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Institutional Indifference

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INTRODUCTION

It is no secret that American prisons and jails are often cruel and degrading places to those who are forced to live or choose to work within their walls.[1] With the current political and social interest in criminal justice reform, intrepid journalists are shedding some light on what goes on behind prison walls.[2] But the indignities suffered each day by the nearly 2.2 million people held in American prisons and jails[3] occur largely in the dark, out of the public's critical eye.[4] These indignities include lack of access to medical care,[5] subpar mental health

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[1] *See, e.g.*, Shane Bauer, *My Four Months as a Private Prison Guard: A Mother Jones Investigation*, MOTHER JONES (July/Aug. 2016), https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/ [https://perma.cc/VCU3-NDSC] (describing cells that look like tombs, guards using force on a prisoner who just had open-heart surgery as all "part of the bid'ness," and the undercover reporter's own reflection that, as a prison guard, "[s]triving to treat everyone as human takes too much energy"); Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAGAZINE (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html [https://perma.cc/RK2X-UY3A] (recounting tales of self-mutilation, psychosis, and suicide at the federal supermax prison, where all prisoners are held in solitary confinement); Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic*,*'* N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html [https://perma.cc/WP2Y-YJSZ] (recounting the experience of federal detainees "stuck in freezing cells" with little to no power or heat for at least a week); Jennifer Gonnerman, *Do Jails Kill People?*, NEW YORKER (Feb. 20, 2019), https://www.newyorker.com/books/under-review/do-jails-kill-people [https://perma.cc/XMM2-GRYK] (noting that the well-known New York City jail on Rikers Island "has long been notorious for its culture of brutality").

[2] *See, e.g.*, Bauer, *supra* note 1; Binelli, *supra* note 1; Correal, *supra* note 1; Gonnerman, *supra* note 1.

[3] Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/K344-RA5Y].

[4] *See generally* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462–66 (2014) (discussing the lack of transparency of penal institutions); Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460–64 (2018) (discussing the invisibility of prisons as compared to other aspects of the criminal justice system).

[5] Confidential Report of Robert L. Cohen, M.D., Parsons v. Ryan, No. 2:12-cv-00601-NVW (D. Ariz. Nov. 8, 2013), https://www.acluaz.org/sites/default/files/field_documents/parsons_v_ryan_cohenexpertreport2013.11.08.pdf [https://perma.cc/R7ET-55FC] (detailing systemic problems in the delivery of medical care to prisoners confined in the Arizona Department of Corrections). The Cohen expert report included a detailed recitation of the experience of one prisoner who suffered for months without treatment for his throat cancer because of chronic delays by medical staff:

> Beginning in March 2012, medical staffs were fully aware that [prisoner] was in severe pain, and did not treat him. When they finally realized that he had an uncontrolled infection, they delayed treatment. When he required surgery, the

services,[6] physical and sexual assaults by prison staff members,[7] and a clear disregard for the safety of vulnerable prisoners.[8] In theory, however, even without public condemnation of the inhumane conditions of our prisons, incarcerated persons should be protected from cruel conditions under the Eighth Amendment's prohibition on "cruel and unusual punishments."[9] Regrettably, the reality for prisoners who seek relief from cruel and inhumane conditions is much more complicated.

Prisoners seeking judicial intervention to stop subjugation to cruel conditions must meet an exacting Eighth Amendment test. The prisoner must prove that the condition is "sufficiently serious" and that prison officials exhibit "deliberate indifference" in exposing the prisoner to that condition.[10] For prisoners seeking injunctive relief, the proof necessary to meet the second prong of this analysis—the deliberate indifference prong—is hopelessly unclear. The uncertainty posed by the deliberate indifference prong is driven in large part by the federal courts' focus on the subjective intent of individual prison officials.[11] But when a prisoner sues for injunctive relief, he[12] most often sues a

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> surgery was delayed. When he was diagnosed with cancer, his biopsy was ignored. When he sought care for the spreading cancer in March 2013, he again experienced delay after delay. Four months after the rediscovery, he had received no treatment. This is a horrifying example of a failed system that places every seriously ill man and woman it serves at extreme risk.

Id. ¶ 26.

6 Binelli, *supra* note 1.

7 Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html [https://perma.cc/Q7YB-69CU].

8 Eli Rosenberg, *A Federal Inmate Threatened Another for Being Gay. Then Guards Moved Them Into the Same Cell*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/nation/2019/05/21/federal-inmate-threatened-another-being-gay-then-guards-moved-them-into-same-cell/?utm_term=.bd810e1f2c0f [https://perma.cc/WG2T-QJXV].

9 U.S. CONST. amend. VIII.

10 *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994); Wilson v. Seiter, 501 U.S. 294, 298 (1991).

11 *Farmer*, 511 U.S. at 837–38 (holding that showing of "deliberate indifference" requires proof that prison officials knew of and disregarded a substantial risk of harm).

12 I use the male pronoun here because the overwhelming majority of prisoners are male. *See, e.g.*, The Arthur Liman Center for Public Interest Law, *Statement to the United States Commission on Civil Rights re Women in Prison: Disparate Treatment, Disparate Impact, and the Duty of Care*, Jan. 25, 2019, at 2 (noting that women make up approximately 7% to 7.5% of the federal and state prison populations, but also commenting on the marked increase in the women's prison population in recent years). *But see id.* at 5 (noting that women make up 14.5% of the national jail population).

prison system, not an individual prison official.[13] Federal courts have provided little direction in how a prisoner can demonstrate the deliberate indifference of an institution, that is, the deliberate indifference of the prison system that confines him.[14]

This Article proposes three specific types of proof courts should accept as evidence of institutional indifference in Eighth Amendment cases for injunctive relief. The three particular sources of proof proposed are: (1) the prison system's policies and procedures related to the challenged condition; (2) the prison system's responses to a prisoner's internal complaints; and (3) the prison system's inferred knowledge from the lawsuit itself and community correctional standards. A prisoner does not necessarily need to provide all three types of proof in order to prove his claim. The quantum of proof necessary to prove deliberate indifference will depend on both the condition challenged and the specific factual circumstances of each case.[15]

Other scholars have provided compelling critiques of the application of the deliberate indifference prong in Eighth Amendment claims, and many propose a wholesale reworking of the deliberate indifference test.[16] This Article takes a narrower approach, focusing on why the

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[13] The reasons why the prison system, not an individual, is the proper defendant in cases involving injunctive relief is discussed in more detail below. *See infra* Part II.

[14] Throughout this Article, I will use the term institution to refer to prison systems. Prisoner claims against institutions can take the form of claims against the institution itself for federal prisoners, *see, e.g.*, Silverstein v. Fed. Bureau of Prisons, 559 Fed. App'x. 739 (10th Cir. 2014) (involving a federal prisoner asserting Eighth Amendment conditions claim against federal prison system), or claims against an individual prison official in his or her "official capacity" for state prisoners, *see, e.g.*, Decoteau v. Raemisch, No. 13-cv-3399-WJM-KMT, 2015 WL 3407232 (D. Colo. May 27, 2015) (involving state prisoners asserting Eighth Amendment conditions claim against state prison system by naming Executive Director of state prison system as defendant in his "official" capacity). State prisoners are unable to sue the state or its prison system directly due to Eleventh Amendment immunity, but, in effect, official capacity suits are a legal fiction that allow a state prisoner plaintiff to plead an action against a government entity that would otherwise be immune. *See* Kentucky v. Graham, 473 U.S. 159, 165–66 (1985).

[15] For example, a prisoner challenging the prison system's treatment of his Type 1 diabetes can demonstrate deliberate indifference by pointing to the prison system's policies on the treatment and care of persons with diabetes. If those policies outline the appropriate standard of care for Type 1 diabetes, and the prisoner can show that the prison's employees are not following those policies with his care, then that alone should be sufficient to provide deliberate indifference.

[16] *See, e.g.*, Brittany Glidden, *Necessary Suffering?: Weighing the Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815 (2012); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

current standard is unworkable in cases against institutions and proposing a mechanism for proving institutional intent under the current deliberate indifference test.

As detailed below, current Supreme Court doctrine is focused on the individual intent of prison officials. The rationale for such a focus is that the Cruel and Unusual Punishments Clause of the amendment only proscribes *punishments*.[17] In the view of the Court, prison conditions claims challenge conduct outside the purview of a traditional criminal sentence. Therefore, because the claims involve conditions not formally imposed by a criminal court as part of the prisoner's sentence, the Supreme Court requires proof of a specific intent to punish in order to afford Eighth Amendment protections.[18] But the conditions that a prisoner is subjected to during his incarceration are necessarily part of his punishment.[19] As Professor Sharon Dolovich has persuasively shown,

> It is thus implausible to suggest that, because the particular conditions of [a prisoner]'s confinement are determined by prison officials after the fact and not by the legislature or the judge at the time the sentence is announced, those conditions are somehow not part of the penalty the sentence represents.[20]

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[17] *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 302 (1991) ("Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind . . . .").

[18] *Id.* at 300 ("If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as punishment protected by the Eighth Amendment].") (emphasis in the original).

[19] Dolovich, *supra* note 16, at 897–901.

[20] *Id.* at 900–01 (I have chosen to alter the quote to say prisoner, rather than inmate or offender, to promote clarity and consistency within this Article). Professor Dolovich's critique originates from the idea that the American criminal justice system imposes punishment through a complex system of intertwined bureaucratic forces, not through the actions of individual officials:

> Prison officials who create the conditions under which a prisoner will live are by their actions administering a state punishment, whatever their mental state regarding the conditions they create. In the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, *is* the punishment the state has imposed. For this reason, *all* conditions to which [a prisoner] is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny. Understood in this light, the requirement that the punishment be "deliberate[ly]" imposed in order "to chastise or deter" does not disappear . . . . That these penalties can take years to administer and their precise shape determined only over time by the acts and omissions of prison officials who may know nothing of the original crime does not make the [prisoner]'s conditions of confinement any less the terms of her

While I fully agree with Professor Dolovich's robust critique of current Eighth Amendment doctrine, the focus of this Article is not how the doctrine should be changed to appropriately reflect the realities of the American criminal justice system. Instead, the focus is on how to apply the current doctrine—doctrine that (albeit wrongly) includes a subjective intent inquiry[21]—to claims brought by prisoners for injunctive relief against institutions.

This Article proceeds in three parts. Part I provides the historical context of both the Eighth Amendment and its application to prison conditions. It then traces how and why the focus of the Eighth Amendment inquiry became deliberate indifference and explains how that focus ignores the realities of prison life. Part II examines why and how suits for injunctive relief for unconstitutional prison conditions are necessarily suits against institutions, not suits against individual prison officials. Part III then examines the critiques of the current Eighth Amendment doctrine and proposes a new evidentiary framework for prison conditions claims asserted against prison systems for injunctive relief. Specifically, Part III proposes that courts examine three particular types of proof when evaluating institutional indifference in prison conditions cases and demonstrates why those types of proof demonstrate institutional indifference.

I
PRISON CONDITIONS AND THE EIGHTH AMENDMENT

The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[22] Since its inclusion in the Bill of Rights, the meaning and purpose of the Cruel and Unusual Punishments Clause has been largely debated by jurists and scholars. Although the clause is clearly meant to prohibit certain types of

> punishment. They simply reflect the particular nature of incarceration as a penal form, which in these ways is fundamentally different from more discrete penalties like fines or capital punishment.

Id. at 899–900 (I have chosen to alter the quotes to say prisoner, rather than inmate or offender, to promote clarity and consistency within this Article).

[21] *See* Dolovich, *supra* note 16, at 897 (noting that the Supreme Court's focus on the subjective intent of prison officials "is premised on a narrow, individualistic conception of punishment that is wholly unsuited to the Eighth Amendment context").

[22] U.S. CONST. amend. VIII.

punishment, jurists and scholars alike still debate whether it allows for inquiry into the method of punishment.[23]

In other words, if a certain type of punishment is determined to be constitutional—such as execution or imprisonment in the modern era—jurists and scholars disagree as to whether the Eighth Amendment provides further constitutional protection as to how that punishment is carried out.[24] As this Part will demonstrate, current constitutional doctrine allows for an inquiry into the constitutionality of how the proscribed punishment is executed. But the debate surrounding the amendment's meaning and purpose directly led to the current deliberate indifference standard that governs Eighth Amendment challenges to prison conditions.

This Part begins by tracing the historical development of Eighth Amendment jurisprudence, including how the Eighth Amendment has evolved to allow for inquiry into the conditions experienced by the incarcerated. Section I.A examines the textual history of the Eighth Amendment at the time of its enactment and then outlines the first century and a half of Eighth Amendment jurisprudence. From there, Section I.B examines the Supreme Court's slow recognition of the Eighth Amendment's application to prison conditions and the historical conditions that gave rise to that recognition. Finally, the Part concludes by describing the birth of the deliberate indifference standard.

A. The Origins of the Eighth Amendment

The Eighth Amendment's text is drawn nearly verbatim from Article Ten of the English Bill of Rights of 1689.[25] Given the clear link between the verbiage used in the two documents, legal historians have

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23 *See, e.g.*, Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852–53 (1969) (explaining how the original meaning of the Cruel and Unusual Punishments Clause in Article Ten of the English Bill of Rights differed from the founders' understanding of the clause); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 575 (2010) (arguing that the original meaning of the Cruel and Unusual Punishments Clause focused on the methods of punishment); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 365–88 (2018) (tracing the doctrinal development of Eighth Amendment prison conditions jurisprudence and summarizing the majority, dissenting, and concurring opinions that contributed to the doctrine's development).

24 *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring).

25 Granucci, *supra* note 23, at 852–53 ("[Article Ten of the English Bill of Rights of 1689] was transcribed verbatim into the Virginia Declaration of Rights of 1776 and, with the substitution of 'shall' for 'ought,' now appears in the eighth amendment to the United States Constitution.").

sought to understand what both the English parliamentarians and the American Framers meant by the Cruel and Unusual Punishments Clause.[26] While some scholars argue that English parliamentarians drafted Article Ten "to prevent the recurrence of cruel methods of punishment used during the Bloody Assize of 1685,"[27] the current scholarly consensus is that Article Ten was simply meant to prevent English courts from meting out punishments unauthorized by statute.[28] This consensus, however, does little to explain the Framers' intent in including the Cruel and Unusual Punishments Clause in the American Bill of Rights, because most scholars conclude the Framers *thought* Article Ten was intended to prevent cruel methods of punishment.[29] Therefore, most scholars universally accept the idea that the Framers, unlike the British parliamentarians, intended for the clause to prohibit certain methods of punishment.[30]

At least one scholar ascribes the Framers' focus on methods of punishment to a fear of "torture and barbarous punishments" that could be imposed by Congress.[31] This focus makes sense in the context of the colonial approach to crime and punishment.[32] For the American colonists, local jails only served to confine those waiting for trial, those waiting for punishment, and those who could not pay their debts.[33] The posttrial punishments imposed ranged from "fines, whippings, mechanisms of shame (the stock and public cage), banishment, and of course, the gallows."[34] Because the colonial criminal justice system

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26 *Id.* at 853.

27 Ryan, *supra* note 23, at 575. In 1685, James, Duke of Monmouth, led a Protestant uprising against King James II, which ended at the Battle of Sedgemoor in June of that year. *Id.* at 575–76. After King James II defeated the rebellion, he sought to make an example of the rebels to quell future uprisings by imposing barbarous punishments on those found guilty of treason. *Id.* at 576. Such punishments included drawing the rebels "on a cart to the gallows, where [they were] hanged by the neck, cut down while still alive, disembowelled and [their] bowels burnt before [them], and then beheaded and quartered." *Id.* (quoting Granucci, *supra* note 23, at 854).

28 Ryan, *supra* note 23, at 576–77.

29 *Id.* at 579–80 (discussing why scholars believe the Framers had a fundamental misunderstanding of the purpose of Article Ten).

30 *Id.*; *see also* Granucci, *supra* note 23, at 860–65 (discussing the Americans' misinterpretation of the cruel and unusual punishments clause as used in the English Bill of Rights of 1689).

31 Ryan, *supra* note 23, at 579.

32 *See* David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 100, 101 (Norval Morris & David J. Rothman eds., 1995).

33 *Id.*

34 *Id.*

focused on deterrence and repentance rather than rehabilitation, the punishments prescribed by colonial law tended to oscillate between leniency for first offenses and harshness for repeat offenses of the same crime by the same person.[35]

Two characteristics inherent to colonial society explain the focus on deterrence: its small population and its religious nature.[36] American colonists "punished . . . the way autocratic fathers or mothers punish children; they made heavy use of shame and shaming. The aim was not just to punish, but to teach a lesson, so that the sinful sheep would want to get back to the flock."[37] In "[a] society short on labor," imprisonment "was not a standard way of making criminals pay."[38] To be certain, the colonial citizenry remained committed to the importance of community involvement in punishment. In other words, colonial punishment was rooted in a belief in the deterrent power of shaming.[39] Local magistrates tended to impose punishments in the public square, where the community could express its collective contempt on the actions of the accused.[40] Thus, in light of the historical context of punishment in the American colonies, it is no surprise that the Framers focused on prohibiting certain torturous methods of punishment when enacting the Eighth Amendment.[41]

Early Eighth Amendment jurisprudence supports this conclusion. The Supreme Court's initial Eighth Amendment cases involved an inquiry into the constitutionality of death sentences authorized by statute. These early opinions specifically focused on the constitutionality of the method of punishment meted out by the courts.[42] When the type of punishment imposed was imprisonment

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35 *Id.* at 101–02; *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 37 (1993) (noting that the point of colonial punishment was to teach a lesson).

36 FRIEDMAN, *supra* note 35.

37 *Id.*

38 *Id.* at 48.

39 *Id.* at 37, 48 ("Punishment tended to be exceedingly public. The magistrates loved confessions of guilt, open expressions of remorse. They loved to enlist the community, the bystanders; their scorn, and the sinners' humiliation, were part of the process . . . . [R]ubbing the noses of offenders in community context was an essential part of the process of ripping and healing, which criminal justice was supposed to embody.").

40 *Id.* at 37.

41 Granucci, *supra* note 23, at 842.

42 *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 136–37 (1879) (holding a statute that prescribes the mode of executing a criminal sentence must be followed *unless* the mode of punishment is cruel and unusual in violation of the Eighth Amendment; where a statute is

rather than death, however, the Court became less inclined to focus on the method (i.e., the conditions) of incarceration. This changed, however, in the mid to late twentieth century, as the American penitentiary system began to grow to proportions previously unimagined.

B. The Eighth Amendment's Application to Prison Conditions

For the first century and a half after the adoption of the Eighth Amendment, federal courts did not entertain challenges to prison *conditions* on an Eighth Amendment theory.[43] This changed in the latter half of the twentieth century, as prisoners confined in the massive prison state slowly started to assert their rights in the federal courts. Before examining the jurisprudence that developed as this new class of plaintiffs asserted Eighth Amendment claims, it is helpful to understand the context of the American carceral system in the mid to late twentieth century.

1. The Birth of the American Penitentiary System

Given the practical realities of the American criminal justice system in the colonial and post-Revolution eras, it is no surprise that neither the Framers nor the earliest members of the federal judiciary thought that Eighth Amendment jurisprudence need consider the constitutionality of prison conditions. Quite simply, the young nation did not use incarceration as a standard form of punishment, and to the extent the new nation embarked upon criminal justice reform, it focused on whether a new type of punishment may be effective in American society.[44] Indeed, imprisonment did not become the primary mode of punishment until around the early nineteenth century.[45]

After the American Revolution, the new nation quickly looked for ways to separate itself from its British legacy.[46] Viewing the British criminal justice system as irrational and unmoored to the rule of law,

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silent on the mode of execution, a court may authorize any constitutional mode (in this instance, shooting)).

43 Glidden, *supra* note 16, at 1819.

44 *See, e.g.*, Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 427 (2016) ("Examining penal reform in the early republic indicates that the determination of what punishments were acceptable was a process involving experimentation with new approaches to punishment, rather than a fixed state of affairs.").

45 Rothman, *supra* note 32, at 107 (noting that most states began constructing state prisons around 1820–1840).

46 *Id.* at 102.

American reformers sought to create a criminal justice system anchored in a system of rational law.[47] As the country began rapidly expanding, the stigma and shame of colonial punishments lost their deterrent effect as small towns gave way to larger cities and the church lost its stranglehold on authority.[48] Americans began to question the cause of crime in the newfound nation, and those questions ultimately led to the adoption of the penitentiary system:

> New ideas about the *sources* of crime fed the urge to reform. People felt that bad company, vice-rotten cities, temptations, weaknesses in the family were producing waves of crime. They located the sources of deviant behavior in society itself, in the environment. This was, of course, quite different from the classic colonial view, which located the source of sin in individual weaknesses, or in the devil and his minions. But if society itself was corrupting, for some people, what was to be done? One solution was a kind of radical surgery: remove the deviant from his (weak and defective) family, his evil community, and put him in "an artificially created and therefore corruption-free environment."[49]

In other words, the American prison system grew out of the perceived disarray created by the rapidly growing and changing American society.[50]

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47 FRIEDMAN, *supra* note 35, at 63–64; *see also* Braatz, *supra* note 44, at 439 ("[I]n America following the Revolution, traditional sanctions not only came into question because of the changing nature of society, but because they were seen as a corrupt inheritance from England.").

48 Rothman, *supra* note 32, at 104–05; FRIEDMAN, *supra* note 35, at 77.

49 FRIEDMAN, *supra* note 35, at 77 (quoting DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 71 (1971)).

50 Rothman, *supra* note 32, at 104–05. As Professor Rothman postulates,

> Over the period 1820-50, Jacksonian Americans, in marked contrast to their colonial predecessors, believed that crime was posing a fundamental threat to the stability and order of republican society. The idea of the prison was rooted in this perception, reflecting the fear that once stable social relationships were now in the process of unraveling, that social order and cohesion were in danger of collapsing. It became the task of the prison to do nothing less than ensure the future safety of the republic.
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> To judge by the numerous articles, pamphlets, and legislative reports that discussed the issues, Americans in the antebellum era were frankly puzzled by the persistence of crime . . . . The answer that Jacksonian Americans arrived at suggests that their great pride in the openness of their society was qualified by a nagging fear that this very openness was producing disorder and disarray. As they viewed it, all of the institutions [e.g., church and family] that had once stabilized the social order were declining in influence . . . .
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> Were these fears justified? Was the social crisis real or imagined? It may be that European countries were experiencing a degree of social disturbance more severe than anything found in the United States. But it is nearly impossible to calculate the actual rates of crime in antebellum America—the recording of crime

By the 1820s, inspired by the idea that society must separate its deviants in order to transform them into law-abiding citizens, New York and Pennsylvania began developing competing models of imprisonment to serve this rehabilitative goal.[51] The two models became known as the Auburn plan and the Pennsylvania plan, respectively:

> Under the Auburn plan, prisoners slept alone, one to a cell. They came together to eat and to work in the prison shops, but the rules prohibited all talking and even the exchanges of glances. The Pennsylvania system, on the other hand, confined prisoners to individual cells for the entire period of their confinement. They worked, ate, and slept in solitary confinement and were allowed to see only selected visitors.[52]

While an intense debate on the efficacy of the two models of imprisonment persisted, state legislatures appropriated considerable funds to ensure the operation of at least one penitentiary throughout the 1820s, 1830s, and 1840s.[53]

After the Civil War, the construction and design of new penitentiaries was driven by the limitations on state budgets—"by how to confine the largest number of [prisoners] at the lowest possible cost"[54]—rather than by the most effective means to carry out the so-called rehabilitative purpose. As the focus on rehabilitation waned, the American penitentiary became known for its "pervasive overcrowding, corruption, and cruelty."[55] Prison administrators blamed the cruel conditions on the prison system's need to control the large immigrant population that filled the nation's prisons:

> Prisoners were often living three and four to a cell designed for one, and prison discipline was medieval-like in character, with bizarre and brutal punishments commonplace in state institutions. Wardens did

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> statistics was as primitive as the policing mechanisms themselves. Nevertheless, the likelihood is that the preoccupation with crime had less to do with the real incidence of crime and more to do with general social attitudes about a society in change. Whatever the reality, there was a subjective vision of disorder. Indeed, it is this perspective that is most helpful in enabling us to understand the resulting form of the public response to crime.

Id.

51 *Id.* at 105.

52 *Id.* at 106.

53 *Id.* at 107.

54 Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 169, 170 (Norval Morris & David J. Rothman, eds., 1995).

55 *Id.*

> not so much deny this awful reality as explain it away, attributing most of the blame not to those who administered the system but to those who experienced it. Because the prisons were filled with immigrants who were ostensibly hardened to a life in crime and impervious to American traditions, those in charge had no choice but to rule over [prisoners] with an iron hand. In fact, the closing decades of the nineteenth century were the dark ages for America's prisons.[56]

As described in the next Section, the practice of blaming prisoners subject to cruel conditions for the existence of those conditions continued for the next century. America's animus toward the human beings it incarcerates grew along with the nation's prison population. This animus was driven in no small part by the social strife that plagued the reunited nation in the years following the Civil War, as Jim Crow laws eventually gave way to the War on Drugs and mass incarceration.

2. Incarceration Nation

The federal government[57] did not open its first prison until 1890.[58] In the years following, both the federal and state prison systems rapidly expanded.[59] By 1930, the number of federal prisoners had so greatly increased that the number of federal prisons grew from three to seven, and Congress created the Federal Bureau of Prisons, which marked the formal creation of the federal prison bureaucracy.[60] Meanwhile, state systems became so large that many states created prisons that were colloquially known as the "Big Houses" because of the sheer number of men held within the walls.[61] The growth of the American state and federal prison systems and the development of the various "Big

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56 *Id.*

57 *See* Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 973–74 (2018) (noting that until the adoption of the Fourteenth Amendment and the development of the incorporation doctrine, the U.S. Constitution applied to the federal government only, not the states).

58 Norval Morris, *The Contemporary Prison: 1965-Present*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 227, 237 (Norval Morris & David J. Rothman eds., 1995) ("[T]here were criminal offenses against congressional statutes from the first days of the Union, there were no federal prisons until the Three Prisons Act of 1890, which authorized the building of federal prisons at Leavenworth, Kansas; Atlanta, Georgia; and McNeil Island, Washington. Until 1890, those convicted of federal offenses were farmed out by contract to state institutions.").

59 *Id.* (remarking on the growth of the federal system); Rotman, *supra* note 54, at 170 (describing growth in state systems).

60 Morris, *supra* note 58, at 237.

61 Rotman, *supra* note 54, at 185 ("Big Houses were large prisons that held, on average, 2,500 men, prisons such as San Quentin in California, Sing Sing in New York, Stateville in Illinois, and Jackson in Michigan.").

Houses" attracted the attention of politicians, sociologists, and, eventually, lawyers.[62] Conditions in prisons were generally "described as stenchy, noisy, and excessively cold in the winter and hot in the summer."[63] Prison officials often used vicious methods to maintain order and discipline.[64]

In the face of these conditions, the continuously expanding prisoner population, and the social changes that accompanied the post–World War II era in the United States, the prisoners' rights movement was born.[65] As the eradication of Jim Crow laws led to the creation of the War on Drugs, the American prison population exploded:[66] "From 1970 to 1980 the population of the prisons in the United States doubled; from 1981 to 1995 it more than doubled again, so that a crisis of crowding overwhelmed the prison systems, both federal and state."[67]

Although a detailed discussion of all the causes and effects of the exploding prison population is beyond the purview of this Article, it is worth pausing to note that the growth of American prisons is inextricably intertwined with race and politics.[68] After World War II, crime became a central feature of most political campaigns.[69] The rhetoric associated with the politics of crime makes clear that imprisonment is meant to be a means of retribution, regardless of whether the official, stated purpose is rehabilitation.[70] There can be no doubt that the rhetoric associated with the law and order politics of the

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62 *See generally id.* at 185–86.

63 *Id.* at 185.

64 *Id.* at 195 ("There is an endemic tendency to inflict cruel physical punishment in prison environments, a tendency that now constitutes a major source of prisoner litigation.").

65 *Id.* at 191–93.

66 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, *passim* (2010) (emphasizing the racial disparity in the American prison population and tying mass incarceration to America's past forms of institutionalized racism: slavery and Jim Crow).

67 Morris, *supra* note 58, at 236.

68 *Id.* at 258 ("Efforts at social reform in the early 1960s have been unjustly maligned, and the public has been misled by a series of political platforms that make unreal promises of effective crime reduction by means of increased severity of punishment, by capital punishment, by the lengthening of prison terms, and by false assurances that condign incarcerative punishment will be imposed on all criminals."); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 14 (2015) ("The construction of the carceral state was the result of a complex set of historical, institutional, and political developments."); ALEXANDER, *supra* note 66 (emphasizing the racial undertones to the political developments of the War on Crime and the War on Drugs).

69 FRIEDMAN, *supra* note 35, at 274.

70 *See generally id.* at 273–75 (highlighting the "brutality, corruption, and inefficiency" of the criminal justice system).

second half of the twentieth century influenced the conditions prisoners were subjected to during the period of their carceral punishments.[71] This certainty is important as we discuss how federal courts first began to examine prison conditions under the auspices of the Eighth Amendment and look at the doctrine that exists today.

3. The Birth of Deliberate Indifference

For over a century after the adoption of the Eighth Amendment, federal courts refused to entertain claims challenging prison conditions as cruel and unusual.[72] The federal courts' approach to prison conditions reflected an unwillingness to "disrupt institutional discipline" by exercising authority "over the internal management of prisons."[73] This approach later became known as the "hands-off" doctrine, and it left prison officials with unfettered discretion to impose "whatever punitive or despotic methods they chose to apply."[74]

All this changed, however, in the late sixties and early seventies as the Supreme Court began recognizing federal remedies for constitutional violations in actions brought under 42 U.S.C. § 1983.[75] In 1964, the Supreme Court held in a per curiam opinion that a prisoner's complaint that prison officials denied him access to certain religious publications stated a cause of action, effectively ending the hands-off era of prison litigation.[76] Thereafter, lower courts and the Supreme Court began to entertain cases challenging prison conditions on Eighth Amendment theories.[77]

By 1976, one of those cases reached the Supreme Court. In *Estelle v. Gamble*,[78] J.W. Gamble, a prisoner confined to the Walls Unit of the Texas Department of Corrections, filed a lawsuit against three Texas prison officials for inadequate medical care for a back injury he

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71 *See, e.g.*, GOTTSCHALK, *supra* note 68, at 184 ("What to do about 'the worst of the worst' lurks in the background of any discussion about life sentences."); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 45–46 (2012) (highlighting the stark difference between the myth of supermax prisons being full of the "worst of the worst" and the reality of those prisons being full of "the wretched of the earth, people who are mentally ill, illiterate, and cognitively impaired").

72 Rotman, *supra* note 54, at 191.

73 *Id.*

74 *Id.*

75 *See* Monroe v. Pape, 365 U.S. 167, 167–68 (1961) (recognizing a federal cause of action under 42 U.S.C. § 1983); Godfrey, *supra* note 57, at 931–32.

76 Cooper v. Pate, 378 U.S. 546, 546 (1964).

77 Glidden, *supra* note 16, at 1819 (collecting cases).

78 429 U.S. 97 (1976).

received while working his prison job.[79] On November 9, 1973, while working at the prison's textile mill, a six-hundred-pound bale of cotton fell on top of him, causing substantial injuries, including severe pain in his lower back.[80] A prison doctor determined that Mr. Gamble did not have a herniated disc, gave him some medication, and sent him back to his cell.[81] The next day, still in pain, Mr. Gamble again saw a prison doctor, who diagnosed Mr. Gamble with a lower back strain, prescribed a pain reliever and muscle relaxant, and provided him a pass to miss work for two days.[82] After repeated meetings and continued extensions of his work pass, the prison doctor required Mr. Gamble to return to work on December 3, despite that Mr. Gamble continued to experience as much pain as he had on the first day of his injury.[83] Mr. Gamble refused to return to work because of the pain, and, in response, prison officials placed him in solitary confinement for the entire months of December and January.[84]

On January 31, 1974, Mr. Gamble appeared before a prison disciplinary committee, charged with refusing to work.[85] Undeterred by the discipline, Mr. Gamble steadfastly refused to return to work. By February 4, 1974, Mr. Gamble was experiencing chest pains and black outs, and after waiting an entire day, prison officials eventually hospitalized him.[86] A day later, prison officials sent him back to solitary confinement, where he continued to experience unrelenting pain in his chest, left arm, and back.[87] Prison officials refused his request to see a doctor, and Mr. Gamble filed a lawsuit.[88]

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79 Gamble v. Estelle, 516 F.2d 937, 938 (5th Cir. 1975).

80 *Id.*

81 *See Estelle*, 429 U.S. at 99.

82 *See id.*

83 *See id.* at 99–100.

84 *See id.* at 100–01. In footnote 5 of *Estelle*, the Supreme Court implies that administrative segregation is somehow different than solitary confinement. *Id*. at 100 n.5. However, administrative segregation is simply one of many euphemisms prison officials use for solitary confinement. *See, e.g.*, Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 3 n.18 (2015) ("There are many different words, phrases, and euphemisms that are used to describe what is most commonly known as solitary confinement, including 'separation,' 'isolation,' 'intensive support unit,' punitive, protective[,] or administrative segregation . . . ."). Because these terms all are synonymous with solitary confinement, I use the term solitary confinement throughout this Article.

85 *Estelle*, 429 U.S. at 101.

86 *Id.*

87 *Id.*

88 *Id.*

It is against this backdrop that the Supreme Court first adopted the deliberate indifference standard for Eighth Amendment prison conditions claims.[89] After providing a brief summary of the interpretation and development of Eighth Amendment law, the Court ultimately concluded that two "elementary principles" demonstrate why the Eighth Amendment requires that prisons provide medical care "for those whom it is punishing by incarceration."[90] First, prisoners have no options for medical care other than those provided by their incarcerators. A failure to provide sufficient care may result in torture or death, "the evils of most immediate concern to the drafters of the Amendment."[91] Second, contemporary standards of decency require avoidance of "unnecessary suffering."[92] Under these principles, the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain[,]' . . . proscribed by the Eighth Amendment."[93] The *Estelle* Court did not clearly define what it meant by deliberate indifference, instead concluding that Mr. Gamble's claims against the prison doctor could not amount to deliberate indifference because, at most, those claims amounted to medical malpractice, which could not be deliberate indifference.[94] The Court remanded the claims against other prison officials to the lower courts for consideration whether those claims demonstrated deliberate indifference.[95] On remand, the Fifth Circuit "found that his care had not been sufficiently poor to justify compensation."[96]

Not long after *Estelle*, the Supreme Court considered another case challenging prison conditions in *Rhodes v. Chapman*.[97] In *Rhodes*, two prisoners at Southern Ohio Correctional Facility (SOCF), Kelly Chapman and Richard Jaworksi, challenged the prison's practice of double-celling.[98] Mr. Chapman and Mr. Jaworksi, as representatives of

89 *See id.* at 104.

90 *Id.* at 102–03.

91 *Id.* at 103.

92 *Id.*

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

94 *See id.* at 106–07.

95 *See id.* at 107–08.

96 Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis?reload=true [https://perma.cc/77QL-J3KE].

97 452 U.S. 337 (1981).

98 *Id.* at 339–40. Double-celling refers to the practice of confining two prisoners to an individual cell. *See generally id.*

a class of prisoners confined at SOCF, sought an injunction requiring the prison to discontinue the double-celling practice.[99] In determining that SOCF's practice of double-celling could not be deemed cruel and unusual, the Court focused on the objective effects of the double-celling. The Court found that the practice did not deprive prisoners of food, medicine, or sanitation nor did it increase violence among prisoners.[100] In making these determinations, the Court made clear it was focusing on "objective factors to the maximum possible extent."[101]

After *Estelle* and *Rhodes*, the lower courts struggled to uniformly apply the deliberate indifference test.[102] Much of this confusion was

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[99] *Id.* at 340.

[100] *Id.* at 348 (finding also that diminished rehabilitative opportunities did not amount to cruel and unusual punishment).

[101] *Id.* at 346 (quoting Rummel v. Estelle, 445 U.S. 263, 274–75 (1980) (internal quotations omitted)). In reaching its determination that the objective realities of conditions in SOCF precluded a finding of cruel and unusual punishment, the Court relied on *Estelle* and *Hutto v. Finney*, 437 U.S. 678, 685 (1978), where the Court also focused on objective indicia to determine that "conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivation of basic human needs." *Rhodes*, 452 U.S. at 347 (citing *Hutto*, 437 U.S. at 685). Notably, the *Hutto* Court expressly recognized that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards." 437 U.S. at 685.

[102] *See, e.g.*, Tillery v. Owens, 907 F.2d 418, 426–28 (3d Cir. 1990) (focusing on objective indicia (e.g., "increased violence, disease, and other negative conditions") to determine that conditions at the State Correctional Institution at Pittsburgh fell so far below constitutional norms that double-celling could be found unconstitutional); Foulds v. Corley, 833 F.2d 52, 54–55 (5th Cir. 1987) (declining to require a showing of intent and focusing instead on objective question of severity of pain to prisoner where prisoner alleged "that his solitary confinement cell was extremely cold and that he was forced to sleep on the floor where rats crawled over him"); French v. Owens, 777 F.2d 1250, 1252–54 (7th Cir. 1985), *cert. denied*, 468 U.S. 817 (1986) (affirming an injunction prohibiting double-celling on behalf of a class of prisoners at the Indiana Reformatory at Pendleton where "deplorable conditions," including inadequate ventilation, poor lighting, "dirty and odorous" cells with no hot water, "uncleanable" bathrooms, and "poor supervision, safety, medical care and food preparation" existed in the facility; also affirming injunction against the use of mechanical restraints where prison used mechanical restraints "against those who threatened suicide or were physically disruptive" by chaining them to a bed, often stripped of clothing, and denying them the right to use the toilet such that they "had to lie in their own filth"); Hoptowit v. Spellman, 753 F.2d 779, 783–84 (9th Cir. 1985) (affirming injunction based on findings of inadequate lighting, poor plumbing, vermin infestation, substandard fire prevention, lack of adequate ventilation, serious safety hazard in the occupational areas, lack of cleaning supplies, and unsafe conditions in the segregation and protective custody units). *Compare* Lopez v. Robinson, 914 F.2d 486, 491–92 (4th Cir. 1990) (granting qualified immunity to prison warden where prisoners did not provide evidence disputing penological justification of warden's subjective decisions to turn off running water in individual cell for twenty-four-hour period and to lock prisoners down in their cells during the same period), *and* Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (focusing on subjective beliefs of prison officials as to whether noise and fumes from remodeling in prison in area near where prisoner-plaintiff was confined could give prisoner-plaintiff migraine headaches), *and*

compounded by the Supreme Court's decision in *Whitley v. Albers*, wherein the Court announced that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock."[103] *Whitley* was the Supreme Court's "first application of the [Eighth] Amendment to prison officials' use of force,"[104] and it imposed a heightened intent requirement in use-of-force cases.[105] Because the *Whitley* Court made clear that the quantum and type of proof necessary to prove an Eighth Amendment violation in a prison conditions case turned on the "differences in the kind of conduct against which an Eighth Amendment objection is lodged,"[106] *Whitley* is significant in that "it recognized that Eighth Amendment state of mind requirements could differ depending on different situations."[107]

However, even post-*Whitley*, the lower federal courts continued to struggle to determine what the Supreme Court meant by deliberate indifference and when deliberate indifference (as opposed to *Whitley*'s obduracy and wantonness) applied. Professor Brittany Glidden

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Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988), *cert. denied*, 488 U.S. 823 (1988) (upholding award of damages against prison officials and focusing on prison officials knowledge of and response to "appallingly bad" prison conditions, "with severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors" when determining whether prison officials were deliberately indifferent to prison conditions), *with* Morgan v. District of Columbia, 824 F.2d 1049, 1057–58 (D.C. Cir. 1987) (affirming appropriateness of district court's deliberate indifference jury instruction focusing on what prison officials knew or should have known), *and* LaFaut v. Smith, 834 F.2d 389, 394 (4th Cir. 1987) (finding prison official who "was fully advised both of the inhumane conditions of prisoner-plaintiff's confinement" and who failed "to provide him with needed therapy" liable under the Eighth Amendment).

103 475 U.S. 312, 319 (1986).

104 Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1614 (1996).

105 *Whitley*, 475 U.S. at 320 (announcing that the test to determine whether a prison official's use of force violated the Eighth Amendment turns on "whether force was applied in a good faith effort to restore discipline or maliciously and sadistically for the very purpose of causing harm") (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973)).

106 *Whitley*, 475 U.S. at 320.

107 James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 423 (2001).

provides an excellent summary of how the lower courts struggled.[108] As Professor Glidden explains, the lower courts fluctuated between applying an objective standard (where the focus of the inquiry is the harm to the prisoner) and a subjective standard (where the central inquiry is the intent of the prison officials).[109] Ultimately, Professor Glidden concludes, this tension resulted in the current Eighth Amendment test, which requires both an objective (a sufficiently serious condition) and subjective (deliberate indifference) showing by a prisoner plaintiff.[110]

The Supreme Court confirmed in *Wilson v. Seiter* that this two-pronged test applies in *every* case involving an Eighth Amendment challenge to prison conditions.[111] In that case, Pearly L. Wilson, a man confined to the Hocking Correctional Facility (HCF) in Nelsonville, Ohio, alleged that an assortment of prison conditions—"overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill [prisoners]"—amounted to cruel and unusual punishment under the Eighth Amendment.[112] The United States District Court for the Southern District of Ohio dismissed Mr. Wilson's case at summary judgment, and the Sixth Circuit Court of Appeals affirmed that decision.[113] The lower courts reached this decision largely because the Sixth Circuit had previously determined that *Whitley*'s obduracy and wantonness standard applied to prison conditions claims,[114] and Mr. Wilson failed to create a dispute of fact as to whether Ohio prison officials demonstrated this subjective intent in imposing the prison conditions at issue.[115]

Although the Supreme Court rejected the Sixth Circuit's application of *Whitley*'s obduracy and wantonness requirement to cases challenging prison conditions, the Court made clear that *some*

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108 *See* Glidden, *supra* note 16, at 1820–21.

109 *See id*.

110 *Id.* at 1821. My focus here is on the subjective portion of that test in a particular instance (i.e., claims for injunctive relief against prison systems themselves), but Professor Glidden makes a compelling showing that the entire Eighth Amendment test should be reimagined to allow for more predictable and uniform outcomes. *Id.*

111 *See* 501 U.S. 294, 299–300 (1991).

112 *Id.* at 296.

113 Wilson v. Seiter, 893 F.2d 861, 863, 867 (6th Cir. 1990), *judgment vacated*, 501 U.S. 294 (1991).

114 *See* Birrell v. Brown, 867 F.2d 956, 958 (6th Cir. 1989).

115 *Wilson*, 893 F.2d at 863, 867.

subjective showing is required in such cases because "Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind."[116] Ultimately, the Court found "no significant distinction between claims challenging inadequate medical care and those alleging inadequate 'conditions of confinement.'"[117] Therefore, the Court concluded that *Estelle*'s deliberate indifference requirement should apply to all prison conditions cases.[118] The *Wilson* Court, however, left for another day the question of what a prisoner-plaintiff must prove to show deliberate indifference.

Almost twenty years after *Estelle*, the Supreme Court finally took up the question of what a prisoner-plaintiff is required to show in order to prove deliberate indifference in the context of an Eighth Amendment prison conditions claim. In *Farmer v. Brennan*, the Court held that establishing deliberate indifference requires proof that the prison official defendants subjectively knew of and disregarded a substantial risk of harm to the prisoner-plaintiff.[119] Dee Farmer, a male-to-female transgender prisoner, was sentenced to federal prison at the age of eighteen for credit card fraud.[120] Incarcerated by the Federal Bureau of Prisons (BOP), Ms. Farmer found herself confined to male prisons per BOP policy, despite that Ms. Farmer had been living as a woman for five years before her incarceration.[121] More often than not, BOP officials confined Ms. Farmer to solitary confinement. In some instances, BOP officials placed Ms. Farmer in segregation for disciplinary violations; in others, the officials placed her in isolation for her own safety.[122]

On March 9, 1989, over two years into her sentence, BOP officials transferred Ms. Farmer from the Federal Correctional Institution in Oxford, Wisconsin ("FCI-Oxford"), to the United States Penitentiary in Terre Haute, Indiana ("USP-Terre Haute").[123] FCI-Oxford is an all-male, medium-security prison, and USP-Terre Haute is an all-male,

116 *Wilson*, 501 U.S. at 302.

117 *Id.* at 303.

118 *Id.*

119 511 U.S. 825, 837–38 (1994).

120 *Id.* at 829.

121 Jason D. Sanabria, Note, Farmer v. Brennan: *Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1116 (1995).

122 *Id.* at 1117.

123 *Farmer*, 511 U.S. at 830.

high-security facility with significantly more prisoners.[124] Within weeks of being placed in the general population at USP-Terre Haute, another prisoner brutally raped and beat Ms. Farmer in her cell.[125] Ms. Farmer, acting pro se, sued the BOP and several individual prison officials, requesting an injunction ordering the BOP to place her in a lower-security correctional facility and compensatory and punitive damages for the violation of her rights.[126]

By the time Ms. Farmer's case reached the Supreme Court, she was represented by counsel, who argued that the deliberate indifference test articulated by the Court in *City of Canton v. Harris*[127] should apply to Ms. Farmer's case.[128] *Canton* involved the arrest of Geraldine Harris, a fifty-two-year-old mother of eight, by police officers in Canton, Ohio.[129] During the course of the arrest, Mrs. Harris experienced a medical emergency, but the Canton police never provided Mrs. Harris any medical attention.[130]

Mrs. Harris sued the City of Canton and several individual officials for violations of her rights under the Constitution and Ohio's state laws, including a claim against the city for failing to provide her medical care while in police custody in violation of the Due Process Clause of the Fourteenth Amendment.[131] The *Canton* Court held that a municipality

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124 *Compare FCI Oxford*, FED. BUREAU PRISONS, https://www.bop.gov/locations/institutions/oxf/ [https://perma.cc/R4PK-JZKG] (last visited Oct. 11, 2019) (listing statistics for FCI Oxford), *with USP Terre Haute*, FED. BUREAU PRISONS, https://www.bop.gov/locations/institutions/thp/ [https://perma.cc/468B-X4QM] (last visited Oct. 11, 2019) (listing statistics for USP-Terre Haute).

125 *Farmer*, 511 U.S. at 830.

126 Sanabria, *supra* note 121, at 1117–18.

127 489 U.S. 378, 378 (1989).

128 *Farmer*, 511 U.S. at 829 (citing *Canton*, 489 U.S. at 378).

129 *Canton*, 489 U.S. at 381. On April 26, 1978, Canton police officers pulled Mrs. Harris over for speeding as she drove her daughter Bernadette to school. *Harris v. Cmich*, 798 F.2d 1414, 1986 WL 17268, at *1 (6th Cir. 1986) (unpublished table opinion), *judgment vacated sub nom. Canton*, 489 U.S. 378. The facts of what happened during the traffic stop were heavily disputed at trial, with the officers claiming that Mrs. Harris refused to show them her driver's license and Mrs. Harris testifying that the police verbally and physically mistreated her. Brief for Respondent at 1, City of Canton v. Harris, 489 U.S. 378 (1989) (No. 86-1088) 1988 WL 1026008 at *1. What is not disputed is that Mrs. Harris was arrested, placed in a patrol wagon, later found incoherent on the patrol wagon floor, and unable to remain upright at the police station. *Canton*, 489 U.S. at 381.

130 *Canton*, 489 U.S. at 381. The Canton police released Mrs. Harris about an hour after she arrived at the police station and did not file any charges against her. *Id.* A nearby hospital admitted Mrs. Harris for a week to treat severe emotional ailments. *Id.*

131 Because Mrs. Harris was not convicted of a crime at the time of the events on April 26, 1978, her status as a pretrial detainee meant that her claim could not be asserted under the Eighth Amendment, which is preserved for only those who have been adjudicated guilty

is liable when a municipal policy causes a constitutional violation and the policy "reflects deliberate indifference to the constitutional rights of its inhabitants."[132] Thus, in cases seeking to establish municipal liability, the Supreme Court defined deliberate indifference to include not only policies that disregard a *subjectively known* risk of constitutional violation but also policies that disregard an *obvious* risk of constitutional violation.[133] Deficiencies in a policy may be "so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent . . . ."[134] This type of deliberate indifference—disregarding a self-evident risk—can be described as "objective deliberate indifference."[135] Thus, in the context of a claim against a municipality, "deliberate indifference" means that a municipal policy created an obvious risk of harm—and liability can be established through constructive notice regardless of whether any municipal official subjectively realized the risk.[136]

Dee Farmer's attorneys argued that *Canton*'s objective standard should apply to her claims once Ms. Farmer's claims reached the Supreme Court, just five years after *Canton*.[137] But the Court rejected this argument and instead created a subjective deliberate indifference standard for claims asserted under the Eighth Amendment.[138] After *Farmer*, prison officials can be held liable only for disregarding

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of a crime and can therefore be said to be experiencing the "punishment" necessary to invoke the protections of the Eighth Amendment. *See* DeAnna Pratt Swearingen, *Innocent Until Arrested?: Deliberate Indifference Toward Detainee's Due-Process Rights*, 62 ARK. L. REV. 101, 111 (2009) ("Pretrial detainees may not be punished prior to an adjudication of guilt in accordance with due process of law. Because of this, the Eighth Amendment's prohibition of cruel and unusual punishment is inapplicable.") (internal quotations and citations omitted).

132 *Canton*, 489 U.S. at 392. Mrs. Harris's claim against the city rested on a *Monell* theory of liability. In Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694 (1978), the Supreme Court held that a municipality cannot be held liable under 42 U.S.C. § 1983 for the actions of its subordinates in *respondeat superior* but can be held liable when a municipal "policy or custom . . . inflicts the injury . . . ."

133 *Canton*, 489 U.S. at 390.

134 *Id.*

135 *Id.* at 396 (O'Connor, J., concurring in part). Under this standard, "[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual *or constructive* notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." *Id*. (emphasis added).

136 *Farmer*, 511 U.S. at 840–41; *Canton*, 489 U.S. at 390.

137 *Farmer*, 511 U.S. at 840.

138 *Id.* at 841.

conditions or risks of which they are subjectively aware.[139] In other words—and in contrast to the objective deliberate indifference standard for municipal entities—an individual who is subjectively unaware of an obvious risk is not deliberately indifferent.[140] The *Farmer* Court recognized that its decision would result in "deliberate indifference" having one meaning in cases under the Eighth Amendment and a different meaning in municipal liability cases.[141] This linguistic anomaly did not trouble the Court because "deliberate indifference" is merely a judicial term of art.[142]

Why have a different deliberate indifference test in different contexts? Because, the *Farmer* Court explained, a court can inquire as to the subjective awareness of a person, but the subjective awareness of an inanimate organization is a contradiction in terms. "[C]onsiderable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official."[143] Despite recognizing the conceptual difficulty inherent in applying a subjective standard to a claim against an entity, the *Farmer* Court failed to adequately explain how the deliberate indifference standard it articulated could be applied to Eighth Amendment cases for injunctive relief. Such claims are necessarily claims asserted against entities,[144] and Part II details why this is so.

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139 *Id.*

140 *Id.* at 838.

141 *Id.* at 840 (describing "deliberate indifference" as "a judicial gloss, appearing neither in the Constitution nor in a statute").

142 *Id.*

143 *Id.* at 841.

144 The *Farmer* Court labelled Ms. Farmer's claims as *Bivens* claims. *Id.* at 830. Because 42 U.S.C. § 1983 provides for a constitutional cause of action for damages against state and local officials only, any person seeking a remedy for the violation of her constitutional rights by a federal official must bring a "*Bivens* claim" in court. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971). *Bivens* claims are claims asserted against individuals for money damages. *See* Godfrey, *supra* note 57, at 932. But the Court also indicated that Ms. Farmer, at least initially, sought "an injunction barring future confinement in any penitentiary." *Farmer*, 511 U.S. at 831. Federal prisoners asserting injunctive claims are asserting claims against an entity, either in reality or through the legal fiction created in *Ex parte* Young, 209 U.S. 123, 159–60 (1908),. *See infra* Part II. Yet, despite mentioning this injunctive request, the *Farmer* Court's analysis remains focused on deliberate indifference of individuals and differentiates the *Canton* deliberate indifference standard by concluding it "is not an appropriate test for determining the liability of prison *officials* under the Eighth Amendment." *Farmer*, 511 U.S. at 841 (emphasis added).

II
SUITS AGAINST PRISON SYSTEMS FOR INJUNCTIVE RELIEF

Complicated immunity and remedial doctrines govern when an individual can sue the government or its officers for relief from constitutional rights violations.[145] Prisoners seeking to file suit for unconstitutional prison conditions must consider these doctrines when determining who to sue and what type of relief to seek. Prisoners seeking prospective relief from unconstitutional prison conditions will generally sue two types of defendants.[146] Where possible, the prisoners will sue the entity that confines them.[147] For example, federal prisoners seeking relief from unconstitutional conditions in federal prisons will

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[145] *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 552–72 (2003) (discussing the history of immunity, jurisdiction, and remedies that govern suits against the government).

[146] For purposes of this discussion, I concentrate on prisoners confined in public facilities, not those confined in private prisons. Prisoners confined in private prisons will sue the private prison company that subjects them to unconstitutional conditions, and prisoners provided treatment by private medical care providers will sue those providers. *See, e.g.*, Davis v. Corr. Corp., No. CIV-13-1174-HE, 2014 WL 4716209, at *1 (W.D. Okla. Sept. 22, 2014) (noting that prisoner-plaintiff sought injunctive relief against private prison corporation for denial of medical care); *see also* Swan v. Physician Health Partners, Inc., 212 F. Supp. 3d 1000, 1009–10 (D. Colo. 2016) (allowing a prisoner-plaintiff's claim against a private medical contractor to proceed). Private corporations that operate private prisons or provide services to prisoners are treated like city and county governments when sued for constitutional violations: they can be held liable for their policies or for acts taken pursuant to their policies that meet the *Canton* deliberate indifference standard. *See, e.g.*, Natale v. Camden Cty. Corr. Facility, 318 F.3d 575, 583–85 (3d Cir. 2003) (holding that a policy to see all new admissions within seventy-two hours, with no provisions for prisoners with immediate medication needs, supported a deliberate indifference claim against corporate provider); Kruger v. Jenne, 164 F. Supp. 2d 1330, 1331 (S.D. Fla. 2000) (holding that an allegation that a private provider denied care as a result of a policy to refuse or delay treatment to save money stated a deliberate indifference claim against corporation); Hartman *ex rel*. Estate of Douglas v. Corr. Med. Servs., Inc., 960 F. Supp. 1577, 1582–83 (M.D. Fla. 1996) (permitting a person with only a master's degree and no professional licenses to have authority over mental health referrals and suicide precautions supported claim of a policy of deliberate indifference by private medical provider). Notably, while state prisoners confined to private prisons can sue for injunctive relief *or* damages, federal prisoners have no monetary relief available to them. *See* Minneci v. Pollard, 565 U.S. 118, 131 (2012) (no damages remedy available to prisoner seeking damages for constitutional violations by individuals employed by private prison contractor); Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (no damages remedy available to prisoner seeking damages for constitutional violations by private prison corporation).

[147] *See, e.g.*, Silverstein v. Fed. Bureau of Prisons, 704 F. Supp. 2d 1077, 1098–99 (D. Colo. 2010) (noting that prisoner-plaintiff sued Defendant BOP for injunctive relief related to his placement in solitary confinement for decades). I was a student-attorney representing Mr. Silverstein at the time the Amended Complaint at issue in this decision was filed.

sue the Federal Bureau of Prisons.[148] State prisoners confined to state institutions, however, are limited in their ability to sue the state or its agencies because of the immunity provided to the states by the Eleventh Amendment.[149] Therefore, state prisoners seeking injunctive relief must sue an individual prison officer in his official capacity pursuant to the doctrine created by *Ex parte Young*. Sections II.A and II.B describe both types of suits. This Part concludes with Section II.C, which addresses suits against jails. Generally speaking, pretrial detainees or prisoners confined to local jails can sue the local entity that runs the jail under a *Monell* theory of liability,[150] but, as is discussed below, much confusion surrounds what standard governs claims regarding prison conditions brought by those incarcerated in jails.

A. Suing the Federal Bureau of Prisons

Federal prisoners seeking relief from unconstitutional conditions have the distinct advantage of being able to sue the Federal Bureau of Prisons (BOP) itself.[151] Indeed, failure to name the BOP as a defendant can lead to dismissal of a prisoner-plaintiff's suit as moot once the BOP transfers the prisoner-plaintiff to a new institution.[152] Indeed, at least

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148 *Id.* at 1086; *see also* Chapman v. Fed. Bureau of Prisons, 235 F. Supp. 3d 1066, 1068 (S.D. Ind. 2017) (noting that a prisoner-plaintiff sued Defendant BOP for injunctive relief, requesting "constitutionally-adequate medical care *wherever* he is incarcerated by Defendant BOP."). I am counsel-of-record for Mr. Chapman in this matter.

149 U.S. CONST. amend. XI.

150 *See, e.g.*, Ford v. Cty. of Grand Traverse, 535 F.3d 483, 497 (6th Cir. 2008) (allowing a suit alleging deliberate indifference to serious medical needs against county that runs local jail); Hamm v. DeKalb Cty., 774 F.2d 1567, 1574 (11th Cir. 1985) (allowing a suit challenging constitutionality of conditions at the jail during plaintiff's confinement against a county jail).

151 *See, e.g.*, Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1238 (10th Cir. 2005) (recognizing a distinction between claims against individual BOP officials in their official capacities and claims against the BOP itself); *see also* Jackson, *supra* note 145, at 567–68 (noting that the Administrative Procedure Act allows for suits against the government for nonmonetary relief).

152 *See, e.g.*, Jordan v. Sosa, 654 F.3d 1012, 1033 (10th Cir. 2011). In *Jordan*, a prisoner-plaintiff sued certain BOP officials for injunctive relief for constitutional violations that occurred at the United States Penitentiary-Administrative Maximum (ADX) in Florence, Colorado. *Id.* at 1015. Notably, Mr. Jordan sought an injunction enjoining the BOP officials from applying a *national* regulation prohibiting the use of BOP funds "to distribute or make available to a prisoner any commercially published information or material that is sexually explicit or features nudity." *Id.* at 1016 (quoting 28 U.S.C. § 530C(b)(6)(D)). Criticizing Mr. Jordan for not naming the BOP itself (or its director) as a defendant, *id.* at 1018, the Tenth Circuit held that the BOP's subsequent transfer of him from ADX to a different prison facility mooted his claim, despite that he had named prison officials in their official capacity, *id.* at 1029.

one federal appeals court has encouraged prisoner-plaintiffs seeking declaratory or injunctive relief to "sue not only the individual prison officials, in their official capacity,[153] who work at the particular facility at which they were housed at the time that the alleged unconstitutional conduct purportedly occurred, but also the BOP's Director in his official capacity, and sometimes the BOP itself."[154] Failure to name the BOP can often result in the loss of a prisoner-plaintiff's ability to have his claims adjudicated on their merits because the BOP has a well-known practice of transferring prisoners in active litigation in order to avoid adjudication of prisoners' claims.[155] Judicial review of federal prison officials' actions is further limited by the fact that federal prisoners are able to receive monetary compensation for the violation of their constitutional rights only in some circumstances.[156] Thus, for

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153 Official capacity suits are suits wherein an individual government officer is named in his official capacity in order to effectively sue the state for some relief other than damages. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985). *See* discussion *infra* Section II.B for a more detailed explanation of this legal fiction.

154 *Jordan*, 654 F.3d at 1029. Despite this encouragement, post-*Jordan*, assistant United States attorneys defending the BOP and its officials in suits often argue in motions to dismiss that complaints naming *both* the BOP and individual prison officials in their official capacity are redundant and that only the BOP need be named. *See, e.g.*, Defendants' Motion to Dismiss Official-Capacity Claims at 9, Ajaj v. Fed. Bureau of Prisons, 15-cv-0992-RBJ-KLM, 2011 WL 902440 (D. Colo. Feb. 10, 2016) (citing Silverstein v. Fed. Bureau of Prisons, 704 F. Supp. 2d 1077, 1087 (D. Colo. 2010)) (arguing that individual defendants sued in their official capacities "are not proper Defendants for injunctive relief claims" and that naming both individuals and the BOP is "redundant, unnecessary, and potentially confusing").

155 Danielle C. Jefferis & Nicole B. Godfrey, Chapman v. Bureau of Prisons: *Stopping the Venue Merry-Go-Round*, 96 DENV. L. REV. ONLINE 9, 11–12 (2018) (describing BOP's ability to move prisoners from one federal district to another all over the country to avoid adjudication), https://www.denverlawreview.org/dlr-online-article/2018/8/2/chapman-v-bureau-of-prisons-stopping-the-venue-merry-go-roun.html?rq=godfrey [https://perma.cc/89KN-J3NC]; *see also* Godfrey, *supra* note 57, at 958 ("[I]n cases for injunctive relief that present important constitutional questions, the BOP's modus operandi is to move the prisoner-plaintiff from the jurisdiction in which the case was filed to another judicial district in an attempt to moot or otherwise throw unique procedural wrenches into the prisoner's claim.").

156 Godfrey, *supra* note 57, at 959 (criticizing federal courts for determining that the availability of injunctive relief counsels against providing federal prisoners a *Bivens* remedy for the violation of their rights).

> In other words, the BOP can and does manipulate litigation in order to avoid judicial decisions on the merits of any constitutional claim. Without access to *Bivens* claims, prisoner-plaintiffs may find themselves with no judicial relief for violations of their constitutional rights. For example, if a prisoner files suit for violation of his religious rights and the BOP immediately takes steps to moot the injunctive claim while the court determines that the prisoner's damages claims are not allowed under *Bivens*, the prisoner-plaintiff is left with no judicial relief whatsoever for the harms he suffered. Indeed, such a result incentivizes, rather than

federal prisoners seeking relief from unconstitutional conditions of confinement, particularly when those unconstitutional conditions may often continue at any facility wherein the prisoner is confined by the BOP, the prisoner's best choice of defendant is the BOP itself.

B. Suing State Prison Systems: The Legal Fiction Created by Ex Parte Young *and Its Progeny*

State prisoners, unlike their federal counterparts, are unable to sue the prison system itself because of the protections afforded to the states by the Eleventh Amendment.[157] The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[158]

On its face, the Eleventh Amendment seems to bar suits by private actors against a state.[159] However, Supreme Court jurisprudence interpreting the Eleventh Amendment has never been very consistent,[160] and "the text of the Eleventh Amendment ha[s] held very little sway"[161] in the development of the doctrine. Indeed, within two

> deters, the unconstitutional conduct of federal prison officials who are able to act unconstitutionally and are perpetually insulated from liability by manufacturing mootness, either by instituting policy changes or transferring prisoners.

Id. at 958–59.

157 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (citing *Ex parte* Young, 209 U.S. 123, 159–60 (1908)).

158 U.S. CONST. amend. XI.

159 Although the text of the amendment appears to limit suits only by "citizens of *another* state," Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting U.S. CONST. amend. XI) (emphasis added), the Supreme Court has clearly held that the amendment also applies to suits against a state brought by that state's own citizens. *Id.* at 21. *See* discussion *infra* notes 162–64 and accompanying text discussing the idea that the Eleventh Amendment bars suits by private actors against a state remains facially valid, albeit subject to the legal fiction created by *Ex parte Young*, 201 U.S. 123 (1908). A state's immunity is not limited to the state itself; agencies of a state enjoy the Eleventh Amendment's protections too. *See, e.g.*, Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1196 (10th Cir. 1988).

160 Indeed, even "[t]he history of the Eleventh Amendment is deeply contested, but the version the Court favors (and perhaps is correct) is that it was adopted in a 'shock of surprise' at the Court's own 1793 decision in *Chisholm v. Georgia*." Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURT STORIES 247, 257 (Vicki C. Jackson & Judith Resnik eds., 2010) (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)). The concept of the "shock of surprise" of *Chisholm* is further explored in Richard H. Fallon, Jr. et al., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 978–87 (5th ed. 2003).

161 Friedman, *supra* note 160, at 257.

decades of the ratification of the Eleventh Amendment, the Supreme Court held "that state officials could still be sued in the federal courts to enjoin unconstitutional state action."[162]

Therefore, state prisoners are not without recourse, in large part because of the doctrine created by the Supreme Court in *Ex parte Young*.[163] The *Ex parte Young* case grew out of a battle that played out in Minnesota state and federal courts between local farmers, railroad barons, the state legislature, and the state attorney general over legislation meant to regulate railroad rates.[164]

On May 31, 1907, the railroads filed nine shareholder derivative suits "together in the District of Minnesota challenging the

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[162] *Id.*

[163] *See generally* 209 U.S. at 159–60.

[164] Friedman, *supra* note 160, at 259–64. Although the Minnesota battle is what ultimately landed in front of the Supreme Court, similar battles were playing out in states across the country at the same time. *Id.* at 261. To fully understand the complicated procedural history and posture of *Ex parte Young*, one must understand the political, economic, and historical background of "this great *Lochner*-era jurisdictional battle." *Id.* at 248 (referring to Lochner v. New York, 198 U.S. 45 (1905), wherein the Supreme Court "struck down the effort by New York to limit the work week to sixty hours as a violation of freedom of contract") (quoting Bruce Ackerman, 2 WE THE PEOPLE: TRANSFORMATIONS 257 (1998)). A full recounting of this history is beyond the scope of this Article, but it may be helpful to understand the economic, political, and social forces at work during this period in American history.

The *Lochner*-era generally refers to the period of American legal history lasting from 1897 to 1937 when the Supreme Court struck down laws viewed to be interfering with economic liberty and private contract rights protected by the Due Process Clause of the Fourteenth Amendment. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 663–73 (6th ed. 2019). In the years preceding and immediately following *Lochner*, the country faced rapid economic, political, and social changes as it transitioned from the Reconstruction era to the Gilded Age. Friedman, *supra* note 160, at 248. Economically, the Panic of 1873 caused an economic depression. *Id.* at 249. Politically, the presidential election of 1876 was "hotly contested, among widespread claims of voter fraud," leading to a deal wherein the Democratic candidate Samuel Tilden would cede the presidency to Republican candidate Rutherford B. Hayes in exchange for the withdrawal of troops from the South. *Id.* at 250. Socially, the industrial revolution brought enhanced mobility and communication through the construction of railroads, allowing the American economy to shift from agrarian to manufacturing as large-scale corporations took the place of local merchants. *Id.* ("In 1870 the average firm had eight people; by 1900 over 1500 firms employed more than 500.").

This rapidly changing society saw the nation's workers and farmers organizing into unions and voluntary associations meant to give political voice to economic and societal ills experienced by their members. *Id.* at 250–51. These organizations took aim at the railroad barons, seeking to regulate the rates charged by the railroad companies for shipping. *Id.* at 260–63. The railroad industrialists fought back, seeking refuge in the federal courts, which they saw as less prone to the localism and bias inherent in the state courts. *Id.* at 252. One of these battles took place in Minnesota, challenging Minnesota's 1907 rate law legislation. *Id.* at 260–61. That battle grew into the federalism standoff of *Ex parte Young*. *Id.*

constitutionality of various Minnesota rate laws."[165] Deemed "one of the most gigantic lawsuits ever filed in the courts of this country,"[166] Judge William H. Lochren drew the case and immediately issued a temporary restraining order blocking the state's rates the same day.[167] Edward T. Young, the Minnesota state attorney general, "quickly moved to dismiss the actions on the grounds that they were collusive, and an impermissible suit against the State of Minnesota given the Eleventh Amendment."[168] Judge Lochren denied Attorney General Young's request for dismissal and set the matter for a preliminary injunction hearing.[169]

After the September 20, 1907, preliminary injunction hearing, Judge Lochren ruled against Attorney General Young, holding that the lawyer, as a state official, could be sued for injunctive relief.[170] As to the Eleventh Amendment issues, Judge Lochren found that an injunction had been issued against state officers to preclude a state from enforcing an unconstitutional law "in so many cases that it seems to me it does not now require argument to sustain that position."[171] Judge Lochren therefore enjoined Minnesota—through Attorney General Young—from putting its latest commodity rates into effect.[172] Undeterred, Attorney General Young ignored the "injunction and filed suit under the rate law against the Northern Pacific in the Ramsey County state district court."[173] Predictably, Judge Lochren held Attorney General Young in contempt, who, through his own attorney, filed a motion for leave to file a petition for a writ of habeas corpus in the Supreme Court on October 25, 1907.[174] The Supreme Court granted

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165 Friedman, *supra* note 160, at 261.

166 *Id.* (quoting MINNEAPOLIS TRIB., June 1, 1907, at 1).

167 Importantly, Judge Lochren was "appointed by the conservative Democrat Grover Cleveland, with the warm support of J.J. Hill, the president of the Great Northern Railroad." *Id.* at 261–62.

168 *Id.* at 262.

169 *Id.*

170 *Id.* at 262–63.

171 Perkins v. N. Pac. Ry. Co., 155 F. 445, 448 (D. Minn. 1907). Judge Lochren's point was well founded—"the issue of injunctions against state officials was plainly a hot one throughout the country"—and state officials gave speeches throughout the country "complaining about threats to state sovereignty from centralizing federal authority." Friedman, *supra* note 160, at 263 (discussing various speeches across the country addressing this issue).

172 *Perkins*, 155 F. at 455–56.

173 Friedman, *supra* note 160, at 264.

174 *Id.* at 264.

the motion and set a hearing for *Ex parte Young* on December 2, 1907.[175]

The Supreme Court upheld the injunction issued by Judge Lochren and the accompanying contempt citation against Attorney General Young.[176] To address Attorney General Young's Eleventh Amendment arguments, the Supreme Court "held that state officials could be sued to restrain enforcement of unconstitutional laws."[177] In reaching this holding, Justice Rufus W. Peckham, writing for the 8–1 majority, created what has since been termed the legal fiction that allows suits for injunctive relief from unconstitutional state conduct to proceed in federal court:

> The answer to all [the claims regarding the Eleventh Amendment] is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.[178]

A plain reading of this language may lead one to conclude that *Ex parte Young* merely carved out an exception to Eleventh Amendment immunity for those instances where a state law or regulation clearly violated the Constitution and, therefore, allowed suit against the actor responsible for carrying out that law within the state. But the import of *Ex parte Young* is much more expansive than that, as the Supreme Court itself has recognized. In *Edelman v. Jordan*,[179] the Court "relied on the *Young* fiction to permit suits against state officials for any sort of forward-looking relief, holding that the Eleventh Amendment primarily was a bar to suits seeking money damages from state treasuries."[180]

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175 *Id.*

176 *Id.*

177 *Id.* at 266.

178 *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

179 415 U.S. 651 (1974).

180 Friedman, *supra* note 160, at 273.

Thus, it is now a standard canon of federal jurisdiction that the *Ex parte Young* doctrine permits plaintiffs to bring suit against state officials in their official capacity for prospective injunctive relief for constitutional violations.[181] An understanding of the distinction between official and individual capacity suits is critical to understanding how the *Ex parte Young* doctrine is practically implemented. While an individual capacity suit is a suit against the person named, an official capacity suit is, in fact, a suit against the state entity itself.[182] Therefore, official capacity suits proceed under a legal fiction in that the suits in all respects other than name are to be treated as a suit against the entity, which the named official represents in his official role.[183] In other words, a suit against a state official in his official capacity "is *not* a suit against the official personally, for the real party in interest is the entity."[184] The fiction created by these suits, then, is that a claim asserted against a state official in his official capacity is somehow "different in substance than a suit against the state itself."[185]

Professor Kenneth C. Davis has aptly summarized the legal fiction created by the *Ex parte Young* doctrine as follows:

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181 *See, e.g.*, Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906, 911 (10th Cir. 2008); Hill v. Kemp, 478 F.3d 1236, 1255–56 (10th Cir. 2007); Guzman-Vargas v. Calderon, 672 F. Supp. 2d 273, 295–296 (D. P.R. 2009).

182 *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985).

183 *Id.* at 166. *See also Edelman*, 415 U.S. at 663 (discussing that although a state may not be a named party to an action, the suit may nonetheless not be barred by the Eleventh Amendment). As Professor Friedman aptly points out, this fiction was the exact quandary that Attorney General Young highlighted in his brief opposing the railroad baron's request for a preliminary injunction:

> Counsel for the plaintiffs contend . . . that these actions are not against the state, and yet at the same time they argue with equal vehemence that by means of these actions they have prevented the state from initiating any proceedings to enforce its laws. . . . If the state is a party, how can the suits be maintained in the face of the Eleventh Amendment? If the state is not a party no objection can reasonably be offered by these suitors to any steps it may take to enforce its laws . . . . It would be a waste of time and would be almost discourteous to this court for me to argue the proposition, which is now so well settled, that a suit against the officers of a state to either compel them to perform discretionary duties or to prevent them from performing such duties is a suit against the state.

Friedman, *supra* note 160, at 262 (quoting RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 163–64 (1993)).

184 *Graham*, 473 U.S. at 166 (emphasis in original).

185 *Hill*, 478 F.3d at 1256 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984)) (proposing that *Ex parte Young* is a legal fiction).

> You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.[186]

Although much criticism has been levied about the lack of principle embodied in the Supreme Court's decisions applying the *Ex parte Young* doctrine,[187] the fact remains that its legal fiction allows state prisoners to sue prison systems for injunctive relief for unconstitutional conditions.[188] Thus, prisoners asserting claims for injunctive relief are suing a prison official in name only—the suit is, in fact, against the prison system itself as the "real party in interest"[189] should any injunction issue. For our purposes, then, the constitutional question presented by Eighth Amendment claims for injunctive relief challenging unconstitutional prison conditions is, again, how a prisoner-plaintiff can prove deliberate indifference against the institution itself.

C. Suing Local Jails

Although jails may sometimes hold some prisoners after sentencing, most individuals confined to local jails are pretrial detainees.[190]

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186 Kenneth C. Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 435 (1962).

187 *See, e.g.*, Eridania Pérez-Jaquez, Note, *Constitutionalizing State Sovereign Immunity:* Ex Parte Young *and the Conservative Wing's Attempt to Restore Federalism and Empower States*, 51 RUTGERS L. REV. 229, 270–73 (1998) (arguing that the Supreme Court's decision in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) undermined the constitutional value of *Ex parte Young*); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987) (describing the Court's Eleventh Amendment jurisprudence as incoherent, leaving litigants "with . . . an *ad hoc* mishmash of *Young* and *Edelman*, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness"); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1044 (1983) (describing the *Ex parte Young* case and its progeny as "jerry-built" and "complicated" by "use of fictions").

188 *Cf.* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 994 (2008) (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997)) ("The Supreme Court today says that Ex parte Young represents an exception to principles of sovereign immunity 'for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities.'"); David L. Shapiro, Comment, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 82 (1984) (arguing against classifying the *Ex parte Young* doctrines as a legal fiction).

189 *Graham*, 473 U.S. at 166.

190 *See, e.g.*, SONYA TAFOYA, PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA 1 (July 2015), https://www.ppic.org/content/pubs/report/R_715STR.pdf [https://perma.cc/UW97-EQCL].

Because pretrial detainees cannot be punished under the Eighth Amendment, conditions claims brought by incarcerated persons with pretrial-detainee status are, in theory, governed by the Due Process Clause.[191] When a person transitions from pretrial detainee status to convicted-prisoner status is not completely clear.[192] Oftentimes federal courts interpret claims brought by persons of either status using the same constitutional standards.[193] For example, the Eighth Amendment should not apply to pretrial detainees at all because detainees cannot be punished,[194] but until recently, most courts held that detainees' due process claims involving medical care and safety were governed by the Eighth Amendment's deliberate indifference standard.[195] After the

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191 *See* Bell v. Wolfish, 441 U.S. 520, 536–37 (1979) (The government may detain a person pretrial and "may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution."); Magluta v. Samples, 375 F.3d 1269, 1273 (11th Cir. 2004) ("The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose.").

192 The time period between when a person is convicted but not yet sentenced appears to be the most contested. *Compare* Tilmon v. Prator, 368 F.3d 521, 523 (5th Cir. 2004) ("In our view, the adjudication of guilt, *i.e.*, the conviction, and not the pronouncement of sentence, is the dispositive fact with regard to punishment in accordance with due process."), *and* Berry v. City of Muskogee, 900 F.2d 1489, 1493 (10th Cir. 1990) ("The critical juncture is conviction . . . at which point the state acquires the power to punish and the Eighth Amendment is implicated."), *with* Lewis v. Downey, 581 F.3d 467, 475 (7th Cir. 2009) (stating that the right to punish does not begin until after sentencing), *and* Fuentes v. Wagner, 206 F.3d 335, 341 (3d Cir. 2000) (stating that the loss of liberty does not begin until sentencing), *and* Benjamin v. Malcolm, 646 F. Supp. 1550, 1556 (S.D.N.Y. 1986) (stating that those convicted but not yet sentenced should be treated as detainees because the sentence imposed may be suspended or something other than a prison term). Generally speaking, courts uniformly agree that the line between arrestee and pretrial detainee is much clearer: the probable cause hearing draws the distinction, and constitutional violations occurring prior to the probable cause theory are governed by the Fourth Amendment's objective reasonableness test. *See, e.g.*, Lopez v. City of Chicago, 464 F.3d 711, 718–20 (7th Cir. 2006).

193 *See, e.g.*, Caiozzo v. Koreman, 581 F.3d 63, 72 (2d Cir. 2009), *overruled by sub nom.* Darnell v. Pineiro, 849 F.3d 17, 34–35 (2d Cir. 2017); Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 259 (2009); Ford v. Cty. of Grand Traverse, 535 F.3d 483, 495 (6th Cir. 2008); Hartsfield v. Colburn, 491 F.3d 394, 396 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1745 (2008); Young v. City of Mt. Rainier, 238 F.3d 567, 576 (4th Cir. 2001); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Salazar v. City of Chi., 940 F.2d 233, 237–38 (7th Cir. 1991); Boring v. Kozakiewicz, 833 F.2d 468, 471–73 (3d Cir. 1987).

194 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); *Wolfish*, 441 U.S. at 535.

195 *See, e.g.*, *Caiozzo*, 581 F.3d at 72; *Martinez*, 563 F.3d at 1088; *Ford*, 535 F.3d at 495; *Hartsfield*, 491 F.3d at 396; *Young*, 238 F.3d at 576; *Cottrell*, 85 F.3d at 1490; *Salazar*, 940 F.2d at 237–38; *Boring*, 833 F.2d at 471–73.

Supreme Court's 2015 decision in *Kingsley v. Hendrickson*,[196] however, courts are slowly determining that "there is no basis" to require detainees to prove "the subjective intent requirement for deliberate indifference claims" because such a requirement stems from the Eighth Amendment's focus on punishment.[197] Should the trends continue, pretrial detainees bringing claims for injunctive relief regarding prison conditions will no longer require proof of a subjective intent, whether the defendants are individuals or institutions.

The question remains, though, how prisoners confined to county jails can bring Eighth Amendment conditions challenges for injunctive relief. Because jails are run by local municipal entities, individuals confined in jails can bring claims against the municipality itself under a *Monell* theory of liability.[198] But *Monell* will not help those prisoners seeking an injunction for unconstitutional conduct where the unconstitutional conduct cannot be tied to an official custom, policy, or practice of the municipality.[199] Nor will *Monell* provide relief in those instances where the prisoner can prove no underlying constitutional violation by an individual actor.[200] Therefore, prisoners confined in city and county jails who wish to bring claims for injunctive relief against the institutions that confine them must do so in the same manner as their state counterparts—through official capacity suits against individual actors under the doctrine created by *Ex parte Young*. These prisoners also will face the same analytical conundrum as their state counterparts—how might they prove institutional intent sufficient to satisfy the subjective prong of current Eighth Amendment doctrine? I answer this question in the next part.

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196 135 S. Ct. 2466 (2015).

197 *Darnell*, 849 F.3d at 34–35. A comprehensive discussion of *Kingsley* and its impact on prisoners' rights litigation can be found in Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 402–24 (2018). Notably, Professor Schlanger makes a persuasive argument that *Kingsley* provides support for abandoning the deliberate indifference standard as a whole because nothing in the amendment's text requires the subjective intent that is the focus of the current test. *Id.* at 425–33.

198 Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 585–86 (2014).

199 *See, e.g.*, Szabla v. City of Brooklyn Park, 486 F.3d 385, 391 (8th Cir. 2007) (finding facially valid policy insufficient to prove municipal liability).

200 Cron et al., *supra* note 198, at 586.

III
INSTITUTIONAL INDIFFERENCE TO PRISON CONDITIONS

Because Eighth Amendment conditions of confinement claims for injunctive relief are claims against the institutions themselves, current Eighth Amendment doctrine makes little sense in the context of these claims. I am certainly not the first scholar to levy criticism against current Eighth Amendment doctrine in the context of prison conditions claims, but my focus on the identity of the defendant (either real or fictional) in cases for injunctive relief is unique. In this part, I am focused on finding a workable application of current Eighth Amendment doctrine in the context of cases for injunctive relief against institutions. In searching for this solution, I do not mean to suggest that the current Eighth Amendment doctrine is consistent with the Amendment's text and history. Nor do I suggest that the doctrine is normatively sound in the context of the practical realities of punishment in the United States. Instead, I seek to offer a practical solution for the application of current doctrine in the narrow context of claims for injunctive relief against prison systems.

A. Application of Current Doctrine in Claims Against Institutions

The current Eighth Amendment test requires a prisoner prove both an objective and subjective element.[201] First, the prisoner must show he is subject to an objectively serious prison condition.[202] Second, in order for a defendant to be held liable under the Eighth Amendment, the prisoner must demonstrate that the defendant is deliberately indifferent to that serious prison condition.[203] To prove this subjective element, a prisoner must make two showings. First, he must show that the defendant knew that the prison condition at issue posed a substantial risk of serious harm to the prisoner (the knowledge component).[204] Then, after demonstrating knowledge, the prisoner must show that the defendant disregarded the "risk by failing to take reasonable measures to abate it" (the disregard component).[205]

In an injunctive case, the prisoner-plaintiff can prove the objective prong in much the same way that he would prove it in a case for damages against an individual prison official. Because the inquiry into

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

202 *Id.*

203 *Id.*

204 *Id.* at 847.

205 *Id.*

the seriousness of the harm is an objective one, the answer is not tied to the identity of the defendant.

By contrast, the analysis of the subjective prong does depend on the identity of the defendant. In other words, "the knowledge and intent in question is of whomever the plaintiff has sued."[206] The knowledge component is particularly focused on the identity of the defendant because, in order to prove this component, a prisoner must demonstrate that the defendant *subjectively* knew of the existence of the challenged condition and its dangerousness.[207] To prove the disregard component, a prisoner-plaintiff must show that the defendant's actions taken subsequent to acquiring the demonstrated knowledge disregarded the harm created or risk of harm posed by the condition. In this way, the proof necessary for the disregard piece of the deliberate indifference test is also not so different in an injunctive case against an institution than in a damages case against an individual. In either case, a failure to act to rectify the harm after learning of it amounts to deliberate indifference. If the defendant—individual or institution—fails to react to the knowledge acquired, the defendant is liable.

Therefore, the focus of our inquiry is on how a prisoner-plaintiff might demonstrate institutional knowledge in those cases where he is seeking an injunction (i.e., in those cases where he has sued the prison system itself, either through a direct suit or the legal fiction created by the Supreme Court in *Ex parte Young*). In the next Section, I examine scholarly critiques of current Eighth Amendment doctrine. Then, I propose how courts might apply the current Eighth Amendment doctrine in these types of suits.

B. Criticisms of Current Eighth Amendment Doctrine

Scholars have been levying criticisms against the Supreme Court's Eighth Amendment doctrine for decades.[208] Most of these criticisms can be classified into three broad areas of critique: (1) ignorance of the historical realities of the amendment's purpose and meaning, (2) an improper understanding of what should be considered punishment

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206 Glidden, *supra* note 16, at 1836 n.141.

207 *Farmer*, 511 U.S. at 847.

208 *See* Braatz, *supra* note 44; Dolovich, *supra* note 16; Schlanger, *supra* note 23; Glidden, *supra* note 16. *See also* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753–54 (2008) ("[T]he evolving standards of decency test also suffers from a deeper theoretical problem, in that it appears to make the rights of criminal defendants dependent upon public opinion.").

under the plain text of the Amendment, and (3) inconsistent applications of the doctrine because it is tethered to public opinion or societal views.

First, some scholars have persuasively argued that the Supreme Court's interpretation of the Eighth Amendment reflects a misunderstanding of the contextual history of the amendment in light of the history of punishments in England and America and the "changes these punishments underwent in the early years of the republic."[209] As Part I outlines above, penal reform in the early republic consisted of a process of rapid "experimentation with new approaches to punishment" in order both to grapple with a swiftly expanding nation and changing society and to distance the young nation from its colonial heritage.[210] These scholars argue that the Supreme Court's recognition that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[211] is the correct conceptual understanding of the amendment's application.[212] However, the scholars critique the Court for its failure to embrace the conclusion that the evolving standards concept necessarily means that the amendment must be viewed as examining a country's progress toward becoming more civilized.[213] In these scholars' view, the cruelty proscribed by the amendment is ever expansive as the country changes and deems certain previously accepted punishments as cruel.[214] This focus on society's ever-evolving view of what is cruel shifts the Eighth Amendment standard to an objective one, focused on what society has determined as cruel at any given point, rather than whether a particular defendant intended his actions to be cruelly punitive.[215]

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209 Braatz, *supra* note 44, at 426.

210 *Id.* at 427, 439.

211 Trop v. Dulles, 356 U.S. 86, 101 (1958).

212 Braatz, *supra* note 44, at 462; Dolovich, *supra* note 16, at 883 n.3 (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)) ("The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.").

213 Braatz, *supra* note 44, at 464–67.

214 *Id.* at 471.

215 *See, e.g.*, Schlanger, *supra* note 23, at 428 (quoting *Trop*, 356 U.S. at 101; Rummel v. Estelle, 445 U.S. 263, 274 (1980)) ("There is fully developed Eighth Amendment jurisprudence elaborating on the meaning of 'cruel and unusual,' with respect to sentencing. In that jurisprudence, the Court has implemented the constitutional ban on cruelty by testing state-inflicted punishments against the 'evolving standards of decency that mark the

Second, some scholars have criticized, particularly in the context of prison conditions claims, the Supreme Court's undue focus on what qualifies as punishment rather than what is cruel.[216] In particular, Professor Sharon Dolovich provides a compelling critique of Justice Scalia's individualistic conception of punishment as articulated in *Wilson* and expounded upon by Justice Souter in *Farmer*.[217] As explained by Professor Dolovich,

> Prison officials who create the conditions under which a prisoner will live are by their actions administering a state punishment, whatever their mental state regarding the conditions they create. In the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, *is* the punishment the state has imposed. For this reason, *all* conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny. Understood in this light, the requirement that the punishment be "deliberate[ly]" imposed in order "to chastise or deter" does not disappear . . . . That these penalties can take years to administer and their precise shape determined only over time by the acts and omissions of prison officials who may know nothing of the original crime does not make the offender's conditions of confinement any less the terms of her punishment. They simply reflect the particular nature of incarceration as a penal form, which in these ways is fundamentally different from more discrete penalties like fines or capital punishment.[218]

In many ways, Professor Dolovich's critique carries forward the historical assessment described above—the method of punishment imposed by the American criminal justice system has evolved such that imprisonment within the American penal complex *is* the punishment that cannot be cruel nor unusual under the Eighth Amendment.

A final critique of Eighth Amendment doctrine stems from the methodological and theoretical problems associated with tethering the test for cruelty to the evolving standards of decency.[219] As Professor John Stinneford has aptly pointed out, individual rights are typically viewed as mechanisms by which the law can "protect unpopular individuals or groups when public opinion becomes enflamed against

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progress of a maturing society.' The Court has insisted on use of 'objective factors to the maximum possible extent.'").

216 Dolovich, *supra* note 16, at 890.

217 *Id.* at 895–97.

218 *Id.* at 899–900.

219 *See, e.g.*, Stinneford, *supra* note 208, at 1753–54.

them."[220] By contrast, the Eighth Amendment's protections only "come into play after public opinion has already turned *in favor of*, not against, criminal defendants."[221] In a similar vein, Professor Brittany Glidden has argued that both the objective and the subjective prong of the Eighth Amendment inquiry are subject to inconsistent application because of the deference to prison officials and the difficulties courts face when trying to determine an individual's intent.[222] By espousing clear deference to prison officials, Professor Glidden asserts that the federal "courts have effectively turned the objective prong on its head: it now hinges on the subjective motivations of the people it is intended to monitor."[223] Thus, because courts are often struggling to apply the evolving standards of decency test by determining society's tolerance of that which may be cruel, the application of the Eighth Amendment has become increasingly unpredictable.[224] This uncertainty is particularly profound in the context of prison conditions, where the inquiry into the evolving standards of decency is coupled with the inquiry into prison officials' subjective mindset.

In articulating the above criticisms of Eighth Amendment doctrine, scholars have also provided proposals of how to rewrite the test to be applied in Eighth Amendment cases challenging prison conditions.[225] I find little to criticize in these proposals and find the reasons for them justified. I write separately to propose a specific test for analysis of the subjective prong of an Eighth Amendment claim for injunctive relief only because I remain pessimistic that the Supreme Court will, in the near future, reverse course on its focus on punishment and its required intent. To that end, my proposed solution, as outlined below, provides concrete parameters upon which a court can consider an Eighth Amendment conditions claim within the confines of current doctrine. Although far from perfect, these proposed sources of proof provide necessary clarity as to how a prisoner-plaintiff can prove institutional indifference. This solution may prove to be merely a stopgap until the

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220 *Id.* at 1754.

221 *Id.*

222 Glidden, *supra* note 16, at 1817.

223 *Id.*

224 *Id.* at 1828 ("Separating the assessment of whether a condition is cruel from the reason underlying it is effectively impossible because the determination of *what* is a 'basic human need' will often be influenced by one's perceptions about *why* the condition exists.").

225 *See id.* at 1817 (arguing that inferred intent should be made explicit in the Eighth Amendment analysis); Dolovich, *supra* note 16, at 899 ("[*A*]*ll* the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny.").

Court is primed to address the deeper doctrinal problems with the current Eighth Amendment jurisprudence. Nevertheless, it will equip prisoner litigants with concrete sources of proof by which they may obtain necessary relief from unduly harsh and cruel conditions.

C. Proposal for Application of Current Doctrine to Claims Against Institutions

Since *Farmer*, federal courts examining prison conditions claims seeking injunctive relief for Eighth Amendment violations often gloss over the proof required to demonstrate deliberate indifference. Instead, courts tend to focus on whether the defendant named in his or her official capacity has the ability to correct the violation, not whether the named defendant has the knowledge or intent sufficient to demonstrate deliberate indifference.[226] But the question remains what type of proof a prisoner-plaintiff should seek to demonstrate the institutional knowledge necessary to prove his deliberate indifference claim.

I submit that there are three categories of proof courts should consider when analyzing whether an institutional defendant has the knowledge necessary under the subjective prong. First, the prison system's policies and procedures, both written and informal, that relate to the complained-of condition are an important source of proof. For example, in a case challenging a prison system's treatment of a prisoner-plaintiff's Type 1 diabetes, the institution's knowledge of the types of treatment and community standards of care can be demonstrated by its policies related to the provision of medical care for persons with diabetes.[227] A failure to protect case wherein a prisoner-

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[226] *See, e.g.*, Koehl v. Dahlseim, 85 F.3d 86, 89 (2d Cir. 1996) (reversing dismissal of injunctive claim against prison superintendent because superintendent "had overall responsibility to ensure that prisoners' basic needs were met" and prisoner demonstrated that medical personal knew of his eyeglass prescription but failed to respond to his request for replacement eyeglasses); Houston v. Sheahan, 62 F.3d 902, 903 (7th Cir. 1995) (finding injunctive claim against sheriff and warden responsible for county jail moot but determining if the claim were not moot, defendants must have known about the jail's crowded state and could be "ordered to take appropriate steps" to correct the overcrowding), *abrogated on other grounds by* Haley v. Gross, 86 F.3d 630 (7th Cir. 1996); Woods v. Carey, 2006 WL 548190, at *5 (E.D. Cal. Mar. 6, 2006) (allowing injunctive claim to proceed against warden despite lack of personal involvement in the violation); Torrence v. Pelkey, 164 F. Supp. 2d 264, 273 (D. Conn. 2001) (allowing injunctive claim to proceed despite lack of personal involvement of warden in action relating to plaintiff's medical care).

[227] I submit that placing too much emphasis on this type of proof could cause prison systems to develop lackluster policies that fail to fully demonstrate the scope of institutional knowledge on the subject matter at issue. I think this pitfall could be overcome, however, by the third type of proof—the prison system's response to the lawsuit itself and proof of *well-established community knowledge* of the harms associated with particular conditions.

plaintiff is continuously placed in unsafe situations and brutally attacked by fellow prisoners because of his status as a gang dropout provides another example of how this type of proof may be used to demonstrate institutional knowledge. In this type of case, prison policies demonstrating the prison system's separation procedures and gang violence prevention efforts would be relevant to demonstrating the institution's knowledge of the risks of harm inherent to certain prisoners (e.g., policies related to where and how to house gang dropouts would be evidence of knowledge of the risks of harm inherent to leaving a gang).[228]

The second type of proof a court should consider when examining a prisoner-plaintiff's claim of deliberate institutional indifference is the prison system's response to a prisoner's grievances. The Prison Litigation Reform Act (PLRA) requires prisoners to exhaust their administrative remedies prior to filing any suit challenging prison conditions in federal court.[229] The purpose of the PLRA was to "reduce the quantity and improve the quality of prisoner suits,"[230] in part by giving prison systems a chance to resolve unconstitutional conditions prior to being sued in federal court.[231] Thus, a prisoner's grievances necessarily provide the institution knowledge of the substance of the Eighth Amendment claim—knowledge of the substance of the harm alleged. A prison system's failure to rectify that harm prior to suit demonstrates deliberate indifference to a known harm.[232]

Finally, and similarly, a federal court can infer institutional knowledge of the harm or risk of harm from both the prison system's responses to the lawsuit itself and from the well-established community correctional standards that are associated with the challenged condition. As to the inference of institutional knowledge by the

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In the example of the prisoner-plaintiff with Type 1 diabetes, I submit that if the prison policies failed to properly capture well-established medical standards for the treatment of persons with Type 1 diabetes, then the policies' silence demonstrates the institution's deliberate indifference.

228 In the same way that the lack of policy could demonstrate indifference in the diabetes case, a lack of policy in violence prevention areas would demonstrate the prison system's disregard of the common correctional practices and norms across the country.

229 42 U.S.C. § 1997e(a) (2012).

230 Porter v. Nussle, 534 U.S. 516, 524 (2002).

231 Woodford v. Ngo, 548 U.S. 81, 93 (2006) (quoting *Porter*, 534 U.S. at 525).

232 *See, e.g.*, Davidson v. Scully, 148 F. Supp. 2d 249, 254 (S.D.N.Y. 2001) (allowing evidence of plaintiff's grievances after transfer to demonstrate that "the prison system has continued to be deliberately indifferent to plaintiff's medical needs.").

substance of the lawsuit itself, the *Farmer* Court itself recognized this as a source of proof of indifference:

> If, for example, the evidence before a district court established that [a prisoner] faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment, and in deciding whether [a prisoner] has established a continuing constitutional violation a district court may take such developments into account. At the same time, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm that they would not revert to their obduracy upon cessation of litigation.[233]

Additionally, if a prisoner-plaintiff is able to acquire proof that well-established correctional community norms and standards place defendant institutions on notice of the harms related to particular conditions, then federal courts should consider inaction in light of those norms and standards as evidence of deliberate indifference. Many organizations have articulated such norms for prison systems, and most prison systems strive for accreditation from these groups. Such organizations include the National Institute of Corrections, which develops trainings for prison agencies,[234] and the American Correctional Association (ACA), which accredits the nation's prisons

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[233] Farmer v. Brennan, 511 U.S. 825, 846 n.9 (1994). Despite this recognition that the lawsuit itself can form the basis of proof for the knowledge component, there are a couple of problems with this footnote in *Farmer*. First, the use of the word "obduracy" seems to revert to the confusion between whether the *Whitley* obduracy and wantonness standard applied to conditions claims as well as excessive force claims. *See supra* Section I.B.3. It also seems to encourage prison systems to allow lawsuits to be filed and litigated, only to reverse course at the end to moot the claims and avoid adjudication on the merits. *See* Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 775 (2016) ("The prison context . . . renders [prisoners] vulnerable to such unilateral, involuntary mootness. [Prisoner] locations, treatment, and classifications exist at the whims of prisons. Thus, if prisons can simply re-shuffle [prisoners] through transfers and reclassify prisoners through implementing measures . . . in order to avoid or strategically manipulate litigation, [prisoners] are distinct kinds of plaintiffs who require additional protections from defendants who attempt to render their claims moot.").

[234] *History*, NAT'L INST. CORRECTIONS, http://nicic.gov/history-of-nic [https://perma.cc/3QW4-MKWG] (last visited Oct. 11, 2019).

and jails and has done so since 1870.[235] The ACA's accreditation standards are meant "to prescribe the best practices that could be achieved in the United States, while being both realistic and practical."[236]

These three sources of proof, alone or in combination (depending on the particular factual circumstances of the claim at issue), should be sufficient to establish institutional knowledge of the harms at issue in any prison conditions lawsuit. The continuance of the harms or risk of harms throughout the course of the lawsuit demonstrates the institution's disregard of that knowledge.[237] Although it may be that these types of proof are already the sort of evidence courts look to when considering Eighth Amendment injunctive claims,[238] courts should be explicit in defining what types of evidence are sufficient to demonstrate institutional intent. Such an explicit definition of the types of proof required will help address some of the criticisms of current Eighth Amendment doctrine.

CONCLUSION

Ascertaining institutional intent has been rightly criticized as imprecise, inaccurate, and arbitrary.[239] But if the Eighth Amendment is to afford meaningful relief to prisoner-plaintiffs in the context of injunctive claims against institutions under the current doctrine, we must strive to find coherent parameters around which institutional indifference can be ascertained. Allowing prisoner-plaintiffs to use the three sources of proof described above to show institutional knowledge of harms associated with certain conditions will create a uniform standard that courts can apply in Eighth Amendment claims for relief

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235 *About Us*, AM. CORRECTIONAL ASS'N, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us/ACA_Member/Standards_and_Accreditation/SAC_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb [https://perma.cc/PU2Y-2QBP] (last visited Oct. 11, 2019).

236 *Id.*

237 This is not to say that a prisoner can bring an Eighth Amendment prison conditions claim without some good-faith basis that the prison system knows of and is disregarding the risk of harm to him at the time he files the lawsuit. My point is merely that the existence of the lawsuit and the defendant's failure to correct the challenged condition allow the prisoner to prove the disregard component by pointing to the litigation itself at the time of trial. It is unlikely this will be the *only* piece of evidence the prisoner has available to prove his claim at trial, but it will certainly be a critical source of proof.

238 *See generally* Glidden, *supra* note 16, at 1833–37 (discussing the knowledge and intent requirements for punishment under the Eighth Amendment).

239 *See* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1357–58 (2008).

from unconstitutional prison conditions. Such uniformity will allow prisoner-plaintiffs to hold prison systems accountable for imposing cruel conditions in prisons and jails.