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Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual

Brittany L. Glidden, University of Denver
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It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.

- Nelson Mandela

Introduction

Imagine that a man is held in solitary confinement for thirty years. For three decades he eats every meal alone in his cell, “exercises” by himself in an outside cage, and is only touched when handcuffs are placed on him. As a result of the prolonged isolation he suffers mental anguish and develops severe depression. Should this treatment be deemed constitutionally acceptable? Does it matter if the prisoner was placed there because he killed a prison guard? What if he was subjected to this treatment at random?

The Eighth Amendment forbids the Government from inflicting “cruel and unusual punishments” on individuals convicted of a crime. The Supreme Court has interpreted this language to provide a means for prisoners to challenge their conditions of confinement while in custody. As such, inmates can bring legal action against prison officials, for conditions such as inadequate food or freezing cell temperatures. To assert an Eighth Amendment conditions of confinement claim, a prisoner must demonstrate: 1) that the challenged conditions he faces are “sufficiently serious” and 2) that the prison officials acted with deliberate indifference to the condition. These are known respectively as the objective prong (i.e. whether the condition is “bad” enough to merit protection) and the subjective prong (i.e. whether the prison officials had a mindset that was inappropriate).

1 Visiting Assistant Professor, University of Denver Sturm College of Law. I would like to thank the many people who gave me invaluable insights, feedback, and assistance in writing this paper, including Laura Rovner, Tammy Kuennen, Alan Chen, Sara Norman, Lindsey Webb, Kevin Lynch, Eric Frankin, Peggy Collins, Blake Glidden, and Dave Rolnitzky.

2 NELSON MANDELA, LONG WALK TO FREEDOM 174-75 (1994).

3 U.S. CONST. amend. VIII.


6 As over 90 percent of prisoners in the United States are male, I use the masculine pronoun to refer to the average “prisoner” throughout the article. See Heather West & William Sabol, Prisoners in 2009, BUREAU OF JUSTICE STATISTICS (December 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (finding 92.9% of prison population is male).


8 Id.; see also Smith v. Cochran, 339 F.3d 1205, 1212 (10th Cir. 2003); Thaddeus-X v. Blatter, 175 F.3d 378, 402
The current two-part conditions test is largely uncontroversial. The test is universally accepted and cited by the Supreme Court and all lower courts addressing Eighth Amendment claims that any particular condition is “cruel and unusual.”9 Perhaps for this reason it has received limited criticism from courts and commentators,10 especially when compared to the abundant scholarly attention given to other areas of Eighth Amendment jurisprudence, such as criminal sentencing.11 That lack of controversy could be an indication that the test is working effectively, however, in this article I argue that the test is confusing, inconsistent, and failing to serve its intended purpose.

I posit that many of the problems arising from the current test stem from a central issue with the Eighth Amendment conditions test: that it lacks a coherent theoretical basis. Jurists, like most of society, wish to intervene when they see deplorable conditions, regardless of the cause. But they also respect the difficult work of prison officials and do not want to hold them liable under the Eighth Amendment when their intentions were for legitimate purposes, or when they simply made a mistake. Without secure theoretical footholds, jurists still wrestle with whether the Eighth Amendment serves to protect prisoners from any inhumane conditions, or only prohibits those instances where prison officials acted with a demonstrable bad intent.

The impact of this struggle is apparent in each prong of the Eighth Amendment conditions test. The “objective” prong purports to measure the “seriousness” of the challenged condition, but closer scrutiny of courts’ analyses of this prong reveals insufficient methodology to determine what makes a condition “serious.” When a prisoner raises a novel challenge to a condition, courts have no means to assess the seriousness of the condition apart from each jurist’s innate sense of what is acceptable. Consequently, the decisions within the objective prong are based on subjective regional, political, and personal motivations and biases—leaving jurists and prison officials uncertain as to what conditions violate the Constitution and require court intervention.

Without consistent criteria for determining what constitutes a “sufficiently serious”

(6th Cir. 1999).

9 While excessive force cases—which also challenge prison conditions or treatment—use this two prong test, the mindset requirement is heightened. See Wilkins v. Gaddy, 130 S.Ct 1175 (2010).


11 This point is generally illustrated by a Westlaw search. A search of journals and law reviews for articles with the terms “eighth amendment” and “sentences or sentencing” yields nearly 9000 results, while a search for “eighth amendment” and “prison conditions” or “conditions of confinement” only yields 2150 results. See, e.g., John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 Va. L. Rev. 899 (2011); William W. Berry III, Separating Retribution From Proportionality: A Response to Stinneford, 97 Va. L. Rev. In Brief 61 (2011); Michael M. O’Hear, Mandatory Minimums: Don’t Give Up on the Court, 2011 Cardozo L. Rev. 67 (2011); Mary Berkheiser, Death is Not so Different After All: Graham v. Florida and the Court’s ‘Kids are Different’ Eighth Amendment Judisprudence, 36 Vt. L. Rev. 1 (2011).
condition, the intent of the prison officials who allowed or created that condition has crept into this “objective” analysis. In their attempt to hold accountable only those prison officials who have inappropriate reasons for their actions, courts will often factor into the analysis the reasons underlying the challenged condition. This examination of governmental interest in the prison condition (which occurs both explicitly and silently) and the resulting deference to the correctional officers has resulted in the objective prong being turned on its head: it now often hinges on the subjective motivations of the people it is intended to monitor.

This impulse of judges to want to know the reason for a condition in order to assess its seriousness is normal. A prisoner placed into solitary confinement for two years for a violent incident is inherently different from a person placed there for no reason at all. Yet the Supreme Court has never clarified whether a subjective assessment of the reason for a condition is part of the first prong, the second prong, or has no place in the analysis. Lower courts have disagreed about the place of the prison official’s penological intent in Eighth Amendment conditions cases—that is, whether it is appropriately considered as part of the objective or subjective prong—and also about the weight it should be given regardless of where it fits. As a result, the test as currently employed fails to provide sufficient guidance to a court faced with any novel challenge to a prison condition.

In order for liability to be established, the two-prong test also requires defendants to have the mindset of “deliberate indifference.” Determining an individual’s intent is difficult in any context, but many challenges to prison conditions necessarily confront the ongoing practices and policies of an entire correctional system, where neither the enactment of the policy (when the harm was unknown) nor the actions of the prison staff (who are required to follow the policy) result specifically from an intent to harm prisoners. When a condition is ongoing, many courts seem to infer intent on the part of prison defendants as they are unwilling to allow the conditions to persist. I argue that this impulse toward objectivity in the form of inferred intent should be made explicit in injunctive cases, because when harmful conditions are allowed to persist, there is culpability even without proof of mindset. Inferring intent in injunctive cases is more efficient, and allows the courts to interfere where society has the highest interest, where harmful conditions persist.

Part I of the article gives background on the origins of the Eighth Amendment doctrine concerning prison conditions, and identifies persistent conflicts regarding the theoretical underpinnings for the doctrine. That history provides context for Part II’s description of the problems plaguing the current two-part Eighth Amendment test, both in the objective and subjective prongs.

Part III includes a brief examination of the theoretical basis underlying other areas of Eighth Amendment jurisprudence, including those challenging criminal sentences, fines, and method of execution cases. This review demonstrates that nearly all of these doctrines rely on a determination of the “excessiveness” of a given punishment, a proportionality analysis that is absent from conditions cases. Part III considers whether proportionality review can be imported into the context of challenges to prison conditions, and the benefits and drawbacks to doing so.

Part IV discusses how the two-prong conditions test should be modified to address these concerns. First, I argue that the current “objective” test should include a balancing test reviewing the “excessiveness” or “proportionality” of a given condition. This analysis would
expressly permit courts to consider the prison condition in light of the purpose for which it is employed. Second, I urge courts, under the “subjective” prong, to infer intent in injunctive cases. This inference will promote efficiency and will ensure that ongoing harmful conditions are stopped.

This modified version of the two-prong test would maintain the two foci of current Eighth Amendment conditions law—the significance of the harm of the challenged condition and the intent of the prison official in creating or prolonging it. Yet the modifications would allow a framework that more cleanly aligns with societal means of identifying what is cruel, and societal interest in ensuring that our prisons do not perpetuate cruel conditions of confinement.

PART I: Are Prison Conditions “Punishment”?: The Debate Underlying the Eighth Amendment’s Application to Conditions of Confinement.

To be considered punishment, a penalty or negative action must be intentionally inflicted, usually in response to an offense. While it is axiomatic that criminal sentences are purposefully prescribed, there is reasonable disagreement as to whether prison conditions are imposed intentionally and therefore constitute “punishment.” Unlike criminal sentences or fines, prison conditions are neither dictated by state statute nor ordered by a judge. Usually a prisoner’s conditions do not even directly relate to his crime of conviction. Rather, conditions can result from purposeful action (such as the use of handcuffs and restraint chairs) or from circumstance (such as asbestos or overcrowding). Because conditions are not always the result of intentional conduct on the part of prison actors, courts have vacillated on the question of whether they qualify as punishment.

Prior to the mid-1900s, there was no doctrine that permitted prisoners to challenge their conditions of confinement. Courts adopted what was retrospectively referred to as the “hands-off” doctrine, refusing to interfere in prison matters because they believed it would be disruptive and would implicate separation of powers concerns. The growth of the social services movement during the 20th century began to change this view. As the government assumed additional responsibilities of care for its citizens and the civil rights movement took hold, a more

13 Reinert, supra note 10, at 74-75; Sharon Dolovich, supra note 10, at 885 (2009). In the past, some conditions—such as hard labor—were specifically imposed as part of a sentence. See generally Amy L. Riederer, Note, Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor, 43 VAL. U. L. REV. 1425 (2009).
14 Adam Kolber describes how a person’s experience in prison can vary greatly based factors—including location, funding, management, and luck—that do not result from his crime of conviction. Adam Kolber, Unintentional Punishment, LEGAL THEORY (forthcoming 2012). Certain crimes, however, will dictate some conditions of confinement. For example, a prisoner convicted of sex crimes often are placed in “protective custody” units. See Michael S. James, Prison is ‘Living Hell’ for Pedophiles, ABC NEWS (Aug. 26, 2003).
17 Id. at 171-72.
protectionist mentality developed toward prisoners. Gradually prisoners began to assert their rights, and courts became more receptive to addressing the most egregious conditions and inhumane treatment.

In the mid-1900s, the judiciary faced many cases involving extreme suffering and dangerous conditions within the prisons. The courts had to determine whether these claims were actionable under the Eighth Amendment. At that time, prison conditions were indisputably harsh, unsanitary, and verging on anyone’s definition of inhumane. Perhaps in response to these extreme situations, some lower courts in the latter half of the 1900s began to affirmatively deem some conditions of confinement to be “punishment,” and found many to be illegal under the Eighth Amendment.

The Supreme Court would soon follow suit. In 1976, the Court held in Estelle v. Gamble that prison conditions could constitute punishment, though the Court did not directly answer the question of when a condition was punishment and when it was not. In Estelle, the prisoner claimed he had back pain and alleged that the prison staff had not provided him with adequate medical care. In determining whether the actions of medical staff qualified as “punishment” within the meaning of the Eighth Amendment, the Court first focused on the prison system’s affirmative duty to provide medical treatment, stating: “An inmate must rely on prison authorities to treat his medical needs; if authorities fail to do so, those needs will not be met.” The Court also held that there was no penological interest in denying care, as “denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose...Such unnecessary suffering is inconsistent with contemporary standards of decency.” Despite establishing a duty to provide medical care, the Court held that the prison staff was not liable for the failure to provide medical care to Mr. Gamble as their actions did not demonstrate that they had a culpable mindset, characterized as deliberate indifference.

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18 Id. During this time the Eighth Amendment was incorporated against the states, broadening its potential application to state prisons. Robinson v. California, 370 U.S. 660 (1962).
20 A thorough history of these conditions can be found in THE OXFORD HISTORY OF THE PRISON, supra note 16, at 152-57. The conditions in “most state prisons” at this time were “grossly deficient” in that they were overcrowded, had rampant abuse, and inadequate management. See also Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (in dissent) (finding conditions in a number of prisons to be “deplorable” and “sordid”).
21 See, e.g., Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (holding doctor's decision to throw away the prisoner's ear and stitching the stump may be attributable to deliberate indifference); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974) (finding actionable the injection of a prisoner with penicillin despite knowledge that prisoner was allergic, and subsequent refusal to treat allergic reaction); Jones v. Lockhart, 484 F.2d 1192 (8th Cir. 1973) (refusal of paramedic to provide treatment found actionable); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970) (claim stated where prison physician refused to administer the prescribed pain killer and rendered leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949) (addressing cruelty of a chain gang and finding it violated the Eighth Amendment).
22 Id. at 97.
23 Id. at 103.
24 Id. at 103.
25 Id. at 103-04. While lower courts had already used the Eighth Amendment as a limitation on harmful conditions of confinement, this type of litigation “mushroomed” after Estelle. Pugh v. Locke, 406 F.Supp. 318, 328 (D. Ala. 1976). In 1981, there were twenty-four states with system-wide consent decrees in place, resulting from findings that the conditions therein violated the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337, 353 (1981).
Over the next decade, the Supreme Court and the lower courts grappled with the question of what *Estelle* required to successfully raise a challenge to a prison condition.\(^{27}\) The debate converged on the central question, left largely unanswered by *Estelle*: was the purpose of the Eighth Amendment to prevent prisoners from being made to suffer harmful conditions, or was it to prevent inappropriate actions by staff members, or were *both* required for liability?

In the face of atrocious and dangerous prison conditions across the country, one set of jurists took the position that the central inquiry of the Eighth Amendment is the harm to the prisoner.\(^{28}\) These courts believed that it was necessary to safeguard the prisoners, who had little protection from prison officials, the legislature, or the public.\(^{29}\) They found that “the ‘touchstone’ of the Eighth Amendment inquiry, is ‘the effect upon the imprisoned.’”\(^{30}\) This position did not examine the mindset or intent of the officers, but concluded that “federal courts are required by the Constitution to play a role” when “conditions are deplorable and the political process offers no redress.”\(^{31}\) Inherent to this view was some degree of distrust of prison officials, and a belief that courts have a role in the protection of prisoners.\(^{32}\)

On the other side were judges who stated that the main inquiry for an Eighth Amendment claim was not the effect of a condition on the prisoners, but rather the intent of the prison official.\(^{33}\) These judges argued that under the terms of the Amendment, conditions only became “punishment” when they were intended as such by the prison officials or the legislature.\(^{34}\) This position was deferential to prison staff, maintaining that they are trying diligently to perform difficult duties.\(^{35}\) Accordingly, these courts would only find liability when prison officials exhibit wantonness, and not when harm results from accidental or unintentional consequences.\(^{36}\) Espousing a stronger version of this position, Justice Scalia has urged that only when prison staff

\(^{27}\) In hindsight *Estelle* was the easy case. Failure to provide medical care places a prisoner at severe risk, potentially death, and the prison rarely, if ever, can allege a legitimate reason for not providing medical care to one of its wards. *See* *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

\(^{28}\) *See* *Rhodes*, 452 U.S. at 364 (finding that when “impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates…the court must conclude that the conditions violate the Constitution”).

\(^{29}\) These judges believed prison inmates to be “voteless, politically unpopular, and socially threatening” and that their suffering “moves the community in only the most severe and exceptional cases.” *Id.* at 358 (citing *Morris, The Snail’s Pace of Prison Reform*, in Proceedings of the 100th Annual Congress of Correction of the American Correctional Assn. 36, 42 (1970)). In addition, legislatures often refused “to spend sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards.” *Johnson v. Levine*, 450 F.Supp. 648, 654 (D. Md. 1978).


\(^{32}\) *Rhodes*, 452 U.S. at 358 (Brennan, J, concurring in the judgment).


\(^{34}\) *See generally id.* at 301-02 (“An intent requirement is either implicit in the word “punishment” or is not; it cannot be alternately required and ignored as policy considerations might dictate.”)

\(^{35}\) One clear example of this belief was in *Rhodes*, where the majority believed that the prison officials were doing the best they could and were only suffering the impact of “an unanticipated increase in the State's prison population compelled the double celling that is at issue.” *Rhodes*, 452 U.S. at 340-41. Under these circumstances, the Court urged deference to the officials, stating courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. *Id.*

act with a heightened mental state requirement—with malicious or sadistic intent—should a condition be actionable.  

Debate between these two opposing positions has persisted for the past thirty-five years of Eighth Amendment jurisprudence as it relates to conditions of confinement. Consequently, the current Eighth Amendment test requires both components to be actionable: a prisoner must make an objective showing that a condition causes harm (or risk of harm), and prison officials must have acted with a culpable mental state. These two requirements are now known as the objective and subjective prongs of the Eighth Amendment conditions test.

In requiring both components, the test satisfies neither side of the debate, as there are whole sets of circumstances that the two-prong test does not address in a satisfactory way. For example, there is no recovery where a prisoner’s conditions are deplorable but the requisite mindset cannot be demonstrated; nor is there recovery where the harm is minimal, but the prison staff acted maliciously. Furthermore the two-prong test leaves unresolved significant questions that have troubled courts for decades.

PART II: Problems with the Current Conditions Test: How the Objective Prong Became Subjective and the Subjective Prong Became Objective.

At first glance, the issues with the two-prong Eighth Amendment test are not apparent. The objective prong limits the scope of the courts’ ability to oversee prisons in that it restricts reviewable conduct to that which is “sufficiently serious.” It makes sense that the Eighth Amendment does not exist to regulate all happenings in prison, but only to prevent aversive and inhumane conditions—that is, those that are “sufficiently serious.” Even the staunchest prison advocate would be hard-pressed to assert that the Eighth Amendment should be used to review conditions that do not cause pain or harm. Prison, by its very nature, and as reflected in much judicial rhetoric, is punishment and is not intended to be pleasant or comfortable.

The subjective prong measures the mindset of the actors in the prison system. Courts,

39 Id. at 838 (“an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment.”).
40 Hudson v. McMillian, 503 U.S. 1, 9 (1992) (citing a frequently quoted statement by Judge Friendly that “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights,” from Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
42 See, e.g., Rhodes, 452 U.S. at 352.
43 See, e.g., Id. at 349 (finding that “the Constitution does not mandate comfortable prisons, and prisons…cannot be free of discomfort”); Atiyeh v. Capps, 449 U.S. 1312, 1315-15 (1981) (“[i]n short, nobody promised [inmates] a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like”); Chandler v. Crosby, 379 F.3d 1278, (11th Cir. 2004) (“If prison conditions are merely “restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”).
and largely society,\textsuperscript{45} are uncomfortable holding prison officials responsible for a condition or event that was not intended.\textsuperscript{46} The Eighth Amendment is designed to hold accountable “bad” intent displayed by officers, not to penalize those who, through accident or mistake, cause or permit something bad to happen.\textsuperscript{47} Underlying this requirement is the belief that these officials are doing difficult work and should only be held accountable for situations that were known and preventable.\textsuperscript{48}

While this two-part test has intrinsic appeal, a closer examination of the test in practice reveals that it is not functioning as intended, and is creating negative consequences.

A. The “Objective” Prong

While the law is clear that no prisoner can recover under the Eighth Amendment unless he can demonstrate that the harm he suffers is “sufficiently serious,”\textsuperscript{49} determining what meets this standard as a normative matter is complicated and uncertain. Trying to decide which prison conditions are acceptable and which are “sufficiently serious” such that they are illegal is a difficult question about which many people would disagree.

\textit{Estelle v. Gamble} was the Supreme Court’s first attempt to define the class of actionable conditions.\textsuperscript{50} In \textit{Estelle}, the Supreme Court confirmed that the Constitution created a duty for prison staff to provide for the medical needs for prisoners because they could not independently meet their own needs.\textsuperscript{51} The case also signaled that this duty was not exclusive, but the Court was not specific regarding which conditions triggered protection.\textsuperscript{52} Rather, the Court has referenced broad categories of duties owed to prisoners, including requiring “basic human needs” and preventing conditions that could result in death or substantial harm.\textsuperscript{53}

In the thirty-five years since \textit{Estelle}, courts have attempted to determine what conditions are “sufficiently serious.” Despite efforts by the Supreme Court to clarify this standard,\textsuperscript{54} lower courts’ holdings regarding what violates the Eighth Amendment are largely dictated by the

\textsuperscript{45} This sentiment is captured by the quote from Judge Posner, that “[i]f [a] guard accidentally stepped no [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word” \textit{Duckworth v. Franzen}, 780 F.2d 645, 652 (7th Cir. 1985).
\textsuperscript{46} \textit{Farmer}, 511 U.S. at 835-40 (applying mindset requirement to find liability).
\textsuperscript{47} Id. at 840-41; see also \textit{Wilson v. Seiter}, 501 U.S 294, 299-301 (1991); \textit{Duckworth v. Franzen}, 780 F.2d 645, 652 (7th Cir. 1985).
\textsuperscript{48} As Judge Posner has observed: “The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century.” \textit{Duckworth}, 780 F.2d at 652.
\textsuperscript{50} 429 U.S. 97 (1976).
\textsuperscript{51} \textit{Estelle v. Gamble}, 429 U.S. 97, 104 (1976) (“(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”)
\textsuperscript{52} Id. (finding that “the public [is] required to care for the prisoner…”); see also \textit{Hutto v. Finney}, 437 U.S. 678 (1978) (applying Eighth Amendment to review of isolation cell).
\textsuperscript{53} The Eighth Amendment violation must include “the deprivation of a single, identifiable human need such as food, warmth, or exercise.” \textit{Wilson v. Seiter}, 501 U.S. 294, 304 (1991); see also \textit{Craig v. Eberly}, 164 F.3d 490, 495 (10th Cir. 1998) (basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee the inmates’ safety).
sentiments of the judge and the quality of the advocacy, rather than by any theoretical basis. As a result, the decisions about what is “sufficiently serious” are grossly inconsistent, both in result and in the process by which a judge reaches his or her conclusion.\textsuperscript{55} While this inconsistency is discussed in detail below, the disagreements exist in all areas of prison life, including living conditions, disciplinary measures, exercise requirements, and denial of amenities.\textsuperscript{56}

As a result of these inconsistent rulings, those with an interest in knowing the boundaries of the Eighth Amendment—prisoners, prison staff, judges, and the public—are left with significant questions regarding what conditions are acceptable. These questions are further complicated because it is unclear if and how the penological rationale underlying a condition impacts this determination. While in theory it may seem that a condition can be evaluated for its seriousness absent its purpose, in reality this separation has proven difficult to achieve as the cruelty of a condition is innately tied to the reason it is applied.

1) The Problem of What

The Supreme Court has relied on a variety of phrases to describe what conditions satisfy the objective prong of the Eighth Amendment test. Actionable conditions are those that deprive prisoners of the “minimal civilized measure of life’s necessities,” are “inhumane,” place prisoners at “unreasonable risk” of “significant harm,” or are the cause “of unnecessary suffering.”\textsuperscript{57} From these characterizations, one descriptor is now used predominantly; most courts now require that a prisoner be deprived of a “basic human need” to demonstrate that the challenged condition qualifies for Eighth Amendment protection.\textsuperscript{58}

This apparently defining question—whether there is a deprivation of a “basic human need”—is not simple to answer. Some of these basic needs are those required to stay alive: food, clothing, shelter, medical care, and reasonable safety.\textsuperscript{59} Other “basic human needs” would not be directly fatal if absent, such as exercise\textsuperscript{60} and outdoor access.\textsuperscript{61} Significantly, the Supreme Court has consistently stated that this list is not exhaustive and that it can change.\textsuperscript{62}

How the “list” of basic needs changes is a matter of debate. The Supreme Court indicates that the list will change with “society’s evolving standards of decency.”\textsuperscript{63} Thus, some punishments that were acceptable in the past have been eliminated as public opinion shifts.\textsuperscript{64} In

\textsuperscript{55} See infra notes 76-85.
\textsuperscript{56} Id.
\textsuperscript{58} See, e.g., Lockamy v. Rodroguez, 402 Fed.Appx. 950, 951 (5th Cir. 2010); Renchenski v. Williams, 622 F.3d 315, 338 (3d Cir. 2010); Muñiz v. Richardson, 371 Fed.Appx. 905, 908 (10th Cir. 2010).
\textsuperscript{59} Helling, 509 U.S. at 32.
\textsuperscript{60} Wilson, 501 U.S. at 304.
\textsuperscript{61} See Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987) (finding there to be “substantial agreement among the cases” that some form of regular outdoor exercise is required under the Eighth Amendment); see also Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir. 1982); Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979).
\textsuperscript{62} Trop v. Dulles, 356 U.S. 86, 101 (1958) (Eighth Amendment’s prohibition of cruel and unusual punishments “draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society.”); see also Estelle v. Gamble, 429 U.S. 97, 103 (1976) (definition is contextual and responsive to “contemporary standards of decency”).
\textsuperscript{64} See, e.g., Graham v. Florida, 130 S.Ct. 2011 (2010) (prohibiting life without parole for non-homicide crimes
the context of criminal sentencing, courts assess public opinion by examining the laws of varying jurisdictions.\textsuperscript{65} Prison conditions do not have an equivalent indicator of majority opinion. Information about prison conditions is notoriously hidden from public view and there is no easy way for judges to compare various practices.\textsuperscript{66} Additionally, even when this information is available, regular use of a practice does not indicate its acceptance by society.\textsuperscript{67} Thus, judges currently have no clear or universal means to assess “evolving standards of decency” in the context of basic human needs.

The problem of identifying what conditions are objectively bad is illustrated by a hypothetical. A prisoner, Mr. Jones, has been held in solitary confinement for thirty years.\textsuperscript{68} He has had almost no contact with other prisoners and believes that these isolating conditions have harmed him by causing depression, inability to sleep, inability to concentrate, and mental anguish. Based on these conditions, Mr. Jones filed a lawsuit alleging that his conditions of confinement violate the Eighth Amendment.

How is a well-meaning judge to analyze this situation? Is human contact a human need? Does this need include touching other people? How does the length of the isolation impact this decision? There is no clear indicator of public opinion regarding solitary confinement; on one hand solitary confinement is a common prison practice, on the other, there is increased criticism of its long-term use.\textsuperscript{69} The case has experts on both sides, both vehemently arguing that human

\textsuperscript{65} See, e.g., Graham, 130 S.Ct. at 2024 (reviewing state laws and practices for imposition of sentence of life without parole for non-homicide crimes committed by juvenile offenders).

\textsuperscript{66} Justice Kennedy spoke on this issue at an ABA meeting in 2003. See Justice Anthony Kennedy, Speech at ABA Annual Meeting (Aug 13, 2003). He stated: “The subject of prisons and corrections may tempt some of you to tune out. . . Even those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections. The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken way, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.” Id.


\textsuperscript{68} While facts used in the hypothetical example are not an exact match, see Silverstein v. Federal Bureau of Prisons, 07-cv-02471-PAB-KMT, 2011 WL 4552540 (D. Colo. Sept. 30, 2011), for the general factual background used in the hypothetical. Any inner thoughts ascribed to the judge throughout this paper are entirely conjecture.

\textsuperscript{69} The number of individuals housed in solitary confinement is unclear due to lack of reporting and variance in the definition, and estimates range from 20,000 to 120,000. Joseph B. Allen, Extending Hope into the ‘Hole’: Applying Graham v. Florida to Supermax Prisons, 20 WM. & MARY BILL RTS. J. 217, 226 (2011). In the past several years, a
contact is, or is not, necessary for the human experience. Does it matter whether Mr. Jones can show he developed depression as a result of these conditions? What if he experienced these conditions and did not develop depression or another illness? The results of such cases—alleging that long-term solitary is a serious condition—vary greatly.70

Determining the seriousness of a condition based on actual harm is already difficult, but courts face an even more complicated task when asked to assess whether the potential harm that might result from a condition makes it “serious.” The Supreme Court has unequivocally declared that harm does not need to have manifested to be actionable; any condition that places a prisoner at “substantial risk of serious harm” satisfies the objective prong of an Eighth Amendment claim.71 But courts struggle to define “substantial risk.”72 It is not clear whether the risk is to an “average” prisoner,73 or to the particular prisoner-plaintiff.74 Other courts have ignored the law of potential risk and require an “actual showing of harm.”75 While not saying so explicitly, it is plausible that these jurists are not entirely dismissing risk of harm as a way to satisfy the objective prong, but are not being explicit or thoughtful about their determination that a risk is “not substantial.” Again, these varying approaches yield a lack of uniformity in court decisions.

Because of the confusion, when challenges are made to conditions absent from the

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movement against solitary confinement has been building, and includes legislation to limit the use of solitary confinement being proposed and passed in numerous states, and organizations—including the UN, the ABA, the ACLU, the European Court for Human Rights and others—speaking out against the long-term use of this practice. See id. at 235-41 (discussing international opinion); see generally Stop Solitary, ACLU (verified Feb. 28, 2012), http://www.aclu.org/stop-solitary-dangerous-overuse-solitary-confinement-united-states (listing information on state changes, including bill banning minors in solitary in Mississippi (Feb. 27, 2012); the closing of the main supermax prison in Illinois (Feb. 23, 2012); Colorado’s reduction of the number of individuals in isolation (Jan. 19, 2012); consideration of solitary confinement in Virginia legislature (Jan. 17, 2012)).

70 Compare Wilkerson v. Stalder, 639 F.Supp.2d 654 (M.D. La. 2007) (finding obvious risks and harms in long term solitary confinement, sufficient to implicate the Eighth Amendment) with Silverstein, 2011 WL 4552540, *18-21 (finding thirty years of solitary confinement not sufficiently serious to satisfy the objective prong); In re Long Term Administrative Segregation, 174 F.3d 464, 471-72 (4th Cir. 1999) (finding solitary confinement did not deny a “basic human need”).

71 Helling v. McKinney, 509 U.S. 25, 35 (1993) (exposure to second hand smoke posed an “unreasonable risk of serious damage to [prisoner’s] future health” and stated an Eighth Amendment claim.”). While this opinion was significant, in some respects it was only an articulation of what already existed. For example, no courts had suggested that starvation had to result before denial of food was actionable. See, e.g., Dearman v. Woodson, 429 F.2d 1288, 1289 (10th Cir. 1970) (prisoner who was deprived of food for 50+ hours had a viable Eighth Amendment claim).


74 See, e.g., Chiavarria v. Stacks, 102 Fed. App’x 433, 436-37 (5th Cir. 2004) (denying relief because individual plaintiff could not demonstrate individual harm from lights being on 24/7); Silverstein, 2011 WL 4552540, *18-21 (denying relief because individual plaintiff did not demonstrate harm from long-term solitary confinement, despite evidence of risk of harm to an average prisoner).

“known list” of basic human needs, courts puzzle over how to determine what deprivations are sufficient to trigger Eighth Amendment protection. Predictably, there are numerous disparate rulings concerning whether numerous conditions are actionable, including: long-term solitary confinement, uncomfortable cell temperatures, continuous lighting, lack of windows in cells, sleeping on mattresses on the floor, noise in the cellblock, vermin infestation, non-functional plumbing, unsafe transportation, and exposure to toxic fumes.

Even when a condition gradually gains general acceptance as being sufficiently serious, the reason underlying this acceptance is often unarticulated. An example is the addition of exercise as a basic human need. While exercise was not initially mentioned by the Supreme Court, it was added to “list” in the Court’s 1991 decision, Wilson v. Seiter. Out of cell exercise was deemed by the Court to be a basic human need, even though common experience suggests

76 Compare Wilkerson v. Stalder, 639 F.Supp.2d 654 (M.D. La. 2007) (finding obvious risks and harms in long term solitary confinement, sufficient to implicate the Eighth Amendment) with In re Long Term Administrative Segregation, 174 F.3d 464, 471-72 (4th Cir. 1999) (finding administrative segregation with 23-hour a day lock up did not deny a “basic human need”).
77 Compare Chandler v. Crosby, 379 F.3d 1278, 1296-97 (11th Cir. 2004) (holding that “severe discomfort” from inside temperatures during Florida summers did not violate Eighth Amendment) with Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997) (holding that Eighth Amendment entitles prisoners “not to be confined in a cell at so low a temperature as to cause severe discomfort”)
78 Compare LeMaire v. Maass, 745 F. Supp. 623, 636 (D. Or. 1990) (keeping cell lights on for 24 hours a day is unconstitutional) with Chiavarria v. Stacks, 102 Fed. App’x 433, 436-37 (5th Cir. 2004) (constant illumination was not unconstitutional because it served a security interest).
80 Compare Union County Jail Inmates v. DiBuono, 713 F.2d 984, 994 (3d Cir. 1983) (floor mattresses for more than a few days are unconstitutional) with Ferguson v. Cape Girardeau County, 88 F.3d 647, 650 (8th Cir. 1996) (thirteen nights on floor mattress did not violate the Constitution under the circumstances).
81 Compare Benjamin v. Fraser, 161 F.Supp.2d 151, 185 (S.D.N.Y. 2001) (holding excessive noise contributed to difficulty sleeping and may constitute the deprivation of a basic human need) with Johnson v. Lynaugh, 800 S.W.2d 936, 938 (Tex.App. 1990) (claim for excessive noise dismissed as frivolous) and Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (noise and fumes insufficient even when prisoner alleged migraines).
83 Compare Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985) (inadequate sanitation deprived prisoners of basic element of hygiene) with Wilson v. Cooper, 922 F. Supp. 1286, 1292 (N.D. Ill. 1996) (being held in cell for days without running water was “not sufficiently egregious” to violate the constitution).
84 Compare Davis v. Stanley, 740 F. Supp. 815, 817-18 (N.D. Ala. 1987) (allegations that officers engaged in high speed chase during transport was not Eighth Amendment violation) and Dexter v. Ford Motor Co., 92 Fed. Appx. 637, 640 (10th Cir. 2004) (finding no Eighth Amendment claim stated where inmate was not allowed to use a seatbelt and was paralyzed when transport vehicle had an accident) with Allah v. Goord, 405 F.Supp.2d 265, 276 (S.D.N.Y. 2005) (Eighth Amendment claim stated where inmate who required wheelchair was transported in a nonaccessible van).
85 Compare Board v. Farnham, 394 F.3d 469, 485-87 (7th Cir. 2005) (allegations that ventilation system was contaminated with black mold and fiberglass supported Eighth Amendment claim) with Givens v. Jones, 900 F.2d 1229, 1934 (8th Cir. 1990) (subjecting prisoner for three weeks to fumes from housing renovations did not violate Eighth Amendment even if they gave the prisoner migraine headaches).
87 See id.
88 Id. at 304.
that exercise is not essential for survival\textsuperscript{89} and even though prisoners are still able to do limited exercise within their cells. Moreover, the opinion itself does not reveal the thought process that led to the decision, nor do other lower court opinions that simply declared exercise to be a basic human need\textsuperscript{90}. Exercise was added to the list without a proven showing of harm, and with judges instead relying on the “obviousness” that lack of exercise threatens prisoners’ physical and mental health.\textsuperscript{91} While people might generally agree that physical exercise is a human need, that simple declaration—without analysis—does little to assist future courts in knowing how to address other novel allegations that a particular deprivation is a “basic human need.”

Because of the uncertainty, a significant concern with the objective prong is that it is determined mainly by the opinions of the judge deciding the case. This is not the fault of the judge; when she seeks to earnestly review a challenged condition based on theoretical bases, there is remarkably little to rely upon.\textsuperscript{92} Absent legislation or public opinion data about a specific condition, both of which rarely exist, it is understandable that judges turn to their own subjective views of what seems acceptable. In this way, the objective prong of the conditions test has become highly subjective.

2) The Problem of Why

A second area of confusion in the objective prong is whether courts should consider the reason a condition exists when assessing whether it is “sufficiently serious.” Eighth Amendment conditions litigation illustrates that the penological purpose behind a challenged condition cannot be neatly excised from decisions about basic human needs. In reality, these two concerns often interact and overlap; the determination of what is a “basic human need” will often be influenced by the perception about why the condition exists.

The reason underlying a condition is essential to most people’s evaluation of whether it is acceptable or cruel. For example, it generally would be considered cruel to severely cut a person with a knife. Yet, if told that the person wielding the knife is a surgeon about to perform a life-saving procedure, the sense of cruelty would disappear. Separating the assessment of whether a condition is cruel from the reason for the condition is difficult.

\textsuperscript{89} Exercise is known to combat obesity and to reduce risks for obesity related diseases. However, the fact that exercise may not be necessary for life is demonstrated by studies that show even as Americans continue to have higher rates of obesity, our life expectancy continues to rise. Steven Reinberg, \textit{Smoking and Obesity Slowing Growth of United States Life Expectancy}, US News. (Jan. 25, 2011), http://health.usnews.com/health-news/family-health/heart/articles/2011/01/25/smoking-obesity-slowing-us-life-expectancy-report-finds.

\textsuperscript{90} See, e.g., Wilson, 501 U.S. at 304 (adding exercise to list of needs without explanation); \textit{Delaney v. DeTella}, 256 F.3d 679, 683 (7th Cir. 2001) (“Given current norms, exercise is no longer considered an optional for of recreation, but is instead a necessary requirement for physical and mental well-being.”).

\textsuperscript{91} See \textit{Delaney}, 256 F.3d at 683 (“we have acknowledged the strong likelihood of psychological injury when segregated prisoners are denied all access to exercise for more than 90 days.”); \textit{Lopez v. Smith}, 203 F.3d 1122, 1133 n.15 (9th Cir. 2000) (no showing of adverse medical effects required where prisoner alleged denial of exercise for more than six weeks).

\textsuperscript{92} Courts have not typically relied upon measures of human needs from the field of psychology, such as Maslow’s Human Needs Scale, or the Human Scale of Development developed by Manfred Max-Neef. See generally Manfred Max-Neef, \textit{Development and Human Needs} (verified Feb. 27, 2012), http://atwww.alastairmcintosh.com/general/resources/2007-Manfred-Max-Neef-Fundamental-Human-Needs.pdf. If used these scales would urge a much broader scope of human needs, to include: affection, leisure, participation, and freedom. \textit{Id.}
Supreme Court precedent gives some encouragement to the practice of weighing the reason for a condition in assessing its seriousness. Estelle notes that “[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency.”93 The Court’s decisions indicate that the Eighth Amendment may be violated when a condition causes pain without a reason94 or serves no legitimate end.95 This principle applies generally to assessments of a punishment: pain inflicted without a purpose is considered to be cruel; but if a condition is necessary to achieve the recognized purpose, it may be acceptable even if it results in pain and suffering.96 This notion that punishment must be justified is also supported by punishment theory, as discussed in more detail in Part III of this paper.97

Because a lack of purpose can invalidate a condition, it is understandable that judges have used this reasoning in reverse, finding a condition to not be “sufficiently serious” because it is based on a legitimate end.98 For example, it is not in dispute that food is a basic human need and that denial of food—even for a few days—is sufficiently serious for an Eighth Amendment claim.99 However, if a denial is based upon noncompliance with a prison rule, courts often find that same denial of food does satisfy the objective prong of the Eighth Amendment.100 Obviously, the reason behind a denial of food will never change the fact that food is a human need. But judges find the deprivation not serious because they believe the prison is justified in this action.

Certainly, when a condition causes pain without any alleged penological purpose, it is easier for a judge to determine that the condition is cruel. For example, courts have ruled invalid

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95 Estelle, 429 U.S. at 103; see also Hope, 230 U.S. at 738. In 2002, the Supreme Court decided Hope v. Pelzer, a case challenging the use of a hitching post for discipline. 536 U.S. 738. Even though the prison alleged the hitching post was necessary for discipline, the Court dismissed this assertion and held the policy was unconstitutional because it caused pain without furthering a legitimate penological interest. Id. at 738. At no point did the Court consider whether the post violated a “basic human need,” a claim that would have been difficult to substantiate.
96 Resulting from this case there is controversy regarding whether claims that a condition causes “pain without a purpose” state an independent action (outside of the “basic human needs” context). Compare Hope, 536 U.S. at 738 (finding claim where there was pain without legitimate purpose); with Wilkerson v. Stalder, 639 F.Supp.2d 654, 666-67 (M.D. La. 2007) (finding no independent Eighth Amendment action for allegations that conditions caused pain without purpose). This point is largely semantic as claims of pain can be raised under the basic human need of reasonable safety. See Alexander & Fathi, supra note 72, at 693.
97 Michael Cavadino & James Dignam, THE PENAL SYSTEM: AN INTRODUCTION 36 (4th ed. 2007) (explaining that punishment nearly always causes pain or discomfort, but that this can be legitimized if done to achieve an accepted objective).
98 See infra Part III.
99 See, e.g., Rodriguez v. Briley, 403 F.3d 952 (7th Cir. 2005) (finding denial of food acceptable because it was part of disciplinary measure); Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998) (same); Chiavarria v. Stacks, 102 Fed. App’x 433, 436-37 (5th Cir. 2004) (finding use of lights 24/7 did not state Eighth Amendment claim because of security needs).
100 Talib, 138 F.3d at 214; Rodriguez, 403 F.3d at 952-53.
conditions such as requiring an HIV-positive inmate to wear a facemask, cross gender strip searches, and use of pepper spray on a mentally ill inmate, all because they caused pain without any legitimate purpose. But there exists little guidance on how to navigate a situation where a condition causes a prisoner pain, but where the prison staff put forth evidence that the condition is necessary for the prison to function. Before determining if guidance about how to consider the penological interest in a condition is of assistance in these cases, the initial question is if this interest should be examined at all in assessing whether that condition meets the objective prong of the Eighth Amendment conditions test.

The example of Mr. Jones, the prisoner in long-term segregation, is again illustrative. A typical reaction to hearing that Mr. Jones has been held in isolation for three decades is shock, and concern for his mental health. This initial shock is often swiftly followed by an inquiry into why he is held in these conditions. In assessing whether the isolation is acceptable—or whether it is cruel—people want to know if he is segregated arbitrarily, or if he is in isolation because of a justified security risk. Most people’s ultimate conclusion as to whether his conditions are a problem relates both to the harm caused by the isolation and the reason it was imposed. If Mr. Jones is a model prisoner, isolated at random and without explanation, people generally believe the treatment is unacceptable. Yet if they are told he is isolated because of repeated and continuous assaults, they may view the condition as reasonable and necessary.

Situations regularly arise where a prisoner is denied a basic human need, but prison officials claim the denial is necessary. For example, a prisoner’s clothes are taken away, causing him to shiver uncontrollably, but the prison staff members testify that his garments posed a suicide risk. A prisoner provides evidence that having the lights on twenty-four hours a day causes him headaches and blurred vision, but the prison administrators claim this furthers nighttime safety. A prisoner is denied food, but the prison staff asserts the prisoner refused to get on his hands and knees prior to the service of the meal, a required safety precaution. It seems difficult, or potentially impossible, to ask courts to assess these conditions without looking at the reason they are imposed. Yet, the Supreme Court has not definitively stated that the prison’s reason for a given condition is an appropriate consideration in the “sufficiently serious” inquiry. While in theory, considering the prison’s interest in a condition is necessary to assess its “seriousness,” in practice there is substantial hesitation to rely on alleged prison interests by both

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101 Thomas v. Bryant, 614 F.3d 1288, 1311 (11th Cir. 2010) (finding use did not further legitimate interest because inmate’s history of mental illness and psychotic episodes rendered him unable to comply); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 810-11 (10th Cir. 1999) (forcing inmate to wear a face mask, which is “meant to brand him” satisfied the objective prong); Jordan v. Gardner, 986 F.2d 1521, 1526-28 (9th Cir. 1993) (record showed cross gender searches re-traumatized sexual assault and abuse victims and that these searches were not justified by security concerns because there were female guards available).

102 Thomas, 614 F.3d at 1307 (finding “We balance these standards of decency against prison officials’ need to keep the prison safe.”); Foster v. Runnels, 554 F.3d 807 (9th Cir. 2009) (balancing basic human need of not receiving food against prison officials’ interest in security and enforcement of policy); Talib, 138 F.3d at 214 (same); Rodriguez, 403 F.3d at 953 (balancing basic human need of not receiving food and showers against prison officials’ interest in security and enforcement of policy).


105 Talib v. Gilley, 138 F.3d 211, 214 (5th Cir. 1998).
courts and advocates.\textsuperscript{106}

Part of the hesitation is because many courts and practitioners read the Eighth Amendment’s prohibition on cruel and unusual punishment as a normative dictate against inhumane conditions.\textsuperscript{107} They assert that the Eighth Amendment exists to provide ultimate limits; it prohibits certain conditions as cruel, no matter what purpose may exist for them.\textsuperscript{108} Under this view the Eighth Amendment is not only to protect prisoners but to ensure our society stays within humane and acceptable practices.\textsuperscript{109} Accordingly, these theorists would make bright line rules to ban qualifying conditions, such as torture or denial of food, because these conditions cannot be justified and prison officials should not have an opportunity to do so.

Another concern in allowing courts to consider the reason for a condition stems from a fear that too much deference will be granted to prison staff if they are allowed to explain their practices.\textsuperscript{110} To some extent this concern is justified, as courts have a common practice of deferring to the concerns of those managing the prisons.\textsuperscript{111} When non-Eighth Amendment

\textsuperscript{106}John F. Stinneford, \textit{Incapacitation through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity}, 3 U. ST. THOMAS L. J. 559 (2006) (arguing that even despite benefits of castration for sex offenders, this should be banned under the Eighth Amendment).

\textsuperscript{107}See, e.g., Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (“(l) it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . .”); In re Kemmler, 136 U.S. 436, 447 (1890) (“it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution.”); O’Neil v. State of Vermont, 144 U.S. 323, 339 (1892) (Field, J. dissenting) (“punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs . . . were rendered impossible by the declaration of rights”); John F. Stinneford, \textit{The Original Meaning of “Unusual”}: The Eighth Amendment as a Bar to Cruel Innovation, 102 NW. U. L. REV. 1739 (2008).

\textsuperscript{108} For example, some individuals argue that the Eighth Amendment prohibits the application of certain punishments, even when the defendant chooses them. See, e.g. Jeffrey L. Kirchmeier, \textit{Let’s Make A Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment}, 32 CONN. L. REV. 615 (2000) (arguing waiver should not be permitted because conditions should be impermissible under all circumstances); Steven A. Blum, \textit{Public Executions: Understanding the “Cruel and Unusual Punishments” Clause}, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“One may not consent to cruel and unusual punishment.”).


\textsuperscript{111} Most violations of constitutional rights with the prison are reviewed under a deferential rational basis test. \textit{Turner v. Safley}, 482 U.S. 78 (1987). The Court in \textit{Turner} urged deference towards prison officials, stating “the problems of prisons in America are complex and intractable, and ... separation of powers concerns counsel a policy of judicial restraint.” \textit{Id.} at 84-85.

This tendency towards deference is borne out by empirical analysis. Adam Winkler conducted a study of cases applying strict scrutiny to determine if there were areas of law, or types of institutions/cases, where a law or practice was more likely to be upheld, even under this heightened level of review. Adam Winkler, \textit{Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts}, 59 VAND. L. REV. 793 (2006). His research demonstrated the when penal institutions had enacted a policy or practice that was reviewed under a strict scrutiny analysis, that courts upheld these at a rate of 74%. \textit{Id.} at 818. This “survival rate” was the highest of any enacting institution considers as part of the test. \textit{Id.} Ultimately, Winkler concluded that “even where courts apply this supposedly rigorous standard of review, the [typical rational basis review] may still exert some gravitational pull on judicial decisionmaking towards deference.” \textit{Id.} at 819.
challenges are brought against prison regulations that burden constitutional rights, they only succeed if there is no “rational basis” for the violation—a standard that permits regular and extensive deference to the judgments of prison staff. Courts know that they are not agency experts and give wide berth to the decisions and practices of those in specialty departments. In the prison context, this deference is particularly common and apparent, perhaps because courts fear making a decision that could cost staff or prisoners their lives.

Even accepting these concerns as valid, a more fundamental question is whether it is possible for the penological interest motivating a particular condition to be ignored during the objective review. In reality, many courts already are considering these reasons in assessing challenged conditions, but are not always explicit in doing so. It is regular societal practice to consider the reason any punishment—from spanking to a criminal sentence—is given in assessing that practice. Though the purpose of a condition is not officially included as part of the analysis of the objective prong, judges, like other people, cannot set aside this factor in evaluating whether a punishment is acceptable.

Without guidance on whether and how to perform this assessment, judges not only differ in their rulings, but also in the framework used to examine the necessity of the state action. One frequent response is for judges to avoid any discussion of the challenged condition before them, simply deeming the objective prong satisfied or not, without substantial explanation of the deprivation or of the interest. One example of this is in the context of lockdowns, which are times when—for security or administrative reasons—prisoners are kept in their cells essentially 24 hours per day and denied exercise, showers, library access, outdoor access, and other privileges. Courts generally assume that there is a legitimate interest for a lockdown, and many courts treat deprivations during lockdowns differently than the same deprivations at other times. Thus, some courts seem—explicitly or silently—to be taking the interest for a condition into account, while others are ignoring this interest.

12 Under Turner, the standard is notably deferential and prevents the courts from micro-managing prisons, or interfering in issues where they lack expertise. See Turner, 482 U.S. at 92-93.

13 Weidman, supra note 110 (discussing significant deference given to state penological interests).

14 Winkler, supra note 111, at 819 (stating that “Courts are famously unwilling to oversee prison policies with too demanding an eye for fear of interfering with the security of inmates and prison personnel.”)

15 See infra notes 118-27.

16 See supra note 45.

17 See generally Cavadino & Dignam, supra note 96, at 36.

18 See, e.g., Cunningham v. Eyman, 17 Fed.Appx 449, 454 (7th Cir. 2001) (finding prisoner that spent 16 hours in shackles without use of bathroom was failed to state an objective claim because prisoner had “created a dangerous disturbance”); Snipes v. DeTella, 95 F.3d 586, 591-92 (7th Cir. 1996) (removal of toenail without pain killer does not “remotely strikes us as inhumane or a denial of the minimal necessities of a civilized society.”).

19 See generally Hayward v. Proconier, 629 F.2d 599, 600 & n.1 (9th Cir. 1980).

20 Id. at 603 (failed objective prong where five-month lockdown and 28-day deprivation of outdoor exercise was in response to a “genuine emergency”); Noorwood v. Woodford, 583 F.Supp.2d 1200 (S.D. Cal. 2008) (finding lockdown specific to plaintiff that resulted in 39 day denial of exercise satisfied objective prong); Fisher v. Barbieri, 3:95CV913 (D. Conn. May 19, 1999) (no violation where showers were prohibited during twenty eight day lockdown); Alley v. Angelone, 962 F.Supp 827 (E.D. Va. 1997) (finding laundry list of deprivations upheld where lockdown was constitutional); McLeod v. Scally, 81-cv-3139, 1984 WL 692, *2 (S.D.N.Y. July 30, 1984) (no violation where prison deprived inmates of showers during eight day lockdown).

21 See also supra notes 122-27.
The most troubling response by courts when prisons assert a legitimate interest in a condition is to defer entirely to prison staff’s assessments of what is necessary. In these courts (which notably include the entire Fifth Circuit), if prison staff assert any reason for a condition, the judge will find the challenged practice to be acceptable. This treatment turns the objective prong on its head by making the subjective views of prison staff its central feature. While such deference to prison staff may be comfortable and expedient for courts, this model utterly fails in providing objective analysis or outside monitoring of the treatment in prisons because it credits any explanation provided by staff. In essence, it eliminates the objective prong entirely and prevents judicial review of almost all prison conditions challenged under the Eighth Amendment.

It is impossible to determine how frequently and to what degree the prison staff’s basis for their policies influences determinations about what is objectively acceptable (or “sufficiently serious”). But empirical evidence, as well as comments in decisions make plain that judges’ views on the necessity of a particular condition are extremely influential in what they determine to be “sufficiently serious” under the Eighth Amendment. Without a framework for considering penological interest, the decisions about what is “objectively” bad are frequently controlled by the very individuals the court is tasked with monitoring: the prison officials. With this deference, the judiciary is minimizing their role in scrutinizing conditions, leaving only the proverbial fox to guard the hen house.

B. The “Subjective” Prong

Once an objective harm is demonstrated, a prisoner must demonstrate that the prison official acted with a sufficiently culpable mindset—that is, that he or she was deliberately indifferent to the serious condition. The importance of the mindset requirement is definitional; to be “punishment” under the terms of the Eighth Amendment, there must be some level of

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122 Another response by courts is to address the prison staff’s interest in condition in the second prong of this test, in assessing the mindset of those sued. For example, in Richard v. Reed, a prisoner was denied outdoor access for 100 days. 49 F.Supp.2d 485, 488 (E.D. Va. 1999). The court found there was no showing of deliberate indifference “because there may be legitimate security reasons for the restrictions.” Id. (emphasis added). Notably, while interest and intent are related and may overlap, these two issues are distinct: the prison staff may have a reason for a condition or policy and yet still have been deliberately indifferent to the harm that their policy was causing.

123 See, e.g., Chavarria v. Stacks, 102 Fed. Appx. 433, 436-37 (5th Cir. 2004) (finding prisoner’s claims that lights were on 24 hours a day was frivolous, and holding “a prison regulation that infringes upon a prisoner’s constitutional rights will be upheld if it is reasonably related to legitimate penological interests.”)

124 Id.

125 Whitman v. Nesic, 368 F.3d 931, 934-35 (7th Cir. 2004) (noting deference that should be granted to prison officials and upholding strip search policy as “plainly constitutional” because of interest raised by prison staff).

126 Winkler, supra note 111, at 818.

127 See, e.g., Chiavarria v. Stacks, 102 Fed. App’x 433, 436-37 (5th Cir. 2004) (“But with deference to those who are concerned about Mr. Chiavarria’s illuminated cell, I regard this judicial attention as much ado about nothing. A little cloth over his eyes would solve the problem, negate deprivation, and escape this exercise in frivolity.”); Rue v. Gusman, No. 09-6480, 2010 WL 1930936, *7 (E.D. La. May 11, 2010) (“It has been noted that policies mandating constant illumination are grounded in security concerns and are constitutional.”); Norris v. District of Columbia, 737 F.2d 1148, 1158 (D.C. Cir. 1984) (“The reality is that the incidence of direct applications of governmental force is markedly higher in prisons than outside prisons. It is probable that the justification for the use of force will be found, properly more frequently in cases arising in prisons than in those arising elsewhere”).

intentionality. This sentiment is summed up in the oft-repeated quote from Judge Posner, that “if the guard accidentally stepped on the prisoner’s toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word.” A prison staff member acted with deliberate indifference when: 1) he or she knew the risk to a prisoner posed by a condition, and 2) disregarded it by failing to take specific measures to abate it.

In this article I do not explicitly address the correctness or value of the deliberate indifference test. Rather, I examine how the knowledge and reasonable response components of that test work in specific types of prisoner civil rights actions: those seeking injunctive relief and those raising challenges to institution-wide policies or practices.

1) The Problem of Ongoing Harms

While the second part of the Eighth Amendment conditions test is called the “subjective” prong, it is actually a hybrid of objective and subjective components. The test requires 1) knowledge of a harmful condition, and 2) failure to respond reasonably to this risk. The knowledge component is subjective. The Supreme Court specifically clarified that it was not enough to show that a reasonable prison official should have known about the harm, actual knowledge by the relevant prison staff is required. Thus, the test protects an officer from being held liable when a condition existed only because of lack of knowledge or mistake. Yet, once it is shown that a prison staff member was aware of a problem, there is an objective requirement: she must have responded in a reasonable manner.

In practice, the only “subjective” part of this test, the knowledge requirement, does not exist in injunctive cases. In cases where a harm is ongoing, the knowledge inquiry is rarely—if ever—a problem to demonstrate. The lawsuit itself will almost always provide subjective knowledge to defendants of the condition being challenged. Thus, in these cases the knowledge portion of the test is superfluous. With the knowledge portion of the deliberate indifference test satisfied, the inquiry turns to an objective inquiry, or whether the prison staff responded reasonably to the harm or risk. In injunctive cases courts seem more willing to find that prison officials have not responded reasonably, and have a culpable mindset. While I do not have empirical evidence to demonstrate this point, I think that judges—like most people—are hesitant to see an ongoing harm and determine that they are unable to act to stop it.

See id. at 837-38 (finding that official must be aware of risk of harm to prisoner as “this approach comports best with the text of the Amendment as our cases have interpreted it.”); see also note 12, supra.


Farmer, 511 U.S. at 842–44 & 846 n.9.

Id.

Id.

Id. at 838, 843. While it may seem reasonable that prison officials are not held liable if they did not have actual knowledge of a problem, this standard does not always accurately assess culpability. Courts and commentators have pointed out that the actual knowledge requirement provides an incentive to be unaware of risks and harms occurring in the prison, and may result in prison officials actively (and culpably) avoiding such knowledge. See, e.g. Dolovich, supra note 10 at 945.

Farmer, 511 U.S. at 837.

Id. at 844.

Id. at 847 n.9 (“If [] the evidence before the district court establishes an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness”).
In injunctive cases, before a court even considers if prison officials have responded reasonably, it must find that the objective prong is satisfied. If the condition is deemed “sufficiently serious” that means the court has found that there is a dangerous or painful prison condition,\(^\text{138}\) a that will continue unless the judge acts.\(^\text{139}\) For example, a judge will have determined that medical care is inadequate and is causing prisoner deaths, or that officers are not protecting prisoners from assaults or rapes, or that disabled prisoners are denied wheelchairs, ramps and safe showers.\(^\text{140}\) To make this finding, a judge will have heard substantial evidence about these harms, including specific details about how prisoners are being hurt.

If, in the face of such evidence, a judge determines that prison officials are not deliberately indifferent—that they are reasonably responding to these harms—the judge is not permitted to intervene or order particular responses. The judge will not be able to impact the fate of those individuals; the prisoner-plaintiffs may go on being harmed and dying. In the face of such circumstances, judges often feel a responsibility to protect those in state custody. Further, judges might experience cognitive dissonance\(^\text{141}\) when they find a significant harm, but doing nothing to stop it. These influences result in an increased number of injunctive cases where prison officials are found to not have acted with deliberate indifference. Broadly stated, in the face of a dangerous, ongoing harm, judges and juries have a hard time not taking steps that will assure them that the problem is solved: thus, they find intent even when the evidence of it is limited or spotty.

Admittedly, the evidence to support this point is limited. If courts are ignoring the steps prison officials are taking—in improving policies, increasing training, auditing—of harms, they are certainly not saying so explicitly. Yet, some court decisions indicate this point. For example, one court found an objective harm was occurring in a Wyoming prison: prisoners were being threatened and beaten by other prisoners and officers were simply ignoring the threats.\(^\text{142}\) The defendants were supervisors in the prison and it was undisputed that they were making substantial efforts to re-train the staff to ensure safety.\(^\text{143}\) This effort could easily have been found to be “reasonable,” thus defeating the prisoners’ claim on the subjective prong of the conditions test. Yet the court found in favor of the prisoners on summary judgment, stating

\(^{138}\) Supra Part II.A.
\(^{139}\) In injunctive cases the condition will always be ongoing because even after the commencement of a lawsuit, prison officials can still prevent liability if they fix the problem or remove the harmful condition. Farmer v. Brennan, 511 U.S. 825, 847 n.9 (1994) (“even prison officials who had an subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no long unreasonably disregarding an objectively intolerable risk of harm and that they would never revert to their obduracy upon cessation of the litigation.”)
\(^{141}\) Cognitive dissonance theory, pioneered by Leon Festinger, predicts that when individuals experience high levels of disconnect or conflict between their behaviors and their beliefs, they will feel strong psychological pressure to reduce that dissonance. See generally Leon Festinger, CONFLICT, DECISION, AND DISSONANCE 8 (1964) (elaborating on cognitive dissonance theory); Leon Festinger, A THEORY OF COGNITIVE DISSONANCE 3 (1957) (integrating large body of research into theory of cognitive dissonance). In other words, when a person holds two contradictory beliefs (here, the belief that prisoners are being harmed, but that the law does not allow intervention), it causes discomfort and produces a drive to modify or reject one of the inconsistent ideas.
\(^{143}\) Id. at 1211.
“[t]he Court can only conclude that Defendant prison officials have...demonstrated deliberate indifference.”144 In so doing, the judge held that no reasonable person could find these efforts were sufficient, holding: “the Court is not impressed by such measures unless they are accompanied by genuine good-faith efforts to ensure actual compliance with the policies.”145

This tendency toward finding deliberate indifference in the face of an ongoing harm is exacerbated if the judge has already considered the alleged penological interest in a condition in the objective prong (as discussed in Part II.A.2). If, as part of the objective inquiry, a judge decided that the penological interest for the condition was insufficient, this inherently is a decision that the officers did not act reasonably.146 For example, in one case, a mentally ill prisoner challenged the repeated use of pepper spray against him.147 In the judge’s analysis of the objective prong, he determined that this use of chemical agents was without a purpose because the mentally ill prisoner could not comply with the requirements.148 In the deliberate indifference prong, the court found that the risk of harm was obvious and the repeated use of pepper spray was unreasonable.149 Had the staff taken any mitigating steps—for example trying other restraint methods, or involving mental health staff in subduing the prisoner—the condition likely would not have been found to be “sufficiently serious” at all and the claim would have failed on the objective prong.

For this reason, in injunctive cases, the utility of the “subjective prong” is questionable and at times has been subsumed into the objective test. As a normative matter this approach may not be problematic; we want to stop ongoing harmful conditions in prisons. Yet, the ability to draw this inference in injunctive cases should be made explicit.

2) The Problem of Institutional Knowledge and Intent

Judges are able to find correctional systems acted unreasonably, in part, because agency intent is notoriously difficult to prove. In cases involving discrete, past actions by prison staff members, determining intent may be achievable; the prisoner must demonstrate that the officer’s actions were not legitimately motivated.150 In finding group intent, judges and juries are more likely to substitute their own view of the institution to reach an answer to this complicated question.

While there are problems inherent in proving any individual’s subjective mindset, courts and juries are seen as able to resolve them.151 By contrast, in Eighth Amendment cases challenging an ongoing practice or policy, there are particular difficulties in proving the subjective prong. This challenge is illustrated by returning to the example of Mr. Jones.

144 Id. at 1216.
145 Id. at 1215.
146 Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010); Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).
147 Thomas, 614 F.3d 1288.
148 Id. at 1309-10.
149 Id. at 1310-17.
150 See generally Part IV.B infra.
151 See generally ULA MODEL PENAL CODE § 2.02 (2011) (section generally explains intent requirements; nearly all crimes are assigned a requisite mental state that a jury must find in order to establish criminal liability); Alice Ristroph, State Intentions and the Law of Punishment, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1364-65 (“For the most part, fact-finders appear comfortable making mental state determinations for individual defendants, even with only circumstantial evidence.”)
Imagine he is subjected to a policy that requires his cell to have a light on twenty-four hours a day. The policy was put into place by an administrator for security purposes (the need for prison staff to be able to see Mr. Jones at all times), but the light is causing Mr. Jones significant harm in that he is losing sleep and his eyesight is declining. Assuming that the court finds the lighting to be sufficiently serious under the objective prong, whose intent should be looked at to determine if the prison is culpable?

Whose knowledge and intent is at issue in this instance? Is it those people who signed the policy, even if they likely did not know of the potential negative consequences? Is it the people implementing the policy, even though they are simply following orders? In institutions, there are multiple actors involved in creating and implementing policies, who likely have multiple mental states. One officer may enjoy watching Mr. Jones suffer in his cell; another may think the treatment is cruel but is unable to alter Mr. Jones’s conditions. The administrator who put the policy in place may have no knowledge that the lights are causing Mr. Jones harm; another may know this concern but decline to change the situation. Can the mental state of any of these individuals be said to reflect the intent of the prison?

Much has been written in scholarly literature about the imprecision, at times called the “slop,” of institutional intent. This concern arises in many other contexts, including employment discrimination lawsuits, First Amendment challenges, Ex Post Facto application, and Double Jeopardy cases. In the context of assessing institutional intent to punish, Alice Ristrop explains that a factfinder’s assessment of institutional intent relies on their biases or views of the institution. Ristrop explains that the purpose underlying the action of an institution—and in particular, prison systems or legislatures—can usually be presented in a way that avoids constitutional offense because of the deference given to these institutions. She notes that, “[r]arely can a single coherent intent be attributed to the entire institutional apparatus that imposes punishment. The intentions of individual officials within the criminal justice system may be relevant to, but are not dispositive of, the question whether the system is imposing punishment.” In particular, “[e]videntiary ambiguities allow for discretionary judgment, and courts have considerable leeway to find the requisite intent (or not) in order to reach a preferred outcome.” Overall, Ristrop concludes that a fact-finder’s view of institutional intent is inaccurate and arbitrary.

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152 This is not a question at issue in the actual cases; the knowledge and intent at issue is of whoever the plaintiff has sued. The hypothetical indicates, however, how difficult it is to identify who is the appropriate party to sue and who should be held accountable.


154 Irrational Application, supra note 153, at 2157 (discrimination); Ristrop, supra note 151, at 1356-57 (discussing areas where institutional intent is relevant).

155 Ristrop, supra note 151 at 1357-58.

156 Id. at 1358; See also Irrational Application, supra note 153, at 2157 (discussing difficulty of determining legislating intent and noting “courts are reluctant to pierce the legislative veil, preferring instead to affirm legislative competence” (internal quotation omitted)).

157 Id. at 1399.

158 Id. at 1357.
Given the perspective that the fact-finder’s conclusions about institutional intent are simply a proxy for their own biases about the institution, there is a question as to if this consideration should be included. Some commentators urge elimination or de-emphasis of the intent factor in the prison context. Sharon Dolovich argues that when the state assumes custody of an individual, it assumes the burden for his care (she terms this “carceral burden”). With this burden in mind, she would eliminate or lessen the intent requirement and hold prison officials responsible whenever a harm was foreseeable. While there is room for disagreement about this essentially “negligence” approach to Eighth Amendment conditions cases against institutions, there is little debate that this change would provide additional incentives to protect prisoners.

PART III: Excessiveness Matters: Other Eighth Amendment Doctrines and Proportionality Review

Eighth Amendment conditions caselaw demonstrates that the current application of the two-prong test lacks uniformity and is subject to the personal opinions of judges. In contemplating ways to reconsider the conditions test generally, and the objective prong in particular, other areas of Eighth Amendment jurisprudence may be instructive. Since the conditions doctrine stands as an outlier in its explicit use of a subjective mindset requirement, other Eighth Amendment jurisprudence will provide less guidance on this point.

Several doctrines have arisen under the Eighth Amendment, all of which “evaluate penal measures” and assess whether punishments comport with “the evolving standards of decency that mark the progress of a maturing society.” These other Eighth Amendment doctrines—including challenges to sentences, excessive bail, punitive fines, methods of execution, and application of the death penalty—all review punishment to determine whether it is excessive. This focus is not surprising as most courts and scholars regard prohibiting excessive governmental action as the crux of the Eighth Amendment.

The principle of preventing excessive punishment is long-standing and the Supreme Court has held that it applies to all governmental punitive measures. The Eighth Amendment

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159 Dolovich, supra note 10, at 943-46 (finding that state assumes a “carceral burden” when it chooses to imprison individuals and that this requires it to investigate and eradicate harmful conditions).
160 Id.
161 Id.
163 Id. note 162, at 49-62.
164 The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Graham v. Florida, 130 S.Ct. 2011, 2021 (2010) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).
165 Excessiveness was first used as a limitation to punishment in the Magna Carta, where a provision was added to prohibit fines being levied excessively against political dissidents. See Gerald W. Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 COOLEY L. REV. 667 (1988) (giving history of Magna Carta and how it relates to the Eighth Amendment). This principle was extended beyond fines and adopted into English law in a form that is nearly identical to the modern Eighth Amendment. Id. at 705-06.
166 A useful history of the excessiveness principle is laid out in Stephen Parr’s article, Strict Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause, 68 TENN. L. REV. 41 (2000). Professor Parr argues that
itself uses the term “excessive” twice, stating that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In *Solem v. Helm*, the Supreme Court stated that the prohibition against “excessive” action applies to all forms of governmental punishment and to all clauses of the Eighth Amendment. Despite the Court’s pronouncement that there is an implied “excessiveness” limit to all areas of punishment arising under the Eighth Amendment, courts have not generally relied upon this limit in the conditions context.

In non-conditions contexts, courts will deem a punishment to be “excessive” if the punishment does not “fit” the offense, as determined via a proportionality analysis. Regardless of the exact framework, the essence of a proportionality review is to balance the interest of the government in enacting the punishment against the interest of the individual in having the least amount of suffering. In a series of articles, Richard Frase has conducted a thorough review of how proportionality is used in the Eighth Amendment context. Frase points out that we cannot evaluate whether a punishment is excessive until we determine the interest we are comparing it with—in other words, he asks, “excessive as compared to what?” He notes that while “proportionality” is a term generally used by courts and scholars, the actual analysis depends heavily on the normative theory of punishment underlying the comparison.

Punishment theories differ in what they rely upon to justify the harm inflicted on an individual. In Western culture, there are four regular justifications for punishment: retribution, deterrence, rehabilitation, and incapacitation. Traditionally, philosophers and punishment scholars have described these justifications as fitting into two theories, retributivism and utilitarianism. Frase explains that the type of proportionality review employed by courts (and often courts’ rulings) depends upon whether it is based on a retributive or utilitarian theory.

Retributivism is backwards-looking. It justifies the harshness of a punishment by examining the severity of the crime. Retributivists consider the harm suffered by a victim, as

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the founders did not intend to require proportionality analysis in the Eighth Amendment, but that the adoption of the Fourteenth Amendment included this limitation on governmental power. *Id.* at 49-58 (citing Akhil Amar, *The Bill of Rights, Creation and Reconstruction* xii (1998)).

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171 Id. at 37-50. 
172 *Id.* at 40-47. 
174 Id. at 40-46.
175 *Id.* at 40-49.
176 *Id.* at 40-49.
well as the blameworthiness of the criminal. Retributivism is a long-standing theory with roots in Old Testament Jewish law that required punishment based on severity, or “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.” In the modern sense, retributivists do not call for punishment that is literally equivalent to the crime, but may examine a variety of factors to determine what punishment is appropriate, including the amount of harm to the victim, the unfair advantage to the perpetrator resulting from the crime, or the moral imbalance caused by the crime.

Frase states that when employing a proportionality review based on retributive theory (“retributive review”) a court compares the harshness of a sentence to the gravity of a crime. A retributive review focuses on the actor’s blameworthiness, including the severity of the crime and the culpability of the person in committing it. Retributive proportionality may set an upper limit on the sentence or punishment that is available for a crime, though a court may be permitted to lower the ceiling for a variety of reasons. Strict retributivists, however, would urge harsh penalties for harsh crimes, even when there exists no potential for future reform or deterrence.

By contrast, utilitarianism is forward-looking, and justifies punishment through future societal or individual benefits. Under utilitarianism theory, a punishment is viewed as a solution to societal ills of crime and deviance. The justifications of deterring crime, increasing public safety, rehabilitating the criminal, or incapacitating the criminal to reduce future crime are all utilitarian goals. The influence of utilitarian principles on our current prison system is displayed in its vocabulary; terms such as “corrections”, “training”, “treatment”, and “rehabilitation” are regularly used to describe what penal systems do.

Proportionality review based on utilitarian principles (“utilitarian review”) examines the future benefit of the punishment. A utilitarian review examines the punishment to determine whether it is working toward the goal of deterring future crime, incapacitating the offender, or reforming the criminal. Frase explains that a penalty can be disproportionate under this theory in two ways. First, the good achieved by a punishment may be outweighed by the cost to society or the harm to the individual. Frase terms this “ends-benefits” proportionality. Second, a punishment will also be invalid if the same goal or ends can be achieved with less harm to the person convicted (for example, a shorter sentence). Frase terms this “alternative-means”

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178 Id.
180 Cavadino & Dignam, supra note 96, at 44-46.
181 Frase, supra note 162, at 40-41.
182 Id.
183 Id. at 41-42.
184 See generally id. at 40-41.
185 Id.; see also David Garland, PUNISHMENT IN MODERN SOCIETY 6-7 (1990).
186 Cavadino & Dignam, supra note 96, at 37-43.
187 Id., supra note 186, at 7.
188 Frase, supra note 162, at 43.
189 Id.
190 Id. at 43-44.
191 Id. at 45-46.
Both of these types of proportionality review—retributive and utilitarian—are illustrated by one of the first cases relying on the Eighth Amendment to limit government action: *Weems v. United States.* In this case, a government employee made two inaccurate entries in a government book and was sentenced to fifteen years of “painful as well as hard labor.” The Supreme Court found that review of this punishment was essential as “power might be tempted to cruelty.” Using this principle, it held the fifteen-year sentence was disproportionate compared with the minor nature of the crime. The Court also used utilitarian principles and looked at the goal or benefit achieved by the law Mr. Weems violated. The Court concluded that the law existed to deter future crimes and to rehabilitate offenders. Considering these goals, the Court found that a lesser punishment could satisfy these interests: “[t]he state suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.” Because a shorter sentence was adequate to meet the goals of punishment, the Court held that the longer sentence was disproportionate to the crime and caused unnecessary harm to Mr. Weems. Based on both of these rationales, Mr. Weems’s sentence was invalidated as excessive.

Since *Weems*, the Supreme Court and lower courts have relied on retributive and utilitarian proportionality reviews to overturn and uphold state punishments. Unfortunately, as discussed in depth by Frase, these types of proportionality reviews are used interchangeably and without explanation as to when each applies. The decisions often sound as if the retributive comparison of punishment and crime is the essential review; however, more than once the Supreme Court has also noted that utilitarian goals can be of utmost importance in assessing proportionality.
Proportionality review is the predominant analysis to determine what punishments are cruel and unusual in other Eighth Amendment doctrines, including those challenges to sentences, fines and application to the death penalty. Despite this, proportionality review is not generally used in cases reviewing prison conditions. How did the conditions cases become an outlier in Eighth Amendment jurisprudence? And does proportionality review have something to offer in these cases?

A) Is proportionality review transferrable to conditions challenges?

In order to determine whether proportionality review could be used to evaluate what conditions are “sufficiently serious,” the different excessiveness theories must be examined.

1) Retributive Theory

Retributive review is commonly used in challenges to sentences, including the imposition of the death penalty and of fines. In the conditions context, it would be largely unworkable to weigh a condition against the crime that an inmate committed. This would result in divergent prison conditions based on the varying convictions of those within. First, such review would be logistically disastrous, with the prison having to adjust general conditions for each individual. Second, using the conviction as a guide would not take into account a prisoner’s behavior and experience after he is already in prison. Prison classification systems currently put ample weight on a prisoner’s actions while in prison—for example his disciplinary history, whom he affiliates with, and what his family contacts are—in determining what conditions prison officials consider appropriate and safe for him.

Thus, while conditions cases on the whole do not lend themselves to the retributive model of proportionality review, it could be effective for examining challenges to disciplinary measures. In prisons, temporary penalties (loss of amenities, loss of time credits, disciplinary segregation) are applied for breaking prison rules. As these punishments are specific, punitive responses to offenses, the retributive model could assess whether these disciplinary measures

207 Reinert, supra note 10, at 69-73.
208 See, e.g., Graham, 130 S.Ct. at 2026 (weighing culpability of juvenile offenders in assessing punishment); Solem v. Helm, 463 U.S. 277, 303 (1983) (finding life without parole excessive compared to crime of issuing a bad check, even with prior criminal history); Enmund v. Florida, 458 U.S. 782 (1982) (death penalty excessive for felony murder when defendant did not take life); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (“sentence of death is grossly disproportionate and excessive punishment for the crime of rape”); id., at 601, (Powell, J., concurring in in part, dissenting in part) (“ordinarily death is disproportionate punishment for the crime of raping an adult woman”).
209 Reinert, supra note 10, at 69-73.
210 Id.
211 A prisoner’s behavior while in custody influences his conditions and placement. See, e.g., Program Statement 5270.09, Inmate Discipline Program, BUREAU OF PRISONS (July 2011) (detailing offenses and disciplinary consequences). For example, if a prisoner is frequently fighting with others, the prison officials are forced to respond to this, even if he is never criminally prosecuted for those fights. See id. at Table 44 (listing fighting as “high severity level offense” and listing possible sanctions, including segregation, fine, forfeiture of good time credits, or loss of privileges).
212 See id.; see also Program Statement 5100.08, Inmate Security Designation and Custody Classification, BUREAU OF PRISONS (Sept. 2006) (detailing information used to determine custody level and prison placement).
213 See Program Statement 5270.09, supra note 211, at Table 44.
satisfy the objective prong by looking at the fit of the violation and the penalty.\textsuperscript{214}

2) Utilitarian Theory

Utilitarian review weighs the harm to the individual from the punishment against the benefit to society obtained from the punishment. In order to make this assessment, courts must identify that the punishment serves a legitimate purpose.\textsuperscript{215} Courts have held that when a punishment serves no purpose (such as the denial of medical care), it is unconstitutional.\textsuperscript{216} These cases are still relying on utilitarian principles: a punishment “lacking any legitimate penological justification is by its nature disproportionate to the offense.”\textsuperscript{217}

Even when there is a legitimate future benefit from a punishment, it still can be found excessive under utilitarian review if a lesser or different sentence could fulfill the goal. This is what Frase describes as “alternative-means” proportionality review.\textsuperscript{218} This principle is also described by the Supreme Court in \textit{Furman v. Georgia}: “The first principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which punishment is inflicted…the punishment inflicted is unnecessary and therefore excessive.”\textsuperscript{219}

In the conditions of confinement context, utilitarian review would weigh any harm to a prisoner against the prison’s interest or benefit in the condition itself. Interestingly, many commentators and courts fail to recognize that, in early conditions litigation, courts already used a proportionality review that was largely based on utilitarian principles.\textsuperscript{220} This type of analysis effectively supplanted when the subjective mindset prong was introduced and when the “basic human needs” test gained favor. Yet these early conditions cases demonstrate that using a


\textsuperscript{216} \textit{See, e.g.}, \textit{Graham}, 130 S.Ct at 2028; \textit{Atkins}, 536 U.S. 318-19.

\textsuperscript{217} \textit{Graham}, 130 S.Ct. at 2028.

\textsuperscript{218} \textit{Frase, supra} note 162, at 45-46.

\textsuperscript{219} \textit{Furman v. Georgia}, 408 U.S. 238, 279 (1972).

\textsuperscript{220} For examples, see \textit{infra} notes 222-23. Likewise, Eighth Amendment cases challenging use of force by prison officials have employed a utilitarian-based proportionality review; indeed this doctrine is termed a review for “excessive force.” \textit{Wilkins v. Gaddy}, 130 S.Ct. 1175 (2010) (examining action by officer under “excessive force” doctrine). Prior to the firm implementation of the mindset requirement by the Supreme Court in \textit{Whitley} (which occurred in 1986), courts regularly balanced a prison official’s need for force against the amount used. In making this inquiry, courts would weigh the following factors: the need for the application of force; the relationship between the need and the amount of force used; the extent of the injury; and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. \textit{Johnson v. Glick}, 481 F.2d at 1038. Under this weighing, the Eighth Amendment was deemed to be violated when the force used is “so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time.” \textit{Jones v. Mabry}, 723 F.2d 590, 596 (8th Cir. 1983).
utilitarian review is viable and useful. In these cases, the courts examined the reason for the condition or treatment and considered whether it served the prison officials’ stated goals. If a less painful or restrictive treatment could accomplish that goal, then the condition was found to be unconstitutional.

For example, a prisoner, Mr. Moss, challenged the denial of food for a period of four days. Prison officials asserted that this denial was necessary because Mr. Moss had violated a prison rule, in that he had refused to return a plastic cup. The prison officials had a legitimate reason for the harsh punishment for failure to return the cup; they were trying to prevent prisoners from throwing urine or feces or making weapons. It was undisputed, however, that Mr. Moss only wanted the cup as storage for his dentures. In weighing the prison’s interest against the harm to Mr. Moss caused by four days without food, the court relied on a utilitarian analysis, finding the punishment disproportionate because it “[went] beyond what is necessary to achieve a legitimate aim to wit, that it is unnecessarily cruel in view of the purpose for which it was used.”

In another case, a group of prisoners challenged the practice of closing the doors to their cells. The court had previously declared these cells (when closed) to violate the Eighth Amendment, because they were so isolated as to cause sensory deprivation and the prison officials offered “no justification for their use.” As a result, the cell doors were typically open, but prison officials closed them at times and the prisoners challenged these closures. The court allowed the prison to continue their practice of closing these doors whenever it deemed appropriate, because of the legitimate interest shown that this practice prevented rule violations and was necessary to safely move other inmates. The prisoners argued that the defendants failed to show any need that outweighed the harm inflicted, the court in balancing the interest disagreed and stated that the door closing was justified because the prison officials “demonstrated a dire need to put a stop to certain kinds of behavior which disrupted [the unit] and threatened the health and safety of staff.”

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221 See infra notes 222-23.
222 See, e.g., Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984) (“it is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain.”); Schmitt v. Crist, 333 F.Supp. 820, 822 (D. Wis. 1971) (weighing prison’s interest in safety but finding “it is difficult to conceive of a legitimate prison objective which requires that a prisoner be denied the use of soap, toothbrush, and clean bedding”); Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971) (“Security” or “rehabilitation” are not shibboleths to justify any treatment. Still courts must keep in mind that a recognized valid object of imprisonment is not just to separate and house prisoners but to change them.); Jordan v. Fitzharris, 257 F.Supp. 674 (N.D. Cal. 1966) (weighing legitimate needs for strip cells with “shocking” conditions therein).
224 Id.
225 Id. at 596.
226 Id.
227 Id.
228 Id.
230 Id. at 1188.
231 Id. at 1189.
232 Id. at 1190-91.
233 Id. at 1196-97.
While these examples demonstrate the use of utilitarian review, this type of analysis was gradually less relied upon as the mindset inquiry gained significance in conditions challenges. Likewise, the adoption of the “basic human needs” standard eliminated most explicit usages of balancing.234

**B) Criticisms of Proportionality Review**

Proportionality review is not without problems. One criticism of this type of review is that it is subjective, and that—similar to the criticism of the “objective” prong—courts simply apply their own biases to each case. Another critique is that proportionality review has been overly deferential to state interests, with courts only willing to intervene in the most egregious situations.

a) *Subjectivity*

Many commentators have criticized proportionality reviews as subjective,235 and even the attempt to focus on factors that are purely objective may not counter this criticism.236 In the context of criminal sentences, courts review for “gross disproportionality.”237 To do so, they have established objective factors, including: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.238 These comparisons at least allow an arguably non-subjective basis for decisions and have proven to be a staple of the courts.

Yet commentators do not believe these factors have actually increased objectivity. Pam Karlan and Tracy Thomas note that the standard for gross disproportionality resembles one of “I know it when I see it”239 or “what-shocks-the-consciences-of-the-Justices.”240 That the “gravity” of a crime and the “harshness” of the penalty will be interpreted differently by different people, in different areas of the country is not a new concept.241 It is common knowledge that a drug crime or a gang incident are not viewed equally in all jurisdictions; indeed, it was variability in assessing the severity of crimes that originally led to the enactment of the federal sentencing

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238 *Graham*, 130 S.Ct. at 2038; *Solem*, 463 U.S. at 305.
239 Thomas, supra note 235, at 87.
240 Karlan, supra note 205, at 893.
241 For example, the sentences given in the United States are typically two to three times the length of the sentences assigned in Europe for the same crimes. *The Oxford History of the Prison*, supra note 16, at 113.
guidelines.\textsuperscript{242}

Notably, subjectivity would likewise be a concern if a utilitarian-based form of proportionality review were applied in the conditions context. Indeed, this raises the same basis for criticism of the current “objective” prong (as discussed in Part II). Part IV discusses reasons why—even with equal issues of subjectivity—a balancing approach could still improve the uniformity and transparency in judicial resolutions of challenges to prison conditions.

b) Narrowness

While the purpose of the Eighth Amendment is to act as a limitation on government punishments, one criticism is that the courts have rarely intervened using a proportionality review. While some punishments have been struck down—particularly in the area of excessive fines\textsuperscript{243} and in regard to who is eligible for the death penalty\textsuperscript{244}—courts have been hesitant to intervene in other areas. Advocates and scholars have particularly criticized the courts’ limited willingness to intervene in overturning criminal prison sentences.\textsuperscript{245} Alex Reinert attributes this reluctance to separation of powers concerns;\textsuperscript{246} he states, “deference is considered essential to ceding to the legislature, as a majoritarian institution, the primary responsibility of judging the seriousness of particular crimes...it follows that legislatures should be given as much leeway to punish particular crimes as they are given to define them.”\textsuperscript{247}

Thus, one concern is that if proportionality review—as is used in all of these other areas of Eighth Amendment law—is imported into the conditions arena, courts will only use it to invalidate the most egregious conditions. This concern is valid because deference to prison officials is a common reaction to cases challenging prison conditions. In assessing whether proportionality review would be useful one must assess whether courts reviewing conditions cases will be overly hesitant and narrow in its application.

Despite this concern, there are reasons why the proportionality review would be easier to manage in the conditions setting. First, in reviewing legislative decisions (as is done with issues of fines, sentences and death penalty eligibility), courts must often infer the goal of particular penalties, as it is difficult to obtain reliable testimony on this point.\textsuperscript{248} Without clear information on the intended purpose, some courts may have a tendency to ascribe rationales to the legislature that may not be accurate. However, in the prison conditions setting this information is more

\textsuperscript{243} Frase, supra note 162, at 51-53.
\textsuperscript{244} Id. at 54-57.
\textsuperscript{245} Id. at 57-58 (calling the Court’s holdings “disappointing” and noting it is “well known” that “the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds.”); Reinert, supra note 10, at 71.
\textsuperscript{246} Reinert, supra note 10, at 71.
\textsuperscript{247} Id.
\textsuperscript{248} Ristroph, supra note 151, at 1363-67; see also John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205, 1212-17 (1970) (discussing difficulty with discerning legislative motivation and problems with using motivation to invalidate otherwise valid laws).
Part IV: A New Approach: Balancing in Prison Condition Cases

This section proposes a modified version of the two-prong test for Eighth Amendment conditions of confinement challenges. This altered test would better serve the interest of protecting prisoners from future harm while not holding officers accountable for simple errors or misjudgments. Under the proposed test, analysis under the objective prong would still assess whether a condition is sufficiently serious to merit constitutional protection. However, it would eliminate the “basic human needs” requirement and would require the assessment of a challenged condition to be a utilitarian-based proportionality review. The court would weigh the harm of the condition against its alleged purpose.

The proposed test would also retain the subjective, deliberate indifference prong, but would permit intent to be inferred in injunctive cases. Allowing an inference of intent in injunctive cases would better acknowledge the different societal interests in cases seeking change to prison conditions that are ongoing, versus those cases seeking money damages for past action. It would allow courts to protect prisoners from ongoing harmful or risky conditions, but would protect past actors from being held liable absent the requisite intent.

A. A New Objective Prong

As an initial matter, the “basic human needs” requirement of the objective prong test should be eliminated as ambiguous and unhelpful to courts. There are several reasons why substituting a utilitarian review—where the court could weigh the reason for a particular condition (i.e., the prison’s interest in having the condition) against the harm it inflicts on prisoners (i.e., the prisoner’s interest of being free from the harm the condition inflicts)—would be beneficial in determining if a condition is sufficiently serious to merit protection under the Eighth Amendment.

1) The Case for Excessiveness Review

In the conditions realm, the operative question in the balancing analysis would be whether the challenged condition is proportional to the interest alleged in having it in place. For example, preventing suicides is a necessary and important goal within prison. One potential response to this concern is to keep everyone who is incarcerated on constant suicide watch.251 But while such a policy would undoubtedly decrease suicides, prisons would understandably hesitate to enact it, as prisoners on suicide watch require constant monitoring and are allowed

250 See id.
essentially no clothing. Under a utilitarian proportionality analysis, placing all prisoners on permanent suicide watch would be disproportionate to the problem it sought to address, and would raise a sufficiently serious condition to satisfy the objective prong.

There are two main benefits of importing proportionality review into the objective prong of the conditions of confinement test. First, doing so would harmonize the various areas of Eighth Amendment jurisprudence (including sentencing, excessive force, etc.). Second, the use of proportionality review would lead to better guidance and explicitness in the judicial opinions in conditions cases.

Increased harmonizing among the different Eighth Amendment doctrines may not seem important in and of itself. Yet, absent alignment of the guiding principles, the courts are talking out of both sides of their mouths—denying similarity between certain areas of law while borrowing principles and language from other areas without acknowledging the assorted contexts. For example, though the Supreme Court has explained that “death is different” and justifies a different degree of review, the Supreme Court has nevertheless directly relied on quotes and reasoning used within death cases when advantageous in other Eighth Amendment venues, such as prison sentences and method of execution cases. Without agreement on the basic principles underlying these diverse challenges, this amalgamation is confusing and at times disingenuous. More uniformity across the doctrines would enhance the theoretical bases for the language of the Eighth Amendment, and assist the courts in knowing what principles to abide by.

Second, utilitarian proportionality review of a challenged condition would increase the transparency of judicial opinions. Many scholars have espoused the benefit of simply having courts “show their work.” In the qualified immunity context, Sam Kamin explains that increased transparency will guide subsequent court decisions, reduce litigation by creating concrete rules, and prevent errors. In the conditions context, requiring explicit balancing would require, or at least permit, courts to provide more explicit rationales for why they allow or forbid certain conditions. As discussed in Part I, it is likely that most judges are weighing the reasons underlying a condition into their analysis of whether it is “bad,” yet due to the current structure of the test, they are not including this thought process in their opinions.

252 Rachel A. Van Cleave, “Death is Different,” Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality, 12 S. CAL. INTERD. L. J. 217, 230 (2003) (discussing confusion related to method for determining punishment). Indeed, the Court itself has acknowledged that “its precedents in [the area of Eighth Amendment] have not been a model of clarity . . . [and] have not established a clear or consistent path for courts to follow.” Lockyer v. Andrade, 123 S.Ct. 1166, 1173 (2003).

253 Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (“Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”).


255 Van Cleave, supra note 252, at 230-31 (arguing for uniformity among Eighth Amendment doctrines).


257 Id. at 59-61.

258 See supra Part II.A.
more explicit weighing of these factors would provide notice to other judges (as well as to prisoners and prison officials) about what concerns or judgments underlie the decisions. This increases transparency and might harmonize decisions that appear to be entirely contradictory now.

To give an example of these benefits, we return to the hypothetical of Mr. Jones, who challenged his thirty-year placement in solitary confinement. In this version of the hypothetical, Mr. Jones killed a correctional officer and is still thought to be extremely dangerous. Mr. Jones alleges psychological and physical harm as a result of his isolation, but the evidence concerning this harm is contested. The judge in the case is concerned generally about the effects of three decades of solitary confinement, but believes the prison officials in this case were justified in continuing to isolate Mr. Jones because of security risks. The judge, however, may be concerned that if he finds that Mr. Jones’s prolonged isolation is “sufficiently serious” to satisfy the objective prong, he will then be required to send the case to a jury on the question of the intent of the prison officials, as intent is classically a disputed issue of fact.259 With this in mind, the judge rules that the three decades of solitary confinement were not “sufficiently serious” to satisfy the objective prong, thereby ending the case. The court’s opinion has the effect of sanctioning any use of solitary confinement, as it simply finds it is not a troubling or serious practice.

In contrast, a decision employing utilitarian review would provide a richer discussion on the issues raised in the case, even if the outcome is the same. The judge could explicitly discuss his concerns with holding someone in solitary confinement for thirty years and could state that he believed that Mr. Jones was harmed by this treatment. He would also, however, be able to identify his perception that there was a significant concern about releasing Mr. Jones to general population. The judge could consider (if such evidence existed) whether there are less harmful alternatives for Mr. Jones, ones that would reduce his isolation but still achieve the goals of security. Even if ultimately the judge still determined that the isolation under these circumstances is acceptable under the Eighth Amendment, this latter opinion would provide more guidance on this issue going forward. Rather than give blanket acceptance to the use of long-term solitary confinement, the court’s decision provides notice to prison officials that prolonged isolation is a concerning and harmful practice, only permissible for such a lengthy period of time when the interest is specific and compelling.

The benefits of increased transparency and harmonizing the Eighth Amendment doctrines counsel in favor of using a balancing test to determine whether a condition of confinement is excessive, and thus, “sufficiently serious.” Once a balancing approach is adopted, the primary questions are how to weigh the different interests, and upon whom to place the burden of proof.

259 See generally Brian Saccenti, Comment, Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious, 59 Md. L. Rev. 642, 662-63 (2000) (noting courts’ recognition that there should be caution before granting summary judgment where a party’s state of mind is at issue.); see also McMillian v. Johnson, 101 F.3d 1363, 1368-69 (11th Cir. 1996) (“I find it difficult to see how [subjective intent] can be determined at the summary judgment stage if there is any substantial evidence of an illegal motive in view of the established law which precludes a trial court's making credibility determinations, weighing the evidence, and interfering with a jury's drawing of legitimate inferences from the evidence”); Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970).
2) Sharing the Burden

In devising how the balancing test should function, it is important to remember the critical role of the judiciary in providing a check on the prisons. While courts may not serve as the best monitor of this country’s prison systems, in many regards the judiciary is the only effective means for prisoners to seek redress for infringements on their rights. Other sources for oversight of the prisons—including ombudsmen, legislative audits, community organizing, and media—suffer from funding problems, political pressures, and the lack of available information. Federal judges are in a better position to provide a check on governmental power in prisons because they can command prison staff to produce information, order state action, hold parties in contempt for non-compliance, and because they don’t need to run for re-election.261

Keeping this in mind when devising a balancing test, it must first be determined whether either side (the prisoners or the system) is entitled to a presumption of correctness. One option is to require prison officials to justify every challenged condition.262 Such a heavy burden is generally only applied to the government for “cases in which it is highly predictable that illegitimate motives are at work,”263 which is a circumstance most would hesitate to roundly ascribe to those administrating prisons.264 There is a strong argument that some conditions or deprivations—for example, denials of food, clothing, and safety—are so basic that the government should be required to justify them. But placing the burden of proof on prison officials to justify every condition of confinement, regardless of its impact, might cause courts to hesitate before allowing a condition to qualify as sufficiently serious. Thus, a heightened review of prison conditions—established with the goal of better protecting prisoners—might actually impede progress. Rather than establishing liability for bad prison conditions, this scrutiny might prevent a broad interpretation of what qualifies for Eighth Amendment protection,265 thus eliminating liability for some conditions.

260 See generally Michele Deitch, Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory, 30 PACE L. REV. 1754, 1762 (2010) (reviewing monitoring mechanisms in all fifty states and concluding that while there are many monitoring organizations “it should be clear…that formal and comprehensive external oversight—in the form of inspections and routine monitoring of conditions that affect the rights of prisoners—is truly rare in this country. Even more elusive are forms of oversight that seek to promote both public transparency of correctional institutions and accountability for the protection of human rights.”).
263 Id. Only two rights in the prisons have been deemed to require this heightened protection: the right to be free from racial discrimination, and the right to be free from infringement upon religious practice. See Johnson v. California, 543 U.S. 499 (2005) (applying strict scrutiny to policies related to race); Derek L. Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions, 28 HARV. J.L. & PUB. POL’Y 501, 539-45 (2005) (discussing strict scrutiny standard in religious rights context).
264 Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would significantly hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, there by “unnecessarily [] perpetuat[ing] the involvement of the federal courts in affairs of prison administration.” Procunier v. Martinez, 416 U.S. 396, 407 (1974).
265 The hesitation to find “new” areas to be covered under the Eighth Amendment is discussed generally in Part II. In addition, this is illustrated by some courts explicitly stating that they should only intervene in the fact of “clearly demonstrated” constitutional violations. See., e.g., Burks v. Teasdale, 492 F.Supp. 650, 655 (W.D. Mo. 1980).
On the other side of the spectrum, another option would be to give the prison officials the presumption of correctness in their use of a challenged condition, and applying a form of rational basis review. Most challenges to prison policies or practices (those not raised under the Eighth Amendment) are reviewed under the rational basis framework dictated in Turner v. Safley. Under Turner, when a prison regulation or practice impinges on a prisoner’s constitutional rights, the regulation is still valid if it is reasonably related to a legitimate penological interest.

While it is possible Turner could be extended to the Eighth Amendment context, to date the Supreme Court has explicitly rejected rational basis review for these challenges. The Justices explained that while most constitutional protections can be limited for those who are incarcerated, limiting the Eighth Amendment thwart its purpose of protecting those who are incarcerated. Citing the Ninth Circuit, the Court included the language that: “the full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes.” Accordingly, the Court explained that affording “deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.”

Rather than giving either the prisoner or the prison officials a presumption of correctness in the proportionality analysis of the objective prong, courts should more evenly balance the interests of the government and of the prisoner. The burden would neither be on the government to justify use of the condition nor on the prisoner to demonstrate that the condition is illegitimate. Once the prisoner has shown some degree of harm more than de minimis, neither side would presumptively prevail and the court would be empowered to weigh both sides’ interests.

This procedure could be similar to the Pickering/Connick balancing test employed in First Amendment cases involving speech by a public employee. In those cases, the Supreme Court has recognized individual interests to be able to speak freely and provide information to the public and governmental interests in the need to achieve agency goals efficiently and effectively. Under Pickering/Connick, the employee first has a burden to demonstrate that his speech addressed a matter of public concern. If demonstrated, then a judge must weigh the interests of the two sides to determine whether the speech should be protected. The court considers relevant factors on each side, including the significance of the matter of public concern

267 Id. at 89.
268 See Johnson v. California, 543 U.S. 499, 511 (2005) (finding that giving only rational basis review to claims brought under the Eighth Amendment thwarts its purpose).
269 Id. (“the integrity of the criminal justice system depends on full compliance with the Eighth Amendment”).
270 Id. (quoting Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979)).
271 Id. (quoting Spain, 600 F.2d at 193-94).
272 The de minimis standard—requiring a harm is more than di minimis for a lawsuit to proceed—currently exists in Eighth Amendment law. See Hudson v. McMillian, 503 U.S. 1, 9-10 (1992). Some commentators have criticized this requirement, claiming it eliminates harms that should be actionable. Reinart, supra note 10, at 74-75.
275 Connick, 461 U.S. at 149.
and the disruptive nature of the employee’s speech to the functioning of the governmental office.\textsuperscript{276}

Considering both sides’ interests is a method also used within other Eighth Amendment doctrines. For example, when an individual is punifically assessed a fine, the court weighs the amount of the forfeiture against the gravity of the crime.\textsuperscript{277} The Court has invalidated fines as disproportionate when the governmental benefit (mostly as retribution and deterrence) was served by assessing a lower amount.\textsuperscript{278} Expanding such balancing to assessments of prison conditions would be feasible and is more reflective of the method used by society in assessing the fairness of punishments.

3) How to Weigh the Interests

“Weighing interests” may sound intrinsically appealing, but the use of a balancing test alone does not provide a clear basis for how to weigh the competing interests.

Under the proposed test, the initial step would require the prisoner to put forth evidence of the harm or risk of harm from a condition. If the prisoner failed to demonstrate any harm or risk, the inquiry would end with the objective prong unsatisfied. But when the prisoner could demonstrate that the minimum threshold had been reached, the court would then consider all evidence relating to the challenged condition. The evidence presented by the prisoner would not be significantly different than what prisoner-plaintiffs currently use under the objective prong. It could include testimony from the prisoner or prisoners about the harm, expert testimony concerning the harm or risk, and other research on the effects of this condition. If the prison officials claim that the condition is useful or necessary for a penological interest, the prisoner could rebut by showing that there is a less onerous means to achieve the desired objective. Courts are accustomed to hearing this type of evidence, as one Turner rational basis factor is whether there are inexpensive, less-restrictive alternatives to an infringing policy.\textsuperscript{279}

The prison officials would present evidence of their reason for the condition. In some cases, this evidence is already presented in the form of correctional officials and/or experts testifying about the rationale underlying the condition. This may be general evidence (for a policy) or specific to an individual prisoner (if the challenge is individual). The rationale could also be bolstered by demonstrating that the condition is commonly used by other prisons/systems to achieve the stated goal. The prison officials could also present evidence rebutting the prisoner’s claims of harm or risk.

With the evidence presented, this type of balancing test would permit courts to compare the merits and degree of each side’s interest. In situations where the harm is insignificant or

\textsuperscript{276} Id. at 149 & 152; Rankin v. McPhearson 483 U.S. 378 (1987).
\textsuperscript{277} See United States v. Bajakajian, 524 U.S. 321, 334 (1998). In one case, a person was charged over $300,000 for failing to report leaving the country with a large sum of currency. Id. In looking at a fine assessed as a punishment, the Supreme Court specifically has weighed the harm caused by the loss to the individual, any benefit to the government. Id. at 336-39.
\textsuperscript{278} Id.
\textsuperscript{279} Turner v. Safley, 482 U.S. 78, 90-91 (1987) (finding “the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns”).
minimal (e.g. a prisoner alleging that part of his food upsets his stomach), the prisoner’s interest would be judged as low and prison officials would require little explanation to overcome the challenge to the condition. But in situations where the condition is more serious (e.g. no outdoor exercise), the interest of the prisoner in not suffering harm is greater. Accordingly, the prison officials will be required to present a heightened justification and evidence about the necessity of the condition. In circumstances where heightened justification is required, courts may consider evidence of added inconvenience or staffing costs, however, since any implemented change would presumably cost money and cause inconvenience, these factors should only overcome a prisoner’s interest when the financial burden is significant.\footnote{Gaubatz, supra note 264, at 547 & n.207 (noting in context of RLUIPA costs may be considered in analysis but will only be sufficient in limited situations and not when cost of change or alternative is \textit{de minimis}).} For example, adding outdoor exercise areas would present a cost and require labor, but the cost is likely relatively minimal. On the other hand, if a prisoner presented a specific security risk—e.g. he had previously attempted an attack on the way to his outdoor exercise—then this alone might be sufficient justification.

One initial issue with the proposed model is that not all challenged conditions are the result of an intentional interest or choice of the prison officials. In cases challenging discrete or one-time actions by officers there can be a significant gap between the \textit{penological interest} in a condition and the \textit{individual intent} of an officer in his or her action. For example, denying a prisoner exercise might not serve \textit{any} legitimate penological objective, but could be the result of an individual’s malicious attitude, laziness, or simple mistake. In some cases challenging past actions (damages cases), the prison officials’ actions might not serve a penological interest; they may result from mistake, misunderstanding, or malicious action. This lack of any legitimate interest could make the objective determination easier (if the prison official has no evidence to present of an interest), and might even require a concession of an objective harm. Yet, this lack of interest does not mean the individual had the requisite \textit{intent} for Eighth Amendment liability. In these cases the second “subjective” prong still plays a critical role, and the prisoner must demonstrate deliberate indifference in order to prevail. For example, if a prisoner asserted that he was injured as a result of unsafe, exposed wiring, it is hard to imagine the prison officials asserting they had an interest in exposed wires. But the prisoner would still need to demonstrate that the prison officials acted with deliberate indifference (that they were aware of the exposed wiring and did not respond reasonably) before they will be held liable.

In the case of injunctive claims, prison officials will usually assert a penological interest underlying the challenge. Yet there will be certain instances where there is no alleged interest. For example, denial of medical care—which is among the most common claims raised by prisoners—is rarely, if ever, based on a legitimate penological interest.\footnote{\textit{Estelle v. Gamble}, 429 U.S. 97, 103 (1976).} Rather, in medical care cases, the main question will typically be whether the prisoner could meet his initial burden to demonstrate a harm. Prison officials could rebut the claim that the prisoner had been harmed by providing evidence that ongoing treatment was reasonable and met the standard of care. For example, if the prisoner claimed to have ongoing back pain that required surgery, prison officials could rebut the evidence of harm by showing that he had received treatment consistent with the standard of care, such as pain pills and injections, and that the doctors did not believe anything else was indicated. But as discussed in the following section a prison could still escape liability by showing they did not have the culpable mindset, i.e. they did not act with deliberate
indifference.

d) Concerns about Use of a Balancing Test

Despite the potential benefits of importing a form of proportionality review into the objective prong, there are two concerns about reviewing for excessiveness that arise immediately: the fear that courts will micromanage the prisons, and the possibility that a balancing test would still allow judges the leeway to color decisions regarding serious conditions in the light of their personal proclivities.

The caselaw of prisoners’ rights is replete with examples of judges expressing their discomfort with reviewing the daily management and decisions of prison officials. Judges are aware of their lack of correctional judgment and often believe it is appropriate to defer to the expertise of prison staff. Yet this concern is something of a red herring; despite the courts’ discomfort at being in this role, they are already regularly making similarly hard decisions, even in the context of other prisoners’ rights claims and Eighth Amendment challenges. Yet this concern is perhaps a red herring as they are already make many similarly demanding decisions, even in the context of other prisoners’ rights claims. For example, in cases brought by prisoners under RLUIPA challenging denial of group worship, courts will consider evidence of the prison’s alleged financial and security concerns, as well as information about what practices are permitted for other religions, before concluding whether the religious infringement is permissible.

Another criticism of proportionality review, or balancing generally, is that it is overly subjective; indeed this very criticism was leveled against the current two-prong test earlier in this article. The criticism is apt—just as decisions concerning what is “objectively” bad are subject to a judge’s own background and experience, so is the weighing of a prison official’s and prisoner’s interest. For that reason, it is likely that the outcome of any Eighth Amendment conditions decision employing a proportionality framework would be the same as under the current test.

Notably, the purpose of the proposed balancing test is not to change the outcome of conditions cases; it is to empower a more intellectually honest review of these complicated

282 Turner states that “the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.” 482 U.S. at 84 (citation and internal quotations omitted).

283 According to the Court, “[s]ubjecting day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” Id. at 89.

284 Id.

285 See generally Gaubatz, supra note 264 (discussing court decisions weighing security and religious rights).


287 Id.; see also Sarah E. Vallety, Comment, Criminals are all the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination Under the Religious Land Use and Institutionalized Persons Act, 30 HAMLINE L. REV. 191, 226-29 (2007).

288 See supra Part III.B.a.
situations and to require judges to discuss that review. The development of the doctrine would be much improved if, for instance, the hypothetical judge reviewing the solitary confinement case of Mr. Jones had ventured into a discussion of the potential risks associated with solitary confinement, while still having the latitude to find that these risks are outweighed by the prison official’s specific security interest. The increased transparency afforded by a balancing test is its own end. Future courts faced with a challenge to solitary confinement would be better served by having more thoughtful and robust opinions to guide them.

The concern about the arbitrary nature of a proportionality review could also be mitigated by using objective factors. In the sentencing context, as discussed in Part III, judges consider empirical evidence including sentences imposed on other criminals in the same jurisdiction, and sentences imposed for commission of the same crime in other jurisdictions. While factors from other doctrines obviously cannot be cut-and-pasted verbatim into the conditions analysis (in part because of the lack of legislation concerning prison conditions and the lack of concrete information about actual conditions), the concept is instructive. Courts analyzing conditions cases could establish similar factors, including potentially: (1) the reasonableness of the prison’s response as judged by whether other prisons/systems respond similarly; (2) any national or international information on public opinion concerning the condition at issue; and (3) evidence that the prison’s interest could be furthered in a less restrictive or painful manner. Of course these are only a starting point, and additional factors could be established by courts in the process of determining what evidence is instructive and available.

While not fully resolving the concern about subjectivity, the establishment of factors would, at a minimum, help to structure a framework for judicial inquiry. These factors would furthermore also be instructive to both prisoners and prison officials in determining what conditions are acceptable. If a particular prison knows that the practice it employs is unusually harsh, or that there is a national consensus against the condition, it would be on notice that a challenge to that condition would be more likely to succeed.

**B. A Twist on the Subjective Prong – Inferring Intent in Injunctive Challenges**

In addition to altering the objective prong of the conditions of confinement test, I argue for modification of the subjective prong in injunctive cases. As previously discussed, the caselaw is explicit and firm in finding that intent is a requirement in order for conduct to be considered “punishment” under the Eighth Amendment. Courts and scholars have been hesitant to hold that a harm caused by mistake constitutes “punishment” within the meaning of the Eighth Amendment. While some theorists criticize this requirement, the intent prerequisite is universally used by courts in prison conditions cases.

As discussed in Part II, despite agreement that intent is required, this requirement loses meaning in cases involving an ongoing harm. The truly “subjective” portion of the deliberate

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289 See supra Part III.B.a.
290 One potential criticism of this approach is that it could result in lowering prison conditions to the “lowest common denominator;” meaning if many prisons use a harsh condition, it would be acceptable.
291 See, e.g., Dolovich, supra note 10 at 945.
292 See supra Part II.B.
293 Dolovich, supra note 10 at 945; see generally Kolber, supra note 14.
indifference inquiry—the knowledge portion—is always satisfied, if only by the lawsuit itself.\textsuperscript{294} Thus, the main inquiry turns on the “reasonableness” of the prison officials’ response.\textsuperscript{295} Upon finding an ongoing harm, courts are generally uncomfortable with not taking action to improve it;\textsuperscript{296} society has an interest in treating prisoners humanely. In injunctive cases prisoners continue to suffer the challenged conditions, and if they are painful or unnecessary, we want judges to have a broad ability to end them. These cases both prevent future harm to prisoners and enhance the prison officials’ understanding as to what conditions are acceptable.

A court’s interest in addressing an ongoing harm is notable when juxtaposed with its interest in addressing an alleged past harm. Society may want prisoners to be compensated for their harm, but typically only when culpability exists on the part of the responsible prison actors.\textsuperscript{297} The harmful action itself, isolated from the mindset that motivated it, does not demonstrate culpability as the act may have been intentional, or may have resulted from an isolated mistake.\textsuperscript{298} Past cases may still serve a notice function by clarifying the standards of acceptable conduct, but ensuring compensation for prior harm is deemed to be of secondary importance.

Based on these interests, intent should be inferable in any injunctive action. When prison officials are sued in an injunctive case, they have notice of the challenged action and the alleged harm or risk resulting from it. There can be no question that they have knowledge of the disputed practice. At any point, they could alter or discontinue the practice (and many do; mooting out prison conditions cases is common).\textsuperscript{299} Thus, a culpable mindset can be inferred by the continuance of a particular challenged action.\textsuperscript{300}

Authorizing different treatment for injunctive and damages suits is not a novel concept. In several contexts related to suits against the government, plaintiffs have the ability to obtain future, equitable relief, but past, monetary recovery is subject to limitations or defenses.\textsuperscript{301} For example, qualified immunity protects officers only from money damages; it does not preclude their being ordered to follow a court order. The reason underlying this differential treatment has been explained as a preference of the courts for equity, which is a less intrusive means than damages for plaintiffs to validate their rights and allows courts to establish clear legal boundaries.\textsuperscript{302} Allowing this differential treatment in Eighth Amendment conditions cases would serve similar interests: allowing the court to prevent future violations without finding individual.

\textsuperscript{295}See supra Part II.B.1.
\textsuperscript{296}See supra Part II.B.1.
\textsuperscript{297}See supra note 45.
\textsuperscript{298}See supra note 135.
\textsuperscript{299}See supra note 139.
\textsuperscript{300}This inference of intent would be similar to what is allowed in discrimination cases. See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (finding prima facie case and sufficient evidence of pretext may permit trier of fact to infer unlawful discrimination).
\textsuperscript{301}Alex Reinert, Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity, 78 UMKC L. REV. 931, 932 (2010).
\textsuperscript{302}See id. at 936-42 (summary of literature).
Conclusion

The current two-prong test for Eighth Amendment conditions of confinement cases is broken. What should be a helpful means of investigating the legality of prison conditions is instead a source of dissonant standards and tangled reasoning. While acknowledging the formidable challenge of distinguishing acceptable prison conditions from unconstitutional ones, this article points to specific weaknesses in the test as it is currently operates.

By modifying the two-prong test, I aim to preserve the traditional interests of the court—identifying objective harm and subjective mindset—while establishing a more natural and efficient analytical process. This modified test urges an integration of proportionality review into the objective prong, transforming the court’s unspoken balancing of interests into an explicit and transparent feature of the court’s analysis. I also suggest a modification of the subjective prong in injunctive cases, endorsing the inference of a culpable mindset from a persisting inaction. While modest in scope, I suggest that these adjustments would produce a more robust, nuanced, and honest consideration of the numerous Eighth Amendment claims that confront judges on a daily basis.

303 Id. at 942 (discussing John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999)).