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## When Fines Don't Go Far Enough: The Failure of Prison Settlements and Proposals for More Effective Enforcement Methods

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# WHEN FINES DON'T GO FAR ENOUGH: THE FAILURE OF PRISON SETTLEMENTS AND PROPOSALS FOR MORE EFFECTIVE ENFORCEMENT METHODS

Tori Collins

ABSTRACT

INTRODUCTION

I. EIGHTH AMENDMENT PURPOSE, REQUIREMENTS, AND VIOLATIONS

A. *“As Punishment, Not for Punishment”*: An Empty Promise

1. *Select Eighth Amendment Requirements: Healthcare and Nutrition*

a. *Healthcare*

b. *Nutrition*

2. *Supreme Court Precedent for Gauging Eighth Amendment Violations*

II. AN UNACCEPTABLE STATUS QUO: HOW THE PUNISHMENTS CLAUSE IS (UN)ENFORCED

III. SOLUTIONS

A. *Statutory Solutions*

1. *Partial Abrogation of Qualified Official Immunity*

2. *Modification of the Deliberate Indifference Standard*

3. *Loosening the Restrictions of the Prison Litigation Reform Act*

a. *Exhaustion*

b. *In Forma Pauperis Ineligibility*

4. *Practical Considerations*

a. *Judicial Application*

b. *Congressional Approval*

B. *Policy Solution: Enhanced Focus on Prosecutorial Discretion*

CONCLUSION

## WHEN FINES DON'T GO FAR ENOUGH: THE FAILURE OF PRISON SETTLEMENTS AND PROPOSALS FOR MORE EFFECTIVE ENFORCEMENT METHODS

Tori Collins\*

### ABSTRACT

The Eighth Amendment's Punishments Clause provides the basis on which prisoners may bring suit alleging unconstitutional conditions of confinement. Only a small number of these suits are successful. The suits that do survive typically end in a settlement in which prison authorities agree to address the unconstitutional conditions. However, settlements such as these are easily flouted for two primary reasons: prison authorities are not personally held liable when settlements are broken, and prisoners largely lack the political and practical leverage to self-advocate beyond the courtroom. Because of this, unconstitutional prison conditions may linger for years after prison authorities have agreed to ameliorate them.

This is an unacceptable result, and one that is largely shielded from the public eye. This Comment contends that if the United States is to fulfill its promise that "cruel and unusual punishments" will not be inflicted on its prison populations, the judiciary's methods of enforcing settlements must be expanded beyond the fines it currently employs. This Comment provides a brief grounding in Punishment Clause suits based on select conditions of confinement issues and discusses a real-world example of a prison settlement that went largely ignored for several years. It then proposes three statutory modifications as stronger enforcement methods that the judiciary may employ post-settlement: partial abrogation of qualified immunity, modification of the deliberate indifference standard, and a loosening of the strictures of the Prison Litigation Reform Act. Finally, this Comment also offers a policy solution pre-incarceration: strengthened adherence to the twin prosecutorial duties of protecting the public and imposing alternatives to incarceration.

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## INTRODUCTION

“Suffering is one very long moment. We cannot divide it by seasons . . . . With us time itself does not progress. It revolves. It seems to circle round one centre of pain.”  
—Oscar Wilde<sup>1</sup>

“White hairs are scattered untimely on my head, and the skin hangs loosely from my worn-out limbs. Happy is that death which thrusts not itself upon men in their pleasant years, yet comes to them at the oft-repeated cry of their sorrow.”  
—Anicius Manlius Severinus Boethius<sup>2</sup>

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”  
—Eighth Amendment to the United States Constitution<sup>3</sup>

Although American society has progressed enough to condemn the more barbaric prison practices of Boethius’s and Wilde’s times, there is still much to be done. The state of American penal institutions has been a subject of much scholarship and much criticism throughout the last two decades, and for good reason.<sup>4</sup> Rates of state and federal imprisonment have declined since their peak in 2009,<sup>5</sup> but America still incarcerates a shocking number of its citizens each year.<sup>6</sup>

1. OSCAR WILDE, *DE PROFUNDIS* 1 (Biblictech Press 2019) (1905) (speaking for himself and fellow prisoners at Reading Gaol, Berkshire, England, in his acclaimed 1897 prison letter).

2. ANICIUS MANLIUS SEVERINUS BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 8 (W.V. Cooper trans., Ex-Classics Project 2009) (523 C.E.) (Boethius, who penned *The Consolation of Philosophy* while imprisoned, was a Roman statesman).

3. U.S. CONST. amend. VIII (emphasis added).

4. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (10th Anniversary ed. 2020) (discussing disproportionate imprisonment rates of Black men); BETH E. RICHIE, *BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012) (discussing disproportionate incarceration rates of Black women); *HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* (Jean Casella et al. eds., 2016) (criticizing the history and psychiatric effects of solitary confinement and recounting prisoners’ experiences with extended isolation); SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* (2018) (documenting poor conditions in a private prison).

5. See E. ANN CARSON, U.S. DEP’T OF JUST., *PRISONERS IN 2020—STATISTICAL TABLES 1* (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

6. Compare *id.* (noting that in the United States, “[t]he combined state and federal imprisonment rate for 2020” was 358 per 100,000 residents), with *Prisoners in Australia*, AUSTL. BUREAU STATS. (Dec. 3, 2020), <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2020> [<https://perma.cc/QY2F-5HSF>] (citing the Australian rate for 2020 as “202 prisoners per 100,000 adult[s]”), and *Germany: World Prison Brief*, INST. FOR CRIME & JUST. POL’Y, <https://www.prisonstudies.org/country/germany> [<https://perma.cc/M25N-X9QQ>] (last visited Dec. 11, 2023) (showing a 2020 imprisonment rate of 72 per 100,000), and *Italy: World Prison Brief*, INST. FOR CRIME & JUST. POL’Y, <https://www.prisonstudies.org/country/italy> [<https://perma.cc/D9E2-4HT7>] (last visited Dec. 11, 2023) (89 per 100,000). Though the United States would like to think better of itself than what it considers oppressive regimes, such as Russia, its imprisonment rates belie this illusion. The United States neared Russia in

An oft-cited example of this aggressive approach to incarceration is that the United States, while holding only five percent of the world's population, is responsible for twenty percent of the world's incarcerated population.<sup>7</sup> Current figures indicate that around two million Americans are incarcerated, a number that “far outpace[s] population growth and crime,”<sup>8</sup> and it is suggested that many of these two million are “subjected to degrading treatment, inhumane conditions, and abusive interactions,” due to both intentional acts of persons employed by prisons and abysmal prison conditions.<sup>9</sup>

Left unchecked, these poor prison conditions can and do violate prisoners' <sup>10</sup>Eighth Amendment right, embodied in the Punishments Clause, to be free from cruel and unusual punishment.<sup>11</sup> The Punishments Clause provides the basis on which prisoners may bring suit alleging unconstitutional prison conditions and practices.<sup>12</sup>

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imprisonment rates for 2020: Russia imprisoned 363 adults per 100,000, only 5 more per 100,000 than the United States. *Russia: World Prison Brief*, INST. FOR CRIME & JUST. POL'Y, <https://www.prisonstudies.org/country/russian-federation> [<https://perma.cc/3T2X-27ZF>] (last visited Dec. 11, 2023).

7. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/B8B9-LSHV>] (last visited Dec. 11, 2023).

8. *Id.*

9. Ruth Delaney et al., *Examining Prisons Today*, VERA (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/examining-prisons-today> [<https://perma.cc/W3SB-6QKV>].

10. For the purposes of this Comment, the Author will use the term “prisoner” to refer to individuals who are incarcerated. There are multiple persuasive arguments that terms such as “prisoner” are dehumanizing and should be replaced with person-first language such as “person who is incarcerated.” See, e.g., Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA (Mar. 31, 2021), [https://perma.cc/T6JS-TPC7](https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates). But see TaLisa J. Carter, *Person-First Language Is Not Enough*, URBAN WIRE (May 28, 2021), <https://www.urban.org/urban-wire/person-first-language-not-enough> (arguing that such a language shift brings with it a false sense of accomplishment in the social justice sphere, and that advocates should instead strive toward systemic change). Because “person who is incarcerated” becomes unwieldy in a long text which necessitates many references to such, the Author has settled on the term “prisoner.” As noted by criminal justice journalist Akiba Solomon, “prisoner” is useful for the sake of brevity and, more importantly, “conveys a physical or mental state of being rather than an identity.” Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration*, THE MARSHALL PROJECT (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration>.

11. U.S. CONST. amend. VIII. The Supreme Court has made the Punishments Clause of the Eighth Amendment applicable to the states. See *Robinson v. California*, 370 U.S. 660, 667–68 (1962) (holding that a California law, which allowed imprisonment based on no more than addiction status, was unconstitutional under the Eighth and Fourteenth Amendments, and in the course of such holding, incorporating the Punishments Clause of the Eighth Amendment). There is remarkably little Supreme Court precedent interpreting the Punishments Clause, but the Court has at least held that the clause requires adequate healthcare, see *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and bars torture or practices that amount to such, see *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that the use of excessive force—here, the apparently unprovoked beating of a shackled prisoner—may violate the Punishments Clause even without serious injury); *Hope v. Pelzer*, 536 U.S. 730, 734–35, 738 (2002) (holding violative of the Punishments Clause Alabama's “hitching post” practices, which for one unfortunate prisoner involved not only the usual shackling to the post, but also being left shirtless in the sun for seven hours, during which time he was denied bathroom breaks, given water only once or twice, and taunted by guards about his thirst).

12. See JOHN BOSTON & DANIEL E. MANVILLE, PRISONER'S SELF-HELP LITIGATION MANUAL 8–17 (4th ed. 2010). Other amendments are also implicated in prison life, such as the First Amendment right

However, only a small number of these lawsuits are successful,<sup>13</sup> and the suits that do survive typically end in a settlement in which prison authorities agree to address the issues raised.<sup>14</sup> The promises made by prison authorities as part of these settlements, however, are easily flouted.<sup>15</sup>

This Comment contends that the judiciary's methods of enforcing settlements must be expanded. The courts' current responses to settlement violations—simple fines or civil coercive contempt holdings resulting in fines<sup>16</sup>—are inadequate enforcement mechanisms.<sup>17</sup> Because incarcerated populations lack political sway or practical leverage, it is imperative that the judiciary is equipped to respond effectively to prisoners whose constitutional rights have been violated.

Part I of this Comment describes the constitutionally inadequate experiences of many prisoners, describes selected requirements of the Punishments Clause, and lays out the framework that the Supreme Court uses to determine whether an Eighth Amendment violation has occurred.

Part II explains how successful prisoner complaints result in settlements and how those settlements are traditionally enforced, and then uses *Jensen v. Shinn*, a United States District Court decision, to illustrate how the traditional means of enforcing Eighth Amendment rights are not strong enough to result in deterrence.

Part III proposes several solutions to better enforce settlements, ranging from partial statutory abrogations to system-wide policy change. Regarding statutory solutions, this Comment suggests that Congress should allow courts to temporarily abrogate the qualified immunity of offending prison officials and authorities, modify the deliberate indifference standard, or impose less stringent filing requirements on prisoners than are currently imposed by the Prison Litigation Reform Act. As a

to religious freedom, *see id.* at 251–79, but this Comment is concerned only with conduct that violates the Punishments Clause.

13. See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 163 (2015) (“[I]n cases brought by prisoners, the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often. Those settlements that do occur are harder fought.”).

14. *See id.* at 164 tbl.3. Settlements are categorized as “voluntary dismissals.” *See id.*

15. *See infra* Part II.

16. Barton H. Thompson, Jr., *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1563 (1975) (“An injunction is supported by the threat or imposition of contempt penalties.”).

17. *See infra* Part II. This Comment discusses coercive civil contempt fines as opposed to civil compensatory sanctions. See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 693 (2018). Though many settlements provide for the awarding of damages, *see, e.g.*, James Gordon, *Enforcing and Reforming Structured Settlement Protection Acts: How the Law Should Protect Tort Victims*, 120 COLUM. L. REV. 1549, 1551 (2020), prison civil rights settlements are often not amenable to damages, *see* Susan A. Herman, *Slashing and Burning Prisoner's Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1230 (1998) (“[I]f [prisoners] win their cases, they, unlike all other litigants, will not be allowed to collect costs.”); *see also* Hilary Detmold, *'Tis Enough, 'Twill Serve: Defining Physical Injury Under the Prison Litigation Reform Act*, 46 SUFFOLK U.L. REV. 1111, 1119–20 (2013). Injunctions are needed in order to compel prison officials to comply with the specific constitutional improvements they agreed to. *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 555–56 (2006). Thus, this Comment does not discuss civil compensatory sanctions or damage awards, except in the context of proposed enforcement strategies.

potential policy solution, this Comment presents practices in which prosecutors can engage to reduce the risk of unconstitutional prison conditions, specifically by adhering closely to their duty to protect the public, which is informed by the duty to impose alternatives to incarceration.

## I. EIGHTH AMENDMENT PURPOSE, REQUIREMENTS, AND VIOLATIONS

### A. “As Punishment, Not for Punishment”: An Empty Promise

It is difficult to fully appreciate the incarcerated person’s daily life, but let us make an attempt. Imagine that you have committed a felony—typically speaking, either a violent offense or a drug offense—and, as punishment, you have been sentenced to serve some number of years in prison. Your prison sentence exposes you to myriad unpleasantnesses:<sup>18</sup> poor food quality, thin mattresses over hard metal bars, cells that always seem either too cold or too hot, low-wage or unpaid labor that is often physically harsh or mind-numbingly repetitive, periods of aching boredom punctuated by the threat and perpetration of prisoner and correctional officer violence, and, perhaps worst of all, near-total isolation from your community and your loved ones.<sup>19</sup> All of these hardships, so long as they do not rise to a level that the Supreme Court deems unconstitutional, have been declared mere attendants of incarceration; “[b]y virtue of [] conviction,” prisoners have forfeited their right to challenge these daily indignities.<sup>20</sup>

But imagine there is still more than the presumed indignities attending incarceration. Along with what courts have declared the norms of prison life, perhaps you are one of the hundreds of thousands of Americans who have been sentenced to serve your term in a correctional facility that violates your Eighth Amendment right against cruel and unusual punishment.<sup>21</sup> The situation quickly becomes grim.<sup>22</sup>

Do you need to see a dentist for tooth pain? Too bad. If you even get in to see the prison dentist, they might just take the tooth out with no numbing solution. Did you break several bones in your hand because you punched a wall upon hearing the news that your mother has died, and you will not be allowed to attend her funeral? Too bad. Although there is a risk that you could partially lose use of the hand,<sup>23</sup> the

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18. The Author has professional experience within a midwestern Department of Corrections. The Author gathered the observations discussed in this Comment from direct contact with “certain midwestern prisoners” with whom the Author has worked. Further identifying information of either the institution or the individuals involved in the observations is omitted due to privacy and safety concerns, although that information is on file with the Author.

19. Certain midwestern prisoners, *supra* note 18, have reported these challenges, and have identified isolation from family and loved ones as the most oppressive condition of incarceration.

20. *Madrid v. Gomez*, 889 F. Supp. 1146, 1244 (N.D. Cal. 1995).

21. *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> [<https://perma.cc/4LNR-745C>] (last visited Dec. 11, 2023).

22. The examples of possibly unconstitutional practices in the following paragraph are gathered from the reported and observed experiences of certain midwestern prisoners, *supra* note 18.

23. *Hand and Wrist*, UCONN HEALTH, <https://health.uconn.edu/orthopedics-sports-medicine/conditions-and-treatments/where-does-it-hurt/hand-and-wrist/hand-fracture/> [<https://perma.cc/7T8T-GZB9>] (last visited Dec. 11, 2023).

prison medical team might deny care for your broken bones for weeks because you expressed your grief and frustration in an inappropriate manner. Were you assaulted when you cut ties with a gang? Too bad. The investigating officer may decide that you do not deserve treatment because you have demonstrated participation in organized criminal activity, even though you have displayed extraordinary courage in voluntarily withdrawing.

These situations are not as uncommon as one might think. Neither are situations in which punishment was not the objective, but nevertheless the result. Consider the experience of Shawn Jensen, a prisoner in the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR). Beginning around 2003, when Jensen was already incarcerated, blood tests revealed an abnormally high amount of prostate-specific antigen, indicating the presence of prostate cancer.<sup>24</sup> Nevertheless, it was not until October 2009—about six years after he began to test abnormally—that he finally received a diagnosis.<sup>25</sup> Even then, it took prison officials another nine months to get him into surgery.<sup>26</sup> After surgery, Jensen began to have serious problems with his catheter, including leakage.<sup>27</sup> When one prison authority with no medical expertise could not identify the problem with the catheter, he came up with an alternative solution: to stop the leak, simply “push the catheter further into . . . Jensen’s urethra.”<sup>28</sup> The result was as devastating as any reasonable person would expect—the official’s action necessitated six more surgeries to control the damage to Jensen’s urethra and bladder.<sup>29</sup>

The United States purportedly subscribes to the idea that individuals are sent to prison “as punishment, not for punishment.”<sup>30</sup> In other words, loss of liberty itself is the punishment, and there is no justification for further pain, suffering, or humiliation to occur in any carceral setting.<sup>31</sup> The Punishments Clause ostensibly guarantees prisoners that “cruel and unusual punishments” will not be inflicted upon them.<sup>32</sup> However, prisons across the United States have made a mockery of this ideal through the actions and inactions described above.

### *1. Select Eighth Amendment Requirements: Healthcare and Nutrition*

The Supreme Court has recognized that denial of medical care can give rise to a Punishments Clause violation; thus, the Court requires that prisoners receive adequate medical care.<sup>33</sup> Lower courts have incorporated mental and dental care into

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24. *Parsons v. Ryan*, 289 F.R.D. 513, 518 (D. Ariz. 2013).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977).

31. See *HELL IS A VERY SMALL PLACE*, *supra* note 4, at 10 (“[D]eprivation of freedom alone is supposed to be the price society exacts for crimes committed. The additional suffering that happens inside prison—whether it is violence and brutality, rape, or solitary confinement—can therefore be seen as extrajudicial punishment.”).

32. U.S. CONST. amend. VIII.

33. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).



this requirement.<sup>34</sup> The lower courts have also grappled with nutritional requirements, for which the Supreme Court has not set a national standard.<sup>35</sup>

*a. Healthcare*

The Punishments Clause mandates that prisoners may not be denied adequate healthcare.<sup>36</sup> In *Estelle v. Gamble*, the seminal Supreme Court case on prison medical care, prisoner-respondent Gamble's back was injured in the course of his prison work when "a bale of cotton fell on him while he was unloading a truck."<sup>37</sup> The Court ultimately rejected Gamble's contention that his experience presented a case of insufficient medical care, noting that though the prison failed to explore every medical avenue to diagnose and treat Gamble's back pain, the treatment that prison medical staff did provide him was appropriate under the circumstances.<sup>38</sup> However, the Court recognized that the government has an "obligation to provide medical care for those whom it is punishing by incarceration," reasoning that the demands of the Eighth Amendment will not be met if prisoners are allowed to suffer what amounts to torture due to the denial of medical care or, in less extreme cases, pain that does not amount to torture but nonetheless serves no "penological purpose."<sup>39</sup> Lower courts have since defined adequate medical services to be services "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards."<sup>40</sup>

The same standard applies to dental care.<sup>41</sup> In *Tillery v. Owens*, the United States District Court for the Western District of Pennsylvania found one prison's dental services so delayed and understaffed as to be unconstitutional.<sup>42</sup> The understaffing was severe and nearly guaranteed that prisoners would experience a significant delay in services—in 1989, only two dentists and one assistant served 1,829 prisoners.<sup>43</sup> Unsurprisingly, one witness testified that no matter how serious the need for services, there was up to a year-long wait time for dental work.<sup>44</sup> The court "note[d] that

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34. See, e.g., *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) ("We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart."); *Tillery v. Owens*, 719 F. Supp. 1256, 1301 (W.D. Pa. 1989) (defining health services to include "dental and psychological or psychiatric care").

35. See *Knop v. Johnson*, 667 F. Supp. 512, 525 (W.D. Mich. 1987) (finding that food is a basic necessity protected by the Punishments Clause). Many other courts have held that denial or significant reduction of food for more than twenty-four hours stated a claim under the Punishments Clause. See, e.g., *Reed v. McBride*, 178 F.3d 849, 853–54 (7th Cir. 1999); *Green v. Johnson*, 977 F.2d 1383, 1391 (10th Cir. 1992); *Hodge v. Ruperto*, 739 F. Supp. 873, 876 (S.D.N.Y. 1990).

36. See *Estelle*, 429 U.S. at 103.

37. *Id.* at 99.

38. *Id.* at 107.

39. *Id.* at 103.

40. *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *accord United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987).

41. See *Tillery v. Owens*, 719 F. Supp. 1256, 1301 (W.D. Pa. 1989) (articulating essentially the same standard as in *Fernandez v. United States*).

42. See *id.* at 1309.

43. *Id.* at 1301.

44. *Id.* at 1309.

delays in providing dental services can result in ‘continued and unnecessary pain and loss of teeth.’”<sup>45</sup>

As noted above, prisoners must also receive adequate mental healthcare, which is “constitutionally inadequate if inmates with serious mental illnesses are effectively prevented from being diagnosed and treated by qualified professionals.”<sup>46</sup> Also in *Tillery*, the court found that the prison’s psychiatric services were “grossly deficient” and unconstitutional due to severe understaffing.<sup>47</sup> The understaffing led to “significant delays” in consultations and treatment and “hasty, rather than accurate, evaluations of . . . mental health status.”<sup>48</sup> Inadequate treatment contributed to a ten to fifteen percent increase in the number of prisoners with severe mental illness when compared to New York averages.<sup>49</sup> The resultant lack of bed space in the psychiatric wards of the prison infirmary created circumstances in which prisoners who were found to need psychiatric services experienced delay in actual transfer to the wards.<sup>50</sup> A medical expert testified that the “physical environment of the prison in general . . . contributes to a deterioration of those suffering from severe mental illness.”<sup>51</sup> He concluded that “it [was] impossible to create a therapeutic environment” in the prison.<sup>52</sup> The court consequently found that prison officials had “violated the [E]ighth [A]mendment with respect to psychiatric and psychological care.”<sup>53</sup>

#### *b. Nutrition*

“Food is one of the basic necessities of life protected by the Eighth Amendment”; therefore, prisoners must also receive adequate nutrition.<sup>54</sup> Because no national standard for adequate nutrition has been set by the Supreme Court, nutrition is consequentially a more inscrutable area of law than is healthcare.<sup>55</sup> The standard for adequate prison nutrition is decided by states on an apparently arbitrary basis; some jurisdictions require a certain number of meals per day while others require a certain number of calories.<sup>56</sup> The touchstone for adequate nutrition in federal prisons seems to spring from the Sixth Circuit’s decision in *Cunningham v. Jones*, which held ambiguously that prisoners must receive “sufficient food to maintain normal health.”<sup>57</sup> Unhelpful as this standard is, it is the best we have to

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45. *Id.* (quoting *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987)).

46. *Id.* at 1301 (citing *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979)).

47. *Id.* at 1302–03.

48. *Id.* at 1302.

49. *Id.* at 1287.

50. *Id.*

51. *Id.* at 1288.

52. *Id.*

53. *Id.* at 1302.

54. *Knop v. Johnson*, 667 F. Supp. 512, 525 (W.D. Mich. 1987).

55. *See id.*; *Reed v. McBride*, 178 F.3d 849, 853 (7th Cir. 1999); *Green v. Johnson*, 977 F.2d 1383, 1391 (10th Cir. 1992); *Hodge v. Ruperto*, 739 F. Supp. 873, 876 (S.D.N.Y. 1990). Though the Supreme Court has recognized that food is a necessity of life in the carceral context, *see Helling v. McKinney*, 509 U.S. 25, 32 (1993), it has not expounded on specific nutritional requirements.

56. Alysia Santo & Lisa Iaboni, *What’s in a Prison Meal?*, THE MARSHALL PROJECT (July 7, 2015), <https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal>.

57. *Cunningham v. Jones*, 567 F.2d 653, 660 (6th Cir. 1977).

work with; thus, this Comment measures nutritional deprivations in terms of “food insufficient to maintain normal health.”

Food insufficient to maintain normal health can lead to devastating consequences which are at least on par with, if not per se, torture.<sup>58</sup> Undernutrition can, of course, lead to loss of fat reserves and muscle mass, and cause irritability and fatigue.<sup>59</sup> When allowed to go on for an extended period, undernutrition results in muscle atrophy, organ damage, and a heightened risk of deadly infections.<sup>60</sup> Insufficient nutrition can also cause significant psychological damage.<sup>61</sup> Even more worrisome is “complicated starvation,” in which an individual is already sickly or weak and is then undernourished.<sup>62</sup> Complicated starvation results in generally worse symptoms and more rapid progression toward the most fatal effect of prolonged undernutrition—muscle wasting, in which the body turns muscle proteins into fuel,<sup>63</sup> eventually beginning to “eat” the heart and ultimately leading to heart failure.<sup>64</sup> Thus, when combined with inadequate healthcare, undernutrition poses an even more significant risk.<sup>65</sup>

The risks of undernutrition were scientifically probed for the first time in United States history in the Minnesota Starvation Experiment.<sup>66</sup> Thirty-six “healthy young

58. There is little, though significant, international precedent “considering deprivation . . . of food as ill-treatment or torture.” Pau Pérez-Sales, *Hunger: Deprivation and Manipulation of Food as a Torture Method. State of the Art in Research and Ways Forward*, 30 J. ON REHAB. TORTURE VICTIMS & PREVENTION TORTURE 3, 5 (2020). Indeed, the results of starvation and undernutrition are so grave that the United Nations Security Council has warned that, when a group of civilians is intentionally subjected to “starvation methods in armed conflict . . . [it] ‘may constitute a war crime.’” Tom Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 CHI. J. INT’L L. 368, 372 (2022).

59. Roopam Bassi & Saurabh Sharma, *Starvation—By “Ill” or “Will”*, 2 CURRENT TRENDS DIAGNOSIS & TREATMENT 32, 34–35 (2018). Starvation in a healthy mammal sets in when the animal uses up its stores of carbohydrates, which occurs in about twenty-four hours in a human. MARJORIE L. CHANDLER, *CANINE AND FELINE GASTROENTEROLOGY* 386 (Robert J. Washabau & Michael J. Day eds., 2013) (although this source is tailored to veterinarians, the material explicitly applies to humans).

60. Bassi & Sharma, *supra* note 59.

61. Leah M. Kalm & Richard D. Semba, *They Starved So That Others Be Better Fed: Remembering Ancel Keys and the Minnesota Experiment*, 135 J. NUTRITION 1347, 1351 (2005). Those subjected to semi-starvation in this famous experiment suffered, for example, neurological deficits and long-lasting changes in personality. *Id.* at 1350–51.

62. GLENN E. MAULDIN & JACQUELINE R. DAVIDSON, *TEXTBOOK OF SMALL ANIMAL SURGERY* 89 (Douglas H. Slatte ed., 3d ed. 2003) (although this source is tailored to veterinarians, the section on complicated starvation explicitly applies to humans).

63. *Id.* at 90. In complicated starvation, the body does not use its carbohydrate stores efficiently; this leads to more severe outcomes than are seen in simple starvation. *See also* Regina C. Casper, *Might Starvation-Induced Adaptations in Muscle Mass, Muscle Morphology and Muscle Function Contribute to the Increased Urge for Movement and to Spontaneous Physical Activity in Anorexia Nervosa?*, 12 NUTRIENTS (SPECIAL ISSUE), Jul. 2020, at 2–3 (describing muscle wasting).

64. Susan Brink, *What Happens to the Body and Mind When Starvation Sets In?*, NPR (Jan. 20, 2016), <https://www.npr.org/sections/goatsandsoda/2016/01/20/463710330/what-happens-to-the-body-and-mind-when-starvation-sets-in>.

65. *See* MAULDIN & DAVIDSON, *supra* note 62, at 91–92.

66. Kalm & Semba, *supra* note 61. The study was designed to answer two pressing questions presented by the close of WWII: “how civilians would be affected physiologically and psychologically by such a limited diet and what would be the most effective way to provide postwar rehabilitation.” *Id.* The experiment was broken into two discrete parts: the starvation months and three months of

men” opted into the experiment, which provided them with 1,800 calories per day for three months and required them to walk twenty-two miles each week in order to induce the effects of undernutrition.<sup>67</sup> The men were explicit about the level of suffering that they endured: “We were starving under the best possible medical conditions . . . we knew the exact day on which our torture was going to end.”<sup>68</sup> This sense of “medical safety” was vital to the participants.<sup>69</sup> Unlike the men who took part in the Minnesota Starvation Experiment, prisoners subjected to underfeeding are in far from the best medical conditions, and they do not know when the torture will end.<sup>70</sup>

## 2. Supreme Court Precedent for Gauging Eighth Amendment Violations

Supreme Court decisions interpreting the Punishments Clause have recognized that social and cultural mores come to bear directly on the Clause’s meaning.<sup>71</sup> As Chief Justice Earl Warren wrote in 1948 in *Trop v. Dulles*, “the words of the Amendment are not precise, and [] their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>72</sup>

Even when a practice lies outside of society’s evolving standards of decency, though, there is still more to consider. To constitute an Eighth Amendment violation, the act or condition must also meet the threshold laid out in *Farmer v. Brennan*.<sup>73</sup> In that case, a unanimous Supreme Court explained that a successful Eighth Amendment claim must meet two requirements: “the deprivation alleged must be, objectively, ‘sufficiently serious’” and “a prison official must have a ‘sufficiently culpable state of mind.’”<sup>74</sup> The first requirement demands that the alleged violation “result[s] in the denial of ‘the minimal civilized measure of life’s necessities.’”<sup>75</sup> In other cases, the Court has identified “food, clothing, shelter, medical care, and

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rehabilitation. *Id.* at 1348. Even after the rehabilitation period, the men continued to suffer long-term effects of food deprivation. *Id.* at 1351.

67. *Id.* at 1347–48.

68. *Id.* at 1351.

69. *Id.*

70. See, e.g., Sam McCann, *Health Care Behind Bars: Missed Appointments, No Standards, and High Costs*, VERA (June 29, 2022), <https://www.vera.org/news/health-care-behind-bars-missed-appointments-no-standards-and-high-costs> [<https://perma.cc/HS25-U5W5>] (“Each year that someone spends in prison cuts their life expectancy by two years. Mass incarceration multiplies that impact on a societal level: if not for incarceration, the U.S. life expectancy would be five years higher. The abysmal state of health care behind bars bears much of the blame for those figures.”).

71. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Legislation . . . is enacted . . . from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.”).

72. *Trop*, 356 U.S. at 100–01.

73. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

74. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297–98 (1991)).

75. *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

reasonable safety”<sup>76</sup> and “warmth [and] exercise” as minimal necessities.<sup>77</sup> The second requirement, regarding state of mind, refers to the subjective formation of the deliberate indifference standard, which ultimately means that an Eighth Amendment claim based on mere negligence will fail.<sup>78</sup>

There is more than legal precedent and theory to think about, however. We must now consider the uphill battle that prisoners face in alleging a constitutional violation.

## II. AN UNACCEPTABLE STATUS QUO: HOW THE PUNISHMENTS CLAUSE IS (UN)ENFORCED

If and when prison conditions are constitutionally inadequate, how can prisoners enforce their Eighth Amendment rights against prison authorities? Often, the answer is litigation.<sup>79</sup> Most prisons have a grievance system through which prisoners may, and indeed must, lodge any complaint which they have regarding treatment or conditions before bringing it to a court’s attention.<sup>80</sup> Grievance systems are adjudicatory in nature, meaning that an adverse decision can be appealed to a higher prison authority.<sup>81</sup> After a certain number of appeals, the process is exhausted; the prisoner must either simply give up or, if a cause of action can be stated, take their complaint to court.<sup>82</sup> Theoretically, the grievance system should, at a minimum, redress constitutional violations; however, many prisoners allege that it fails even to do this.<sup>83</sup> Thus, prisoners (who are rarely represented by counsel) must file a complaint with a trial court in order to enforce their rights.<sup>84</sup> These cases are often resolved with a settlement in which prison authorities agree to provide constitutionally adequate conditions of confinement in exchange for the prisoner dropping the case.<sup>85</sup>

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76. *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (quoting *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)).

77. *Wilson*, 501 U.S. at 304.

78. *Id.* at 305 (concluding that “mere negligence” does not rise to the level of deliberate indifference); *see also Farmer*, 511 U.S. at 839–47 (rejecting Petitioner’s suggestion that deliberate indifference be measured objectively and discussing the reasoning behind a subjective standard).

79. *See Ashley Dunn, Flood of Prisoner Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (quoting constitutional scholar Erwin Chemerinsky’s assertion that “[t]hese are people with no way of protest except through the courts”).

80. *See PRIYAH KAUL ET AL., PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 4* (2005), <https://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf> (noting that forty-nine states and the federal government have prison grievance procedures written into their Department of Corrections policies); *see also* 42 U.S.C. § 1997e(a).

81. *See, e.g.*, 28 C.F.R. § 40.7(d), (f) (2023).

82. *See* 42 U.S.C. § 1997e(a).

83. Certain midwestern prisoners, *supra* note 18, contend that the grievance system is, in fact, designed to fail. *See infra* Section III.A for further support of this well-grounded contention.

84. *See JOHN BOSTON & DANIEL E. MANVILLE, PRISONER’S SELF-HELP LITIGATION MANUAL 5* (4th ed. 2010) (“Getting a lawyer for a prison case is frequently difficult, since most lawyers don’t know much about prisons or prison law and many don’t want to get involved with them. Also, private lawyers are out to make a living and they know that most prisoners do not have a lot of money to pay fees or to front the out-of-pocket costs of even meritorious cases.”); *Dunn, supra* note 79.

85. *See Schlanger, supra* note 13, at 164 tbl.3.

However, there is little motivation to comply with a settlement when it is not the actors within prisons, but the state or federal department overseeing them that is held responsible.<sup>86</sup> As one commentator notes, “settlement agreements—just like remedies stipulated by a final [ ] judgment—depend on a [government’s] willingness to commit to the terms of its agreement.”<sup>87</sup> Though trial courts can choose to impose imprisonment on high-ranking officials who have been held in contempt, they are often hesitant to do so.<sup>88</sup> Regarding federal courts in particular, commentator Nicholas Parrillo has this to say: “You Can Send Officials to Jail—But Don’t Actually Do It!”<sup>89</sup> He further explains:

[W]hile several individual federal judges believe they can (and have tried to) attach sanctions to these [contempt] findings, the judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions, at times intervening dramatically to block imprisonment or budget-straining fines at the eleventh hour.<sup>90</sup>

Regrettably, because of the accountability issues that settlement enforcement presents and because prisoners lack the leverage needed to self-advocate beyond the courtroom, situations arise in which prison authorities flout the terms of a settlement for years at a time.<sup>91</sup> The most recently documented example can be found in the 2022 United States District of Arizona decision in *Jensen v. Shinn*, a class action arising from federal prisoners’ claims that ADCRR violated the Punishments Clause through its lack of adequate healthcare and nutrition.<sup>92</sup> The court found that ADCRR had failed to provide the bare minimum standard of medical care and mental healthcare, and that ADCRR had failed to provide adequate nutrition to a specific set of prisoners.<sup>93</sup> The court explained that a stipulation which was approved in 2015 and was “intended by the parties to eventually resolve all claims” ultimately failed

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86. See Nicholas Parrillo, *Holding the Federal Government in Contempt of Court: What Powers Do Judges Have Over an Administration?*, JUST SEC. (Mar. 2, 2017), <https://www.justsecurity.org/38268/holding-federal-government-contempt-court-powers-judges-administration/> [<https://perma.cc/CN9K-EFWD>] (“[T]he monetary liabilities that federal officials incur in doing their jobs are virtually always indemnified out of the appropriations of their agencies . . .”). The same is largely true of the states. See, e.g., NEB. REV. STAT. § 81-8,239.05(1); MINN. STAT. ANN. § 466.07; GA. CODE ANN., § 45-9-60.

87. Jorge Contesse, *Settling Human Rights Violations*, 60 HARV. INT’L L.J. 317, 367–68 (2019) (discussing settlement enforcement problems in the context of international human rights violations).

88. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 746–47 (2018). One factor in this trend is that judges who impose imprisonment are often “dealt with severely by the higher courts,” facing charges of bias and demands for recusal. *Id.* at 746.

89. *Id.* at 745.

90. *Id.* at 697.

91. See generally, e.g., *Jensen v. Shinn*, 609 F. Supp. 3d. 789 (D. Ariz. 2022).

92. *Id.* at 796.

93. *Id.* The set of prisoners denied adequate nutrition were those in ADCRR’s restrictive housing units. *Id.* ADCRR’s other solitary confinement practices are beyond the scope of this Comment, but it should be noted that the court found that the sum of conditions in the maximum custody units “results in the deprivation of basic human needs.” *Id.* Many commentators and prisoners consider the American practice of solitary confinement to be *per se* torture. See, e.g., UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 13 (2015) (defining indefinite or prolonged solitary confinement as torture); HELL IS A VERY SMALL PLACE, *supra* note 4, at ix, 4, 33.

due to prison official defendants' refusal to comply with the agreed-upon settlement.<sup>94</sup>

The experience of Shawn Jensen, one of the aggrieved plaintiffs, illustrates how prisoners were routinely deprived of minimally adequate healthcare.<sup>95</sup> Recall his case, discussed in Section I.A above: though Jensen's blood tests showed abnormalities indicating cancer, he was not diagnosed for years and, when he finally received life-saving surgery, he was forced to undergo further operations after a prison official shoved Jensen's catheter further into his body.<sup>96</sup> This conduct was, of course, not sanctioned by a medical expert. It is also a course of action that can be described as negligent: a reasonable citizen exercising due care would likely not force a rigid plastic tube further into an individual's urethra. A reasonable person would or should understand that this would not only cause injury, but also undermine the goals of the patient's healthcare.

Dental care was similarly lacking for plaintiffs in this class action.<sup>97</sup> Plaintiff Chisolm, for example, reported a lapse of over six years in between teeth cleanings.<sup>98</sup> More egregiously, when seeking care for a lost filling, she was given only one option: tooth extraction.<sup>99</sup> Unsurprisingly, mental healthcare was also utterly inadequate.<sup>100</sup> Lurking beneath reports of treatment delays, expired prescriptions, and mismanagement of medication up to and including outright denial, is the near-inevitable consequence of such actions and inactions—prisoner suicide.<sup>101</sup> The court highlighted one report showing that a prisoner found hanging from a bedsheet in his cell on August 23, 2012, had been prescribed mood stabilizers, but had not received his medication for the first twenty-three days of that month.<sup>102</sup>

Inadequate nutrition, measured in terms of food insufficient to maintain normal health, was also an issue at ADCRR. In the Minnesota Starvation Experiment detailed above, the men received thirteen meals in seven days, and this meal frequency was labeled as “semistarvation.”<sup>103</sup> Compare this meal frequency with that at ADCRR: one prisoner allegedly received only nine meals over a seven-day period.<sup>104</sup> As the district court noted, “that prisoner was one of the lucky ones. A different prisoner that week . . . received only seven meals. Other prisoners . . . only

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94. *Jensen*, 609 F. Supp. 3d. at 797–98.

95. *See Parsons v. Ryan*, 289 F.R.D. 513, 518 (D. Ariz. 2013). *Jensen* has a long and storied history, originating in 2012 under the name *Parsons v. Ryan*, in which prisoners first complained of poor healthcare and sought injunctive relief. *Id.*

96. *Id.*

97. *Id.* at 519.

98. *Id.*

99. *Id.* The Author has received similar reports from certain midwestern prisoners. *See supra* note 18. The pervasiveness of this practice and its physical and mental effect on prisoners, while outside the scope of this Comment, provides fertile ground for further study and advocacy.

100. *See Parsons*, 289 F.R.D. at 519.

101. *See id.*

102. *Id.*

103. Kalm & Semba, *supra* note 61, at 1349.

104. *Jensen v. Shinn*, 609 F. Supp. 3d. 789, 899 (D. Ariz. 2022).

received one or two meals for the entire week.”<sup>105</sup> The court concluded that these prisoners were “subject to food practices that create a substantial risk of harm.”<sup>106</sup>

The court accepted a settlement via stipulation in 2015.<sup>107</sup> The settlement, in which defendants denied any wrongdoing, applied to “[a]ll prisoners who are now, or will in the future be, subjected to the medical, mental health, and dental care policies and practices” of ADCRR.<sup>108</sup> It mandated compliance with certain minimum healthcare standards,<sup>109</sup> required the department to implement a training program for dental assistants and dentists,<sup>110</sup> and called for increased mental health staffing<sup>111</sup> and psychological autopsies,<sup>112</sup> which evaluate the “suicide risk factors present at the time of death.”<sup>113</sup> The settlement also required that prisoners be given nutritionally and calorically sufficient meals.<sup>114</sup>

Prison authorities, however, refused to comply with the agreement.<sup>115</sup> As a result, between 2016 and 2021, the plaintiffs filed twelve motions with the district court seeking to enforce the settlement, which resulted in “dozens of Orders . . . mandating Defendants comply with the Stipulation.”<sup>116</sup> The court also “issued three Orders to Show Cause why Defendants should not be held in contempt,” which twice led to prison authorities being held in contempt.<sup>117</sup> These contempt holdings were accompanied by “millions of dollars in fines.”<sup>118</sup> Of course, as a result of official immunity, prison authorities were not themselves held responsible for these fines; rather, it was ADCRR itself that was fined.<sup>119</sup>

Unsurprisingly, the fines levied against ADCRR and the “threats of even more” completely failed to spur prison authorities to take action consistent with the settlement.<sup>120</sup> Ultimately, the court found that officials had “consistently refused to perform the obligations” that they had agreed to.<sup>121</sup> Because of this extended non-

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105. *Id.*

106. *Id.* at 912.

107. *Id.* at 797.

108. Stipulation at 1, *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2014) (No. 12-601), <https://prisonlaw.com/wp-content/uploads/2016/04/14.10.14-Doc-1185-Stipulation-Settlement-Agreement-and-exhibits.pdf>.

109. *See id.* at 2–5.

110. *Id.* at 4.

111. *Id.* at 2.

112. *Id.* at 5.

113. James L. Knoll, *The Psychological Autopsy, Part I: Applications and Methods*, 14 J. PSYCHIATRIC PRAC. 393, 393 (2008) (explaining that a psychological autopsy “involves a thorough and systematic retrospective analysis of the decedent’s life, with a particular focus on suicide risk factors, motives, and intentions”).

114. Stipulation at 11, *Parsons v. Ryan*, 289 F.R.D. 513.

115. *Jensen v. Shinn*, 609 F. Supp. 3d 789, 798 (D. Ariz. 2022).

116. *Id.*

117. *Id.*

118. *Id.*

119. *See Federal Court Finds Conditions in Arizona State Prisons Unconstitutional*, PRISON L. OFF. (June 2022), <https://prisonlaw.com/news/federal-court-finds-conditions-in-arizona-state-prisons-unconstitutional/> [<https://perma.cc/676Q-HK9U>] (noting that the court fined the state of Arizona more than \$2.5 million).

120. *Jensen*, 609 F. Supp. 3d at 798.

121. *Id.*



compliance, the court held in July 2021 that enforcement had failed so completely that the settlement must be vacated.<sup>122</sup> The parties were ordered to go to trial on November 1, 2021.<sup>123</sup>

Importantly, during the six years that prison officials flouted the 2015 settlement, ADCRR consistently denied its prisoners constitutionally adequate healthcare, including mental and dental care, and continued its practice of withholding meals from maximum custody prisoners.<sup>124</sup> As a result, prisoners suffered unconstitutional prison conditions long after they first filed suit to enforce their Eighth Amendment rights.

### III. SOLUTIONS

The constitutional and humanitarian values which our country professes to hold—namely, that each citizen deserves equal justice under the law and that no one should be subjected to torture—surely are not served by the pretense that prison officials will be brought to task by court fines for which they are not personally liable. If the nation is to live up to its Eighth Amendment promise that prisoners will not be subject to cruel or unusual punishment, easily defied settlements and injunctions must not be the only solution for unconstitutional prison conditions. New and creative judicial remedies are required. This Comment proposes three statutory solutions and explains how they would be applied when prison authorities have previously demonstrated non-compliance with a settlement.<sup>125</sup> In addition, this Comment proposes a policy solution that increases focus among prosecutors on their duty to public safety, supported by their duty to find alternatives to incarceration where appropriate.

#### *A. Statutory Solutions*

This Comment proposes three statutory solutions: abrogation of qualified immunity, modification of the deliberate indifference standard, and less stringent filing requirements for prisoners than are currently imposed by the Prison Litigation Reform Act (PLRA).

##### *1. Partial Abrogation of Qualified Official Immunity*

Qualified official immunity “shields [state and federal government officials] from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”<sup>126</sup> Qualified immunity was created in the Supreme Court case *Pierson v.*

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122. *Id.*

123. *Id.*

124. *Id.* at 797.

125. This Comment defines non-compliance as a single instance of (i) a court issuing an order that defendants comply with a settlement, (ii) defendants being held in contempt for failure to comply with a settlement, or (iii) defendants being fined for failure to comply with a settlement.

126. *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

*Ray*, a 1967 action against law enforcement officers.<sup>127</sup> Chief Justice Warren explained the rationale behind the newly minted doctrine: “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>128</sup> The Warren court thus concluded that an officer should be excused from liability when he acts in good faith, but later is brought to court by a citizen wishing to enforce their rights.<sup>129</sup> The doctrine purportedly balances “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>130</sup> Essentially, the doctrine “shields from liability ‘all but the plainly incompetent or one who is knowingly violating the federal law.’”<sup>131</sup>

Official immunity, then, boils down to this issue: “whether someone in the officer’s position could reasonably but mistakenly conclude that his conduct complied with” the strictures of federal law.<sup>132</sup> An official will be granted immunity if “a reasonable officer could have believed” that a particular interaction was lawful “in light of clearly established law and the information the . . . officers possessed.”<sup>133</sup> Additionally, an official’s mistake may be of fact as well as of law: “[t]he protection of qualified immunity applies regardless of whether the government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’”<sup>134</sup>

The doctrine has received substantial criticism on multiple grounds.<sup>135</sup> Among these criticisms is the narrowing of the meaning of “clearly established law.”<sup>136</sup> The

127. *Pierson v. Ray*, 386 U.S. 547, 549 (1967). The circumstances of this case warrant exposition. A racially mixed group of petitioners, including ministers and spectators, were engaged in a prayer pilgrimage. *Id.* at 552. Police conceded that the African American ministers were “orderly and polite,” but worried about violent impulses from the mostly white onlookers. *Id.* at 553. In the end, the officers arrested the ministers and a few supportive spectators because they “determined that the ministers was [sic] the cause of the violence if any might occur.” *Id.* A municipal judge sentenced petitioners to four months in jail for “congregat[ing] with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refus[ing] to move on when ordered to do so by a police officer.” *Id.* at 549.

128. *Id.* at 555.

129. *See id.*

130. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

131. *Jones v. Fransen*, 857 F.3d 843, 851 (11th Cir. 2017) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). *But see Rich v. Bruce*, 129 F.3d 336, 339–40 (4th Cir. 1997) (holding that one correctional officer was “too stupid” to give rise to liability).

132. *Jones*, 857 F.3d at 851.

133. *Groh v. Ramirez*, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting on other grounds) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

134. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004)) (Kennedy, J., dissenting on other grounds).

135. *See, e.g., Joanna C. Schwartz, Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 608 (2021) (“The Supreme Court’s qualified immunity doctrine has been criticized six ways from Sunday—for bearing no resemblance to common law protections in effect when 42 U.S.C. § 1983 became law, undermining government accountability, and failing to achieve the doctrine’s intended policy goals.”).

136. *Id.* (“The Court’s definition of ‘clearly established law’ has also received its fair share of criticism . . . truly awful conduct can be shielded from liability so long as no court has previously declared that conduct unconstitutional. ‘It is,’ [Professor John] Jeffries writes, ‘as if the one-bite rule for bad dogs started over with every change in weather conditions.’”)

Supreme Court supposedly evaluates claims of official immunity under two prongs: whether a plaintiff has sufficiently alleged a violation of their constitutional rights by a government official, and whether the right is “clearly established.”<sup>137</sup> However, the Court has ruled that, when deciding whether to grant official immunity, courts need not even examine the underlying alleged violation to determine whether the Constitution was, in fact, violated; courts may simply apply the clearly established prong and disregard the violation prong.<sup>138</sup> Further, the Court has narrowed the “clearly established” prong nearly out of existence.<sup>139</sup> In fact, as one commentator notes:

In its most recent decisions, the Court has only been willing to assume *arguendo* that circuit precedent or a consensus of cases can clearly establish the law—suggesting that Supreme Court precedent is the only surefire way to clearly establish the law. Moreover, the Supreme Court’s qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case.<sup>140</sup>

The curtailed scope of the “clearly established” prong bestows immunity on officials “so long as: (1) no officer did something similar in the past; or (2) an officer did something similar in the past but that conduct did not, for any number of reasons, produce a court decision explicating the unconstitutionality of that officer’s conduct.”<sup>141</sup> The prong thus leads to absurdity, protecting not only the official acting in good faith, but also the official acting in bad faith.<sup>142</sup> The constriction of, and often sole reliance on, the “clearly established” prong, encourages what Justice Sotomayor refers to as “a ‘shoot first, think later’ approach” to law enforcement which “renders [constitutional] protections . . . hollow.”<sup>143</sup>

This “shoot first” mentality has become an important concern—and an especially potent argument—as confrontations between law enforcement officers and private citizens have been widely published and analyzed in recent years,<sup>144</sup> but our national analysis need not stop there. The idea of “think later” can be understood to extend past community policing and into corrections, encompassing both corrections officers and higher prison authorities. Prison employees and officials make many decisions a day about the treatment of prisoners in their care,<sup>145</sup> and any one of these decisions, if not considered fully, can compromise a prisoner’s

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137. *Pearson*, 555 U.S. at 232.

138. *Id.* at 232, 234–36.

139. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018).

140. *Id.* at 1814–15.

141. *Qualified Immunity’s Boldest Lie*, *supra* note 135, at 679.

142. *Id.* at 674.

143. *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

144. Luke Burton, *Qualified Immunity—An Attorney’s Primer*, 55 THE ARK. LAW. 24, 24 (2020) (“George Floyd’s tragic death invigorated the debate about whether to reform the laws governing interactions between police and the public.”).

145. See, e.g., Mark Jones & John J. Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, 71 FED. PROB. J. CORR. PHIL. & PRAC. 9, 12 (June 2007). Though this journal is specifically geared towards probation and parole officers, the introductory material specifically mentions correctional officers. *Id.* at 9.

constitutional rights.<sup>146</sup> As Justice Sotomayor feared, “thinking later” has morphed constitutional guarantees into empty promises.

Because the construction of the “clearly established” prong is, at least in part, what has led to the “shoot first, think later” mentality, it is essential that any abrogation—even partial—of qualified immunity start with a deconstruction, and reconstruction, of the prong.<sup>147</sup> To better protect prisoners who are already involved in a settlement that a prison is non-compliant with, a reworking of the standard should, first, take into account sources of law besides specific dictates of the Supreme Court and, second, be adjusted to accommodate a wider divergence of fact.

Consider *Walker v. Schult*, a 2022 decision from the Second Circuit which held that prison officials were entitled to qualified immunity in a case involving cell overcrowding.<sup>148</sup> Walker, the inmate who brought suit, was subjected to filthy and violent conditions due to his confinement in a 190 square foot cell with five other men.<sup>149</sup> Walker reported unsanitary conditions such as urine on the cell floor, which were made worse by prison employees’ refusal to provide him with adequate cleaning supplies.<sup>150</sup> Due to the crowding and filth, Walker and his five cellmates became easily agitated and the situation soon became violent: “trivial inadvertent actions—or sensible comments such as objections to urine on the cell floor—triggered violent attacks with fists or makeshift knives.”<sup>151</sup> Despite these unsanitary and unsafe conditions, the Second Circuit, employing the “clearly established” prong, ruled that prison officials were entitled to qualified immunity “because a prisoner ha[s] no *clearly established constitutional right* to be transferred to a new cell on account of overcrowding.”<sup>152</sup>

A reimagining of *Walker* provides an example of how the “clearly established” prong can be modified to better protect prisoners. Remember that the Court requires that the act or condition be a violation of “clearly established law,” which in recent cases has only meant Supreme Court precedent, and that the surrounding fact pattern is similar to another in which a violation was found.<sup>153</sup> Let us imagine that the prong was redefined to consider other sources of law, such as statutes and lower court decisions, and to accommodate a wider divergence of fact.

First, if a consensus of cases—even if those cases did not come from the Supreme Court—had ruled against the kind of overcrowding to which Walker and

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146. See *supra* Section I.A.

147. *Qualified Immunity’s Boldest Lie*, *supra* note 135, at 678 (“If Congress or the Supreme Court decides to amend qualified immunity instead of ending it, the definition of ‘clearly established law’ should be at the top of the list for adjustment.”).

148. *Walker v. Schult*, 45 F.4th 598, 621 (2d Cir. 2022).

149. *Id.* at 602.

150. *Id.* at 605 (“Walker was once without cleaning supplies for a month . . . [and] when supplies were made available, the supplies were ‘watered down.’”).

151. *Id.*

152. *Id.* at 621 (emphasis added).

153. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, *supra* note 139, 93 NOTRE DAME L. REV. 1797, at 1814–15 (2018) (explaining that the Supreme Court gives qualified immunity to defendants so long as they do not violate a law that was clearly established at the time the action occurred, requires plaintiffs to produce circuit or Supreme Court opinions finding constitutional violations in cases with nearly identical facts, and indicates in recent opinions that Supreme Court precedent is the only way to clearly establish the law).

his cellmates were subjected, a constitutional violation would be found regardless of whether there is direct precedent from the Supreme Court. Such a line of cases indeed exists.<sup>154</sup>

Second, the divergence of fact patterns between *Walker* and other cases finding unconstitutional overcrowding would not, standing alone, justify an automatic grant of official immunity. Officials would be barred from claiming immunity simply because the overcrowding in *Walker*, involving six men in one cell and resulting in fistfights, is factually distinct from the overcrowding in, for example, the Fifth Circuit case *Williams v. Edwards*. *Williams* involved overcrowding in the prison population as a whole and resulting in 270 stabbings and an undocumented but significant number of rapes in a three-year span.<sup>155</sup> This is a more sensible outcome; officials should not escape liability for egregious conditions simply because the same fact pattern has not been previously declared unconstitutional.

Reworking the “clearly established” prong is not all that must be done. To sufficiently deter prison officials from continuing to engage in conduct which violates the Eighth Amendment even after they have agreed to improvements in conditions of confinement, fines should be imposed when a violation occurs that exceeds the bounds of qualified immunity. Fines would be paid by the individual(s) whose conduct gave rise to the violation rather than by the institution itself. This sanction against the individual would perhaps function as a better deterrence method than sanctions against a faceless institution.

Obviously, a fine levied against an individual must be significantly less than a fine levied against an institution—individuals must actually have the ability to pay in order for this deterrence method to work. For example, in the *Parsons v. Ryan* and *Jensen v. Shinn* line of cases, ADCRR faced fines of “\$100,000 for each instance of future non-compliance.”<sup>156</sup> This dollar amount is clearly unworkable for an ADCRR correctional officer, for whom an annual starting annual salary averages just over \$50,000.<sup>157</sup> Though the director of ADCRR has a salary of nearly \$200,000, a \$100,000 fine would still be impractical.<sup>158</sup> Courts must therefore fashion an appropriate calculation for fines imposed on individual actors.

Luckily, creating new financial penalty guidelines is not a particularly challenging task; courts can look to administrative materials for guidance. For example, the Federal Deposit Insurance Corporation (FDIC) has created its own

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154. See, e.g., *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977); *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1286, 1391 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1384 (N.D. Cal. 1983), *aff'd in relevant part sub nom.* *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984); *Holt v. Sarver*, 300 F. Supp. 825, 828 (E.D. Ark. 1969).

155. *Williams*, 547 F.2d at 1211.

156. *Jensen v. Pratt*, No. CV-12-00601-PHX-ROS, 2021 WL 3828502, at \* 8 (D. Ariz. July. 16, 2021).

157. *Correctional Officer Benefits*, ARIZ. DEP'T OF CORR., REHAB. & REENTRY, <https://corrections.az.gov/correctional-officer-benefits> [<https://perma.cc/DAR3-SNZQ>] (last visited Dec. 11, 2023).

158. *Arizona State Employees*, OPEN THE BOOKS, [https://www.openthebooks.com/arizona-state-employees/?F\\_Name\\_S=Shinn&Year\\_S=0&F\\_Min\\_Amount\\_S=47259&F\\_Max\\_Amount\\_S=397921.4&Emp\\_S=Arizona%20Department%20of%20Corrections](https://www.openthebooks.com/arizona-state-employees/?F_Name_S=Shinn&Year_S=0&F_Min_Amount_S=47259&F_Max_Amount_S=397921.4&Emp_S=Arizona%20Department%20of%20Corrections) [<https://perma.cc/GA3G-P455>] (last visited Dec. 11, 2023).

“matrix” for fines against individuals.<sup>159</sup> The FDIC’s fine matrix assesses multiple factors such as intent, previous misconduct, attempted concealment, and number of current misconduct instances, among others.<sup>160</sup> These factors are each assigned a numerical weight which reflects the importance of the factor in the fining decision.<sup>161</sup> The violating individual is then scored on each factor on a scale from zero to four.<sup>162</sup> For example, the intent factor is measured on a *mens rea* scale where good faith has a score of zero, negligence a score of two, willful disregard a score of three, and bad faith a score of four.<sup>163</sup> The factor score is multiplied by the factor weight, giving a final point value for each factor.<sup>164</sup> The point values of all factors are then added, and this point total is then used to determine an appropriate fine.<sup>165</sup>

The FDIC’s matrix and other administrative fining guidelines provide a robust foundation for courts fashioning an individual fine calculation. This Comment proposes that courts create their own matrix that closely tracks that of the FDIC’s. The factors on this matrix should, in descending order of weight, include at least: level of harm to the prisoner, intent of the violating individual, and previous misconduct. Like the FDIC’s scheme, the factor score would be multiplied by the weight to generate a final point value. However, the FDIC does not include ability to pay in their matrix, but rather assesses ability to pay only after a fine range has already been determined<sup>166</sup>—this is where a court’s matrix should diverge. Final point values should correlate to a percentage of salary, from which the ultimate fine would be calculated.

As a simple illustration of how a court’s matrix could apply in a certain case, imagine that, after a court has determined non-compliance with a settlement that requires adequate healthcare, both a corrections officer and a director are implicated in a prisoner complaint of denial of adequate medical care. The court determines the veracity of the complaint, applies the modified qualified immunity standard, and rules that qualified immunity does not apply. The court would then turn to its individual fine matrix. Let us say that this particular fine matrix attaches a weight of three to the level of harm to the prisoner, a weight of two to the violating individual’s intent, and a weight of one to previous misconduct. This matrix also provides factor scores from zero to four. For simplicity, let us assume that the court has settled on a score of two for each factor, and for each defendant. Thus, after multiplying the weight and the scores of a factor and adding all factors’ results, both the correctional officer and the director each have a point total of twelve each, out of a possible point range of zero to twenty-four.

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159. FED. DEPOSIT INS. CORP., FORMAL AND INFORMAL ENFORCEMENT ACTIONS MANUAL: RESTITUTION AND CIVIL MONEY PENALTIES 9-8 to -16 (2022). The FDIC is “an independent agency of the federal government.” *What We Do*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/what-we-do/index.html> [<https://perma.cc/FU7H-LEX7>] (last visited Dec. 11, 2023).

160. FORMAL AND INFORMAL ENFORCEMENT ACTIONS MANUAL, *supra* note 159.

161. *Id.* at 9-14 to -15.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 9-8.

These point totals would indicate the percentage of salary which will determine the fine amount. Our imagined matrix might, for example, separate point values into ranges of one to four, five to eight, nine to twelve, and so on to twenty-four. Every point range would be assigned a percentage of salary that will constitute the fine. The fine should be large enough to create a deterrent effect, but it should also be a manageable fee when compared to salary. Thus, a point range of one to four might be assigned 0.05% of salary, a point range of five to eight 0.1% of salary, and so on. Our correctional officer and director, finding themselves in the nine to twelve range, would each face a fine of 0.15% of their salary. Assuming that the correctional officer makes \$40,000 per year, the fine that the officer pays is \$60; assuming that the director makes \$200,000 per year, the fine that the director pays is \$300.<sup>167</sup> Ideally, fines would be paid to the harmed prisoners' commissary accounts or held in trust to be paid upon release.<sup>168</sup>

Overall, a partial abrogation of qualified immunity that better vindicates the rights of prisoners would involve both a reconceptualization of the "clearly established" prong and incorporate smaller fines to be paid by the offending individuals.

## 2. *Modification of the Deliberate Indifference Standard*

Deliberate indifference developed in the context of qualified immunity in Eighth Amendment claims.<sup>169</sup> To succeed on an Eighth Amendment claim, a prisoner must not only show harm, but also defeat an official's claim to qualified immunity by demonstrating that the official acted with deliberate indifference.<sup>170</sup> The deliberate indifference standard requires the satisfaction of two elements: (i) that "the official knows of . . . an excessive risk to inmate health or safety," and (ii) that the official "disregards [that] risk."<sup>171</sup> In other words, not only must "the official . . . be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but they "must also draw the inference."<sup>172</sup>

The Supreme Court justified this reading of the deliberate indifference standard by an examination of the text of the Punishments Clause: "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments' . . . an official's failure to alleviate a significant risk that he should

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167. These values are, of course, only for illustration, and do not necessarily represent an optimal fine. Percentages should be adjusted by the court to reflect optimal fines that balance ability to pay with deterrent effect.

168. A commissary account is the account through which a prisoner makes purchases of discretionary items sold by the correctional facility. See *How Does the Prison Commissary System Work?*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-prison-comm-issary/> [https://perma.cc/R2GF-VPP9] (last visited Dec. 11, 2023).

169. See Peter Diliberti, *Cementing Good Law by Tolerating Bad Outcomes: Examining the Eighth Circuit's Commitment to Upholding the Defense of Qualified Immunity for Prison Officials in Kulkay v. Roy*, 59 B.C. L. REV. 297, 299–303 (2018) (explaining the deliberate indifference standard as intricately tied to Eighth Amendment claims, as well as one way for prison authorities to prevail on a qualified official immunity claim).

170. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

171. *Id.* at 837.

172. *Id.*

have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment.”<sup>173</sup> This requirement of actual awareness functions to remove all but the grossest negligence from the realm of deliberate indifference; “[i]t is not enough merely to find that a reasonable person would have known or that the defendant should have known” that the risk was present or material.<sup>174</sup> Instead, the deliberate indifference standard is akin to “recklessly disregarding [a] risk.”<sup>175</sup>

As noted by the Court in *Farmer v. Brennan*, simply using the term “reckless” does not solve the problem.<sup>176</sup> Two competing definitions could be used: one from criminal law, and one from civil law.<sup>177</sup> While criminal recklessness typically requires actual knowledge of a risk, civil recklessness encompasses a risk that is known or is “so obvious that it should be known.”<sup>178</sup> Ultimately, the Court chose the criminal definition to standardize the level of culpability required for a finding of deliberate indifference.<sup>179</sup> Because the criminal definition of recklessness does not contemplate the civil law’s reasonable person standard—in other words, because the criminal definition does not encompass events or conditions that *should* be recognized as risks—it provides more latitude for officials to act unreasonably and it affords less protection to prisoners. The most obvious proposal for modification, then, is to employ the civil standard of recklessness rather than the criminal standard.

An illustration using the facts in *Estelle* is instructive on this point.<sup>180</sup> Remember that in that case, prisoner-respondent Gamble injured his back while unloading a truck.<sup>181</sup> Taking as true the allegations in the complaint,<sup>182</sup> a shortened version of the story goes like this: on that day, November 9th, Gamble continued to work for four hours and was then sent to the prison’s hospital due to complaints of stiffness.<sup>183</sup> After he was checked for a hernia and sent on his way, he was still in such intense pain that he had to return to the hospital that same day.<sup>184</sup> The next day, a physician at the prison diagnosed Gamble with lower back strain, prescribed medication, and excused him from work.<sup>185</sup> Gamble continued to suffer back pain over the following months, such that he could not work.<sup>186</sup> On January 31st of the following year,

Gamble was placed in solitary confinement for prolonged periods as punishment for refusing to perform assigned work which he was physically unable to perform. The only medical evidence presented to the disciplinary committee was the statement of a medical assistant that he was in first-class condition, when in fact he was suffering

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173. *Id.* at 837–38.

174. *Id.* at 843 n.8.

175. *Id.* at 836.

176. *See id.*

177. *See id.* at 836–37.

178. *Id.*

179. *See id.* at 837.

180. *See supra* text accompanying notes 37–39.

181. *Estelle v. Gamble*, 429 U.S. 97, 99 (1976).

182. *Id.* (“Because the complaint was dismissed for failure to state a claim, we must take as true its handwritten, pro se allegations.”).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 99–101.



not only from the back sprain but from high blood pressure. Prison guards refused to permit him to sleep in the bunk that a doctor had assigned. On at least one occasion a medical prescription was not filled for four days because it was lost by staff personnel. When he suffered chest pains and blackouts while in solitary, he was forced to wait 12 hours to see a doctor because clearance had to be obtained from the warden.<sup>187</sup>

Gamble was, in fact, experiencing not only back pain, but irregular cardiac activity.<sup>188</sup>

Let us change the procedural backdrop of *Estelle* for the purposes of illustration. As we did in our hypothetical application of the proposed fine matrix in the context of a reworked “clearly established” prong, let us again imagine that a settlement requiring adequate healthcare is already in place, and that Gamble’s complaints arose after it.<sup>189</sup> Gamble takes his complaint of inadequate healthcare violative of the Punishments Clause to the court which approved the settlement. He alleges that the correctional officers subjected him to cruel and unusual punishment when they refused to follow the doctor’s directions regarding his bunking arrangement and when they delayed getting him to a doctor when he was experiencing cardiac symptoms. The correctional officers would, of course, claim qualified immunity. If prison officials have previously demonstrated non-compliance with the settlement, the court will determine whether the prison staff are entitled to qualified immunity using the modified standard of deliberate indifference, rather than the usual criminal recklessness standard.

Under the usual standard, the court would simply ask whether the correctional officers had actual knowledge of the risk of causing further pain and suffering to Gamble by their refusal to follow his doctor’s orders and by their delay in cardiac treatment. Gamble must now contend with the issue of deliberate indifference that the officer and the director will raise. They will argue that, because they are not medical professionals and have never had formal medical education, they had no actual knowledge of either the severity and extent of the injury to Gamble’s back or of his heart problem. The officer and the director may have been “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,” but if they failed to “draw the inference,” they cannot be held responsible.<sup>190</sup> They will argue that their lack (whether real or feigned) of actual knowledge means that they did not act with deliberate indifference, and they are therefore entitled to qualified immunity.

Using the typical measure of criminal recklessness in applying the deliberate indifference standard, a court would likely find no deliberate indifference in this case.<sup>191</sup> It is true, after all, that both the officer and the director lack formal medical education; therefore, it is likely that neither had *actual* knowledge of the risks of delaying or denying care for Gamble’s back injury or heart problem. Deliberate

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187. *Id.* at 109–10 (Stevens, J., dissenting).

188. *Id.* at 101.

189. *See supra* Section III.A.1.

190. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

191. The Supreme Court did not decide whether prison employees were deliberately indifferent in this case. *See Estelle*, 429 U.S. at 108.

indifference is thus not found, and qualified immunity is granted to the officers—no matter how unreasonable their conduct. Gamble’s Eighth Amendment rights remain unvindicated.

If the court instead used a modified deliberate indifference standard which incorporated the civil definition of recklessness, deliberate indifference would likely be found. The defendants would be required to claim that, not only did they have no actual knowledge of the risk, but that the risk was also not so obvious that it should have been known.<sup>192</sup> The officer and the director now face both a subjective standard and an objective standard. It would be difficult to argue that a reasonable person would not recognize that medical care is required for a prisoner reporting such severe back pain that he cannot work, even with the threat of solitary confinement as punishment for not reporting to work. It would be even more difficult to argue that a reasonable person would not recognize that chest pain and blackouts require immediate medical attention that cannot be put off for twelve hours. A court would thus be more inclined to find deliberate indifference and deny qualified immunity to prison employees on a civil recklessness standard. This is a more reasonable outcome that better vindicates Gamble’s Eighth Amendment rights, because it does not allow defendants to claim qualified immunity when they have acted unreasonably.

### 3. *Loosening the Restrictions of the Prison Litigation Reform Act*

In the mid-1990s, legislative concern regarding the number of suits brought by prisoners reached a fever pitch as inmate suits became “one of the largest categories of all Federal civil filings.”<sup>193</sup> Congress began to work on the PLRA, a solution to what it regarded as a prisoner filing frenzy—meaning that, in its view, too many inmates were resorting to the courts regarding prison conditions.<sup>194</sup> While it is certainly true that many of these filings had no basis in law and were often dismissed for failure to state a claim,<sup>195</sup> the PLRA is an enormously overbroad response to the problem. As constitutional scholar Erwin Chemerinsky noted before the PLRA was enacted, a prisoner’s only recourse against poor conditions or treatment is to seek

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192. See *Farmer*, 511 U.S. at 836–37.

193. Ashley Dunn, *Flood of Prisoner Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1. One senator’s ill-informed statement on the Senate floor well illustrates legislators’ attitudes at the time: “[T]he result of such litigation is that violent criminals are freed to prey on more victims, and that, I think, brings all of our social institutions into disrepute . . . . An endless flood of prisoner lawsuits alleging prisoner rights . . . fatally undercuts the fundamental purpose of incarceration.” *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the S. Comm. On the Judiciary*, 104th Cong. 5 (1995) (statement of Sen. Spencer Abraham). Senator Abraham’s unfortunate comment conflates the redressing of unconstitutional prison conditions with the actual release of prisoners, and suggests that prisoners deserve to live in a setting that provides only punishment, not rehabilitation.

194. See, e.g., Jason E. Pepe, *Challenging Congress’s Latest Attempt to Confine Prisoners’ Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 62 (1999) (“The PLRA was a reaction to Congress’s perception that the ‘civil justice system is overburdened by frivolous prisoner lawsuits.’”) (quoting 141 CONG. REC. S18136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch)).

195. See Dunn, *supra* note 193 (quoting a federal judge who estimated that “70 percent of [civil filings by prisoners] don’t even state a complaint on which relief can be granted.”).

relief from a court.<sup>196</sup> Chemerinsky agreed that frivolous suits did indeed exist, but questioned the PLRA's effect: "if you take away the prisoners' ability to sue, they will have no place to go. Is that what we really want?"<sup>197</sup>

It may not be what we wanted, but it is what we got: Congress passed, and President Clinton signed, the PLRA in 1996.<sup>198</sup> In general, the PLRA "makes court orders less effective" by "shortening the lifespan of court orders and making it easier for them to be terminated."<sup>199</sup> Specifically, the PLRA requires prisoners to exhaust the grievance process before filing a complaint in court<sup>200</sup> and makes prisoners ineligible to file *in forma pauperis*.<sup>201</sup> The PLRA as a whole, and these two requirements in particular, work to create a patently unjust system which "singles out prisoners for a unique set of barriers to vindicating their legal rights in court."<sup>202</sup>

Like official immunity and deliberate indifference, the PLRA has been subject to much criticism across the years.<sup>203</sup> Professor Susan A. Herman notes that "[i]f [prisoners] lose their cases, they cannot be excused from paying costs and may also lose good time credit, extending their incarceration; however, if they win their cases, they, unlike all other litigants, will not be allowed to collect costs."<sup>204</sup> Injustices such as this have led one commentator to observe that the PLRA "is explicitly dedicated to creating unequal justice under law," in direct opposition to the putative American value of equal justice.<sup>205</sup> In fact, the Human Rights Watch "is not aware of any other country" which subjects prisoners to different filing requirements than the rest of its citizens.<sup>206</sup>

Besides acting as a barrier to justice, the PLRA also works to blind the public to horrific prison conditions.<sup>207</sup> Because lawsuits generate public records, and because the PLRA makes meritorious claims easier to dismiss, "[d]angerous living

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196. *Id.*

197. *Id.*

198. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POLICY INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html) [<https://perma.cc/L8AW-UYL2>]. Though the PLRA only applies to federal suits, many states have passed their own versions of the Act which mirror its substance. *See, e.g.*, 42 PA. CONS. STAT. §§ 6601-08 (2022); WIS. STAT. § 801.02(7) (2022).

199. Fenster & Schlanger, *supra* note 198.

200. 42 U.S.C. § 1997e(a). Interestingly, the PLRA also provides that "[t]he failure of a State to adopt or adhere to an administrative grievance procedure" does not constitute an actionable claim. *Id.* § 1997e(b). Alabama is the only state which does not have a "general" grievance system. *See KAUL ET AL.*, *supra* note 80, at 4.

201. Fenster & Schlanger, *supra* note 198.

202. *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH (June 16, 2009), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states> [<https://perma.cc/T675-QSMK>].

203. *See generally, e.g.*, Pepe, *supra* note 194; Susan A. Herman, *Slashing and Burning Prisoner's Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998).

204. Herman, *supra* note 203, at 1230.

205. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 429 (2001).

206. *No Equal Justice, supra* note 202.

207. Easha Ananad et al., *How the Prison Litigation Reform Act Has Failed for 25 Years*, THE APPEAL (Apr. 26, 2021), <https://theappeal.org/the-lab/explainers/how-the-prison-litigation-reform-act-has-failed-for-25-years/> [<https://perma.cc/X4BL-TAQA>].

conditions . . . beatings and rape, [and] disastrous healthcare” are effectively hidden from the public, making advocacy and reform efforts all the more difficult.<sup>208</sup>

Additionally, there is evidence that the PLRA has failed to achieve the goal of separating frivolous lawsuits from meritorious ones:

Presumably, there would have been at least some increase in the rate of successful civil rights lawsuits by incarcerated plaintiffs. Not so. Instead, the success rate of civil rights lawsuits for incarcerated plaintiffs steadily dropped after the enactment of the PLRA and despite a recent uptick is nearly identical to the success rate pre-PLRA.<sup>209</sup>

This supports the idea that there is an unstated purpose of the PLRA that is more sinister: to block even meritorious claims in an effort to clear court dockets.<sup>210</sup>

When a prison system has demonstrated non-compliance with a settlement, a court should be able to impose less stringent filing requirements than does the PLRA. Less stringent filing requirements would make it easier for a court to detect and address further non-compliance because more prisoner suits would make it to the courthouse. A proposed loosening of the strictures of the PLRA must alter at least two impositions that are regarded as most significantly hampering meritorious prisoner suits: the exhaustion provision and the ineligibility of prisoners to file *in forma pauperis*.<sup>211</sup>

#### *a. Exhaustion*

At first blush, the exhaustion requirement seems like good sense: the prison grievance system is, in part, meant to provide prisoners with relief from conditions that they believe violates their rights, so of course a prisoner should use this internal check on prison authorities before filing a complaint and using up judicial resources.<sup>212</sup> A closer look reveals, however, that the exhaustion requirement is not so simple—the Supreme Court has ruled that, in addition to resorting to the grievance system, prisoners must comply with all of the highly technical and often absurd rules governing the individual prison’s grievance process.<sup>213</sup> This results in the dismissal of meritorious cases on technicalities due to procedural rules which govern the admission of a grievance.<sup>214</sup>

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208. *Id.*

209. *Id.*

210. *See id.*

211. *Id.*

212. Jack Ryan, *Handling Grievances in a Jail/Detention Setting*, LEGAL & LIAB. RISK MGMT. INST. (Apr. 10, 2009), [https://www.llrmi.com/articles/legal\\_update/jail\\_grievances/](https://www.llrmi.com/articles/legal_update/jail_grievances/) [https://perma.cc/236A-2BHJ].

213. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006). According to the Court, exhaustion ““means using all steps that the agency holds out, and doing so properly.”” *Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (2002)). In so ruling, the Court reasoned that “exhaustion requirements are designed to deal with parties who do not want to exhaust.” *Id.* This statement reflects an inappropriate assumption of bad faith on the part of prisoners.

214. Fenster & Schlanger, *supra* note 198; *see KAUL ET AL.*, *supra* note 80, at 14.

Each state's Department of Corrections is free to promulgate its own procedural rules regarding its grievance system.<sup>215</sup> These rules are often "exacting."<sup>216</sup> Take, for example, a requirement within West Virginia's grievance policy: not only may prisoners write only on one side of one sheet of 8.5 x 11 paper, but they are also barred from using more than "one staple . . . to affix" the paper to the grievance form.<sup>217</sup> Additionally, "[i]nmate[s] may not tear, fold, or affix tape to the forms."<sup>218</sup> Many prison systems demand that only one subject be addressed in each grievance filing, providing that grievances failing to meet this standard will be returned without response; it is unclear "whether or not a prisoner can amend and re-file the grievance if it is rejected on these grounds."<sup>219</sup> Procedural rules such as these can make it particularly difficult for a prisoner to work through the grievance process, and "allows suits to be dismissed . . . when grievances were filed in the wrong color ink or failed to meet incredibly tight deadlines as short as two or three days in some states."<sup>220</sup>

Thus, to alleviate the burden of the PLRA on prisoners, the exhaustion requirement must be adjusted to allow for minor procedural mistakes. A court that has approved a settlement and has determined that prison officials are non-compliant should mandate that the offending prison system is not to reject grievances on technical grounds.

#### b. In Forma Pauperis Ineligibility

The *in forma pauperis* statute, 28 U.S.C. § 1915, is "designed to ensure that indigent persons have meaningful access to federal courts" and relieves poor litigants of many of the costs associated with initiating a civil action.<sup>221</sup> Before the passage of the PLRA, the statute "generous[ly] waive[d] . . . filing fee[s] for indigent prisoners,"<sup>222</sup> who make up the majority of prison populations.<sup>223</sup> The PLRA, though, included a modification of the *in forma pauperis* statute which requires

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215. See KAUL ET AL., *supra* note 80, at 4. As noted above, the state of Alabama does not have a "general" grievance system. *Id.*

216. *Id.* at 13.

217. *Id.*

218. *Id.*

219. *Id.* at 14–15. More egregiously, at least two states—New Jersey and Missouri—provide that "violations of the single-subject rule [are] misuse of the [grievance] system, subject to punishment." *Id.*

220. Fenster & Schlanger, *supra* note 198.

221. Jody L. Sturtz, *A Prisoner's Privilege to File in Forma Pauperis Proceedings: May It Be Numerically Restricted?*, 1995 DETROIT COLL. L. MICH. ST. U. L. REV. 1349, 1358 (1995).

222. Simone Schonenberger, *Access Denied: The Prison Litigation Reform Act*, 86 KY. L.J. 457, 463 (1998).

223. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SELECTED FINDING: INDIGENT DEFENSE (Feb. 1996), <https://bjs.ojp.gov/content/pub/ascii/id.txt> [<https://perma.cc/BG6U-HZ6V>] ("About three-fourths of the inmates in State prisons and about half of those in Federal prisons received publicly-provided legal counsel for the offense for which they were serving time," meaning that a court made an indigency finding that required the appointing of a public defender). Consider the fact that the average prison wage as of 2022 "range[d] from 13 cents to 52 cents an hour." Marsha Mercer, *Advocates Seek to Make Prison Work Voluntary*, STATELINE (Sept. 7, 2022), <https://stateline.org/2022/09/07/advocates-look-to-make-prison-work-voluntary/> [<https://perma.cc/84YE-53L6>]. It is not difficult to conclude that the prisoners adjudged indigent pre-conviction remain indigent post-conviction.

prisoners to “pay the full amount of the filing fee,” which is fifty-five dollars in the federal district courts.<sup>224</sup> The revised statute permits prisoners to pay filing fees on what is essentially “a strictly enforced installment loan agreement.”<sup>225</sup> However, the prisoner may be required to pay the full filing fee up front under the PLRA’s “three strikes” modification to the *in forma pauperis* statute, which states in substance that if a prisoner’s suits have been dismissed three times for frivolity, maliciousness, or failure to state a claim, even meritorious claims may not be filed *in forma pauperis*.<sup>226</sup> Thus, an indigent prisoner who has failed in court three times but now has a legitimate, winning claim essentially has no access to the courts.<sup>227</sup> One commentator captures succinctly the plain injustice of this aspect of the PLRA: “sometimes when prisoners cry wolf, there really is a wolf.”<sup>228</sup>

Thus, a court seeking to modify the stringent filing standards of the PLRA after an institution has demonstrated non-compliance with a settlement should, in addition to barring the rejection of grievances for minor procedural errors, restore the *in forma pauperis* statute to its pre-PLRA posture, properly allowing indigent prisoners to proceed without filing fees.

#### 4. Practical Considerations

##### a. Judicial Application

Each proposed solution would be specifically tailored to meet the needs of cases such as *Jensen*. Thus, each solution would be employed only when prison authorities have failed to comply with a settlement after the court has assessed fines, contempt findings, or both, and each would be subject to judicial oversight. In this context, judicial oversight means that the court would carefully and faithfully monitor prisoners’ claims, taking into account the fact that prison authorities have already demonstrated non-compliance with constitutional norms. The court would, as usual, disallow frivolous claims,<sup>229</sup> but allow meritorious claims under the modified standard(s) to move forward.

*Jensen* provides a hypothetical illustration of how these solutions could work in practice. The settlement was approved by the court in February 2015.<sup>230</sup> Let us imagine that it is now February 2017; prison officials have had two full years to bring the prison into compliance with the Constitution. The class of prisoners who originally instituted the suit bring a non-compliance complaint to the court, and the court imposes the typical sanction(s). Another year passes,<sup>231</sup> and prison authorities

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224. 28 U.S.C. § 1915(b)(1); *District Court Miscellaneous Fee Schedule*, U.S. COURTS (Dec. 1, 2023), <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule> [<https://perma.cc/Z4NP-2RAE>].

225. Schonenberger, *supra* note 222, at 463.

226. *Id.* at 470.

227. *See id.* at 468–69.

228. *Id.* at 469.

229. *See* FED. R. CIV. P. 11(b), 12(b)(6), 41(b).

230. *Jensen v. Shinn*, 609 F. Supp. 3d 789, 797 (D. Ariz. 2022).

231. A year is but an example of a timeline and does not necessarily represent the amount of time in non-compliance for which a court should or would impose the proposed solutions.

still have not brought the institution into compliance. This demonstrates failure to comply with the settlement, which triggers the use of the proposed solutions.

The court may then impose one of the three solutions, all three solutions, or any combination of solutions upon a hearing of the defendants and the aggrieved plaintiffs. The court would issue an order specifying the exact modification to qualified immunity, deliberate indifference, and/or the PLRA that the court is imposing upon the institution. The order would also indicate a definite end date for this modification, not to exceed the amount of time in which officials have been out of compliance with a settlement, but which may be extended upon good cause shown by the plaintiff or class of plaintiffs. Additionally, the order would set the inner and outer limits of judicial oversight regarding these modifications, outlining the standards by which the court will evaluate plaintiffs' claims.

### *b. Congressional Approval*

The Supreme Court could, in theory, alter the doctrines of qualified immunity and deliberate indifference.<sup>232</sup> The Court, however, has seemed to inject qualified immunity straight into its reading of 42 U.S.C. § 1983, the statute which “makes liable state actors who violate constitutional or other legal rights.”<sup>233</sup> While the Court acknowledges that the statute “on its face admits of no defense of official immunity,” it has in the same breath “found immunities” in it.<sup>234</sup> Relying on often-opposing canons of statutory construction, the Court has generally supported this injection by pointing to common law in effect when Section 1983 was enacted, and the legislature’s silence in Section 1983 as to the continuing applicability of that common law.<sup>235</sup> Having convinced itself—on dubious grounds—that qualified immunity comes part and parcel with Section 1983, it seems highly unlikely that the Court will now change its course.<sup>236</sup> Because deliberate indifference is so deeply enmeshed in the Court’s theory of both qualified immunity and Punishment Clause claims generally,<sup>237</sup> this judicial creation seems equally unlikely to evolve in a way

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232. See Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1462 (2022) (“Qualified immunity is an entirely judge-made doctrine . . .”); *Farmer v. Brennan*, 511 U.S. 825, 840 (1994) (“[D]eliberate indifference’ is a judicial gloss, appearing neither in the Constitution nor in a statute.”).

233. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 49 (2018). The statute reads: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” 42 U.S.C. § 1983.

234. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

235. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 56 (1989); see also Baude, *supra* note 233, at 51 (“[T]his [common-law] argument does not withstand historical scrutiny, and the Court has been inconsistent in adhering to it.”).

236. See Beermann, *supra* note 235, at 52–53.

237. See *supra* Sections III.A.1–.2.

that is favorable to prisoner-plaintiffs.<sup>238</sup> It is therefore likely that the federal judiciary would only be able to impose the suggested modifications to qualified immunity and deliberate indifference upon an act of Congress reversing direction on the Supreme Court's application of the doctrines.<sup>239</sup> And since the PLRA is legislation, a congressional change of scope would of course be necessary in order for the judiciary to loosen its requirements.<sup>240</sup>

The United States Congress is, admittedly, not currently poised to completely override official immunity, the deliberate indifference standard, or the PLRA.<sup>241</sup> However, a bill to end qualified immunity has recently been proposed, signaling not only an increasing awareness of the problems with these schemes, but also an increasing willingness to address the problem (at least on the part of some House members).<sup>242</sup> The bill in question reveals a predictable breakdown along party lines.<sup>243</sup> Initially, this breakdown seems to foreclose the possibility of statutory solutions: could Republicans and Democrats come together to pass a bill which incorporates these solutions, especially considering the current polarized state of the nation?

Yet these proposals are neither radical nor impossible to implement. The qualified immunity bill, and similar bills that may be proposed which would remove deliberate indifference and the PLRA from federal law, are considerably broader than the proposed solutions in five ways. First, the proposed solutions would apply only in prison litigation cases. This limitation ensures that government officials will

238. The current Court makeup—three liberal justices to six conservative justices—and the doctrine of stare decisis also come into play here. See *The Political Leanings of the Supreme Court Justices*, AXIOS (July 3, 2023), <https://www.axios.com/2019/06/01/supreme-court-justices-ideology>; *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455–57 (2015) (“Respecting stare decisis means sticking to some wrong decisions.”).

239. State courts need only look to their state legislatures for such an act. See, e.g., Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way To Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/>. State courts also need not wait for the Supreme Court to change direction on qualified immunity or deliberate indifference; indeed, the Montana Supreme Court and the Maryland Court of Appeals have both declined to adopt the defense of qualified immunity in cases that involve “the acts of state employees in violation of state constitutional rights.” *Dorwart v. Caraway*, 2002 MT 240, ¶¶ 60–61, 65, 312 Mont. 1, 58 P.3d 128.

240. See *supra* Section III.A.4.b.

241. See Allison Pecorin, *Why Congress Has Failed to Pass Policing Reform in Recent Years*, ABC NEWS (Jan. 27, 2023), <https://abcnews.go.com/Politics/congress-failed-pass-policing-reform-recent-years/story?id=96723272> (explaining that “there are currently no major efforts in Congress to reform policing,” and past efforts have stalled out due to disagreements about qualified immunity, which encompasses the standard of deliberate indifference); John Boston, *25 Years of the Prison Litigation Reform Act*, PRISON LEGAL NEWS (Aug. 1, 2021), <https://www.prisonlegalnews.org/news/2021/aug/1/25-years-prison-litigation-reform-act/> (“Concerted efforts began early in the Obama Administration to amend or repeal [the PLRA’s] most damaging provisions. Rep. Bobby Davis, D-Va., introduced a reform bill in the House of Representatives, which went nowhere; nothing happened in the Senate. The only successful amendment came a few years later . . . . Whether the present Congress or administration will take up amendment or repeal part or all of the PLRA remains to be seen.”).

242. See Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021) (co-sponsored by forty House Democrats).

243. See *Cosponsors: H.R. 1470—117th Congress (2021-2022)*, <https://www.congress.gov/bill/117th-congress/house-bill/1470/cosponsors> (last visited Dec. 11, 2023).



not be subject to suits by the public at large. Second, the solutions would only be resorted to in circumstances demonstrating non-compliance with settlements, addressing the concern that overzealous judges could impose harsh requirements on a whim. Third, as previously discussed, prison litigation that survives initial motions and results in a settlement represents a minuscule number of cases;<sup>244</sup> this eases the genuine anxiety around judicial overburdening. Fourth, the solutions call only for partial abrogation or modification, rather than doing away with the doctrines entirely; prison officials and employees would not be completely without protection. Fifth, these solutions would be temporary measures for a court to impose on offending officials—they would not be a permanent change in the law. This should dispel concerns of judicial overreach, as the judiciary would not fashion laws to be followed indefinitely but would merely prescribe remedies for constitutional inadequacies using temporary measures.

The narrow scope of the solutions makes the proposal more conservative in nature and, therefore, more amenable to the views of a wider scope of the legislature. Naturally, it may take Congress a number of years to enact such a bill; however, the narrow scope of these solutions would make a proposed bill along these lines pass more easily than a sweeping, comprehensive reform. A thorough eradication of all three laws discussed above would certainly advance prisoners' rights more thoroughly and expeditiously than the proposed solutions, but appears to be, regrettably, unrealistic at the political moment.

### *B. Policy Solution: Enhanced Focus on Prosecutorial Discretion*

Prosecutors can and should help reduce the risk of grossly unconstitutional prison practices by adhering closely to their duty to consider the public's safety.<sup>245</sup> This duty is informed by the duty to pursue alternatives to incarceration for low-level and non-violent offenders.<sup>246</sup> By engaging in careful consideration of recidivism rates when making sentencing recommendations to judges,<sup>247</sup> the prosecuting

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244. See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 163 (2015).

245. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION: FUNCTIONS AND DUTIES OF THE PROSECUTOR § 3–1.2(b) (AM. BAR ASS'N 2017) (“The prosecutor serves the public interest and should act . . . to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.”).

246. U.S. Dep’t of Just., Just. Manual: Non-Criminal Alternatives to Prosecution § 9-27.250, cmt. (2023) <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.000> [<https://perma.cc/U34G-D8QZ>] (“Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to criminal prosecution, on other occasions these alternatives can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions or other measures that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests.”).

247. *Id.* § 9-27.730 (when making sentencing recommendations, prosecutors “should seek a sentence that . . . [p]rotects the public from further crimes of the defendant.”). As discussed below, subjecting low-level and non-violent offenders to prison sentences does not protect the public; rather, reams of scientific and peer-reviewed evidence point towards prison time *increasing* recidivism, a perverse result which has been recognized and criticized in academia since at least the mid-1980s. See, e.g., Francis T. Cullen et

attorney can fulfill both of these duties.<sup>248</sup> This, in turn, will result in a lesser burden on prison systems and thus free up resources to ensure constitutional conditions.<sup>249</sup>

Any focus on public safety is ill-served by condemning large numbers of non-violent offenders to serve time in prisons with poor constitutional practices.<sup>250</sup> As multiple studies indicate, poor prison conditions are directly linked to higher rates of recidivism.<sup>251</sup> The public interest, as well as the punitive interest, is best served by low recidivism rates: not only does a low recidivism rate mean a lower crime rate,<sup>252</sup> but it also indicates that communities and families are functioning well with released individuals who do not pose a significant risk of reoffending and thus can provide more economic and social stability to the group.<sup>253</sup>

About three-quarters of federal prisoners are incarcerated for non-violent criminal activity and have no history of violence.<sup>254</sup> The United States Sentencing Commission reports that the most common type of crime for federal offenders in prison as of January 2022 was drug trafficking: nearly 64,000 out of around 153,000 prisoners.<sup>255</sup> Despite its reputation, drug trafficking is an overwhelmingly non-violent crime.<sup>256</sup> The makeup of prisons is important to note in any discussion of

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al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 49S (Supp. Aug. 2011).

248. Taking recidivism into account both protects the public, Cullen et al., *supra* note 247, and encourages alternative sentencing, U.S. Dep't of Just., Just. Manual: Non-Criminal Alternatives to Prosecution, *supra* note 246.

249. See *Solutions*, ACLU, <https://www.aclu.org/other/solutions> [<https://perma.cc/MKQ6-Y4KT>] (last visited Dec. 11, 2023) (“It is un-American to stand idly by and tolerate our government locking up so many people . . . . On the front end, [we can improve the criminal justice system] by reducing the number of people who needlessly enter prison in the first place.”).

250. Cullen et al, *supra* note 247; U.S. Dep't of Just., Just. Manual: Non-Criminal Alternatives to Prosecution, *supra* note 246.

251. E.g., Francesco Drago et al., *Prison Conditions and Recidivism*, 13 AM. L. & ECON. R. 103, 103 (2011) (“[A]ll point estimates suggest that harsh prison conditions increase post-release criminal activity.”). See generally Cullen et al., *supra* note 247.

252. Indeed, recidivism rates are calculated using crime rates. See *Recidivism*, NAT'L INST. OF JUST., <https://nij.ojp.gov/topics/corrections/recidivism> [<https://perma.cc/H53N-HHAP>] (last visited Dec. 11, 2023).

253. See ALEXANDER, *supra* note 4, at 220 (“[M]any people labeled criminals still[] manage to care for and feed their children, hold together marriages, obtain employment, and start businesses. Perhaps most heroic are those who, upon release, launch social justice organizations that challenge the discrimination formerly incarcerated people face and provide desperately needed support for those newly released from prison.”).

254. THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1, <https://static.prisonpolicy.org/scans/sp/federalprison.pdf> (last visited Oct. 15, 2023). The author uses this data rather than data from the Department of Justice (DOJ) because DOJ data combines violent offenses with multiple offenses, creating a skewed metric for measuring violence. See FAMILIES AGAINST MANDATORY MINIMUMS, ARE ALL DRUG OFFENDERS REALLY VIOLENT?: A SNAPSHOT OF FEDERAL DRUG OFFENDERS & THEIR SENTENCES, <https://famm.org/wp-content/uploads/Factsheet-Are-All-Drug-Offenders-Violent.pdf> (last visited Dec. 11, 2023).

255. UNITED STATES SENTENCING COMMISSION, QUICK FACTS: FEDERAL OFFENDERS IN PRISON—JANUARY 2022 (2022), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP\\_January2022.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2022.pdf).

256. FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 254, at 45 (“[D]ata show that while most federal drug traffickers are not violent or major dealers and kingpins, they still receive lengthy, expensive prison terms . . . . Of the approximately 19,400 federal drug offenders sentenced in [fiscal year] 2016 . . .

prison practices, not because lower-level offenders inherently deserve more humane treatment than higher-level offenders, but because prison makeups both highlight America's aggressive approach to incarceration and implicate prosecutorial practices. Our nation's eagerness to put nonviolent offenders behind bars compounds the risk and occurrence of constitutional violations by overcrowding and the resultant strain on prison administration.<sup>257</sup> Because non-violent offenders make up a great percentage of the prison population, limiting the number of prison sentences for this group could have a drastic effect on population levels, which in turn can have a positive impact on prison conditions generally.

#### CONCLUSION

Overall, the interests and values underlying the Eighth Amendment can and should be better served than by the failing methods in use now. Settlements between prison authorities and prisoners are especially ill-equipped to enforce constitutional rights in penal institutions. Judicial remedies which account for the reality that such settlements can easily be violated, and which provide protection against this failing, are more likely to result in prison conditions that are constitutionally up to par. Partially abrogating qualified official immunity, modifying the deliberate indifference standard, and reforming the PLRA would better protect the Eighth Amendment rights of prisoners. Enhanced prosecutorial focus on the conditions of prison would also contribute to ensuring constitutional prison conditions. Of course, the possibilities included in this Comment are not exhaustive; creative legal minds will see other paths forward. Perhaps we will live to see a day of outright liberation; and perhaps while we continue to demand its arrival, we can strive to affirmatively address at least some of the current suffering that is so plentiful in our prisons.

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82% had no weapon involved in the crime . . . [and] [o]nly 86 cases (0.4%) resulted in serious bodily injury or death to another person.”)

257. Overcrowding can itself constitute an Eighth Amendment violation. *See* *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (concluding that overcrowding which “forced [prisoners] to sleep in garages, barber shops, libraries and stairwells; and . . . dormitories without any toilet and shower facilities . . . [including] the housing of two men within a little 35-40 square foot ‘cubbyhole’” was *per se* unconstitutional). However, overcrowding is more likely to lead to other constitutional violations than to constitute a separate violation itself. *See, e.g.,* *Brown v. Plata*, 563 U.S. 493, 545 (noting that, as a result of prison overcrowding, “medical and mental healthcare provided by California’s prisons [fell] below the standard of decency that inheres in the Eighth Amendment.”).