual incarceration" line, *pro se* cases might be expected to be weaker or have better sentencing outcomes.[49]

The third concern would presumably apply only to arguments for a due process right to appointed counsel (which Rogers does not make, but which flow naturally from the arguments and test she sets forth). The concern is that any expansion of the constitutional right to appointed counsel might inspire the Supreme Court to revisit the right to begin with. After all, at least two current justices have suggested that *Gideon* was wrongly decided (or at least has no basis in originalism).[50] There are clearly ways to save *Gideon* even with an expanded right to counsel,[51] but progressives should be ready to have that fight.

A final concern is that offering more compassionate release movants the assistance of counsel will have a legitimating effect on the current statutory regime, quelling substantive reforms. Analogously, others have argued that the right to appointed counsel in criminal cases may mask the punitiveness of the system and discourage substantive law reform.[52] In the compassionate release

---

[49] *See, e.g.*, Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1180 n.31 (2017) (citations omitted); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 44 (2013) (arguing that Hashimoto's study does not account for several variables related to charging, pleas, and collateral consequences). Hashimoto herself has argued that counsel should nonetheless be provided in misdemeanors. *See* Erica Hashimoto, *Misdemeanor Cases Need Lawyers Too*, REGUL. REV. (Dec. 5, 2018), https://www.theregreview.org/2018/12/05/hashimoto-misdemeanor-cases-need-lawyers/ [https://perma.cc/4RYK-J97S]; *see also* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 755–56 (2017) (arguing for prioritization of misdemeanors in public defender offices).

[50] *See, e.g.*, Garza v. Idaho, 139 S. Ct. 738, 757–58 (Thomas, J., dissenting, joined by Gorsuch, J.) (arguing that neither *Gideon* nor its immediate precedents "attempted to square the expansive rights they recognized with the original meaning" of the right to counsel); Scott v. Illinois 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment . . . contemplated any guarantee other than the right of an accused . . . to employ a lawyer to assist in his defense").

[51] Andrea Roth, *The Embarrassing Sixth Amendment*, 112 CAL. L. REV. 55, 88–93 (2024) (exploring the concern that an expanded right to counsel in non-incarceration cases might jeopardize *Gideon*).

[52] *See generally, e.g.*, Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (citing critical legal theory as support for the argument that public defenders and other procedural rights legitimate the system by making it look fair, even as the outcomes are overly punitive); Premal Dharia, G*ideon Turns Sixty*, INQUEST (Mar. 8, 2023) https://inquest.org/gideon-turns-sixty/ [https://perma.cc/H35L-VA2K] (celebrating *Gideon* but warning that it "may even facilitate a collective turning away, a widespread diminution of our imaginations about what is possible. *As long as we provide lawyers, it will all be fair.* "); Angélica Cházaro, *Court-Assisted Expulsions*, INQUEST (Aug. 9, 2022) https://inquest.org/court-assisted-expulsions/ [https://perma.cc/2KKR-SAYA] (arguing that federal funding of counsel in immigration proceedings should not be a movement goal due to its legitimating effects); Matthew Caldwell, *The End of Public Defenders*, INQUEST (Feb. 25, 2022) https://inquest.org/the-end-of-public-defenders/ [https:/

context, it may be that a more meaningful reform would be to allow movants access to records, better train judges on the avenues for relief under the amended statute, or to make the thresholds less onerous to meet. Then again, given the presumably low likelihood of congressional action to expand compassionate release any time soon,[53] this concern seems minimal, at least on the federal level.

IV. CONCLUSION

Professor Rogers' article makes two significant contributions to the right-to-counsel literature and to policy and legal arguments for counsel in compassionate release cases. First, she offers the only nationwide comprehensive account of federal districts' handling of appointment of counsel in compassionate release cases. Second, she explains why lawyers are critically needed in many of these cases and offers a test for federal judges that reflects the best of district court practice and the factors she shows to be most relevant in determining the importance of counsel.

I hope, and expect, that Rogers' novel study of this critical access-to-justice issue will inspire others to explore the lingering empirical questions that could shed more light on the critiques discussed above. For example, does the appointment of counsel in this and other contexts make a difference? In the compassionate release context, could we conduct a natural experiment by exploiting the fact, shown by Rogers, that there are three categories of districts with different rules on the appointment of counsel? How would we account for the fact that districts more likely to recognize a right to counsel might also be more likely to grant compassionate release motions to begin with?

In a time of hyperpolarization, access to compassionate release still offers a rare possibility for bipartisan agreement on what justice requires. Rogers' work offers hope that whatever reforms come out of this bipartisan policymaking are truly meaningful to the people and families who need them.

/perma.cc/LC4T-Z6TD] (explaining how public defenders have, in some ways, acted as "collaborators" in mass incarceration).

[53] *See, e.g.*, Charlie Hunt, *Why Was It Hard for the GOP – Which Controls Congress – To Pass Its Spending Bill?*, THE CONVERSATION (Mar. 14, 2025) https://theconversation.com/why-was-it-hard-for-the-gop-which-controls-congress-to-pass-its-spending-bill-252257 [https://perma.cc/PG8Q-GVNX] (offering theories as to why congressional gridlock continues in second Trump term).