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NECESSARY SUFFERING?: WEIGHING GOVERNMENT AND PRISONER INTERESTS IN DETERMINING WHAT IS CRUEL AND UNUSUAL

Brittany Glidden*

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones . . . .
- Nelson Mandela

INTRODUCTION

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

The Eighth Amendment forbids the Government from inflicting “cruel and unusual punishments” on any individual convicted of a crime. The Supreme Court has interpreted this language to provide a means for prisoners to challenge their conditions of confinement while in custody, including the adequacy of their food or the temperature of their cells. To challenge a prison condition under the Eighth Amendment, a prisoner must demonstrate (1) that the challenged condition he faces is “sufficiently serious,” and (2) that prison officials acted with deliberate indifference to the condition. These requirements are known as the objective prong (i.e. whether the condition is “bad” enough to merit protection) and the subjective prong (i.e. whether the prison officials had a mindset that was inappro-

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1. NELSON MANDELA, LONG WALK TO FREEDOM 174–75 (1994).
2. U.S. CONST. amend. VIII.
5. As more than 90% of prisoners in the United States are male, I use the masculine pronoun to refer to the average “prisoner” throughout the article. See HEATHER C. WEST & WILLIAM J. SABOL, PRISONERS IN 2009, BUREAU OF JUSTICE STATISTICS 2 (Dec. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (finding males account for 93% of all prisoners).
The current two-part conditions test is largely uncontroversial. The test is universally accepted and cited by all courts addressing Eighth Amendment conditions of confinement claims. Perhaps for this reason it has received limited criticism from courts and commentators, especially when compared to the scholarly attention given to other areas of Eighth Amendment jurisprudence, such as criminal sentencing. Although the lack of controversy could be an indication that the test is working effectively, in this article I maintain the reverse is true. Namely, the Eighth Amendment conditions of confinement test is confusing, inconsistent, and ultimately lacks a sound theoretical basis, which prevents it from serving its intended purpose. I argue that—as in nearly all other Eighth Amendment claims—assessment of the validity of a prison condition should be reviewed for “excessiveness,” meaning the condition should be considered in light of its asserted purpose. Further, I urge that in cases seeking injunctive relief, where a harm or risk is ongoing, courts should presume that the prison officials have a culpable mindset that satisfies the second prong of the test.

Without a coherent test or secure theoretical footholds, judges struggle with a basic question: whether the Eighth Amendment serves to protect prisoners from any inhumane conditions or only prohibits conditions resulting from a prison official’s demonstrable bad intent. Jurists, like most of society, wish to intervene when they see deplorable conditions regardless of what is causing them. However, they also respect the difficult work of prison officials and hesitate to hold them liable when the officials’ were seemingly well intentioned or simply made a

7. **Id.; see also** Smith v. Cochran, 339 F.3d 1205, 1212 (10th Cir. 2003); Thaddeus-X v. Blatter, 175 F.3d 378, 402 (6th Cir. 1999).

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


10. This point is generally illustrated by a Westlaw search. A search of journals and law reviews for articles with the terms “eighth amendment” and “sentencing or sentencing” yields nearly 9,000 results, while a search for “eighth amendment” and “prison conditions” or “conditions of confinement” only yields 2,150 results. See, e.g., Mary Berkheiser, Death is Not so Different After All: Graham v. Florida and the Court’s “Kids are Different” Eighth Amendment Jurisprudence, 36 Vt. L. Rev. 1 (2011); John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 Va. L. Rev. 899 (2011); William W. Berry III, Response, Separating Retribution From Proportionality: A Response to Stinneford, 97 Va. L. Rev. In Brief 61 (2011); Michael M. O’Hear, Mandatory Minimums: Don’t Give Up on the Court, 2011 Cardozo L. Rev. De Novo 67 (2011), www.cardozolawreview.com/content/denovo/OHEAR_2011_67.pdf.
The impact of this struggle is apparent in each prong of the Eighth Amendment conditions test. The “objective” prong purports to measure the “seriousness” of the challenged condition, but close scrutiny of court decisions reveals that there is no organized methodology to determine what makes a condition “sufficiently” serious. When a prisoner raises a novel challenge to a condition, jurists have no means to assess the seriousness of the condition apart from their innate sense of what is acceptable.

Without consistent criteria for determining what constitutes a sufficiently serious condition, judges often factor a prison official’s motivations into this “objective” analysis in an attempt to hold accountable only those with inappropriate reasons for their actions. It is normal for judges or juries to want know the reason for a condition in order to assess its seriousness. For example, juries recognize that a prisoner placed into solitary confinement for two years for a violent incident is inherently different from a person placed there for no reason at all. Yet, the Supreme Court has never clarified whether a subjective assessment of a prison official’s motivations belongs in first prong, the second prong, or has no place in the analysis.

Lower courts disagree about the role intent should play in Eighth Amendment analyses. While lower courts have traditionally viewed intent as part of the subjective prong, some regularly incorporate intent analyses into the objective prong. As a result, the test fails to provide sufficient guidance to a court faced with any novel challenge to a prison condition. Without guidance, courts do as they often do in prison cases: they defer to the assessments of prison officials. Yet, by deferring, courts ignore the protection provided by the Eighth Amendment. While the Amendment is intended as a check against excessive state action, those same state actors are defining its limits. Put another way, by deferring to the judgment of correctional officers, courts have effectively turned the objective prong on its head: it now hinges on the subjective motivations of the people it is intended to monitor.

The test also requires prison officials to have a subjective mindset of “deliberate indifference.” Determining an individual’s intent is difficult in any context, but the prison setting is especially challenging because it often implicates the practices and policies of the entire correctional system. In many cases, neither the policy’s initial enactment nor the actions of the prison staff required to follow the policy resulted from a specific intent to harm prisoners, which makes the intent analysis very challenging for jurists.

When a harmful condition is ongoing, many courts also seem to infer intent on the part of prison defendants since the officials are willing to allow the conditions to persist. I argue that this inference should be made explicit in all injunctive cases. When harmful conditions are allowed to continue, there is culpability even without proof of mindset. Inferring intent in injunctive cases is more efficient and allows the courts to interfere in ongoing conditions cases where society has a strong interest.
Part I of this Article gives background on the origins of the Eighth Amendment doctrine concerning prison conditions and identifies persistent conflicts regarding the theoretical underpinnings for the doctrine. This history then provides context for Part II's description of the problems plaguing the current two-prong Eighth Amendment test. Part III includes a brief examination of the theoretical basis underlying other areas of Eighth Amendment jurisprudence, including those challenging criminal sentences, fines, and method of execution cases. This review demonstrates that nearly all of these doctrines rely on a determination of the "excessiveness" of a given punishment, a proportionality analysis that is absent from conditions cases. Part III considers whether proportionality review can be imported into the context of challenges to prison conditions, and the benefits and drawbacks of doing so.

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

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

I. ARE PRISON CONDITIONS “PUNISHMENT”?: THE DEBATE UNDERLYING THE EIGHTH AMENDMENT’S APPLICATION TO CONDITIONS OF CONFINEMENT

To be considered punishment, a penalty or negative action must be intentionally inflicted, usually in response to an offense.11 While it is axiomatic that criminal sentences are deliberately prescribed, there is disagreement as to whether prison conditions are imposed intentionally and therefore constitute "punishment." Unlike sentences or fines, prison conditions are neither dictated by state statute nor ordered by a judge.12 Usually a prisoner’s conditions do not directly relate to his

12. Reinert, supra note 109, at 74–75; Dolovich, supra note 9, at 885. In the past, some conditions—such as hard labor—were specifically imposed as part of a sentence. See generally Amy L. Riederer, Note, Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor, 43 Val. U. L. Rev. 1425 (2009).
crime of conviction, but result from general prison policies, such as the use of handcuffs and restraint chairs, or from circumstances such as overcrowding or the presence of asbestos. Because conditions are not always the result of intentional conduct on the part of prison actors, courts have vacillated on the question of whether they qualify as punishment.

Prior to the mid-1900s, there was no doctrine that permitted prisoners to challenge their conditions of confinement. Courts adopted what was retrospectively referred to as the "hands-off" doctrine, a refusal to interfere in prison matters, because they believed it would be disruptive and would implicate separation of powers concerns. The growth of the social services movement during the twentieth century began to change this view. As the government assumed additional responsibilities as caretaker for its citizens and the civil rights movement took hold, a more protectionist mentality developed toward prisoners. Gradually prisoners began to assert their rights and courts became more receptive to addressing the most egregious conditions and inhumane treatment.

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

13. Adam Kolber describes how a person’s experience in prison can vary greatly based factors—including location, funding, management, and luck—that do not result from his crime of conviction. Adam J. Kolber, *Unintentional Punishment*, LEGAL THEORY (forthcoming 2013). Certain crimes, however, will dictate some conditions of confinement. For example, a prisoner convicted of sex crimes is often placed in a "protective custody" unit. See Michael S. James, *Prison is ‘Living Hell’ for Pedophiles*, ABC NEWS (Aug. 26, 2003), http://abcnews.go.com/US/story?id=90004#.UD53tdb8t2A.


16. Id. at 191-92.

17. Id. During this time the Eighth Amendment was incorporated against the states, broadening its potential application to state prisons. Robinson v. California, 370 U.S. 660 (1962).


19. A thorough history of these conditions can be found in THE OXFORD HISTORY OF THE PRISON, supra note 15, at 170-71. The conditions in “most state prisons” at this time were “grossly deficient” in that they were overcrowded, had rampant abuse, and inadequate management. See also Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (finding conditions in a number of prisons to be “deplorable” and “sordid”).

20. See, e.g., Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (holding doctor’s decision to throw away a prisoner’s ear and stitching the stump may be attributable to deliberate indifference); Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974) (finding actionable the injection of a prisoner with penicillin despite knowledge that prisoner was allergic, and subsequent refusal to treat allergic reaction); Jones v. Lockhart, 484 F.2d 1192, 1193 (8th Cir. 1973) (finding actionable refusal of paramedic to provide treatment); Martinez v. Mancusi, 443 F.2d 921, 922 (2d Cir. 1970) (finding prisoner stated a colorable claim where prison physician refused to administer a
The Supreme Court soon followed suit. In 1976, the Court held in *Estelle v. Gamble* that prison conditions could constitute punishment but did not directly answer the question of when a condition was punishment and when it was not.\(^{21}\) In *Estelle*, the prisoner alleged that the prison staff had not provided him with adequate medical care for his back pain.\(^{22}\) In determining whether the actions of medical staff qualified as punishment, the Court first held that the prison system had an affirmative duty to provide medical treatment, stating, “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”\(^{23}\) The Court also held that there was no penological interest in denying care, as “denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose . . . . [S]uch unnecessary suffering is inconsistent with contemporary standards of decency . . . .”\(^{24}\) Despite these requirements, the Court held the prison staff’s actions did not violate the Eighth Amendment because the plaintiff could not prove the staff acted with the required mindset of deliberate indifference.\(^{25}\)

Over the next decade, the Supreme Court and lower courts grappled with what was required to successfully challenge a prison condition under *Estelle.*\(^{26}\) The debate converged on a central unanswered question: Was the purpose of the Eighth Amendment to prevent prisoners from enduring harmful conditions, to prevent inappropriate actions by staff members, or both?

In the face of dangerous prison conditions across the country, one set of jurists took the position that the central inquiry of the Eighth Amendment is the harm to the prisoner.\(^{27}\) These courts believed the Amendment was necessary to safeguard prisoners, who had little protection from prison officials, the legislature, or the public.\(^{28}\) They found the “touchstone” of the Eighth Amendment inquiry was the
"effect upon the imprisoned."29 This position did not examine the mindset or intent of the officers but concluded "federal courts are required by the Constitution to play a role" when "conditions are deplorable and the political process offers no redress."30 Some degree of distrust of prison officials and a belief that courts have a role in the protection of prisoners were inherent to this view.31

However, other judges maintained that the main Eighth Amendment inquiry was not the effect of a condition on the prisoners, but the intent of the prison official.32 Under the terms of the Amendment, conditions only became "punishment" when prison officials or the legislature intended them to be punishment.33 This position was deferential to prison staff because it presumed that officers were trying diligently to perform difficult duties.34 Accordingly, these courts would only find liability when prison officials exhibit wantonness, not when harm resulted from unintended consequences.35 Espousing a stronger version of this position, Justice Scalia has urged that a condition should be actionable only when prison staff acts with a heightened mental state, such as malicious or sadistic intent.36

Debate between these two opposing positions has persisted for the past thirty-five years. Consequently, the current Eighth Amendment test requires both components to be actionable: (1) a prisoner must make an objective showing that a condition causes harm (or risk of harm), and (2) prison officials must have acted with a culpable mental state.37 These two requirements are now known as the objective and subjective prongs of the Eighth Amendment conditions test. Although adopting both prongs did address concerns raised by both viewpoints, they have also created new problems in Eighth Amendment jurisprudence.


31. Rhodes, 452 U.S. at 358 (Brennan, J., concurring in the judgment).

32. Wilson, 501 U.S. at 303.

33. See generally id. at 301–02 ("An intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate.").

34. One clear example of this belief was in Rhodes, where the majority believed that the prison officials were doing the best they could and were only suffering the impact of "an unanticipated increase in the State's prison population compelling the double ceiling that is at issue." Rhodes, 452 U.S. at 351 n.16. Under these circumstances, the Court urged deference to the officials, stating courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. Id. at 352.


36. See id. at 320–21; see also Wilson, 501 U.S. at 299. Justice Thomas takes this approach even further, and argues that a condition is only punishment when it is specifically applied as part of the sentence. Helling v. McKinney, 509 U.S. 25, 37–42 (1993) (Thomas, J., dissenting).

II. PROBLEMS WITH THE CURRENT CONDITIONS TEST: HOW THE OBJECTIVE PRONG BECAME SUBJECTIVE AND THE SUBJECTIVE PRONG BECAME OBJECTIVE

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

The subjective prong measures the mindset of the actors in the prison system. Courts, and largely society, are uncomfortable holding prison officials responsible for a condition or event that was not intended. The Supreme Court determined the Eighth Amendment is designed to hold accountable "bad" intent displayed by officers, not to penalize those who, through accident or mistake, cause or permit something bad to happen. Underlying this requirement is the belief that these officials are doing difficult work and should only be held accountable for situations that were known and preventable. While this two-part test has intrinsic appeal, a closer examination of its application reveals that it is not functioning as intended, and is creating negative consequences for both prisoners and prison officials.

38. Wilson, 501 U.S. at 298.
39. See, e.g., id.
40. See, e.g., Rhodes v. Chapman, 452 U.S. 337, 349 (1981) (finding that "the Constitution does not mandate comfortable prisons, and prisons ... cannot be free of discomfort"); Atiyeh v. Capps, 449 U.S. 1312, 1315-15 (1981) ("[I]n short, nobody promised [inmates] a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like."); Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004) ("If prison conditions are merely restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.") (internal quotation marks omitted).
41. See, e.g., Farmer, 511 U.S. at 834.
42. This sentiment is captured by the quote from Judge Posner, that "[i]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word." Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).
43. Farmer, 511 U.S. at 835-40 (applying mindset requirement to find liability).
44. Id. at 840-41; see also Wilson v. Seiter, 501 U.S 294, 299-301 (1991); Duckworth, 780 F.2d at 652.
45. As Judge Posner has observed: "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century." Duckworth, 780 F.2d at 652.
NECESSARY SUFFERING

A. The "Objective" Prong

While the law is clear that no prisoner can recover under the Eighth Amendment unless he can demonstrate that the harm he suffers is "sufficiently serious,"\(^{46}\) determining what meets this standard as a normative matter is complicated and uncertain. *Estelle v. Gamble* was the Supreme Court's first attempt to define the class of actionable conditions.\(^{47}\) In *Estelle*, the Court confirmed the Constitution created a duty for prison staff to provide medical care for prisoners because they could not independently meet their own needs.\(^{48}\) Although the case signaled this duty was not exclusive, the Court was not specific regarding which conditions triggered protection.\(^{49}\) Since *Estelle*, courts have therefore identified broad categories of duties owed to prisoners, including the provision of "basic human needs" and preventing conditions that could result in death or substantial harm.\(^{50}\)

Lower court decisions on what constitutes "sufficiently serious" have been largely dictated by the sentiments of the judge and the quality of the advocacy.\(^{51}\) The subjectivity has created inconsistent decisions across all areas of prison life, including living conditions, disciplinary measures, exercise requirements, and denial of amenities.\(^{52}\) As a result of these inconsistent rulings, interested parties, including prisoners, prison staff, judges, and the public, are left with significant questions regarding what conditions are acceptable. These questions are further complicated because of the undefined role that the penological interest underlying a condition plays in this determination. While in theory it may seem that a condition can be evaluated for its seriousness absent its purpose, in reality this separation is difficult; the cruelty of a condition is innately tied to the reason it is applied.

1. The Problem of What

The Supreme Court has relied on a variety of phrases to describe what conditions satisfy the objective prong of the Eighth Amendment test. Actionable conditions are those that deprive prisoners of the "minimal civilized measure of life's necessities," are "inhumane," place prisoners at "unreasonable risk" of

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46. See Wilson, 501 U.S. at 298.
47. 429 U.S. 97 (1976).
48. *id.* at 104 ("[It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.").
49. *id.* (finding that "the public [is] required to care for the prisoner").
50. The Eighth Amendment violation must include "the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson*, 501 U.S. at 304; see also *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (finding basic necessities to be adequate food, clothing, shelter, and medical care and taking reasonable measures to guarantee the inmates' safety).
51. See infra notes 74–83.
52. *id.*
"significant harm," or are the cause "of unnecessary suffering." From these characterizations, one descriptor has emerged predominant: a condition must deprive a prisoner of a "basic human need" to warrant Eighth Amendment protection.

Whether a prisoner is deprived of a "basic human need" is not a simple question. While some basic needs are necessary to stay alive, such as food, clothing, shelter, medical care, and reasonable safety, others would not be directly fatal if absent, such as exercise and outdoor access. The Supreme Court has also maintained that this list is not exhaustive, which leaves room for the recognition of additional needs.

How the "list" of basic needs changes is a matter of debate. The Supreme Court indicates that the list will change with "society's evolving standards of decency." Thus, some punishments that were acceptable in the past have been eliminated as public opinion shifts. In the context of criminal sentencing, courts can and do assess public opinion by examining the laws of varying jurisdictions. Prison conditions do not have an equivalent indicator of majority opinion. Information about prison conditions is notoriously hidden from public view and there is no easy way for judges to compare various practices. Additionally, even when this

54. See, e.g., Lockamy v. Rodriguez, 402 F. App'x 950, 951 (5th Cir. 2010); Renschinski v. Williams, 622 F.3d 315, 338 (3d Cir. 2010); Mufiiz v. Richardson, 371 F. App'x 905, 908 (10th Cir. 2010).
56. Wilson, 501 U.S. at 304.
57. See Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987) (finding there to be "substantial agreement among the cases" that some form of regular outdoor exercise is required under the Eighth Amendment); see also Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir. 1982); Spain v. Proconier, 600 F.2d 189, 199 (9th Cir. 1979).
58. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding the Eighth Amendment's prohibition of cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."); see also Estelle v. Gamble, 429 U.S. 97, 103 (1976) (finding that definition of cruel and unusual punishment is contextual and responsive to "contemporary standards of decency").
61. See, e.g., Graham, 130 S. Ct. at 2024 (reviewing state laws and practices for imposition of sentence of life without parole for non-homicide crimes committed by juvenile offenders).
62. Justice Kennedy spoke on this issue at an American Bar Association ("ABA") meeting in 2003. See Justice Anthony Kennedy, Speech at ABA Annual Meeting (Aug. 9, 2003) ("The subject of prisons and corrections may tempt some of you to tune out . . . . Even those of us who have specific professional responsibilities for the criminal justice system can be negligent when it comes to the subject of corrections. The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession
information is available, regular use of a practice does not indicate its acceptance by society. Thus, judges currently have no clear or universal means to assess "evolving standards of decency" in the context of basic human needs.

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

How does a well-meaning judge analyze this situation? Is human contact a human need? Does this need include touching other people? How does the length of the isolation impact this decision? There is no clear indicator of public opinion regarding solitary confinement. On one hand, solitary confinement is a common prison practice and on the other, there is increased criticism of its long-term use. The case has experts on both sides, both arguing that human contact is, or is not, necessary for the human experience. Does it matter whether Mr. Jones can seem to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.


64. While facts used in the hypothetical example are not an exact match, see Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) for the general factual background used in the hypothetical. Any inner thoughts ascribed to the judge throughout this paper are entirely conjecture.

65. The number of individuals housed in solitary confinement is unclear due to lack of reporting and variance in the definition, and estimates range from 20,000 to 120,000. Joseph B. Allen, Extending Hope into "The Hole": Applying Graham v. Florida to Supermax Prisons, 20 WM. & MARY BILL RTS. J. 217, 226 (2011).

66. In the past several years, increased attention has been paid to solitary confinement, with a growing number of government officials and other organizations—including the United Nations, the ABA, the American Civil Liberties Union ("ACLU"), the European Court for Human Rights and others—speaking out against the long-term use of this practice. See id. at 235–41 (discussing international opinion). Many legislatures have limited the use of extended solitary confinement, and most recently the United States Senate held a subcommittee meeting to evaluate the use of solitary confinement in the federal Bureau of Prisons. See Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the S. Judiciary Subcomm. on the Const., Human Rts., and Civil Rts., 112th Cong. (2012), available at http://solitarywatch.com/resources/testimony (last visited Jan. 7, 2013) (compiling written and oral testimony from hearing); see also Stop Solitary, ACLU, available at http://www.aclu.org/prisoners-rights/stop-solitary-state-specific-resources (last visited Jan. 7, 2013) (listing information on state changes, including bill banning minors in solitary confinement in California; the closing of the main "supermax" prison in Illinois; Colorado’s reduction of the number of prisoners in isolation; and consideration of solitary confinement in Virginia legislature).
show he developed depression as a result of these conditions? What if he experienced these conditions and did not develop depression or another illness? The results of cases challenging long-term solitary confinement vary greatly. 67

Determining the seriousness of a condition based on actual harm is already difficult, but courts face an even more complicated task when asked to assess whether a condition’s potential harm is sufficiently “serious.” The Supreme Court has expressly stated that prospective harm is actionable, as any condition that places a prisoner at “substantial risk of serious harm” satisfies the objective prong. 68 However, courts struggle to define “substantial risk.” 69 For example, it is unclear whether the risk is to an “average” prisoner 70 or to the particular prisoner-plaintiff. 71 Meanwhile, other courts have ignored the law of potential risk completely and require an “actual showing of harm.” 72 It is plausible that these jurists are not dismissing risk of harm entirely, but are simply being unclear or inexplicit in their determination that a risk is “not substantial.” The varying approaches nevertheless reflect a lack of uniformity in court decisions.

Because of the confusion, when challenges are made to conditions absent from the “known list” of basic human needs, courts puzzle over how to determine what deprivations are sufficient to trigger Eighth Amendment protection. Predictably, there are numerous disparate rulings concerning whether particular conditions are actionable, including: long-term solitary confinement, 73 uncomfortable cell tem-

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

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


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

72. See, e.g., King v. Frank, 371 F. Supp. 2d 977, 985 (W.D. Wis. 2005) (finding no violation where constant illumination had not yet led to loss of sleep or other problems); Chavarria, 102 F. App’x at 436–37 (same); Silverstein, 2011 WL 4552540 at *18–21 (failing to consider risk of harm); O’Neal v. Brenes, No. EDCV 09-1884-DDP, 2009 WL 3785572, *4 (C.D. Cal. Nov. 10, 2009) (dismissing case because plaintiff did not allege deprivation of food caused him to “suffer physical effects”).

73. See cases cited supra, note 67.
peratures, continuous lighting, lack of windows in cells, sleeping on mattresses on the floor, noise in the cellblock, vermin infestation, non-functional plumbing, unsafe transportation, and exposure to toxic fumes.

Even when a condition is generally accepted as sufficiently serious, the reason for its acceptance is rarely articulated. For example, exercise is generally accepted as a basic human need. It was added to the “list” of basic needs in the Court’s 1991 decision, Wilson v. Seiter, even though common experience suggests exercise is not essential for survival and prisoners are still able to perform

74. Compare Chandler v. Crosby, 379 F.3d 1278, 1296–97 (11th Cir. 2004) (holding “severe discomfort” from inside temperatures during Florida summers did not violate Eighth Amendment), with Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997) (holding the Eighth Amendment entitles prisoners “not to be confined in a cell at so low a temperature as to cause severe discomfort”).

75. Compare LeMaire v. Maass, 745 F. Supp. 623, 636 (D. Or. 1990) (holding keeping cell lights on for 24 hours a day is unconstitutional), with Chavarria, 102 F. App’x at 436–37 (holding constant illumination is not unconstitutional because it serves a security interest).


77. Compare Union Cnty. Jail Inmates v. DiBuono, 713 F.2d 984, 994 (3d Cir. 1983) (finding that making prisoners sleep on floor mattresses for more than a few days is unconstitutional), with Ferguson v. Cape Girardeau Cnty., 88 F.3d 647, 650 (8th Cir. 1996) (finding that making prisoners sleep for thirteen nights on floor mattress did not violate the Constitution under the circumstances).

78. Compare Benjamin v. Fraser, 161 F. Supp. 2d 151, 185 (S.D.N.Y. 2001) (holding excessive noise contributed to difficulty sleeping and may constitute the deprivation of a basic human need), with Johnson v. Lynaugh, 800 S.W.2d 936, 938 (Tex. App. 1990) (dismissing claim for excessive noise as frivolous), and Givens v. Jones, 900 F.2d 1229, 1234 (8th Cir. 1990) (holding noise and fumes are insufficient to establish an Eighth Amendment violation even when prisoner alleged migraines).


80. Compare Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985) (finding inadequate sanitation deprived prisoners of basic element of hygiene), with Wilson v. Cooper, 922 F. Supp. 1286, 1292 (N.D. Ill. 1996) (finding being held in cell for days without running water was “not sufficiently egregious” to violate the constitution).

81. Compare Davis v. Stanley, 740 F. Supp. 815, 817–18 (N.D. Ala. 1987) (finding no Eighth Amendment violation from allegations that officers engaged in high speed chase during transport), and Dexter v. Ford Motor Co., 92 F. App’x 637, 640 (10th Cir. 2004) (finding no Eighth Amendment claim stated where inmate was not allowed to use a seatbelt and was paralyzed when transport vehicle was involved in a traffic accident), with Allah v. Goord, 405 F. Supp. 2d 265, 276 (S.D.N.Y. 2005) (finding an Eighth Amendment claim where inmate who required wheelchair was transported in a non-accessible van).

82. Compare Board v. Farnham, 394 F.3d 469, 485–87 (7th Cir. 2005) (finding allegations that ventilation system was contaminated with black mold and fiberglass supported Eighth Amendment claim), with Givens, 900 F.2d at 1234 (finding subjecting prisoner for three weeks to fumes from housing renovations did not violate Eighth Amendment even if the fumes caused the prisoner to experience migraines).


84. See id.

85. Id.

86. Exercise is known to combat obesity and reduce risks for obesity related diseases. However, the fact that exercise may not be necessary for life is demonstrated by studies showing even as more Americans are classified obese, their life expectancy continues to rise. Steven Reinberg, Smoking, Obesity Slowing Growth of U.S. Life Expectancy, Report Finds, US NEWS, (Jan. 25, 2011), http://health.usnews.com/health-news/family-health/heart/articles/2011/01/25/smoking-obesity-slowing-us-life-expectancy-report-finds.
limited exercise in their cells. Moreover, the Court did not reveal its thought process behind the addition; neither do the lower courts following Seiter. Instead, the courts rely on the "obviousness" that lack of exercise threatens prisoners' physical and mental health, even though the harm has never actually been proven. While people may agree that physical exercise is a human need, that simple declaration—without analysis—does little to assist future courts in knowing how to address novel allegations that a particular deprivation is a "basic human need."

The uncertainty has prompted concerns that judges are simply deciding cases based on personal opinions. This concern is not the fault of the judge. Absent legislation or public opinion data about a specific condition, both of which rarely exist, it is understandable that judges turn to their own subjective views of what seems acceptable. The result is that the objective prong has become highly subjective.

2. The Problem of Why

Another issue with the objective prong is whether courts should consider why a condition was imposed when assessing its seriousness. The reason underlying a condition is essential to most people's basic evaluation of whether a condition is acceptable. For example, it is generally considered cruel to cut a person with a knife. Yet, if the person wielding the knife is a surgeon about to perform a life-saving procedure, the sense of cruelty disappears. Separating the assessment of whether a condition is cruel from the reason underlying it is effectively impossible because the determination of what is a "basic human need" will often be influenced by one's perceptions about why the condition exists.

A condition's penological purpose cannot be neatly excised from decisions about basic human needs. In Estelle, the Court noted "[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency." Conditions have also been found to violate the Eighth Amendment when they cause pain for no reason or serve no legitimate end. For example, courts have

87. See, e.g., Wilson, 501 U.S. at 304 (adding exercise to list of needs without explanation); Delaney v. DeTella, 256 F.3d 679, 683 (7th Cir. 2001) ("Given current norms, exercise is no longer considered an optional form of recreation, but is instead a necessary requirement for physical and mental well-being.").
88. See Delaney, 256 F.3d at 685 ("[W]e have acknowledged the strong likelihood of psychological injury when segregated prisoners are denied all access to exercise for more than 90 days . . . ."); Lopez v. Smith, 203 F.3d 1122, 1133 n.15 (9th Cir. 2000) (requiring no showing of adverse medical effects where prisoner alleged denial of exercise for more than six weeks).
91. Estelle, 429 U.S. at 103; see also Hope, 536 U.S. at 738. In 2002, the Supreme Court decided Hope v. Pelzer, a case challenging the use of a "hitching post" for discipline. 536 U.S. at 738. Even though the prison alleged the post was necessary for discipline, the Court dismissed the assertion and held the policy was unconstitutional because it caused pain without furthering a legitimate penological interest. Id. at 738. At no point
ruled conditions such as requiring an HIV-positive inmate to wear a facemask, mandatory cross gender strip searches, and use of pepper spray on a mentally ill inmate invalid because they cause pain without any legitimate purpose.  

Courts have also used this reasoning in reverse, deeming conditions insufficiently serious because they are based on a legitimate end. For example, it is undisputed that food is a basic human need and denial of food—even for a few days—is sufficiently serious to raise an Eighth Amendment claim. However, if the denial is based upon noncompliance with a prison rule, courts often find the denial of food is not objectively harmful under the Eighth Amendment.

Accordingly, it is unclear whether a condition that causes a prisoner pain, but is necessary to maintain prison safety, implicates the Eighth Amendment. For example, suppose people hear our hypothetical Mr. Jones has been held in isolation for three decades and want to know the reasons for this treatment. In assessing whether the isolation is acceptable—or whether it is cruel—it matters if Mr. Jones is segregated arbitrarily or because of a justified security risk. The conclusion as to whether his conditions are a problem relates both to the harm caused by the isolation and the reason it was imposed. If Mr. Jones is a model prisoner, isolated at random and without explanation, many would view the treatment as unacceptable. Yet, if he is isolated because of repeated and continuous assaults, it may be regarded as reasonable and necessary.

Situations regularly arise where a prisoner is denied a basic human need and did the Court consider whether the post violated a “basic human need,” a claim that would have been difficult to substantiate. Resulting from this case there is controversy regarding whether claims that a condition causes “pain without a purpose” state an independent action (outside of the “basic human needs” context). Compare Hope, 536 U.S. at 738 (finding colorable claim where there was pain without legitimate purpose); with Wilkerson v. Stalder, 639 F. Supp. 2d 654, 666–67 (M.D. La. 2007) (finding no independent Eighth Amendment action for allegations that conditions caused pain without purpose). This point is largely semantic as claims of pain can be raised under the basic human need of reasonable safety. See Alexander & Fathi, supra note 69, at 693.

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

93. See, e.g., Rodriguez v. Briley, 403 F.3d 952, 952 (7th Cir. 2005) (finding denial of food acceptable because it was a result of prisoners’ non-compliance with a prison regulation); Chavarria v. Stacks, 102 F. App’x 433, 436–37 (5th Cir. 2004) (finding use of lights twenty-four hours a day did not state Eighth Amendment claim because of security needs); Talib v. Gilley, 138 F.3d 211, 212 (5th Cir. 1998) (finding denial of food acceptable because it was caused by prisoner’s voluntary refusal to comply with prison regulations).

94. The Supreme Court has noted in dicta that it would be an Eighth Amendment violation to deny a prisoner an “identifiable human need such as food.” Wilson v. Seiter, 501 U.S. 294, 304 (1991). Other courts have found even short denials of food satisfy the objective prong. See Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (denial of four consecutive meals); Cooper v. Sheriff, Lubbock Cty., Tex., 929 F.2d 1078 (5th Cir. 1991) (twelve days); Deerman v. Woodson, 429 F.2d 1288, 1289 (10th Cir. 1970) (more than fifty hours); but see Talib, 138 F.3d at 214 n.3 (denial of one out of every nine meals is not a constitutional violation when coupled with prisoner’s non-compliance with prison meal service policy).

95. Talib, 138 F.3d at 214; Rodriguez, 403 F.3d at 952–53.
prison officials claim the denial is necessary. For example, a prisoner’s clothes are taken away, causing him to shiver uncontrollably, but the prison staff members testify that his garments pose a suicide risk, or a prisoner provides evidence that having the lights on twenty-four hours a day causes him headaches and blurred vision, but the prison administrators claim the policy furthers nighttime safety. It seems virtually impossible to ask courts to assess these conditions without looking at the reason they are imposed. Yet the Supreme Court has not stated the prison’s reason for a given condition should be considered in the objective inquiry, resulting in uncertainty and hesitancy to rely on alleged prison interests in practice.

Part of this reluctance also results from an interpretation of the Eighth Amendment as a normative dictate against inhumane conditions. Some courts and practitioners assert the Eighth Amendment exists to provide ultimate limits, prohibiting certain conditions as cruel, no matter what purpose may exist for them. The Eighth Amendment not only protects prisoners but also ensures our society continues to use humane and acceptable practices. Accordingly, these theorists would make bright line rules to ban qualifying conditions, such as torture

96. Thomas, 614 F.3d at 1307 ("We balance these standards of decency against prison officials' need to keep the prison safe."); Foster v. Runnels, 554 F.3d 807, 813–14 (9th Cir. 2009) (balancing basic human need for food against prison officials' interest in security and enforcement of policy); Talib, 138 F.3d at 214 (same); Rodriguez, 403 F.3d at 953 (balancing basic human need for food and hygiene against prison officials' interest in security and enforcement of policy).


99. See, e.g., John F. Stinneford, Incapacitation through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity, 3 U. St. Thomas L.J. 559 (2006) (arguing that despite benefits to prison interests of castration for sex offenders, this should be banned under the Eighth Amendment).

100. See O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting) ("[P]unishments which inflict torture, such as the rack, the thumbscrew, the iron boot, [and] the stretching of limbs . . . were rendered impossible by the Declaration of Rights . . . ."); In re Kemmler, 136 U.S. 436, 447 (1890) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] Amendment . . .") (quoting Wilkerson v. Utah, 99 U.S. 130, 136 (1878)) (internal quotation marks omitted); John F. Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739 (2008) (arguing the Eighth Amendment should be read to limit the government’s ability to introduce new or innovative punishments that are significantly harsher than traditional punishments for the same crime).

101. For example, some people argue the Eighth Amendment prohibits the application of certain punishments, even when the defendant chooses them. See Steven A. Blum, Public Executions: Understanding the "Cruel and Unusual Punishments" Clause, 19 Hastings Const. L.Q. 413, 451 (1992) ("One may not consent to cruel and unusual punishment."); Jeffrey L. Kirchmeier, Let’s Make A Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment, 32 Conn. L. Rev. 615 (2000) (arguing waiver should not be permitted because conditions should be impermissible under all circumstances).

102. The Supreme Court has stated "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). The Court also noted "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," 9d. at 101, and it must be "flexible and dynamic," Gregg v. Georgia, 428 U.S. 153, 171, 173 (1978). See also Dolovich, supra note 9, at 945 (discussing whether prisons and prison officials should be held to an objective standard of institutional knowledge when prison conditions fall below basic levels, regardless of their subjective knowledge);
or denial of food, because these conditions cannot be justified and prison officials should not have an opportunity to do so.

There is also fear that too much deference will be granted to prison staff if they are allowed to explain their practices. Courts often defer to the experience of those managing the prisons in making their decisions. They know they are not prison experts and fear making a decision that could cost staff or prisoners their lives. Non-Eighth Amendment challenges against prison regulations that burden constitutional rights only succeed if there is no "rational basis" for the violation—a standard that permits regular and extensive deference to the judgment of prison staff. When used in the Eighth Amendment context, this extensive deference is troubling because it effectively enables violators—the prison officials—to judge their own offenses.

Despite these concerns a fundamental question is whether it is possible to ignore the reasons underlying a condition during objective review? It is regular societal practice to consider the reason behind any punishment—from spanking to a criminal sentence—in assessing that practice. Many courts consider the reasons underlying a challenged condition, but they exclude it from the objective prong or simply do not disclose their reasoning, deeming the objective prong satisfied.


104. Most violations of constitutional rights in prison are reviewed under a deferential rational basis test. Turner v. Safley, 482 U.S. 78, 89–91 (1987). The Court in Turner urged deference towards prison officials, stating "‘the problems of prisons in America are complex and intractable’ . . . and separation of powers concerns counsel a policy of judicial restraint.” Id. at 84–85 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)). This tendency towards deference is borne out by empirical analysis. Adam Winkler conducted a study of cases applying strict scrutiny to determine if there were areas of law, or types of institutions or cases, where a law or practice was more likely to be upheld, even under this heightened level of review. Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793 (2006).

105. See Winkler, supra note 104, at 819 ("Courts are famously unwilling to oversee prison policies with too demanding an eye for fear of interfering with the security of inmates and prison personnel.").

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

107. See cases cited supra note 40.

108. See infra notes 112–18 and accompanying text.

109. See, e.g., Cunningham v. Eyman, 17 F. App’x 449, 452, 454 (7th Cir. 2001) (finding prisoner that spent sixteen hours in shackles without use of bathroom failed to state an objective claim because prisoner had “creat[ed] a dangerous disturbance”); Snipes v. DeTella, 95 F.3d 586, 591–92 (7th Cir. 1996) (stating removal of prisoner’s toenail without pain killers does not "remotely strike[] us as inhumane or a denial of the minimal necessities of a civilized society").
For example, in lockdowns—where prisoners are kept in their cells twenty-four hours per day and denied exercise, showers, library access, outdoor access, and other privileges for security or administrative reasons—courts generally assume there is a legitimate interest supporting the restrictions, and treat deprivations during lockdowns differently than the same deprivations at other times. Thus, some courts seem to be taking the reason for a condition into account.

In many cases, the deference of courts to prison officials' judgments is explicit. In these cases, including nearly all Eighth Amendment challenges raised in the Fifth Circuit, if prison staff asserts any reason for a condition, the judge will find the challenged practice to be acceptable. Thus, the prison staff's assessment that a condition is necessary actually precludes Eighth Amendment review. This treatment has the consequence of making the objective prong subjective, as the court's analysis is based entirely on the opinions of prison staff. While such deference may be comfortable and expedient for courts, it effectively eliminates the objective prong and negates judicial review of challenged conditions.

Although it is impossible to pinpoint the degree and regularity with which courts defer to prison staff opinions, empirical evidence and decision comments
show the necessity of a condition is often a crucial factor in whether it survives Eighth Amendment scrutiny. Without a framework for considering penological interest, prison officials therefore effectively decide what is "objectively" bad and the proverbial fox is left guarding the hen house.

B. The "Subjective" Prong

Once an objective harm is shown, a prisoner must demonstrate the prison official acted with a sufficiently culpable mindset, meaning he or she was deliberately indifferent to the serious condition.\textsuperscript{119} The importance of the mindset requirement is definitional. To be "punishment" under the terms of the Eighth Amendment, there must be some level of intentionality.\textsuperscript{120} This sentiment is summed up in the oft-repeated quote from Judge Posner: "if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word."\textsuperscript{121}

Generally, a prison staff member will have acted with deliberate indifference when: (1) he or she knew the risk to a prisoner posed by a condition, and (2) disregarded it by failing to take specific measures to abate it.\textsuperscript{122} The application of this requirement poses particular problems for plaintiffs seeking injunctive relief and challenging institutional policies and practices. Namely, it creates the problem of ongoing harms and the problem of institutional knowledge.

1. The Problem of Ongoing Harms

The Eighth Amendment "subjective" prong is actually a hybrid of subjective and objective components. The knowledge component is subjective.\textsuperscript{123} A plaintiff must show that a prison official had actual knowledge of a condition's harm, not simply that he or she should have known harm would result.\textsuperscript{124} The test therefore

\textsuperscript{120}. See id. at 837–38 (finding an official must be aware of the risk of harm to a prisoner in order to be liable under the Eighth Amendment, as "[t]his approach comports best with the text of the Amendment as our cases have interpreted it"); supra text accompanying note 13.
\textsuperscript{121}. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).
\textsuperscript{122}. Farmer, 511 U.S. at 842–43, 846 n.9.
\textsuperscript{123}. Id.
\textsuperscript{124}. Id. at 838. While it may seem reasonable that prison officials are not held liable if they did not have actual knowledge of a problem, this standard does not always accurately assess culpability. Courts and commentators have pointed out the actual knowledge requirement provides an incentive to be unaware of risks and harms occurring in the prison, and may result in prison officials actively (and culpably) avoiding such knowledge. See Dolovich, supra note 9, at 945 (discussing whether prisons and prison officials should be held to an objective standard of institutional knowledge, regardless of their subjective knowledge).
prevents an officer from being held liable for lack of knowledge or mistake. The response component is then objective. Once a plaintiff shows a prison official was aware of a problem, the court must evaluate whether the official responded in a reasonable manner.

In practice, the subjective knowledge component does not exist in injunctive cases. If harm is ongoing, the lawsuit itself notifies defendants of the challenged harm, rendering the knowledge requirement superfluous. The inquiry then turns on whether prison staff responded to the harm or risk in an objectively reasonable manner. Courts often find prison staff failed to do so, as judges hesitate to permit an ongoing harm, but then conclude that an official is powerless to stop a damaging condition.

The subjective prong also follows the court's initial objective determination that the condition is sufficiently serious to merit Eighth Amendment protection. A judge will have already heard substantial evidence about these harms, including specific details about how prisoners are being hurt, but cannot stop the harm unless he or she finds deliberate indifference. In light of that evidence, judges may feel a responsibility to protect those in custody or experience cognitive dissonance if they have identified a significant harm, but can do nothing to stop it. Therefore in the face of a dangerous, ongoing harm, judges and juries may act to ensure the problem is solved, even finding intent when evidence is limited or spotty.

Although a court is not likely to admit such reasoning explicitly, several court
decisions support this point. For example, the District Court of Wyoming found the fact that officers were simply ignoring prisoners being threatened and beaten by other prisoners to be a sufficiently serious harm. However, the defendants were also in the process of re-training their staff to ensure better safety, a response that could have been found reasonable. Yet the court found in favor of the prisoners on summary judgment, stating the officials showed deliberate indifference and “the Court is not impressed by such measures unless they are accompanied by genuine good-faith efforts to ensure actual compliance with the policies.”

Judges are also likely to find deliberate indifference if they considered the reason for the condition during the objective analysis. Namely, if a judge decides the penological interest for a condition is insufficient, he or she is inherently deciding the officers did not act reasonably. For example, in the Eleventh Circuit, a mentally ill prisoner challenged the repeated use of pepper spray against him. The court found the harm sufficiently serious because there was no legitimate state interest in using chemical agents against the prisoner due to his mental disability. In the deliberate indifference prong, the court found the risk of harm was obvious and the repeated use of pepper spray was unreasonable. Had the staff taken any mitigating steps—such as trying other restraint methods or involving mental health staff in subduing the prisoner—the condition likely would not have been found to be sufficiently serious in the first place.

For this reason, the utility of the “subjective prong” is often subsumed by the objective test in injunctive cases. Although this approach may not be problematic as a normative matter, the ability to draw this inference in injunctive cases should be made explicit.

2. The Problem of Institutional Knowledge and Intent

Another issue in is that agency intent is notoriously difficult to prove. In cases involving a discrete action, a plaintiff can prove intent by simply showing an individual’s reasons for enacting a condition. While there are problems inherent in proving any individual’s subjective mindset, courts and juries are seen as able to

132. Id. at 1211.
133. Id. at 1216.
134. Id. at 1215.
135. See Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010); Jordan v. Gardner, 986 F.2d 1521, 1528–29 (9th Cir. 1993).
136. Thomas, 614 F.3d at 1293.
137. Id. at 1311–12.
138. Id. at 1313–16.
139. But see discussion infra Part IV.B.
resolve them.140 However, when determining intent behind general institutional practices and policies, judges are far more likely to simply substitute their own view of the institution.

This challenge is illustrated by returning to Mr. Jones. Imagine he is subjected to a policy that requires his cell to have a light on twenty-four hours a day. The policy was put into place by an administrator for security purposes, as the prison staff must be able to see Mr. Jones at all times, but the light is causing Mr. Jones to lose sleep and his eyesight is declining. Assuming the court finds the lighting to be sufficiently serious under the objective prong, whose intent should be looked at to determine if the prison is culpable?141

In prisons, many actors with multiple mental states create and implement policies. One officer may enjoy watching Mr. Jones suffer in his cell, while another may think the treatment is cruel but is unable to alter Mr. Jones’s conditions. The administrator who put the policy in place may have no knowledge that the lights are causing Mr. Jones harm, while another may know of the alleged harm but decline to change the situation. Can the mental state of any of these individuals be said to reflect the intent of the prison?

Much has been written in scholarly literature about the imprecision, at times called the “slop,” of institutional intent.142 This concern arises in many contexts, including employment discrimination lawsuits, First Amendment challenges, ex post facto application, and double jeopardy cases.143 In the punishment context, Alice Ristroph explains that a fact finder’s assessment of institutional intent relies

140. See generally MODEL PENAL CODE § 2.02 (2011) (explaining general intent requirements: nearly all crimes are assigned a requisite mental state a jury must find in order to establish criminal liability); Alice Ristroph, State Intentions and the Law of Punishment, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1364 (2008) (“For the most part, fact-finders appear comfortable making mental state determinations for individual defendants, even with only circumstantial evidence.”).

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

142. See United States v. O’Brien, 391 U.S. 367, 383 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter.”); Dolovich, supra note 9, at 923–28 (exploring whether an institution may be deemed “cruel,” and whether purposeful intent or merely lack of sensitivity to the prisoner’s suffering is required); Michael S. Moore, Patrolling the Border of Consequentialist Justifications: The Scope of Agent-Relative Restrictions, 27 LAW & PHIL. 35, 48–53 (2008) (arguing for a general consequentialist view of intent, based on the concept that any definitional classification of intent “inevitably will have some slop in it”); Ristroph, supra note 140, at 1357 (discussing the ambiguity caused by imprecision in determining institutional intent); Pamela S. Karlan, Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 YALE L.J. 111, 119–21 (1983) (considering “the problem of group intent” in light of the different levels of intent recognized by the Model Penal Code); Note, The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity, 114 HARV. L. REV. 2146, 2157–59 (2001) [hereinafter Irrational Application] (discussing the deference courts traditionally show legislatures, as resulting from the difficulty in assessing legislative intent as compared with the intent of an individual or small group).

143. Ristroph, supra note 140, at 1356–57 (discussing areas where institutional intent is relevant); Irrational Application, supra note 142, at 2155–57 (discussing intent in discrimination cases).
on her biases and views of the institution. Ristroph explains that the purpose underlying the action of an institution—and in particular, prison systems or legislatures—can usually be presented in a way that avoids constitutional offense because of the deference given to these institutions. Ristroph notes that "[r]arely can a single coherent intent be attributed to the entire institutional apparatus that imposes punishment. The intentions of individual officials within the criminal justice system may be relevant to, but are not dispositive of, the question whether the system is imposing punishment." In particular, "[e]videntiary ambiguities allow for discretionary judgment, and courts have considerable leeway to find the requisite intent (or not) in order to reach a preferred outcome." Overall, Ristoph concludes that a fact-finder’s view of institutional intent is inaccurate and arbitrary.

Since institutional intent can be a proxy for a fact finder’s own biases about the institution, there is a question whether this consideration should be included in the Eighth Amendment analysis. The Supreme Court acknowledged the difficulty of this determination in institutional cases, noting “considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official.” While this Article does not argue this requirement should be eliminated entirely, these critiques provide further support for limiting the role of subjective intent analysis in institutional cases.

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

Eighth Amendment case law demonstrates the current application of the two-prong test lacks uniformity and is vulnerable to the personal opinions of judges. This Part looks to other areas of Eighth Amendment jurisprudence for guidance on reforming the conditions test generally and the objective prong in particular. It does not discuss the subjective prong because no other Eighth Amendment doctrine requires intent.

Several Eighth Amendment doctrines have been created to evaluate “penal measures” and assess whether punishments comport with “the evolving stan-

144. Ristroph, supra note 140, at 1357–58.
145. Id. at 1358; See also Irrational Application, supra note 142, at 2158 (discussing the difficulty of determining legislative intent and noting “courts are reluctant to pierce the legislative veil, preferring instead to ‘affirm legislative competence’”) (quoting Robert C. Post & Reva B. Seigel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441, 469 (2000)).
146. Ristroph, supra note 140, at 1399.
147. Id. at 1357.
ards of decency that mark the progress of a maturing society." These doctrines, including challenges to sentences, bail, punitive fines, methods of execution, and application of the death penalty, all center on whether a punishment is excessive. This focus is unsurprising as most courts and scholars regard disproportionate governmental action as the crux of the Eighth Amendment.

The prohibition on excessive punishment is also long-standing. The Eighth Amendment itself uses the term "excessive" twice: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Solem v. Helm, the Supreme Court stated the prohibition against "excessive" action applies to all forms of governmental punishment and to all clauses of the Eighth Amendment. However, despite the Court's pronouncement, lower courts have not generally relied upon this limitation in conditions of confinement cases.

In non-conditions cases, courts will find a punishment "excessive" if the punishment does not "fit" the offense, as determined by a proportionality analysis. A proportionality review balances the interest of the government in enacting the punishment against the interest of the individual in avoiding suffering. Richard Frase has conducted a thorough review of proportionality in the Eighth Amend-

151. Frase, supra note 150, at 49-62.
152. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).
153. Excessiveness was first used as a limitation to punishment in the Magna Carta, where a provision was added to prohibit fines being levied excessively against political dissidents. See Gerald W. Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 COOLEY L. REV. 667 (1988) (giving history of the Magna Carta and how it relates to the Eighth Amendment). This principle was extended beyond fines and adopted into English law in a form nearly identical to the modern Eighth Amendment. Id. at 705-06. A useful history of the excessiveness principle is laid out in Stephen T. Parr's article, Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause, 68 TENN. L. REV. 41 (2000). Professor Parr argues the Founders did not intend to require proportionality analysis in the Eighth Amendment, but the adoption of the Fourteenth Amendment included this limitation on governmental power. Id. at 49-58 (citing AKHILAMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xii (1998)).
154. U.S. CONST. amend. VIII.
155. 463 U.S. 277, 285-86, 289 (1983) ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality.") (citation omitted); see also Ingraham v. Wright, 430 U.S. 651, 664 (1977) (concluding the Eighth Amendment was designed to limit excessive fines, bail, and punishment).
ment context. He points out that we cannot evaluate whether a punishment is excessive until we determine the interest we are comparing it with. In short, he asks, "excessive relative to what?" He notes that while proportionality is a term generally used by courts and scholars, the actual analysis depends heavily on the normative theory of punishment underlying the comparison.

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

Retributivism is backwards-looking. It justifies the harshness of a punishment by examining the severity of the crime. Retributivists consider the harm suffered by a victim and the blameworthiness of the criminal. This longstanding theory has roots that reach at least as far back as to the Old Testament Jewish law that required a punishment to match the crime, or "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." In the modern sense, retributivists do not call for punishment that is literally equivalent to the crime, but often examine a variety of factors to determine what punishment is appropriate, including the amount of harm to the victim, the unfair advantage the perpetrator gained from the crime, or the moral imbalance caused by the crime.

Frase states that when courts review proportionality based on retributive theory ("retributive review"), they compare the harshness of the sentence to the gravity of a crime. A retributive approach focuses on the actor's blameworthiness, and

158. Frase, supra note 150, at 40.
159. Id. at 40-47.
161. Cavadino & Dignan, supra note 160, at 33 (terming utilitarianism "reductivism"); Frase, supra note 150, at 40-49.; Recently, commentators have urged a fifth justification: expressiveness. See Christopher Bennett, Expressive Punishment and Political Authority, 8 OHIO ST. J. CRIM. L. 285 (2011). Expressive punishment theory argues the expression of deserved condemnation is the fundamental purpose of a system of punishment. Id. at 287. This theory is retrospective and is not done for future gain or to better society. Id. For that reason, regardless of its traction and acceptance as a punishment theory, expressive punishment can work in the proportionality review model as a form of retributive review.
162. Frase, supra note 150, at 40-49.
164. Id.
165. Id.
168. Frase, supra note 150, at 40-41.
compares the penalty to such factors as the severity of the crime and the culpability of the individual offender. Retributive proportionality may therefore set an upper limit on the punishment available for a crime, but a court can lower the ceiling for a variety of reasons. Strict retributivists, however, would urge harsh penalties for harsh crimes, even when there exists no potential for future reform or deterrence.

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

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

Retributive and utilitarian proportionality reviews are illustrated in one of the first cases to use the Eighth Amendment to limit government action, Weems v. United States. In Weems, a government employee made two inaccurate entries in a government book and was sentenced to fifteen years of “painful as well as hard labor.” The Supreme Court relied on retributive and utilitarian principles to invalidate the sentence. The Court’s statement, “that it is a precept of justice that

169. Id.
170. Id. at 41–42.
171. See generally id. at 40–41 (describing retributive proportionality).
176. Frase, supra note 150, at 43.
177. Id.
178. Id. at 43–44.
179. Id. at 45–46.
181. Id. at 362–63, 366.
182. See id. at 381–82 (reasoning the punishment is excessive for the crime and noting that limiting punishment still prevents the repetition of the crime in the future and reforms the criminal).
punishment for crime should be graduated and proportioned to [the] offense,” an example of retributivism and it found the fifteen-year sentence disproportionate to the minor nature of the crime. The Court also used utilitarian principles to examine the benefit of the law Mr. Weems violated, concluding that the law’s purpose was to deter future crimes and to rehabilitate offenders. Considering these objectives, the Court found a lesser punishment would be sufficient because “[t]he State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.” Because a shorter sentence was adequate to meet the goals of punishment, the Court held that the longer sentence was disproportionate to the crime and caused unnecessary harm to Mr. Weems.

Since Weems, the Supreme Court and lower courts have relied on both retributive and utilitarian proportionality reviews to evaluate state punishments. Frase discusses that courts use different types of proportionality review interchangeably and fail to explain when each applies. The Supreme Court has often relied on retributive analysis is the essential review, but has also noted that utilitarian goals are integral to assessing proportionality. While the Court has not said so explicitly, the current trend of decisions from the Supreme Court indicate that a punishment will be upheld if it can be justified under either a retributive or a utilitarian principle.

Regardless of the underlying theory, proportionality review is the predominant analysis to determine cruel and unusual punishment under the Eighth Amendment, including challenges to sentences, fines, and application to the death penalty. Yet,
Despite its ubiquity, proportionality review is not generally used in conditions of confinement cases. Because of the confusion and inconsistencies in the conditions challenges, it is worth considering whether incorporating a proportionality analysis is feasible and would improve the doctrine.

A. Is Proportionality Review Transferrable to Conditions Challenges?

In order to assess the applicability of proportionality review to conditions of confinement cases, we must examine how the retributive and utilitarian theories would function in this context.

1. Retributive Theory

Heavy reliance on the traditional retributive analysis would be largely unworkable in conditions of confinement cases. Retributive review generally weighs the crime against the punishment, and is commonly used in challenges to sentences, including the imposition of the death penalty and of fines. For example, the Supreme Court has overturned sentences of death for the crimes of rape and felony murder, finding that "grossly disproportionate and excessive punishment" is forbidden. In evaluating proportionality, the Court looked to factors such as "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . . ."

In most circumstances, prisoners are not placed in conditions specific to their crime, making this analysis not feasible in conditions cases. Weighing a prison condition against the crime the inmate committed would result in different prison conditions for different convictions. The outcome would be logistically disastrous, with the prison having to tailor conditions on an individual basis. For example, could officials allow a rape offender to be raped in prison? Assuming this

192. Reinert, supra note 9, at 69–73.
193. See, e.g., Graham, 130 S. Ct. at 2026 (weighing culpability of juvenile offenders in assessing punishment); Solem v. Helm, 463 U.S. 277, 303 (1983) (finding life without parole excessive compared to crime of issuing a bad check, even with prior criminal history).
194. See, e.g., Enmund v. Florida, 458 U.S. 782, 788 (1982) (finding the death penalty excessive for felony murder when defendant did not take life); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (finding a sentence of death is grossly disproportionate and excessive punishment for the crime of rape); id. at 601, (Powell, J., concurring in part, dissenting in part) ("[O]rdinarily death is disproportionate punishment for the crime of raping an adult woman.").
196. Another reason that retributive analysis is largely not workable for conditions cases is because prison officials do not cite retributive bases—such as punishment for a particular crime—as the basis for conditions. Rather, officials generally cite "safety" or "security," or other future-focused bases, as justification for treatment. To the extent that prison officials did begin to offer use retributive justifications for conditions, a court could analyze them and weigh them under a proportionality analysis, just as is done in other areas of Eighth Amendment jurisprudence. Courts could compare how others with similar crimes were treated, or could take the circumstances of unique crimes into account.
197. Reinert, supra note 9, at 69–73.
198. Id.
would not be permitted, would more isolating conditions be acceptable for a rapist, but unacceptable for someone who committed petty theft? The complications arising from this type of circumstance are apparent and illogical.

Basing prison conditions on convictions would also ignore a prisoner’s behavior and experience after he is already in prison. Prison classification systems place substantial weight on a prisoner’s actions while in prison. His disciplinary history, affiliations, and family contacts all help determine what conditions are appropriate and safe for him. If the type of conviction guided proportionality, the prison system would have to disregard the inmate’s subsequent behavior. For example, officials may not be able to isolate a prisoner who assaulted an officer, because his conviction was a minor offense. Likewise, a prisoner convicted of murder or rape might never be allowed out of high security conditions even when he has demonstrated changed behavior.

While conditions cases on the whole do not lend themselves to the retributive model of proportionality review, retributive theory could help analyze challenges to disciplinary measures. In prisons, temporary penalties, such as loss of amenities, loss of time credits, and disciplinary segregation, are imposed for breaking prison rules. Since these punishments are punitive responses to specific offenses, the retributive model could assess whether disciplinary measures fit the violation and satisfy the objective prong.

2. Utilitarian Theory

In contrast, utilitarian review could be helpful tool for conditions of confinement cases. Utilitarian review weighs the individual harm of the punishment against the benefit to society obtained from the punishment. To make this assessment, courts must identify that the punishment serves a legitimate purpose. Even when there is a legitimate purpose, a punishment can still be found excessive under utilitarian

199. A prisoner’s behavior while in custody influences his conditions and placement. See, e.g., BUREAU OF PRISONS, INMATE DISCIPLINE PROGRAM, Program Statement 5270.09 (July 2011) [hereinafter INMATE DISCIPLINE PROGRAM] (detailing offenses and disciplinary consequences), http://www.bop.gov/policy/progstat/5270_009.pdf. For example, if a prisoner is frequently fighting with others, prison officials are forced to respond, even if he is never criminally prosecuted. See id. at Table 44 (listing fighting as “high severity level offense” and listing possible sanctions, including segregation, fine, forfeiture of good time credits, or loss of privileges).

200. See id.; see also BUREAU OF PRISONS, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION, Program Statement 5100.08 (Sept. 2006) (detailing information used to determine custody level and prison placement), http://www.bop.gov/policy/progstat/5100_008.pdf.

201. Reinert, supra note 9, at 79–82.

202. See INMATE DISCIPLINE PROGRAM, supra note 199, at Table 44 (listing possible sanctions).

203. At times, retributive review has been used in the context of disciplinary infractions. See, e.g., Hardwick v. Ault, 447 F. Supp. 116, 125–26 (M.D. Ga. 1978) (comparing gravity of insubordination to gravity of resulting administrative segregation for sixteen months); Johnson v. Anderson, 370 F. Supp. 1373, 1387–88 (D. Del. 1974) (listing the comparison of gravity of the offense to the gravity of the disciplinary action as a relevant factor for determining whether disciplinary action was cruel and unusual).

204. See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”); Kennedy v. Louisiana, 554 U.S. 407,
review if a lesser or different sentence could fulfill the goal. In conditions of confinement cases, utilitarian review would weigh any harm to a prisoner against the governmental interest or benefit in applying the condition. This principle is not new. Early conditions courts used a proportionality review that was largely based on utilitarian principles. In those cases, the courts examined the reason for the condition and evaluated whether it served the prison officials' stated goals. If a less painful or restrictive treatment could accomplish that goal, then the condition was found to be unconstitutional. The cases show the usefulness of utilitarian review in the conditions of confinement context.

For example, in Moss v. Ward, a prisoner, Mr. Moss, challenged his denial of food for four days. Prison officials asserted the denial was necessary because Mr. Moss had refused to return a plastic cup and therefore violated a prison rule. The prison officials justified their punishment because they needed to prevent prisoners from throwing urine or feces and making weapons. However, it was undisputed that Mr. Moss only wanted the cup as storage for his dentures.


205. Frase describes this process as “alternative-means” proportionality review. See Frase, supra note 150, at 45–46. This principle has also been described by the Supreme Court. See Farman, 408 U.S. at 279 (“The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary. . . . If there is a significantly less severe punishment adequate to achieve the purposes for which punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.”).

206. For examples, see infra notes 223–24. Likewise, Eighth Amendment cases challenging use of force by prison officials have employed a utilitarian-based proportionality review; this doctrine is termed a review for “excessive force.” Wilkins v. Gaddy, 130 S. Ct. 1175 (2010) (examining action by officer under “excessive force” doctrine). Prior to the firm implementation of the mindset requirement by the Supreme Court in Whitley (which occurred in 1986), courts regularly balanced a prison official’s need for force against the amount used. In making this inquiry, courts weighed the following factors: the need for the application of force; the relationship between the need and the amount of force used; the extent of the prisoner’s injury; and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). Under this weighing, the Eighth Amendment was deemed to be violated when the force used was “so unreasonable or excessive as to be clearly disproportionate to the need reasonably perceived by prison officials at the time.” Jones v. Mabry, 723 F.2d 590, 596 (8th Cir. 1983).

207. See, e.g., Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984) (“[I]t is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary or for the sole purpose of punishment or the infliction of pain.”); Schmitt v. Crist, 333 F. Supp. 820, 822 (D. Wis. 1971) (weighing prison’s interest in safety but finding “it is difficult to conceive of a legitimate prison objective which requires that a prisoner be denied the use of soap, toothbrush, and clean bedding”); Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971) (“ ‘Security’ or ‘rehabilitation’ are not shibboleths to justify any treatment. Still courts must keep in mind that a recognized valid object of imprisonment is not just to separate and house prisoners but to change them.”); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (weighing legitimate needs for strip cells with “shocking” conditions therein).


209. See infra notes 223–24.

210. 450 F. Supp at 591.

211. Id. at 596.

212. Id.

213. Id.
The court relied on a utilitarian analysis to weigh the prison's interest against Mr. Moss's harm and found the punishment disproportionate because it "[went] beyond what is necessary to achieve a legitimate aim to wit, that it is unnecessarily cruel in view of the purpose for which it was used."\footnote{214}

In \textit{Bono v. Saxbe}, a group of prisoners challenged the practice of closing the doors to their cells.\footnote{215} The Southern District of Illinois had previously held that permanently closed cells violate the Eighth Amendment because they were extremely isolating, caused sensory deprivation, and the prison officials offered "no justification for their use."\footnote{216} As a result, the cell doors were typically open, but prison officials occasionally closed them and the prisoners challenged these closures.\footnote{217} In \textit{Saxbe}, the court stated that the door closing was justified because the prison officials "demonstrated a dire need to put a stop to certain kinds of behavior which disrupted [the unit] and threatened the health and safety of inmates and staff."\footnote{218} This interest outweighed the harm alleged by the prisoners.\footnote{219}

Despite the viability and helpfulness of utilitarian review, this type of analysis was effectively supplanted when the current two-prong test gained favor, though no explanation was given to justify its diminishment.\footnote{220}

\textbf{B. Criticisms of Proportionality Review}

Although proportionality review could be useful in conditions cases, it also presents problems. Proportionality review, like the current objective prong, has been criticized for its subjectivity and vulnerability to judge bias. Other critics assert proportionality review is overly deferential to state interests, with courts only willing to intervene in the most egregious situations. Each criticism will be explored in turn.

\textit{1. Subjectivity}

Many scholars have criticized proportionality reviews as subjective\footnote{221} and its introduction of objective factors may not counter this criticism.\footnote{222} In retributive

\footnotesize{\begin{itemize}
  \item \footnote{214} Id. at 595.
  \item \footnote{216} Id. at 1188 (quoting Bono v. Saxbe, 450 F. Supp. 934, 948 (D. Ill. 1978)).
  \item \footnote{217} Id. at 1189.
  \item \footnote{218} Id. at 1196-97.
  \item \footnote{219} Id. at 1190-91.
  \item \footnote{220} Rhodes v. Chapman, 452 U.S. 337 (1981).
  \item \footnote{222} See, e.g., Tonja Jacobi, \textit{The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus}, 84 N.C. L. Rev. 1089, 1097-1100 (2006) (criticizing use of}
reviews of criminal sentencing, courts evaluate "gross disproportionality" through a series of objective factors, including: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Although the factors are now commonplace, commentators do not believe they have actually increased objectivity. Pam Karlan and Tracy Thomas note the standard for gross disproportionality resembles one of "I know it when I see it" or "what-shocks-the-consciences-of-the-Justices." The fact that the "gravity" of a crime and the "harshness" of the penalty will be interpreted differently by different people, in different areas of the country is not a new concept. Indeed, it was variability in assessing the severity of crimes that led to the enactment of the federal sentencing guidelines.

Subjectivity is also a concern for utilitarian-based proportionality reviews of prison conditions. This raises the same basis for criticism as the current "objective" prong (as discussed in Part II), in that the view of what is acceptable or illegal is largely based on the personal opinion of the jurist. Part IV discusses why, even with these subjectivity issues, a balancing approach would still improve uniformity and transparency of conditions of confinement decisions.

2. Narrowness

Proportionality reviews have also been criticized for provoking insufficient judicial intervention. While courts have struck down some punishments, particularly in the area of excessive fines and death penalty eligibility, they have been hesitant to intervene in many other areas. Advocates and scholars have particularly criticized the courts' limited willingness to intervene in overturning criminal prison sentences. Alex Reinert attributes this reluctance to separation of powers concerns, stating deference is "essential to ceding to the legislature, as a majoritarian institution, the primary responsibility of judging the seriousness of

"objective" criteria of state legislation and arguing that their use is illogical or junk science); Karlan, supra note 189, at 886–88.

224. Graham, 130 S. Ct. at 2038; Solem, 463 U.S. at 305.
225. Thomas, supra note 221, at 87.
226. Karlan, supra note 189, at 893.
227. For example, sentences in the United States are typically two to three times the length of the sentences assigned in Europe for the same crimes. The Oxford History of the Prison, supra note 15, at 113.
229. Frase, supra note 150, at 51–53.
230. Id. at 54–57.
231. Id. at 57–58 (calling the Court's holdings "disappointing" and noting it is "well known" that "the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds"); Reinert, supra note 9, at 71.
particular crimes” and “legislatures should be given as much leeway to punish particular crimes as they are given to define them.”

Critics worry courts will only use proportionality review to invalidate the most egregious prison conditions. This concern is valid because courts often defer to prison officials in cases challenging prison conditions, so they may be overly hesitant and narrow in analyzing proportionality. However, there are also reasons why proportionality review would be easier to manage in the conditions setting. First, in other Eighth Amendment contexts, courts often lack accurate information about the purpose of a punishment. For example, in reviewing legislative decisions, such as fines, sentences, and death penalty eligibility, courts must often infer the goals of statutory penalties because it is difficult to obtain reliable testimony. Without clear information on the intended purpose, some courts ascribe legislative Justifications that may not be accurate. However, in prison conditions cases, this information is more readily obtainable. Testimony and evidence is regularly presented in these cases regarding the interest and rationale underlying certain conditions or treatment. The next Part discusses why proportionality review would also increase transparency in court decisions.

IV. A New Approach: Balancing in Prison Condition Cases

Despite its criticisms, proportionality review would improve the uniformity and transparency of decisions in conditions of confinement cases. This Part proposes a modified version of the two-prong test for conditions of confinement challenges that integrates proportionality balancing. Under the adjusted test, the objective prong would still assess whether a condition is sufficiently serious to merit constitutional protection. However, it would eliminate the “basic human needs” requirement and require a utilitarian-based proportionality assessment of the challenged condition where the court would weigh the harm of the condition against any alleged purpose. Additionally, the subjective prong would be inferable in injunctive cases. Allowing the court to infer subjective intent would better address societal interests in ongoing conditions cases, while still accurately evaluating cases seeking money damages for past action. In short, it would allow courts to protect prisoners from current harmful or potentially dangerous conditions and protect past actors from liability if they lacked the requisite intent.

This altered test would better balance the competing interests of protecting

232. Reinert, supra note 9, at 71.
235. See id.
prisoners from future harm and ensuring officers are not unfairly liable for simple errors or misjudgments. The changes also provide increased transparency in court decision-making and better unify conditions of confinement doctrine with other Eighth Amendment jurisprudence. Since the proposed test retains the objective and subjective prongs, judges and lawyers can immediately implement it.

A. A New Objective Prong

Under the new objective prong, the operative question in the balancing analysis would be whether the harm from the challenged condition is proportional to the penological interest in its use. It effectively eliminates the "basic human needs" requirement as ambiguous and unhelpful to courts and imposes a utilitarian review where the court weighs the reason for instituting a particular condition against the harm it inflicts on prisoners.

For example, preventing suicides is a necessary and important goal in prisons. One potential response to this concern is to keep everyone who is incarcerated on constant suicide watch. However, while such a policy would undoubtedly decrease suicides, prisons would understandably hesitate to enact it, as prisoners on suicide watch require constant monitoring at a large cost to the prison. The prisoner's quality of life also decreases, as he must reside in austere conditions, without possessions and clothing. Under a utilitarian proportionality analysis, placing all prisoners on permanent suicide watch would be disproportionate to the problem it sought to address, and would raise a sufficiently serious condition, meriting court intervention under the objective prong.

1. Benefits of the Modified Objective Prong

This modified objective prong improves conditions of confinement decision-making in two important ways. First, it harmonizes conditions of confinement cases with other areas of Eighth Amendment jurisprudence, including sentencing and excessive force. Second, it provides better guidance to judicial decision-making, facilitating more explicit analysis in judicial opinions. Each benefit is discussed in turn.

Harmonizing Eighth Amendment doctrine is more important than it seems. Absent alignment of the guiding principles, courts are effectively talking out of both sides of their mouths, denying similarities between certain areas of law while borrowing principles and language from others without acknowledging their differences. For example, the Supreme Court has maintained "death is differ-


ent" and justifies a different degree of review in death penalty cases, but has directly relied on capital punishment reasoning in other Eighth Amendment venues, such as prison sentences. Without agreement on the basic principles that underlie these diverse challenges, the amalgamation is confusing and often disingenuous. Harmonization would strengthen the Eighth Amendment's theoretical basis as based in a prohibition on excessiveness and help the courts identify guiding principles.

Utilitarian proportionality review would also increase transparency. Many scholars have espoused the benefit of simply having courts "show their work." In the qualified immunity context, Sam Kamin explains that increased transparency guides subsequent court decisions, reduces litigation by creating concrete rules, and prevents errors. Justice Breyer has also espoused the importance of including all considerations in an opinion, explaining that he would include all "helpful" sources because "transparency is important in an opinion." Without these disclosures, courts may also dismiss a similar case in the future.

In the conditions context, explicit balancing would require courts to provide clear rationales for why they allow or forbid certain conditions. As discussed in Part II, it is likely that many judges consider the purpose of a condition when evaluating its seriousness. However, they rarely include this thought process in their opinions given the structure of the current test. Encouraging courts to explicitly weigh these factors provides notice to other judges, prisoners, and prison officials about the concerns or judgments that underlie the decisions. This increases transparency and uniformity between rulings.

For example, suppose our hypothetical Mr. Jones is serving thirty years of solitary confinement for killing a correctional officer and is thought to be extremely dangerous. Mr. Jones alleges psychological and physical harm as a result of his isolation, but evidence of such harm is contested. The judge is concerned about the effects of three decades of solitary confinement, but believes acknowledged that its "precedents in [the area of the Eighth Amendment] have not been a model of clarity . . . [and] have not established a clear or consistent path for courts to follow." Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

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


242. Id. at 59–61.


244. See supra Part II.A.
the prison officials were justified in continuing to isolate Mr. Jones because of security risks. Under the traditional test, the judge may worry that if he finds Mr. Jones's prolonged isolation "sufficiently serious" under the objective prong, the decision will go to the jury who will then find culpable intent and hold the officials liable. The judge therefore rules the three decades of solitary confinement were not "sufficiently serious" in order to satisfy the objective prong and end the case. The opinion effectively sanctions solitary confinement by holding it is not a troubling or serious practice.

In contrast, a decision employing utilitarian review would provide a richer discussion on the issues raised in the case, even if the outcome is the same. The judge could explicitly discuss his concerns with thirty years of solitary confinement and state Mr. Jones was harmed by this treatment. He could also voice his concerns that Mr. Jones remains a safety risk to general population and look into less harmful alternatives that would reduce Mr. Jones's isolation but still achieve security goals. Even if the judge still found the isolation was acceptable under the Eighth Amendment, the opinion would provide more guidance for future courts. Rather than give blanket acceptance to the use of long-term solitary confinement, the court's decision would provide notice to prison officials that prolonged isolation is a concerning and harmful practice, only permissible for such a lengthy period of time when the interest is specific and compelling.

The new objective prong helps harmonize Eight Amendment jurisprudence, increases transparency in conditions of confinement cases, and yields more clearly reasoned opinions. All these benefits are not attainable under the traditional test. However, once the balancing approach is adopted, the primary challenge becomes deciding who should bear the burden of proof and how to weigh the different interests.

2. Sharing the Burden of Proof

In designing the new balancing test, it is important to remember the critical role of the judiciary in providing a check on the prisons. While courts may not be the best monitors of prison systems, in many cases the judiciary is the only vehicle for prisoners to seek redress for infringements of their rights. Other sources for oversight of the prisons, including ombudsmen, legislative audits, community organizing, and the media, suffer from funding problems, political pressures, and

245. See McMillian v. Johnson, 101 F.3d 1363, 1368–69 (11th Cir. 1996) ("I find it difficult to see how [subjective intent] can be determined at the summary judgment stage if there is any substantial evidence of an illegal motive in view of the established law which precludes a trial court's making credibility determinations, weighing the evidence, and interfering with a jury's drawing of legitimate inferences from the evidence."); Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970); see generally Brian Saccenti, Comment, Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious, 59 MD. L. REV. 642, 662–63 (2000) (noting courts' recognition that there should be caution before granting summary judgment where a party's state of mind is at issue.).
the lack of available information. Federal judges are in a better position to provide a check on government power in prisons because they are not elected, can command prison staff to produce information, order state action, and hold parties in contempt for non-compliance. Keeping this in mind, a balancing test must first determine whether prisoners or prison officials are entitled to a presumption of correctness. After reviewing the options, this article concludes that, under the new objective prong, the prisoner should bear the initial burden of demonstrating harm and then the court should evenly weigh the interests of both parties against one another.

There are numerous ways to approach the burden of proof under the new objective prong. One option is to require prison officials to justify every challenged condition. However, the government generally bears such a heavy burden only where it is "highly predictable that illegitimate motives are at work," a prerequisite many would hesitate to ascribe to prison administrators. Despite this general hesitation, there are some conditions, such as deprivations of food, clothing, and safety, which are so basic that their denial requires government justification. Yet, even these conditions cannot be separated from the general balancing test. For instance, the determination of what fits into this "special class" of deprivations would complicate the already problematic debate about what conditions are sufficiently serious. Placing the burden of proof on prison officials to justify every condition of confinement, regardless of its impact, might also prompt courts to hesitate before ruling a condition sufficiently serious. Thus, a heightened review of prison conditions, established with the goal of better protecting prisoners, might actually impede progress. Rather than establishing liability for bad prison conditions, such scrutiny might prevent a broad interpreta-

246. See generally Michele Deitch, Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory, 30 PACE L. REV. 1754, 1762 (2010) (reviewing monitoring mechanisms in every state and concluding while there are many monitoring organizations "it should be clear . . . that formal and comprehensive external oversight—in the form of inspections and routine monitoring of conditions that affect the rights of prisoners—is truly rare in this country. Even more elusive are forms of oversight that seek to promote both public transparency of correctional institutions and accountability for the protection of human rights").


249. Id. Only two rights in the prisons have been deemed to require this heightened protection: the right to be free from racial discrimination and the right to be free from infringement upon religious practice. See Johnson v. California, 543 U.S. 499 (2005) (applying strict scrutiny to policies related to race); Derek L. Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions, 28 HARV. J.L. & PUB. POL'Y 501, 539-45 (2005) (discussing strict scrutiny standard in religious rights context).

tion of what qualifies for Eighth Amendment protection\textsuperscript{251} and eliminate liability for some conditions.

At the other end of the spectrum, courts could simply presume prison officials are correct by using rational basis review. This approach is common in the prison context, as challenges outside the Eighth Amendment are reviewed under the rational basis framework dictated in \textit{Turner v. Safley}.\textsuperscript{252} Under \textit{Turner}, a prison regulation or practice that impinges on a prisoner’s constitutional rights is only valid if it reasonably relates to a legitimate penological interest.\textsuperscript{253} While it is possible \textit{Turner} could be extended to Eighth Amendment claims, the Supreme Court has explicitly rejected rational basis review for these challenges.\textsuperscript{254} The Justices explained that limiting the Eighth Amendment would thwart its purpose of protecting those who are incarcerated.\textsuperscript{255} Citing the Ninth Circuit, the Court held, “[T]he full protections of the [E]ighth [A]mendment most certainly remain in force [in prison]. The whole point of the [A]mendment is to protect persons convicted of crimes.”\textsuperscript{256} Accordingly, the Court explained, “deference to the findings of state prison officials in the context of the [E]ighth [A]mendment would reduce that provision to a nullity in precisely the context where it is most necessary.”\textsuperscript{257}

Rather than giving either the prisoner or the prison officials a presumption of correctness in the proportionality analysis of the objective prong, courts should evenly balance the interests of the government and the prisoner. The burden would neither be on the government to justify use of the condition nor on the prisoner to demonstrate that the condition is illegitimate. Once the prisoner shows some greater than de minimis degree of harm,\textsuperscript{258} neither side would presumptively prevail, as the court would be empowered to weigh both sides’ interests. Using such an evaluation would require both sides to be explicit about their justifications or concerns and to provide evidence of the same. Even if the outcome of cases did not change under such a balancing test, a main benefit of this approach would be increased transparency on the reasons for governmental actions, allowing judges a

\textsuperscript{251} The hesitation to find “new” areas covered under the Eighth Amendment is discussed generally \textit{supra} Part II. In addition, this is illustrated by some courts explicitly stating they should only intervene in the face of “clearly demonstrated” constitutional violations. \textit{See}, e.g., \textit{Burks v. Teasdale}, 492 F. Supp. 650, 655 (W.D. Mo. 1980).

\textsuperscript{252} \textit{Turner}, 482 U.S. at 89.

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} \textit{See Johnson v. California}, 543 U.S. 499, 511 (2005) (finding that giving only rational basis review to claims brought under the Eighth Amendment thwarts its purpose).

\textsuperscript{255} \textit{Id.} ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment.”).

\textsuperscript{256} \textit{Id.} (quoting \textit{Spain v. Procunier}, 600 F.2d 189, 193–94 (9th Cir. 1979)).

\textsuperscript{257} \textit{Id.} (quoting \textit{Spain}, 600 F.2d at 193–94).

\textsuperscript{258} The de minimis standard—requiring that a harm be more than de minimis for a lawsuit to proceed—currently exists in Eighth Amendment law. \textit{See} \textit{Hudson v. McMillian}, 503 U.S. 1, 9–10 (1992). Some commentators have criticized this requirement, claiming it eliminates harms that should be actionable. Reinert, \textit{supra} note 9, at 74–75.
greater ability to evaluate the assertions.

This procedure is similar to the Pickering/Connick/Garcetti balancing test for First Amendment cases involving speech by a public employee. In those cases, the Supreme Court has recognized individual interests in speaking freely and providing information to the public, as well as a governmental interest in achieving agency goals efficiently and effectively. Under Pickering/Connick/Garcetti, the employee has an initial burden to demonstrate that her speech was not part of her official capacity and that it addressed a matter of public concern. If she fulfills this burden, then the judge must weigh the interests of the two sides to determine whether the speech should be protected. The court considers relevant factors on each side, including the significance of the matter of public concern and the disruptive nature of the employee's speech to the functioning of the governmental office.

Weighing both sides' interests is also used in other Eighth Amendment doctrines. For example, when an individual is punitively assessed a fine, the court weighs the amount of the forfeiture against the gravity of the crime. The Court has invalidated fines as disproportionate when the governmental benefit, mostly retribution and deterrence, was served by assessing a lower amount. Expanding such balancing to conditions of confinement cases is not only feasible, but better reflects the method used by society in assessing the fairness of punishments.

3. How to Weigh the Interests

Balancing tests vary as to how to weigh the competing interests. Under the new objective prong, the prisoner must present evidence of harm that is more than de minimis or demonstrate there exists a risk of harm from the challenged condition. If the prisoner fails to demonstrate any harm or risk, the objective prong is not satisfied. If the prisoner can demonstrate a minimum threshold had been reached, the court then should consider all evidence relating to the challenged condition. The evidence presented by the prisoner would not differ significantly from what prisoner-plaintiffs currently use under the objective prong. It could include prisoner or expert testimony about the harm, as well as other research on the effects of the condition. The prisoner could rebut any claim of necessity by

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261. Connick, 461 U.S. at 149.
262. Id. at 149, 152; Rankin v. McPherson, 483 U.S. 378, 386–89 (1987).
263. See United States v. Bajakajian, 524 U.S. 321, 334 (1998). In Bajakajian, a person was charged over $300,000 for failing to report leaving the country with a large sum of currency. Id. In looking at a fine assessed as a punishment, the Supreme Court specifically weighed the harm caused by the loss to the individual against any benefit to the government. Id. at 336–39.
264. Id. at 337–40.
showing there is a less onerous alternative to achieve the desired objective. Courts are accustomed to hearing this type of evidence, as one Turner rational basis factor is whether there are inexpensive, less-restrictive alternatives to an infringing policy.\(^{265}\)

To counter the alleged harm, prison officials would present evidence of their reasons for the condition. In some cases, this evidence is presented through correctional official or expert testimony. Evidence may include general evidence for a policy or evidence specific to an individual prisoner. Prison officials can also present evidence that the condition is commonly used by other prison systems to bolster their case or evidence rebutting the prisoner’s claims of harm or risk.

The evidence would enable courts to compare the merits and degree of each side’s interest. In situations where the harm is insignificant or minimal, such as a prisoner alleging his food upsets his stomach, the prisoner’s interest would be judged as low and prison officials would require little explanation to overcome the challenge to the condition. Yet, in situations where the condition is more serious, such as denial of outdoor exercise, the prisoner’s interest is much greater and prison officials must present heightened justifications and evidence of why the condition was necessary. In these circumstances, courts may consider the financial or administrative burdens of correcting the condition, such as inconvenience or staffing costs, but these considerations should only overcome a prisoner’s interest when the financial or administrative burden is significant.\(^{266}\) For example, adding outdoor exercise areas would present material, design, and labor costs but they are likely to be relatively minimal. On the other hand, if a prisoner presented a specific security risk, such as previously attempting an attack on the way to his outdoor exercise, then this alone might be a sufficient justification.

One issue with the new objective prong is that not all challenged conditions stem from intentional actions of prison officials. In cases challenging discrete or one-time actions, officials may not have had a valid penological interest in a condition. For example, in some damages cases, a prison official’s actions might result from mistake, misunderstanding, or malicious action.

Although the absence of any legitimate purpose for a condition could make the objective determination easier, it does not necessarily fulfill the Eighth Amendment intent requirement. If the prison official has no evidence to counter a harmful condition, courts can easily evaluate whether the condition is sufficiently serious. However, this lack of interest does not mean the individual had the requisite intent for Eighth Amendment liability. The prisoner must still demonstrate the officials acted with deliberate indifference under the subjective prong. For example, if a prisoner asserted he was injured as a result of unsafe, exposed wiring, it is hard to

\(^{265}\) Turner v. Safley, 482 U.S. 78, 90–91 (1987) ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns.").

\(^{266}\) Gaubatz, supra note 249, at 547–48 & n.207 (noting in context of RLUIPA, costs may be considered, but will only be sufficient in limited situations and not when the cost of change or alternative is de minimis).
imagine the prison officials asserting they had an interest in exposed wires. However, the prisoner would still need to demonstrate the prison officials acted with deliberate indifference—that they were aware of the exposed wiring and did not respond reasonably—before they will be held liable.

While prison officials usually assert a penological interest for injunctive claims, there are many important instances where they do not. For example, denial of medical care, which is among the most common claims raised by prisoners, is rarely, if ever, based on a legitimate penological interest. Instead, typically, the objective inquiry is focused on whether the prisoner can meet his initial burden to demonstrate harm. Prison officials can rebut claims of harm by providing evidence that the ongoing treatment was reasonable and met the standard of care. For example, if the prisoner claimed to have ongoing back pain that required surgery, prison officials could rebut the evidence of harm by showing that he was not denied care and had received treatment as required by medical standards. However, as discussed in subpart four, a prison official could still escape liability by showing he or she did not have the culpable mindset of deliberate indifference.

4. Concerns with Using a Balancing Test

Despite the potential benefits of integrating proportionality review into the objective prong, two concerns arise immediately: (1) the fear that courts will micromanage the prisons, and (2) the possibility that a balancing test would still allow judges the leeway to color decisions regarding serious conditions in the light of their personal proclivities. The case law of prisoners’ rights is replete with judges expressing discomfort at reviewing the daily management and decisions of prison officials. Judges think they lack correctional judgment and often believe it is appropriate to defer to the expertise of prison staff. Yet this concern is a red herring. Despite the courts’ discomfort, they are already regularly making many similarly demanding decisions, even in the context of other prisoners’ rights claims. For example, in cases challenging the denial of group worship, raised under the Religious Land Use and Institutionalized Persons Act (RLUIPA), courts will consider evidence of the prison’s alleged financial and security concerns, as well as information about what practices are permitted for other religions, before

268. Turner states "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." 482 U.S. at 84 (citation and internal quotations omitted). According to the Court, "[subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."
269. Id. at 90.
270. See Gaubatz, supra note 249, at 562.
concluding whether a religious infringement is permissible.\textsuperscript{271}

Another criticism of proportionality review is that it is overly subjective.\textsuperscript{272} Indeed, this very criticism was leveled against the current two-prong test earlier in this article.\textsuperscript{273} The criticism is apt. Just as decisions concerning what is "objectively" bad are subject to a judge's own background and experience, so is the judge's weighing of prison official and prisoner interests. For this reason, it is likely the outcome of any Eighth Amendment conditions decision employing a proportionality framework would be the same as under the current test.

Notably, the purpose of the proposed balancing test is not to change the outcome of conditions cases, but to empower a more intellectually honest review of these complicated situations and require judges to discuss their reasoning. The development of Eighth Amendment doctrine would be much improved if, for instance, the hypothetical judge reviewing the solitary confinement case of Mr. Jones had discussed the potential risks associated with solitary confinement, while still having the latitude to find those risks outweighed by the prison official's specific security interest. The increased transparency afforded by a balancing test is its own end. Future courts faced with a challenge to solitary confinement would be better served by having more thoughtful and robust opinions to guide them.

Courts could also mitigate arbitrariness concerns by using objective factors. In the sentencing context, judges consider empirical evidence including sentences imposed on other criminals in the same jurisdiction and sentences imposed for commission of the same crime in other jurisdictions.\textsuperscript{274} While factors from other doctrines cannot be substituted verbatim into the conditions analysis, in part because of the lack of legislation concerning prison conditions and the lack of concrete information about actual conditions, the concept is instructive. Courts analyzing conditions cases could employ similar factors, including: (1) the reasonableness of the prison's response as judged by whether other prisons respond similarly; (2) any national or international information on public opinion concerning the condition at issue; and (3) evidence that the prison's interest could be furthered in a less restrictive or painful manner. Of course these factors are only a starting point. Courts would need to establish additional factors in the process of determining what evidence is instructive and available.

While not fully resolving the concern about subjectivity, the establishment of factors would, at a minimum, help to structure a framework for judicial inquiry. These factors would also be instructive to prisoners and prison officials in determining what conditions are acceptable. If a particular prison knows the

\textsuperscript{271} Id.; see also Sarah E. Vallely, Comment, Criminals Are All the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination Under the Religious Land Use and Institutionalized Persons Act, 30 HAMLINE L. REV. 191, 225–29 (2007).
\textsuperscript{272} Supra Part III.B.1.
\textsuperscript{273} See supra Part II.A.
\textsuperscript{274} See supra Part III.B.1.
practice it employs is unusually harsh, or there is a national consensus against the condition, it would be on notice that a challenge to the condition would be more likely to succeed.

B. A Modified Subjective Prong

In addition to altering the objective prong of the conditions of confinement test, this Article also argues for a modification to the subjective prong. As discussed below, questioning of the subjective prong is not novel, and some commentators urge that it should be removed entirely. This Article takes a more moderate view, arguing that in cases of ongoing harm courts should establish a rebuttable presumption that prison officials possess a culpable mindset.

1. Removal of the Subjective Prong

The basic theory underlying the subjective prong is that intent is required for conduct to be “punishment” under the Eighth Amendment. Courts and scholars have been hesitant to find harm caused by mistake is actionable “punishment” within the meaning of the Eighth Amendment. While some theorists criticize this requirement, courts now universally use the intent prerequisite in prison conditions cases.

Despite its universal application, there is uncertainty as to what “intent” means. The Supreme Court compared the deliberate indifference requirement to criminal recklessness. The test is not one of strict liability; a person lacks necessary intent if her actions were the result of lack of knowledge, mistake, or accident. Rather, the Supreme Court requires subjective knowledge of risk of harm for prison officials to be liable under the Eighth Amendment. Although the official must be aware of the risk of harm resulting from the condition, if the risk is seemingly obvious then the fact-finder can infer awareness.

The deliberate indifference standard is also a high threshold. For cases alleging risk of harm, prison officials must have known the challenged condition presented excessive risk of serious harm. Given how difficult it is to objectively define merely “substantial risk of serious harm,” the subjective requirement is

275. One potential criticism of this approach is that it could result in lowering prison conditions to the “lowest common denominator;” meaning if many prisons use a harsh condition, it would become acceptable.
276. See, e.g., Dolovich, supra note 9, at 945.
277. See supra Part II.B.
278. Dolovich, supra note 9, at 897–98; see generally Kolber, supra note 13.
280. Id.
281. Id. at 839–40.
282. Id. at 840–41.
almost prohibitively ambiguous and many commentators have questioned the ability of prisoners to present satisfactory evidence of mindset, even in the face of an objectively established risk. For example, in *Riccardo v. Rausch*, a jury found the requisite mindset and held an officer liable under the Eighth Amendment. An en banc panel reversed the jury decision, finding the jury’s conclusions about the guard’s knowledge to be inadequate as a matter of law. In that instance, even the prisoner telling an officer he was in peril from his cellmate and subsequently being attacked by that cellmate was inadequate to prove knowledge.

This standard is so onerous that the federal government has statutorily mandated any failure to follow its legal requirements preventing prisoner rape will amount to deliberate indifference. Specifically, Congress wrote a definition of deliberate indifference into the Prison Rape Elimination Act (PREA), stating “States that do not take basic steps to abate prison rape by adopting standards... demonstrate such indifference [as defined by Farmer].” The fact that Congress would put such a requirement in place is notable. Even more notable is that some courts still find a prison’s failure to comply with PREA inadequate to demonstrate deliberate indifference under the Eighth Amendment.

The deliberate indifference standard effectively rewards officials for remaining ignorant of their institutions’ affairs. For this reason, some commentators urge elimination or de-emphasis of the intent factor in the prison context. Sharon Dolovich argues a State assumes the burden for a prisoner’s care when it assumes custody of an individual. With this burden in mind, she would eliminate or lessen the intent requirement and hold prison officials responsible whenever harm was foreseeable. While there is room for disagreement about this “negligence”

284. See supra Part II.A.1.
287. Id.
288. Id.
290. Id.
292. This concern was raised in the Farmer case discussing the deliberate indifference standard, but was summarily dismissed. Farmer v. Brennan, 511 U.S. 825, 842–43 (1994).
293. Dolovich, supra note 9, at 943–46.
294. Id. at 891–93 (arguing the state assumes a “carceral burden” when it imprisons individuals and this requires it to investigate and eradicate harmful conditions).
295. Id. at 964–66.
approach to Eighth Amendment conditions cases, there is little debate that this change would provide additional incentives to protect prisoners.

Although a more objective standard would increase court efficiency and encourage official awareness of potential risks resulting from prison conditions, these interests are in tension with the plain language of the Amendment’s text, which compels “punishment” and requires subjective intent. The Supreme Court could alter its standard and infer the failure to know what a reasonable person should have known, the standard of negligence, is a form of willful ignorance. Yet, this would require an overturning of Farmer where the majority rejected that exact suggestion.296 It would also require a more radical alteration than necessary. Instead, this Article argues for a more narrowly drawn adjustment that addresses some onerous areas of deliberate indifference but works within the current criminal recklessness requirement.

2. Inferring Intent in Injunctive Cases

In the modified subjective prong, courts would presume a culpable mindset of prison officials in injunctive cases. As discussed in Part II, the intent requirement loses meaning in cases involving an ongoing harm. The truly “subjective” portion of the deliberate indifference inquiry, the knowledge portion, is always satisfied, if only by the lawsuit itself.297 Thus, the main inquiry turns on the “reasonableness” of the prison officials’ response.298 Society has an interest in treating prisoners humanely. After finding an ongoing harm, courts are generally uncomfortable with not taking action to improve it.299 In injunctive cases, prisoners continue to suffer the challenged conditions, and if they are painful or unnecessary, we want judges to have a broad ability to fix them. Injunctive cases prevent future harm to prisoners and enhance the prison officials’ understanding as to what conditions are acceptable.

The strength of the court’s interest in addressing an ongoing harm is apparent when it is juxtaposed with the court’s interest in addressing an alleged past harm. Although society may want to compensate prisoners for their harm, officials are only liable when they display a culpable mindset.300 The harmful action, when isolated from the mindset that motivated it, does not demonstrate culpability because the act may have been intentional or may have resulted from an isolated

298. See supra Part II.B.1.
299. See supra Part II.B.1.
300. See supra note 37 and accompanying text.
mistake. Although past cases may still provide notice by clarifying the standards of acceptable conduct, ensuring compensation for prior harm is of secondary importance.

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

Authorizing different treatment for injunctive and damages suits is not a novel concept. In several government contexts, plaintiffs can obtain future equitable relief, but past monetary recovery is subject to limitations or defenses. For example, qualified immunity protects officers only from money damages, but does not preclude them from following a court order. The differential treatment results from a court preference towards equity, which is a less intrusive means for plaintiffs to validate their rights than damages and allows courts to establish clear legal boundaries. Allowing this differential treatment in Eighth Amendment conditions cases would serve similar interests, as it allows the court to prevent future violations without finding individual fault.

CONCLUSION

The current two-prong test for Eighth Amendment conditions of confinement cases is broken. The test should be a helpful means of investigating the legality of prison conditions, but instead it is a source of dissonant standards and tangled reasoning. Although distinguishing between acceptable and unconstitutional prison conditions is challenging, the current application of the two-prong conditions of confinement test is arbitrary and fails to account for the factor of penological interest, prompting inconsistent holdings, and offering little guidance to judges, prison officials, or advocates in the field.

By modifying the two-prong test, I aim to preserve the traditional interests of the court while establishing a more natural and efficient analytical process. This

301. See supra note 127 and accompanying text.
302. See supra note 138 and accompanying text.
303. This inference of intent would be similar to what is allowed in discrimination cases. See, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (finding prima facie case and sufficient evidence of pretext may permit trier of fact to infer unlawful discrimination).
304. Alex Reinert, Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity, 78 UMKC L. Rev. 931, 932 (2010).
305. See id. at 936–43 (summarizing literature).
306. Id. at 941–43 (discussing John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999)).
modified test urges an integration of proportionality review into the objective prong, transforming the court's unspoken balancing of interests into an explicit and transparent feature of the court's analysis. I also suggest a modification of the subjective prong in injunctive cases, endorsing the inference of a culpable mindset from a persistent inaction. While modest in scope, these adjustments would produce a more robust, nuanced, and honest consideration of the numerous Eighth Amendment claims confronting judges on a daily basis.