Suffolk Journal of Trial and Appellate Advocacy

Volume 27 | Issue 1 Article 7

1-1-2022

Well, At Least They Tried: Deliberate Indifference As Prison Officials' Liability Scapegoat For Objectively Inhumane Prison Conditions During COVID-19

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WELL, AT LEAST THEY TRIED: DELIBERATE INDIFFERENCE AS PRISON OFFICIALS' LIABILITY SCAPEGOAT FOR OBJECTIVELY INHUMANE PRISON CONDITIONS DURING COVID-19[1]

"The Constitution requires that prison officials and governments protect incarcerated people from the inevitable continued spread of Covid-19 behind bars . . . . Some of the 95 percent of people in prisons who have been left behind have taken to the courts. While their options are generally to request release or seek improvements to conditions, they face a gauntlet of legal obstacles to enforce their constitutional rights in federal court."[2]

I. INTRODUCTION

On March 15, 2020, Anthony Cheek—an incarcerated man having served eighteen years of his twenty-year sentence—suddenly passed out while in the gym.[3] Cheek called his mother only five days prior complaining of flu-like symptoms, but the forty-nine-year-old assured his mother he was on the mend.[4] That was the last time Cheek's mother ever heard from her son, as Cheek soon became the first incarcerated person[5] to die during

[1] Given the ever-changing nature of the COVID-19 virus, this Note focuses exclusively on the height of the virus, specifically between March 2020 and January 2021. The rate of infection and death in prisons decreased dramatically following many states' issuance of the COVID-19 vaccine in prisons. As such, this Note will not address the conditions of confinement following the vaccination. For currently up to date statistics on COVID-19 in prisons, please see https://covidprisonproject.com/.

[2] Taryn A. Merkl & Brooks Weinberger, *What's Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. FOR JUST. (July 22, 2020), https://www.brennancenter.org/our-work/research-reports/whats-keeping-thousands-prison-during-covid-19 (describing cases brought to federal court resulting from inadequate medical conditions in prison).

[3] *See* Joshua Sharpe & Christian Boone, *Ga. inmate dies from COVID-19 as virus hits more prisons*, THE ATL. J.-CONST. (Mar. 27, 2020), https://www.ajc.com/news/local/breaking-inmate-dies-from-covid-outbreak-worsens-prison/TzQZL4uXfK4GzH9ebSFNQN/ (reporting first incarcerated death during COVID-19).

[4] *See id.* (highlighting conversation between Cheek and mother before Cheek's death).

[5] In conjunction with The Marshall Project's "The Language Project," this Note uses the term "incarcerated persons," or similar phrases, to refer to individuals currently in confinement. The Language Project is committed to using language intentionally to prevent the dehumanizing usage of terms such as "inmate," "felon," and "offender," which define human beings by their crimes and punishments. *See* Lawrence Bartley et al., *The Language Project*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2021/04/12/the-language-project (last visited Aug. 8, 2021). The Language Project asserts that, "[w]ords like 'inmate,' 'prisoner,' 'convict,' 'felon'

the COVID-19 pandemic ("COVID-19").[6] At the time of Cheek's death, incarcerated persons at Lee State Prison in Georgia were regularly denied medical treatment for COVID-like symptoms, confined in cells with six other individuals, given "tiny" cups of anti-bacterial soap sporadically, and were only required to wear masks discretionarily.[7]

These types of conditions were not abnormal for detention facilities during COVID-19; thus, given the rapid deterioration of prison conditions the pandemic, the 2.12 million[8] incarcerated persons in the United States were routinely subjected to inadequate protection from illness and death during the height of the virus.[9] One incarcerated person writes,

> [t]o say that I am concerned about my health is an understatement. I feel trapped and helpless in this prison. No matter what I do to protect myself. I am at the mercy of others and can only hope they wear their masks and socially distance. Some [incarcerated persons] follow the rules.

and 'offender' are like brands. They reduce human beings to their crimes and cages." *See* Lawrence Bartley, *I am Not Your 'Inmate'*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate (last visited Aug. 8, 2021). Of note, the author has also altered all quotations in the piece to reflect this language adjustment.

[6] *See* Sharpe & Boone, *supra* note 3 (noting Cheek's death as first COVID-19 death).

[7] *See id.* (summarizing incarcerated persons complaints at Lee State Prison). Unsurprisingly, prison officials actively rejected the "inadequate conditions" narrative incarcerated persons at Lee State Prison attempted to paint; notably, the Georgia Department of Corrections spokeswoman pointed to the agency's website in denying this narrative, indicating that the website said the prison had increased soap supply, halted visitation, and eliminated the typical $5 medical co-pay for inmates. *See id.* (providing agency response to incarcerated persons' complaints).

[8] *See Countries with the largest number of prisoners per 100,000 of the national population, as of May 2021*, STATISTA, https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/ (last visited Nov. 15, 2021) (stating number of incarcerated persons in United States).

[9] *See The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/virus/virusresponse.html (last updated Nov. 1, 2021) (reviewing jail and prison release conditions in wake of COVID-19 pandemic). Although many factors contribute to the increasingly worsening state of prisons and jails during COVID-19, the rapid deterioration and influx of cases in these facilities is often largely attributed to the concept of "jail churn." *See Local Jails: The real scandal is the churn*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/pie2019_jail_churn.html (last visited Oct. 10, 2021). "Jail Churn" refers to the rapid movement of individuals in and out of jails, largely related to the United States increased rates of mass incarceration. *Id.* This consistent introduction and removal of individuals in jails exposes incarcerated persons to additional modes of contraction, thereby promoting the rapid spread of COVID-19. *Id.*

> Some do not. Some don't care because they are never going home. *But I am*.[10]

Other incarcerated persons have commented on the poor living conditions during COVID-19—which further exacerbated the spread of the virus regionally—with one person writing to his wife, "I can tell you right now, with nearly 100% certainty, that I am going to get this virus."[11] He added that incarcerated persons' temperatures had not been checked in over two days, and that even once checked and determined feverish, the sick remained in dorms with dozens of other incarcerated persons, including those who were immunocompromised.[12] Unfortunately, lack of temperature checks and minimal accommodations for immunocompromised individuals were not the full extent of incarcerated persons' exposure while confined.[13] Of incarcerated persons' complaints, they noted that sick and healthy individuals were often haphazardly mixed, they were periodically shipped to different facilities without proper testing, they were refused consistent testing practices, healthy individuals were kept in close confinement with infected persons, and individuals were further exposed to dirty and

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[10] *See* Benny Hernandez, *Will I Die of Coronavirus Before My Release in 100 Days?*, PRISON WRITERS (emphasis added), https://prisonwriters.com/will-i-die-of-coronavirus/ (last visited Mar. 6, 2020). In his letter he adds:

> I hope not to die in the next 145 days. Unfortunately, the possibility of death remains real. In the event of my demise, I ask that my story be told as an example of everything we have gotten wrong with mass incarceration policies. And that my death not be in vain, but serve as a rally cry for those seeking to repair a broken system that routinely discounts the lives of black and brown people. If I happen to make it to December, I look forward to joining the fray or voices as we remake and rebuild the criminal justice system that has too often failed us and our communities.

Id. Hernandez is not alone in his persistent fear of contracting COVID-19—and potential death due to inadequate protection by prison administrators—calling to attention the need for reform. *See id.* (indicating significant agreement among incarcerated persons regarding reform).

[11] *See* Jake Harper, *When Prisons Are 'Petri Dishes,' Inmates Can't Guard Against COVID-19, They Say*, KHN (May 6, 2020), https://khn.org/news/when-prisons-are-petri-dishes-inmates-cant-guard-against-covid-19-they-say/ (introducing story of incarcerated person who has been adversely affected by COVID-19 with little remedy). This incarcerated person is currently suffering from chronic obstructive pulmonary disease (COPD)—the third leading cause of death in the United States—amplifying his constant fear of infection. *See id.*; *see generally* Linda Hepler, *COPD Life Expectancy and Outlook*, HEALTHLINE (Nov. 7, 2018), https://www.healthline.com/health/copd/life-expectancy#conclusion (discussing side effects and complications of COPD).

[12] *See* Harper, *supra* note 11 (articulating fears of contracting virus based on his current conditions).

[13] *See id.* (introducing problematic prison conditions during COVID-19).

unhygienic living conditions while confined.[14] Despite concerning conditions, however, prisons across the country refused to modify their confinement practices, and further prevented the release of individuals to slow the spread.[15]

[14] *See id.* (describing current conditions of confinement as a result of COVID-19). Generally, within prisons, incarcerated persons often complain of dirty and inhumane living conditions. *See Prisons in the United States of America*, HUM. RTS. WATCH PRISON PROJECT, https://www.hrw.org/legacy/advocacy/prisons/u-s.htm (last visited Mar. 6, 2021). While this Note only briefly touches upon the inhumane conditions of confinement, chief complaints among incarcerated persons consist of overcrowding, violence, and sexual misconduct by incarcerated persons and prison staff, isolation, mental illness going untreated, and unhygienic conditions. *Id.* For instance, incarcerated persons have complained of "bugs swarming their food and showers, broken and overflowing toilets. . .being forced to sleep on the floor because of overcrowding. . .mold in the showers and cold food on trays that smelled of mildew." John Seewer, *Inmates sue over what they call inhumane conditions at jail*, AP NEWS (Apr. 24, 2019), https://apnews.com/article/6995620a208245a9a629dbff5ffdd2eb (discussing major complaints among incarcerated persons). Furthermore, incarcerated persons allege that they are "denied medication, personal hygiene items, accommodations for disabilities and medical visits." *Id.* "One [incarcerated person] diagnosed with several mental health disorders said he was denied all of his medication during the first month he was in jail and later received only one of them." *Id.* Additionally, even after being offered medical treatment while incarcerated, incarcerated persons are also challenged to pay for these services. *See The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9 (criticizing medical co-pay practice in prisons in various states).

> In most states, incarcerated people are expected to pay $2-$5 co-pays for physician visits, medications, and testing in prisons. Because incarcerated people typically earn 14 to 63 cents per hour, these charges are the equivalent of charging a free-world worker $200 or $500 for a medical visit. The result is to discourage medical treatment and to put public health at risk. In 2019, some states recognized the harm and eliminated these co-pays in prisons.

Id. As a result of the unsanitary conditions coupled with relaxed guidelines, incarcerated persons are not only subjected to higher rates of disease—including COVID-19—but they can also be outwardly refused medical treatment based on an inability to pay. *See id.* (noting increased rates of disease given lack of access to medical care).

[15] *See* Harper, *supra* note 11 (outlining various state practices regarding release of incarcerated persons during pandemic). Prison Policy Initiative further notes that prisons "[are] releasing almost no one." *The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9. Other commentators on the worsening state of prison conditions remark,

> Despite advocates' early calls for a fast reduction of prison and jail populations, a recent study from the ACLU and Prison Policy Initiative found that the measures taken by governors, prisons officials, prosecutors, and law enforcement have resulted in only a small overall reduction in the prison population, but there have been larger reductions in jail populations. Among 49 states, the total prison population has been reduced by only around 5 percent. The jail population, however, showed a 20 percent median decrease nationwide. But even with people being released, safe social distancing in jail or prison is virtually impossible. And all states have failed to adequately implement policies necessary to prevent the transmission of Covid-19 among their incarcerated populations and staff.

As a result of the inhumane prison conditions maintained by prison administrators during the height of the virus, the rate of both infection and death for incarcerated persons and prison staff significantly increased between March 2020 and January 2021.[16] From March 2020 through January 2021, 366,121 incarcerated persons and prison staff tested positive for COVID-19, with 2,314 of these cases resulting in death.[17] In December of 2020, over four times as many incarcerated persons in the U.S. had COVID-19 as compared to the general population; this resulted in 1 in 5 incarcerated persons infected, while only 1 in 20 members of the general population infected.[18] The rate of infection showed few signs of decreasing during the height of the virus, with the positive test rates increasing by roughly 3% each week.[19] The same extended to the death rate of incarcerated persons, with the death rate increasing by 4% over one week.[20] Federal prisons experienced the highest number of deaths, reporting over 200

Merkl & Weinberger, *supra* note 2; *see also* Claudia Deane et al., *A Year of U.S. Public Opinion on the Coronavirus Pandemic*, PEW RES. CTR. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/a-year-of-u-s-public-opinion-on-the-coronavirus-pandemic/ (indicating public concern for conditions of confinement during COVID-19); Laura Crimaldi, *Advocates ask court to release inmates as COVID-19 sweeps through state prisons*, BOSTON GLOBE (Dec. 24, 2020 1:17 PM), https://www.bostonglobe.com/2020/12/24/metro/advocates-ask-court-release-inmates-covid-19-sweeps-through-state-prisons/ (suggesting worsening conditions require change in prison practices).

[16] *See* Keri Blakinger & Keegan Hamilton, *"I Begged Them To Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, THE MARSHALL PROJECT (June 18, 2020, 7:00 AM), https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps (describing increased rate of infection in prisons due to poor response); *see also* Kim Bellware, *Prisoners and guards agree about federal coronavirus response: "We do not feel safe"*, WASH. POST (Aug. 24, 2020), https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/ (discussing prison staff effects of COVID-19).

[17] *See* Katie Parker & Tom Meagher, *A State-by-State Look at 15 Months of Coronavirus in Prisons*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last updated July 1, 2021) (recording and updating data on COVID-19 infection rates in federal and state correctional facilities). To illustrate the rapid nature of infection, between October 2020 and January 2021, the total number of infected incarcerated persons increased from 161,349 to 366,121. *Id.*

[18] *See* Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. has had COVID-19*, THE MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 (discussing inequities in prisons leading to increased rate of infection); *see also* Giles Clark, *1 in 5 prisoners in the U.S. has had COVID and 1,700 have died*, CNBC (Dec. 18, 2020, 6:31 AM), https://www.cnbc.com/2020/12/18/1-in-5-prisoners-in-the-us-has-had-covid-and-1700-have-died-.html (commenting on disproportionate COVID rate of infection for incarcerated persons).

[19] *See* Schwartzapfel, *supra* note 18 (providing statistical data relating to rate of infection and deaths of incarcerated persons).

[20] *See id.* (confirming death rate among incarcerated persons during COVID-19).

deaths between March 2020 and January 2021.[21] Similarly, every state—with the exception of Vermont—reported incarcerated deaths from COVID-19 during the height of the virus.[22] Of these states, Nevada and New Mexico had the highest rate of death, with both states averaging 43 deaths per 10,000 incarcerated persons in January 2021.[23]

These numbers resulted in higher likelihoods of infection, with incarcerated persons being 5.5 times more likely to contract COVID-19 and 3.3 times more likely to die from the virus, as compared to those who were not incarcerated.[24] In addition to causing higher COVID-19 infection rates in correctional facilities, the willful ignorance with regard to incarcerated persons' health and safety also increased the rate of infection in surrounding neighborhoods.[25] Despite these alarming rates of infection among incarcerated persons and prison staff, the only recourse for incarcerated persons seeking adequate medical care required meeting the Eighth

[21] *See id.* (illustrating state-by-state review of COVID-19 in detention facilities). Interestingly, amidst COVID-19, the Federal Bureau of Prisons changed their policies relating to reporting incarcerated deaths in jails and prisons. Beath Healy, *As Feds Change Rules For Reporting Jail Deaths, Sheriffs Face Less Accountability*, WBUR (Jan. 21, 2021), https://www.wbur.org/news/2021/01/21/jails-deaths-in-custody-reporting-change (remarking on change in BOP policy and adverse effects on incarcerated persons). Under the new policy, the Bureau of Justice Assistance rather than the Bureau of Justice Statistics will track incarcerated deaths, sheriffs and prison officials will report deaths to the medical examiner's office rather than directly to the Department of Justice, and sheriffs will no longer have to file reports on incarcerated persons who die at the hospital. *Id.* These new policies have minimized sheriff accountability, as well as provided deference to prison officials on when to report to medical examiners. *Id.* In one Massachusetts case, an incarcerated person died due to COVID complications in April; however, the medical examiner was not notified until June 5th—a month after the incarcerated person was buried. *Id.*

[22] *See* Schwartzapfel, *supra* note 18 (mentioning equally alarming infection and death rates in state prison facilities).

[23] *See* Parker & Meagher, *supra* note 17 (providing infographics charting infection rate by state).

[24] *See* Alexandra Sternlicht, *Prisoners 550% More Likely to Get Covid-19, 300% More Likely to Die, New Study Shows*, FORBES (July 8, 2020, 5:35 PM), https://www.forbes.com/sites/alexandrasternlicht/2020/07/08/prisoners-550-more-likely-to-get-covid-19-300-more-likely-to-die-new-study-shows/?sh=7367f3593a72 (discussing recent data revealed by UCLA prison study). "Close confinement, limited PPE and increased risk of cardiac and respiratory conditions makes prison populations especially vulnerable to coronavirus, says the report." *Id.*

[25] *See* Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW (July 1, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities (presenting increased infection rates among populations in nearby areas of prisons with high COVID-19 rates).

Amendment's stringent deliberate indifference standard—a near impossible feat—thereby resulting in a lack of any sufficient remedy.[26]

In order to address alleged inhumane medical conditions while confined, incarcerated persons must raise an Eighth Amendment cruel and unusual punishment claim, arguing that prison officials were "deliberately indifferent" to their serious medical needs.[27] To make this determination, courts will apply a two-pronged deliberate indifference test, requiring an objective and subjective assessment of the prison officials' conduct.[28] This two-pronged test, however, has created an inconsistent and arbitrary deliberate indifference standard, effectuating a near impossible burden for incarcerated persons to overcome.[29] As a result of the inconsistent application of this standard throughout federal courts, incarcerated persons are yet again presented with an additional barrier.[30] Through review of historical and modern Eighth Amendment jurisprudence, this Note seeks to assess the federal courts' approach to the deliberate indifference standard when evaluating prison conditions—particularly during unprecedented public health emergencies.[31] After a review of current practices, this Note will propose a new standard for the deliberate indifference test, one that abolishes its subjective element and instead requires an exclusively objective analysis.[32]

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[26] *See The most significant criminal justice policy changes from the COVID-19 pandemic*, *supra* note 9 (analyzing lack of response and its implications). The Eighth Amendment requires both an objective and subjective showing of deliberate indifference, meaning that incarcerated persons must offer evidence of a prison official's "actual knowledge" of the serious medical condition; this often results in a "he said, she said" scenario between incarcerated persons and prison officials. *See* sources cited *infra* notes 63-69 and accompanying text (discussing subjective and objective elements of Eighth Amendment test). As discussed in the foregoing pages, this creates an impossible burden for incarcerated persons, requiring evidence of a subjective disregard for human life, despite objectively inhumane conditions and treatment. *See* sources cited *infra* notes 150-163 and accompanying text (considering practicality of deliberate indifference test). This is particularly difficult given the recency of COVID-19 and the lack of consensus as to appropriate responses. *See* sources cited *infra* note 164-166 and accompanying text (mentioning difficulties of subjective standard during a novel disease).

[27] *See* 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT – ITS DIVISIONS, AGENCIES AND OFFICERS § 7:69. INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD (2021) (describing requirements of Eighth Amendment conditions of confinement requirements).

[28] *See id.* (elaborating further on courts' analyses of deliberate indifference standard).

[29] *See* Merkl & Weinberger, *supra* note 2 (noting difficulties in proving deliberate indifference under subjective standard based on Supreme Court precedent).

[30] *See* INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (outlining inconsistent practices in applying standard among circuit courts).

[31] *See* sources cited *infra* notes 33-43 and accompanying text (providing historical overview of Eighth Amendment).

[32] *See* INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (adding that removal of a subjective analysis will provide for more equitable results).

II. HISTORY

The Eighth Amendment to the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[33] Generally, the Eighth Amendment seeks to prevent government officials from issuing punishments that are "barbaric" or severely disproportionate to the crime committed.[34] Despite this general assessment of the Amendment, the Supreme Court has often referenced the difficulty in properly defining its scope, with Justice Burger noting, "of all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms."[35] As such, the historical origins and development are particularly acute in defining the Amendment's scope today.[36]

A. British Protections and Formative American History

The concept of protection against cruel and unusual punishment dates long before the founding of the U.S. Constitution, with roots in early British governmental structure.[37] Following the tyrannical leadership of King James II in England, the English Parliament ratified a declaration of rights that provided "nor cruell and unusuall Punishments inflicted."[38] Many scholars argue that the inclusion of this language largely stemmed from the trial of Titus Oates, in which the government sought to limit post-conviction sentences.[39] However, other scholars suggest that historical ev-

[33] *See* U.S. CONST. amend. VIII (emphasis added) (providing protections against cruel and unusual punishment).

[34] *See* Micah Schwartzbach, *The Meaning of "Cruel and Unusual Punishment*," NOLO, https://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html (last visited Mar. 6, 2021) (discussing overarching purpose of Eighth Amendment).

[35] *See* Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (noting difficulties in applying Eighth Amendment standards); *see also* Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 665 (2004) (discussing Supreme Court's inability to properly define Eighth Amendment protections).

[36] *See* Schwartzbach, *supra* note 34 (suggesting Eighth Amendment's historical roots require more in-depth interpretation).

[37] *See* Rumann, *supra* note 35, at 670 (discussing British origins of Eighth Amendment in U.S. Constitution).

[38] *See id.* (providing context for introduction of Eighth Amendment and prohibition on cruel and unusual punishment).

[39] *See id.* at 670-71 (indicating trial of Titus Oates as formative event in Eighth Amendment adoption). Titus Oates was convicted in 1685 for perjury that led to numerous executions of people Oates wrongfully accused. *See id.* at 668-71; *see also* Harmelin v. Michigan, 501 U.S. 957, 969 (1991) (presenting historical origins of Eighth Amendment principles); John D. Bessler, *A Century In The Making: The Glorious Revolution, The American Revolution, And The Origins of the Constitution's Eight Amendment*, 27 WM. & MARY BILL OF RTS. J. 989, 1018-19 (2019) (de-

idence points towards inclusion of this language as an effort to prevent torturous methods used to extract confessions.[40]

Predominantly inspired by the English Bill of Rights, Virginia adopted a similar punishment provision in the Virginia Declaration of Rights in 1776.[41] As much of the U.S. Constitution was influenced by the colonies' independent constitutions, Virginia's inclusion of a cruel and unusual punishment clause resulted in the addition of the Eighth Amendment to the federal Bill of Rights during the Constitutional Convention.[42] Since the Bill of Rights' adoption, the Supreme Court has wrestled with determining whether prison conditions, specifically confinement, are considered "punishment" under the Eighth Amendment.[43]

scribing trial of Titus Oates and its Eighth Amendment influences). As a result of Oates' perjury, over twelve Catholic men were executed, and Oates was coined, "the Blackest of Villains that ever lived upon the face of the Earth." *See* Bessler, *supra*, at 1018. However, the judge in Oates' case feared the implications of an execution, considering that a death imposition may deter even honest witnesses from testifying in later cases. *See Harmelin*, 501 U.S. at 970. As a result, Oates was sentenced to imprisonment and an annual public whipping while tied to a moving cart, along with numerous other barbaric punishments. *See* Bessler, *supra*, at 1021-22. Despite the severity of Oates' conduct, his punishments are still cited for their barbarity in contemporary Eighth Amendment jurisprudence. *See, e.g.*, Weems v. United States, 217 U.S. 349, 390 (1910) (discussing scope and power of Eighth Amendment originating from Titus Oates); Ingraham v. Wright, 430 U.S. 651, 665 (1977) (noting "exclusive concern of English version was conduct of judges enforcing criminal law"); Furman v. Georgia, 408 U.S. 238, 274 n.17 (1972) (Brennan, J., concurring) (explaining English provision was intended to restrain the judicial and executive power).

[40] *See* Rumann, *supra* note 35, at 668-70 (considering historical intent of language proposed in Eighth Amendment).

[41] *See id.* at 670 (introducing Virginia's influence on construction and implementation of Eighth Amendment).

[42] *See id.* (outlining timeline for adoption of Eighth Amendment in Bill of Rights). Historically, the inclusion of the Eighth Amendment was also proposed by Virginia during the Virginia Convention, which ratified the U.S. Constitution in 1788. *See* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 170 (Rowman & Littlefield 1992). Two notable Virginians, George Mason and Patrick Henry, were loud advocates for the inclusion of a cruel and unusual punishment limitation on Congress. *See* JOHN PATTERSON, THE BILL OF RIGHTS: POLITICS, RELIGION, AND THE QUEST FOR JUSTICE 84 (2004). Henry added, "[w]hat has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany. . . ." *See Debate in Virginia Ratifying Convention*, THE FOUNDER'S CONST., https://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html (last visited Oct. 21, 2021).

[43] *See* Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishment to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 419 (1994) (rejecting Justice Thomas' assertion that conditions of confinement are outside bounds of Eighth Amendment protection).

B. Current Eighth Amendment Interpretations: Evolving Standards of Decency

As noted by Justice Burger above, defining the scope of what constitutes a "cruel" *and* "unusual" punishment under the Eighth Amendment has been particularly difficult for federal courts.[44] In 1910, the Supreme Court recognized that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided."[45] The Supreme Court has grappled with the term "unusual," having difficulty applying the logic that even if a punishment is inhumane, it may be permissible if it is deemed a "normal" punishment.[46] The Court has since excluded the interpretation of "unusual" in its caselaw, suggesting that the term may have been unintentionally added to the Amendment by the Framers.[47]

Today, the Court is left to determine what constitutes "cruel" under the Eighth Amendment, especially in light of historical punishments that are now seen as inhumane to contemporary society.[48] While many Justices differ, in 1958, the Court adopted an "evolving standards of decency" test, with Justice Burger holding that the cruel and unusual punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[49] In applying the "evolving standards of decency" test, the court assesses the proposed punishment by reviewing both objective and subjective indicia.[50] The "objective indicia" prong re-

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[44] *See* Schwartzbach, *supra* note 34 (mentioning historical difficulties in interpreting terms "cruel" and "unusual" together).

[45] *See* Weems v. United States, 217 U.S. 349, 368 (1910) (acknowledging holes in Eighth Amendment jurisprudence); *see also* Schwartzbach, *supra* note 34 (reviewing early discussions of Eighth Amendment).

[46] *See* Schwartzbach, *supra* note 34 (outlining Court's difficulties in defining term "unusual").

[47] *See* Furman v. Georgia, 408 U.S. 238, 331 (1972) (Marshall, J., concurring) (reiterating term "unusual" was inadvertently included in English Bill of Rights); *see also* Schwartzbach, *supra* note 34 (commenting on early theories of Eighth Amendment interpretation).

[48] *See* Schwartzbach, *supra* note 34 (reviewing historical backdrop of Eighth Amendment tests).

[49] *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (introducing restructuring of Eighth Amendment analysis); *see also* Schwartzbach, *supra* note 34 (discussing new Eighth Amendment test).

[50] *See* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 117 (2018) (explaining scope of evolving standards of decency test). In adopting this test, the Court placed significant emphasis on judicial deference to states and allowing state legislatures to determine appropriate punishments. *See id.* at 116 (outlining history of deference to state legislatures for Eighth Amendment jurisprudence). One scholar argues that this deference was likely afforded to states following the *Furman* decision, where the Supreme Court faced severe backlash for outlawing the death penalty rather than affording states the opportunity to make that determination themselves. *See id.* at 117.

quires the court review societal consensus, namely the number of state and federal governments that permit the punishment.[51] The "subjective indicia" prong utilizes the Court's "own judgment," whereby Justices assess whether the use of punishment at issue may be justified by any theory of punishment (retribution, deterrence, incapacitation, or rehabilitation).[52] Justices place an emphasis on proportionality in their assessments, determining whether they believe that "the punishment is excessive in light of the characteristics of the offender and nature of the crime."[53]

Conversely, originalists on the Court have attempted to interpret the Eighth Amendment as limited to punishments that were historically unacceptable because of their "inherent brutality."[54] Despite this proposed historical approach, the Court has remained consistent with its adherence to

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This background has prompted the Court to adopt the evolving standards of decency test, as it allows for an acknowledgment of state practices. *See id.*

[51] *See id.* at 116 (citing Atkins v. Virginia, 536 U.S. 304, 311-17 (2002)) (describing what Court will review to determine objective indicia). The author notes that this has seemingly resulted in the practice of simply counting the number of state jurisdictions that authorize the punishment, and if less than half authorize the punishment, then it is often considered not in accordance with societal standards. *Id.* The Court has also incorporated international norms in their considerations, but this is frequently met with backlash by originalist Justices. *See id.* at n.58; *see also* Roper v. Simmons, 543 U.S. 551, 625-28 (Scalia, J., dissenting) (discussing improper use of international norms in Eighth Amendment analysis).

[52] *See* Berry, *supra* note 50, at 117 (citing Coker v. Georgia, 433 U.S. 584, 597 (1977)) (providing "subjective indicia" analysis utilized by the Court).

[53] *See id.* at 118 (citing Kennedy v. Louisiana, 554 U.S. 407 (2008)) (indicating theories of punishment most utilized by the Court, particularly proportionality). Under this test, the Court has deemed unconstitutional the death penalty for "rapes, for some felony murder crimes, or where the offender is intellectually disabled or a juvenile." *See id.* (listing unconstitutional punishments under evolving standards of decency test).

[54] *See* Schwartzbach, *supra* note 34 (introducing originalist approach to Eighth Amendment analysis); *see also* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 N.W. U. L. REV. 1739, 1742 (2008) (remarking on Scalia's approach to Eighth Amendment assessments as prohibiting "only certain inherently cruel forms of punishment"). Many scholars, in following an originalist interpretation to the Constitution, argue that the "evolving standards of decency" test promotes far too much inconsistency in the Eighth Amendment jurisprudence. *See* Stinneford, *supra*, at 1741.

> The Court's decisions with respect to the death penalty have been no more consistent than its non-death penalty proportionality jurisprudence. In Stanford v. Kentucky, for example, the Court ruled that execution of sixteen-or seventeen-year-old murderers was not cruel and unusual punishment per se. Sixteen years later, in Roper v. Simmons, the Court ruled that it was. Similarly, in Penry v. Lynaugh, the Court held that execution of the mentally retarded was not necessarily cruel and unusual. Thirteen years later, in Atkins v. Virginia, the Court held that it was. As these results indicate, in recent decades, the *Supreme Court's prior decisions as to the scope and application of the Cruel and Unusual Punishments Clause have been poor indicators of what the Court will do in the future.*

Id. (emphasis added) (critiquing inconsistent application of evolving standards of decency test).

the evolving standards of decency test, oftentimes applying modern public opinion to its Eighth Amendment interpretations.[55] Thus, in applying Eighth Amendment protections today, the Court has placed a particular emphasis on ensuring that basic dignity, considering the time period, is respected.[56]

C. The Eighth Amendment in Prisons: The Court's Construction of the "Deliberate Indifference" Test

The Supreme Court's Eighth Amendment jurisprudence has frequently evolved over time, periodically widening its latitude to restrict inhumane practices by government officials.[57] The Supreme Court has been expansive in their definition of punishment, determining that the scope of the Eighth Amendment may extend beyond the mere infliction of punishment, and instead holding that the Eighth Amendment may also be implicated based on the conditions of confinement.[58] Unsurprisingly, the Supreme Court has qualified this expansion, noting that "harsh conditions of confinement may constitute cruel and unusual punishment, *unless such conditions are a part of the penalty that criminal offenders pay for their offenses against society*."[59]

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[55] *See, e.g.*, *Coker*, 433 U.S. at 597 (holding death penalty as punishment for rape unconstitutional because only one state authorized that sentence); *Atkins*, 536 U.S. at 311-12 (holding death penalty for intellectually disabled unconstitutional based on modern trend); *Roper*, 543 U.S. at 578 (holding death penalty for minors unconstitutional based on trend towards death penalty abolition).

[56] *See* Schwartzbach, *supra* note 34 (assessing importance of context and time period in Eighth Amendment analyses).

[57] *See id.* at 424-29 (establishing jurisprudential history of Eighth Amendment claims).

[58] *See*, *e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (expanding scope of Eighth Amendment to consider conditions of punishment); Hutto v. Finney, 437 U.S. 678, 686-87 (1978) (incorporating conditions of confinement into deliberate indifference assessment); Brown v. Plata, 563 U.S. 493, 511 (2011) (finding extreme prison overcrowding warrants judicial remedy under Eighth Amendment); *see also* Bukowski, *supra* note 43, at 424-25 (introducing Eighth Amendment's expanded scope under *Estelle*); Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. CIV. LIB. L. REV. 635, 637 (2010) (laying out *Estelle* and *Farmer* progression under Eighth Amendment jurisprudence). The Supreme Court further emphasized the Eighth Amendment's protection of incarcerated persons, holding that conditions of incarceration are distinct from punishments in a school setting. *See* Ingraham v. Wright, 430 U.S. 651, 669-70 (1977) (affirming principles established in *Estelle*); *see also* Bukowski, *supra* note 43, at 425 (discussing jurisprudential progression of incarcerated person's conditions of confinement).

[59] *See* Whitley v. Albers, 475 U.S. 312, 319 (1986) (emphasis added) (cleaned up) (providing exception to conditions of confinement protections). The Court continues to emphasize that Eighth Amendment protections are relaxed in the prison context, stating that "[*a*]*fter incarceration*, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual pun-

In defining what would constitute an Eighth Amendment violation based on conditions of confinement, the Court determined that prison officials' conduct must demonstrate "deliberate indifference" to the serious medical needs of incarcerated persons, holding that mere negligence alone is not enough.[60] Despite its commitment to protection against inadequate prison conditions, the Supreme Court ruled that prison officials must inflict "unnecessary or wanton" pain to constitute cruel and unusual punishment.[61] The Court continued to refine this interpretation, holding that prison officials will only violate the Eighth Amendment when their conduct is malicious with the purpose of causing harm, and that lack of due care for an incarcerated person's interests or safety is not enough to warrant remedy.[62]

The Supreme Court subsequently worked to define the requisite standards under the newly proposed "deliberate indifference" test, including determining whether an objective or subjective assessment of a prison official's conduct would be appropriate.[63] In the seminal *Farmer v. Brennan*,[64] the Supreme Court set forth the two-pronged test to be applied to Eighth Amendment deliberate indifference claims, including the use of both an objective and subjective analysis.[65] Under this test, a prison official will be held liable under either § 1983 or *Bivens* for violations of the Eighth Amendment when the plaintiff establishes: (1) there was an objectively serious medical need; and (2) prison officials were deliberately indif-

ishment . . . ." *See Ingraham*, 430 U.S. at 670 (emphasis added) (describing scope of Eighth Amendment protections in prison).

[60] *See Whitley*, 475 U.S. at 319 (noting Eighth Amendment requires "more than ordinary lack of due care for the [incarcerated person's] interests or safety.")

[61] *See Ingraham*, 430 U.S. 651 at 669-70 (establishing unnecessary and wanton infliction of pain threshold); Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (holding double celling does not constitute cruel and unusual punishment without unnecessary or wanton pain).

[62] *See Whitley*, 475 U.S. at 324 (holding that prison official's intentional shooting of incarcerated person during riot was not cruel and unusual). Affording prison administrators significant deference when security risks are implicated, the Court in *Whitley* concluded that even though prison officials could have handled the response better, there was no "wantonness" necessary to offend the Eighth Amendment. *Id.* "The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Id.* at 319.

[63] *See* Bukowski, *supra* note 43, at 427 (discussing Court's shift to include objective and subjective analysis).

[64] Farmer v. Brennan, 511 U.S. 825, 826 (1994) (stating court's disposition).

[65] *See id.* at 836 (outlining use of two-prong deliberate indifference test). *Farmer* dealt with a preoperative transsexual with feminine characteristics incarcerated in a male prison who alleged, among other things, that the prison official's failure to segregate her resulted in her subsequent rape and beatings, thereby making prison officials liable for deliberate indifference. *Id.* at 829. The plaintiff in Farmer asserted that the prison officials were deliberately indifferent because they were aware of the facility's violent tendencies and that the plaintiff would be susceptible to attack based on her particular characteristics. *Id.*

ferent to that need.[66] As to the second prong, the Supreme Court thereafter held that deliberate indifference must be assessed subjectively; the court determined that objectively inhumane prisons conditions are not enough to establish liability, but rather, the Court must review the prison official's state of mind.[67] Consequently, the Supreme Court noted that even obvious risks will not implicate a prison official, so long as the prison official was not subjectively aware of the risk.[68] Therefore, as a result of this ruling, prison officials whom the Supreme Court Justices deem to have acted "reasonably" in response to a risk may still avoid liability under the Eighth Amendment.[69]

D. Relevant Prerequisite Hurdles to an Eighth Amendment Claim: § 1983, Bivens, and the PLRA

While the Eighth Amendment is explicit in its protections against inhumane treatment, incarcerated persons must first surpass a series of hurdles before properly asserting a meritorious Eighth Amendment analysis in federal court.[70]

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[66] *See id.* at 837 (laying out Eighth Amendment test). Depending on whether an incarcerated person is in state or federal prison, in order to reach this Eighth Amendment test, an incarcerated person must first allege a § 1983 (state or local prison) or *Bivens* (federal) claim alleging that a state or federal official violated their Eighth Amendment rights while acting "under the color of law." *See* sources cited *infra* notes 71, 75 and accompanying text (describing initial bases for raising Eighth Amendment violations).

[67] *See Farmer*, 511 U.S. at 838 (discussing necessity of subjective test for deliberate indifference).

[68] *See id.* (adding detail to use of subjective test). The Court in *Farmer* elaborated further by adding that a prison official cannot be required to "anticipate" victims, and that even plaintiffs who are especially susceptible to injury will not alter the Court's requirement that a prison official must be *aware* of the risk. *Id.* at 844. Moreover, the *Farmer* Court provided additional scapegoats for prison officials, as they articulated that prison officials who were aware of the risk to incarcerated persons may still escape liability if they can show that they "respond[ed] reasonably to a risk, even if the harm was not ultimately avoided." *See id.* (elaborating on prison official's liability in this context).

[69] *See id.* (adding prison official's duty is to ensure "reasonable safety"). The Court rejected the plaintiff's argument that a subjective test would "unjustly" require physical injury prior to suit, holding that incarcerated persons may still seek injunctions under the subjective test, and that this test does not require an injury to occur prior to suit. *Id.* at 845; *see also* Brief for the Petitioner, *Farmer*, 511 U.S. 825, No. 92-7247 (Nov. 16, 1993) (introducing physical injury requirement to court). Some commentators have critiqued the use of a subjective analysis within this context, arguing that "[t]he conditions of a[n] [incarcerated person]'s confinement are part of his punishment regardless of a prison official's state of mind." *See* Jason D. Sanabria, Note and Comment, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1142-43 (1995).

[70] *See* sources cited *infra* notes 75-83 and accompanying text (providing several instances of procedural hurdles for incarcerated litigants).

To pursue an Eighth Amendment violation by state or local actors in federal court, incarcerated persons must first raise a § 1983 civil rights claim, which holds state and local government officials working "under the color of law" tortiously liable for violations of "immunities secured by the Constitution."[71] Practically, though, § 1983 serves as a procedural device, giving claimants jurisdiction to bring civil rights suits against state and local actors in federal court.[72] Since it is a procedural device, however, allegations are ancillary in nature, that is, claimants must allege a violation of another federal law in order to obtain relief.[73] Further, § 1983 claims apply exclusively to state and local actors, and do not typically reach federal officials unless they act alongside state or local officials.[74]

However, if a federal prison official was acting independently, incarcerated persons instead must raise a *Bivens* claim.[75] Similar to § 1983 claims, a *Bivens* claim is a civil rights lawsuit, holding federal officials "acting under the color of authority" personally liable for violations of constitutional rights, such as the Eighth Amendment.[76] However, in obtaining

[71] *See* 42 U.S.C. § 1983 (laying out liability for federal officials who violate protected rights). In addition, the term "color of law" has often raised significant discourse among federal courts. *See* Gonzaga University v. Doe, 536 U.S. 273, 277 n.1 (2002) (declining to review whether petitioners acted "under color of state law"). Ultimately, "under color of law" has most often been interpreted to hold government actors liable when they act with the power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *See* West v. Atkins, 487 U.S. 42, 49 (1988) (defining "under the color of law" for deliberate indifference). Thus, police officers and prison officials will be acting "under the color of law" when acting within the scope of their employment. *Id.*

[72] *See* Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation*, FED. JUD. CTR., 7-8 (2008), https://www.fjc.gov/sites/default/files/2012/Sec19832.pdf. Historically, § 1983 was adopted under the Civil Rights Act of 1871, seeking to provide freed slaves the opportunity to bring suit against southern law enforcement officials in federal court, avoiding biases likely present in state courts. *Id.* at 1-2. Thus, the federal government adopted § 1983 exclusively as a procedural remedy, hoping to provide freed slaves the opportunity to address civil rights claims in a more impartial court. *Id*. at 2-3; *see also* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (detailing historical adoption of § 1983).

[73] *See* Schwartz & Urbonya, *supra* note 72, at 7-8 (explaining functional and procedural use of § 1983 claims).

[74] *See* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (holding § 1983 claims do not apply to federal officials); Tongol v. Usery, 601 F.2d 1091, 1099 (9th Cir. 1979) (holding federal officials liable under § 1983 when working alongside state actor).

[75] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding federal officials may be liable for monetary damages resulting from violation of constitutional tort).

[76] *See id*. at 389 (describing appropriateness of monetary damages against federal officials where cause of action is proven). *Bivens* claims were adopted to provide relief for litigants where negligent acts by government officials were not covered by the Federal Torts Claims Act (FTCA). *See id.* at 392 (offering *Bivens* as additional source of remedy where FTCA will not apply); *see also* Federal Torts Claim Act, 28 U.S.C. § 1346 (providing relief only where the ac-

its basis through common law, *Bivens* claims are implied causes of actions, meaning incarcerated persons must demonstrate that there is no other statutory remedy available for their claim.[77] In addition, since it is an implied cause of action, courts have upheld the discretionary authority to refuse to imply a cause of action if there are other concerns, such as national security considerations.[78]

In another series of hurdles, even after alleging inadequate confinement under the Eighth Amendment's cruel and unusual punishment, based on either § 1983 or *Bivens*, incarcerated persons must further meet the stringent requirements of the Prison Litigation Reform Act ("PLRA").[79] Notably, Congress adopted the PLRA in response to the surplus of § 1983 claims, with its overall purpose to avoid "meritless" incarcerated person lawsuits.[80] Much like several other litigation prerequisites, the PLRA requires incarcerated persons to first exhaust all administrative remedies prior to bringing a claim in federal court.[81] Having surpassed the base-level PLRA requirements, incarcerated persons may allege civil complaints in

tion is brought against the United States). *Bivens* actions are not prohibited by the federal government's "sovereign immunity" doctrine because the officials are acting in their personal capacities and are therefore not considered "the United States." *See* 28 U.S.C. § 1346(a)(1) ("Any civil action *against the United States*" (emphasis added)).

[77] *See* Bush v. Lucas, 462 U.S. 367, 374-75 (1983) (holding Civil Service Reform Act permitted statutory remedy for wrongful termination by federal agencies).

[78] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (holding *Bivens* did not extend to Plaintiffs' Fifth Amendment claims). The Court has also refused to acknowledge a *Bivens* claim when injuries were suffered during military service. *See* Chappell v. Wallace, 462 U.S. 296, 305 (1983) (holding enlisted military service members cannot bring *Bivens* actions against their superior officers).

[79] *See* 18 U.S.C. § 3626 (articulating process for incarcerated persons to adjudicate claims in federal court). Typically, in § 1983 and *Bivens* claims, there are no exhaustion requirements. *See id.* However, because incarcerated persons have been subjected to the PLRA, they have to overcome an additional hurdle before their civil rights claims may be redressed in court. *See id.*

[80] *See* Ethan Rubin, Comment, *Unknowable Remedies: Albino v. Baca, The PLRA Exhaustion Requirement, and the Problem of Notice*, 56 B.C. L. REV. E-SUPPLEMENT 151, 151 (2015) (introducing context of PLRA adoption). This comment further discusses the inequities surrounding the PLRA's exhaustion requirement, noting that the administrative exhaustion requirement applies to all incarcerated persons regardless of whether they have been notified of this requirement. *Id.*

[81] *See* 42 U.S.C. 1997(e) (describing requirement for exhaustion of administrative remedies); 18 U.S.C. § 3626(a)(3)(A)(i)-(ii) (refusing prison release orders unless administrative remedies exhaustion); *see also* Ross v. Blake, 136 S. Ct. 1850, 1857 (2016) (holding available remedies prevent incarcerated persons from bringing claim in court). This requirement has also been applied arbitrarily during the COVID-19 pandemic, with some courts claiming that the exhaustion requirement is disregarded because of the severe circumstances of the pandemic, whereas others contend that an exhaustion of administrative remedies remains necessary. *See* McPherson v. Lamont, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) (holding COVID-19 risks are so dire that exhaustion requirement is not necessary); *see also Blake*, 136 S. Ct. at 1857 (holding "special circumstances" do not preclude incarcerated persons from meeting exhaustion requirement).

federal courts.[82] Thus, before incarcerated persons may even address the requisite analysis under the Eighth Amendment, they must first convince a federal court that they have met the exhaustive requirements in the PLRA, among others, and that they have sufficient basis under either § 1983 or *Bivens*.[83]

E. Deference to Prison Administrators and Its Added Burden on Incarcerated Litigants

While litigating, incarcerated persons are next challenged to overcome the long-held deference afforded to prison administrators by the Court.[84] The Supreme Court has maintained that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[85] Not only does this deference exist, but subsequent Supreme Court cases have instructed that this deference be "substantial," providing prison administrators with the ability to "defin[e] legitimate goals of corrections systems and determin[e] most appropriate means to accomplish them."[86]

This general standard has been extended to deliberate indifference cases, with the Supreme Court specifically recognizing the competing interests of Eighth Amendment protections for incarcerated persons and security risks in prisons.[87] The Court, in fact, emphasizes just how important

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[82] *See* 18 U.S.C. § 3626 (providing implications of failure to meet requirements of PLRA).

[83] *See* sources cited *supra* note 81 and accompanying text (discussing exhaustion requirements under PLRA).

[84] *See* sources cited *infra* notes 85-90 and accompanying text (commenting on substantial deference afforded to prison administrators).

[85] *See* Bell v. Wolfish, 441 U.S. 520, 547-48 (1979) (introducing concept of deference to prison administrators).

[86] *See* Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (holding "legitimate penological interests" were alleged by restricting visitation of children to prison). The Court in *Overton* discusses the four key factors in evaluating prison regulations and whether they would pass constitutional scrutiny, namely: (1) "whether the regulation has a 'valid, rational connection' to a legitimate governmental interest;" (2) "whether alternative means are open to [incarcerated persons] to exercise the asserted right;" (3) "what impact an accommodation of the right would have on guards and [incarcerated persons] and prison resources;" and (4) "whether there are 'ready alternatives' to the regulation." *Id.* at 132; *see also* Turner v. Safley, 482 U.S. 78, 89-91 (1987) (establishing four-factor test utilized in assessing prison regulations and appropriate deference).

[87] *See Whitley*, 475 U.S. at 320-21 (discussing balancing interests between incarcerated persons and prison officials in Eighth Amendment context). The Court adopted a new test under *Whitley* regarding disturbances and deliberate indifference, stating that

> [w]here a prison security measure is undertaken to resolve a disturbance . . . we think the question whether the measure taken inflicted unnecessary and wanton pain and suf-

deference to prison administrators is, stating, "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."[88]

In facing these series of hurdles, incarcerated persons will be required to surpass the Supreme Court's explicit trust in prison administrators' decisions regarding safety.[89] Incarcerated persons will thus face a final presumption against them when arguing the merits of their claim, in addition to an already challenging subjective element to establish under the deliberate indifference test.[90]

F. Final PLRA Limitations on Relief

Finally, even if incarcerated persons somehow manage to surpass the above hurdles, incarcerated persons again must return to the PLRA, as it provides applicable limitations on available relief for individuals.[91] The PLRA provides that any federal court prospective relief order that results from an incarcerated person's successful deliberate indifference claim must be "narrowly drawn" and be the "least intrusive means necessary" to correct prison officials' apparent violation.[92] The rule also adds that "[t]he

> fering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id.

[88] *See id.* at 320 (reviewing appropriate deference in a deliberate indifference setting).

[89] *See* Alicia Bianco, Article*, Prisoners' Fundamental Right to Read: Courts Should Ensure that Rational Basis is Truly Rational*, 21 ROGER WILLIAMS U. L. REV. 1, 19 (2016) (arguing "the level of deference afforded to prison administrators causes the purported balancing test in *Turner* to be heavily slanted against [incarcerated persons].") Notably, this deference also extends to medical opinions received by prison administrators in evaluating the subjective understandings for deliberate indifference. *See* Westlake v. Lewis, 537 F.2d 857, 860 n.5 (applying medical deference in deliberate indifference assessment).

[90] See Bianco*,* supra note 89, at 20 ("[T]he courts are inclined to defer to the prison administrator's judgment regardless of whether a[n] [incarcerated person] claims that a policy is in violation of the [incarcerated person's] rights, or that the regulated material is appropriate.")

[91] *See* 18 U.S.C. § 3626 (establishing requisite elements incarcerated persons must establish to warrant judicial relief).

[92] *See id.* § 3626(a)(1)(A) (providing requirements for prospective relief for incarcerated persons). "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* Additionally, the PLRA requires that a release order be issued by a three-panel bench, further illustrating the stringent and arbitrary requirements of this rule. *Id.* § 3626(a)(3)(B) ("In

court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief," granting federal courts and prison officials additional discretion to avoid resolving Eighth Amendment violations in the name of public safety.[93] Thus, incarcerated persons face a steep uphill battle in obtaining relief for the potential violations of their constitutional rights.[94]

III. FACTS

A. Circuit Splits

As a result of the adherence to a subjective analysis, federal courts' application of the deliberate indifference test often varies in its results.[95] Several circuit courts are split as to both parts of the test, namely what constitutes a serious medical need, and whether a prison official was subjectively indifferent to this medical need.[96] For example, circuit courts have been unable to come to a consensus regarding whether refusal to provide surgery for transgender incarcerated persons' gender dysphoria—distress caused by discrepancy between person's sex and gender—constitutes deliberate indifference under the Eighth Amendment.[97] In addition to contradictions among circuits regarding the standard for "serious medical need," federal courts across the country have been inconsistently applying the subjective test, ranging in decisions as to what constitutes deliberate indifference based on a prison official's conduct.[98]

any civil action in Federal court with respect to prison conditions, a[n incarcerated person] release order shall be entered only by a three-judge court . . . .")

[93] *See* 18 U.S.C. § 3626(a)(1)(A) (describing discretion afforded to courts to assess public safety).

[94] *See id.* (establishing hurdles for incarcerated persons in litigation); Farmer v. Brennan, 511 U.S. 825, 835-36 (1994) (outlining deliberate indifference test); *see also* Merkl and Weinberger, *supra* note 2 (discussing inability for incarcerated persons to meet these high burdens).

[95] *See* INADEQUATE MEDICAL CARE – DELIBERATE INDIFFERENCE STANDARD, *supra* note 27 (emphasizing inconsistent application among circuit courts).

[96] *See id.* (discussing inconsistent approaches among both circuit and district courts).

[97] *See* Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019) (holding lack of medical consensus regarding gender dysphoria prevented denial of procedure from being a deliberate indifference subjective violation). The Ninth Circuit, by comparison, held that the lack of treatment was deliberately indifferent because the surgery was medically necessary. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 793 (9th Cir. 2019) (holding medical necessity rendered the prison official's denial of the procedure deliberately indifferent).

[98] *See*, *e.g.*, Lowrance v. Coughlin, 862 F. Supp. 1090, 1119 (S.D.N.Y. 1994) (holding refusal to give physician-prescribed operation constitutes deliberate indifference); Meadows v. Huttonsville Corr. Ctr., 793 F. Supp. 684, 688 (N.D.W. Va. 1992), *order aff'd* 991 F.2d 790 (4th Cir. 1993) (holding forced operation despite lack of permission does not constitute deliberate indifference); Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993) (finding forcing incarcerated per-

B. Deliberate Indifference During Public Health Emergencies

1. H1N1

Nevertheless, federal courts have previously been prompted to assess deliberate indifference claims during public health emergencies, particularly during the H1N1[99] pandemic in 2009.[100] Federal courts primarily avoided resolving inadequate medical condition claims during the H1N1 epidemic by holding that unless prison officials blatantly ignored the H1N1 virus in its entirety, prison facilities' sanitation practices will not amount to a subjective deliberate indifference to a serious medical condition, regardless of their actual adherence to medical guidelines.[101]

Of their notable holdings, federal courts have determined that failing to provide incarcerated persons with necessary vaccinations to prevent diseases does not constitute deliberate indifference under the Eighth Amendment, instructing that this practice does not amount to a "subjective" disregard of known medical risks.[102] Furthermore, federal courts have at times indicated that the mere exposure to the deadly disease does not constitute "a deprivation of basic human needs that was objectively sufficiently

son to work with fractured spine not deliberately indifferent); Aaron v. Finkbinder, 793 F. Supp. 734, 737-38 (E.D. Mich. 1992), *order aff'd* 4 F.3d 993 (6th Cir. 1993) (concluding failure to record incarcerated person needed insulin on medical chart not deliberately indifferent); Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (holding failure to provide prescription glasses to incarcerated person was sufficiently deliberately indifferent); Ruarck v. Drury, 21 F.3d 213, 217-18 (8th Cir. 1994) (holding delay in calling ambulance for incarcerated person experiencing discomfort not deliberately indifferent); McElligott v. Foley, 182 F.3d 1248, 1260 (11th Cir. 1999) (delaying medical treatment for severe pain can constitute deliberate indifference).

[99] *See H1N1 flu (swine flu)*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/swine-flu/symptoms-causes/syc-20378103 (last visited Oct. 10, 2021) (explaining symptoms of H1N1 or swine flu). H1N1—often referred to as "swine flu"—is a combination of the H1N1 and H3N2 strains of influenza. *2009 H1N1 Pandemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html (last visited Nov. 19, 2021). In 2009, the H1N1 infected 60.8 million people around the world, thereby resulting in the World Health Organization ("WHO") declaring H1N1 a pandemic. *Id.*

[100] *See*, *e.g.*, Ayala v. NYC Dep't of Corr., No. 10 Civ. 6295, 2011 WL 2015499, at *1 (S.D.N.Y. May. 9, 2011) (evaluating deliberate indifference during swine flu); Jackson v. Rikers Island Facility, No. 11 Civ. 285, 2011 WL 3370205, at *1 (S.D.N.Y. Aug. 2, 2011) (analyzing whether swine flu constitutes serious medical risk); Freeman v. Quinn, No. 09-cv-1055, 2010 WL 2402917, at *2-3 (S.D. Ill. June 15, 2010) (declining to acknowledge prison official's response to swine flu as deliberate indifference).

[101] *See Ayala*, 2011 WL 2015499, at *2 ("Absent any indication that the defendants ignored willfully the swine flu outbreak in their facilities, the plaintiff's infection, though unfortunate, is insufficient to support an Eighth Amendment claim.")

[102] *See Freeman*, 2010 WL 2402917, at *3 ("Freeman makes no allegation that any of the named defendants . . . acted with deliberate indifference in denying him access to the vaccine.")

serious."[103] However, public health officials have frequently cited major distinctions between the COVID-19 virus and the H1N1 virus, leaving open the question of how courts should resolve deliberate indifference claims in the context of COVID-19.[104]

2. COVID-19

Moreover, given the obtrusive nature of COVID-19,[105] federal courts have been tasked with resolving a significant number of deliberate indifference claims brought by incarcerated persons.[106] As a result of this litigation influx, the Supreme Court has since been petitioned with the question of whether prison conditions during COVID-19 violate constitutional protections against cruel and unusual punishment.[107]

Of the hundreds of COVID-19 related cases brought in both state and federal court, most are class actions filed by civil rights and advocacy groups on behalf of incarcerated persons.[108] These plaintiffs typically re-

[103] *See Jackson*, 2011 WL 3370205, at *2-3 (holding "[e]xposure to swine flu, in and of itself, does not involve an 'unreasonable risk of serious damage to future health.'")

[104] *See Similarities and Differences between Flu and COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (last updated June 7, 2021) (discussing differences in severities between common influenza and COVID-19 virus). "COVID-19 seems to spread more easily than the flu . . . . Compared to flu, COVID-19 can cause more serious illnesses in some people . . . ." *Id.*; *see also* Kimberly Hickok, *How does the COVID-19 pandemic compare to the last pandemic?*, LIVE SCI. (Mar. 18, 2020), https://www.livescience.com/covid-19-pandemic-vs-swine-flu.html (outlining key distinctions between swine flu and COVID-19). Officials cite COVID-19's higher rates of infection and mortality, as well as its significantly more deadly impact on older and immunocompromised individuals as other notable distinctions between the COVID-19 virus and the H1N1 virus. *See* Hickok, *supra* (noting mortality difference of .02% for swine flu and 2% for COVID-19 virus).

[105] *See COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/dotw/covid-19/index.html (last visited Nov. 19, 2021) (noting COVID-19's infectiousness); *Coronavirus and COVID-19: What You Should Know*, WEBMD, https://www.webmd.com/lung/coronavirus#:~:text=There%20is%20more%20than%20one,all%20came%20from%20bats (last visited Jan. 30, 2021) (explaining symptoms of COVID-19). "COVID-19 is a disease caused by SARS-CoV-2 that can trigger what doctors call a respiratory tract infection . . . SARS-CoV-2 is one of seven types of coronavirus . . . ." *Coronavirus and COVID-19: What You Should Know*, *supra*.

[106] *See* Carolyn Casey, *Dozens of Prisons Now Face COVID-19-Related Civil Rights Lawsuits*, EXPERT INST., https://www.expertinstitute.com/resources/insights/dozens-of-prisons-now-face-covid-19-related-civil-rights-lawsuits/ (last updated Aug. 9, 2021) (discussing prevalence of COVID-19 lawsuits).

[107] *See* Ariane de Vogue, *Supreme Court denies Texas inmates' appeal in case over Covid-19 protections*, CNN POLITICS (May 14, 2020, 8:02 PM), https://www.cnn.com/2020/05/14/politics/supreme-court-texas-inmates-coronavirus-protections/index.html (introducing various cases regarding prison conditions).

[108] *See* Burton Bentley II, *The Growing Litigation Battle Over COVID-19 in the Nation's Prisons and Jails*, LEXIS+, https://plus.lexis.com/search?pdsearchterms=LNSDUID-ALM-

quest improved conditions that mirror the Centers for Disease Control and Prevention's (CDC) requisite protocols.[109] In addition, these advocacy groups frequently request compassionate release for sick or vulnerable incarcerated persons.[110] Despite viable arguments advocating for improved conditions, prison authorities have been able to successfully dismiss many of these claims, arguing that their responses are severely limited when balanced against the fast-paced nature of the virus, public safety concerns, and budget limitations.[111]

C. The Supreme Court and Recent Developments in Deliberate Indifference

In Texas, two incarcerated persons filed a class action lawsuit on behalf of high-risk incarcerated persons, alleging that prison officials' deliberate indifference to their medical needs resulted in the death of a fellow

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AMLAWR-20200825THEGROWINGLITIGATIONBATTLEOVERCOVID19INTHENATIONSPRISONSANDJAILS&pdbypasscitatordocs=False&pdsourcegroupingtype=&pdisurlapi=true&pdmfid=1530671&crid=c4151adc-2301-486a-88bb-dddc74606a76 (last visited Oct. 10, 2021) (summarizing influx of incarcerated persons' COVID-19 class actions).

[109] *See* Burton Bentley II, *supra* note 108 (outlining causes of actions raised by incarcerated persons in class action suits regarding COVID-19).

[110] *See* Meghan Downey, *Compassionate Release During COVID-19*, THE REG. REV. (Feb. 22, 2021), https://www.theregreview.org/2021/02/22/downey-compassionate-release-during-covid-19/ (outlining process for applying compassionate release standard to requests made by individuals due to COVID-19pandemic). Downey further discusses the procedure of compassionate release, noting the difficulty in obtaining these requests. *Id.* Downey notes that the request initially goes to a warden, who, statistically, deny most requests for release. *Id.* When raising compassionate release requests during an appeal process or during sentencing, individuals must still exhaust all administrative remedies. *Id.*

> With the onset of the COVID-19 pandemic and its prevalence in prison facilities, many federal courts have held that the conditions of confinement during the pandemic contribute to the extraordinary and compelling reasons justifying compassionate release. For example, courts have observed that prisons are "powder kegs for infection" due to "greater risks of infectious disease spread within detention facilities." Data kept by the Bureau of Prisons confirm these concerns, as more than 46,000 federally incarcerated people—approximately one third of people in federal custody—have tested positive for COVID-19.

Id. Despite some courts providing compassionate release for incarcerated persons, many motions are still denied, thus elevating incarcerated persons' exposure to the virus. *See id.* (discussing how compassionate release denial is directly linked to increase in COVID-19 cases).

[111] *See* Bentley II, *supra* note 108 (noting frequency of dismissals of incarcerated persons' actions); *see also* sources cited *supra* notes 84-90 and accompanying text (discussing deference afforded to prison officials to maintain order and discipline).

incarcerated person.[112] The Fifth Circuit overruled the district court's finding of deliberate indifference, holding that the requirements went further than applicable CDC guidelines, and as such, prison officials were not subjectively aware of the apparent risk.[113] The plaintiffs subsequently petitioned the Supreme Court, but their writ was denied.[114] While ultimately agreeing with the Court's decision to deny the appeal, Justice Sotomayor, joined by the late Justice Ginsburg, concurred separately to discuss the prevalence of this issue and the necessary adjustments that must be made to adequately respond to the mistreatment of incarcerated persons.[115] Justice Sotomayor writes,

> It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where [incarcerated persons] everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.[116]

Justice Sotomayor also explicitly "encouraged lower courts to ensure that prisons are not deliberately indifferent in the face of danger and death."[117] Harsh prison conditions during COVID-19, alongside increased

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[112] *See* Valentine v. Collier, 140 S. Ct. 1598, 1598 (2020) (describing factual background of case and incarcerated persons' allegations); *see also* de Vogue, *supra* note 107 (detailing facts of suit and reason for filing). The district court held that prison officials were deliberately indifferent based on inadequate conditions of confinement, requiring prison officials to "provid[e] unrestricted access to hand soap and hand sanitizer that contains 60% alcohol in public areas . . . educate and inform [incarcerated persons] about the pandemic . . . provide a detailed plan to test all [incarcerated persons]" and were ordered to do "extensive cleaning and disinfecting protocols." *See* Valentine v. Collier, 956 F.3d 747, 802 (5th Cir. 2020), *aff'd Valentine*, 140 S. Ct. at 1598 (outlining district court's order for relief).

[113] *See Valentine*, 956 F.3d at 802 (describing justification for disposition); *see also* de Vogue, *supra* note 107 (discussing decision on appeal).

[114] *See* Valentine v. Collier, 140 S. Ct. 1598, 1598 (2020) (Sotomayor, J., concurring) (statement respecting denial of application to vacate stay); *see also* de Vogue, *supra* note 107 (noting results of appeal).

[115] *See Valentine*, 140 S. Ct. at 1598-1601 (Sotomayor, J., concurring) (writing separately to stress health concerns for incarcerated persons); *see also* de Vogue, *supra* note 107 (elaborating on Justice Sotomayor's and Ginsburg's concurrence).

[116] *See Valentine*, 140 S. Ct. at 1601 (Sotomayor, J., concurring) (drawing attention to incarcerated persons' vulnerabilities); *see also* de Vogue, *supra* note 107 (illustrating Justice Sotomayor's concern in protecting incarcerated persons under Eighth Amendment jurisprudence).

[117] *See Valentine*, 140 S. Ct. at 1599 (Sotomayor, J., concurring) (stressing prison officials' obligations); *see also* Bentley II, *supra* note 108 (referencing Justice Sotomayor's contention regarding prison's management of COVID-19 under deliberate indifference standard).

litigation alleging deliberate indifference, warrants a review of whether the subjective test should still stand.[118]

The Court recently readdressed deliberate indifference in prisons during COVID-19 in *Barnes v. Ahlman*.[119] In *Barnes*, a group of incarcerated persons brought suit against jail officials, alleging that the officials failed to meet CDC guidelines by not following social distancing standards and mixing healthy and sick incarcerated persons.[120] Among other allegations, the incarcerated plaintiffs alleged that they "were required to clean the bedding of detainees who tested positive for COVID-19."[121] A California district court judge issued a preliminary injunction in response to the petition, requiring the jail to, at minimum, meet relevant CDC guidelines.[122] Jail officials appealed and requested a stay on the injunction; however, the Ninth Circuit swiftly denied this request.[123] Relying on prison administrative deference, the jail again appealed to the Supreme Court, alleging that they had "largely implemented" CDC guidelines "to the extent possible."[124] In a 5-4 decision in favor of the jail officials, the Supreme Court granted a stay on the injunction; however, the Court failed to provide an explanation of their reasoning.[125] Justice Sotomayor, joined by Justice

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[118] *See* Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020) (finding failure to establish subjectively unreasonable response fails deliberate indifference test); Swain v. Junior, 961 F.3d 1276, 1289 (11th Cir. 2020) (determining subjective response by prison official warrants denial of injunctive relief); *see also* Merkl and Weinberger, *supra* note 2 (alluding to necessity of review of the subjective element by critiquing deliberate indifference standard).

[119] *See* Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020) (granting stay for preliminary injunction).

[120] *See* Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief at 1-6, Ahlman v. Barnes, 445 F. Supp. 3d 671, No. 8:20-cv-835 (C.D. Cal. Apr. 30, 2020) (seeking injunction for inhumane conditions of confinement); *see also* James Romoser, *Siding with jail officials, court lifts injunction that imposed coronavirus safety measures*, SCOTUSBLOG (Aug. 5, 2020, 11:57 PM), https://www.scotusblog.com/2020/08/siding-with-jail-officials-court-lifts-injunction-that-imposed-coronavirus-safety-measures/ (introducing basis for action in *Barnes*).

[121] *See* Romoser, *supra* note 120 (quoting Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief at 1-6, Ahlman v. Barnes, 445 F. Supp. 3d 671, No. 8:20-cv-835 (C.D. Cal. Apr. 30, 2020)) (discussing allegations raised in incarcerated persons' complaint).

[122] *See id.* (summarizing *Barnes*' lower court determinations and describing initial order to remedy COVID-19 mismanagement).

[123] *See id.* (outlining *Barnes*' procedural history).

[124] *See id.* (quoting Emergency Application for Stay of Injunctive Relief Pending Appeal of Denial of Stay Application in the United States Court of Appeals for the Ninth Circuit at 2, Barnes v. Ahlman, 140 S. Ct. 2620, No. 20A19 (July 21, 2020)) (summarizing arguments in *writ of certiorari* filed by prison officials). The jail officials also argued that injunction required measures not mandated by the CDC and that it was a "micromanagement of local jail procedure." *Id.*

[125] *See id.* at 2620 (granting stay of preliminary injunction); *see also* Romoser, *supra* note 120 (referencing holding of Barnes case).

Ginsburg, vehemently dissented, writing that the decision to grant the stay was an "extraordinary intervention" of the Court.[126] Thus, while touching on the issue of deliberate indifference and its increasingly concerning impacts on incarcerated persons, the Supreme Court has yet to substantively address the merits of these claims.[127]

IV. ANALYSIS

As discussed above, alarming rates of infection and death within prisons between March 2020 and January 2021 gave legitimacy to many lawsuits brought by incarcerated persons.[128] In March of 2020, the World Health Organization (WHO) released a statement on COVID-19's impact on incarcerated persons and surrounding communities, adding that "prisons, jails, and similar settings. . .may act as a source of infection, amplification, and spread of infectious diseases," and that "[p]rison health is, therefore, critical to public health," and requires a "whole-of-government and whole-of-society approach."[129] Thus, to explicitly disregard the conditions of incarcerated persons not only violates basic civil rights, but it also endangers surrounding communities and innocent prison officials.[130]

In addition, the Eighth Amendment has repeatedly been interpreted to consider conditions of confinement as a part of the cruel and unusual punishment analysis.[131] The Supreme Court noted that "[c]onfinement in a prison . . . is a form of punishment subject to [judicial] scrutiny under

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[126] *See Barnes*, 140 S. Ct. at 2621 (Sotomayor, J., dissenting) (arguing Court improperly intervened on behalf of jail officials). Overall, Justice Sotomayor perceived the majority's decision to be ignorant to the District Court's valid findings that the staff fell "well short" of implementing the CDC guidelines. *Id.*; *see also* Romoser, *supra* note 120 (discussing Justice Sotomayor's issues with grant of stay).

[127] *See* sources cited *supra* notes 112-127 and accompanying text (commenting on Supreme Court's inaction in relation to recent remarks on deliberate indifference in prisons).

[128] *See* Harper, *supra* note 11 (analyzing lack of response and its implications).

[129] *See* Burton Bentley II, *supra* note 108 (describing importance of societal change regarding protection of incarcerated persons during COVID-19).

[130] *See* Ollove, *supra* note 25 (discussing high infection rates in prisons and dangers to surrounding communities).

[131] *See* Hutto v. Finney, 437 U.S. 678, 686-87 (1978) (holding inhumane conditions of confinement supported finding of deliberate indifference). The Court noted: "It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months." *Id.*; *see also* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (finding "[Eighth Amendment] principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.")

Eighth Amendment standards."[132] The Supreme Court elaborated on this determination in *Hutto*, holding that prison conditions may result in violations of basic human rights and must comport with "contemporary standards of decency."[133]

By refusing to reflect the minimum standards of decency within prisons, the judicial system has permitted an explicit disregard for incarcerated persons health and safety.[134] First, incarcerated persons face a litany of procedural battles before being able to argue the merits of their claim in court.[135] Moreover, incarcerated persons are next challenged to face a court that affords significant discretion to prison administrators, and further assess a prison administrators subjective understandings before finding a constitutional violation.[136] As a result of this focus on subjectivity, incarcerated persons are continually denied relief for objectively inhumane treatment while incarcerated.[137] Therefore, instead of the two-part deliberate indifference test requiring a subjective assessment of prison officials' understandings, the Court must adopt a test that exclusively uses an objective approach in order to adequately reflect the Court's adherence to minimum standards of decency in confinement.[138]

A. Practical Issues with Deliberate Indifference

As a result of the *Farmer* decision, incarcerated persons are now required to prove that prison officials had "actual knowledge" of "subjective recklessness" before effectively establishing an Eighth Amendment violation.[139] Thus, despite being presented with objectively inhumane prison conditions, prison officials may curb liability based on a lack of "actual

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[132] *See Rhodes*, 452 U.S. at 345 (quoting *Hutto*, 437 U.S. at 685) (stating confinement is form of punishment governed by Eighth Amendment).

[133] *See Hutto,* 437 U.S. at 685 (citing *Estelle*, 429 U.S. at 102) (maintaining Eighth Amendment interpretations must evolve with time). The Court in *Hutto* determined that prolonged stays in isolation confinement cells may constitute cruel and unusual punishment. *Id.* at 680.

[134] *See* sources cited *supra* notes 16-23 and accompanying text (charting disproportionate impact on incarcerated persons during COVID-19).

[135] *See* sources cited *supra* notes 70-83, 91-94 and accompanying text (outlining various procedural and administrative prerequisites to Eighth Amendment claims).

[136] *See* sources cited *supra* notes 85-90 and accompanying text (describing "substantial deference" afforded to prison officials and subjective element under deliberate indifference test).

[137] *See* sources cited *infra* note 160 and accompanying text (displaying how objectively meritorious claims fail for inability to overcome subjectively determined "reasonable responses").

[138] *See* sources cited *infra* notes 167-178 and accompanying text (discussing adoption of exclusively objective test for deliberate indifference).

[139] *See* Farmer v. Brennan, 511 U.S. 825, 843 (quoting Brief for Petitioner at 27, Farmer v. Brennan 511 U.S. 825, 843 (1993) (No. 92-7247)) (internal quotation marks omitted) (holding two-part test is necessary for deliberate indifference).

knowledge."[140] The Court in *Farmer* rejected the notion that a subjective approach would permit prison officials "to take refuge in the zone between ignorance of obvious risks and actual knowledge of risks," holding that a fact finder could instead determine the official had "actual knowledge" because it was obvious.[141] Accordingly, incarcerated persons must prove that prison officials actually knew of a risk, rather than that prison officials *should* have known of a risk.[142] Not only is this test plainly illogical considering the Court's commitment to human decency, but it also perpetuates an ambiguous test with varying results for litigants.[143]

1. State of Mind and Congressional Intent

When adopting § 1983, both Congress and the Court recognized the incumbent need for a judicial remedy to inhumane and problematic conduct by government officials.[144] However, little Congressional evidence suggests that an "actual knowledge" consideration was intended when evaluating prison official conduct.[145] Upon examining Congress' legislative history in adopting § 1983, the record is void of concern regarding government officials' *actual* knowledge of wrongful conduct; rather, the legislative history suggests that Congress' intention in adopting § 1983 was to limit discretionary abuse by government officials that either deliberately or inadvertently infringed upon an individual's constitutional rights.[146]

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[140] *See* Sanabria, *supra* note 69, at 1135 (noting jurisprudential evolution for Eighth Amendment deliberate indifference claims).

[141] *See Farmer*, 511 U.S. at 843 (quoting Brief for Petitioner at 22, 27, Farmer v. Brennan, 511 U.S. 825, 843 (1993) (No. 92-7247)) (internal quotation marks omitted) (justifying use of subjective prong in deliberate indifference test).

[142] *See id.* (emphasis added) (mandating "actual knowledge" test as opposed to objective understandings).

[143] *See* sources cited *infra* notes 167-178 and accompanying text (discussing adoption of exclusively objective test for deliberate indifference); see Hill, *supra* note 96 (discussing circuit court splits under current deliberate indifference test).

[144] *See* 42 U.S.C. § 1983 (outlining grounds to bring civil cause of action for deprivation of rights by the State); *see also* Sanabria, *supra* note 69, at 1135 (mentioning adoption of § 1983 to respond to mistreatment by government officials).

[145] *See* Eisenberg, *supra* note 72, at 485 (providing historical overview of § 1983 adoption). Eisenberg suggests that while government sought to limit § 1983, their primary focus was curbing misconduct, writing, ". . . although the 1871 Act dealt with a limited problem, its history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations." *Id.* (outlining main takeaways from article).

[146] *See id.* at 485-86 (assessing historical backdrop of § 1983). To the contrary, a historical analysis suggests that § 1983 was drafted to aggressively resolve government mistreatment, as it was adopted under the Civil Rights Act of 1871. *Id.* at 484-85. Of mention on the floor of Congress,

Despite Congressional intention indicating government mistreatment must be curbed, the Supreme Court insisted upon a more limited standard when raising claims against government officials.[147] Furthermore, the Supreme Court's recognition of prison conditions as part of the cruel and unusual punishment analysis was undermined by the Court's decision to also consider prison officials' state of mind in their Eighth Amendment determinations.[148] By assessing a prison official's state of mind to determine whether conditions are inhumane, the Court explicitly ignores the objectively wrongful conditions of confinement.[149]

2. Burdens on Incarcerated Persons

Accompanying the prerequisite burdens incarcerated persons are forced to overcome—such as the PLRA, § 1983, or *Bivens'* sufficiency arguments—incarcerated litigants must also compile some presentation of evidence that demonstrates prions officials near-intentionally subjected them to degrading and substandard conditions.[150] Before any judicial remedy is available, an incarcerated person must take several steps to avoid dismissal of the suit by the PLRA; per the exhaustion requirements of the PLRA, an incarcerated person must raise inadequate conditions or medical

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

Id. (quoting CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871)).

147 *See* 42 U.S.C. § 1983 (failing to delineate clear standard of "actual knowledge" to establish relief); *see also* Sanabria, *supra* note 69, at 1116-15 (emphasizing idea that *Farmer* test fails to provide any remedy for incarcerated persons' relief); Eisenberg, *supra* note 72, at 486 (suggesting congressional intent for § 1983 as covering government mistreatment).

148 *Compare* Eisenberg, *supra* note 72, at 485 *with* Sanabria, *supra* note 69, at 1123 (juxtaposing scope of Congressional intent and practical execution of § 1983).

149 *See Sanabria, supra* note 69, at 1135 (determining primary purpose of Eighth Amendment as disregarded under *Farmer* test).

150 *See* 18 U.S.C. § 3626(a)(3) (defining procedural remedies for relief with respect to incarcerated persons' prison conditions). The statute specifically states, "[a] party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met." *Id.* at § 3626(a)(3)(C) (placing burden on incarcerated persons to produce evidence of violation).

issues with the prison's internal grievance systems prior to bringing suit.[151] Naturally, these claims often fail to provide any relief because the individual reviewing them is either ". . . an employee of the medical contractor, such as a colleague of the individual providers whose actions are being reviewed, or a prison administrator whose interests, particularly in controlling costs, are closely aligned with the contractor's interests."[152] Therefore, the determinations of the medical provider typically stand, thereby persisting the existence of medical issues for incarcerated persons.[153] In addition, this process is also long and draining for incarcerated persons, as they are repeatedly forced to undergo additional tests, file additional paperwork, seek additional referrals, and endure other cyclical administrative procedures.[154] Thus, incarcerated persons pursuing the grievance process typically spend months seeking treatment, in what some scholars refer to as "a giant feedback loop."[155] Finally, the PLRA specifically demands the dismissal of "frivolous claims," presenting incarcerated persons with an immediate barrier to proving their case.[156]

If the grievance process fails, then incarcerated persons must make their best attempt at obtaining judicial relief.[157] Based on the subjective

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[151] *See id.* § 3626(a)(3)(A)(i)-(ii) (instructing incarcerated persons to surpass administrative requirements before alleging merits of claim). The statute places the requirements in the negative, instructing that "no court shall enter a prisoner release order *unless*—. . . ." *Id.* § 3626(a)(3)(A). This illustrates the emphasis the statute places on refusing release for incarcerated persons—much in line with the court's growing precedent. *See id.*

[152] *See* Thompson, *supra* note 58, at 649 (providing context to grievance process for incarcerated persons at administrative level). The author further elaborated on the inadequacies in terms of prison medical care, adding that "the reviewing officials often are not medical professionals. Thus, they are not qualified to question the individual provider's actions and usually defer to the provider's medical judgement." *Id.*

[153] *See id.* 650 (remarking on medical providers opinions as final).

[154] *See id.* at 649 (introducing other relevant considerations during grievance process).

[155] *See id.* at 649-50 (defining prison administrative process as "feedback loop" for its lack of resolution).

[156] *See id.* at 650-51 n.41 (describing *Estelle*'s determination that prison officials were not deliberately indifferent based on evidence alone); *see also* Estelle v. Gamble, 429 U.S. 97, 108 n.16 (1976) (dismissing complaint outright despite "detailed factual accounting" in complaint because "[b]y his exhaustive description he renders speculation unnecessary. It is apparent from his complaint that . . . the doctors were not indifferent to his needs.")

[157] *See* Thompson, *supra* note 58, at 650 (commenting on judicial remedy for inadequate medical care for incarcerated persons).

> However, they face an uphill battle. If the provider has taken any action at all, a court may not be willing to find deliberate indifference. Even if a court undertakes an examination of the adequacy of care, the examination is typically one-sided, pitting a[n] [incarcerated person] without legal counsel or any expert witnesses against a medical provider armed with its own records and expert opinions.

approach instituted by *Farmer*, it is difficult for incarcerated persons to prove violations if prison officials took any steps towards protection.[158] For example, prisons that provide some CDC guidelines are often believed to have "responded reasonably" to the risk of danger posed by COVID-19.[159]

Eighth Amendment claims are further difficult to satisfy given the requisite showing of "inadequate" medical care, compelling a review of all medical documents, records, affidavits, and more.[160] Furthermore, courts have expressed a "general reluctan[ce] to second guess medical judgments," as well as an explicit determination that choice of treatment for incarcerated persons will not constitute deliberate indifference.[161] Despite its exclusion from the *Farmer* test, courts frequently cite this language to dis-

Id. (describing incarcerated persons' difficulties raising Eighth Amendment deliberate indifference claims).

[158] *See id.* (analyzing subjective approach to deliberate indifference claims). Thompson goes on to discuss the difficulties in establishing a subjective violation, arguing that it provides an outlet for providers to deny mistreatment without any remedy to the incarcerated person.

> Providers can use their own records and affidavits to argue that they did not deny all care to the [incarcerated person] patient and that they did not interfere with any prescribed treatment. However, neither directly addresses the [incarcerated person's] claim, which is that the medical care was so inadequate that it constituted deliberate indifference.

Id. at 650 (discussing subjective setbacks); *see also* Sanabria, *supra* note 69, at 1129 (arguing incarcerated persons limited rights following subjective analysis).

[159] *See* Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020) (holding incarcerated persons unlikely to establish prison administrators responded unreasonably); Swain v. Junior, 961 F.3d 1276, 1289 (11th Cir. 2020) (failing to establish preliminary injunctive relief because prison officials responded reasonably).

> There is no question that the BOP was aware of and understood the potential risk of serious harm to [incarcerated persons] at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine [incarcerated persons] and forty-six staff members tested positive for COVID-19, and six [incarcerated persons] had died. 'We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.' The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton . . . Here, while the harm imposed by COVID-19 on [incarcerated persons] at Elkton "ultimately [is] not averted," the BOP has 'responded reasonably to the risk' and therefore has not been deliberately indifferent to the [incarcerated persons'] Eighth Amendment rights.

Wilson, 961 F.3d at 840-41 (explaining reasoning for finding no deliberate indifference).

[160] *See* Thompson, *supra* note 58, at 652 (mentioning incarcerated litigants' struggle to obtain medical documents and files while preparing cases).

[161] *See* Westlake v. Lewis, 537 F.2d 857, 860 n.5 (acknowledging deference to medical opinions).

miss prison claims at their early stages.[162] In addition, since many of the claims brought by incarcerated persons are filed *pro se*, they will likely lack the funding to obtain sufficient counsel or experts to testify to the inadequate care.[163]

These hardships are further exacerbated by the impact of COVID-19 on prison conditions.[164] Due to the unprecedented nature of the virus, prison officials often attempt to avoid liability by arguing that they are not well versed in adequate responses to the virus, and that even their minimal efforts meet the subjective standard proffered under *Farmer*.[165] Given the sheer number of obstacles regularly faced by incarcerated persons seeking relief, individuals forced into confinement remained disproportionately subjected to death during the height of the virus.[166]

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[162] *See, e.g.*, *Bell*, 441 U.S. at 520 (affording deference to prison officials); *Overton*, 539 U.S. at 132 (reviewing penological purposes and giving greater weight to prison administrators); *Turner*, 482 U.S. at 78 (establishing four-factor test utilized in assessing prison regulations and appropriate deference); *Whitley*, 475 U.S. at 320-21 (concluding substantial deference to prison officials is appropriate).

[163] *See* Thompson, *supra* note 58, at 651-52 (describing difficulties incarcerated pro se litigants typically face when alleging Eighth Amendment claim in federal court).

> [Incarcerated persons] generally lack the wherewithal to locate a willing expert and the funds to retain her as an expert witness. A plaintiff's sworn statement about how she was treated, without more, stands little chance against the records, affidavits, and expert opinions that the prison medical providers can generate.

Id.

[164] *See id.* (offering additional struggles amidst prison administration deference); *see also* Bellware, *supra* note 16 (emphasizing inhumane confinement conditions effects on incarcerated persons). Furthermore, incarcerated persons are not alone in their court claims, with even prison staff alleging inadequate response. *See* Bellware, *supra* note 16.

> "All of us are trying to survive," Troitino said. "Your health affects me, and vice versa. [Incarcerated persons] and staff, we do not feel safe." Troitino is among the federal workers suing the government for hazard pay over what they say are risky conditions they're forced to work under during the pandemic — but he's hardly a disgruntled worker. When the BOP announced Aug. 5 it had moved into Phase 9 of its covid-19 action plan, [incarcerated persons] and their advocates panned the news as the bureau's attempt to create the impression that the virus is under control in facilities while papering over a deepening health and safety crisis.

Id. (introducing prison staff's disapproval of prison facilities).

[165] *See* Thompson, *supra* note 58, at 649 (listing procedural problems for incarcerated persons prior to court).

[166] *See* Bellware, *supra* note 16 ("Covid-19 cases are proportionally higher and have spread faster in prisons than in the outside population.")

B. Adopting an Objective Test for Deliberate Indifference so as to Embrace "Evolving Standards of Decency"

The Supreme Court's interpretation of the Eighth Amendment is that the treatment of prisoners must meet "evolving standards of decency," and that "[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[167] Nevertheless, the Court's permitted use of objective analyses for the deliberate indifference test fully ignores the obvious disproportionate impact of COVID-19 on incarcerated persons and the few available legal mechanisms for relief.[168]

The Supreme Court explicitly recognized that in interpreting conditions of confinement, "'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges."[169] As a result, the Court emphasized that "judgment[s] should be informed by objective factors to the maximum extent possible."[170] As such, the Supreme Court should restructure their deliberate indifference test to more closely resemble this intention.[171]

Under an entirely objective deliberate indifference test, the court would assess: (1) whether there was an objectively serious medical need;

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[167] *See* Brown v. Plata, 563 U.S. 493, 511 (2011) (noting deprivation of basic sustenance incompatible with civilized society); *see also* Estelle v. Gamble, 429 U.S. 97, 103-04 (contextualizing conditions of confinement protections).

> These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An [incarcerated person] must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that '(i)t is but just that the public be required to care for the [incarcerated person], who cannot by reason of the deprivation of his liberty, care for himself.'

Id. (discussing importance of protecting incarcerated persons from inadequate medical care).

[168] *See Estelle*, 429 U.S. at 102 ("The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .' against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society.")

[169] *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)) (implementing objective tests for assessing Eighth Amendment claims).

[170] *See id.* (citing *Rummel*, 445 U.S. at 275) (evaluating beneficial uses of objective analysis).

[171] *See id.* (insisting subjectivity will not adequately resolve cruel and unusual punishment claims).

and (2) whether an objectively reasonable prison official was deliberately indifferent to the risk the medical need poses.[172] An objective analysis of the second prong of the test requires that prison officials be held liable for risks that are deemed obvious, and also for more nuanced risks that minimal investigative efforts would reveal to such an objectively reasonable prison official.[173] While maintaining the "reasonable response" rather than an "any response at all" assessment under the deliberate indifference test, the Court can therefore find minimal efforts by prison officials deliberately different, even in the face of unprecedented health emergencies.[174]

As it stands, the subjective element of the approach fails to satisfy the evolving standards of decency test.[175] Applying objective indicia, public opinion is seeking more aggressive responses to COVID-19 by the government and international organizations are calling for a deeper protection of incarcerated persons.[176] Applying subjective indicia, it is clear that a number of the COVID-19 measures lack proportionality, as *all* incarcerated persons are subjected to these inhumane and inadequate medical conditions.[177] Where the Court employs a test that is inconsistently applied, therefore perpetuating inhumane prison conditions, the Court fails to provide any "evolving standard of decency" that they purportedly adhere to.[178]

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[172] *See* Farmer v. Brennan, 511 U.S. 825, 842-44 (assessing and ultimately rejecting purely objective analysis). Again, the Court in *Farmer* relied on standards of criminal recklessness in making this determination, finding that deliberate indifference requires a "subjective component," even when confronted with objectively inhumane conditions of confinement. *Id.* at 839.

[173] *See* sources cited *supra* note 68 and accompanying text (commenting on how even obvious risks may not implicate liability if prison official was unaware).

[174] *See* sources cited *supra* notes 68-69 and accompanying text (noting reasonable response may be adequate to pass subjective deliberate indifference test).

[175] *See* sources cited *supra* note 66 and accompanying text (introducing elements of test).

[176] *See* Deane et al., *supra* note 15 (describing data on public opinion regarding COVID-19).

> It may seem hard to believe today, but in late March 2020, there was strong bipartisan support for a variety of government-imposed shutdown measures. At the time, broad majorities in both parties supported restricting international travel to the U.S., canceling sports and entertainment events, closing K-12 schools, asking people to avoid gatherings of more than 10 people and halting indoor dining at restaurants.

Id.; *see also* Crimaldi, *supra* note 15 (outlining worsening health conditions for incarcerated persons during COVID-19 and subsequent calls for action).

[177] *See* sources cited s*upra* note 52 and accompanying text (discussing specifically subjective indicia under evolving standards of decency test).

[178] *See* sources cited *supra* notes 49-51 and accompanying text (describing elements of evolving standards of decency test).

V. CONCLUSION

In sum, COVID-19 has presented the Court with a unique opportunity to address the inhumane medical conditions and blatant mistreatment of incarcerated persons during public health emergencies—a recognizable violation of the Eight Amendment. Broadly, the Supreme Court's failure to respond to the disproportionate effects of COVID-19 on incarcerated persons ignores the Supreme Court's Eighth Amendment commitment to evolving standards of decency test. Further, the inundation of COVID-19 prison condition litigation within federal courts is indicative of the woefully inadequate confinement conditions. Finally, the series of circuit splits regarding the test for deliberate indifference also serves as evidence that the standard itself is unclear, and the test is likely applied both inconsistently and arbitrarily among courts. Abolishing the subjective approach and adhering to an exclusively objective analysis for deliberate indifference would allow the Supreme Court not only to resolve an unclear and inadequate test, but it would also usher in a new era of human rights protection under the Eighth Amendment.

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