April 4, 2008

Federal Courts as Constitutional Laboratories: The Rat's Point of View

Maureen N Armour
Federal Courts as Constitutional Laboratories: The Rat’s Point of View

Professor Maureen N. Armour
Dedman School of Law
Southern Methodist University

marmour@smu.edu
214-213-2808
# TABLE OF CONTENTS

I. INTRODUCTION  
II. THE RAT’S POINT OF VIEW: MUSINGS AND METHODOLOGIES
III. THE EXPERIMENTAL DESIGN: NEGOTIATING THE MAZE OF JUDICIAL DISCRETION
   A. Designing the Maze: Problematic Supreme Court Decisions
   B. Constructing the Maze: Institutional Deference, the Special Expertise of the Lower Courts, and the Problem of Conflicts Within the Circuits
IV. THIRTY YEARS OF JUDICIAL EXPERIMENTATION
   A. The New Experiment: The Problem of Institutional Liability
      1. The Problem of Institutional Liability – Who is Responsible?
      2. Changes in the Environment- The Political Arena Engages
      3. The Laboratory at Work: Conflicts in the Circuits
      4. Experimenting with the “Zone of Ignorance” -- What Does the Data Show?
      5. The Supreme Court Ignores the Laboratory’s Findings
      6. The Reaction to Farmer: Flaws in the Experimental Design
      7. The Experiment Expands: Intent and Municipal Liability
V. THE LABORATORY AT WORK: THE LAWSON LITIGATION GOES FORWARD
   A. A Tale of Two Litigants: Comparing Lawson and Farmer
VI. NEGOTIATING THE MAZE: LITIGATING A JAIL CASE UNDER FARMER AND BROWN
   A. The Disputed Facts
   B. The Discovery Phase
      1. Requests for Production – Sparse Documentation at the Jail
      2. Two Hundred and Ninety Five Requests for Admission Later
      3. Corporate Representative Depositions – Deposing the Policy Makers
      4. Deposing the Caregivers-Defining the Zones of Ignorance
   C. Cross-Motions for Summary Judgment – Looking at the Law
   D. The Trial: A Question of Innocent Ignorance or Reckless Disregard?
      1. Putting the County on Notice Decubitus Ulcers Are Constitutionally Significant – Estelle v. Ruiz
      2. Putting the County on Notice with Local Litigation – Lawson and Westbrook
      3. Deposing the Decisionmakers: Hiding in the Zone of Ignorance
      4. The Inference to be Drawn From Records – Their Presence, Their Absence and Their Contents
      5. The Problem of Negligence and Notice – The Missing Link in Farmer and Brown
   E. The Lower Court Enters Judgment
   F. Not Out of the Maze Yet: Dallas County Appeals
VII. CONCLUSION: HOW THE LABORATORY WORKS
VIII. EPILOGUE

---

2
I. INTRODUCTION

This article began life with a typically pretentious title, “Challenging the Supreme Court’s Deliberate Indifference Jurisprudence: Litigating in the Zone of Ignorance.” My plan was to use a major civil rights lawsuit in which I was involved, Brent Lawson v. Dallas County, Sheriff Jim Bowles in his Official Capacity, and Dr. James R. Farris in his Official Capacity,1 to critique the impact of two Supreme Court decisions, Farmer v. Brennan2 and Board of the County Commissioners of Bryan County, Oklahoma v. Brown3 on prison litigation.4 The thrust of the paper has changed. Instead of a traditional normative critique of the Supreme Court’s decision making, the article now encompasses a more highly contextualized study of constitutional decision making at the trial and lower appellate levels. Successfully litigating a jail medical treatment case under the Civil Rights Act is sufficiently unique on its own to warrant an article,5 but the Lawson litigation is presented here within its larger doctrinal and institutional contexts as a rich case study of the constitutional laboratory that is the lower federal courts. Examining the Lawson litigation from this perspective yields unique insights into the roles of constitutional litigants and federal judges as they make their way through the maze of malleable Supreme Court jurisprudence, fragmented constitutional doctrine, institutionalized appellate deference, delegated fact expertise, and a circumscribed judicial vocabulary for rendering “decisions,” in their efforts to reach and render fair results implementing constitutional law.6 The Lawson case study examines how the law shapes litigation by forcing the lower federal courts to exercise their substantial judicial discretion in resolving individual cases and in discharging a role they appear remarkably reluctant to openly embrace, developing constitutional law.

When I began this project I discovered this metaphor, federal courts as a constitutional laboratory, is often used but little studied.7 The Lawson case study

---

1 Brent Lawson v. Dallas County, et al., 112 F. Supp. 2d 616 (N.D. Texas 2000) (Original Complaint on file with author). The Trial Court awarded Mr. Brent Lawson $250,000 in damages.)
4 My initial goal was to focus on the Supreme Court’s inadequate policy analysis and unwarranted factual assumptions that underlay large parts of these cases.
5 Lawson v. Dallas County: Jim Bowles, in his official capacity as Dallas County Sheriff; James R. Farris, in his official capacity as Dallas County Chief Medical Officer, 286 F. 3d 257 (Fifth Circuit Court of Appeals, 2002)(Sheppard’s showed this opinion with negative treatment for over four years, but that mistake has been corrected. The Circuit issued two opinions, one on March 28 and on April 6. The citation is to the April 6 opinion which made minor cosmetic changes.)
6 This article is dedicated to all of the hardworking jurists who make our constitutional system work and the students who worked on the Lawson litigation.
7 See Pauline T. Kim, Lower Court Discretion, 82 N.Y.U.L.Rev. 383, 434 - 442 (May 2007) (citing Evan Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan.L.Rev. 817 (1994) (“Scholars have debated whether or not it is beneficial to allow legal issues to ‘percolate’ in the lower courts, thereby producing a divergence of approaches which may then inform the Supreme Court’s ultimate resolution of an issue.” Id. at note 215). As Professor Kim points out much of this literature is highly normative and lacks empirical grounding, see e.g. J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Calif. L. Rev. 913 (May 1983),
attempts to remedy this gap in the literature while responding to recent calls for positive scholarship. First it addresses directly the normative role of Supreme Court opinions, especially the Court’s missteps, in shaping litigation and lower court decisions. More importantly, it examines the important question of the role of judicial discretion in the implementation of problematic Supreme Court constitutional decisions by providing a glimpse of the lower federal courts’ conscious use of their legitimate judicial discretion in determining case outcomes and their equally obvious reluctance to acknowledge their role in developing the law. Finally, the article answers the question of what happens when the Supreme Court misperceives a jurisprudential fact or outcome crucial to their opinion. Overall the Lawson case study provides other scholars rich data and observations drawn directly from my experience as a litigant and scholar.

II. THE RAT’S POINT OF VIEW: MUSINGS AND METHODOLOGIES

When I began this project I assumed enough time and distance separated me today from my role as the supervising clinical faculty on the Lawson case, and I could offer objective insights from an academic perspective rather than the perspective of the trial lawyer embroiled in litigation. A few weeks spent reorganizing the Lawson litigation files and revisiting the myriad decisions involved in a large civil rights case of this nature quickly convinced me I was wrong. I didn’t feel like an objective academic able to offer keen, analytical insights into the complex process of prison litigation and how that litigation was shaped by the doctrinal flaws of Farmer and Brown. Instead I found myself back in the maze of decisions, doctrines, filings, motions and rulings that was the Lawson litigation and my life for over eight years. I liken this perspective to that of the rat running through the maze in the laboratory, a metaphor that is especially apt for a lawyer litigating a civil rights case immediately following two major Supreme Court decisions on point.


9 Numerous critiques of Farmer focused on Justice Souter’s explicit dismissal of any argument that prison or jail officials would seek to “hide” in the “zone of ignorance” as a way to avoid liability, see infra pp. 31 to 32. Justice Souter was wrong, but the jurisprudential dimensions of the decision were explicitly rendered irrelevant by the textualist basis of the opinion. The answer is that nothing happens when a jurisprudential error is imbedded in a highly textual, historical interpretation of the Constitution, constitutional intent trumps institutional effect.

10 I do not intend to beat this metaphor to death, but I must confess listening to my teenage daughter discuss her project on animal rights and laboratory testing while I was working on the article had to impact my thinking on many levels.
As I sat working on this piece one question reverberated in my head: Why bother? Tomes have been written about judicial decision making particularly in the constitutional context. What did I have to offer that was unique? Whether my perspective is insightful or simply self serving, I bring the dual perspective of a trial lawyer involved in the process of constitutional litigation and an academic interested in that same process. Methodologically my “rat’s point of view” is more than a metaphor; this perspective captures the richness of a participant observation study and mines the insights available from such qualitative research.\textsuperscript{11} Legal scholarship is a veritable grab bag of “ologies” with their proponents engaged in extensive dialogues about their relative utility, objectivity, normativity and overall relevance.\textsuperscript{12} Unfortunately the theoretical perspective of academic scholarship can undermine its vitality unless grounded in reality. From this perspective my unique offering is a little bit of reality -- the Lawson case as a study in constitutional litigation which examines the role of the litigants, the role of the judges, the role of the “substantive law,” and the role of the normative ideal of the legal paradigm – the “rule of law” -- in shaping the case and its outcome.

Let me immediately disclaim any prescience or omniscience -- the Civil Clinic did not undertake Mr. Lawson’s representation so that I could have a research project. Quite the opposite, I was in the middle of my “tenure” writing projects when the case came to the clinic and my decision to take this “large case” can only be characterized as insane given other demands on my time. But my readers who are lawyers or clinical faculty or who have otherwise been involved in significant civil rights work will understand my reasons. Serendipity ended up a major factor in this project; there I was deeply involved in constitutional litigation and the topic of my “scholarly”\textsuperscript{13} work was


\textsuperscript{13} I use quotations here to acknowledge the debates that have raged within the legal academy regarding the appropriate meaning of this term and what counts as acceptable (warranting tenure, promotion or enhancing rankings) legal scholarship. Obviously trends change. In the 1970’s treatises, casebooks and ALI work was the gold standard, but in the 1980’s and moving into the 1990’s the academy’s favor shifted to scholarship focused on “theory” and published in traditional “law reviews.” Whether recent “scholarly backlashes” will serve any purpose, one constant theme in the academy is whether anything other than “traditional publications in law related journals or books” should count? Some schools acknowledge the important role of engaged scholarship, while others reject this type of work as unworthy of being rewarded as scholarship. See e.g., Nancy Levit, Symposium on the Trends in Legal Citations and Scholarship: Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality, 71 Chi.-Kent L. Rev. 947 (1996) (discusses how attempts to define or evaluate “good scholarship” tends to rely upon criteria that “reinforces” existing hierarchies, excludes innovative, unusual or unfamiliar perspectives, and over rewards “popularity”); Deborah L. Rhode, Law, Knowledge, and the Academy: Legal Scholarship, 115 Harv. L. Rev. 1327 (2002) (academic incentive structures over reward legal scholarship and under reward other critical academic activities resulting in the production of scholarship that is of limited utility and the deflection of resources away from other important academic enterprises); “The Hierarchy of Legal Scholarship,” Jurisdynamics, Sept. 21, 2006 (D:\temp\Temporary internet Files\OLK7\hierarchy-of-legal-scholarship.htm); Panel Discussion, Legal Scholarship for Equal Justice: Summary of Panel Discussion,” 30 Wm. Mitch. L. Rev. 295 (2003) (the challenge of ensuring legal scholarship addresses real problems and reaches those who need it); Michael D. McClintock, The Declining Use of Legal Scholarship by Courts: An Empirical Study, 51 Okla. L. Rev. 659 (1998); Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issues in
judicial discretion. I didn’t approach the litigation at the outset as scholarly research. I had no hypothesis or point to make as I worked on the case other than to “win” for our client. However, as the case evolved I developed increasingly articulate views informed by my research regarding the scope and nature of judicial discretion as the animating force driving the adjudicative process. Thus my understanding of judicial discretion, the subtext of this article, is equally informed by both sets of experiences, an imperfect merger of theory and practice.

My original project bears little resemblance to what is presented here, but that is predictable once we accept the premise that “research is imbedded in social contexts . . . . And [r]esearchers themselves . . . have contexts and purposes far beyond the immediate scope of their studies.” If research is a social act then a participant observation case study in which the researcher was involved as an accountable actor is a thoroughly social act. Social acts inevitably alter their own environments and create new contexts. My original project focused on what I perceived to be the doctrinal and prudential flaws of Farmer and Brown; my intent was to use the Lawson litigation to illustrate those flaws and their adverse impact on prison “reform” litigation. These are still legitimate points

---


15 Personally I find this dichotomy of limited utility. At most it reflects the legal academy’s attempt to differentiate itself from law as a practice and align itself more closely with perceived legitimate paradigms of traditional university scholarship. Oddly enough other “practice” oriented departments, the performing arts and business schools, have faced similar dilemmas. Why this is necessary is never addressed directly in most of these debates. At the least it expresses some notion of intellectual hierarchy, another perspective I find of limited utility. I simply use the phrase to reflect upon the context within which I am called upon to produce “legal scholarship.”

16 Wolcott, supra note 11 at p. 93.

17 Qualitative research spans a broad spectrum of field methods and is widely accepted and practiced. These methodologies include phenomenology, case study, ethnmethodology, etc. Wolcott, supra note ___ at p. 100. Much of the work on judicial discretion calls upon applied phenomenology, how do judge’s perceive and apply their own discretion. I will not attempt to wrap myself in that particular “ology” at this time. What I am doing here combines case study methods with phenomenological work aimed at my own self perceptions. The best way to describe this methodology is as participant observation. It will suffice to acknowledge that what I am attempting to present here is similar to work being done in other fields as well. See e.g. Carrie L. Elrod, Jessica L. Hamblen, and Fran H. Norris, Challenges in Implementing Disaster Mental Health Programs: State Program Directors’ Perspectives, 604 Annals of the Am. Acad. of Pol. and Soc. Science, 152 (March 2006); Robert M. Emerson, Being Here and Being There: Fieldwork Encounters and Ethnographic Discoveries, 595 Annals of the Am. Academy of Pol. And soc. Science, 8 (Sept. 2004).

but my perspective has shifted away from this highly normative critique of the Supreme Court’s Eight Amendment jurisprudence. The Lawson litigation offers a unique moment of insight into the process of constitutional litigation as a social process imbedded in the complex legal environment of the lower federal courts.19

In a “descriptively oriented fieldwork-based” study there is always too much to report and analyze. My challenge in revisiting Lawson was to narrow my research project, pick one thread to follow from among many, while maintaining a focus that did justice to the complex social phenomenon of the case. Quite literally I woke up one morning at around 4 a.m. and had this thought—few scholars talk about the lawyers’ or the litigants’ perception of judicial discretion, the trial judge and appellate judges as institutional decision makers engaged in a critical dialogue with litigants, or more realistically, their lawyers. Much formal legal scholarship examines constitutional law making, adjudicative discretion, or judicial policymaking by focusing on the courts as a hermetically sealed system and explicitly excludes from its consideration the dialogue between the courts and litigants, and their engagement with the applicable law as part of the adjudicative processes.20

I don’t think scholars actively reject the idea that the “law” matters; it is a question of what they have access to, what they can comfortably work with. Unless you are involved in litigation, it is very difficult to grasp on a day to day basis the legal and social processes at work. From the perspective of the trial lawyer, the fact of judicial discretion, its scope and malleable application across a range of issues, whether procedural, factual or doctrinal, is the “bread and butter” of practice. While some might dismiss this process as the simplistic fitting of “law to facts,” this is in fact the “play” in the system lawyers focus on when preparing their cases for the courts. And this “play” is itself directed and limited in large part by the “law” or the “rules and norms” of practice that shape the lower courts’ decisions. I decided that is what I would examine and with that decision my project took shape. I now had a clearer theoretical focus: I wanted to examine constitutional litigation as a dialogue, a contextually rich interaction between litigants and courts that takes place in the interstices of the law. I wanted to examine this dialogue, how it is shaped by the critical spaces allowed to courts to make factual and legal decisions and how it, in turn, shapes the law. My theoretical goal was clearer: How did the lower federal courts actually function as a constitutional laboratory? How did problematic constitutional opinions shape litigation? How did the courts respond and what strategies did they use to address the problems that inevitably arise in attempting to fit openly textured, malleable Supreme Court opinions to the real world?

19 Others are interested in expanding the context for adjudicative decisions to include larger political contexts or attitudinal variables. I prefer to address the context with which I am most familiar, litigation and adjudication as a structured social process of interaction and decision making between a finite set of actors and within a set of perceived “legal limits” that define and legitimate the institutional and individual conduct.

20 In a recent article Professor Pauline Kim points to this problem making the sound point that studies of judicial discretion should also consider the role of the law as a normative force. Pauline T. Kim, Lower Court Discretion, 82 N.Y.U. L. Rev. 383 (2007); see e.g. Suzanna Sherry, Logic without Experience; The Problem of Federal Appellate Courts, 82 Notre Dame L. Rev. 97 (2006) (Professor Sherry analyzes the impact of appellate court “rule making” on trial court discretion).
The lower federal courts are a fertile ground for scholarship because these are the courts that bear the day to day responsibility for the application, clarification, development and, ultimately, legitimacy of democratic constitutionalism, the mandate that all must comply with the constitution as interpreted by the United States Supreme Court. This article examines that role from the perspective of one who had to plan and prosecute litigation with an eye toward the trial court’s and appellate court’s legal context, how these judges would perceive the scope of their adjudicative discretion to handle the tasks before them. If I can present this phenomenon as “appropriately complex without rendering it . . . opaque,” and provide interpretations and analyses that “mirror that complexity” rather than suggesting “that [I] . . . ha [ve] the omniscience to infer [the] “real” meanings” of events and actions, the project will be a success. It will be especially successful if I can step out of the comfort zone of “hindsight” and provide, not the perspective of the “objective academic” removed from the fray, but rather the perspective of the lawyer caught up in the laboratory of constitutional law that is the lower federal courts.

This is a rich environment to study especially when, as occurred with Lawson, this legal context is fundamentally altered by a Supreme Court decision that revises an existing framework of constitutional accountability. The Lawson litigation took place within two significant shifts in the constitutional context relevant to jail litigation, the decisions in Farmer and Brown. Following these decisions the constitutional world was profoundly altered: state actors had new duties; individuals gained or lost rights; and daily interaction between these two was redefined. Beginning with the filing of the original complaint, through trial and appeal, a period of seven years, the Lawson litigants and courts faced the often daunting task of figuring out how the Supreme Court’s new jurisprudence limiting institutional liability in prison litigation fit the unique facts of their case. The District Court’s and Circuit Court’s applications of Farmer and Brown to Lawson at trial and on appeal resulted in an award to Mr. Lawson of $250,000 in damages. From the rat’s perspective the experiment was a success, the maze of judicial discretion and decision making had been successfully negotiated. From the scientist’s perspective the litigation was a success because the laboratory worked providing crucial insights into the vital role the lower federal courts play in constructing our constitutional world.

The most intellectually honest presentation of my work would start with the Lawson litigation and work backward to my more general, or theoretical, conclusions concerning judicial discretion, and the role of trial and appellate courts in shaping our constitutional world. But before we can even begin to discuss these issues, a few preliminary points must be made to set the stage for the litigation. In Part III the article takes the work-a-day world of the lower federal courts and examines their “experimental

21 [http://www.uscourts.gov/judbus2005/appendices/b0.pdf](http://www.uscourts.gov/judbus2005/appendices/b0.pdf) (provides extensive data on the number of cases handled at the trial and appellate levels), see also Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 2005. (Less that 1 percent of the constitutional cases tried and decided by the lower federal courts ever reach the Supreme Court or even attempt to reach that Court for final resolution).
22 Wolcott supra note 11 at 96.
23 Id.
24 The term theory is used to denote the array of discourses about “theory” that have proliferated in the legal academy without preferencing any particular one.
design” as a laboratory. How do the lower federal courts approach the problems inherent in implementing problematic Supreme Court rulings? What are the institutional characteristics of federal trial and appellate courts, particularly three judge panels that enable them to address these problems? How are the litigants and the courts engaged in this process, and what can we learn about this process from the lower courts’ opinions? The article moves on in Part IV to examine Farmer and Brown. Here I examine the thirty years of judicial experimentation with the Eighth Amendment’s “deliberate indifference” standard that led up to Farmer. It is only within the context of this constitutional dialogue that we can understand the significance of and controversy surrounding Farmer, the Supreme Court’s creation of new municipal liability paradigms in Brown, and, finally, the impact of both decisions on Lawson. In Part V the factual similarities between the Lawson and Farmer litigants is examined highlighting the challenge facing Lawson’s litigation team. Part VI presents the rich texture and details of the Lawson litigation as it explores how the laboratory of the lower courts actually works, how the lawyers and the courts addressed the problems posed by Farmer and Brown within the context of the Lawson litigation. By briefly reviewing the discovery and trial of the case it is possible to concretely observe the “friction” of the Supreme Court’s rulings in Farmer and Brown as they bumped up against, molded and shifted perspectives within the case shaping the discovery and the trial strategy of the litigants. Here the article examines the two lower courts’ different, but equally legitimate, institutional “responses” to the mandate that they apply Farmer and Brown to the Lawson facts. And it is here the courts reveal, not only their unique institutional roles, but their perspective on those roles and the workings of the laboratory.

Ultimately, as discussed in the conclusion, Part VII, this case study reveals the complex processes involved in generating decisions like Lawson and the significance of this type of decision in creating a constitutional world. Farmer was perfectly designed to achieve the Supreme Court’s larger institutional goal, the goal of reducing systemic reform litigation in the country’s prisons and jails. This goal is accomplished in part, as was seen in Lawson, by refocusing the Eight Amendment’s jurisprudence away from institutions and institutional reforms and onto individual conduct and culpability as the sine qua non of constitutional liability. Lawson is intriguing because the trial court and appellate courts didn’t follow the Supreme Court’s clear policy mandate, preferring to apply accepted doctrines of municipal liability in order to maintain some modicum of institutional reform. But ultimately these doctrinal and prudential lessons are not the most important lessons learned from Lawson. More importantly we have a close, contextually enriched view of two courts working with complex facts to fashion “fair” constitutional decisions and engage, as needed, in the doctrinal and jurisprudential debates generated by the Farmer and Brown decisions. It is these courts that make the laboratory work. Twelve years after Brent Lawson came to Dedman School of Law’s Civil Clinic it is possible to mine these rich experiences for their larger truths about the essential roles of litigation, litigants, and lawyers engaged with the federal trial and appellate courts in implementing the federal constitution.

III. THE EXPERIMENTAL DESIGN: NEGOTIATING THE MAZE OF JUDICIAL DISCRETION
Some view the federal trial courts and appellate courts’ roles within the constitutional system as narrowly defined and their adjudicative discretion within this context as highly constrained. For purposes of the article this perspective is denoted the narrow “rule of law” paradigm. Adherents to this perspective state with almost mantra like regularity that the role of the federal trial courts and circuit courts is to “apply” the “constititutional law” “as decided” by the Supreme Court. The simplicity of this statement is more an expression of faith and ideology about the overall role and function of the federal courts, than it is an accurate description of the complex role played by federal trial courts and appellate courts in the dynamic process of implementing constitutional law through the process of adjudication. Few constitutional decisions rendered by the Supreme Court are constructed to fit this narrow legal paradigm and admonishing the lower courts to simply “apply” this law obscures the richly textured and dynamic process that is constitutional adjudication in the lower federal courts.

Acknowledging the reality of judicial discretion does not undermine the legitimacy of these courts’ decisions. The legitimacy of a system of adjudication designed to implement the “rule of law” is not necessarily based on the theory that “laws provide, at any time, one right answer –one unequivocally correct way of disposing of a case . . . .” Rules of law, especially the constitutional rulings of the Supreme Court, its core textual interpretations, its doctrinal elaborations, standards and tests, are often “open textured” and extremely malleable. The application of these “rules of law” to “facts”


27 William L. Reynolds and Gordon G. Young, Equal Divisions in the Supreme Court: History, Problems and Proposals, 62 N. C. L. REV. 29 (1983) (this article reflects the extensive literature on the scope and nature of judicial discretion; see e.g., supra note 14 Rethinking and Practice Makes Perfect (These two articles explore the operationalization of judicial discretion in “abuse of discretion” standards that mandate appellate deference on numerous issues. These standards explicitly acknowledge the institutional reality that variability in trial court decisions is expected and legitimate.); see supra note 25 Rubin and Feely (discussing the legitimacy of judicial law making or policy making), and note 25 Bloom (reviewing the work of Rubin and Feely on judicial policymaking).

28 A rich literature examines Supreme Court opinions from a variety of perspectives, the social process of Supreme Court opinion writing, the genre qua genre, epistemological explorations, etc. The point is simple: Supreme Court opinions “mean” many things and are prey to numerous applications,
inevitably and predictably produces varied outcomes. The design of the federal trial and appellate process, the institutionalized deference to lower courts’ fact findings and case management decisions, the proliferation of decisions by three judge panels, the limited access to en banc consideration, and the even more limited access to Supreme Court review reflects both an institutional demand for final resolution of constitutional disputes and an institutional tolerance for a wide range of variability in resolving these disputes. Rather than viewing decisional variability as problematic, participants in the process acknowledge variability as a fact of institutional life, an inevitable product of the process, and an accepted dimension of the lower federal courts’ adjudicative discretion.

Commentators and theorists characterize this process as an adjudicative laboratory which allows the federal circuits to experiment with “substantive and procedural solutions” to the variety of legal problems inevitably posed by Supreme Court constitutional decisions. This laboratory allows the courts to implement constitutional decisions, fixing prudential and doctrinal problems as they arise, while identifying issues that need to be addressed in a more comprehensive manner by the Circuit Courts sitting en banc, and ultimately, by the Supreme Court. Simply stated, the lower federal courts, here I am referring to the trial courts and the three judge panels that render the majority interpretations and analyses. See e.g., Ruth Bader Ginsberg, Remarks on Writing Separately, 65 Wash. L. Rev. 133 (Jan. 1990); Ashutosh Bhagwat, Hard Cases and the (D) Evolution of Constitutional Doctrine, 30 Conn. L. Rev. 961 (Spring 1998); Philip Bobbitt, Youngstown: Pages from the Book of Disquietude, 19 Const. Commentary 3 (Spring 2002) citing Philip Bobbitt, CONSTITUTIONAL INTERPRETATION, Blackwell Publishers, 1991; Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 29 (March 2004); Richard H. Fallon, Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274 (March 2006); Matthew D. Adler, Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon, 113 Harv. L. Rev. 1371 (April 2000), Charles Fried, 23 Harv. J. L. & Pub. Pol’y 807.


30 Many commentators have defined judicial discretion as the ability of a judge to pick between conflicting decisional choices without violating the applicable doctrines or rules of decision. See, Armour, supra note 14 and Kim, supra note 7.

of the decisions in any given circuit play an acknowledged, albeit circumscribed role in the “implementation” of the Supreme Court’s constitutional opinions – the law.\textsuperscript{32}

What dimension of this “experimental design” enables the lower courts to discharge this role? And what dimension of the laboratory ensures that their implementation of federal constitutional law in the day to day resolution of litigants’ disputes is perceived as legitimate especially in the face of such tremendous decisional variability? The answer is simple, their inherent judicial discretion. For the purposes of this study we examine two dimensions of the lower courts’ discretion. There is the court’s inherent adjudicative discretion that is a function of malleable or highly fact sensitive constitutional doctrines and their prudential counterparts.\textsuperscript{33} The second dimension of their adjudicative discretion is a function of institutional deference in the form of standards limiting the scope and nature of appellate review. This institutional deference acknowledges the trial courts and lower appellate courts’ unique skills and perspectives, and reflects the judicial institution’s willingness to rely upon those skills and perspectives. This dimension of the trial courts’ and lower appellate courts’ discretion ranges across an array of tasks and decisions, from the purely managerial through the procedural to the evidentiary tasks of fact finding and the responsibility to render judgments. But regardless of its cast or character, judicial discretion is the basic experimental building block of the laboratory and it is within the interstices of this discretion that constitutional law takes shape in the lower federal courts.

A. Designing the Maze: Problematic\textsuperscript{34} Supreme Court Opinions

One of the Supreme Court’s roles is to interpret the Constitution and develop constitutional law, rules, tests, and doctrines that will ensure its implementation. It is inconceivable that the Supreme Court is not aware of the implementation problems posed by its opinions, is not aware of the questions raised by its rhetorical approach to opinion writing, or is not aware of the challenges faced by the lower courts in “understanding” the

\textsuperscript{32} Richard H. Fallon, \textit{Implementing the Constitution}, 111 Harv. L. Rev. 54 (November 1997) (Professor Fallon discusses the challenge of transforming constitutional values or purposes into applicable rules, laws and doctrines that can be used to implement the Constitution while focusing on the “gap” that often exists between the meaning of constitutional norms and the tests, standards and rules by which these norms are implemented.)

\textsuperscript{33} See supra notes 14, 25 to 32.

\textsuperscript{34} Michel Foucault wrote at length about problematization, the consciousness of a discrepancy between current practices and the dominant conceptualization of the social context and practice. With this concept Foucault attempts to distinguish between a “history of thought” and a history of ideas, mentalities, schemas, etc. As Foucault points out the “history of thought is the analysis of the way an unproblematic” experience or practice is perceived as a problem. See e.g., “Polemics, Politics and Problematizations: An Interview with Michel Foucault,” interview conducted by Paul Rabinow in May, 1984, translated by Lydia Davis, \textit{ETHICS: SUBJECTIVITY AND TRUTH}, p. 11, Ed. Paul Rabinow, New York: The New Press, 1997; Michel Foucault, \textit{FEARLESS SPEECH}, pp. 71-74, Semiotext: Los Angeles 2001. The problematization of the constitution, how it is to be interpreted and how those interpretations are understood and applied, yields a rich body of legal scholarship. See e.g., Sotorios A. Barber, \textit{ON WHAT THE CONSTITUTION MEANS}, Baltimore and London, the Johns Hopkins University Press,1984; James M. Lawler, Ed., \textit{DIALECTICS OF THE U.S. CONSTITUTION}, Minneapolis, MEP Publications, 2000; Daniel A. Farber and Suzanna Sherry, \textit{DESPERATELY SEEKING CERTAINTY; THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS}, Chicago and London, the University of Chicago Press, 2002; Richard Sherlock, et. al. Ed, \textit{THE NORMATIVE CONSTITUTION: ESSAYS FOR THE THIRD CENTURY}, Lanham, Maryland, Rowman & Littlefield Publishers, Inc.
conventional law set forth in its opinions. It is equally inconceivable that the Court is not aware of the implementation problems posed by its opinions when nonjudicial state actors attempt to apply them. Rather than treating the process of constitutional implementation as if it is part of some “natural order” or disengaged from the human decisions that cumulatively make up the social acts of judicial institutions, I suggest in this article that we look at the process by which a Supreme Court opinion becomes living constitutional law through litigation as a conscious one. The problematizing of Supreme Court opinions has been going on for some time, witness the wealth of legal scholarship aimed at “understanding” the Court’s writings, but few have looked at the problem from the perspective suggested here.

The paradigm or perspective that allows us to examine the problematization of Supreme Court opinions, and by inference, constitutional law, is the critical paradigm of public policy, a paradigm that attempts to engage directly with questions of lawmaking and implementation. The complex relationship between the Supreme Court and the lower federal courts encompasses three core dimensions of the public policymaking process: (1) the process by which problems come to the policymaker’s attention; (2) the process of legitimating ultimate policy decisions; and (3) the process of implementing the policymaker’s decision.

Looking at the relationship between the Supreme Court and the lower federal courts from this perspective offers insight into the multiple roles of the lower federal courts: First the lower federal courts develop and identify problems and issues for the Supreme Court’s consideration. The Supreme Court cannot sua sponte issue an opinion; it must wait for the lower courts to bring the issue forward. Secondly, they are an integral part of the process of legitimating constitutional decisions, both because they are the institutional representatives most widely engaged in trying the constitutional case and because all of the courts involved in this dimension of the process have developed rhetorical strategies to anticipate and respond to the question of constitutional legitimacy. Finally they are responsible for the general implementation and application of the Supreme Court’s constitutional decisions, and by implication, the constitution.

35 See Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 Calif. L. Rev. 1457 (Dec. 2003) (looks at different models of judicial decisionmaking, including a litigant-driven theory of predicting outcomes, and finds that an array of factors influence decisions but that the “legal model” is best the predictor of outcomes).


37 See infra pp. 56-63. The trial courts and appellate courts have developed specialized rhetorical strategies for addressing problematic or difficult constitutional cases. These strategies focus on facts and present applicable law in a summary fashion, especially when the case is one of first impression, avoiding any attempts to clarify, explain or expand the Supreme Court’s doctrinal formulation lest they be found to have invaded that Court’s province or failed to adhere to the formalist discourse of the “rule of law.” See e.g. Stephane Leman-Langlois, Constructing a Common Language: The Function of Nuremberg in the
The *Farmer* decision imposed a subjective intent element upon all “deliberate indifference” cases addressing conditions of confinement in jails and prisons; this ruling predictably had far reaching public policy implications. It helps to think about the issuance of this opinion and its impact by asking the question, “What if Congress had enacted a statute that prohibited state and federal jail officials from acting with “deliberate indifference” to problems within their institutions that pose a risk of serious harm to their inmates?” Prior to Congress issuing such a “decision” the problem would have had to capture Congress’s attention by generating support within the larger political environment. Once its attention is caught, Congress holds numerous hearings, creates a record, drafts responsive legislation and finally submits the question to its highly politicized deliberative process. This Congressional policymaking is open to public and political scrutiny challenging its findings and decisions at any and all points in the process.

Ultimately Congress generates a decision (a statute); it provides guidance and direction regarding the scope and intent of the decision to the administrative agency delegated responsibility for its implementation. In its turn, this federal bureaucracy can call upon experts of its own to draft guidelines and interpretations of the decision, hopefully culminating in a coherent regulatory scheme. The resulting regulatory scheme is “enforced” by designated actors working directly with the regulated parties. The point is simply this: The Supreme Court resolves profound social and legal issues with a single, often divided, opinion and without any of the institutional infrastructure available to Congress. The rapid proliferation of trial court and circuit opinions following the Supreme Court’s issuance of these core constitutional decisions is evidence that federal trial and appellate courts’ attempts to understand the Supreme Court’s substantive constitutional decisions is as problematic and troubled as any litigants.

Which brings us back to our original question: What is meant by saying the Supreme Court’s constitutional rulings are problematic? The genre of Supreme Court opinions, their expression of the decision making modalities used by the Court to explain their ruling, their lack of expression regarding the actual decision making that led to the opinion, and their lack of clarification regarding the scope and future application of the opinion, all pose challenges to their immediate implementation. While the Supreme Court may reflect prudentially on the future impact of its ruling on state actors and

---

*Problematization of Postapartheid Justice,* 27 Law & Soc. Inquiry 79 (Winter 2002) (explores the development and function of an institution’s legitimating discourse)

38 Traciel V. Reid, *Judicial Policy-Making and Implementation: An Empirical Examination,* 41 West Political Quarterly, 509 (Sept. 1988) (looks at the normal processes of judicial implementation in the context of cases with limited political impact or normative sensitivity);

39 See infra pages 27 to 32. (discussing the Supreme Court’s application of a narrow, textualist approach to the Eighth Amendment question of “cruel and unusual punishment” in prison condition cases).

40 See infra pages 24 to 27. This was not the problem that captured Congress’s attention. Its attention was focused on the problem of prison litigation as a perceived “burden” on the courts. Congress responded to this perceived problem by developing the Prison Litigation Reform Act.

41 This is not intended to be a detailed description of Congress’s public policymaking. The intent is to offer a simplified paradigm for comparison purposes. See supra note 36(referencing the detailed nature of this process).

42 For discussions regarding this portion of the public policymaking and implementation process see supra note 36.
individuals, this perspective is usually couched in abstract or general policy terms and rarely includes language addressing the immediate impact of the opinion on the world and eventually the lower federal courts and litigants. If litigation, the judicial resolution of disputes concerning compliance with the Supreme Court’s rulings, is one of the primary “tools” for implementing and enforcing the Court’s constitutional rulings and the constitution, the problematic impact of the Court’s decisions on this process must be acknowledged.

The point is obvious; Supreme Court constitutional opinions are problematic because they are not written with a clear eye toward their immediate implementation or future application despite current conceptions of institutional and legal practices that affirm and claim to adhere to the narrow application of these rulings to predictable, if not paradigmatic, sets of future “facts.” The problematization of Supreme Court opinions lies in the disjunction between claims constitutional adherence requires nothing more than compliance with the legal paradigm of the “rule of law,” and the reality of the practice, a reality made increasingly complex by the Court’s rhetorical strategies used to ensure adherence to the “rule of law” paradigm is the perceived norm, and the restrictions this practice imposes upon the Court’s expression of its judicial decisionmaking through opinions. However conceived, the thrust of the normative “rule of law” is quite simple: Courts make decisions by applying the law to the facts. Their competency and right to do so is undisputed. Judges should not decide cases based on their personal biases or predilections; judges do not legislate, i.e. they do not simply produce results reflecting their personal, political preferences. More importantly, they cannot be seen to do so. This paradigm is not as narrowly applied to the Supreme Court because we acknowledge their in making constitutional law, however, Supreme Court opinions cannot stray far from this path. How does this play out in the real world? As will be seen in more detail below, the accepted phenomenological dimension of courts’ drafting strategies is limited by this normative paradigm; any decision that fails to rely upon this paradigm raises the spectre of judicial decision making that is potentially illegitimate. Regardless of how

43 The idea that judicial policy making is an “illegitimate” adjudicative activity is grounded in the idealized narrow norms of practice legitimated by the “rule of law” paradigm and its supporting political ideologies. The “anti-majoritarian critique” is this ideology’s “theoretical” doppleganger. Fortunately a growing body of research challenges these narrow conceptions of the legitimate scope of constitutional adjudication. See e.g., Malcolm M. Feeley and Edward L. Rubin, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS, Cambridge University Press, 1998, p. 5 (hereinafter Feeley and Rubin) (one of the best grounded analyses of “adversarial legalism,” the term given to the courts’ engagement in significant constitutional adjudications leading to substantial legal and institutional reforms); Louis Fisher, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS, Princeton, New Jersey: Princeton University Press, 1988 (examines the dynamic process of constitutional interpretation as it engages the courts, Congress and the administrative branch of government); Louis Fisher, Constitutional Law Writ Large, 49 St. Louis L.J. 633 (discusses the limited exposure of law students to the process of constitutional law making as law schools focus on “judicial supremacy” in the arena of constitutional interpretation); Bruce G. Peabody and John D. Nugent, Toward a Unifying Theory of the Separation of Powers, 53 Am.U. L. Rev. 1 (2003)( challenges the antimajoritarian critique of judicial public policymaking on grounds the underlying assumptions regarding separation of powers and the constitutional role of the courts lacks grounding in the constitution); Mark C. Miller and Jeb Barnes, Ed., MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE, Washington, D.C.: Georgetown University Press, 2004 (examines the legitimate role of the courts in making law from an interbranch perspective and provides a compelling rejoinder to the anti-majoritarian critique of “adversarial legalism”); Michael W. McCann and Gerald L. Houseman, JUDGING THE
the courts in fact reach their final decision, their use of these legitimating rhetorical strategies in their opinions reflects the judges’ consciousness of the perceived limits of their institutional role.

These accepted rhetorical strategies and the formalist “rule of law” paradigm as a normative perspective limits the Supreme Court’s, and the lower courts’, drafting strategies. They direct the courts’ approach to the construction of judicial opinions by setting the normative limits for what should be addressed in the opinion and what should not, what falls within the scope of the court’s legitimate adjudicative discretion given the nature of the underlying case and dispute, and how the court justifies, legitimates or explains its final decision. From this perspective the Supreme Court’s perception of its adjudicative role ultimately prevents the Court from openly and directly addressing the types of implementation problems that will predictably arise from a constitutional decision coupled with the legal and social mandate that state actors should conform their conduct to the law. Similarly these normative rhetorical constraints limit how the lower federal courts, perceived to have even less discretion than the Supreme Court in this arena, will approach their own opinions. Whether this strategy of opinion writing is consciously adopted by the courts to further goals of legitimation, justification, minimalism, gradualism, or other judicial strategies the result is predictably problematic. The Supreme Court’s institutionalized approach to its own constitutional decisions – its expression of the law -- inevitably delegates to the lower federal courts a significant role in the development and implementation of the constitution, the case by case application of constitutional law in the resolution of individual litigants’ disputes.

**B. Constructing the Maze: Institutional Deference, the Special Expertise of the Lower Courts, and the Problem of Conflicts with-in the Circuits**

A significant dimension of the “experimental design” of this judicial laboratory is the special relationship between trial and appellate courts enshrined in the “abuse of discretion” standard designed to limit the appellate courts’ interference with the numerous decisions properly delegated to the trial court’s discretion in the arena of case management and adjudicative fact finding. This institutional norm mandates appellate deference to the trial courts’ perceived expertise in these two areas. For example, high levels of institutional deference to the trial court’s fact expertise highlights the importance of the trial court’s up close and personal handling of the evidence and witnesses.

While the highly deferential “abuse of discretion” standard is not applicable when questions of legal interpretation are at issue, neither trial courts nor three judge panels engaged in constitutional adjudication undertake the task of doctrinal analysis or elaboration lightly. Predictably none of these institutional actors will ever claim to have changed the Supreme Court’s law; at the most they may claim to offer clarification or to fill in gaps. As will be seen below, this is the rhetorical strategy adopted by both the trial court and the three judge panel in the *Lawson* case. Neither court offered new tests,
commented on applicable legal standards or otherwise engaging in the iterative explication of the Supreme Court’s rulings in Farmer or Brown as they applied to Lawson. Both courts ultimately grounded their favorable decisions for Mr. Lawson in an extremely conclusory application of the legal standards to extensive facts, a rhetorical strategy that takes advantage of the laboratory’s design.

The question remains whether these types of decisions are legitimate constitutional decisions and whether we can even talk about their legitimacy apart from the rhetorical structure of the opinion? However much reality may veer away from ideology, the normative ideal of the “rule of law” is an essential part of this experimental design. And ultimately the “rule of law” paradigm confronted with the extensive institutional and adjudicative discretion described above, asserts itself by demanding a commitment from both the judicial institution and its actors to the principle of consistency and uniformity in the development of the law. The Supreme Court has explicitly developed a jurisprudential principal to monitor this institutional process; one of the accepted criteria for a grant of certiorari is the Supreme Court’s determination that there is a “conflict among the circuits” which, without explanation, falls outside the scope of tolerable variability. At the Circuit Court level a parallel phenomenon exists, awareness of conflicts among three judge panels which may require en banc consideration and those which don’t. Trial courts are equally aware of their trial colleagues’ decisions and their circuit’s rulings. Unfortunately the utility of this normative ideal is limited in cases of first impression when litigation follows hard on the heels of a major Supreme Court ruling as was the case in Lawson. This was the context for the Lawson litigation which makes it the perfect case for exploring how the laboratory of the lower courts works when confronted with cases of first impression.

IV. THIRTY YEARS OF JUDICIAL EXPERIMENTATION

44 See infra pages 56 to 63.
45 Early on in this debate scholars were aware that courts made public policy decisions, i.e. law, the question was whether they made them by adhering to established legal criteria. Such writers acknowledged that “it is an essential characteristic of the [judicial] institution that from time to time its members decide cases where [traditional] legal criteria are not available.” Robert A. Dahl, Decision-Making in a Democracy; The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 279 (1957). Much of subsequent scholarship attempted to determine what those “non-legal” criteria might be since they rarely appear explicitly in the opinions. Courts’ understand these rules and their opinions are crafted to comply and reaffirm this normative ideal or legitimate other discourses/methodologies as reflecting acceptable “legal criteria.” See e.g., Bobbitt, supra note 28 (discussing legal criteria, or modalities of interpretation, routinely used by the Supreme Court that extend beyond the narrow notion of precedent and the rote “application of law to facts” process of the formalist paradigm of adjudicative decision making).
46 In Farmer, infra pages 26 to 27, the Court determined the conflict between the criminal recklessness intent standard and the civil recklessness intent standard could not be tolerated; the conflict had to be resolved by the court. In Brown the Court had to address a gap in its municipal liability jurisprudence; could the acts of a decision maker responding to a single, episodic situation be the basis for municipal liability? Brown, infra pages 32 to 35.
47 See supra note 31.
48 The development and application of the “rule of law” principle of “uniformity” at the circuit level has not been examined in any depth. Circuits’ adherence to the standard obviously fluctuates, look at their policies acknowledging but prohibiting reliance upon conflicting “unpublished” panel opinions. See e.g., David C. Vladeck and Mitu Gulati, Symposium: Have We Ceased to be a Common Law Country? Moral and Ethical Dimensions of the Controversy: Judicial Triage: Reflections on the Debate over Unpublished Opinions, 62 Wash & Lee L. Rev. 1667 (2005).
A brief look at the Farmer decision itself illustrates the working of the laboratory. The Farmer case followed thirty years of judicial experimentation in the arena of Eighth Amendment jurisprudence. The constitutional question that had “split the circuits,” the Supreme Court’s stated reason for granting certiori in Farmer, was whether the interpretation of the Eighth Amendment’s “deliberate indifference” standard, a standard in use effectively for over thirty years and successfully applied to circumstances not unlike those in Farmer, required a finding of subjective intent. Simply referring to the “split in the circuits” does not explain why the Supreme Court in Farmer, while claiming it was simply interpreting core constitutional text, issued an opinion perfectly designed to halt institutional reform litigation in the prison arena. It also doesn’t explain why the Supreme Court explicitly refused to follow the laboratory’s lead, claiming the issue before it could not be and would not be informed by the “judicial experience” of the lower courts. It should also be noted that variability in the implementing decisions of the lower federal courts is predictable and healthy, reflecting their engagement with problematic constitutional decisions and their implementation in the “real world.” The conflict in the circuits on this point was significant, not because it existed, but because of the nature of the conflict. The question driving the appeal was whether “deliberate indifference,” the doctrinal standard by which to test whether conduct, individual or institutional, rose to the level of “cruel and unusual punishment,” required a finding of subjective intent or whether “constructive knowledge” would suffice?50

A. The New Experiment: Addressing the Problem of Institutional Liability

The larger institutional context of Farmer helps situate the Lawson litigation. The federal courts, starting in the mid-1960’s, had overseen the reform and rebuilding of state and local prisons. After over 30 years of reluctance and refusal to recognize any constitutional claims in prison settings, the United States District Court for the Eastern


50 The question of the contour of 8th Amendment jurisprudence has fascinated scholars over time because of the seeming lack of theoretical or pragmatic coherence in the Supreme Court’s rulings. See e.g., Tom Stacey, Cleaning Up the Eighth Amendment Mess, 14 Wm. & Mary Bill of Rts. J. 475 (2005)(among other critiques points out that Justice Scalia’s view “effectively drains the Cruel and Unusual Punishment Clause of contemporary import, p. 508); Melvin Gutterman, The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement, 48 SMU L. Rev. 373, 387 (1995)(examines the Supreme Court’s formidable barriers to prison reform litigation in its Eighth Amendment jurisprudence); Christopher e. Smith and Madhavi McCall, Justice Scalia’s Influence on Criminal Justice, 34 U. Tol. L. Rev. 535 (2003); David Heffernon, America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law, 45 Cath. U. L. Rev. 481 (1996); Susanna Y. Chung, Prison Overcrowding: Standards in Determining Eighth Amendment Violations, 68 Fordham L. Rev. 2351 (2000).
District of Arkansas in 1965 “declared that certain conditions at Cummins Farm State Prison constituted cruel and unusual punishment in violation of the Eight Amendment.”

Within thirty years over forty-one states, the District of Columbia, Puerto Rico, and the Virgin Islands found themselves tangled in prison reform litigation. When local jails are included in the count, by 1965 all fifty states faced federal court orders questioning whether they had exercised the state’s power to incarcerate, to build and maintain state prisons and local jails, in compliance with the Eighth Amendment.

During this time period federal court decisions, individually and collectively, interpreted the Eighth Amendment’s textual prohibition against “cruel and unusual punishments” to include “conditions of confinement” and were both critiqued and lauded on this point. For purposes of this article two points need to be noted. First, these early decisions faced head on questions about the “meaning of the Constitution” as they sought to ground their rulings regarding prisoners’ rights and states’ obligations in the Constitution’s textual term, “punishment.” This activity quickly evolved into a second judicial task, the development, the creation and interpretation, of “core” Constitutional doctrine needed to implement the “meaning of the Constitution.” This “judicial work – interpretations, reasons, mediating principles, and implementing frameworks-[was] more comprehensive than [the original] judge-interpreted constitutional meaning.” The distinction between these two types of decisions while often muddied in opinions and conflated in much of the research on constitutional decision making, legally, functionally and pragmatically reflects distinct judicial tasks. The point is the laboratory was at work. The work of the lower federal, and state, courts yielded the Estelle decision. Following Estelle the lower federal courts continued to play a critical role developing...

---

51 See Ruiz v. Estelle, 429 U.S. 97, ___ (1975). The period of litigation reform inaugurated by Estelle is documented at length by numerous scholars including Feeley and Rubin, supra note 43 (Prisoners began filing suits in 1930, but “as of 1964, no American court had ever ordered a prison to change its practices or its conditions” p. 13.)
52 Supra note 43 at 13.
53 Whether the courts’ actions are characterized negatively as judicial activism or more neutrally as part of the American phenomenon called adversarial legalism the impact of the courts in the arena of prison litigation was felt across the land. See e.g., Robert E. Kagan, Adversarial Legalism: Tamed or Still Wild, 2 N. Y. U. J. Legis. & Pub. Pol’y 217 (1999); Edward L. Rubin and Malcolm M. Feeley, Suing the Government: Velazquez and Beyond: Judicial Policy Making and Litigation Against the Government, 5 U. Pa. J. Const. L. 617 (2003); Stephen P. Garvey, Did Making Over the Prisons Require Making Up the Law, 84 Cornell L. Rev. 1476 (1999). While numerous legal academics profess to be troubled by the idea that courts’ decisionmaking may exceed the narrow formalist paradigm of the “rule of law,” others find the proposition less troubling especially when examined within its larger context. See Robert A. Kagan, American Courts and the Policy Dialogue: The Role of Adversarial Legalism, in Miller and Barnes supra note 43 at 13; Neal Devins, Is Judicial Policymaking Countermajoritarian? In Miller and Barnes supra note 43 at 189; and Jeb Barnes and Mark C. Miller, Governance as Dialogue, in Miller and Barnes supra note 43 at 202. These latter writers see the courts as inextricably involved in the larger democratic dialogue and as responsive to that dialogue. See also, William H. Clune III, A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers, 69 Iowa L. Rev. 47 (1983)(looks at adjudication as part of the public policy implementation process and the application of law to facts as the sine qua non of implementation strategies).
55 Feeley and Rubin, supra note 43 at 13.
56 Id. at 3.
57 Berman, supra note 54.
new constitutional tests, standards, and applications based on Estelle’s core textual interpretation, which eventually established the roots for core constitutional doctrines supporting these institutional reforms.58

In crafting the original doctrinal formulation for “deliberate indifference,” the Court’s interpretation of what constitutes “punishment” as that term is used in the constitutional text; Justice Marshall in Estelle worked with reference to the accepted legal continuum of liability that ranges from mere mistake through specific criminal intent. His crafting of the “deliberate indifference” standard was intended to exclude mere negligence or mistake from the scope of the new constitutional tort. Justice Marshall and the Estelle Court thought they made it clear where on this legal continuum the unconstitutional point would lie, but they recognized that the question of intent, its “objective” and “subjective” dimensions, is not easily defined. For the Estelle Court the metaphorical device of a continuum provided a sufficient analytical structure to define “deliberate indifference” relative to other gradations of intent. Having delineated the bottom part of the continuum as encompassing conduct that should be excluded from the scope of constitutional regulation, the Estelle Court defined the minimum liability threshold as the next step up from inadvertent failures, mistakes or mere negligence, but still below the higher level of culpability grounded in consciousness and found in the criminal law.59

The Court was not confused about its goal; the problem, as is so often the case when faced with the task of crafting constitutional doctrines, tests and standards, was crafting an opinion that provided clarity and direction. Simple linguistic formulations rarely do this; the fuller context of the opinion and the Court’s analysis are needed to understand and apply the new doctrine. And often it is the dissent’s challenge, the dialogue between the Justices that provides the final note of clarification. Justice Stevens, dissenting in Estelle, criticized the ruling for introducing any element of subjective intent into the liability calculus of the Eight Amendment. This subjectivity, according to Justice Stevens, undermines the objective institutional analysis of prison “conditions” as punishment imposed by the state. From the dissent’s perspective the constitutional question is whether the state in its institutional role imposes “cruel and

58 Feeley and Rubin supra note 43at 14. The early studies did not focus on the particularized approaches of the courts in describing their work or attempt to trace the evolution of the law from description, to iteration, to repeating fact paradigms, to tests and standards and eventually to “doctrinal” statements that took on their own independent normative significance within the Eight Amendment’s jurisprudence.

unusual punishment” when it incarcерates individuals in prisons whose conditions are inhumane and intolerable. The tension between the dissent’s institutional, objective approach and the majority’s “continuum of intent” approach provided the interpretive background for prison litigation in the lower federal courts for over 20 years.

How did the constitutional laboratory respond to Estelle? The lower courts developed two lines of prison jurisprudence, the episodic acts cases and the conditions of confinement cases, which, while not resolving the tension inherent in Estelle between the objective or constructive knowledge standard and the subjective or individual intent standard allowed the lower courts to address paradigmatic fact situations in an efficient and effective manner. Within the larger context of prison litigation it is not surprising that these two lines of cases developed. The “conditions of confinement” cases were institutional challenges that focused on the state’s policies and practices in running its prisons. The alternative approach, examining specific individual episodic acts, focused on the conduct of individual prison officials, usually guards, whose conduct caused direct, and at times, unique personal harm. This distinction, institutional cases versus individual conduct cases, was not created by the courts from whole cloth, but rather reflected an approach that evolved out of the day to day array of fact scenarios the lower federal courts were asked to examine under the Eighth Amendment’s “cruel and unusual punishment” prohibition. Adapting constitutional law on a case by case basis in this manner is viewed by some commentators as “inconsistent” or legally incoherent, but upon closer inspection reflects a jurisprudential and institutional logic consistent with the Estelle Court’s original ruling situating “deliberate indifference” between negligence and specific criminal intent. Any confusion inherent in applying the Estelle standard reflected the problematic nature of the Supreme Court constitutional opinions more than any

60 Estelle, 429 U.S. at 116-117.
61 Judge Buchmeyer in Brent Lawson v. Dallas County, et al, CA3-95-CV-2614-R, Memorandum Opinion and Summary Judgment Order at 10, n. 4, specifically rejects application of the two categorical paradigms, “conditions of confinement” and “episodic acts” in deliberate indifference cases on grounds the Farmer Court rejected this distinction in Eighth Amendment “cruel and unusual punishment” cases.
62 These two categorical paradigms evolved within the Fifth Circuit and even after Farmer the Fifth Circuit continues to use the analysis - conditions of confinement cases versus episodic acts cases - in pre-trial incarceration cases. The early conditions of confinement cases addressed the “intent” issue by assuming the prison or jail intended its policies or the results of its policies and acknowledging that intent is a metaphor for liability in the institutional setting. In institutional cases the liability test was whether the practice in question was reasonably related to a legitimate governmental purpose, not subjective deliberate indifference. This dual analysis was rejected by the Circuit in Eighth Amendment post conviction cases and the standards were conflated into one. See Scott v. Moore, 85 F. 3d 230, 2355-236 (5th Cir. 1996), vacated for her’g en banc, 85 F. 3d 230 at 240 (5th Cir. 1996) (vacating and remanding a summary judgment). In the subsequent case of Scott v. Moore, 114 F. 3d 51 (Fifth Circuit 1997) the Court opined that the reasonable relationship test employed in conditions cases is “functionally equivalent” equivalent to the deliberate indifference standard employed in episodic acts cases. But see, Herbert v. Maxwell, 2007 U.S. Upp. LEXIS 1160 (5th Cir. 2007) (Circuit discusses conditions of confinement cases and episodic acts cases. Citing to Scott v. Moore, supra, and Hare v. Corinth, 74 F. 3d 633, 644 (5th cir. 1996) the Circuit announces the standard in condition of confinement cases to be whether “the condition of confinement is not related to a legitimate, non-punitive governmental objective.” Id.). It is not hard to see why the “conditions of confinement” standard remains attractive when the issue is one of institutional action, not individual.) See Feeley and Rubin, supra note 43 at 14. (“The entire conditions of confinement doctrine was articulated in little more than a decade, after 175 years of judicial silence on its subject matter.”)
personal policy preference of the lower court judge. The array of trial and circuit court opinions following *Estelle* are a best attempt to clarify and present the Court’s thinking about a complex social phenomenon, one which the lower courts clearly saw had distinct dimensions. For the lower courts the Supreme Court’s opinions are not only a “set of representations” that attempt to capture certain behavior or an expression of “attitudes that can determine” that behavior, but “an object of thought” open to question as to their meaning, conditions and goals. The lower courts’ implementation of *Estelle* and their interaction with the doctrinal subtleties of the “continuum of intent” in the context of prison litigation resulted in the *Farmer* appeal: Would the Supreme Court defer to the lower courts’ experience with the social reality of prisons in developing a two part doctrinal approach to “deliberate indifference” by acknowledging the need for both an “objective” institutional standard and a “subjective” individual liability standard?

1. The Problem of Institutional Liability --- Who Should Be Responsible

As stated above, the narrow legal issue in *Farmer v. Brennan*, whether the liability standard of “deliberate indifference” was objective or subjective, had been working its way up through the courts for years. The *Estelle* “test has been in place since 1976,” but proponents of a more specific doctrinal formulation or explication of the “deliberate indifference” standard now claimed the original standard was being inconsistently applied. The larger question was whether this predictable variability in the standard’s application fell within institutionally tolerable limits. If *Estelle* was the benchmark and the continuum outlined in that opinion was the interpretive reference for purposes of determining liability, then the answer was yes. But the lower appellate courts, as they attempted to explain their application of the “deliberate indifference” standard generated a body of case law whose rationales were not simply varied, but in direct conflict. The lower courts could simply have applied the constitutional standard of “deliberate indifference” generally and left it at that, but the prison litigation scenarios as they developed over time demanded more explanation of the “intent” dimension of “deliberate indifference.” The institutional litigants had begun to see the light at the end of their tunnel; a subjective intent element would drastically reduce institutional reform litigation aimed at general policies, practices and procedures.

The lower courts were grappling with critical questions: What types of evidence and fact findings would suffice and, more importantly, what would not suffice to support a finding of “deliberate indifference” especially when the litigation was aimed at the institution rather than individual actors. Not surprisingly the lower courts’ rulings on “deliberate indifference” grounded in the factually rich data of their docket ranged from descriptions of actual subjective knowledge of the threat of harm including findings of criminal recklessness to rulings grounding liability in a purely objective standard. Some courts found it sufficient to hold the prison official liable if they “knew or should

---

63 See infra pages 56 to 67(discussing the lower court’s adherence to the “rule of law” paradigm).
64 See Foucault, supra note 34 (discussing problematization, the process of thinking critically about thought).
66 Id. at 122
67 McGill v. Duckworth, 944 F. 2d 344, 348 (7th Cir. 1991)
have known” the challenged conduct or policies posed a threat of serious bodily harm; others occupied a middle ground with their focus on the “obviousness” of the risk of harm. 68 Institutionally the doctrinal standard, “deliberate indifference” and its analytical benchmark, the exclusion of “mere negligence” from the constitutional tort, fit the courts’ facts or at least the courts’ facts fit the standard. 69

Did this variability cause the Supreme Court to grant certiori in Farmer? 70 What underlay the growing concern with the lower courts’ wide ranging applications of the “deliberate indifference” standard? Was the Supreme Court motivated simply motivated by concerns about the coherence and consistency in the development of this particular constitutional doctrine? The early prison cases applied the standard of “deliberate indifference” in a series of broad based attacks on institutions of incarceration and their policies; these cases questioned everything from the number of individuals in a cell to the rights of inmates to be paid for their employment. In these early cases there was little doubt challenged conduct, and related institutional policies and practices were explicitly adopted and sanctioned by high ranking state prison officials if not the state or local governing bodies themselves. While some of these early cases challenged the specific conduct of prison guards, even these individual challenges were typically within the ambit of the broader institutional attacks. Questions concerning the lack of a uniformly articulated interpretation of the element of “intent” under the “deliberate indifference” standard was not raised in these early cases, 71 but as prison litigation evolved and

68 Young v. Quinlan, 960 F. 2d. 351, 360 (3rd Cir. 1992)
69 See infra pages 56 to 67 (the District Court’s approach in Lawson reflects a similar analytical process).
70 Estelle v. Gamble stood in relatively grand isolation with few cases challenging its basic constitutional structure and analysis for almost 20 years. This may be more a testament to the Supreme Court’s reluctance to become embroiled in the prison litigation reform movement and the horrific factual narratives associated with the Texas prisons, see e.g., Ruiz v. Estelle, supra note 51, than to the opinion’s legal coherence or moral persuasiveness. When the Supreme Court became involved in prison cases it clearly expressed a preference not to expand the reach of Estelle. Initially the Court left Estelle alone; in 1979, Bell v. Wolfish, 441 U.S. 520 (1979), and again in 1981, Rhodes v. Chapman, 452 U.S. 337 (1981), the Supreme Court reversed the lower courts in two prison cases, but did not negatively comment on the “deliberate indifference” doctrine as developed by Estelle. But in 1991 in Wilson v. Seter, 501 U.S. 294 (1991) the Court began to narrow the reach of the conditions of confinement doctrine. In his opinion Justice Scalia reaches out to a prior decision in Whitley v. Albers, 475 U.S. 312 (1986) examining the use of force in a prison riot. An excessive force, not conditions of confinement, case Whitley examined that force to determine whether it was imposed as intentional punishment or a result of wanton behavior. Justice Scalia in an analytical slight of hand simply equated Whitley’s wantonness to Estelle’s deliberate indifference in reaching his ruling in Seiter. The dissent immediately spoke up as it had done in Estelle, questioning the application of wantonness or any type of intent element in an institutional setting, i.e. conditions of confinement case. The Court provided little doctrinal clarification on this point in the next conditions of confinement case, Helling v. McKinney, 113 S. Ct. 2475 (1993); here it held simply that exposure to second hand smoke could be “cruel and unusual,” punishment but the current claim failed on issues unrelated to the elaboration of this element of intent. On its face given the recitation of facts Helling could almost be read as supporting the Court’s original analysis of institutional conditions of confinement cases, but Farmer v. Brennan would effectively foreclose this argument. Did the tension within the Supreme Court between those jurists moving toward an increasingly individualized conception of “deliberate indifference” and those seeking to protect the state/institutional actor perspective reflect the conflicts in the circuits or vice versa?

71 Perhaps because the conduct, whether individual or institutional, was so egregious or obviously problematic the question of intent was not problematic. Only after litigation generated a doctrinal scheme with tests and standards did thinking about “intent” become problematized. See Foucault, supra note 34.
expanded so did concern about its scope and the burden it imposed on the institutional litigants and the federal courts. The pressure driving the issue of institutional reform litigation up through the courts was also felt at the top and within the political arena.

2. Changes in the Experimental Environment – the Political Arena Engages

The Supreme Court in Farmer faced a task that fell well within its competency and jurisdiction, interpreting its own doctrinal formulation of “deliberate indifference” as the test or standard for cases involving “cruel and unusual punishment.” But much more was at stake in 1993 as the appeal went forward. Prison litigation, particularly lawsuits filed by pro se litigants, had captured center stage in the national political arena. After hearings involving numerous state officials and federal judges, Congress stood poised to pass the Prison Litigation Reform Act in an attempt to stem the flow of prison litigation in the federal courts. Suddenly the question of elaborating or clarifying constitutional doctrine in a prison context took on an overtly political dimension.

The Supreme Court had only to look at the dockets of lower courts and listen to Congressional hearings to realize the political significance of the question in front of it and the potential impact of its decision. From a lawyer’s perspective it is obvious and simplistic to make the following statement: It is easier for a plaintiff to plead and prove an objective or constructive knowledge standard of “deliberate indifference” than a subjective standard. If litigants, especially pro se prisoners, have to plead and prove individual prison officials acted with actual knowledge of the threat of harm posed by their policies and practices in a “conditions of confinement” case, liability will become an elusive goal. Stated in a different way, commentators, scholars and activists agreed that


73 During the hearings proponents focused on statistics indicating federal courts were overcrowded and on cases that appeared frivolous on their face. In addition, the theme of getting federal courts out of the business of running state prisons was crucial to the hearings. The important impact of prison cases is never mentioned, meritorious cases are never mentioned and there is no discussion of potential constitutional issues raised by a statute that bars access to the federal courts for constitutional claims. Some reacted directly expressing concern that constitutional cases created causes of action for prisoners; while others claimed meritorious claims will be so obvious screening out frivolous cases cannot harm those litigants. See Lynn S. Branham, The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement; What It Means and What Congress, Courts and Correctional Officials Can Learn from It, 86 Cornell L. Rev. 483, 487, n. 12 (2001) (excerpting much of the Act’s legislative history); Bernard D. Reams, Jr, and William H. Manz, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB. L. NO 104-134, 110 STAT. 1321, William S. Hein & Co., Inc.; Buffalo, New York, 1977.
this interpretation of the “deliberate indifference” standard would unduly burden the ability of prisoners to challenge their institutional “conditions of confinement.”

Oddly enough this result appeared unwarranted or unnecessary to protect governmental defendants in light of the provisions of the Prison Litigation Reform Act under consideration by Congress and assured of passage at the time of the appeal.

There is little doubt this policy concern was being discussed at the Supreme Court when Justice Souter prepared the opinion in Farmer. It is hard to imagine the United States Supreme Court was not fully briefed and aware of the public debate on the hill regarding prison litigation, especially since the Federal Judicial Center, the administrative arm of the federal courts, was a significant player in this debate. But it is impossible to tell whether or not the Justices discussed this issue explicitly or its relevance to Farmer; Justice Souter is silent on this point, never mentioning or making reference to the political and policy debates of the time regarding the need to stem the flow of prison related litigation, especially institutional reform litigation.

That this larger policy issue was before the Court with the Farmer appeal is undisputed, but so were many others regarding prisons. After thirty years of prison litigation and reform, major institutional changes in the country’s prisons and jails had occurred. Conditions were not perfect, but the lower courts were beginning to withdraw from the arena in deference to the reforms and systemic responses of increasingly professionalized institutions. Scholars debate how to measure the success of three decades of prison reform litigation, but even without resolving that debate it is clear state and local governments approached the management of their prisons and jails differently in 1994 than they had in 1964. The Supreme Court could look out over a federal judicial system moving out of the business of oversight and willingly allowing governmental actors to take over their prisons. It was no longer 1964 and the issue facing the courts.

The appeal captured the attention of numerous commentators and prison advocates because the constitutional issue so clearly turned on the Supreme Court’s attitude toward prison litigation. As will be seen, infra pages 29 to 31, the Supreme Court responded to the highly politicized nature of the issue by taking a narrow textualist approach and rejecting the relevance of jurisprudential factors rendering the laboratory’s efforts irrelevant. See, e.g., The Supreme Court: 1993 Term Leading Cases, 108 Harv. L. Rev. 139 (1994) (The commentator erroneously claims “Farmer contains the seeds of its eventual overruling. Farmer is deeply flawed because it is premised on an implausible conception of reality. The Farmer Court makes predictions that are unlikely to be borne out in fact,” predictions that prison and jail officials will not hide in the zone of ignorance and that the new standard will not burden prison litigation. Id. at 240.);

Ruiz v. Johnson, 37 F. Supp. 2d 855 (1999) (The State’s opening statement declares that “under the guidance of this court, and out of a sincere desire to improve its prison system, . . . Texas has transformed its prison policies and practices over the course of the last 20 years.” The Ruiz Trial Court also reflects on the 20 year old litigation, the epic trials of 1978 and 1979, its own role in the litigation, see Ruiz v. Estelle,
was fitting the constitution to the present. It is entirely possible that a Supreme Court faced with the same doctrinal task, defining the intent element of its ‘deliberate indifference’ standard, back in 1974 or even 1984 would have erred on the side of a constructive intent standard rather than a highly personalized subjective intent standard, but time appeared to have moved on.  

3. The Laboratory at Work - Conflicts in the Circuits

On the whole the lower federal courts had little difficulty equating the implied subjectivity of “deliberate indifference,” itself an oddly oxymoronic formulation, with civil recklessness. The majority of the courts were willing to impute “knowledge” of the risk or potential harm to prison officials when the issues raised in the litigation involved explicit prison or jail policies or widespread conditions that were obvious, egregious and could only be addressed from an institutional perspective. As a result, when the issue finally reached the Supreme Court it was framed as a conflict between civil “reckless disregard,” which included a constructive knowledge component, and criminal “reckless disregard,” which imposed a different model of culpability, one taken from the criminal law and requiring a greater degree of conscious awareness of the threatened harm by the targeted prison official. The civil approach, argued Petitioner Farmer, recognized the need for a paradigm of “intent” that fit the reality of prison administration, the fact that many prison cases involved conditions resulting from an accumulation of decisions that pervaded the institution rather than a single, conscious decision. The contrasting criminal approach to “intent,” the position argued by Respondents, is linked to a model of culpability and morality that seeks to punish actors based on their consciousness of the impact of their acts. Respondents grounded their arguments in the Supreme Court’s

503 F. Supp. 1265 (S.D. Texas 1980), and the fact that “much has changed.” 37 F. Supp. at 860. The Court finds that portions of the prison now meet constitutional, however other portions do not. Citing to the original Circuit opinion Ruiz v. Estelle, 679 F. 2d 1115 (5th cir. 1982), the District Court outlines the areas of incarceration that continue to violate Plaintiffs’ constitutional rights.; see Feeley and Rubin, supra note 43 at 46-50.

Sadly despite improvements institutions of incarceration appear to generate their own constitutional malaise and governments can never be sanguine that “no news is good news.” The recent scandals rocking Texas’ system of juvenile justice serve as fair warning that the powerless must be protected and systems of incarceration are not all proactively constitutional. See INVESTIGATIVE REPORTS: ABUSE SCANDAL ROCKS TYC, October 12, 2007, http://www.dallasnews.com/investigatereports/tyc/ (A series of articles chronicles the blatant sexual and physical abuse of juvenile inmates inside the Texas Youth Commission and the system’s refusal to respond to complaints and employee reports.)

Wilson v. Seiter opinion which appeared to contemplate both a subjective and objective dimension in its doctrinal formulation prohibiting prison officials from acting with “deliberate indifference” to an “unreasonably high risk of harm.” What is striking, given the Supreme Court’s ultimate reliance upon the actual “text” of the Eighth Amendment in resolving Farmer, is that both Petitioner and Respondents focused on the interpretation of “deliberate indifference” as a doctrinal standard and whether a “constructive knowledge” element would suffice as the core issue on appeal. Neither party attempted to ground their case in the narrow textual analysis of the Eight Amendment ultimately adopted by Justice Souter.

4. Experimenting with the Zone of Ignorance – What Does the Data Show

The key factual issue in Farmer was whether the defendant prison officials “knew of the risk of harm [Farmer] confronted as a transsexual” placed in the general prison population. The lower courts, relying on a series of circuit court opinions, had found that liability would exist only if the prison officials involved in the implementation of the prison’s segregation policies, policies which did not require segregating Farmer from the general prison population, “had actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendants’ failure” to act. The problem was that the potential threat of attack posed to feminine appearing transsexuals when placed into the general prison population, real though it would be by the end of the Farmer case, had simply not made its way into the professional consciousness of prison officials, was not addressed in general prison segregation and placement policies, and, as will be seen below, simply didn’t register with many prison officials as a problem or threat requiring their attention or raising a constitutional issue.

Petitioner urged the Court to adopt or adapt the objective standard laid out in Canton v. Harris for deliberate indifference in civil rights cases under 42 U.S.C. Section 1983 as the most workable standard for cases attacking institutional decisions because of its focus on policymakers’ failure to act “in response to obvious risks that are likely to result in the violation of constitutional rights.” Petitioner pointed out that this standard coupled with the “other defenses available to prison staff, will impose [individual] monetary liability only in very limited circumstances.” The attractiveness of the Canton standard, created to address the particular problem of municipal liability under the Civil Rights Act, was that it addressed the question of liability for “state” acts as distinct from the problem of individual acts or conduct of prison officials or guards leading to personal liability. Petitioner argued Canton’s approach finding policymakers liable if they “knew or should have known” of the threat of harm met the Supreme Court’s requirement that punishment can only be the product of “some form of

---

78 Supra note 70 (discussing the opinion).
79 Petitioner’s Brief, supra note 77 at 12.
82 Petitioner’s Brief, supra note 77 at 16.
83 Id.
intent.” Petitioner further pointed out that the higher standards of “criminal” recklessness or “malicious and sadistic” intent proposed by Respondents had been “rejected in connection with failure to protect or other conditions of confinement cases” by the lower federal courts. As set out in Petitioner’s briefs the clear weight of the case law and splits in the circuits reflected the laboratory’s opinion that a “constructive knowledge” standard would be effective and fair to all parties concerned.

Petitioner’s most compelling argument is her warning that “far from simply immunizing the inadvertent or negligent actions of prison officials, the . . . standard [of actual subjective knowledge] encourages prison officials to take refuge in the zone between “ignorance of obvious risks” and “actual knowledge of risks.” This was not a hypothetical argument. This concern had been cited and noted in numerous lower federal court cases and stated as a reason for their pursuing the “constructive knowledge” standard. The evidentiary record in Farmer’s case illustrated this problem. The undisputed facts established that the officials, individually and collectively, knew of Petitioner’s status as a preoperative transsexual with a very feminine appearance, but simply didn’t think that her condition would pose a problem.

Respondent prison officials defended their actions claiming they may have had knowledge of relevant facts, but they did not draw the actual inference from those facts that Petitioner faced a real risk of harm from assault by other inmates. As Petitioner points out other courts had found knowledge of facts creating the unreasonable risk of harm sufficed for purposes of liability in policy or conditions of confinement cases. This approach charges the professionals responsible for the operation and management of the prison who have actual knowledge of the facts giving rise to harm with sufficient knowledge of the risk itself to warrant relief. In this approach the threshold question becomes, not the prison official’s personal state of mind, but whether a reasonably competent prison official would have noted and addressed the risk. Is the individual prison official’s failure to draw the final inference of risk from obvious facts a defense or is it further evidence of the official’s failure to discharge the state’s affirmative duty of care?

Respondents claimed a “constructive knowledge” standard, the “knew or should have known” standard, was nothing more than a broad negligence standard. They also argued that proof of actual knowledge is not unduly burdensome and can be accomplished with “circumstantial evidence to convince the finder of fact that officials

---

85 Id.
86 Id.
87 Id. at 15.
88 See Respondents’ Brief supra note 77 (Respondents focused on their lack of actual awareness of any threat of harm posed by Petitioner’s condition throughout the case; their defense was precisely tailored to the liability standard they proposed.)
89 Id.
90 Petitioner’s Reply Brief supra note 77 at 5. It should be noted that Respondents acknowledge that proof of these types of facts can support a finding of actual knowledge; however that finding must be made explicitly. Petitioner’s position focuses on the “facts available” and doesn’t require “actual knowledge” of the facts, much less a conscious inference of danger drawn from the facts.
91 Id. at 12.
must have had knowledge of a risk because it was obvious.”92 Both parties had to address the problem posed by prior precedent which was ambiguous on this point and took a middle ground in the debate by focusing on the seriousness or obviousness of the “objective risk” of harm and not on the officials’ subjective consciousness of the risk in determining constitutional liability.93 If the risk of harm met the high level of objective unreasonableness posed in prior cases, it was hard to argue that prison officials were not or could not have been aware of the risk. Why then is the second finding of subjective intent needed? Here was the real conflict in the circuits; the conflict between those courts who found an obvious intolerable risk sufficient to state a claim and those circuits who required the next step – turning obviousness into subjective intent. Respondents’ successful strategy was to draw the Supreme Court into a particularized analysis of the immediate harm posed by the “constructive knowledge” standard and avoid any analysis that took a larger, systemic look at the context and conduct at issue.

5. The Supreme Court Ignores the Laboratory’s Findings

The Supreme Court resolved the legal dispute in favor of the respondent prison officials by eschewing either sides proposals and adopting a narrow textualist approach to the question. This approach allowed the Supreme Court to ignore the circuit courts’ experience and define the legal issue before it narrowly as one of primary textual construction: What does the term “punishment” as used in the Constitutional phrase “cruel and unusual punishment” mean? The Court rejects the idea that what is at issue is a question of secondary doctrinal construction involving its own earlier rulings defining constitutional liability by reference to the terms “deliberate indifference.” The Supreme Court did not follow the laboratory’s lead in either clarifying the preexisting standard or evaluating the predicted impact of a narrow subjective intent requirement. While Justice Souter acknowledges the circuit courts’ use of “recklessness” is a fair attempt by the lower courts to grapple with the meaning of “deliberate indifference,” unfortunately the “term recklessness is not self-defining” and has different meanings in the civil and criminal context.94 Justice Souter rejects application of the civil law recklessness definition on grounds that test is objective and an objective test does not comport with the “text of the Eighth Amendment” as it has been interpreted.95 According to Justice Souter the Amendment prohibits “cruel and unusual punishment,” not “cruel and unusual ‘conditions’.”96

In reaching his result Justice Souter works within the same continuum of liability as Justice Marshall had in Estelle, but he does not follow Marshall’s lead in accepting civil recklessness as an appropriate standard of liability. Instead Justice Souter adopts the subjective recklessness standard used in criminal law stating it is familiar, workable, and consistent with the “cruel and unusual punishments” clause as interpreted by the Court. Justice Souter takes the position that the interpretation of the terms “deliberate indifference” depends primarily on the Constitutional text and its interpretation, not the simple parsing of language or the experience of the lower federal

---

92 Respondents’ Brief supra note 77 at 14.
93 See e.g. Helling, 111 S.Ct. 2321, 2481 (1991).
95 Id. at 837-838.
96 Id.
From a purely textual or linguistic perspective, Justice Souter acknowledges that the “deliberate” standard requires nothing more than voluntary action that is not accidental and “would not of its own force, preclude a scheme that conclusively presumed awareness from a risk’s obviousness.” Justice Souter notes that this argument might be persuasive if “deliberate indifference” was other than a “judicial gloss” on the constitutional text, but that is what constitutional doctrine is in fact. Under the Court’s new approach, focusing narrowly on the meaning of “punishment” as that term is used in the constitution, the presence of objectively inhumane prison conditions does not violate the Eighth Amendment unless the prison officials are aware of the conditions and “consciously disregard” the substantial risk of serious harm posed by those conditions. When the Supreme Court issued its ruling in Farmer it was fully aware of the laboratory’s findings and chose an interpretive rationale that allowed it to ignore the doctrinal and prudential work of the lower federal courts.

Given this highly individualistic, or anti-institutional approach to Eighth Amendment liability it is odd that Petitioner’s concern about the “zone of ignorance,” the idea that prison officials can individually ignore obvious problems, is treated as less than compelling by Justice Souter. In spite of his declaration that the lower courts’ doctrinal analysis was not binding, he certainly had access to data substantiating Petitioner’s concerns. Justice Souter directly acknowledges these concerns, but expresses doubt that his proposed “subjective” approach to deliberate indifference will present prison officials with any serious motivation ‘to take refuge in the zone between ignorance of obvious risks’ and ‘actual knowledge of risks.” The Court argues, perhaps not persuasively, that a prison official cannot escape liability if the “evidence shows that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.” The Supreme Court appeared to be putting tremendous faith in the definition of criminal recklessness as “turning a blind eye,” a metaphorical clarification that leaves much to be desired, in order to rein in prison officials who try to claim they never drew an inference of danger from egregious and obvious facts. The Court never really addresses whether the new standard creates incentives not to investigate or ensure problems are reported up the chain of command further evidencing the Court’s unwillingness to address the institutional context of these claims, the prudential impact of its ruling, and the institutional and doctrinal distinctions between individual and institutional liability replete in the caselaw.

While the constitutional prohibition against “turning a blind eye” might appear to offer some relief, what the Court gives with one hand it quickly takes back with the other. Justice Souter’s outline of the prison official’s basic line of defense creates a robust “zone of ignorance” in which officials can hide: (1) prison officials can show that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or [2] that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or

---

97 Id. at 838-839.
98 Id.
99 Id. at 826-827.
100 Id. at 842-843, citing Petitioner’s Brief, supra note 77 at 27.
101 Id.
Finally, (3) prison officials with actual knowledge of the risk of harm will not be held liable if “they responded reasonably to the risk,” even if their actions did not prevent the harm from occurring. Justice Souter’s oddly discursive treatment of “deliberate indifference” in the opinion, intertwining his analysis with the facts of the case, as well as hypothetical facts, does not create an enriched vocabulary of liability under the Eighth Amendment. This rhetorical strategy, while intuitively recognizing the problems inherent in defining and implementing any “mens rea” legal element, offers little more than the narrowest of black letter formulation as guidance to future courts on this point.

It is telling that the Court fails to come to terms with the conflict between its narrow doctrinal interpretation of the constitutional text and the experience of the lower federal courts in implementing the *Estelle* standard of “deliberate indifference.” The narrow precedential and textual approach to the question before it allows the Supreme Court to turn its own blind eye to the lower courts’ greater expertise and years of experience handling prison and jail cases. The functionality of the “constructive knowledge” standard adopted by the majority of the circuit courts compared to the “conscious intent” standard as applied within the prison context is never examined despite the laboratory’s determination it was a workable and needed standard, and the availability of data concerning its application.

In a thoughtful concurrence, Justice Blackmun expresses his concern that the Court’s ruling will eliminate “conditions of confinement cases” and that these types of cases are an essential part of Eighth Amendment jurisprudence. According to Justice Blackmun, inhumane prison conditions can “violate the Eighth Amendment even if no prison official has an improper, subjective state of mind.” Whether there is a constitutional violation turns on the nature of the punishment not the subjective state of mind of the person inflicting the punishment, because the question is whether the state has violated the constitution, not the individual. Prison officials as state actors can be held to this standard and function as surrogate stand-ins for the state. Justice Blackmun in his concurrence does not back away from the central battle ground of *Farmer* and claims the opinion still sends a “clear message to prison officials” that they have affirmative duties and that “prison officials may be held liable for failure to remedy a risk so obvious and substantial that the officials must have known about it.” The concurrence uses this final rhetorical flourish to engage the majority in dialogue, to offer hope to future litigants that finding an “obvious and substantial risk” will factually support liability despite a prison official’s protestations of ignorance to the contrary, and to emphasize the reality of the “zone of ignorance” and its attraction for prison officials concerned about liability.

**6. The Reaction to Farmer - Flaws in the Experimental Design**

*Farmer* gave rise to a veritable cottage industry of commentary, most of which focused on the problems inherent in the decision and echoed the Justice Blackmun’s

---

102 *Id* at 844-845.
103 *Id*.
104 *Id* at 844-848.
105 *Id* at 851-859.
106 *Id*. 
concerns regarding the majority’s emphasis on individual liability paradigms and its refusal to address the problem of institutional liability. Some commentators opined that Farmer “effectively leaves inhumane prison conditions without constitutional remedy.”

or claimed that the Eighth Amendment imposes affirmative duties and is designed to prevent the state’s abuse of its power, but the Farmer opinion’s subjective standard for deliberate indifference “leaves prison officials with no duty actively to seek out” knowledge of inhumane conditions or facts giving rise to a serious risk of harm.

Numerous commentators shared the view that “[a]t best Farmer encourages passivity, at worst, despite the Court’s protestations to the contrary, it rewards willful blindness to the risks prisoners face.”

Other commentators echoed Justice White’s concurrence in Wilson, “[i]nhumane prison conditions are often the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined. . . .”

Much of the confusion inherent in the opinion results from the Court’s analytic conflation of two separate legal issues: the use of the legal element of “intent” to define the “moral” or “ethical” boundaries of culpability and the requirement of “intent” as a dimension of textual, historical, and precedential interpretation of the word “punishment” as that term is used in the Eight Amendment of the Constitution. At one end of this interpretive spectrum is Justice White who argues that punishment is any act of the state incident to the incarceration and should be measured by its harmful impact on the prisoner. At the other end of this spectrum is Justice Thomas who argues that “conditions of confinement” cannot ever be punishment, because punishment as that term is used in the constitution is limited to the explicit sentence imposed upon the individual by the state at the close of trial. Under Farmer’s analysis the constitutional prohibition against “punishment” takes on a negative connotation and is transformed from an “act of the state,” seen in a larger moral and social context, to specific harms inflicted upon the individual prisoners by their jailers.

The critics of Farmer were perhaps too sanguine in their prediction that it carried the seeds of its own destruction. To argue that Farmer is flawed because it is based on an unrealistic view of reality, especially the Supreme Court’s assertion that the narrow subjective intent standard poses no barrier to prisoner litigation, may be correct, but this view ignores political and judicial realities. What if the Court’s jurisprudential assumption that there are no incentives for prison officials to “hide in the zone of ignorance” is incorrect? What if there was a case that undermined Justice Souter’s operative assumption? There is no indication the Supreme Court would revisit its ruling on this ground alone since such jurisprudential concerns are rendered irrelevant and explicitly excluded from consideration under the narrow textualist paradigm used by the Court.

7. The Experiment Expands: Intentionality and Municipal Liability


Id.

Id.

Id at 238, citing Wilson v. Seiter, supra note 70 at 754.
A little over one year after Lawson was filed Brown was decided. Brown is the Supreme Court’s attempt to clarify Canton’s analysis of the “intent” element in the “deliberate indifference” standard applicable in civil rights cases targeting municipalities and discussed at length, albeit rejected, in Farmer. While the Farmer Court ultimately refused to use the “constructive knowledge” or objective standard of Canton as the standard for Eighth Amendment violations, its analysis of Canton in the Farmer opinion was greeted by many, who otherwise disagreed with the decision, as a return to a “depersonalized” approach to municipal liability under 42 U.S.C. Section 1983. Some commentators went so far as to argue that “[t]he Farmer opinion suggests that the Court has recognized what commentators have long argued: inquiries into the subjective mental state have no role in determining entity liability” in civil rights cases. Under this analysis of Farmer and Canton even if an individual “may avoid liability if they lack personal culpability” or can raise the defense of qualified immunity, the municipality’s actors should still be liable in their official capacities if there “is an obvious risk that . . . [the municipality’s] actions, or failures to act, will cause constitutional harm.”

Prior to Farmer there had been some confusion regarding this fault standard which the Court’s opinion in Brown purported to address. According to the earlier Canton Court the deliberate indifference standard for municipal liability could be met in two ways. First, the risk from municipal conduct in the form of policies, procedures and practices could simply be “so obvious” and its impact “so likely to result in a violation of constitutional rights” that the city could be said to have acted with deliberate indifference. Similarly, conduct by city employees or a pattern of constitutional injuries could evidence a need for policies sufficient to support a finding of liability. Bottom line, the city’s liability flows from “facts available to city policymakers” putting “them on actual or constructive notice” that certain acts or omissions predictably will result in a constitutional violation. The Canton opinion was problematic in a number of ways: it did not elaborate on the doctrinal standard of “deliberate indifference;” it did not state whether the standard was objective or subjective; and it did not address the question of “whose” deliberate indifference, an individual policymaker or the city as a collective whole, was at issue.

Immediately following Canton, much like in Farmer, the lower federal courts split. Some courts followed the route of treating municipal deliberate indifference as a more personalized standard to be applied to specific individual policymakers. Others opted to treat the analysis as one of entity liability and applied the constructive knowledge standard to the governing body or the designated policymaker. Prior to

---

112 Id. at 1383
113 Id.
114 Id.
115 Id. at 1398, citing Canton, 489 U.S. at 390.
116 Id. at 1398 – 1403.
117 Id. at 1403.
118 Id.
Farmer the dominant trend in municipal liability cases at the circuit level was the two step analysis of a personalized approach which focused on specific policymakers and their conscious decisions. As one court noted, “[a]bsent the conscious decision or deliberate indifference of some natural person, a municipality, as an abstract entity, cannot be deemed to have engaged in a constitutional violation by virtue of a policy, a custom, or a failure to train.” Critics of this subjectivized approach raised many of the same concerns raised in response to Farmer’s rejection of an objective or constructive knowledge standard. Against this backdrop it is easy to understand why many greeted Farmer’s analysis of Canton, rejecting its application in Eighth Amendment cases because it failed to address the subjective element of punishment, as a resolution of the problem of institutional or entity liability in civil rights cases involving municipal liability. It appeared the Court was willing to apply an objective aggregate standard of entity fault in municipal liability cases, the complete opposite of its position regarding federal prison liability in Farmer.

The Supreme Court’s decision in Brown did not follow Farmer’s lead on the issue of institutional liability, however it did reflect the jurisprudential trend away from objective entity liability and toward an increasingly individualized paradigm of institutional culpability. Brown’s predictably problematic impact on the Lawson litigation, a case premised on institutional not individual liability, is obvious from the opinion. Justice O’Connor in Brown points to three distinct ‘settings’ or fact patterns defining municipal liability arises. Two rely upon a purely objective standard, but the third, while couched in terms of “objectivity” or “constructive knowledge,” introduces an element of subjectivity into the institutional analysis. These paradigmatic cases of municipal liability are distinguished by Justice O’Connor as follows: (1) cases where the municipality’s authorized decision maker has intentionally deprived the plaintiff of a constitutional right, (2) cases where the action taken or directed by the authorized decision maker itself violates constitutional law, including policies that are facially invalid, and (3) cases where the municipality has not directly inflicted an injury, but has caused its employee’s to do so. These latter cases include situations where a “facially lawful municipal action has led an employee to violate a plaintiff’s rights.” According to Brown the first two types of cases do not require any inquiry into the decision maker’s state of mind or even into the “objectively reasonable decision maker’s state of mind, because the Court finds the injurious conduct by its very nature clearly “deliberate” and culpable. It is the third standard that poses problems.

This third approach to municipal liability only applies when “a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so.” This standard, applicable when the challenged policy or procedure is facially neutral, unlike the other two discussed by Justice O’Connor in Brown, requires evidence that “the municipal action was taken with ‘deliberate

---

120 Supra note 111.
121 520 U.S. at 404-406.
122 520 U.S. at 407.
123 Id.
124 Id.
indifference’ as to its known or obvious consequences.” \(^{125}\) Justice O’Conner opines that this requirement is met if there is proof that “a municipal actor disregarded a known or obvious consequence of his action.” \(^{126}\) Here again we see problematic language, language that implies an element of actual, personal, subjective consciousness or disregard of known facts.

The proof problems raised by Brown are similar to the problems raised by Farmer. The “constructive knowledge” standard in Brown, the intent element for a claim of municipal liability, when applied to this last class of municipal policy and practice cases narrowly focuses on the facts and circumstances relating to a specific individual’s unique constitutional injury, and apparently, to a specific policy maker’s state of mind in light of those facts. Rather than allowing the courts to generally examine a policy’s predictable adverse impact on any given individual or class of individuals, the courts are instructed to examine “what the policymaker “knew” or “should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff’s rights.” \(^{127}\) Seemingly the available facts and actual circumstances of the specific case must establish that the policy maker or an objectively reasonable policy maker standing in his shoes, would have been on notice of a potential constitutional violation and acted “deliberately” in ignoring this threat of harm. The objective standard of Canton was not completely evicerated by Brown, but the new highly personalized analysis posed problems similar to those posed by Farmer: Could the gap between the employee’s unconstitutional conduct and the risk of harm to the prisoner, and the ultimate policymaker’s decisions create a second defensive ‘zone of ignorance?’

V. THE LABORATORY AT WORK: THE LAWSON LITIGATION GOES FORWARD

When the Supreme Court decided Farmer and then Brown I knew they posed problems for the Lawson case. The openly textured doctrine of Farmer and Brown, doctrine which attempts to address both culpability and liability within the single element of intent, whether actual or constructive, posed significant problems for litigants and courts alike. This was especially true in a case like Lawson where the primary issue of “deliberate indifference,” under both Farmer and Brown, involved individual actions whose cumulative impact was a condition of confinement for Brent Lawson and which reflected institutional policies, procedures and practices. But developing the new law of intent, its subjective (Farmer) and objective (Brown) dimensions in Eighth Amendment cases, was the task delegated by the Supreme Court to the expertise of the lower courts. This was the new constitutional experiment thrust upon the courts, Lawson and his lawyers. As will be seen in more detail below, the discovery, pre-trial motions, trial strategies and appellate issues on both sides in Lawson highlight the problematic dimensions of Farmer and Brown discussed above, especially the problem of the “zones of ignorance.” The laboratory was going to be hard at work as the rats geared up to run the maze!

A. The Two Litigants: Comparing Farmer and Lawson

\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) See infra pages 56 to 63 (discussing Brown’s application to Lawson).
The two litigants, Dee Farmer and Brent Lawson, were similarly situated when they filed their civil rights actions under 42 U.S.C. Section 1983 challenging their treatment by the state while incarcerated. Both litigants challenged the application of a broad institutional policy on grounds it failed to take into account their special needs. Ms. Dee Farmer claimed the Federal Bureau of Prisons’ policy regarding segregation and placement of inmates on its face ignored the special needs of preoperative transsexuals, inmates of slight, feminine appearance, and the policies, practices and procedures that characterized the general policies’ daily implementation ensured her safety was at risk. In his turn Mr. Brent Lawson claimed the Dallas County Jail’s general medical care policies regarding the placement and medical care offered paraplegics on its face ignored their special needs, and the policies, practices and procedures that characterized its daily implementation ensured his physical health was at risk. Both litigants pointed out their respective institutions were fully aware prisoners with their special needs were accepted into the general prison population.

Dee Farmer was a slight preoperative transsexual with marked feminine characteristics. Brent Lawson was a paraplegic confined to a wheel chair. In Farmer’s case, she challenged the prison officials’ decisions to apply their placement and segregation policies to her in a routine manner, treating her no differently than any other prisoner in the general prison population. Farmer claimed the prison officials involved in this decision from the Warden on down were on notice that given her unique physical status she faced a more serious risk than most prisoners of being the victim of a physical or sexual attack. Brent Lawson’s situation was similar. He challenged the Dallas County Jail’s decision to accept him, place him in a general medical tank, and refuse to provide him the type of specialized medical treatment needed to avoid or treat decubitus ulcers in paraplegics. Lawson claimed the prison officials involved in this decision from Deputy Chief Knowles, the officer in charge of the Jail and its policies, and the Director of the County’s Medical Service, Dr. Farris, on down to the nurses responsible for his daily care were on notice that given his compromised physical status he faced a serious risk of developing life threatening decubitus ulcers once admitted to the Jail.

While Farmer argued her treatment reflected the Federal Bureau of Prison’s (BOP) policy of refusing to provide special treat for individuals in her unique situation, the BOP took the position her treatment was more aptly viewed as the episodic acts of individual prison officials applying a policy neutral on its face. The BOP did not dispute the fact they had not developed policies to address the specialized placement and segregation needs of prisoners like Farmer, but argued, institutionally and individually, they had not been on notice such policies were needed. Like Farmer, Lawson claimed his treatment reflected the Jail’s policy of refusing to address the special needs of paraplegics, and the Jail, like the BOP, took the position Lawson’s treatment should be viewed as a series of episodic acts applying a policy neutral on its face. Both sets of defendants claimed (1) the objective facts known to them did not indicate a serious risk of harm, (2) the policymakers were not on notice of the specific facts attributable to the individual litigants or that these specific facts indicated any greater risk of harm to them than that experienced by the general prison population, and (3) the prison officials and policymakers had not drawn the actual inference of a risk of harm posed by their policies.

128 Dee Farmer’s story is set out in detail in the Supreme Court’s opinion, supra note 2.
that was different from the risks faced by all prisoners. Finally, both sets of defendants claimed even if an objective test might apply, they could not be held liable for any constitutional violation because their treatment of the litigants was “reasonable” under the circumstances.

While both Farmer and Lawson claimed their obvious “physical status” put the prison officials on notice of their special needs as prisoners, each pointed to other facts which made it clear they could not be treated routinely within the general prison population. Farmer’s physical status is often described as that of a “pre-operative transsexual,” but she had in fact “undergone treatment for silicone breast implants and unsuccessful surgery to have her testicle’s removed.”129 These facts were known both because they were obvious in a prison setting and because they had been established in Farmer v. Haas, Brennan and Dubois, prior litigation involving Farmer and some of the named defendants.130 It is worth noting that Farmer had been housed in several different facilities prior to the incident in question and “[i]n the majority of those facilities, the BOP segregated petitioner from the general population.”131

Prior to his arrest for an alleged parole violation Brent Lawson resided in a nursing facility because of his disability. His profound paralysis, including limited use of his arm, made it impossible for him to perform many of the normal tasks of daily living and he required around the clock personal care. For example, Brent Lawson needed help moving from his bed to his wheelchair to avoid striking or injuring himself; he needed daily monitoring to check for “hotspots,” tell tale spots on the skin indicating circulation problems, tissue damage and potential decubitus ulcers; he needed help bathing and dressing himself; and he needed help with personal hygiene, bathing, shaving, dressing, and bowel and bladder functions. The injury causing his paralysis had been relatively high on his spinal column; the damage to his spinal cord was between the T-3 and T-4 vertebra. This level of injury meant Mr. Lawson not only had no use of his legs, but he had limited use of his lower back and abdominal muscles as well. Brent Lawson’s paralysis was further compounded by a bullet wound in his upper left arm which rendered that arm of limited use.132 What happened to Dee Farmer was an abrupt and violent attack on her person. What happened to Brent Lawson while incarcerated in the Dallas County Jail took more time as the decubitus ulcers progressed from hot spots into open festering sores and finally into a life threatening systemic infection.133 Brent Lawson’s experience in the Dallas County Jail differed from Farmer’s in one significant respect. From the moment the Jail made the decision to “accept” Lawson into its general prison population, numerous individuals were involved in his care, all of them deferred to the Jail’s general policies limiting the medical care available to paraplegics and prohibiting specialized

129 Petitioner’s Brief, supra note 77 at 2.
130 No. 90-1088, 1991 U.S. App. LEXIS 3549, a1, n. 1 (7th Cir. March 1, 1991) (a prior case filed by Petitioner and referenced in her Appellate Brief).
131 Petitioner’s Brief, supra note 77 at 2, fn. 5 (In their Answer and Brief Respondents admitted petitioner was held in administrative detention throughout her incarceration at USP Lewisburg.)
132 Mr. Lawson’s disability was so severe during trial the Court ordered breaks allowing Mr. Lawson’s personal attendant, retained for the purposes of trial, to remove him from the courtroom and provide needed personal services. The facts concerning Mr. Lawson’s physical condition are discussed at great length in the District Court’s Findings of Fact, infra pages 56 to 59.
133 Brent Lawson’s story is outlined in detail in the Trial Court’s opinion, supra note 1.
medical treatment of the very type Brent Lawson needed, and all of them testified that most of their decisions to provide or refuse to provide medical care to Lawson were pursuant to Jail policies, practices and procedures.

Brent Lawson’s story begins when he is put under arrest at Tri-City Hospital while undergoing treatment for a small decubitus ulcer on his foot, it continues up through his admission and intake examination at the Jail, his physical examination by the Jail’s treating physician, his treatment at the jail by the nurses and psychologist, his treatment at Parkland Hospital, the acute care facility responsible for providing medical care to jail prisoners, his treatment at the Texas Department of Corrections, and his final release from TDC to Vista Garden’s Nursing home. Mr. Lawson entered the Dallas County Jail without decubitus ulcers, the foot ulcer had healed, but he left the Dallas County Jail with decubitus ulcers diagnosed as Stage III and Stage IV ulcers and a life threatening septic infection. After he left the Dallas County Jail Mr. Lawson underwent major surgery involving muscle and skin grafts. Even after he was discharged from TDC and returned to the nursing home, Mr. Lawson continued to suffer from the ulcers which required specialized care and treatment.\[134\]

VI. **LITIGATING THE ZONES OF IGNORANCE – RATS IN A MAZE**

These events did not happen overnight. Lawson’s lawyers faced the problem of presenting the accumulated decisions of numerous individual actors as simply the episodic negligent acts of the Jail’s medical staff. The lawyers had to link the Jail staff’s decisions to the Jail’s policies, practices and procedures and prove the policies, practices and procedures were adopted or sanctioned with “deliberate indifference” to the constitutional risk of harm. Lawson would have been a classic prison conditions case pre-Farmer seeking as it did to challenge the institution’s conduct, the collective activity that was Brent Lawson’s world. As the facts developed it was clear there was no single conscious policy maker who oversaw this accumulation of individual medical decisions, even though each care decision was based on the Jail’s accepted policies, practices and procedures for treating paraplegics. The facts further highlighted problems created by the hierarchical structures within the Jail, including the lack of communication between medical personnel and prison guards and the lack of written documentation concerning prisoners’ problems. As will be seen in more detail below, the Jail as an institution was organized to ensure information about individual problems, like Brent Lawson’s, would not flow upward or gain attention within the formal administrative decision making process of the Jail overseen by Deputy Sheriff Knowles or the County’s Health Service.

Without giving away the ending, after a full trial the District Court closely examined the facts and found Jail personnel were clearly on notice Mr. Lawson’s physical condition had progressed from relatively healthy at the time of his intake to life threatening at the time of his transfer to Parkland Hospital. While no one individual’s decision could be singled out as causing this situation, it was equally true that one individual’s actions might have prevented the harm that ultimately occurred. After Farmer and Brown, unfortunately, that was the task – to find culpable individuals, be they caregiver’s or policy makers, with the requisite “intent,” be it subjective or

\[134\] The District Court’s opinion is a detailed review of the evidence and facts in the case, 112 F. Supp. at 619-634.
constructive. Lawson’s litigation team quickly found out that the litigation challenges foretold by Farmer’s critics would prove to be only too real. Once the lawsuit was filed Defendants quickly took up residence in the “zones of ignorance.” Whether a function of hierarchy, lack of communication, distance, time delays, poor record management, poor training, lack of adherence to accepted medical practices, lack of a proactive institutional policy regarding medical care or constitutional concerns, lack of appeals or complaint procedures that engaged the administrators, or simply the day-to-day demands of jail operations there were clearly incentives to take advantage of the “zones” of ignorance carved out by Farmer and Brown both in the operation of the Jail and its defense at trial. Lawson is proof Justice Souter was wrong!

A. The Disputed Facts

The Original Complaint filed November 15, 1995 details the events that took place from September 29, 1993 through November 28, 1993 while Brent Lawson was incarcerated at the Dallas County Jail. The District Court’s extensive fact findings outline in detail the events as they progressed from Lawson’s incarceration on September 29, 1993; his struggles at the Dallas County Jail; the developing decubitus ulcers on Brent Lawson’s lower back and hip, initially charted on November 3; the deterioration of Lawson’s condition as the ulcers progress to Stage IV; Lawson’s three visits to Parkland Hospital, the acute care facility for the Dallas County Jail; the Jail’s refusal to follow medical orders from Dr. Benavides, Lawson’s treating physician from the nursing home, or from the Parkland physicians; Lawson’s final admission to Parkland Hospital where he is treated for sepsis, a systemic life threatening infection; and finally Lawson’s extensive series of plastic surgeries while incarcerated in the Texas Department of Corrections (TDC). Lawson’s claims focus on the decisions made by the Dallas County Jail’s medical personnel limiting his medical treatment and refusing to comply with doctor’s orders, all taken pursuant to the Jail’s policies, practices and procedures concerning the treatment of paraplegic prisoners.

In their turn, Defendants claim Lawson caused his own problems by refusing to take proper care of himself. Throughout trial medical personnel from the jail claimed Lawson had adequate use of his arms to transfer himself from his bed to his wheelchair to the shower chair and even pull himself up off of the floor onto his bunk without any harm. They attributed Lawson’s declining physical condition and his increasingly poor hygiene to intransigence on his part. Their defensive allegations included claims Lawson intentionally missed his medications, failed to cooperate in the care of his decubitus ulcers, and otherwise was a difficult prisoner. According to Defendants the decubitus ulcers were not caused by the Jail’s policies, but by Lawson’s own conduct. Moreover, Defendants claimed they had provided adequate care, care that met basic community standards, and it was likely Lawson would have developed decubitus ulcers regardless of their efforts on his behalf.

B. The Discovery Phase

Discovery proceeded in four stages, requests for production, corporate representative depositions, requests for admissions, interrogatories, and finally, extensive witness depositions of virtually every nurse or doctor at the Jail and Parkland Hospital involved in the treatment of Brent Lawson.
1. Requests for Production – Sparse Documentation at the Jail

On February 20, 1996 requests for production were sent to all three defendants, Dallas County, Jim Bowles, sued in his official capacity as Dallas County, and Dr. James Farris, sued in his official capacity as Dallas County’s Chief Medical Officer. The requests targeted documents ranging from Brent Lawson’s personal jail records, including his medical records, relevant Jail policies and the Jail’s general records reflecting medical care for paraplegic prisoners, including any prior incidents of decubitus ulcers. Over time Defendants produced Lawson’s personal jail records and general documents concerning the Jail’s compliance with the Texas Commission on Jail Standards certification requirements; there were no documents reflecting the care or monitoring of paraplegic prisoners, their physical condition, or otherwise noting the appearance of decubitus ulcers in the jail population. Lawson’s counsel continued to press and request records, data, documentation, memos anything that might reflect the treatment this special inmate population receives. For the relevant time period the jail lacked any written policies or procedures covering the provision of general medical care, much less any written policies or procedures addressing the special needs of disabled inmates such as Lawson. The absence of these records, medical records, kites, reports or specialized policies and procedures reflecting the occurrence and treatment of decubitus ulcers plays a significant role in the final trial of the case.

2. Two Hundred and Ninety Five Requests for Admission Later

It should be noted that throughout the discovery process counsel for both parties worked closely together to address discovery problems as they arose. One knotty problem immediately presented itself, a problem unique to “institutional” litigation. In response to Lawson’s Original Complaint Defendants had filed Answers broadly denying Lawson’s lengthy factual allegations. After the first corporate representative deposition of Dr. Farris it became obvious Defendant Dallas County would have a very difficult time fielding a corporate representative prepared to address Lawson’s allegations and the County’s extensive fact based denials. The parties agreed to use requests for admissions as a way to narrow the factual disputes; pursuant to this understanding, on April 18, 1996 Lawson served 295 requests for admission on Dallas County. The requests covered a wide range of “facts” concerning Lawson’s treatment, documents and jail policies and procedures; the County responded, and during the litigation periodically

---

135 See DEFENDANTS’ RESPONSE TO PLAINTIFF’S REQUEST FOR PRODUCTION TO DALLAS COUNTY, DEPUTY CHIEF KNOWLES, AND DR. FARRIS (served on April 16, 1996 and on file with the author).
136 See infra page 45. One of the critical documents in the case, Lawson’s complaint about the lack of assistance dated at the time of his initial incarceration, was not produced until the first day of trial. See Trial Exhibit #152 (on file with the author).
137 See LAWSON’S ORIGINAL COMPLAINT, filed November 14, 1995 (on file with the author) and DEFENDANTS DALLAS COUNTY, DEPUTY SHERIFF KNOWLES AND DR. FARRIS FIRST AMENDED ANSWERS, filed March 7, 1996 (on file with the author).
138 See infra pages 40 to 42 (discussing Dr. Farris’s lack of knowledge and lack of preparation for his deposition as a corporate representative).
139 DEFENDANTS’ RESPONSE TO PLAINTIFF’S FIRST REQUEST FOR ADMISSIONS TO DALLAS COUNTY, ET AL, served June 1996.
updated their admissions. This process provided an additional element of drama at the time of trial.

3. Corporate Representative Depositions -- Deposing the Policy Makers

On March 29, 1996 the first corporate representative deposition took place of Dr. Farris. Dr. Farris was deposed both as a named party, albeit sued only his official capacity, and as the corporate representative for Dallas County with responsibility for the provision of medical care in the Jail. Pursuant to Federal Rule of Civil Procedure 30(b)(6) the deposition notice outlined a series of topics for the deposition including prisoner intake procedures, assessment and evaluation of prisoners’ medical needs, special needs of paraplegics, alternative placements for prisoners with special medical needs, the Jail’s ability to provide medical care to paraplegic prisoners for the specific purpose of avoiding or treating decubitus ulcers, and other topics similar to those included in the original request for production. The deposition notice also incorporated Defendants’ Answers and their specific factual denials as corporate representative deposition topics.

As noted above, Dr. Farris’s deposition was decidedly odd. First, Dr. Farris testified that he had not been provided any information about Lawson’s lawsuit until just prior to the deposition when he met with his defense counsel. Apparently there was no policy or procedure within the Jail which required civil rights or medical malpractice cases challenging the provision of medical care in the Jail be forwarded to the County Medical Officer in charge of the Jail. While Dr. Farris was cooperative during his deposition, despite his title and stated responsibilities as overseer of the Jail’s medical care, it was clear he didn’t know what medical care was available and provided to inmates, particularly paraplegic inmates at the Jail. He acknowledged the Jail’s policies assumed paraplegics had full use of their arms and could take care of themselves upon admission and no effort was made to determine whether or not this was true for any individual inmate. But Dr. Farris also erroneously assumed some personal assistance and bedside nursing was available within the Jail. When asked about the problem of prisoners returning from Parkland Hospital with doctor’s orders that conflicted with the Jail’s safety policies, Dr. Farris stated he assumed there would be some form of discussion or follow up. He did not know the Jail lacked any such procedures. It was obvious from his testimony that Dr. Farris had not prepared for the deposition beyond looking at Lawson’s personal medical records and he was only prepared to testify from his personal knowledge. Despite being designated as a corporate representative for the

140 See Farris Deposition, March 29, 1996 (on file with author).
141 Id. at 54-60 (Plaintiff’s counsel was repeatedly referred to other personnel to answer basic medical care questions).
142 Id. at 50-53 (Dr. Farris testified to nursing care in the tanks which didn’t in fact exist) and 75-79 (Dr. Farris testified Parkland’s orders would be followed or at least discussed, but this was not the practice).
143 Id. at 97-98 (Dr. Farris testified there would be a conscious over ride of Parkland Hospital’s orders, when in fact there was not). At trial the Jail claimed the Parkland doctors’ orders for personal assistance violated safety policies which prohibited nursing staff from entering Jail tanks and orders for special pressure reduction mattresses (one was provided to Lawson at the hospital, but thrown away by the Jail) also violated fire safety policies. There was no procedure to address this issue. See Trial Testimony, Vol. III, pp. 40-48.
144 Supra note 143.
Dallas County Jail he had not reviewed any other records or spoken with relevant witnesses, and he was not prepared to testify about the full range of items set forth in the deposition designation. More importantly, Dr. Farris stated emphatically that the day to day provision of medical care in the Jail was directly controlled by the Sheriff’s department, not his.

Once Dallas County responded to Plaintiff’s Request for Admissions Deputy Chief Knowles’ was noticed for deposition both as a witness and as another corporate representative deponent for Dallas County. This deposition took place on June 27, 1996 and, as had occurred with Dr. Farris, Chief Knowles informed counsel he had not known about the litigation until just prior to his deposition, he had no knowledge of the events underlying Lawson’s claims, and he had done little to prepare for the deposition. During the course of the deposition Chief Knowles readily acknowledged the Jail accepted paraplegic prisoners, but had never developed any policies regarding their special medical needs. Their treatment was handled by the medical staff within the confines of the jail’s general policies regarding medical care and institutional safety, and he had no personal knowledge regarding their medical needs or problems they might face in a jail setting. Because he had never been told about Lawson’s problems or even the pending lawsuit, Chief Knowles conceded there had never been an internal investigation of the facts underlying the pending litigation or reexamination of the Jail’s policies and procedures regarding medical treatment for decubitus ulcers in paraplegics.

4. Deposing the Caregivers – Defining the Zones of Ignorance!

Following Chief Knowles deposition Lawson’s counsel initiated a series of depositions targeting all medical personnel involved in Lawson’s care from the time he transferred from Tri-City Hospital to the Jail up through his treatment after release by TDC to Vista Gardens Nursing Home. Lawson’s counsel ended up taking over twenty depositions including Dr. Benavides, Lawson’s treating physician, Dr. Kimmons, the doctor who treated Lawson during his incarceration in the Jail, virtually all of the nurses involved in Lawson’s care while at the Jail, the Parkland Hospital doctors who treated Lawson during and after his stay at the Jail, the Texas Department of Corrections doctors involved in his treatment after his release from Parkland Hospital, and the physician who treated his decubitus ulcers at the nursing home after his release from TDC. Many of these individuals were called as witnesses at trial, while others were provided as witnesses to the court through their deposition testimony. Here again witnesses took up residence in the “zones of ignorance” either professing not to recall events or recalling clearly Brent Lawson’s lack of cooperation. At trial the Jail’s nursing staff repeatedly claimed they did not recall ever having this type of problem, but they also claimed not to recall Lawson or his individual problems. Equally important was the nursing staff’s

---

145 F.R.C.P. 30(b) (6). These depositions are not limited to the deponent’s personal knowledge; “persons so designated shall testify as to matters known or reasonably available to the organization...” The rule anticipates corporate representative deponents will investigate and prepare for their deposition. Defendants’ never objected to the topics included in the notice on grounds of scope, relevance or specificity.
146 Deputy Chief Knowles’ Deposition, June 27, 1996 (on file with author).
147 Id. at 3.
148 At trial Chief Knowles admitted he knew about decubitus ulcers generally, but only because his wife was an R.N. See e.g. Trial Transcript, Vol. III, pp. 255-258 (on file with the author).
testimony that there were no procedures for documenting serious decubitus ulcers or otherwise putting the Jail’s administration on notice of this type of problem. Simply stated the nursing staff observed Lawson’s deteriorating condition, but felt they could do nothing about it until hospitalization in an acute care unit was the only option. 149

C. Cross-Motions for Summary Judgment

Once discovery was complete the parties filed cross motions for summary judgment pursuant to the District Court’s “Scheduling Order.” 150 Lawson’s Motion for Summary Judgment was supported by an array of documents, deposition testimony, and expert affidavits. 151 Dallas County moved for summary judgment claiming no evidence of a constitutional violation and no basis for attributing any violation of the constitution that might have occurred to the county. 152 At oral argument Counsel for Defendants worked through the prongs of Farmer: (1) there is no evidence any employee “actually knew” Lawson “faced a substantial risk of serious harm” and (2) when they did know something they responded to it, reasonably. 153 The crux of Defendants’ argument is simplicity itself – “What they didn’t know . . . is that he could not care for himself. And missing from this record is evidence, particularly from Mr. Lawson, that he couldn’t.” 154 More importantly, their argument centered on the reasonableness of the care provided to Lawson while he was incarcerated; the Jail’s witnesses claimed they did all that was constitutionally required, providing antibiotics and dressing changes met their duty of care. 155 This was the threshold issue: Whether or not this conduct is simply negligent or “deliberately indifferent” is a question, suggested the Court, for a fact finder and is not appropriate for summary judgment. 156

Dallas County’s counsel then moved on to the question of municipal liability and the application of Brown. Defendants’ interpreted Brown to hold that there can be no liability unless a county policy is the “moving force behind . . . [the employees’] deliberate indifference . . . And more importantly . . . is it a policy that is deliberately indifferent?” 157 According to Defendants’ Brown requires notice to the county in the form of a recurring problem with paraplegics; they have no duty to respond unless there is a pattern of constitutional violations resulting from decisions or conduct undertaken pursuant to Jail policy. The problem as posed raised the question whether what happened to Lawson was an isolated event; if so, Defendants claimed no notice to the county and therefore no liability. They are entitled to one free bite at the apple and Lawson was it. 158

149 See 112 F. Supp. 3rd at 619 (District Court’s critical treatment of these “memories” as evidence).
150 See “SCHEDULING ORDER,” filed December 19, 1996 (on file with author).
151 See PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT (filed March 3, 1997) and DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT (filed March 3, 1997) (pleadings on file with author).
153 Id. at 13.
154 Id.
155 Id. at 14.
156 Id.
157 Id. at 16.
158 Id. at 19-21.
“If the county doesn’t know about . . . [the event] until after the fact” how they respond then is irrelevant.159

The County confused two distinct liability paradigms established by Brown. The first focuses on a policy that directly creates a constitutionally intolerable condition in the jail. The second focuses on a policy that is neutral on its face but in its individualized application poses a constitutional threat to a particular inmate or inmates.160 The institution is thought to have intended its acts and unconstitutional results in the first type of case, while the latter focuses on the problem of individual decisions coming between the facially neutral policy and the alleged constitutional harm. Lawson’s counsel raised this point in their reply, pointing out that the state had knowledge, or at least constructive knowledge, that their policies and procedures were not facially neutral and posed a serious threat of harm to all paraplegic prisoners. Lawson’s counsel urged the Court to evaluate these policies under Brown without reference to any particularized facts putting the county on constructive notice or construing Brown narrowly to require facts that would have put a specific identified policymaker on notice of the particular harm.161 Alternatively, Lawson’s counsel argued that after five weeks and deteriorating decubitus ulcers there were certainly facts available to county officials that met the “constructive knowledge” requirement of Brown’s most forgiving municipal liability paradigm.162

On March 24, 1998 the District Court issued its ruling denying both sets of motions. The District Court rejected any attempt by Lawson to distinguish between conditions of confinement cases and episodic acts cases following Farmer163 or argue the former rather than the latter paradigm should apply. But the Court in elaborating upon Farmer’s164 unitary liability standard opined that “deliberate indifference to a substantial risk . . . is the equivalent of recklessly disregarding that risk.”165 In support of this construction of the “deliberate indifference” standard the Court cited to Ramos v. Lamm166 for the legal proposition that “deliberate indifference . . . can be demonstrated by proving there are such systematic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.”167 Under these standards the Court found Plaintiff had produced sufficient evidence of an objective risk to meet the first prong of Farmer. As for the “intent elements” of Farmer and Brown, the Court further determined numerous “county officials knew Plaintiff faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures . . . .”168 The court concluded by ruling that under this set of facts, the dispute over the jail personnel’s knowledge regarding Lawson’s condition and the reasonableness of their response is best left to trial.

159 Id. at 22 (Defendants’ Counsel’s argument to the court on Brown).
160 See Brown supra pages 32 to 35 (for discussion of Brown’s doctrinal flaws).
161 Summary Judgment Oral Argument supra note 152 at 23.
162 Id. at 24.
163 SUMMARY JUDGMENT MEMORANDUM OPINION AND ORDER, March 24, 2998, at 10, note 4 (on file with the author).
164 Id. at 10.
165 Id.
166 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1051 (1981).
167 SUMMARY JUDGMENT MEMORANDUM MEMORANDUM, supra note 163 at 11.
168 Id. at 13
In its summary judgment opinion the Court noted the Supreme Court's explicit policy limiting judicial intrusion into prison or jail management. The trial court consciously considered this policy in exercising its judicial discretion deciding the motions for summary judgment. The District Court explicitly rejected the application of a policy of judicial deference or reluctance in cases, such as Lawson’s, involving the “continuous and consistent disregard for a paraplegic inmate whose needs were made known . . . .” 169 The Trial Judge made it clear in his opinion that this type of problem falls within the lower courts’ normal adjudicative discretion and should be addressed by trial. 170

The Court next addressed the issue of municipal liability. Two alternative liability paradigms could apply to the Lawson case. The first paradigm involves a municipality’s failure to adopt a policy and the second involves a deficient policy. Faceably neutral but deficient policies require evidence that the “policymakers deliberately chose [measures] which would prove inadequate.” 171 However missing policies can be “deliberately indifferent when it is obvious” the likely consequence of failing to adopt a policy will be a constitutional deprivation. 172 Defendants used Brown’s municipal liability paradigms to claim that the policymakers, Chief Knowles and Dr. Farris, had no actual knowledge of the claimed deficiencies in the disputed policies, that there was no pattern of constitutional violations putting them on constructive notice of these deficiencies, that the deficiencies were not obvious, and that the policymakers, since they had no actual or constructive notice of the problem, cannot be said to have refused to remedy any constitutional deficiencies that might exist. 173 According to the Court since Plaintiff’s medical needs were ignored on at least four different occasions, a fact finder could “find that Defendant was put on notice regarding a policy deficiency, or that the deficiency was so obvious as to likely result in a constitutional deprivation.” 174 Bottom line, the medical staff knew they could not provide Lawson with the care he needed, and that had been ordered, because of the Jail’s standing policies, and lack of policies, addressing paraplegics and yet they refused to take any steps to address the problems as they arose. The Court’s summary judgment opinion set the stage for trial. Lawson’s task was to discover conscious inaction, proving up the Jail’s “acts of omission” in order to develop an evidentiary basis for distinguishing between innocent ignorance and reckless disregard, the boundaries of the Supreme Court’s “zones of ignorance.”

D. The Trial: A Question of Innocent Ignorance or Reckless Disregard?

On October 20, 1993, just about ten days prior to trial Plaintiff filed his “Motion to Strike Untimely Supplementation [of Discovery] and “Motion in Limine.” 175 The Motion to Strike was an impassioned, or perhaps intemperate, challenge to Defendant’s

169 Id.
170 Id.
171 Id. at 19.
172 Id.
173 Id. at 21.
174 Id.
175 PLAINTIFF’S MOTION TO STRIKE UNTIMELY SUPPLEMENTATIONS; PLAINTIFF’S MOTION IN LIMINE; AND BRIEF IN SUPPORT THEREOF, filed October 20, 1993 (pleadings on file with author).
attempt to clean up the discovery record for trial. This dispute, coupled with a few significant events at trial, serves to further illustrate the impact Farmer and Brown had on the trial by posing the question of liability as an either or proposition: Either Defendants’ actions fall within the protected “zone of ignorance” or they are criminally recklessness and the Jail has in fact turned a metaphorical blind eye to the problem. Once that constitutional hurdle is cleared the next question becomes whether Brown’s “constructive notice” standard for municipal liability requires specific facts putting a specific policy maker on notice or simply sufficient facts to put an objectively reasonable decision maker on notice of a potential constitutional harm? Where does “hiding” in the “zones of ignorance” fit within this continuum of innocence and culpability? The conceptual problems inherent in both the Farmer and Brown opinions are significant and explain much of what happened during discovery and at Lawson’s trial. The simplistic idea that the lawyers and judges simply apply the “law” to the “facts” ignores the reality that the “law” shapes those facts in the adjudicative context and does so from the first moment a claim is created. Having survived summary judgment both parties now had to gear up and prove their allegations.

A couple of concrete examples illustrate Plaintiff’s evidentiary problems created by Farmer’s and Brown’s insistence upon a highly individualized and subjectivized paradigm of liability. In this context how should the courts evaluate the decision maker who has constructive knowledge that (1) paraplegics are admitted to his jail, (2) paraplegics develop decubitus ulcers while in jail, (3) the only medical care provided by the jail is routine dressing changes and antibiotics, (4) the jail does not chart the deterioration of decubitus ulcers, (5) the jail does not follow-up if a decubitus ulcer requires hospitalization, and (6) the jail does not follow up if the decubitus ulcer leads to litigation. Is this innocent ignorance? How is the trial court to factor into its overall analysis the policy maker’s assumption – if there is a problem the staff will let me know-- despite the absence of any written procedures or accepted practices supporting such an assumption? Can the “reasonable objective” policy maker under Brown delegate their responsibility for monitoring constitutional conditions in the Jail to the nurses and jailers providing day to day care? Does the Jail’s reliance upon inmate grievances, prisoners’ filing of kites and complaints about their treatment, discharge the objectively reasonable decision maker’s duty in this regard? In fact, does the objectively reasonable decision maker have any duty to proactively monitor the Jail for constitutional problems or are they free to ignore possible constitutional violations until they are affirmatively brought to their attention through litigation? These are the legal and evidentiary issues that shaped Lawson’s trial.

1. Putting the County on Notice Decubitus Ulcers Are Constitutionally Significant – Estelle v. Ruiz

Trial strategy for the case focused on the “intent” elements of Farmer and Brown. What did individuals know, what had they ignored, and what system provided information about problems to the decision makers, Chief Knowles and Dr. Farris? It is possible to examine this evidence as a series of concentric circles. On the outer circle,
setting the larger, but local legal context, is *Ruiz v. Johnson*, the seminal Texas prison case which led to substantial pervasive reforms within the state prison system and which was still in court at the time of Lawson’s incarceration. The original claims in *Ruiz* included questions about the treatment of disabled prisoners and the problem of decubitus ulcers in prison setting. These problems have apparently been addressed within TDC because when Brent Lawson was transferred from Parkland Hospital to the Texas Department of Corrections he received excellent care for his decubitus ulcer including monitoring, turning, dressing changes as order by the treating physician, personal assistance, and access to appropriate assistive devices. Not only was TDC able to provide the full range of care Lawson required as a paraplegic to avoid developing ulcers, TDC also provided extensive specialized plastic surgeries to move muscle from his hip and leg into the cavity of the ulcer forming a tissue bed for the needed skin graft repairing the damage that had occurred at the Jail.

*Estelle v. Ruiz* was a significant substantive constitutional decision that addressed conditions of incarceration within Texas’ state prisons and that specifically noted the special needs of disabled prisoners. Why shouldn’t this type of decision put the Dallas County Jail and its policy makers on notice that decubitus ulcers were constitutionally significant, that housing disabled prisoners created special constitutional problems, and that, as a result, specialized policies were needed? Within the doctrinal context of *Estelle v. Ruiz* the Jail’s policies appear consciously deficient representing an effort by policy makers to “turn a blind eye.” The Dallas County Jail’s lack of an institutional response to *Estelle v. Ruiz* parallels its lack of any substantive response to the Lawson litigation --- it ignored both pieces of litigation. There are obviously legal and institutional incentives to do so and few incentives to be constitutionally proactive, especially since, as stated by the Jail’s defense counsel on numerous occasions, the Jail usually wins in prisoner suits. Constitutional law from this perspective is reduced to a question of limited, personal liability and policies designed to simply avoid culpability rather than a statement of legal and social norms designed to have a pervasive proactive institutional impact.

2. Putting the County on Notice with Local Litigation – Lawson and Westbrook

A little over one year after Lawson was transferred out of the Jail a similar case arose. The manner in which the case was handled by the federal court and the manner in which the inmate was treated by the Jail, despite overlapping actors, are telling. Decided in 1999, *Westbrook v. Dallas County Jail* reflects back on care provided by the Jail in 1994 to another paraplegic inmate, tracks a series of events not unlike Lawson’s and yet

---

177 *Id.*
178 *Id.*
179 *See* Brent Lawson’s testimony at trial, Trial Transcript Vol. II, pp. 131-138 (on file with the author)
180 *See infra* pages 39 to 42.
181 The question of voluntary compliance with Supreme Court decisions is a fascinating topic and the Jail’s approach to *Farmer* and *Brown*, two “new” constitutional cases, provides some indicia that proactive or voluntary compliance is not the modal institutional response in governmental arenas.
182 1999 U.S. Dist. LEXIS 9375 (N.D. Texas, Dallas Division)
fails to reference either *Estelle v. Ruiz* or *Lawson* as putting the Jail on notice of potential constitutional violations. Westbrook, a paraplegic, was incarcerated at the Dallas County Jail on July 22, 1994. By happenstance three of the nurses charged with his treatment had also cared for Brent Lawson and were to become witnesses in the *Lawson* trial.\(^{183}\) Westbrook’s claim is similar to Lawson’s: Westbrook alleges he was not provided the care needed to prevent decubitus ulcers from occurring and he focuses on the two (or three days) he was placed in a single cell without his wheelchair as marking the inception of this problem. As Westbrook and Lawson both testified, in their single cell they could be in bed or if they fell out of bed or had to use the facilities they would end up lying on the floor.\(^{184}\) Lying or sitting on the concrete floor without the ability to shift or move or otherwise keep pressure from building up over bony protuberances created conditions ripe for decubitus ulcers. The Magistrate Judge who handled Westbrook’s summary judgment found Westbrook had been deprived of his wheelchair for two days and expert testimony at the Lawson trial established that decubitus ulcers can begin to develop in less than 48 hours when pressure, like a hard floor or inadequate mattress, squeezes tissue between bone and the hard surface cutting off the blood supply.\(^{185}\)

After two days Westbrook was transferred from the single cell to a handicapped cell where he was seen by medical personnel on a daily basis, apparently for dressing changes on the ulcers. The record is unclear as to whether the medical staff went into the cell or Westbrook came out. On August 20, about a month after incarceration, one of the nurses described the decubitus ulcer on Westbrook’s buttock as “surrounded by two and a half inches of yellow-green infection with necrotic (dead) tissue in the center.”\(^{186}\) He was treated with medication, but not seen by a doctor until a week later. By then the ulcer had worsened and there was a “large amount of dead tissue-draining purulent drainage.”\(^{187}\) The doctor ordered surgical removal of the dead tissue, but this procedure was delayed for six months. Westbrook, like Lawson, was finally admitted to Parkland Hospital on October 11, 1994, although his condition was not as serious as Lawson’s. Apparently he underwent three operations over a five month period to radically debride his ulcer, surgically removing the dead tissue to avoid further infection.

The Jail’s summary judgment evidence in the *Westbrook* case uncannily echoes their evidence in *Lawson*. The Jail admitted that paraplegic patients are at risk of decubitus ulcers due to circulation problems if there is prolonged pressure on tissue situated over bone. But Dr. Bowers, the new Jail treating physician, “testified that plaintiff developed decubitus ulcers because he ‘failed to rotate himself off of these pressure points . . . .’”\(^{188}\) Again the Jail’s defense is simple: they assumed in 1994, just as they had assumed in 1993, and just as they would testify at Lawson’s trial, that most paraplegics have “adequate arm strength” to manipulate themselves off of pressure sites.

\(^{183}\) Nurses Sampson, Potter and Lynn had cared for Lawson and now found themselves caring for Westbrook.

\(^{184}\) *Supra* note 182; *see e.g.* 112 F. Supp. 3rd at 628-629 (District Court found that Lawson was also placed in a single cell without his wheelchair and complained he was forced to lie on the floor.)

\(^{185}\) Trial Testimony Vol. I, pp. 44-104 (expert testimony in the Lawson trial explained the causes and treatment of decubitus ulcers in detail).

\(^{186}\) *Supra* note 182, *Westbrook* at 2.

\(^{187}\) *Id.* at 4.

\(^{188}\) *Id.*
and they have the further ability, or access to equipment, to maintain these new positions or otherwise note when further rotation is required.

Neither the Jail nor the Court in Westbrook ever address the reality of paraplegics’ inability to feel hot spots developing, the problem of holding the body off of the normal hot spot zones without access to materials to stabilize the body in new positions, or the problem of sleeping at night when such self monitoring is almost impossible. The Westbrook Court never discusses the nature of the bed and mattress available to Westbrook, while the inadequacy of this equipment to reduce pressure points is discussed at length at the Lawson trial. Westbrook’s own limited knowledge of medical care led him to focus on his time spent sitting and lying on the concrete floor as the cause of his ulcers when, in reality, even if he had remained in bed the ulcers were as likely to develop.

Westbrook lost his case at summary judgment because he lacked the legal expertise or resources to properly support his claims. He complained that he was unable to move from the floor of the single cell in order to avoid pressure points and ulcers; unfortunately, this was an unsworn allegation and could not be relied upon to raise a fact issue and defeat summary judgment. Westbrook’s other allegations, denial of his requests for assistance or the inadequacy of the minimal care he claimed he received, were simply denied by the Jail’s nursing staff; the staff did not recall these events and the incidents are not documented in the Jail’s medical records. As stated by the Magistrate Judge, “[Nurse] Sampson . . . denied any recollection of plaintiff asking to see a doctor.” These same witnesses raise this same “zone of ignorance” defense in the Lawson trial as well. Just as they did in the Westbrook summary judgment, at Lawson’s trial the Jail’s nursing staff not only denied any problem with Lawson; in November of 1998, during trial the nursing staff, including nurses who had cared for Westbrook, testified that they didn’t recall any other prisoner ever having the types of problems Lawson complained about. By November of 1998, the date of Lawson’s trial, the nursing staff’s memories, an unreliable source of evidence at best, had faded into oblivion despite the pendency of Westbrook’s lawsuit and the similarity between the facts of the two cases. This testimony illustrates the institutional incentives driving witnesses into the Supreme Court’s defensive “zones of ignorance.” Looking back, it is remarkable and telling that the Lawson Court, faced with these repeat players, ultimately finds in its final order that this lack of memory is hard to credit especially when placed up against the witnesses equally vivid, if questionable memory, that there had never been any similar problems.

The Magistrate judge finally determined that Westbrook failed to meet his burden of production and that there was no competent evidence raising a fact issue as to whether or not the Jail’s staff had been “deliberately indifferent” to his medical needs in violation of the constitution. The court’s analysis reflects the essential role of

189 Id.
190 See Plaintiff’s expert’s testimony at trial, supra note 185.
191 Id.
192 The overlapping time lines of the two cases are revealing.
193 112 F. Supp. 3rd at 619.
194 Westbrook, supra note 185 at 5.
summary judgment in prison litigation cases, but it also reflects the lack of institutional fit between Farmer’s highly subjective standard of “deliberate indifference” and the reality of jail litigation such as Farmer’s and Westbrook’s. As will be seen in more detail below, the lack of notation in the Jail’s records or the Jail’s statement that it can find nothing in its records to indicate a larger institutional problem exists, is at best equivocal evidence. As is the Jail staff’s testimony of -- “I don’t recall.” The Jail uses this testimony to raise the defensive assumption that “If something critical had happened I would recall” or “It would be in the records.” The District Court’s fact findings in the Lawson litigation challenge these assumptions, critically examine this inference, and in doing so begin to craft a fairer more credible fit between Farmer and the institutional reality faced by prisoner litigants.  

3. Deposing the Decision Makers: Hiding in the Zone of Ignorance

The Lawson litigation was filed Nov. 15, 1995 and on March 29, 1996 and June 27, 1996 Dr. James R. Farris and Assistant Chief Robert Knowles were deposed as corporate representatives for Dallas County and as individual fact witnesses in the case. As discussed in more detail above, within a few minutes of opening the depositions it was clear neither witness was prepared to testify as corporate representative deponents. Each was prepared to testify based on their personal knowledge of the case, which was extremely limited, neither had undertaken any investigation of the allegations included in the litigation or otherwise followed up on the topics outlined in the corporate representative deposition notice. Both witnesses stated openly that they did not even know the litigation had been filed until just a few weeks prior to their deposition.

Dr. Farris’ testified he was unaware of the state of affairs at the Jail, he assumed much of the care ordered for Lawson was provided, and he was not aware of the Jail’s policies restricting medical care for paraplegics. Deputy Chief Knowles’ position was equally clear; he had no notice of any problems at the Jail involving decubitus ulcers until he was notified to prepare for his deposition in the Lawson case. It is understandable in the context of a busy Jail that administrators could be overburdened if they are expected to notice or respond to every piece of litigation. But, the County’s defensive position throughout trial was that they had no notice of a potential problem and no notice of any complaints from Lawson. Even if the County is allowed its one free bite at the apple Westbrook or Lawson should have been it. Viewed within the larger legal context of Farmer and Brown the Jail’s lack of response to complaints even when filed as litigation with the federal courts takes on the onus of an institutional calculus aimed at avoiding “notice” and therefore liability. The Supreme Court’s larger institutional goal of reducing inmate litigation and reducing institutional liability for unconstitutional care is succeeding, but not for the reasons espoused by Justice Souter. It is the prudential flaws in Farmer and Brown, the defensive and extensive “zones of ignorance,” that the targeted institutions have taken notice of.

196 Supra pages 40 to 42.
197 Id.
198 Dr. Farris had obviously heard nothing of the Westbrook matter in the interim.
4. The Inference to be Drawn From Records – Their Presence, Their Absence and Their Contents?

Requests for production were pending throughout the litigation, but requests aimed at documenting the problem of decubitus ulcers within the Jail failed to extract an institutional response. The Jail either did not keep these types of records or it objected to their production because it would require going through individual inmate records, a task too burdensome to undertake. Although it refused to produce documentary evidence, the Jail responded that there were no complaints from Lawson noted by the medical staff in his records or reflected in a kite or formal grievance, at least this was their position up until the morning of trial. The Jail also took the position that it had no record of any medical staff raising a concern about the Jail’s provision of medical care to paraplegic inmates generally or to Lawson specifically. Because none of their staff had determined there was a problem warranting an institutional response and because the Jail lacked procedures for bringing the problem of inmates developing life threatening decubitus ulcers to the attention of Chief Knowles, the County could comfortably hide in the “zones of ignorance.”

During discovery and at trial it was apparent the Jail did not record or document in any detail the occurrence of decubitus ulcers, their treatment or any events requiring hospitalization of inmates. The nursing staff testified it was not the practice in the jail to follow accepted nursing procedures in documenting the size or progression of ulcers and access to Lawson’s jail medical records confirm their sparse notations regarding the deteriorating ulcers. It is impossible to tell from these records alone exactly how serious Lawson’s condition had become, that is until you read Parkland’s records. In addition, the Jail had no procedures to follow-up on inmates whose decubitus ulcers or other medical condition required hospitalization to determine if the problem could have resulted from the Jail’s own treatment policies and procedures. Lawson’s own Parkland records state that “the jail could not properly treat” the ulcers and it was Parkland Hospital who refused to return Lawson to the Jail, not the Jail who insisted on Lawson’s placement at Parkland. As for the alleged lack of complaints sworn to by the Jail’s staff in testimony and referred to numerous times throughout the litigation, Lawson’s medical record is replete with descriptions of his worsening physical condition and the problems he was having within the Jail; these were apparently discounted by the Jail staff as whining and complaining of no merit. In the end the medical staff all admitted in their depositions that there were no written policies or procedures designed to bring these types of problems to the Jail administration’s attention, and it was certainly not common.

199 The District Court in Estelle v. Ruiz, supra note 176, rejected a similar argument. There Defendants claimed Plaintiffs would need to evaluate all of the institutions within TDC to determine if there was a pattern of ongoing systemic constitutional violations. The Court found this argument “disingenuous and in marked contrast to their persistent efforts” to avoid document discovery. Moreover, the Court held that such an evidentiary burden would “virtually immunize a system as large as Texas” from constitutional scrutiny. 37 F. Supp. 2d 855, 888. A similar observation can be made about the Dallas County Jail’s insistence that Plaintiff search records to prove a pattern of violations, especially when the Jail refused access to these records or claimed they didn’t exist.
201 See Parkland Medical Records for Brent Lawson referenced in Lawson, supra note 1, 112 F. Supp 2d. at 631 (on file with author).
practice to do so. Even when the nurses knew they could not follow the doctors’ orders from Parkland, nothing was noted or forwarded to the Jail administration pointing out the problem – the staffs’ inability to follow doctor’s orders – or asking for resolution.

That said let’s look at the morning of trial. Deputy Chief Knowles arrived with counsel and a document, an inmate grievance, just prior to the time set for trial to begin. Despite the Jail’s numerous representations throughout the extensive discovery that they had fully complied with Lawson’s request for production and their protestations he had never filed a formal complaint, on the day of trial the documented complaint appears. A quick hearing is held and Deputy Chief Knowles testimony is telling on this point. In preparing for trial, defense counsel wanted him to testify unequivocally that there were no incident reports putting the Jail administration, other than the staff dealing directly with Lawson, on notice of Lawson’s problems. In order to provide this sworn testimony, Deputy Chief Knowles undertook a final search focused on incident reports or kites, the formal paper grievances generated by inmates. This time a document popped up in which Lawson complained he had spent the night on the floor of his tank because jail personnel refused to help him back into his bunk. The incident had never been brought to the Deputy Chief’s attention.

Jail personnel testified at trial that the medical staff discounted Lawson’s allegations in the written grievance. Lawson complained he was left to lie on the floor, but the staff, once more, claimed Lawson could use his arms to get back into his chair or bed. Based solely on these “beliefs” and without any further investigation the complaint was treated as “handled” and filed. The incident or concerns raised by Lawson were never brought to anyone’s attention higher up the chain of command. In the face of this evidence Deputy Chief Knowles went on to testify at trial that the grievance and kite system used by Lawson is one of his primary means of monitoring the Jail for potential constitutional problems. According to Knowles he reviews these documents to see if there is a pattern of incidents or complaints requiring his attention. Other than the Lawson grievance, a grievance not brought to his attention, Deputy Chief Knowles testified he was never put on notice or had otherwise been asked to address the question of care for paraplegics at the Jail – no member of the Jail’s medical staff or guard had ever raised the issue. Given the staff’s testimony outlined above about the lack of procedures or practices designed to make this happen does Deputy Chief Knowles’ testimony reflect his innocent ignorance or an institutional policy of “turning a blind eye?”

202 See Lawson, supra note 1, 112 F. Supp. 2d at 616 referencing trial and deposition testimony (on file with the author).
203 See Lawson, 112 F. Supp. 616, supra note 1 (The District Court’s extensive findings reflect thorough discovery and a lengthy trial targeting the “zone of ignorance” and focusing on “acts of omission” and missing documentation.)
204 Trial Exhibit No. 152, see Trial Testimony Vo. I, p. 3 (on file with author).
206 Trial Transcript, Vol. III, pp. 206-207 (examines grievances for patterns), pp. 237-257 (discusses when and how grievances are reviewed and whether follow-up is deemed necessary)(on file with author).
207 Trial Transcript, Vo. I, p 206 (on file with author).
The Jail’s position is troublesome on two grounds. First, the Supreme Court admonished the litigants in *Farmer* that prisons, and jails, should not rely upon inmate complaints or calls for help before determining there a problem of constitutional dimension exists because by then the harm has occurred. Second, it is difficult to impose a nebulous obligation on staff to make independent decisions regarding problems warranting attention from higher up without policies or procedures to encourage this type of behavior. Hierarchical and beauracratic structures do not encourage this type of communication and there are few incentives for individual actors to “create” constitutional problems for their superiors.

Both of these structural problems existed in the Dallas County Jail at the time of Lawson’s trial. Despite testimony from the Jail’s medical staff that decubitus ulcers posed a critical health risk to paraplegic inmates, there were no systems, policies or practices encouraging staff to take note of these critical problems, document them, or bring them to their supervisors or the ultimate policymaker’s attention. It is almost impossible to rebut or challenge Deputy Chief Knowles’ position as the Jail’s delegated policy maker that he was not actually aware of any problem given the Jail’s clear predilection to avoid documenting much of the conduct at issue in the Lawson litigation. This evidentiary problem emerged at trial as a battle over the inferences to be drawn from “missing or empty records.” Does the absence of documentation support Defendants’ claims there were no problems or is it evidence of their individual or institutional indifference?

**Supplementing the Record:** The legal battle over the meaning of “empty records” heated up prior to trial when Defendants attempted to “supplement” key discovery. On October 2, 1998, after discovery had cut off and trial was in the offing, Defendants served a series of discovery supplementations on Lawson’s counsel. Plaintiff’s counsel objected to the supplementations on grounds they were not “timely since they substantially altered prior answers, claimed the existence of new evidence, and were filed after the discovery cutoff, 30 days prior to trial.”

**The Benevides’ Phone Call:** The first attempted change involved a critical phone call from Lawson’s treating physician, Dr. Michael Benavides, to Dr. Farris prior to Lawson’s removal from the acute care hospital to the Jail. Dr. Benavides testified to the phone call in his deposition and testified that he informed Mr. Lawson of the call. Mr. Lawson testified he had raised this phone call at his intake with Nurse Lynn (one of the nurses who subsequently cared for Mr. Westerbrook). This latter event is noted in Nurse Lynn’s intake notes. Initially the County admitted Lawson conveyed this information to Nurse Lynn and further admitted its “constitutional duty to Lawson was the same whether Dr. Farris knew [about Lawson’s condition] or not.” In its attempted

---

208 *Farmer*, 511 U.S. at 848-849.
209 PLAINTIFF’S MOTION TO STRIKE, *supra* note 175 at 2.
210 Dr. Michael Benavides’ Deposition, May 14, 1996, at 23-36 (recounts calls to the Jail and discussions of Mr. Lawson’s medical needs) (on file with author).
212 See Exhibit C to PLAINTIFF’S REQUEST FOR PRODUCTION (on file with author).
213 DEFENDANTS’ RESPONSE TO PLAINTIFF’S REQUEST FOR ADMISSIONS, Number 34 (on file with author).
supplementation the County admits the record notation indicating Lawson informed Nurse Lynn of the call, but “otherwise denies” that Dr. Farris was made aware of Lawson’s medical condition prior to Mr. Lawson being admitted to the jail.” At his deposition on March 29, 1996 Dr. Farris was questioned about the Benavides phone call and his answer, while not terribly helpful to the Plaintiff, was credible. Dr. Farris testified, “He may have contacted my office. I am not at the jail; I am at the health department.” He went on, “It could be that someone contacted my office about it [Lawson coming to the Jail]. But I have no specific recollection of any conversation with anyone concerning this man.” He acknowledged that his own lack of documentation about the call did not indicate one way or the other whether the call had occurred.

Dr. Farris did not deny the call had occurred; he simply testified he had no recollection one way or the other regarding the call. In the supplementation this “equivocal” yet credible position substantially altered and now the County affirmatively denied the phone call ever took place or went to Dr. Farris. Fact disputes of this nature illustrate the attractiveness of the “zones of ignorance” in crafting a defense and the difficulties inherent in proving a defendant acted recklessly, whether subjectively or objectively, by turning the proverbial individual or institutional “blind eye.” If the call occurred, and the District Court treated Dr. Benavides’ testimony as credible on this point, Dr. Farris’s lack of concern is telling. It is significant that in the final analysis Dr. Farris never testified that such a phone call would have prompted any type of response from either him or the jail; the occurrence or nonoccurrence of the Benavides call was itself a nonevent as far as Defendants were concerned.

Persons with knowledge: Another attempted supplementation further highlights the problem of inferences drawn from empty or missing records. In May and June of 1996, Plaintiff asked Defendants’ to identify all persons with knowledge of facts concerning Mr. Lawson’s incarceration and medical treatment. The County responded that all persons with personal knowledge of the relevant facts had been deposed, other than Nurse Pat McCormick and her deposition was scheduled. Thirty days prior to trial Defendants attempted to supplement this interrogatory answer by adding numerous names: “Nurses Emma Louden, Sherry Stamper, Dorothy Sampson and Sue Watson, previously identified to Plaintiff [however not in response to the properly propounded interrogatory] and in Plaintiff’s medical records, have knowledge that, if Plaintiff told them he could not care for himself, they would have recorded such information in Plaintiff’s medical records.” Again, the Jail wants to use the inference – if something critical happened we would have charted it – to support their claim Lawson never complained about his care or put them on notice he could not properly care for himself. Their position only makes sense within the context of their overriding assumption, an assumption that colored all of their care for Brent Lawson, that Lawson’s deteriorating condition was primarily or solely due to his refusal to perform care taking

214 PLAINTIFF’S MOTION TO STRIKE, supra note 175 at. 2.
215 Id. at 3, citing to Dr. Farris’s Deposition.
216 Dr. Farris’s Deposition at p. 46 (on file with author).
217 Supra note 214; MOTION TO STRIKE at 7-8.
218 Id. at 8, quoting from DEFENDANTS’ SUPPLEMENTATION OF INTERROGATORIES (on file with author).
tasks, not his inability to do so. The District Court’s fact findings references more than enough evidence to put the nursing staff on notice something was horribly wrong with Mr. Lawson. Why Jail staff did not consider these facts evidence of a larger problem and attempt to determine whether or not Brent Lawson could properly care for himself is never explained by Defendants. Apparently Mr. Lawson was expected to have more presence of mind and a more sophisticated grasp of the etiology of his declining physical condition than the nursing staff and take aggressive steps to affirmatively put the Jail staff on notice of his serious medical problem.

As the District Court points out in its findings of fact there is evidence throughout the record that Brent Lawson communicated his concerns and his problems, but this evidence is ignored by the staff: the grievance, filed within a few days of his admission, is dismissed by the medical staff without ever interviewing or evaluating Lawson; Nurse McCormick testified the nursing staff didn’t know what went on in the tanks, including whether prisoners needed help with personal hygiene, bowel movements or showers; the charts note Lawson’s growing ulcers, but Dr. Arfa, the jail psychiatrist, after meeting with Lawson treated the hygiene issue as one of attitude and effort; on Nov. 9, Lawson told Dr. Lewis, the jail psychologist, he needed bars or help to pull himself up or move himself off of the ulcers, and Dr. Lewis encourages him to be cooperative; and on Nov. 12, the records indicate Lawson is lying on his back, his speech is slow, he is clearly having difficulty taking care of himself and his chart reflects his statement that “I can’t do it w/out bars.” 219 After this last “charting” Lawson is sent to Parkland and comes back with doctor’s orders stating he needs “personal assistance” in the form of bedside nursing to turn and monitor the ulcers, personal assistance the Jail refuses to provide because of its concerns about safety. If Lawson’s complaints and condition didn’t put the Jail on notice of his increasingly serious medical condition, why didn’t the Parkland doctor’s orders do so? Finally, Mr. Lawson’s trial testimony was replete with incidents where he fell, could not get up, and called for help – in the shower, in the tank and in the single cell. No one disputes these incidents occurred, but they apparently were not treated as evidence of a problem if the Jail staff didn’t observe them and Jail witnesses readily admitted these types of incidents are never charted or written up. All of this evidence raises the question: How wide is the “zone of ignorance?” How narrow is the “zone of reckless disregard?” And what are the inmate’s responsibilities to monitor each after Farmer and Brown?

Defendants’ attempt to use the late supplementation as an end run around the fact disputes raised by the equivocal documentary evidence from the Jail. According to Defendants’ logic the lack of “records,” the lack of charting, notation, institutional oversight, or other procedures reflecting the existence of any problems experienced by paraplegics within Dallas County Jail can only support one inference -- there were no such problems. Thirty days prior to trial, according to the new discovery supplementations the Jail now “knows” there was no problem or pattern of problems with decubitus ulcers and offers this “affirmative knowledge” to the Court. 220 Plaintiff’s counsel challenged this supplementation on grounds the documentary record was

---

219 Lawson, 112 F. Supp. 2d at 630.
220 MOTION TO STRIKE supra note 175 at ___ (citing to DEFENDANT’S MOTION TO SUPPLEMENT).
equivocal at best, witnesses testified they had no recollection of any problems (but as the Trial Court pointed out that included no recollection of Lawson’s own problems) but there was no practice or procedure to chart, note or otherwise bring the types of problems Lawson experienced to the notice of the Jail’s administrative staff. Evidence of this nature, argued Lawson’s counsel, was legally sufficient to support a finding of reckless disregard, a finding that the Jail and its staff had “turned a blind eye” to Lawson’s problems and those of other paraplegics. Lawson’s counsel further argued this evidence supported findings that the policy makers, the Jail administration, judged by the standards of an objectively reasonable decision maker had “turned an institutional blind eye.” The battle lines were drawn for trial: How would the District Court treat Deputy Chief Knowles’ claim that no problems existed or, at least, he had no actual notice of any problems? How would the District Court treat Lawson’s claim that problems existed, but the Jail and its personnel refused to acknowledge the problems, refused to document the problems, and lacked procedures or incentives to involve the administration? Is this innocent ignorance or reckless disregard?

5. The Problem of Negligence and Notice – The Missing Link in Farmer and Brown

The problem of notice is the crux of Farmer at the individual level and Brown case at the institutional level: What was available to put Dallas County’s Jail staff on notice of a problem, what did they notice, and what was provided or available to the administration for its review? This is the legal and evidentiary difference between the protected “zones of ignorance” and “deliberate indifference.” When is an individual or an institution innocent and when is its lack of knowledge actually evidence of culpability? What is its duty to know what is going in within its walls and what creates that duty? What does an empty record mean in this context as an evidentiary matter, a question in Lawson that would be answered at trial. Which evidentiary inference was warranted based on the Jail’s equivocal documentary evidence—innocent ignorance or reckless disregard? How should Farmer and Brown be applied to protect a burdened Jail staff and beleaguered administration doing its best with the problems they perceive as critical? Or is this the very institutional perspective Justice Blackmun in Farmer predicted could undermine the Eighth Amendments’ protection and the Farmer majority attempted to address with its “turning a blind eye” liability standard? Finally does Brown adequately address this problem at the institutional level: what evidence is needed to prove the policymaker, the surrogate for the institutions avoided knowledge or “turned a constructive blind eye?”

These concerns are not mere byproducts of scholarly debate or theoretical concerns raised by the two opinions controlling the Lawson litigation; the sturm and drang of Lawson gives much needed shape and substance to the interplay between constitutional doctrine and its implementing litigation. How was the laboratory going to address these problems? The courts had taken one stab at the issue with Westbrook, but summary judgments do not add as much to our understanding of prison litigation as a full trial. The mere filing of the lawsuit in Lawson did not warrant changes in Jail procedures, unfortunately it didn’t even warrant an investigation of the alleged problem. Deputy Chief Knowles, in his deposition and at trial, made it clear that nothing had changed since the lawsuit was filed and nothing would change until the Court ruled in
Lawson’s favor and ordered the Jail to fix the problem.\textsuperscript{221} From a public policy perspective it is troublesome that the Jail looked at the issue of decubitus ulcers through the narrow lens of constitutional liability when the issues raised presented significant health concerns, but this was the situation presented to the Trial Court and ultimately to the Fifth Circuit Court of Appeals.

\textbf{D. THE LOWER COURT ENTERS JUDGMENT}

It took four days to complete the testimony and argument in the Lawson trial, however extensive witness testimony was submitted by deposition. The witnesses at trial included Brent Lawson, Deputy Chief Robert Knowles, Chris Hall – Plaintiff’s wound care and decubitus ulcer specialist, T.L. Baker – Plaintiff’s expert on jail standards and procedures, Dr. Arfa and Dr. Lewis on behalf of the Jail, and Nurses McCormick, Potter and Lynn, three of the Jail’s nurses directly involved in treating Brent Lawson. The primary fact issues at trial as set out by Farmer were “the extent of the jail personnel’s knowledge regarding Plaintiff’s medical condition,” and “the reasonableness of the jail’s responses to Plaintiff’s medical needs.”\textsuperscript{222}

The District Court’s opinion has two dimensions that reflect its circumscribed institutional role within the laboratory. First is an extensive and detailed discussion of facts and fact findings. Beginning with the nature of paraplegia, incorporating a detailed discussion of the etiology and treatment of decubitus ulcers, and continuing through a detailed narrative review of the events of Brent Lawson’s incarceration, the opinion is firmly grounded in the “facts” of the case. Second, what is even more striking is the District Court’s assessment of witness credibility, including findings that many of the Jail’s witnesses were not credible. The Court focused on the Jail’s nursing staff finding the nurses who attempted to testify that this problem had never occurred before, i.e. they couldn’t recall any similar incidents involving paraplegics and decubitus ulcers in the past, were not highly reliable given their lack of recollection involving Lawson.\textsuperscript{223} Thirdly, the Court engages in little explanatory or clarifying “analysis” of constitutional doctrine preferring to simply setting forth the applicable standards as black letter legal assertions at the end of its “Findings of Fact and Conclusions of Law.” \textsuperscript{224} The only analysis, beyond citations to the basic controlling constitutional precedent, were cites to Fifth Circuit cases, including numerous cases in which Plaintiff prisoner’s claims had been denied.

The Court’s fact findings are extensive and cannot be summarized here, but a few points are worth noting. According to the District Court Deputy Chief Knowles was a credible witness and the Court found he had no actual knowledge of Mr. Lawson or his situation. In a sense this finding counted as a failure for Plaintiff’s counsel. Because of their concerns regarding application of the “knowledge elements” in Farmer and Brown to Chief Deputy Knowles or Dr. Farris as the policymakers for the Jail, Lawson’s counsel had attempted to bring them within the ambit of Farmer by arguing their conduct

\textsuperscript{221} Trial Transcript, Vol. III, p. 262 (“If Judge Buchmeyer told me to go to the moon I would do that.”)
\textsuperscript{222} 112 F. Supp. 3rd at 618.
\textsuperscript{223} Id. at 619, and 626, n. 14.
\textsuperscript{224} Id. at 634-637.
ignoring the situation and refusing to create policies, practices or procedures to identify these problems rose to the level of criminal “recklessness.”

In Dr. Farris’s case the primary issue for purposes of establishing liability under *Farmer* and *Brown* was the telephone call from Dr. Benavides. Dr. Farris’s actual ignorance of the medical policies, practices and procedures in the Jail is not a defense available to policymakers, but even then the question remained whether an objectively reasonable policymaker in Dr. Farris’s position would have been on notice of the potential harm posed by the Jail’s policies to paraplegic inmates. Clearly Dr. Farris was ignorant of much that went on and he was apparently ignorant of the problems encountered by paraplegics in the Jail. For purposes of constitutional liability what is the legal import of Dr. Farris ignoring or remaining oblivious to an obvious problem area, the Jail’s general medical services and lack of specialized care for the unique inmate population of paraplegics. *Farmer* should apply if Dr. Farris were found to have “turned a blind eye” to a known or obvious problem, but that still begs the question of “obvious” to whom? *Brown* should apply if a reasonable policymaker in Dr. Farris’s position would have investigated or at least been deemed on constructive notice of the potential problem. The United State’s Supreme Court in *Farmer* remanded that case for trial on these issues, while providing little insight into the types of evidence sufficient to overcome Defendants’ claim they simply didn’t realize a potential problem existed.\(^\text{225}\)

The same conundrums existed with Deputy Chief Knowles. From the daily caregivers up through Deputy Chief Knowles, the County’s witnesses all claimed they lacked knowledge of facts putting them on notice that the care they were providing would foreseeably lead to a constitutional harm. The County’s witnesses claimed they didn’t know their policies and conduct could have a detrimental physical impact on a paraplegic prisoner unable to provide care for himself and they didn’t know Lawson couldn’t take care of himself. Is this innocent ignorance or “turning a blind eye?” Similarly, is the scope of the Jail policymaker’s constructive knowledge under *Brown* limited by Deputy Chief Knowles’ narrow definition of his oversight role or will the courts be willing to define the policymaking responsibility of the objectively reasonable decisionmaker more broadly? And what does it take to put that policymaker on constructive notice: individualized, specific facts narrowly relevant to Lawson’s actual condition or more general facts addressing the deficiency of care and its potential adverse impact on paraplegic prisoners. The District Court was willing to take the broader view, but the Fifth Circuit was not.

**The District Court’s Findings:** The District Court’s analysis of the facts is extensive. Paraplegia is a serious medical condition that can cause life threatening decubitus ulcers and decubitus ulcers are foreseeable, treatable, and preventable. Brent Lawson’s treatment prior to incarceration addressed this problem and at the time of admission to the Jail, Lawson had no ulcers on his back, hips or buttocks. The Court examines the phone call from Dr. Benavides to Dr. Farris at some length and notes Dr.\(^\text{225}\)
Benavides refers to his call to the Jail at some length in Lawson’s Tri-City Discharge notes summarizing what appears to be a rather extensive conversation regarding the treatment Lawson needs. The Court recites Nurse McCormick’s objections to Lawson’s admission, Nurse Lynn’s failure to transfer Dr. Benavides’ orders into Lawson’s Jail medical chart, and the availability of alternative placements for Lawson. Significantly, the District Court also finds “Chief Knowles was aware that neither he nor the medical personnel to whom he delegated responsibility for medical care in the Dallas County Jail had ever evaluated or reviewed the care provided to paraplegics to determine if it complied with community standards” as required by the Texas Commission on Jail standards. This finding is critical in light of the extensive testimony from Lawson’s expert witness and Jail medical staff that Lawson needed care the Jail could not, or would not, provide.

The Court narrates in detail the facts leading up to the first ulcer, its development and deterioration, and Lawson’s final hospitalization at Parkland with Stage III and IV decubitus ulcers. What stands out is the lack of mobility equipment and assistance from the nursing staff, the Jail’s dismissal as inconsequential of Lawson’s grievance, Lawson’s difficulty securing his daily medication, and the humiliating choices forced on Lawson – should he shower, have a bowel movement or try to get his dressings changed. In the Court’s findings the medical staff ignores doctors’ orders, ignores requests for assistance from Lawson when he is lying on the floor of the tank, the single cell and the shower as the ulcers worsen. The Court describes it as “incredible” that the nursing notes in Lawson’s chart never mention the serious deterioration of the decubitus ulcers. It would be impossible to tell from these medical notes why Lawson is finally admitted to Parkland or why the Parkland doctors refuse to let him return to the jail. After Lawson’s transfer to TDC the Court finds he receives the care he needs, although the physical deterioration he suffered at the Jail necessitates a series of plastic surgeries costing the state almost $70,000.

The District Court’s legal analysis of a prison official’s Eighth Amendment liability is straightforward and tracks the requirements of Farmer. Its analysis of the County Jail’s liability tracks Brown and states clearly that the County’s Jail is not liable unless Brent Lawson’s constitutional harm resulted from an official policy, custom or practice. The Court revisits the points made at summary judgment – failure to adopt a policy and deficient policies can both be challenged as deliberately indifferent acts of the County’s delegated policymaker, Deputy Chief Knowles and Dr. Farris. But when a policy is not unconstitutional on its face, the Court holds that Plaintiff must show the policymakers consciously chose the measures ultimately found to be inadequate thereby rendering the County the moving force in the events leading up to the constitutional injury. The District Court’s rhetoric points to Deputy Chief Knowles, on behalf of Sheriff Bowles, and Dr. Farris, as the Chief Medical Officer, as “maintaining a policy . . . of being deliberately indifferent to Mr. Lawson’s medical needs.” The District Court

---

226 112 F. Supp. at 624.
227 Id. at 625.
228 Id. at 632-633.
229 Id. at 635-636.
230 Id.
avoids any discussion of the “constructive knowledge” analysis of Brown and is apparently willing to treat the case as falling within the second municipal liability fact paradigm which eschews the element of “intent” when what is at issue is a general policy willingly adopted as distinguished from the episodic acts of individuals implementing a facially neutral policy.\textsuperscript{231} This perspective had been argued throughout trial by Lawson’s counsel --- the Jail had “turned a blind eye” on its paraplegic prisoners by adopting a general policy and practice of deliberate indifference to their known medical needs.

F. Not Out of the Maze Yet: Dallas County Appeals

On appeal Dallas County did not challenge the District Court’s fact findings and the Fifth Circuit found no clear error warranting setting aside any of the facts.\textsuperscript{232} As for the Farmer elements the Circuit Court deferred to the District Court’s finding regarding the objective risk of harm stating “it is common medical knowledge that a paraplegic who is not properly cared for is at substantial risk of developing serious, even life-threatening decubitus ulcers.”\textsuperscript{233} One of Defendants’ primary appellate points was challenging the District Court’s alleged failure to make individual findings of constitutional deliberate indifference attributed to individual care givers within the Jail. Dallas County claimed the District Court erred when it applied Farmer’s subjective knowledge test to the “collective knowledge and collective response of the jail medical staff as a whole.”\textsuperscript{234} The Circuit Court rejects the District Court’s attempt to provide a collective or institutional perspective on Farmer’s subjective knowledge requirement stating “each individual’s subjective knowledge must be examined separately.”\textsuperscript{235} But the Circuit further states “it is clear from reading the opinion that the district court believed that all the nurses who primarily treated Lawson . . . had actual knowledge of the risk posed by the development and worsening of Lawson’s ulcers.”\textsuperscript{236} This was a point of significant doctrinal clarification by the Circuit. A “municipal policy and practices” case can only stand if there is also an individual constitutional violation alleged, litigated and linked directly to the challenged policy. The cumulative nature of Lawson’s harm warranted no comment from the Circuit and they rejected the District Court’s efforts to treat the case as one involving a policy deficient on its face. As far as the Circuit was concerned there was no room for this institutional perspective given the facts in Lawson. The Circuit applied the narrowest liability paradigm from Brown: the episodic acts and the individual wrongdoers had to be linked to the “facially neutral” policies. Summarily closing off any analytical play on this point by the Fifth Circuit ensured nothing was left in the case encouraging litigants’ efforts to resurrect a “conditions of confinement” case.

Another striking aspect of the Fifth Circuit opinion is the Circuit’s willingness to read the District Court’s “opinion as a whole” and find that the medical personnel had knowledge of the risk of harm to Lawson and “consciously disregarded that risk” in violation of the constitution. This is not overly surprising given the lower court’s extensive fact findings on these points. But in taking this position the Circuit Court

\textsuperscript{231} Supra note pages 32 to 35(discussing the analytic structure of Brown).
\textsuperscript{232} Lawson v. Dallas County, 286 F. 3d 257 (Fifth Circuit Court of Appeals 2002).
\textsuperscript{233} Id. at 262.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
rejected Defendants’ argument that the employees were not deliberately indifferent to Lawson’s needs on grounds they mistakenly thought they could not provide or secure the disputed care, i.e. they acted reasonably given their context.\textsuperscript{237} Apparently, though there is no explicit discussion on this point, disregard of the risk of harm, according to the Circuit, does not require the individual actor to affirmatively believe they can do anything about the problem, refusing to take any steps to ameliorate the problem suffices. The Defendants’ reasonableness argument, did the Jail reasonably respond to the problem, is never explicitly addressed in the Circuit’s opinion, seemingly subsumed by the District Court’s findings that there were a variety of opportunities available to the Jail staff to stop and attempt to address an increasingly serious medical situation – pick up the phone and call! This defense, the idea that jail staff cannot violate the constitution when they are following Jail policies or orders and providing the care mandated by the Jail is correctly rejected by the Circuit; the reasonableness of their response should not be measured by what they thought they could or could not do. Such a holding would effectively eviscerate \textit{Farmer} and reduce the Eighth Amendment to little more than a specific intent criminal statute, a result anticipated and rejected by the \textit{Farmer} Court.

Finally, the Circuit obviously saw no need to establish an additional point of error by demanding the trial court’s findings take a particular form, i.e. individualized, sequential determinations of liability applying the \textit{Farmer} elements to each specific Jail actor. The sufficiency of the evidentiary record to support such findings was all they required.\textsuperscript{238}

Moving on from \textit{Farmer}, municipal liability was considered next by the Circuit. The Circuit notes that it is undisputed that the practices at issue were “consistently applied to all paraplegics.”\textsuperscript{239} The County’s appellate argument again focuses on the element of “intent,” claiming it cannot be liable unless there has been a “persistent and widespread practice” by County employees that caused the constitutional harm and this practice was “consciously maintained by the County with knowledge that such practices had in the past repeatedly violated” constitutional rights.\textsuperscript{240} Appellant Dallas County raises the “zone of ignorance” once more and claims its one free bite at the apple. According to Dallas County Lawson’s situation was the first time any problem of this nature had been brought to the County’s attention and the medical practices Lawson challenges have been in place for over fifteen years without incident. Appellants are adamant on this point; the County cannot be said to be “deliberately indifferent” unless it had actual or constructive knowledge that its policies in fact caused harm in the past and they had refused to change them; only then would their actions violate the constitution.\textsuperscript{241}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{237}] Brief of Appellants Dallas County, et al, 2001 WL 3414962 (5th Cir.), p. 6 (filed August 2, 2001).
\item[\textsuperscript{238}] At oral argument the Panel commented to Ms. Carla Burke, one of the student attorneys who had tried the case and was handling the oral argument on appeal, that the case had been well tried. This comment brings home the problem – few pro se litigants can pursue the discovery secured by Lawson’s lawyers or afford the expert witnesses provided at trial. District Court’s play a unique role as gate keepers in this regard, often calling on local attorneys to undertake the pro bono representation of prisoner litigants whose cases survive summary judgment and appear to have merit.
\item[\textsuperscript{239}] Supra note 237, APPELLANTS BRIEF at 7.
\item[\textsuperscript{240}] Id. at 7.
\item[\textsuperscript{241}] Id. at 11.
\end{itemize}
\end{footnotesize}
The Circuit Court has little difficulty finding an “official policy” at work in Lawson’s case; the presence or absence of any complaints about this policy is treated by the Court as irrelevant to its existence. As for a causal link between the policies and the constitutional violation, the Court looks to the record and determines that “[h]ad these policies not been in effect, it is reasonable to expect that Lawson would have received more personal assistance” and other care denied him. 242 Finally, the Circuit examined whether the County had maintained “its official policy with deliberate indifference to a constitutionally protected right.” 243 Appellants consistently argued that the County could not be found liable without prior actual notice of the constitutional problems its policies caused, notice in the form of a pattern of constitutional violations or in this case decubitus ulcers. The Fifth Circuit rejected this narrow approach. The question is not only what the policymaker knew, but “what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff’s rights.” 244

Despite its willingness to adopt the broad “constructive knowledge” standard for purposes of determining municipal, or here county liability, the Circuit is unwilling to adopt the District Court’s broad approach and implicitly rejects the conclusion that the conduct of the staff reflects the Jail’s policy of indifference to paraplegics, a policy deficient on its face when judged from a larger perspective, i.e. the Jail’s duty to provide care to its inmates including paraplegic inmates coupled with the general knowledge concerning medical needs of paraplegics. 245 Instead the Circuit approaches the “constructive knowledge” issue narrowly focusing on specific evidence in the record that should have put the County’s policymakers on notice Brent Lawson would have problems at the Jail and that he was having problems at the Jail. First, the Circuit Court notes the District Court rejected the County’s claim “this had never happened before” on grounds the Jail’s records were too unreliable to support such an inference, even Lawson’s records did not reflect the seriousness of his condition, and the Jail staff’s memories were equally problematic. Ultimately the Circuit points to the medical orders from Tri-City and Parkland, Dr. Benavides’ phone call to Dr. Farris, and Lawson’s grievance as supporting the District Court’s finding that the County should have been aware of the risk to Lawson.

How does the laboratory work at this level? The Circuit willingly adopts an institutional approach to the issue of notice and “constructive knowledge” in handling municipal liability under Brown without expressing any concern that such an approach threatens the line drawn by Farmer between “deliberate indifference” and mere negligence. Despite Farmer’s explicit rejection of any paradigm of institutional liability under the Eight Amendment, 246 the Fifth Circuit sees no need to address or justify its “routine” application of the municipal liability paradigm of Brown to a case that produces a result seemingly at odds with Farmer’s. The Circuit Court reaches these conclusions without detailed discussions of the applicable legal standards, their doctrinal iterations in

242 Lawson, 286 F. 3d at 264.
243 Id.
244 Id. citing Farmer at 841.
245 Supra pages 56 to 59 (discussing the District Court’s analysis of the Jail’s general policy of indifference to paraplegics).
246 Supra pages 21 to 24 (discussing the Supreme Court’s rejection of a “conditions of confinement” theory for Eight Amendment cases based on an institutional versus a personal perspective).
the case law, or any stated policy concerns. Thus, even though there was no testimony that Dr. Farris or Deputy Chief Knowles in fact reviewed the Jail’s medical records or individual grievances of paraplegic inmates, much less Lawson’s, and the testimony was unequivocal that Deputy Chief Knowles didn’t know enough about paraplegia to be on notice his policies might cause problems or that Dr. Farris could have intervened in Lawson’s care had he even been aware of a potential problem, the Circuit willingly presumes an “objectively reasonable” Jail policymaker in their situation would have had access to relevant facts, seen the risk and taken action.

While this approach appears helpful to prisoner litigants, the Circuit’s holding is an implicit rejection of both Lawson’s and the District Court’s efforts to characterize the disputed policies as facially defective. To this extent, the Circuit’s holding rejects efforts to apply Brown’s first or second municipal liability paradigms, paradigms which look at institutional conduct and policy as constitutionally defective on its face and don’t require findings of individual constitutional violations. The Circuit elects to apply the narrowest Brown liability paradigm, the paradigm that looks at facially neutral policies and how they are implemented by individual actors, i.e. the episodic acts paradigm. According to the Circuit this third episodic acts or individualized municipal liability paradigm requires a finding of liability under Farmer coupled with specific facts available to identified municipal decision makers that would put an objectively reasonable policy maker on notice of the specific underlying constitutional problem. The Circuit adopts this analysis and rejects the District Court’s analysis on this point without any doctrinal elaboration or critical analysis. In this way the Fifth Circuit Court of Appeals narrowly tailors its application of Brown to the case facts and avoids opening the door to jail litigation generally challenging policies that on their face create potential constitutional threats, the old conditions of confinement case is not going to be resurrected.

This is the rhetorical strategy of the laboratory at work policing the boundaries of constitutional law, intensive fact finding coupled with broad applications of the “black letter law” at issue. The problematic policies and practices of the Jail standing alone do not appear sufficient to place liability at the county’s door, even though an objectively reasonable policy maker who knew the needs of his inmate population, or who had delegated this policy arena to a medical expert, should have been on notice that paraplegic inmates would suffer an undue threat of decubitus ulcers given the Jail’s current level of care. The Circuit Court goes to great lengths to avoid any such generalization by pointing to specific fact findings as essential to the finding of municipal liability and “constructive notice:” the Benevides phone call, Lawson’s grievance, testimony from some of the staff that they knew Lawson would have problems, and Lawson’s worsening physical condition. Absent evidence of a pattern of ongoing constitutional injuries must litigants produce this type of individualized evidence under Brown in order to hold the institution liable or is this simply the Court narrowly fitting doctrine to very helpful facts? The Circuit’s affirmance of the District Court’s judgment doesn’t fully address or resolve this question. Simply because it relied upon the narrowest municipal liability paradigm, doesn’t necessarily mean a litigant who cannot show a pattern of constitutional injuries will only be successful if he can show the types

---

247 Supra pages 45 to 46 (Deputy Chief Knowles testified he looked at grievances to determine if there were patterns of problems, not simply as individual complaints).
of individualized evidence developed in *Lawson*. The Circuit is clearly comfortable applying the constructive knowledge paradigm on these facts, but it does so without any explication, clarification, or attempt to develop any doctrinal dimension of the applicable law in its opinion. The Circuit appears willing to let the laboratory continue to work with future facts, because it certainly does not generate an opinion that attempts to anticipate or address these future issues doctrinally.

**VII. CONCLUSION: HOW THE LABORATORY WORKS**

What have we learned? The constitutional laboratory of the lower federal courts implements and functionally legitimates constitutional law in its daily application through litigation. It accomplishes this institutional goal by engaging in a series of tasks that appear counter intuitive when we think of the legal paradigm or “the rule of law.” First, this system generates and tolerates tremendous variability in case outcomes at the trial level and the initial appellate level, three judge panels. Second, these courts have developed rhetorical strategies uniquely adapted to their perceived institutional expertise, strategies designed to avoid any inference or claim the lower courts have invaded the Supreme Court’s domain of “making constitutional law.” The trial courts’ and appellate courts’ strategies share another important characteristic: The courts’ inherent discretion and its application is rarely referenced and the analytic process by which they actually reach, as distinguished from justify or explain, their decisions is never presented or reflected upon in their opinions. But the most important conclusion to draw from this study is that law as a normative force matters: It shapes institutional conduct; it shapes individuals’ perceptions of their constitutional rights; it shapes constitutional litigation; it shapes the trial courts fact finding and its legal analysis; and it shapes appellate opinions and outcomes. The indeterminate or malleable nature of constitutional law does not simply create a legal black hole filled by the local judges’ personal, political or policy preferences; it allows the lower federal courts to shape our constitutional world.

**Roles and Rhetoric:** The trial court’s fact intensive perspective enables it to examine the potential application of the “law to the facts” by developing the facts. In this sense the trial courts are the ultimate “law” in “context” courts because it is left to them to explore the meaning of the Supreme Court’s opinions by examining the prudential dimensions of that law as it is applied by state actors on a daily basis. We saw in *Lawson* the trial court’s ability to provide needed doctrinal adjustments through detailed fact findings. This dimension of adjudication sits squarely within the trial courts’ expertise and is treated, as it should be, with great deference on appeal. The bad news is this aspect of the laboratory works best when lawyers are involved, lawyers with the time and resources to fully develop a legal theory for their client’s case and the expertise to square off in the constitutional arena with repeat institutional players. This fact development and legal briefing, complex discovery and difficult trials, are time consuming activities and involve technical skills beyond most pro se litigants. Many commentators have noted the hurdle these types of challenges represent for litigants. The Northern District dealt with two decubitus ulcer cases within a two year period;

---

248 Supra pages 56 to 59 (discusses the District Court’s use of extensive fact finding and black letter legal statements as the rhetorical structure for its opinion).
predictably, their outcomes were different and that difference depended greatly upon the lawyers.

*Lawson* also highlights the role of federal trial judges as gatekeepers, a role that extends beyond their normally neutral role. In most pro se prisoner cases summary judgment is the adjudicative touchstone; it is left to the trial judge, based on their full understanding of facts, their experiences with the institutional players, and their careful, nuanced reading of the limited record to determine whether there is an issue that warrants use of their extensive fact discretion to keep the case alive. Or is the trial court called upon to send a warning or sanction potential litigant abuse. This article examined an exemplary case, one in which the trial court’s commitment to developing facts and a record ensured full examination of the alleged constitutional violations and provided a rich contextual background for examining the multidimensional issues of liability and culpability in prison litigation. The Circuit Court’s deference to this fact based adjudication makes this process work. The law as applied to unique, changing or contextually enriched facts should be left to the trial courts to take the first cut, so long as those courts recognize the complexity of their role as institutional gate keepers in the arena of constitutional litigation.

But “law development” is also important to the trial court. The trial court appreciated the potentially problematic analogy if *Farmer*, and the protective “zone of ignorance” created for the Warden, were applied directly to the Sheriff in *Lawson*. The District court crafted an opinion that attempted to fit *Lawson* within the larger municipal liability paradigm and address the subjective knowledge element of *Farmer* by focusing on a jail wide policy that reflected conscious indifference on its face to the care of paraplegics. What is worth noting in the Trial Court’s final opinion is its lack of doctrinal argument or discussion on either of these points. Contrary to commentators’ opinions who see these two goals, controlling case outcomes versus engaging in law development, as invoking different judicial strategies, the trial judge in *Lawson* approached the complex “legal issues” by imbedding them in context enriched facts and addressing the “legal argument” in favor of subsuming the requisite intent elements of *Farmer* and *Brown* within the Jail’s broad policy of conscious indifference to paraplegics as an exercise of the court’s “fact finding” expertise. In this way the trial court avoided any assertion that it was engaging in explicit efforts to clarify or expand the applicable law or criticisms it was simply attempting to reach a particular policy result without reference to the law.\(^4\)

The Fifth Circuit in *Lawson*, while willing to ground its affirmanse in the fully developed fact record, was not willing to defer to the lower court’s attempt to apply *Farmer* or *Brown* broadly or refine the Supreme Court’s factual paradigms, and rejected the District Court’s legal characterization of the Jail’s policy as a broad policy of indifference to the care of paraplegics. The Circuit Court’s opinion is in many ways the perfect merger of the Trial Court’s fact expertise fitting the law to the particular case and the Circuit’s doctrinal expertise and conservatism, limiting efforts to modify or expand

\(^249\) See e.g., Pauline Kim, *Lower Court Discretion*, 82 N.Y.U.L.Rev. 383, 432 (2007) (Professor Kim discusses trial courts’ different approaches depending on their perceived priority, case outcomes versus law development, the first emphasizing fact development, the second focusing on doctrinal analysis. The question is when or why do the Courts adopt one approach over the other?)
constitutional doctrines. Adopting a rhetorical strategy disinclined to engage in a detailed analysis of the application of law to fact, the Circuit Court nevertheless, notes the factual fit. Had the Jail wanted further doctrinal elaboration of that analysis it could have sought *en banc* review. Why it chose not to do so is open to speculation, but losing litigants often do not want to “clarify law” that could pose future problems. The laboratory’s strengths and shortcomings are captured in this process. The District Court’s opinion is a helpful factual roadmap to future disputes and the Circuit’s opinion supports its use for that purpose. As with so many panel decisions, the Circuit’s affirmance is of limited doctrinal utility except in cases factually on point. This may be the genius of the system’s design, at least at the level of the trial court and circuit panels. At this level of prison litigation, the highly fact sensitive intent elements of *Farmer* and *Brown* should drive the decisions and the courts are not called upon to offer doctrinal clarification or iterations, to grapple with the “law” more overtly or explicitly, until the facts are further developed by future cases.

**Not Following the Supreme Court’s Lead:** When Lawson filed his petition *Farmer* was a new ruling by constitutional standards and it was quickly followed by *Brown*. By trial the Circuits, including the Fifth Circuit, had begun to develop some case law providing limited doctrinal clarification of *Farmer* and *Brown*, but nothing dispositive on the major issues raised by *Lawson*. If the system of implementing this new constitutional law was working it was due to litigants and their lawyers working with complex facts and developing legal arguments to fit new fact scenarios within the existing law. Lawson faced a Supreme Court whose decisions and stated policy preferences were to reduce prisoner litigation. Following the Supreme Court’s lead, Dallas County presented compelling legal arguments pointing out the potential dangers of imposing institutional liability in cases like Lawson’s and calling for judicial clarification of the applicable “intent” standards. Lawson in turn had to challenge the “zone of ignorance,” its individual and institutional dimensions. The Fifth Circuit reached its decision without explicitly addressing any of these issues doctrinally. The Fifth Circuit’s unwillingness on the *Lawson* facts to create any greater protections for the Jail despite the Supreme Court’s stated concerns regarding institutional liability needs to be noted. Municipal liability under 42 U.S.C. Section 1983 as a legal paradigm of constitutional liability, according to the Fifth Circuit, was not circumscribed by *Farmer*’s unwillingness to acknowledge such a paradigm within the federal prisons. It is hard to ignore the similarity between the institutional hierarchies involved in both cases, but the Circuit saw no reason to further burden or limit the “constructive intent element” of *Brown* by imposing doctrinal clarifications informed by *Farmer* and urged by Dallas County.

The result was simple; Deputy Chief Knowles as head of the Dallas County Jail would be held to a different standard than Warden Brennan, head of the federal prison in *Farmer*. Unlike the federal prison, the Jail did not need to be on actual notice that its policies had caused prior constitutional harm to be liable to Brent Lawson for acting with deliberate indifference to his constitutionally problematic situation. The underlying facts “fit” the law or at least the “law” could be made to fit the facts. Further discussion would be reserved for later when different facts might require different legal approaches – elaborating, enlarging or narrowly applying *Farmer* and *Brown*. It is worth noting that here is an instant in which the lower federal courts, both the trial and circuit court were willing to adhere to the traditional interpretivist approach and “apply the black letter” law
to the facts; it is also worth noting that this rhetorical strategy belies a much more complex process. It may be the facts were seen as unusually compelling, but neither court was willing to put the Supreme Court’s clear policy preference of limiting jail and prison litigation ahead of the specific wrongs raised by Lawson. 250 Further study is needed to understand the normative impact of constitutional law, the Supreme Court’s opinions, on the lower federal courts, but its impact is obvious, complex and compelling.

**Proactive versus Defensive Constitutional Compliance Models:** In addition to shaping the courts’ conduct, Lawson illustrates how constitutional law shapes institutional conduct outside the courts by state actors. The Trial Court found Deputy Chief Knowles standing within an institutionally created “zone of ignorance,” a zone created by uncharted records, missing institutional procedures to alert Jail administration to medical problems, and an institutional mind set that defined its constitutional duty to exclude proactive responses to potential problems. The Jail’s comfort zone was limited to addressing constitutional problems only after it was clear they exist by fiat of a court. 251 As noted in the Epilogue this liability-avoidance model of institutional conduct ultimately created serious problems for the Dallas County Jail. Any effort to define the Jail’s constitutional duties otherwise, especially findings implying an institutional need to be proactive or alert to potential constitutional problems, the Jail challenged as blurring the line between constitutional culpability and innocent negligence. Despite the Jail’s concerns neither court involved in the litigation perceived that line to have been unnecessarily blurred or needing doctrinal clarification. Neither Farmer nor Brown as currently interpreted imposes any duty on state actors to affirmatively follow constitutional litigation applicable to their institutional duties or engage in proactive compliance. So long as both cases require highly individualized and subjectivized paradigms of liability there is no need to do so.

**Developing a Legitimate Vocabulary of Judicial Discretion:** This case study not only illuminates the normative force of law within the lower federal courts, it also illuminates the contours of those courts perceived adjudicative discretion. 252 What is most striking, given the clear impact of the trial court’s judicial fact discretion in shaping Lawson, is the lack of a legitimate adjudicative vocabulary of discretion or rhetorical strategies that encourage conscious reflection by courts on the exercise of discretion. The Trial Court’s and three judge panel’s opinions appear as if there was little deep doctrinal conflict or novel legal issues associated with the Lawson case, which was not true. Both courts’ adhere to the narrow interpretivist paradigm in presenting their conclusions despite the potentially problematic fit between the law and the facts, and the newness of the controlling Supreme Court precedent. It’s inevitable that the continuum of trial level litigation, with advocates constantly challenging precedent and seeking favorable doctrinal clarifications, will produce conflicting results; at some critical point, what that is remains unclear, the variability at this level is perceived with less institutional tolerance and the Supreme Court steps in to address the conflicts. This is what happened in Farmer with its history of split circuits and doctrinal conflicts in applying different definitions of “deliberate indifference” to similar facts. Lawson when viewed from this perspective can

---

250 *Id.* at 434 – 442.
251 Deputy Chief Knowles stated at trial that the Jail would do whatever the Court ordered, *supra* note 221.
be seen as an “early” case, one in which the doctrinal debates were not sufficiently fleshed out to warrant clarification or one in which the outcome grounded in detailed facts appeared to fit neatly enough without further doctrinal discussion. Whether the courts perceived this explicitly is unknown, but it explains their approaches.

Future study is needed on the phenomenology of judicial discretion or at least attempts to explicate the courts’ applied phenomenology? How do the lower federal courts perceive their discretion, how do they define its boundaries, and how do they make their decisions when the “law” is often malleable or problematic. Do the courts have an applied phenomenology, a way of thinking about their discretion? And if so shouldn’t it be part of their legal discourse in order to ensure transparency and accountability? Judicial decision making is constrained and judges are bounded decision makers, but legal scholarship and common sense have moved beyond the point where direct references to judicial discretion and the acknowledged, inevitable variability inherent in the adjudicative process are seen as undermining the legitimacy of the courts or the “rule of law.” The question is whether courts, especially courts addressing fundamental constitutional issues, can develop a legitimate legal discourse that is both reflective and transparent in its dealings with the driving force in all constitutional decisions, judicial discretion.

VIII. EPILOGUE

On Monday, April 2, 2007 the Austin Statesmen’s on line service published a troubling headline, “One in three Texas jails has failed state inspections this year and more than a fourth failed last year.” The story noted that according to the Texas Commission on Jail Standards the facilities are aging and at risk of being maintained at minimal standards. This was not news in Dallas where the Department of Justice issued a critical report of the Dallas County Jail on December 8, 2006 outlining the results of its inspection of the Dallas County Jail. The report claims the Jail fails to “provide inmates with adequate medical care that complies with constitutional requirements.” Many of the inadequacies cited in the report were issues in the Lawson litigation, but apparently were never addressed by the Jail despite the entry of a $250,000 judgment against them.

In describing the problems faced by the Jail the report specifically cites to Lawson v. Dallas County et al, 112 F. Supp. 2d at 634-635 as support for its finding that the Jail does not provide adequate follow-up care for prisoners with chronic medical conditions. Following the Lawson citation the Report lists eleven additional specific instances in which the Jail failed to follow-up on doctors’ orders or discharge instructions, similar to the problems in Lawson, but never brought to trial. On December 13, 2006 Dallas County Commissioner John Wiley Price, Chairman of the commissioners’ jail population committee, when asked about the report stated: “It’s not

253 See supra pages 12 to 16 (discussing the problematization of constitutional law).
255 Investigation of the Dallas County Jail, Dallas, Texas, December 8, 2006 (Report addressed to The Honorable Margaret Keliher, Presiding Officer, Dallas County Commissioners Court from Wan J. Kim, Assistant United States Attorney General)(on file with the author)
256 Id. at 4
257 Id. at 5 (the report describes inadequate intake screening, inadequate acute care leading to avoidable hospitalizations, inadequate nursing care leading to avoidable infections, and inadequate access to health care).
as though it’s anything that’s new to us . . . . We weren’t waiting for them in order to fix some of this.”

But fixing the problem, despite the federal government’s and federal courts’ best efforts, remains problematic. On February 6, 2007 the Dallas Morning News’ headline reported that “Dallas has 3 Months to Fix Jail” as it went on to recite the results of a meeting between the Texas Commission on Jail Standards and county officials regarding the troubled status of the Jail. In this meeting the Commission was apparently persuaded to hold off issuing a remedial order that day, February 6, 2007, to close the jail. But the problems would not go away. Ultimately the Dallas County Jail entered into an agreement with the Department of Justice to pay independent experts to monitor health care conditions at the jail; the agreement extends from March 2007 through March 2008. Midway through the agreement the Department of Justice filed suit in federal court pursuant to the Civil Rights of Institutionalized Persons Act of 1980. On November 6, 2007 the Department of Justice and the Dallas County Jail entered into an extensive Agreed Order which includes over 15 pages of substantive provisions ranging from improved intake screenings, the provision of acute care and chronic care and proper recording keeping and entry of discharge instructions into the inmates record upon return from hospital; all issues raised in Lawson. The Agreed Order further notes that the “parties have, by separate agreement, agreed upon an Independent Monitor to assist Defendants in achieving compliance with . . . this Agreed order.” It would appear the United State’s Supreme Court’s efforts to protect prisons and jails from vexatious litigation by crafting caselaw that created a clear “zone of ignorance” within which the Jail could hide created institutional incentives that did not lead to an aggressive proactive pattern and practice of constitutional compliance. After numerous lawsuits involving the Dallas County Jail, it was not until the Department of Justice with its institutional perspective and reach, unhindered by the narrow constitutional liability paradigms created by the Supreme Court, was able to get the Jail’s attention. As a national law maker with ultimate responsibility to ensure implementation of the Eight Amendment’s protections the United States Supreme Court can learn an important lesson from this case.

---

261 United States of America v. Dallas County, Texas; Lupe Valdez, Sheriff of Dallas County Texas (in her official capacity), 307 CIV 1559-N, September 11, 2007 (Northern district of Texas) (“Defendants have engaged in and continue to engage in a pattern or practice of failing to protect inmates at the Dallas County Jail from serious harm and undue risk of serious harm by, interalia failing to provide adequate medical and mental health care, and failing to provide safe and sanitary living conditions (Paragraph 13).”)
263 Id. at Paragraph IV. G.
264 As late as January of 2008, the Dallas County Jail was still in the news as it failed its fifth consecutive state inspection, could not secure the money needed to open a new tower, and found itself the focus of an election primary battle in the race for Sheriff. See e.g., Texas Observer, January 24, 2008 (primary battle), Houston Chronicle, January 18, 2008 (Jail fails fifth state inspection), and DallasNews.com of the Dallas Morning News, January 4, 2008 (Jail lacks funds).

69