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WHEN CONDITIONS OF CONFINEMENT LEAD TO VIOLENCE: EIGHTH AMENDMENT IMPLICATIONS OF INTER-PRISONER VIOLENCE

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> "It is society's responsibility to protect the life and health of prisoners .... We have made him our collective responsibility. We are free to do something about him; he is not."[1]

[1] Farmer v. Brennan, 511 U.S. 825, 854 (1994) (Blackmun, J., concurring) (citing United States v. Bailey 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980) (Blackmun, J., dissenting)).

ABSTRACT

Courts have developed a considerable body of case law over the centuries addressing the protections the Constitution provides against punishments administered by the state or federal government. But in today's prisons, the most severe punishments—beatings or psychological abuse—often come at the hands of other inmates, sometimes fomented by conditions of imprisonment, or more frequently, because of systemic management failures. Courts have yet to develop this area of the law, relying instead on vague assertions that prison management must be reasonable. This paper examines the constitutional protections afforded to an inmate against violence from other inmates when the State has maintained prison conditions that fail to reasonably guarantee inmate safety. This paper will explore the history of Eighth Amendment precedent and the tests utilized therein. It concludes that the appropriate test to apply under the Eighth Amendment in failure to protect claims is an objective analysis of prison conditions with no mental element requirement for state actors. With this history and proposed standard in mind, it is appropriate to examine the research conducted on prison conditions of crowding and its connection to inter-prisoner violence. Determining the frequency and cause of inter-prisoner violence is vital for the future of Eighth Amendment violation challenges. While states may not leave inmates to the Hobbesian state of nature, their obligation extends only so far as reasonably protecting inmates. If inter-prisoner violence is not the result of the conditions but is rather a consequence of the fact that the most

violent in our society are disproportionately represented in prisons, then both the remedies and responsibility on the state shrink. However, if the data indicate that the inter-prisoner violence is the result of state determined conditions, inaction, or systemic management failure, then the court can more readily step in to force the states to remedy the violations. The paper concedes that the Constitution gives States latitude in how to reduce inter-prisoner violence but does not permit a total disregard of this growing problem.

INTRODUCTION[2]

The Eighth Amendment's prohibition on Cruel and Unusual Punishment bounds how states can administer punishment. The Clause reflects the Framers' intent to preserve the dignity of citizens when the state administers punishment.[3] The Amendment applies to the "treatment a prisoner receives in prison and the conditions under which he is confined."[4] The Eighth Amendment is not intended to be solely reactive; it can operate proactively to protect against risk of future harm.[5] Because society's primary means of criminal punishment is incarceration, it is necessary to critically examine the conditions we subject inmates to during their confinement.

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[2] Thinking seriously about the concerns of the Eighth Amendment necessarily include considerations for larger issues that this paper will be unable to adequately address. To many, prisons serve to separate the worst of society from the rest of us. Compartmentalizing prison dehumanizes incarcerated citizens and works to relieve society from the responsibility we share to address and reflect on the realities that incarcerated people face. Conversations of prison are inextricably tied to the realities of mass incarceration, racism, exploitation of poor communities, the prison industrial complex, and a history of slavery. Further, this paper will not be able to address whether the Constitution has different requirements for privately owned prisons in maintaining the Constitutional rights of prisoners.

[3] Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

[4] *Farmer*, 511 U.S. at 832 (citing Helling v. McKinney, 509 U.S. 25, 31 (1993)).

[5] Helling v. McKinney, 509 U.S. 25, 33 (1993) ("[T]hat the Eighth Amendment protects against future harm to inmates is not a novel concept. The Amendment … requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs, 489 U.S. 189, 200 (1989)).

State and federal governments are not free to step back and leave inmates defenseless, subject to unrelenting violence at the hand of other prisoners.[6] Incarceration forces people to live in potentially dangerous prison conditions, while at the same time depriving them of means for self-protection. The state, in choosing to incarcerate, creates for itself an on-going corresponding constitutional obligation "to assume some responsibility for his [an inmate's] safety and general well-being".[7] Prison officials must also "take reasonable measures to guarantee the safety of the inmates."[8] This vague imposition of an obligation to be reasonable on prison officials leaves open the question of whether the Constitution compels higher level officials within states to act when background prison conditions prevent prison officials from performing their obligation to protect inmates from other inmates. When a court sentences a person to prison, the state impliedly takes on the constitutional duty to provide prison conditions that can house that person until they are ready to return, alive and unmaimed, from exile back into society. Prison conditions are as much a part of the punishment of sentencing as its duration.

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6 *Farmer*, 511 U.S. at 857 ("[H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." (citing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); *cf.* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989))).

7 DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989).

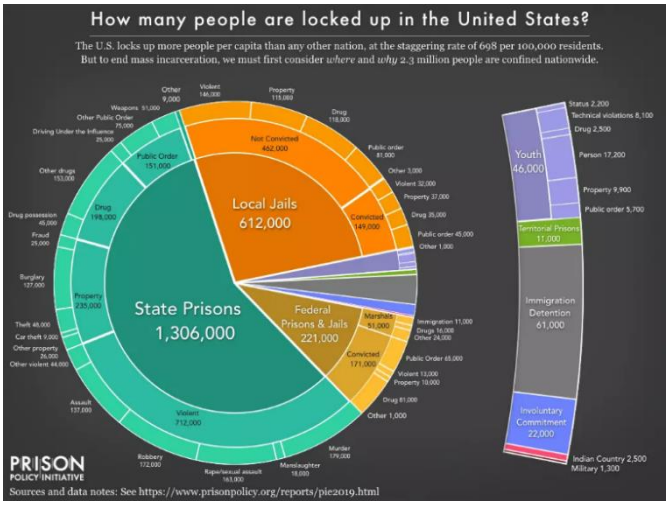
8 Hudson v. Palmer, 468 U.S. 517, 526-27 (1984).

There is an obvious difference between prison conditions that are less than optimal and prison conditions that are cruel and unusual. Prison overcrowding itself can fall on either side of the divide. Even when overcrowding alone is not cruel or unusual, however, the violence that may in turn result from overcrowding can be. The Court has stated that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone."[9] Prison crowding is frequently linked with heightened rates of prison violence.[10] Forcing inmates to live in an environment rife with constant fear of bodily harm or death compares to the psychological damage of forcing inmates to live with "exposed electrical wiring" that the Supreme Court found in *Helling v. McKinney* to constitute an Eight Amendment violation.[11] Subjecting inmates to conditions of confinement that lead to inter-prisoner

[9] Wilson v. Seiter, 501 U.S. 294, 304 (1991) (However, this only applies when the conditions "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.").

[10] St. . .phanie Baggio et al., *Do Overcrowding and Turnover Cause Violence in Prison?*, 10.1015 FRONTIERS IN PSYCHIATRY 1, 2 (2020).

[11] Helling v. McKinney, 509 U.S. 25, 34 (1993) (citing Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (finding that such conditions exposed inmates to a constant threat against their personal safety)).



violence and daily fear of assault serves no justifiable penological purpose and is not intended to be part of the formal punishment inmates must endure for their offenses against society.[12] The fact that it may deter crime is no more a justification for the practice than boiling prisoners in oil. This violence leads to the question of whether the Constitution has anything to say about a state's failure to mitigate the harms resulting from overcrowding, and if so, what.

The United States boasts the largest incarcerated population in the world.[13] Prison populations have surged nationwide since the 1970's, partly due to mandatory sentencing and three strikes rules resulting in a chronically overcrowded system.[14] Prisons are punitive institutions that must control the activities of individual prisoners, as well as the general conditions of the prison environment to maintain order and security.[15] Research, and intuition, tell us that crowded spaces, coupled with overwhelmed resources and disorder, increase

12 *See* Farmer v. Brennan, 511 U.S. 825, 857 (1994) (Blackmun, J., concurring).

13 Wendy Sawyer & Peter Wagner. *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie.html.

14 NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33, 70, 89, 101–02 (Committee on Causes and Consequences of High Rates of Incarceration ed., 2014).

15 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 8, 66, n.b (2012).

opportunities and instances of violence whether due to idleness or lack of meaningful opportunities. The threat is even greater when the state places violent offenders in extremely close confines.[16]

Prison violence can be divided into two categories, collective violence and interpersonal violence, both of which exist on a spectrum with varying degrees of severity.[17] Collective violence seeks to break down normal social order in prison and is most clearly seen during prison riots, whereas interpersonal violence is violence committed by and between individuals that takes place within the normal daily operating framework of the prison.[18] Prisoners who face repeated instances of violence at the hands of other prisoners suffer severe psychological and physical consequences.[19] While these instances of violence are always committed by individuals, they necessarily occur within the confines of prison and can be influenced by the conditions therein.[20] This paper focuses on inter-prisoner violence because it is violence that occurs between two inmates that the state has a duty to protect equally, whereas collective violence is violence against the system by the inmates confined within it.

Section I of this paper outlines the history of the Eighth Amendment and analyzes Supreme Court precedent on conditions of confinement, as well as the evolution of the legal test employed by the Court to determine if conditions violate the Eighth Amendment. It finds that present day Eighth Amendment claims for conditions of confinement contain both an objective and a subjective component in which the burden of proof is placed on the inmate.[21] The relevant Supreme Court case law on conditions of confinement and failure-to-protect claims, when taken together, reveal a vague standard that is impractical to apply and certainly permits judges and juries to shield

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16 *See id*. at 25.

17 Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 CRIME & JUST. 205, 205–06 (1999).

18 *Id.* at 206.

19 Cynthia L. Blitz et al., *Physical Victimization in Prison: Role of Mental Illness*. 31 INT'L J. L. PSYCH. 385, 385–86 (2008).

20 Baggio et al., *supra* note 10, at 2 (citing study that institutional prison factors were significantly associated with prison violence).

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

the state and prison administrators from liability. *Section II* explores the statutory solutions that legislatures have created to address issues of prison conditions and the shortfalls of that process. It discusses the recent shift from judicial activism to judicial restraint. It argues that the unwillingness of the courts to act on these claims and the deference they have given to the states results in ongoing and systemic violations of Eighth Amendment rights. *Section III* argues the courts must be the final arbiters of Eighth Amendment claims. It further argues that the appropriate test to apply in prison conditions cases is the objective analysis employed by the courts prior to the 1986 case of *Wilson v. Seiter. Section IV* examines research that studies the influence that conditions of confinement have on the severity or regularity. It necessarily addresses the unavoidable causation issue presented in trying to connect prison crowding directly to increases in inter-prisoner violence and suggests that the inquiry be done through a totality of the circumstances approach. It then applies these foundations to three cases to further highlight the connection between crowding and inter-prisoner violence. The paper concludes that states, by maintaining crowded prisons conditions that pose a substantial risk of serious harm resulting from inter-prisoner violence, are systemically violating inmates Eighth Amendment rights. States must enforce and maintain practices that do not reduce Eighth Amendment protections against inter-prisoner violence. However, the question remains the pace at which states must address condition concerns and state-specific factors that might alter a default rule on the matter.

I. HISTORICAL APPLICATIONS OF THE EIGHTH AMENDMENT

A. Brief History of the Eighth Amendment

In 1791, the Eighth Amendment to the United States Constitution established that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[22] The Eighth Amendment applies to both federal and state power through

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

the Due Process Clause of the Fourteenth Amendment.[23] In the late 1950's, Supreme Court Chief Justice Warren stated that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[24] The Court later expanded on this idea that evolving standards of decency are to be measured by "objective factors to the maximum possible extent."[25] 'Evolving' means that there can be no static test for determining whether the conditions violate the Eighth Amendment because without flexibility, the amendment would not be able to comport with, or adequately respond to, such changes in attitudes of what treatment is acceptable.[26]

[23] Robinson v. California, 370 U.S. 660, 666 (1962) (U.S. Constitutional Amendment XIV prohibits states from depriving "any person of life, liberty, or property, without due process of law.").

[24] Trop v. Dulles, 356 U.S. 86, 101. The Court in *Rhodes* noted that standards of decency should not be informed by the opinions of experts, but rather of the general public attitude towards the condition. Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981).

[25] Coker v. Georgia, 433 U.S. 584, 592 (1977).

[26] *Trop*, 356 U.S. at 101.

Mule Creek State Prison
Aug. 1, 2008

California Institution for Men
Aug. 7, 2006

There are three primary approaches to the question of 'what constitutes cruel and unusual punishment?' The first asks whether the punishment 'is shocking to the conscience?' This inquiry brings to mind medieval torture practices such as those described in an 1890 Supreme Court case, when the Court determined breaking at the wheel and crucifixion are manifestly cruel.[27] Modern prison conditions can shock the conscience as well. However, this threshold is not crossed only by historic or medieval torture tactics, what is shocking to the conscience evolves as society evolves.[28] In *Brown v. Plata*, a 2011 Supreme Court case, there was neither a cross nor wheel on which to torture prisoners. Nonetheless, the Court included photographs of the crowded conditions in the California prison system to emphasize just how shocking to the conscience the conditions were.

The second approach asks, 'is the punishment disproportionate to the offense committed?' This approach requires a metric for assessing the severity of the crime committed to compare against the length of time confined.[29] This question can expand beyond a 'sentencing' only inquiry to include questions of prison conditions in terms of whether the 'punishment' of "rampant violence" and "repeated victimization" at the hands of the stronger inmates is a

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27 *In re* Kemmler, 136 U.S. 436, 446 (1890) ("[I]f the punishment … were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be [unconstitutional] ….").

28 *See generally* Brown v. Plata, 563 U.S. 493 (2011).

29 *See* Rhodes v. Chapman, 452 U.S. 337, 372–73 (1981) (Marshall, J., dissenting) ("[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." (citing Hutto v. Finney, 437 U.S. 678, 686 (1978))).

disproportionate punishment to the crime committed.[30] The loss of liberty one experiences with incarceration is an acknowledged and accepted part of prison. Indeed, it is the whole point. Loss of security so severe it results in constant physical and psychological torture at the hands of other inmates is quite different. That form of punishment, which may be visited on the pot dealer as much as on the murderer, is not proportional to the offense committed in many instances.[31]

The final approach asks, 'whether the punishment serves a legitimate penal aim.' "Punishment has three elements: it is (1) a penalty, (2) inflicted for criminal conduct, (3) pursuant to regular processes of government administration and thus attributable to the government it its role as monopolist over punishment."[32] In his concurrence to *Farmer v. Brennan*, Justice Blackmun stated that "violence among prisoners serves absolutely no penological purpose."[33] The only legitimate penal aims are ones that are "deliberately administered for penal or disciplinary purpose[s]."[34] Prison officials may use violence to quash prison riots or violence directed at themselves, but deliberately and wantonly administered violence, or a complete disregard for the safety of inmates at the hands of prison officials serves no legitimate penal aim.[35] However, the Court has avoided answering the question of how to approach inter-prisoner violence that is not the result of a prison official's wanton disregard for inmate safety, but rather is a result of systemic

30 Rhodes v. Chapman, 452 U.S. 337, 355 (1981).

31 Conventional ideas of sentencing are that the duration one experiences a deprivation of liberty in prison should be proportionate to the offense committed. Inter-prisoner violence is not necessarily proportionate in the same ways. One would think that those most violent on the outside are less likely to be victims of violence than non-violent offenders. Indeed, the murderer might lead a relatively comfortable life because no one will mess with him whereas the pot dealer becomes the victim because he is perceived as soft. Is constant violence a proportional punishment to the minor crime the pot dealer committed against society?

32 Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment.*, 84 NYU L. REV. 881, 901 (2009).

33 Farmer v. Brennan, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring).

34 Wilson v. Seiter, 501 U.S. 294, 300 (1991) (quoting John v. Johnson, 414 U.S. 1033 (1973)).

35 Rhodes, 452 U.S. at 347.

deficiencies. These systemic deficiencies, which often correlate with systemic management failures and overcrowding, serve no legitimate penal aim and reflect, at least indirectly, a larger cultural disregard for the plight of inmates.

B. Supreme Court Precedent on Prison Conditions for the Purposes of Eighth Amendment Violation Claims

The Court has repeatedly answered the question of how to address punishment inflicted by a prison official but has seldom addressed punishments that emerge from the conditions of imprisonment itself. When it has done so, the Court has offered only vague assertions of reasonableness requirements.

The 1976 case of *Estelle v. Gamble* is a crucial part of Eighth Amendment claims because it is an isolated incident of the Court expanding Eighth Amendment protections. The case itself involved a prisoner denied of adequate medical care. Justice Marshall, writing for the majority acknowledged that the Eighth and Fourteenth Amendments require the State to provide basic medical care, but that negligent or inadvertent failure to prove medical care did not violate the Eighth Amendment.[36] Instead, *Estelle* conditioned Eighth Amendment violations on the state of mind of prison officials, a "subjective" component.[37] Under *Estelle*, a prison official must have demonstrated deliberate indifference (a state of mind more blameworthy than negligence) to a prisoner's serious injury.[38] This deliberate indifference standard, which will this paper will explore at length later, would become the subjective part of the two-pronged test for current Eighth Amendment challenges.

Importantly, *Estelle* determined that the Cruel and Unusual Punishment clause can apply to deprivations of necessities suffered during imprisonment as a result of certain unsafe or unhealthy prison conditions.[39] The Court stated that the denial of medical care is cruel and unusual because, "in the worst case, it can result in physical

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[36] Estelle v. Gamble, 429 U.S. 97, 97 (1976).

[37] *Id.* at 109.

[38] *Id.* at 104–105.

[39] Wilson v. Seiter, 501 U.S. 294, 297 (1991).

torture, and, even in less serious cases, it can result in pain without any penological purpose."[40] This statement amalgamates the first and third inquiries above, denying adequate medical care both shocks the conscience and does not serve a legitimate penal aim.

Estelle recognized that the state, when it assumes responsibility for inmates by incarcerating them, removes their ability to mitigate the harms they experience while imprisoned.[41] Part of the difficulty in using *Estelle* for general conditions of confinement, however, is that it is part of a line of cases involving medical conditions rather than prisoner violence. However, ten years later, the Court stated in *Wilson,* that the protection an inmate is afforded against other inmates is "just as much a condition" as the medical care the inmate receives, the food served, the clothes they are given, and the temperature of the cells.[42] This comparison by the Court situates personal safety within the same realm of constitutional protections as access to health care. Inmates must rely on prison authorities and management to address their needs, if the state does not provide, the needs will go unmet.[43]

For the first time in 1981, in *Rhodes v. Chapman*, the Court considered a "general-conditions case.[44] The Court stated that it was "unquestioned" that confinement in prison "is a form of punishment subject to scrutiny under the Eighth Amendment standards."[45] This was the first time that the Court considered the limitations that the Eighth Amendment "imposes upon the conditions in which a state may confine those convicted of crimes."[46] *Rhodes* dealt with an inmate's complaint that the practice of 'double celling' violated the Eighth Amendment.[47] The majority stated that while "overcrowding

40 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

41 Estelle, 429 U.S. at 103.

42 Wilson, 501 U.S. at 303.

43 Rhodes, 452 U.S. at 347.

44 Richard Bruce Cole. *Prison-conditions Cases Since Wilson v. Seiter: A Study in Lower Court Compliance with Supreme Court Decision Making.* (Doctoral Dissertation: University of Connecticut, January 1999.), 1.

45 Rhodes, 452 U.S. at 345 (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978)).

46 *Id*. at 345.

47 *Id*. at 339 (a practice that is no longer a temporary solution to overcrowding but rather an

and cramped living conditions are particularly pressing problems in many prisons[,]"[48] the Court must give deference to the decisions prison administrators make in responding to overcrowding as well as the resources allotted by the legislature.[49] The Court held that the practice of double celling, even though the cells had been designed for one person, did not deprive prisoners of essentials, nor did it increase violence among inmates or create other conditions intolerable for prison conditions.[50] The Constitution "does not mandate comfortable prisons …. and prisons …. which house persons convicted of serious crimes cannot be free of discomfort."[51] The concurrence, written by Justice Brennan, countered that many conditions of confinement (including overcrowding and inadequate safety precautions) result from neglect rather than prison policy, and such systemic negligent prison management should not receive the level of deference that the majority suggests.[52] The Court ultimately held that while the prison was overcrowded, it was one of the "more humane large prisons in the nation."[53]

After *Rhodes*, the boundaries for constitutional conditions of confinement became that the conditions in prison "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may not deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[54]

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accepted industry standard).

48 *Id.* at 356 (Brennan, J., concurring).

49 *Id.* at 362.

50 *Id.* at 348 (suggesting that perhaps the Court would have responded differently had double-celling been shown to increase violence among inmates).

51 *Id.* at 349.

52 *Id.* at 362 (Brennan, J., concurring).

53 *Id.* at 367 (Brennan, J., concurring).

54 *Id.* at 347.

The next major case on the topic, *Wilson v. Seiter,* decided in 1991, examined whether a prisoner challenging his conditions of confinement had to prove that the defendants had a culpable state of mind, and if so, what that state of mind had to be.[55] The majority held that plaintiffs must show prison officials showed "deliberate indifference" to prison conditions to establish an Eighth Amendment violation.[56] After *Wilson*, if an inmate were to object to prison conditions, they must prove deliberate indifference on the part of the official to show that the condition violates the Eighth Amendment.[57] This standard was clarified in *Farmer v. Brennan* where the court held that a prison official acts with deliberate indifference when they "know of and disregard an excessive risk to prisoner health or safety" and are both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and actually draw the inference.[58]

Farmer v. Brennan was decided shortly after *Wilson* in 1994, where the court clarified and solidified its use of the subjective standard. In *Farmer*, an inmate filed a failure-to-protect claim after being sexually assaulted by another inmate and claimed that the guards knew and did not act to protect him.[59] The majority in *Farmer* relied on *Wilson* to ground its own test for conditions that violate the Eighth Amendment, and in doing so upheld *Wilson's* departure from the

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[55] Wilson v. Seiter, 501 U.S. 294, 296 (1991).

[56] *Id.* at 303 ("any pain and suffering endured by a prisoner that is not formally a part of his sentence—no matter how severe or unnecessary—does not violate the Cruel and Unusual Punishments clause unless that prisoner establishes that some prison official intended the harm.").

[57] Farmer v. Brennan, 511 U.S. 837 (1994).

[58] *Id.* (The test in full; The subjective component requires showing that a prison official acted with deliberate indifference to the inmate's health or safety and the prison official must know of and disregard that risk to the prisoner. The official must be aware of the facts from which the inference of harm could be drawn and make that inference. The objective component requires showing that the conditions of confinement pose a "substantial risk of serious harm." To determine whether prison official conduct violated the deliberate indifference standard, "there must be persuasive evidence of the following: (1) facts presenting an objectively substantial risk to prisoners and awareness of these facts on the part of the officials charged with deliberate indifference; (2) the officials drew the subjective inference from known facts that a substantial risk of serious harm existed; and (3) the officials responded in an objectively unreasonable manner.").

[59] *Id.* at 825.

long-standing precedent of only viewing prison condition claims through an objective analysis.[60] The Court held that Eighth Amendment claims for failure-to-protect inmates from harm require the inmate to meet both the subjective and objective requirements.[61]

Justice Blackmun severely criticized what he saw as an extension of *Wilson's* requirement for a subjective element in prison condition cases. *Wilson* had focused on punishment inflicted by prison guards whereas *Farmer* addressed the actual conditions of confinement.[62] Justice Blackmun wrote that "regardless of what state actor or institution caused the harm, and with what intent, the experience of the inmate is the same."[63] The test that emerges from *Farmer* applies more readily to individual acts of brutality initiated by a prison official rather than collective or systemic neglect of conditions that result in inter-prisoner violence. While this over-broad extension creates uniformity of the test, we must ask, at what cost? Without considerations of uniformity, *Farmer* should be limited to only those cases where individual acts of prison officials are in question.

Wilson and *Farmer* were decided in such a way as to shield prison officials from damages liability for negligent prison management based on the idea that because prison officials do not have much say in the conditions that result from legislative failure to act or appropriately fund prisons, they should not be faced with liability. Injunctive relief is also hard to obtain because the courts are cautioned against becoming involved in daily prison operations and are encouraged instead to give prison officials time to rectify the situation before issuing an injunction.[64] Taken together, *Wilson* and *Farmer* narrowed the application of the Eighth Amendment to prison conditions only where prison officials actually knew of and disregarded a substantial risk of serious harm to prisoners.

This additional subjective requirement created by *Wilson* and *Farmer* makes it difficult to apply the test to prison condition cases

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60 *Id.* at 837.

61 *Id.* at 834.

62 Wilson v. Seiter, 501 U.S. 294, 311 (White, J., concurring).

63 Farmer v. Brennan, 511 U.S. 855–56 (Blackmun, J., concurring).

64 Bell v. Wolfish, 441 U.S. 520, 527 (1979).

even where the conditions are egregious. For example, a prisoner who was allegedly exposed to raw sewage in the course of her work assignment could not meet the standard when she failed to show that correctional officials acted with deliberate indifference; even if she was correct that the protective clothing issued was inadequate, nothing showed that the defendants knew that before she complained.[65] The Supreme Court precedent on prison conditions reveals a course of action that has increasingly narrowed Eighth Amendment claims and increased the burden on inmates to litigate such claims, ushering in a new era of judicial restraint and deference to the states.

II. JUDICIAL CONSTRAINT AND THE PRISON LITIGATION REFORM ACT

The Prisoners' Rights movement roughly spanned the period from 1960-1980.[66] Unlike other areas of judicially led social change, the Supreme Court did not play a note-worthy role in the Prisoners' Rights movement, there is no *Brown v. Board* or *Roe v. Wade* decision for the plight of prisoners.[67] Rather, during the height of this movement, district courts took on the judicial activist role, and judges frequently addressed prison conditions in a fact-intensive analysis to determine whether the conditions present violated the Eighth Amendment.[68] The courts often intervened where the legislatures and prison administrators had refused or failed to act.[69] Lower courts found that specific prisons as well as entire prison systems violated the Eighth Amendment— once discovered, courts often issued broad remedial orders to prison administrators and states to force them to address the areas of concern by imposing judicial oversight until the

65 Shannon v. Graves, 257 F.3d 1164 (10th Cir. 2001).

66 JAMES B. JACOBS, PRISON REFORM AMID THE RUINS OF PRISONERS' RIGHTS, IN THE FUTURE OF IMPRISONMENT, 179–96, 183 (Michael Tonry ed., 2004).

67 *Id.*

68 Cole, *supra* note 44, at 5.

69 *Id.* at 6.

prison conditions were adequately addressed.[70] The Supreme Court, rather than stepping in to encourage judicial activism, responded first with *Rhodes,* then later with *Wilson,* to make clear to lower courts that they must give deference to the state legislatures and the prison administrators, essentially making clear to the lower courts that it was not their role to determine questions of prison conditions.[71]

And, with the benefit of hindsight, *Rhodes* was a poor test case for those seeking prison reform. The concurrence of Justice Blackmun in *Rhodes,* however, stated that it is the duty of federal courts to protect constitutional rights when conditions of confinement amount to cruel and unusual punishment, a sentiment the majority did not echo.[72] *Rhodes* is a problematic piece of prison condition precedents because the conditions of the prison in the case could hardly be considered cruel and unusual especially in contrast to overcrowded prison conditions today.[73] *Rhodes* was used to encourage judicial restraint and deference to the legislature's limited resources, but the courts are now discouraged or limited from addressing even extremely concerning conditions of confinement, as will be explained in *Section IV*.

The problem with *Rhodes* is that while it understandably deferred to the expertise of prison managers, it failed to acknowledge their conflict of interest in making judgements. Prison officials may be the most knowledgeable, but they do not have the neutrality that would make them the ideal decision makers for how best to protect inmates' constitutional rights.[74] Prison officials are likely to experience a

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[70] *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974)). *See also* Ruiz v. Estelle, 505 F. Supp 1296 (S.D. Tex 1980), Hutto v. Finney, 437 U.S. 678 (1978) (upholding a trial court's ability to exercise wide discretion in correcting conditions of confinement found to be unconstitutional).

[71] Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

[72] *Id.* at 353.

[73] The prison in *Rhodes* had adequately provided for the physical protection of inmates, as well as adequate food, shelter, and medical care.

[74] A report on Rikers, discussed in the next section, showed that investigators rarely found that force by officials was used inappropriately, and nearly always concluded that force was justified and in accordance with Departmental policy—often despite evidence to the contrary. The report found that prison administrator investigations featured a general bias toward accepting staff's version of an event at face value, even when evidence pointed to

conflict of interest because of their desire to maintain order, protect their employees, and avoid investigations that require more resources than the administration likely has access to. For these reasons, the role of neutral decision maker should belong to the Courts.

The Supreme Court's instruction to the lower courts to give deference to prison administrators is only one of two major hurdles prisoners face in seeking judicial redress for their constitutional grievances. *Estelle* initially broadened Eighth Amendment protections, and because of this, inmates increasingly filed civil right violation lawsuits under 42 U.S.C. § 1983.[75] Three of the most common 1983 claims raised by inmates were physical security, medical treatment, and physical conditions.[76] Responding to this influx in lawsuits, Congress passed the Prison Litigation Reform Act ("PLRA") in 1995.[77] The enactment of the PLRA was set against the backdrop of the 1990's, which ushered in a new era of "cracking down" on prisons and making conditions more punitive in response to public concern over 'coddling' inmates.[78]

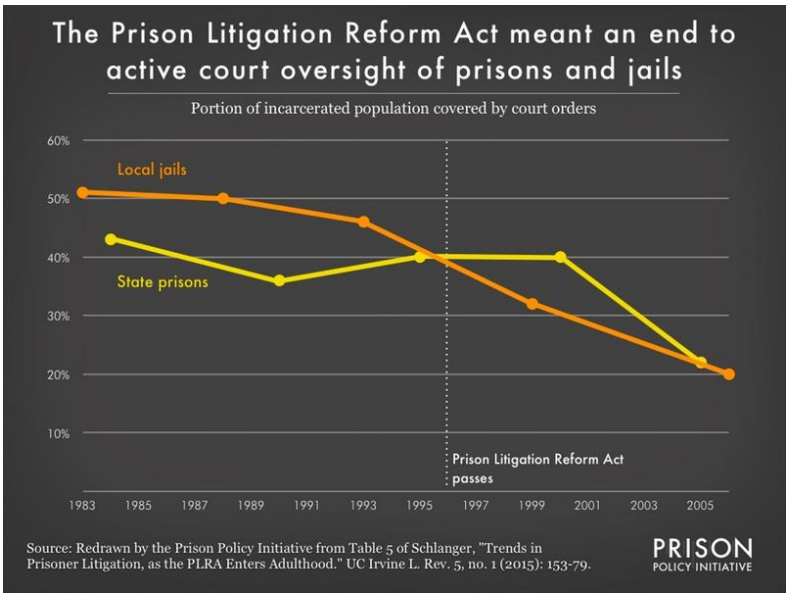
the contrary, and would discredit the inmate's account of the incident.

[75] ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEPT. OF JUST., CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION, NCJ-151652, BUREAU OF JUSTICE STATISTICS (1995).

[76] *Id.* at 8-9.

[77] 42 U.S.C. § 1997e (1995).

[78] Jacobs, *supra* note 66, at 183.

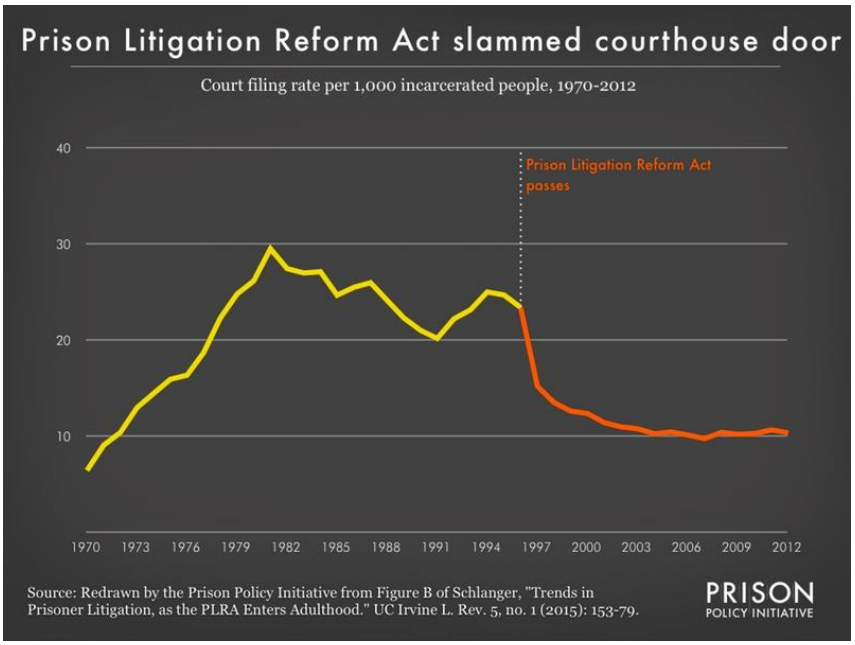


The PLRA is a federal law that reflects Congress's intent to reduce the number of 'frivolous lawsuits' filed and to "prevent the judiciary from recognizing and enforcing prisoners' rights."[79] Two such provisions in the Act are the so called 'exhaustion' requirements and the 'filing fee' requirements. The exhaustion provision of the Act requires inmates to exhaust every available administrative remedy in the prison system before being able to bring a legal claim in court.[80] These provisions sought to "eliminate unwarranted federal court interference with the administration of prisons" and "to reduce the

[79] *Id.* at 185.

[80] Annette Hanson, *Correctional Suicide: Has Progress Ended?* 38 J. AM. ACAD. PSYCH. L., 6–10, (2010).

quantity and improve the quality of prisoner suits."[81] The PLRA succeeded in one of the two goals, the number of civil right lawsuits filed by inmates decreased significantly.[82]



The PLRA was enacted in the effort to reduce the number of frivolous lawsuits, but it has been difficult to find any evidence showing whether it met that goal. If such evidence existed, one would assume that it would show a higher fraction of lawsuits succeeding beyond the pleadings after enactment. However, the primary findings on the impact of the PLRA show an over-all decline in civil-rights filings, plaintiff's victories, and declining prevalence of court-ordered regulation of jails and prisons.[83] While inmate-

[81] Woodford v. Ngo, 548 U.S. 81, 93–94 (2006).

[82] Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*. 81 NYU L. REV., 550–630, 2006.

[83] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*. 5 UC IRVINE L. REV., 153-178, 154. (2015) (discussing the PLRA's impact on meritless lawsuits).

litigation is not free of criticism, it is an oversight method invaluable to upholding the values contained within the Eighth Amendment. Court orders and court-enforceable regulations are "useful correctives to dysfunctions and abuses that frequently occur in our low-visibility jails and prisons."[84] At face value, the PLRA does not completely remove litigation as a possible path of legal redress for inmates, but the practical impact of the procedural burdens placed on inmates is often insurmountable.[85] The PLRA gives the appearance but not the reality of justice.[86]

The PLRA is especially burdensome for questions of prison conditions because the PLRA restricts the ability of the judiciary to address population sizes— "judges cannot impose population caps except in circumstances in which other, less intrusive relief, have failed to remedy the constitutional violation. Only a specifically convened three-judge panel can impose a [population] cap."[87] The PLRA is a successful move by Congress to "supplant the courts as the ultimate arbiter of what prison conditions and operations are acceptable."[88] As a result, the potential for courts to intervene in unconstitutional conditions of confinement is weaker now than it was thirty years ago. Both the willingness and the ability of the courts to monitor and enforce minimal standards of decency in prisons has waned, which has worked to discourage and limit inmate opportunities for redress of grievances.

The Supreme Court has a history of avoiding political thickets.[89] However, questions of Eighth Amendment violations have been removed from the judicial realm in only the last thirty years.[90] The PLRA sought to provide a statutory solution to the problem of

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84 *Id.* at 171.

85 *Id.*

86 *Id.* (For example, many inmates do not have the resources to pay the requisite fees, nor are inmates likely to have access to information on how to exhaust all administrative remedial procedures.)

87 Jacobs, *supra* note 66, at 186.

88 *Id.* at 187.

89 Colegrove v. Green, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket.").

90 Jacobs, *supra* note 66, at 183.

concerning conditions of confinement but this solution is a non-solution. The PLRA is a reactive measure that limits the court's ability to intervene and respond adequately to systemic condition failures.91 Prison conditions can become brutal in violation of the Eighth Amendment without an opportunity for courts to intervene. Access to effective complaints systems, as well as independent external inspection and monitoring mechanisms, are indispensable safeguards to ensure that the rights of inmates are upheld in practice. When those administrative processes fail and there is an unwillingness by the judiciary to take on the role of determining questions of conditions of prison, then inmates are left with little possibility for legal redress. The courts must provide genuine remedies to systemic constitutional violations.

III. WHAT TEST SHOULD THE COURT APPLY IN INTER-PRISONER VIOLENCE CASES RELATING TO CROWDED PRISON CONDITIONS

This paper is not concerned with isolated acts of brutality on the part of the prison official; the Court has been more than clear on what standards apply in that case. Rather, the concern is what standard should apply when systemic management failures lead to brutality on the part of other inmates. The test as it exists after *Wilson* and *Farmer* for failure-to-protect claims contains both a subjective and an objective element.92 This test disincentivizes prison officials to watch for, and protect inmates from, possible violating conditions. The state's burden to provide for the daily needs of inmates is on-going, so prison officials who are charged with protecting inmates need to be proactive. "They must pay attention to existing conditions, notice possible dangers, investigate them, and take appropriate steps to prevent unnecessary suffering."93 The recklessness standard from

91 Michelle Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236 (2012), https://www.equitasproject.org/wp-content/uploads/2018/01/Deitch-The-Need-for-Independent-Prison-Oversight-in-a-Post-PLRA-World-Federal-Sentencing-Reporter-April-2012.pdf.

92 Dolovich, *supra* note 32, at 899.

93 *Id.* at 892.

Farmer holds officers liable only for risks they were actually aware of, which "thereby creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse."[94]

The subjective knowledge element is a question of fact and even if the risk is painfully obvious, prison officials can still escape liability. For a prison official to be 'on-notice' enough of the risk to meet the standard, the inmate must present evidence of "long-standing, pervasive, well-documented, or expressly noted by prison official in the past," and the prison official-defendant must have been exposed to this information and made the connection between the circumstances and the substantial risk of harm present.[95] It is difficult to apply this test to systemic prison conditions that affect many inmates, as opposed to risks to specific inmates, because prison officials are more capable of mitigating individual risks than addressing risks created by legislative inaction or lack of adequate funding.

The majority in *Wilson* rejected the petitioners request for the Court to consider the long term or systemic approach to conditions of confinement (in which the official's state of mind would be irrelevant). The majority rationalized that distinguishing between short term conditions and long terms conditions would be difficult because of line-drawing problems, particularly where the "violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing."[96] Although the Court may have a legitimate point that prevents the short-term versus long-term distinction from being used as a field theory of the Eighth Amendment, that impediment does not apply to overcrowding. Distinguishing between the two would work for conditions of overcrowding because the violence suffered as a response of overcrowding is not as distinct or separate as the Court tries to make it appear. The subjective element of the test should thus be removed when evaluating conditions of confinement, such as prison crowding.

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94 *Id.*

95 Farmer v. Brennan, 511 U.S. 825, 842 (1994).

96 Wilson v. Seiter, 501 U.S. 294, 301 (1991).

Proponents of the subjective element would argue that the bedrock principle of Eighth Amendment claims is that it necessarily involves an individual, who alone, suffered the violation.[97] This leads to the weak argument that removing the subjective element will be equivalent metaphorically to opening a flood gate of litigation. The subjective component, they argue, works to ensure that individuals who had been subjected to unconstitutional treatment can have an individual claim, and to remove that would allow that claim to extend to all other inmates regardless of whether they were truly subjected to the same treatment.[98] The counter to this is that "state sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction on an institutional level)" that affects all inmates.[99]

However, the benefits of implementing an objective only consideration for conditions of confinement are that (1) an objective standard can more easily comply with evolving standards of decency, (2) an objective standard would facilitate institutional change because the state and the state actors would no longer be shielded from liability and it would allow courts to be the neutral arbiter of prison conditions, and (3) it could work to encourage legislatures and prison administrators to decrease population sizes and find new ways of reforming prisons to more acceptable conditions.[100] The failures of prison administrators to control and manage a prison adequately, which results in "barbaric conditions" should not have constitutional immunity simply because an inmate is unable to show that a prison official acted with the requisite mental intent.[101]

With this history and proposed standard in mind, it is appropriate to examine the research conducted on prison conditions

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97 Brown v. Plata, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting).

98 *Id.* (Scalia urged in his dissent that the mere existence of an inadequate system did not automatically subject the entire prison population to cruel and unusual punishment.).

99 *Farmer,* 511 U.S. at 855 (Blackmun, J., concurring) (quoting The Supreme Court—Leading Cases, 105 Harv. L. Rev. 177, 243 (1991)).

100 *Id.*

101 *Id.* at 855 (Blackmun, J., concurring).

of crowding and its connection to inter-prisoner violence. Determining the frequency and cause of inter-prisoner violence is vital for the future of Eighth Amendment violation challenges. While states may not leave inmates to the Hobbesian state of nature, their obligation extends only so far as reasonably protecting inmates. If inter-prisoner violence is not the result of the conditions but is rather a consequence of the fact that the most violent in our society are disproportionally represented in prisons, then both the remedies and responsibility on the state shrink.[102] However, if the data indicate that the inter-prisoner violence is the result of state determined conditions, inaction, or systemic management failure, then the court can more readily step in to force the states to remedy the violations.

IV. CONDITIONS OF CONFINEMENT THAT LEAD TO VIOLENCE: THE DATA

A. The Data

Prison overcrowding is one of the key contributing factors to poor prison conditions around the world.[103] It is arguably the single largest problem facing prison systems because its consequences range from deadly to preventing prison systems from fulfilling their basic roles and functions. The Constitution imposes on prison officials the duty to "take reasonable measures to guarantee the safety of the inmates."[104] When a state takes a person into their custody, the institution "has a corresponding duty to assume some responsibility for his safety and general well-being."[105] Often, the causal link between state-created conditions and the resulting harm are clear.[106] If the harm an inmate endures while incarcerated in

102 HANS TOCH ET AL., ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT (2002).

103 Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 Fordham L. Rev. 2351, 2351 (2000).

104 Hudson v. Palmer, 468 U.S. 517, 526–27 (1984).

105 County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998) (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989)).

106 Dolovich, *supra* note 32, at 908 ("The person who is placed in a cell with an inmate prone to violence and is raped or stabbed as a result, or whose serious medical needs are improperly

traceable to state-created conditions of confinement, then the conditions should fall within the reach of the Eighth Amendment.

The government argued for centuries that incarceration is simply a means of containing a criminal and not a method of punishment.[107] This argument reaches back to the 19th century, where prisons were thought of as a humane alternative to commonplace public mutilations and executions that were the primary means of punitive responses to criminal acts.[108] This argument persists today in that criminals are placed in prison not *for* punishment, but *as* punishment. However, "[t]he idea of punishment as the purpose of imprisonment is plain enough—the person who has committed a wrong or hurt must suffer in return."[109] But confinement is not simply custody alone, it does not exist in a vacuum. The conditions of confinement are just as much of a punishment as the years of life one loses during confinement.

The 1990's produced significant and expansive administrative and legislative attempts to change prison conditions to "make prisons more unpleasant" for what seems like purely punitive reasons.[110] These enactments came under the term of the "no frill prison and jail" movement.[111] A prison may not be crowded intentionally for punitive purposes, rather this can result from a multitude of factors,

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or inadequately treated by prison medical staff, or who suffers under conditions of extreme overcrowding and its attendant effects, is harmed by the conditions that the state, through the acts or omissions of its agents, has created for his confinement.").

107 GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON xi (1958).

108 Jonathan Simon, *Prison is Punishment Enough. But in the US, Inmates also Face Violence and Humiliation,* THE GUARDIAN (Apr. 9, 2015), https://www.theguardian.com/commentisfree/2015/apr/09/prison-punishment-violence-humiliation.

109 SYKES, *supra* note 107, at 9.

110 FRANKLIN E. ZIMRING & GORDON HAWKINS, DEMOCRACY AND THE LIMITS OF PUNISHMENT: A PREFACE TO PRISONERS' RIGHTS, IN THE FUTURE OF IMPRISONMENT, 157–178, 165 (Michael Tonry ed., 2004).

111 *Id.* (Some examples are that Arizona legislature eliminated weight-lifting equipment and charged a $3.00 co-payment for health care services in 1994. In 1995, Mississippi mandated that inmates wear stereotypical stripped uniforms with the word "convict" written across the back and banned televisions and other equipment in private cells. Other prisons reduced the number of items available for sale in the prison store, reduced the amount of property that inmates may keep in their cells.).

including predatory legislative decisions and a general disregard for inmate welfare.[112] It should make no difference whether the state-imposed conditions are intended for punishment or are a failure of the system if the result violates Eighth Amendment rights.

Prisons across the country are facing issues associated with overcrowding and the populations are anticipated to continue increasing in size.[113] One such issue is inter-prisoner violence. Research on the topic of prison violence, though conducted with different methodologies, continues to reach the conclusion that while there may be no bright line linking crowded prison conditions to inter-prisoner violence, crowding nonetheless poses significant challenges to successful inmate management.[114] It is worth noting that the data on prison violence may be unreliable or misleading because of administrative inconsistencies in uniformly reporting instances of violence and because prisoners may fear the consequences of self-reporting violent attacks.[115] These complexities notwithstanding, the data overwhelmingly shows that violence is still occurring in prisons at alarming rates.

Quantitative studies on prison violence began in the 1970s and epidemiological research followed soon after to provide insight into the frequency and characteristics of violence in prisons.[116] There are two primary approaches that emerged from this research. The first, the deprivation approach, is an earlier theoretical approach designed to explore whether prison crowding is a potential cause of inter-prisoner violence. The main assumption is that inmate misconduct is the result of prison conditions.[117] Under this approach, the prison

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112 Bruce Western, *The Prison Boom and the Decline of American Citizenship*, 44 SOCIETY 30, 31 (2007), https://www-proquest-com.ezproxy.lib.uh.edu/docview/206718144/abstract/DF17088A6D62481EPQ/1?accountid=7107.

113 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 25.

114 Chung, *supra* note 103, at 2355.

115 U.S. DEP'T OF JUST., CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND, 8–9 (2014).

116 Eleanor Taylor-Nicholson & Barry Krisberg, *Contagion of Violence: Workshop Summary, in* NAT'L RES. COUNS., CONTAGION OF VIOLENCE: WORKSHOP SUMMARY 78, 79.

117 Travis W. Franklin et al., *Examining the Empirical Relationship Between Prison Crowding at Inmate Misconduct: A Meta-analysis of Conflicting Research*, 34 J. OF CRIM. Justice 4. 401, 408

environment causes prisoners to behave in ways that are 'compatible with their condition' (the condition of imprisonment), meaning the inmates go through a process of 'prisonization' wherein inmates set up a social system that "directly opposes the existing authority."[118] This approach relies on the concept of 'pains of imprisonment' that are intrinsic to all experiences of imprisonment. These pains are deprivations, such as "loss of social acceptance, material possessions, personal security, heterosexual relations, and personal autonomy."[119] This approach argues that it is these deprivations alone that cause maladaptive violent inmate behavior.[120]

Prison crowding is a popular research variable within the deprivation approach. The problem with this approach for use in violence associated with overcrowding is that the pains of imprisonment are the purpose of the punishment of prison, it is part of the deterrent. The loss of liberty associated with incarceration is an acknowledged and accepted part of prison.[121] The deprivation approach fails to differentiate between typical pains of imprisonment and the realm of constant physical and psychological torture at the hands of other inmates. The more typical pains of imprisonment do not extend to egregious deprivations of constitutional rights. Further, the deprivation approach fails to account for how prison management practices can exacerbate or mitigate violence. The administrative-control approach responds to this gap.

The administrative-control approach considers administrative effects on inmate behavior.[122] "While the prison environment fosters particular inmate deprivations, it is its managerial shortcomings—such as insufficient staff training, high staff turnover, and poor security practices that result in prisons with higher rates of inmate

(2006).

118 *Id.* at 402.

119 *Id.*

120 John L. Worrall & Robert G. Morris, *Prison Gang Integration and Inmate Violence*, 91 THE PRISON J. 2 148–149, 131–157 (2012).

121 *See, e.g.*, Victor L. Shammas, *Pains of Imprisonment*, The Encyclopedia of Corrections, (2017). https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118845387.wbeoc020

122 Franklin et al., *supra* note 117, at 403.

misconduct."[123] This approach purports that properly managed prisons, despite their unavoidable deprivations, will be safer institutions for both inmates and staff. This approach differs from the deprivation approach because it claims that prison management has more impact on inmate behavior than reductions in liberty associated with the pains of imprisonment.

Crowding is an example of an administrative deficiency.[124] Prison administrators often attempt to mitigate the harms associated with crowding by implementing more severe reductions in liberty.[125] These restrictive policies intend to maintain order and control and reduce opportunities for violence. However, further reductions in liberty can cause more violence, "with limited exercise available in security units, the energies and tension which inmates formerly release in general population exercise period and other available diversions may have found an outlet in violent activity."[126] This approach argues that the remedy for violent prison conditions is to change the administrative practices, but it does not prescribe a set solution for violence nor does it address whether administrative methods of reducing violence only work in the short term.

When taken together, these two approaches indicate that changed prison conditions, whether the result of deprivations or administrative management, affect levels of inter-prisoner violence. Simply put, inmates behave differently in different prison settings. It is not immediately obvious that the clear answer is to combine both approaches because some argue that the solution to lack of control in prison is prison administrative changes, but efforts to control often result in prison administrators making decisions that further reduce inmate liberties. Inter-prisoner violence should, therefore, be examined through the nature of the prison environment the prisoners are subjected to and how the prison is managed. This interactionist

123 *Id.*

124 *See* Susan M. Campers, *A Failing Correctional System: State Prison Overcrowding in the United States*, Pell Scholars and Senior Theses. Paper 79. (2012), available at https://digitalcommons.salve.edu/pell_theses/79/.

125 Franklin et al., *supra* note 117, at 403. ("As the inmate population grows, the system may very well respond with certain corrective measures designed to compensate for the increased number of inmates in the population.").

126 Bottoms, *supra* note 17, at 239.

approach does not compartmentalize prison violence, rather it views inter-prisoner violence from a multitude of factors.

The concurring opinion in *Rhodes* offers support for a multi-faceted approach to prison violence.[127] There, Justice Brennan wrote that "a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances. Even if no single condition of confinement would be unconstitutional in itself, 'exposure to the cumulative effects of prison conditions may subject inmates to cruel and unusual punishment.'"[128] When utilizing a totality of the circumstances approach, an avoidable causation issue presents itself for inmates who want to challenge crowded prison conditions. There are other factors that may lead to an increase (or decrease) in inter-prisoner violence making it difficult for an inmate bringing an Eighth Amendment claim to prove that their injury was a direct result of overcrowding.

One such example of this causation issue can be seen in a case study of Rikers prison. Rikers is internationally known as one of the most violent and overcrowded jails in the United States.[129] After multiple inmate deaths, numerous lawsuits alleging extreme violence at the hands of prison officials and other inmates, and a two-year investigation by the U.S. Department of Justice, New York has decided to close Rikers by 2027 and will place the inmates in multiple smaller facilities around the state.[130] Prison officials hope these facilities will be safer and more successfully controlled.[131] The report by the Department of Justice addressed multiple conditions within the prison but in particular sought to uncover whether the prison adequately protected inmates from violence by other inmates.[132] The

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127 Rhodes v. Chapman, 452 U.S. 337, 362–63 (Brennan, J., concurring).

128 *Id.*

129 Kimberly Gonzalez, *A Timeline on the Closure of Rikers Island*, CITY & STATE N. Y. (Oct. 20, 2020), https://www.cityandstateny.com/articles/policy/criminal-justice/timeline-closure-rikers-island.html

130 *Id.*

131 Elizabeth Shafiroff, *Rikers Island: Prison Stories*, REUTERS (July 16, 2017), https://widerimage.reuters.com/story/rikers-island-prison-stories.

132 U.S. Department of Justice, *supra* note 115, at 1.

researchers utilized interviews with inmates and corrections officers, records (disciplinary, medical, policies and procedures, and training materials), video surveillance footage, consultations with experts, and reviews of data compiled by third parties.[133] The consultant used for the research stated that they had "never observed a system with such frequent inmate-on-inmate violence."[134] They found that the inmates in Rikers are subject to pervasive violence and a culture of fear due to the constant risk of physical harm while incarcerated.[135] The injuries that the inmates sustained were both physical and psychological, in interviews, "many inmates expressed constant fear for their personal safety" and some even expressed a preference for solitary confinement as opposed to the general population because of the extreme level of violence.[136]

The report did not identify crowding as a major source of violence, in fact the prison population at Rikers has been decreasing over the years—instead, the report explained this apparently negative correlation between overcrowding and violence noting that Rikers switched its solitary confinement policies during the period under study wherein the prison reduced the number of inmates it placed in solitary confinement due to public outcry against the practice.[137] This kept violent perpetrators, and those at risk of targeted attacks, in general confinement. The report instead added to evidence showing that 'age' is most consistently related to levels of prison violence. This is consistent with various studies that continue to show that younger inmates are overwhelmingly the most common "perpetrators of violence."[138]

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133 *Id.* at 2.

134 *Id.* at 9 (In FY 2013, there were 845 reported inmate-on-inmate fights. This marked an increased from the 795 reported fights in FY 2012. Many of the fights involved the use of weapons, which are widespread at Rikers).

135 *Id.* at 7.

136 *Id.* at 7–8.

137 Reuven Blau, *Violence at Rikers Island is Highest in a Decade Despite Thousands of Fewer Inmates,* N.Y. DAILY NEWS (July 16, 2015, 2:30 AM), https://www.nydailynews.com/new-york/nyc-crime/exclusive-rikers-island-violence-inmates-article-1.2293775.

138 Franklin et al., *supra* note 117, at 426.

Overall, the Rikers report shows that violence levels may never reach zero but that is not a justification to allow states and prison administrators to shirk their constitutional obligations to provide for inmate safety. The next section explores three case studies that focus on the connection between prison crowding and systemic management deficiencies to a heightened level of inter-prisoner violence.

B. Case Studies

1. Alabama Prison System

Alabama has one of the most overcrowded and violent prison systems in the nation and is fourth highest in the nation for incarceration rates.[139] According to recent data published by Alabama Department of Corrections ("ADOC"), Alabama's prisons have a system-wide occupancy rate of 165%.[140] While overcrowding is not inherently an Eighth Amendment violation, it can cause and exacerbate unconstitutional conditions as it did in this case study.[141]

The investigation by the Department of Justice ("DOJ") spanned the period of 2016-2019. The investigation focused on whether the ADOC adequately protected inmates from physical harm at the hands of other inmates and whether the ADOC provided inmates with safe and secure living conditions.[142] The investigation was conducted with the assistance of expert consultants in correctional practices and gathered data through prison interviews, incident report review, site visits, medical records, and prison administrative

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[139] U.S. Department of Justice. Notice Regarding Investigation of Alabama's State Prisons for Men United States Department of Justice Civil Rights Division United States Attorney's Offices for the Northern, Middle, and Southern Districts of Alabama. 8 (2019) ("In 2013, Alabama had an imprisonment rate of 646 per 100,000 residents—the fourth highest in the nation and well above the average U.S. incarceration rate of 417 per 100,000 residents. The Alabama rate was well above the rates for other similarly situated states, such as Georgia and South Carolina.").

[140] *Id.* at 8 ("ADOC houses approximately 16,327 prisoners in its major correctional facilities, but the system was designed to hold 9,882.").

[141] *Id.* (*See* Rhodes v. Chapman, 452 U.S. 337, 347–50 (1981); Collins v. Ainsworth, 382 F.3d 529, 540 (5th Cir. 2004); French v. Owens, 777 F.2d 1250, 1252–53 (7th Cir. 1985) (holding that overcrowding was unconstitutional where it led to unsafe and unsanitary conditions).

[142] *Id.* at 3.

policy review. The study found that the conditions of the prisons are objectively unsafe, that ADOC prison officials were often deliberately indifferent to the harm of serious risk facing the inmates, that the ADOC fails to protect inmates from (substantial risk of) serious harm, and that the ADOC has failed to correct known systemic deficiencies that contribute to the extreme levels of inter-prisoner violence.[143] In utilizing a 'totality of the circumstances' approach, the results of the study concluded that overcrowding combined with understaffing is the driving force behind inter-prisoner violence in Alabama's prisons.[144] This combination creates an environment "rife with violence."[145]

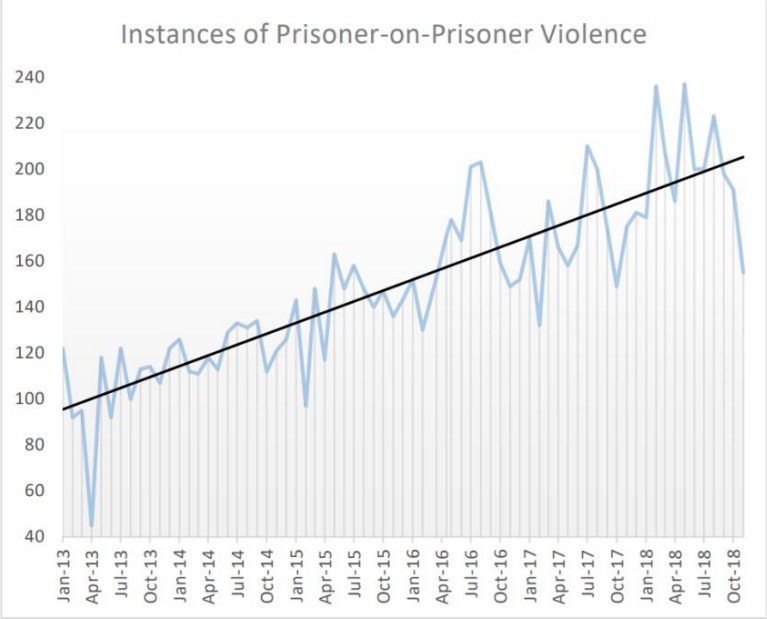

Chart 1: ADOC's reported instances of prisoner-on-prisoner violence

143 *Id.* at 5–6.

144 *Id.* at 9.

145 *Id.* at 5.

The ADOC does not have enough staff to maintain order in its overcrowded prisons.[146] While inadequate staffing ratios are not inherently violations of the Eighth Amendment, they can facilitate violence and illegal activity between inmates.[147] The staff at the ADOC were frequently unable to protect inmates from violence, even with advance notice that inmates may be in danger.[148] The investigators concluded that the ADOC's "incident reports demonstrate a strong pattern of evidence of deficient supervision and ADOC's systemic failure in its duty to "provide humane conditions of confinement" and to "take reasonable measures to guarantee the safety of the inmates."[149]

The current Eighth Amendment test employed by the Court is insufficient to challenge even conditions as awful as those described above. In 2016, the Alabama Supreme Court decided, *Ex parte Alabama Department of Corrections et al*, in favor of the prison because the plaintiff (on behalf of the deceased) could not prove the guards exhibited deliberate indifference to the deceased's safety.[150] Tyus Elliott had an altercation with another inmate over a contraband cell phone and the two were separated and made to sign a "living agreement" that stated they would live peacefully.[151] After a few hours of segregation and a determination that one of the inmates should be moved to another dorm for their safety, the prison captain told the inmate that he could return to the same dorm the altercation occurred in.[152] When asked by another prison official why he was going to send the inmate back, the Captain responded that he "didn't

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146 *Id.* at 9 (quoting *Van Riper v. Wexford Health Sources, Inc.,* 67 F. App'x 501, 505 (10th Cir. 2003) ("When prison officials create policies that lead to dangerous levels of understaffing and, consequently, inmate-on-inmate violence, [there is a violation of the Eighth Amendment.]")).

147 *Id.* at 17.

148 *Id.* at 14 ("Our investigation uncovered numerous instances where prisoners explicitly informed prison officials that they feared for their safety and were later killed. In other cases, prisoners were killed by individuals with a lengthy history of violence against other prisoners.").

149 *Id.* at 18.

150 *Ex parte* Ala. Dep't. of Corr., 201 So. 3d 1170, 1184 (Ala. 2016).

151 *Id.* at 1173.

152 *Id.* at 1174.

give a damn if they killed each other."[153] When the inmate returned to the dorm the two inmates re-engaged in a violent altercation that resulted in Elliott dying from a stab wound.[154] Even in this circumstance, the court held that not enough evidence was presented to prove that the prison officials violated constitutional laws.

This Alabama case study highlights critical components of this paper's argument. First, overcrowding is a significant factor to constitutional violations and rampant inter-prisoner violence. Second, the investigation shows why the Court needs to step back into the realm of the Eighth Amendment and work to protect inmates' constitutional rights without a subjective requirement. The ADOC has long been aware of the objective risk that the conditions in its prison system pose to inmates, yet the state has done little to address the shockingly violent conditions. Alabama is an example of what can happen when states can determine their own remedies on their own timelines. When the courts are removed as arbiters of decision making on Eighth Amendment claims states will act in ways that continue to violate inmates' rights.

2. *Brown v. Plata, California*

In *Brown v. Plata*, the Supreme Court affirmed, in a narrow 5-4 majority, that overcrowding in the California state prison system had overtaken the limited resources of prison staff, imposed demands well beyond the capacity of medical and mental health facilities, and created unsanitary and unsafe conditions.[155] The Court upheld the lower court's order that California must reduce its state prison population to 137% of capacity to attain a reasonable level of safety.[156] Severe prison crowding led to violations of inmate's constitutional rights, specifically, prison crowding hindered California's ability to provide for inmate's basic health care.[157] This decision came against the backdrop of a decades long history of

153 *Id.*

154 *Id.*

155 Brown v. Plata, 563 U.S. 493, 518–19 (2011).

156 *Id.* at 540–41.

157 *Id.*

inmate abuse in California prison systems and the state's continued failure to address the critical violations.

The court-mandated population limit became necessary to remedy violations of California inmates' Eighth Amendment rights. Justice Kennedy, writing for the majority, detailed the atrocities present in the prisons including 54 inmates sharing a single toilet, suicidal inmates locked in telephone booth sized cages for days at a time, and that preventable death occurred, on average, about once a week.[158] The court-mandated population limit order allowed California to provide a flexible plan and decide for itself how to adequately address the concerns. The majority found that overcrowding of California's prisons was the "primary cause" of the Eighth Amendment violations and that the legislature had either been unwilling or unable for up to 16 years to find the financial resources necessary to remedy the problems.[159] The Court noted that "[p]risoners are dependent upon a state for food, clothing, and necessary medical care. When the State fails to provide such necessities, it may constitutionally violate the prisoners' rights. It may be left to a court to remedy the constitutional violation which may include reducing a prison's population."[160]

Brown is an interesting divergence from recent Supreme Court responses to prison conditions. The Court went against the recently established principle of deference to state decision making in favor of a group, inmates, who are both politically unpopular and not subject to wide judicial protections historically. Some may argue that *Brown* shows the current standards are working, that when things get bad enough the Court will intervene. However, the conditions in the California prison system were extreme and the decision was decided narrowly. *Brown* is rooted in the impact overcrowding has on access to medical care specifically. The Court has been more willing to protect and expand inmate's rights to health care. Additionally, courts should not have to wait until the violations reach dire levels as they did in *Brown*. The violations present in California persisted for

158 *Id.* at 502–03.

159 *Id.* at 514–17.

160 *Id.* at 510–11.

years and remained uncorrected.[161] If the Courts are only to step in at the last possible moment, the statement that a prisoner seeking a remedy for unsafe conditions does not need to await a tragic event before obtaining relief becomes a seemingly moot point.[162] However, *Brown* remains important because the Court definitively ruled that overcrowding, at least at some point, can lead to violations of the Eighth Amendment.

3. Government Accountability Office

A 2011 report from the Government Accountability Office ("GAO") provides further evidence of how prison conditions, including but not exclusively overcrowding, lead to inter-prisoner violence and again suggest that the Constitution permits courts to intervene where overall prison conditions create a severe risk of such violence.[163] This report focused on the Bureau of Prisons in five different states. It showed that "the increasing inmate population and [decreased] staffing ratios negatively affect inmate conduct and the imposition of discipline thereby affecting security and safety."[164] Growth in population impacts "inmates' daily living conditions, program participation, meaningful work opportunities, and visitation."[165] Due to crowded conditions, prisons are routinely double and triple bunking (pictured) and placing temporary beds in collective spaces, which means that more inmates are sharing cells and are brought into close confines, "which brings together for longer periods of time inmates with a higher risk of violence and more potential victims."[166] The crowding in the facilities did not only impact housing, it also results in reduced shower times, shortened mealtimes, longer wait times for meals, and largely reduced recreational opportunities.[167]

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161 Brown v. Plata, 563 U.S. 493, 499 (2011).

162 Helling v. McKinney, 509 U.S. 25, 33–34.

163 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 25.

164 *Id.*

165 *Id.* at 18.

166 *Id.*

167 *Id.* at 19 (Pictured: inmates sleep in converted gym at a correction facility in California, at

In addition to severely reduced personal space, the crowding leads to idleness because of reduced program opportunities.[168] The benefits of inmate programming (such as educational programs, rehab, faith-based activities) are increased public safety because of more successful inmate integration back into society and institutional safety because the programs reduce inmate idleness.[169] The GAO reported that there is a connection between reducing inmate idleness and increasing the safety and security of the institution for both the inmates and the officials.[170] This same finding was in the Rikers investigation. Crowding also hinders visitation, and the research

twice its capacity).

168 *Id.*

169 *Id.* at 19–20.

170 *Id.* at 18 ("If you start cramming more and more people into a confined space, you're going to create more tensions and problems," noted David Maurer, director of Homeland Security and Justice Issues for the GAO. "It creates the possibility that someone's going to snap and have a violent incident.").

used by the GAO shows that the quality of interaction between an inmate and their family can positively impact behavior in prison.[171]

The key point of this report is that overcrowding contributes "to increased inmate misconduct, which negatively affects the safety and security of inmates and staff."[172] The report found that the BOP has acted within its authority to try and mitigate the effects of crowding, and have done so by implementing policies that essentially further reduce inmate liberties by confining inmates to their cells and reducing mingling, and also utilized solitary confinement for disciplinary and protective purposes.[173] However, the GAO notes that administrative practices may only counter the negative effects of increased crowding in the short term, but that population pressures will continue to have a steady impact on prison violence until the population decreases to a manageable size.[174] This gives further weight to the argument that administrative practices that reduce inmate liberties in the attempt to mitigate violence work only in the short term. Long term solutions to inter-prisoner violence must include plans to reduce overcrowded facilities.

C. **Data Conclusions**

Crowding poses ever increasing challenges to effective and humane operations of facilities across the country.[175] Violence exists in prison, regardless of whether there are conditions of overcrowding or not. But the data shows that where conditions of overcrowding exist, the higher the likelihood that an observer is going to see elevated levels of violence. Prolonged exposure and forced close contact with offenders who may have long histories of violence deprive inmates of any feelings of safety or security. The constant fear of bodily harm or death, constantly preparing to fight for self-preservation creates an acute anxiety; inmates have nowhere to

171 *Id.* at 21.

172 *Id.* at 25.

173 *Id.* at 28–29.

174 *Id.* at 26–27.

175 JACOBS, *supra* note 66, at 193.

escape this constant fear of violence, with their only option being to retreat into other parts of the prison or join gangs for protection.[176]

In all investigations, prison officials had some form of awareness of the high incidence of inter-prisoner violence but often failed to take what one would assume to be reasonable steps in ensure inmate safety.[177] The data shows that crowding creates persistent problems in controlling disruptive, violent, and resistive inmates.[178] This is not a recent or novel conclusion. District courts have repeatedly found that overcrowding is the root cause contributing to the 'deplorable' conditions in prison.[179] Because crowding is the result of state action, the state is ultimately responsible for the consequences that result from overcrowding. The states have repeatedly shown indifference to the violations inmates are facing in their prisons. The statutory and limited judicial remedies available to inmates are no longer enough. The court cannot stand idly by and allow states to continue diminishing Eighth Amendment protections.

CONCLUSION

Due to the cultural disregard for the conditions that incarcerated people endure, only the "most severe and exceptional cases" of suffering often result in public outcry.[180] There is a high level of "public apathy" that when combined with the "political powerlessness" of inmates has resulted in rampant systemic neglect.[181] Incarcerated, or formerly incarcerated, individuals are "vote-less, politically unpopular, and socially threatening."[182] It is

176 U.S. DEPARTMENT OF JUSTICE, *supra* note 115, at 5 ("some prisoners sleep in dormitories to which they are not assigned in order to escape the violence.").

177 *Id.* at 8.

178 ZIMRING & HAWKINS, *supra* note 110, at 166.

179 Mobile Cty. Jail Inmates v. Purvis, 551 F. Supp. 92, 94 (S.D. Ala. 1982) ("'Overcrowding is the root and basic problem' contributing to the deplorable physiological and psychological effects of the Mobile County Jail.").

180 Rhodes v. Chapman, 452 U.S. 337, 357–58 (1981) (Brennan, J., concurring).

181 *Id.*

182 N. Morris, *The Snail's Pace of Penal Reform*, in Proceedings of the 100th Annual Congress of Correction of the American Correctional Assn. 36, 42 (1970).

true that the inmate is an unsympathetic case for limiting the power of the state to punish, but society must defend those limits. One does not need to imagine themselves incarcerated to "feel threatened by a government that is without restraints in its capability to punish as it chooses."[183]

There is a deal made between society and the state when incarceration is employed as the primary means of criminal punishment. Society finds relief in removing convicts from the public sphere, but in doing so the state creates its own obligation to maintain prison conditions that meet and protect inmates' daily needs for the duration of their exile. Some argue that inmates should not receive any benefits that free people do not, but as *Estelle* made clear, there are certain rights that exist in prison that do not exist for free people.[184] If society wants "the benefits of incarceration, [it] must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world."[185] In sum, it is not a question of what standard of living inmates deserve, but rather what constitutional requirements are imposed on a state that chooses to incarcerate people.

Prison conditions are fundamentally different from punishment at the hands of state officials. Our society has chosen to punish people, no longer through stoning and public hangings, but rather by exile to prison. Because of this, society has created new demands for how those incarcerated should be treated and we must continually change the limits within which those demands should be fulfilled.[186] State-by-state considerations should be made to determine how to reduce inmate populations to manageable levels. Those public policy decisions are not within the scope of this paper. States may have a choice in deciding how to make their prison populations more manageable and less violent, but states do not have the ability to ignore this problem any longer.

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183 ZIMRING & HAWKINS, *supra* note 110, at 176.

184 *See* Estelle v. Gamble,, 429 U.S. 97 (1976).

185 Dolovich, *supra* note 32, at 892.

186 SYKES, *supra* note 107, at 39.

The courts should not intervene based on the mere belief that conditions in a prison will create a heightened risk of violence. Rather, the court should intervene where the state has shown its unwillingness or inability to address and remedy conditions that will lead to systemic Eighth Amendment violations.[187] While courts should be mindful of state-by-state considerations, the courts should not have to wait until the systemic violations reach critical levels to intervene. When a claim is brought, the court should employ only the objective component of the Eight Amendment test as it currently exists. The subjective component should be limited to those circumstances where a prison official was somehow involved in violence affecting individual inmates. The objective test is better suited to apply to prison conditions that lead to inter-prisoner violence because it both comports with evolved standards of decency and it can be more effectively applied to long term systemic management failures affecting the many.

The judiciary cannot "shrink from their obligations to ['enforce the constitutional rights of all 'persons,' including prisoners.'"[188] With the courts in retreat, and a general unwillingness by the states and prison administrators to act, inmates have nowhere left to turn. Access to effective complaint and redress systems are indispensable to a democratic system. The courts must be involved in Eighth Amendment claims. The judiciary must be reasserted as the final arbiter of decisions on Eighth Amendment violations if the constitutional rights of Americans are to be upheld and defended, even during times of incarceration.

187 *See* Brown v. Plata, 563 U.S. 493, 511 (2011).

188 *Id.* (quoting Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curium)).

COVID-19[189]

In the wake of the COVID-19 pandemic, local and federal governments have overwhelmingly failed to cope with the consequences of the virus in every arena of American life, the prison system is no exception. The large prison population in the United States coupled with the rampant spread of the virus creates an Eighth Amendment inquiry into constitutionally acceptable conditions of confinement during a viral pandemic. The topic is too broad to give adequate consideration to in an afterword, but it is worth acknowledging the ways that this virus may shape future discussions of imprisonment in the United States.

COVID-19 poses a serious threat to those confined in close quarters, such as jails, prisons, and detention centers.[190] Prison architecture increases transmission and creates conditions in which slowing the spread is more difficult. The Center for Disease Control ("CDC") has published guidance directed at correctional and detention facilities in an attempt to protect inmates and prepare facilities for the pandemic. The guidance documents include advice such as maintaining a supply of cleaning products that inmates can access, having personal protective equipment ("PPE") on site, disinfecting facilities frequently, and implementing social distance strategies.[191] However, the issuance of guidance documents does not mean that the procedures are implemented. The Texas Department of Criminal Justice ("TDCJ") has failed to implement effective policies to mitigate viral contagion. Rather, the TDCJ has offered vague policy

[189] Discussing the intersection of COVID-19 and the American prison system necessarily involves acknowledging racial disparity of those imprisoned. Black inmates are over-represented in jails, prisons, and detention centers which have specific viral concerns and risks due to congregate living and shared food services. The totality of these circumstances creates a crueler and more unusual sentence. One that may become an inadvertent death sentence for the most vulnerable inmates.

[190] Evelyn Cheng and Huileng Tan, *China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons*, CNBC (last updated Feb. 21, 2020, 3:41 AM), https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html (noting that China has reported 500 new cases of COVID-19 in prisons).

[191] *CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correctiondetention/guidance-correctional-detention.html (last updated July 22, 2020).

initiatives, while continuing to engage in practices that put inmates in conditions of increased risk of exposure.[192]

While *Estelle v. Gamble* provided less guidance in the prison violence context, it is authoritative on medical concerns and could be more powerfully applied to constitutional concerns arising from COVID-19. The Estelle decision established that "deliberate indifference" to serious medical needs of inmates constitutes wanton and unnecessary infliction of pain.[193] Estelle holds that "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "'evolving standards of decency'" in violation of the Eighth Amendment."[194] In *Estelle,* the Supreme Court noted that principles of evolving standards of decency establish a governmental obligation to "provide medical care for those whom it is punishing by incarceration."[195] Where the prison fails to meet these needs, "[i]n the worst cases, such a failure may actually produce physical "torture or a lingering death."[196] Pain and suffering serve no penological purpose. Subjecting inmates to crowded conditions during a viral pandemic is deeply inconsistent with contemporary standards of decency. Estelle establishes that where inmates rely on prison officials, and the officials fail to treat their medical needs with deliberate indifference, they violate the Eighth Amendment. But can this precedent apply in instances where the failure to act occurs prior to the need for medical treatment? Inmates must necessarily rely on prison officials to mitigate the need for treatment in the first place where a viral pandemic is spreading quickly. In this situation, there is not an "inadvertent failure to provide adequate medical care[,]"[197] but rather the failure to mitigate the harms of the virus and the failure to slow

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192 Complaint at 2, Valentine v. Collier, No. 4:20-cv-01115 (S.D. Tex. filed Mar. 30, 2020) (Complaint articulating various failures of the TDCJ to protect inmates from the spread of COVID-19)

193 Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

194 *Id.*

195 *Id.* at 103.

196 *Id.*

197 *Id*. at 105.

the spread is action by prison, local, and state officials. The failure to protect inmates from exposure to the virus seems to be an unnecessary and wanton infliction of pain, where the inmate could have avoided the exposure had the facility undertaken population reduction measures.

The government has an obligation to maintain prisons in a manner that reasonably guarantees inmate safety. As discussed previously, states cannot leave inmates to a Hobbesian state of nature with no ability to defend themselves. Forcing inmates to live in crowded conditions while simultaneously depriving them of any means of protection during a pandemic can be nothing, if not cruel. Using the example of exposed electrical wiring, forcing inmates to live in severely crowded prison conditions during a pandemic similarly creates an environment in which inmates experience a constant threat to their personal safety.[198] Prison crowding, standing alone, is not a cruel and unusual condition, but where prison crowding exists in the context of a viral pandemic, it becomes cruel and unusual as inmates are forced to remain in cramped conditions where the virus can easily spread.

At the final edit of this paper, at least 2,564 COVID-19 related inmate deaths have been reported among prisoners and over 394,994 cases of COVID-19 have been confirmed by the Marshall Project.[199] It is not clear at this time how COVID-19 is going to impact Eighth Amendment precedent, but what is clear is that the conditions prison inmates have been subjected to in this country during this crisis resulted in an inadvertent death sentence for some, and a great deal of suffering for others. The United States is a world leader in many ways, incarceration being the most shameful. The system must change, and it is my hope that the horrors of this pandemic can shine light on the suffering of those incarcerated so that discussions concerning constitutional conditions of confinement continue and real change can be actualized.

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198 Helling v. McKinney, 509 U.S. 25, 34 (1993) (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (finding that such conditions exposed inmates to a constant threat against their personal safety)).

199 THE MARSHALL PROJECT, A STATE-BY-STATE LOOK AT CORONAVIRUS IN PRISONS, (updated Apr. 16, 2021), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.