Indiana Journal of Law and Social Equality

Volume 8 | Issue 2 Article 6

6-14-2020

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Publication Citation

Jack McAllister, Mental Illness in Prison & The Objective Unreasonableness of the Estelle Test, 8 Ind. J.L. & Soc. Equality 355 (2020).

NOTE

Mental Illness in Prison & The Objective Unreasonableness of the *Estelle* Test

Jack McAllister*

INTRODUCTION

The largest providers of psychiatric care are not hospitals.[1] It is prisons and jails who are the largest providers of psychiatric care.[2] Beginning with the widespread deinstitutionalization of state-run psychiatric hospitals in the late 1950s, prisons and jails have become the nation's new mental healthcare system.[3] And this trend shows no sign of changing; for even though the total prison population has decreased in recent years, the proportion of that population experiencing mental illnesses has increased.[4]

The Eighth Amendment requires correctional facilities to provide inmates with adequate healthcare, but shockingly few inmates actually receive it.[5] Perhaps this is because correctional facilities are rarely held liable under the Eighth Amendment for failing to provide adequate healthcare.[6] Indeed, the standard that courts use to measure whether correctional facilities have violated the Eighth Amendment is immoderately pro-prison.[7] This Eighth Amendment standard, known as the *Estelle* test,[8] has two prongs. The first prong requires prisoners to prove they have an objectively serious medical need.[9] The second prong requires prisoners to prove that the correctional facility[10] failed to address the prisoner's medical need with deliberate indifference.[11] Deliberate indifference requires a "culpable state of mind"; to be held liable, a prison official must have subjectively intended to punish a prisoner by depriving him or her of medical care.[12] A prison official who is merely

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* Indiana University Maurer School of Law, J.D. 2020; Senior Managing Editor, *Indiana Journal of Law & Social Equality*, *Volume 8*.

1 *See* Alisa Roth, *A 'Hellish World': The Mental Health Crisis Overwhelming America's Prisons*, THE GUARDIAN (Mar. 31, 2018), https://www.theguardian.com/society/2018/mar/31/mental-health-care-crisis-overwhelming-prison-jail.

2 *Id.*

3 *Id.*

4 *Id.*

5 *See infra* notes 48–50.

6 *See infra* notes 22–26, 51–54, and accompanying text.

7 *See infra* Section I.

8 Estelle v. Gamble, 429 U.S. 97 (1976).

9 *Id.* at 106.

10 I will use the nouns "prison," "jail," and "correctional facility" interchangeably, as prisoners are housed in both prisons and jails. *See infra* notes 163–65.

11 *Estelle*, 429 U.S. at 104, 106; *see also* Wilson v. Seiter, 501 U.S. 294, 304–05 (1991) (holding that inhumane conditions, alone, are not enough to trigger constitutional scrutiny).

12 *Wilson*, 501 U.S. at 297, 300–02.

negligent or who acts without the intent to punish will not be held liable.[13] As other commentators have noted, the *Estelle* test has clothed prison officials in "practical immunity" from liability for constitutional violations.[14] Because the second prong requires an inquiry into the prison official's subjective state of mind, it places a particularly heavy burden on plaintiffs in Eighth Amendment litigation.

In *Kinglsey v. Hendrickson*, the Supreme Court suggested it may be willing to re-evaluate the *Estelle* test.[15] In *Kingsley*, the Court held that the second prong of the *Estelle* test—the deliberate indifference standard—should not be used to evaluate pre-trial detainee excessive-force claims because pre-trial detainee claims arise from the Fourteenth and Fifth Amendment Due Process Clause.[16] Instead of deliberate indifference, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[17]

Although *Kinglsey* dealt with an excessive-force claim, some circuits have interpreted it broadly to apply to both medical care and excessive-force claims of pre-trial detainees.[18] Other circuits, on the other hand, have interpreted *Kinglsey* more narrowly and apply it only to pre-trial detainee excessive force claims.[19]

This Note argues that the Supreme Court should resolve this circuit split and endorse a broad reading of *Kinglsey*. Not only should the Supreme Court affirm that *Kinglsey* applies equally to all pre-trial detainee claims, it should take the opportunity to extend *Kinglsey*'s holding to reach prisoner claims as well. It is high time for the Supreme Court to reexamine the theoretical underpinnings of *Estelle*, used to justify the deliberate indifference standard. For it is unclear why a prisoner's right to adequate medical care should be grounded in the constitutional ban on cruel and unusual punishment, and not in due process. As emphasized below, *Estelle*'s reading of the word "punishment" is divorced from the Eighth Amendment's text and original purpose.[20] Not only does *Estelle* sit upon a precarious legal foundation, the burden it places on plaintiffs often allows a vulnerable population of inmates—those with mental illness—to be deprived of adequate healthcare.

Part I of this Note provides an inmate's account of the cruel, yet constitutional, treatment inmates with mental illness too often suffer in correctional facilities, and also includes a brief history of how prisons have become de facto

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13 *See id.*

14 *See* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018).

15 135 S. Ct. 2466 (2015); *see also infra* Part III

16 *See* 135 S. Ct. at 2473.

17 *Id.*

18 *See, e.g.*, Miranda v. County of Lake, 900 F.3d 335, 350–52 (7th Cir. 2018) (holding *Kingsley* applies to both excessive force and medical-care claims).

19 *See, e.g.*, Nam Dang *ex rel.* Dang v. Sheriff, Seminole Cty. Fla., 871 F.3d 1272, 1279–80 (11th Cir. 2017) (holding that pre-trial detainees' denial of medical care claims are evaluated under the same standard as prisoners' claims).

20 *See infra* Part IV.

mental hospitals. Part II explores the two prongs of the *Estelle* test and why the standard is particularly unfair for inmates who have mental illnesses. Part III discusses the 2015 Supreme Court case *Kingsley v. Hendrickson* and how that opinion has precipitated a circuit split over the merits of the traditional *Estelle* test's application to pretrial detainee claims. Part IV presents an argument for why the law should not distinguish between pretrial detainees and prisoners and why a purely objective standard should apply in all inmate medical care cases.

I. MENTAL HEALTH TREATMENT INSIDE — AN INMATE'S EXPERIENCE

John Rudd, an inmate in a West Virginia federal prison, was serving a sentence for possession of cocaine.[21] Rudd had long history of serious mental illness, yet the prison placed him on "care level 1"—a label reserved for those with no significant mental health needs.[22] In April 2017, Rudd's mental health took a turn for the worse, and he became suicidal.[23] He told prison officials that he wanted to hang himself.[24] Their response? They moved him into a suicide-watch cell, where Rudd banged his head against the wall in an attempt to snap his own neck.[25] To get him to calm down, prison staff had to inject him with haloperidol—a drug used to treat schizophrenia and help prevent suicide.[26]

Following this incident, the prison neither sent Rudd to a psychiatric ward for treatment nor placed him on a higher care level. Officials simply moved him back into the prison's general population.[27] In fact, prison psychology staff ultimately determined that Rudd was likely faking his symptoms and marked Rudd's Post Traumatic Stress Disorder and Schizophrenia as "resolved."[28] So instead of receiving continued treatment and monitoring of his mental health, Rudd was left at the lowest care level and instructed to tell one of the guards if he ever felt suicidal again.[29]

Despite the prison's flippant response, if Rudd had filed a lawsuit against the prison for denial of medical care in light of this incident, the prison would almost assuredly be found not liable under the *Estelle* test. As mentioned above, flippancy or negligence in treating an inmate's medical condition will not subject a prison to Eighth Amendment liability. A prison will be liable under the Eighth Amendment only if an inmate can prove that the prison denied him or her adequate medical care

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21 Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, MARSHALL PROJECT (Nov. 21, 2018, 6:00 AM), https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

as a way to punish him or her.[30] And so even though Rudd suffered greatly under the prison's care, he would probably be unable to prove that the prison staff caused his suffering to punish him.[31]

Unfortunately, Rudd's experience is far too common in prisons and jails across the country.[32] A 2006 study by Bureau of Justice Statistics found that 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates had either current symptoms or a recent history of mental illness,[33] representing a substantial increase when compared to the Bureau of Prison Statistics 1999 study.[34] The incarceration of people with mental illness has become so prevalent that our nation's prisons and jails have been dubbed the "de facto mental healthcare providers."[35] Because of the overwhelming population of prisoners with mental illness and pro-prison legal doctrine, prisoners frequently go without appropriate care and treatment.[36]

The prison landscape did not always look as it does now. At the start of the twentieth century, mental-health care was based almost exclusively on state-institutional care.[37] By the late 1950s, it is estimated that over half a million Americans with mental illnesses lived in state-run psychiatric hospitals.[38] Beginning at that time and continuing up until the turn of the century, psychiatric hospitals across the country were shut down one-by-one as a part of the process of "desinstitutionalization."[39] This process freed hundreds of thousands of people with mental illness who had spent years "receiving greatly ineffectual" and brutal

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30 *See infra* Part I.B

31 *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 9 (1992) (holding that the Constitution does not require prison medical providers to provide inmates with unqualified access to healthcare); Rhinehart v. Scutt, 894 F.3d 721, 750 (6th Cir. 2018) ("An inmate is entitled to adequate medical care, not the best care possible."). Courts give substantial deference to the judgment of medical experts. *See Rhinehart*, 894 F.3d at 738 (quoting Richmond v. Huq, 885 F.3d 928, 940 (6th Cir. 2018)). Even though Mr. Rudd suffered as a result of prison staff's lackluster treatment, because s*ome* form of treatment was provided, the prison would likely be shielded from liability. For the level of care provided to violate *Estelle*, a plaintiff would have to show that the care was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Terrance v. Northville Reg. Psychiatric Hosp., 286 F.3d 834, 844 (6th Cir. 2002) (quoting Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989)).

32 *See id.*

33 DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 tbl. 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf.

34 SASHA ABRAMSKY & JAMIE FELLNER, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 18 (2003), https://www.hrw.org/reports/2003/usa1003/usa1003.pdf; *see also* Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231, 232 (2017) (noting that the rate of prisoners with serious mental health disorders in prisons has risen from 17% in 2004 to 28% in 2011).

35 Roth*, supra* note 1.

36 Jonathan D. LeCompte, *When Cruel Become the Usual: The Mistreatment of Mentally Ill Inmates in South Carolina Prisons*, 66 S.C. L. REV. 751, 759 (2015).

37 Christina Canales, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1731 (2012).

38 *See id.*

39 Abramsky & Fellner, *supra* note 34, at 5.

treatment.[40] Initially, the plan was to move from institutionalization to community-based treatment, but this plan never came to fruition.[41] Patients with mental illness were ejected from state mental hospitals faster than the development of community mental health programs,[42] which left many discharged patients abandoned on the streets without access to any treatment for their condition.[43] While on the streets, these former patients were often unable to take care of even their basic needs.[44] Lacking the resources necessary for survival or any better alternatives, many of them turned to petty crime, which landed them in jail or prison.[45] Thus, individuals with mental illness were swept in by the criminal justice system—mostly for non-violent crimes.[46] Other factors helped fuel this process, such as the criminalization of drugs in the 1980s and police tactics such as "social sanitation."[47] By the start of the twenty-first century, the population in psychiatric hospitals declined from over 500,000 in the 1950s to only 55,000 in the year 2000.[48] Meanwhile, in the year 2000, the population of prisoners with serious mental illness had burgeoned to almost 300,000—a figure representing about 20% of the total prison population. [49]

Considering the Supreme Court recognized prisoners' constitutional right to healthcare in *Estelle v. Gamble*,[50] the fact that statistics show an extensive amount of inmates with mental illness are left untreated or undertreated[51] is unacceptable. As the next Part of the Note will show, however, this is because the constitutional doctrine established by *Estelle* all but guarantees that prisons and jails will be shielded from liability.

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40 *Id.* at 20.

41 Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 53 (2011) (describing the sharp decline of state mental hospital populations coinciding with the sharp rise of inmates with mental illness.).

42 Canales, *supra* note 37, at 1733.

43 Abramsky & Fellner, *supra* note 34, at 16.

44 *Id.*

45 Canales, *supra* note 37, at 1737.

46 Harcourt, *supra* note 41, at 53.

47 *See* GEORGE F. COLE, CHRISTOPHER E. SMITH & CHRISTINA DEJONG, CRIMINAL JUSTICE IN AMERICA 263 (8th ed. 2015). "Social sanitation" is where police arrest socially undesirable members of society—such as the homeless or mentally ill—to remove them from the streets. *See* John Kleinig, *Policing the Homeless: An Ethical Dilemma*, 2 J. SOC. DISTRESS & HOMELESS 289, 296 (1993).

48 COLE ET AL., *supra* note 47, at 173.

49 *See* E. FULLER TORREY, AARON D. KENNARD, DON ESLINGER, RICHARD LAMB, JAMES PAVLE, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES (2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf (noting American Psychiatric Association estimated about 20% of prisoners are seriously mentally ill); ALLEN J. BECK & PAIGE M. HARRISON, PRISONERS IN 2000, BUREAU JUST. STAT. (2001), https://www.bjs.gov/content/pub/pdf/p00.pdf (noting the total number of prisoners under federal or state jurisdiction was 1,381,892 at year end). From this data, I estimate that the population of mentally ill prisoners was near 300,000 during the year 2000.

50 *See* 429 U.S. 97, 104 (1976).

51 *See infra* notes 46–47.

II. THE ROADBLOCK TO RECOVERY: *ESTELLE V. GAMBLE*

In the 1976 landmark case *Estelle v. Gamble*, the Supreme Court held that denying a prisoner medical care constitutes a violation of the Eight Amendment.[52] The Court reasoned that the government had an obligation to care for prisoners, who by reason of their confinement cannot care for themselves.[53] Additionally, the Court reasoned that a denial of medical care would undoubtedly lead to unnecessary suffering, that such suffering would be "inconsistent with contemporary standards of decency as manifested in modern legislation," and that denying medical care is not related to any penological purpose.[54]

Following *Estelle*, a body of caselaw clarifying the Court's holding emerged as cases progressed through federal courts.[55] *Estelle* had proclaimed that the "deliberate indifference to serious medical needs of prisoners" would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.[56] Analyzing this language, lower courts developed a two-prong test to apply to medical-care claims.[57] Under this two-prong test, a prison official violates the Eighth Amendment when: (1) the prisoner's medical condition is sufficiently serious and (2) where the prison official acted with *deliberate indifference* in response to the medical condition.[58]

This two-prong test shields correctional facilities from liability for merely negligent conduct. Given the low risk of liability, correctional facilities are not pressured to provide better medical care.[59] Indeed, a 2012 study revealed that only about half of the prisoners who met the threshold for a serious mental illness had actually received treatment at some point since being admitted,[60] and only about a third of prisoners meeting the threshold for a serious mental illness were still receiving ongoing treatment at the time of the interview.[61] Although the report does not specify whether those inmates who formerly received treatment were still in need of it, the report makes clear that a substantial number of inmates with mental illness are going without treatment for their ailments.[62]

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52 *Estelle*, 429 U.S. at 104.

53 *Id.* at 103.

54 *Id.*

55 *See generally* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 362–85 (2018) (providing a comprehensive overview of Supreme Court caselaw that precipitated from *Estelle v. Gamble*).

56 429 U.S. at 104 (internal quotations omitted).

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

58 *Id.*

59 The small fraction of prisoners who actually succeed in winning lawsuits illustrates how unlikely it is for a correctional facility to be held liable. *See infra* notes 171–73.

60 Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, BUREAU OF JUST. STAT. 8 (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf.

61 *Id.*

62 *See id.* Human Rights Watch states that according to the National Commission on Correctional Health Care (NCCHC), "only 231 of the nation's approximately 1,400 prisons have received NCCHC accreditation, meaning that they adhere to NCCHC guidelines [such as effectively

In sum, to progress through the roadblock that is the *Estelle* test, prisoners must not only prove that they suffered from a qualifying illness, they must also prove prison officials were subjectively aware of the illness and its attendant risks.[63] Thus, even if objective facts indicate an inmate's illness presents an immediate risk of serious harm, prison officials would be insulated from liability unless prison officials actually knew of the immediate risk and intentionally failed to act as a method of punishment.[64] The following two subparts of this Note will analyze both prongs of *Estelle* as applied to mental-health treatment.

A. Prong 1: "A Serious Medical Need"

The first prong of the *Estelle* test requires a prisoner to prove he or she suffers from a serious medical condition, which may be more burdensome to a prisoner with a mental rather than a physical illness. In *Estelle*, the Court provided no guidance as to what constitutes a serious medical condition.[65] This lack of instruction left it up to lower courts to define the contours of a "serious medical need." Given the little guidance from *Estelle*, courts were initially uncertain if mental illness should even qualify as a "serious medical need"—as the prisoner-plaintiff in *Estelle* had a physical illness.[66] The Fourth Circuit was the first court to address this question in the case *Bowring v. Godwin*.[67] Other courts have since followed suit, agreeing with the Fourth Circuit's proposition that no logical distinction (at least in terms of right to treatment) between physical and mental health exists.[68] Along with applying *Estelle* equally to mental health, the Fourth Circuit also provided a helpful test to determine when a mental illness is objectively serious.[69] The Fourth Circuit concluded that a mental illness is objectively serious if a physician or other health care provider, exercising ordinary skill at the time of observation, determines with "reasonable medical certainty that (1) the prisoner's symptoms evidence a serious disease or injury; (2) that such disease is curable or may be substantially alleviated through treatment; and (3) that the potential for harm to the prisoner by reason of delay or denial of care would be substantial."[70]

Following the language in *Bowring*, courts generally determine whether a "serious medical need" exists in one of two ways: (1) whether there is evidence of a

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screening inmates for mental illness upon admission] and submit themselves to monitoring by the organization." Abramsky & Fellner, *supra* note 34, at 94.

63 *See* Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuses of Government Power*, 93 NOTRE DAME L. REV. 357, 381 (2017).

64 *See id.* at 382–83.

65 *Id.* at 382.

66 *See* Kim P. Turner, Note, *Raising the Bars: A Comparative Look at Treatment Standards for Mentally Ill Prisoners in the United States, United Kingdom, and Australia*, 16 CARDOZO J. INT'L COMP. L. 409, 420 (2008).

67 551 F.2d 44 (4th Cir. 1977).

68 Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 504 (2004).

69 *See id.* at 503–04.

70 *Godwin*, 551 F.2d at 47.

prior diagnosis and treatment; or (2) whether the need for treatment was so objectively obvious that even a layperson lacking specialized knowledge would have recognized the need for treatment.[71] If prisoners with mental illness cannot provide medical evidence of a prior diagnosis, then proving they have a serious medical illness may be challenging for them. This is because the symptoms of mental illness are less likely to be obvious to a layperson than would be the symptoms of a physical illness. For instance, a broken bone protruding through the skin would be sufficiently obvious to a layman, but the signs of mental illness are often mistaken or missed.[72] Accordingly, without a formal diagnosis, an inmate must wait until her mental illness manifests itself in the form of bizarre or self-destructive behavior to establish a "serious medical need".[73]

Even if a prisoner can provide medical evidence of having a serious mental illness, courts limit what constitutes adequate treatment to that which would be feasible based on cost and time.[74] Notably, the Fourth Circuit concluded that "the essential test is one of medical necessity and not simply that which may be considered merely desirable."[75] Given the paucity of resources for mental health treatment in prisons,[76] it would follow that the bar to establish a medical necessity is exceedingly high.

B. Prong 2: Deliberate Indifference

The second prong of the *Estelle* test—"deliberate indifference"—is the intent element to establish liability for failure to provide adequate healthcare.[77] Prior to *Estelle*, it appears the Supreme Court had never before used the phrase "deliberate indifference."[78] Hence, at the time of the *Estelle* decision, there was no precedent to indicate the phrase's meaning, and the *Estelle* Court did not offer much in terms of defining the phrase.[79] The Court vaguely held that deliberate indifference is more than ordinary negligence and that only indifference that offends developing standards of decency would violate the Eighth Amendment.[80] Because of the

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71 Marschke, *supra* note 68, at 508.

72 Fred Cohen, *Captives' Legal Right to Mental Health Care*, 17 LAW & PSYCHOL. REV. 1, 19 (1993).

73 *See* Abramsky & Fellner, *supra* note 34, at 82. Bizarre and self-destructive behavior evincing the existence of serve mental illness must be extraordinarily unusual to be considered sufficient to put a layperson on notice. For example, an inmate's cries for help, self-harm such as cutting oneself, masturbating publicly, or smearing feces on the wall. *Id.* Courts have determined that "mere depression," behavioral problems, or emotional problems without more do not qualify as serious mental illness. Fred Cohen & Joel Dvoskin, *Inmates with Mental Disorders: A Guide to Law and Practice*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 339, 341 (1992).

74 *See Bowring*, 551 F.2d at 47–48.

75 *Id.* at 48.

76 *See* Roth, *supra* note 1.

77 Cohen, *supra* note 72, at 22.

78 *See id.* (noting that a search of all Supreme Court decisions back to 1790 reveals no prior reference to "deliberate indifference" or any variation of the phrase).

79 Marschke, *supra* note 68, at 512.

80 *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

phrase's vagueness, a temporary circuit split over the meaning of "deliberate indifference" arose following *Estelle*.[81]

The circuit split centered on whether the deliberate indifference standard required objective or subjective culpability.[82] Some of the circuits equated deliberate indifference with civil recklessness, while other circuits equated it with criminal recklessness.[83] Circuits adopting the civil recklessness definition held that deliberate indifference is when one disregards a substantial risk of danger that is either *known or would be known to a reasonable person in his or her position*.[84] Circuits adopting the criminal recklessness definition held that deliberate indifference means one must have *actual knowledge* of a substantial risk; it is not enough that the risk would have been known to a reasonable person in the defendant's position.[85]

The Supreme Court granted certiorari in *Farmer v. Brennan* to resolve this split and to provide a conclusive definition of deliberate indifference.[86] The Court first determined that "deliberate indifference" is indeed synonymous with some form of recklessness.[87] However, the Court grappled with whether to apply the civil-law standard or the criminal-law standard of recklessness.[88] Ultimately, the Court settled on the criminal-law standard of recklessness—adopting the Model Penal Code definition verbatim.[89] In effect, the Court concluded that to establish deliberate indifference, an inmate must prove that prison officials acted subjectively, or in other words, actually knew of the inmate's serious mental-health need while consciously choosing to ignore it.[90] The Court stated:

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[91]

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81 Marschke, *supra* note 68, at 512.
82 *Id.* at 512.
83 *Id.* at 512–13. The civil definition of recklessness is drawn from the Restatement (Second) of Torts § 500. *Farmer*, 511 U.S. at 836. The criminal definition is drawn from the Model Penal Code § 2.02(2)(c). *Id.* at 836–37.
84 *See, e.g.*, Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990).
85 *See, e.g.*, LaMarca v. Turner, 995 F.2d 1526 (11th Cir. 1993).
86 Farmer, 511 U.S. at 829.
87 *Id.* at 836.
88 *Id.* at 836–37.
89 *Id.* at 839–40.
90 *See* Marschske, *supra* note 53, at 515.
91 *Farmer*, 511 U.S. at 837.

The Court noted that because the Eighth Amendment prohibits the infliction of cruel and unusual *punishment* and not cruel and usual *conditions*, subjective intent is an inherent element within the Cruel and Unusual Punishment Clause.[92] In rejecting an objective standard of culpability, the Court concluded that a prison official's failure to address a significant risk he or she *should* have perceived cannot be considered the infliction of punishment unless the prison official *actually* knew of the risk.[93] Thus, no matter how obvious an inmate's mental illness may be, a prison official is not liable for an injury unless he or she actually knew that the inmate had a serious mental illness.

Because the symptoms of mental illness are often nuanced and difficult for the layperson to detect, this prong presents an extremely high hurdle for prisoners with mental illness to clear.[94] The prong's exacting mens rea requirement provides substantial deference to prison administrators and allows them to almost always evade liability.[95] Because the current standard focuses only on individual state of mind, a prisoner who shows she received medical care that was merely incompetent or negligent cannot recover no matter how badly she was harmed.[96] This standard is exactly why John Rudd, the inmate discussed in Part I, would have been highly unlikely to succeed in a lawsuit against his correctional facility.[97]

All in all, the courts are reluctant to find Eighth Amendment violations absent truly egregious violations.[98] Fortunately, a recent decision by the Supreme Court signals that the Court may be open to reconsidering the merits of the current deliberate indifference standard.

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92 *Id.* at 837–38 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.").

93 *See id.* at 839.

94 *See* Cohen, *supra* note 72, at 19 ("When I recently observed inmates in a prison disciplinary unit climb the bars, disrobe, and display their genitals, and then let loose a string of inflammatory profanities, I could not be certain that this behavior represented mental illness or rebellion. Those experts accompanying me could be no more certain."); Marschke, *supra* note 68, at 529.

95 Shapiro & Hogle, *supra* note 14, at 2039. Prior to Farmer, when the Court used an objective test, plaintiff's prevailed in 32% of custodial suicide cases. Darrell L. Ross, *Examining the Liability Trends of Custodial Suicides*, CORRECTIONSONE NEWS (Nov. 18, 2010), https://www.correctionsone.com/law-and-legislation/articles/examining-the-liability-trends-of-custodial-suicides-jIyhePiWJZCJK0qQ/. Following *Farmer* (1994-2007), plaintiff's prevailed in only 17% of cases. *Id.*

96 Shapiro & Hogle, *supra* note 14, at 2041.

97 *See supra* text accompanying notes 24–31.

98 *See, e.g.*, Marschke, *supra* note 68, at 488–89. The author details the horrific abuse of Pamela Young, a young woman suffering from manic-depression who was sentenced to jail. When Young told a prison guard that she was hearing voices, the guard's idea of "treatment" was placing her in an isolation cell. While in the cell, Young's mental condition continued to deteriorate. In a state of psychosis, Young attempted to flood her cell with urine. The guards responded by stripping Young naked and shackling her to a bed. Because Young could not reach the toilet, she was forced to urinate and defecate where she was shackled. When Young brought claim against the city in district court, the court granted the city's motion for summary judgment and dismissed Young's case.

III. MOVING TOWARDS AN OBJECTIVE STANDARD: *KINGSLEY V. HENDRICKSON*

Not all inmates housed in correctional facilities are convicted prisoners. Many inmates housed in jails are pretrial detainees who have not been convicted of anything but are awaiting trial.[99] Nonetheless, a host of circuits apply the *Estelle* deliberate indifference standard with no regard to whether an inmate was a prisoner or pretrial detainee.[100]

In 2015, the Supreme Court considered the propriety of applying the *Estelle* standard to pretrial detainees.[101] In *Kingsley v. Hendrickson*, the Court held that, in claim for excessive force, a pretrial detainee should not be treated equivalently to a convicted prisoner.[102] Therefore, the Court held, a pre-trial detainee should not need to present evidence of prison officials' subjective intent to punish to hold the prison liable under the Constitution; rather, the pre-trial detainee need only provide evidence that the prison officials' use of force was "objectively unreasonable."[103]

The Court reasoned that a different standard should apply to pretrial detainee claims because their claims arise under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment.[104] Their claims arise under the Due Process Clause because pretrial detainees have not been convicted of any crime and therefore cannot be constitutionally punished.[105] Put otherwise, it would be inappropriate to subject pretrial detainees to Eighth Amendment scrutiny.[106] And given the fact that the language of the Due Process Clause and Eighth Amendment differ, the Court interpreted the Due Process Clause as requiring a different standard of liability than the Eighth Amendment.[107]

Because *Kingsley* involved an excessive-force claim, the circuit courts are divided on how broadly to interpret the case's holding.[108] Some courts construe

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99 *See* Schlanger, *supra* note 55, at 425 (noting that over a third of the 750,000 housed in American jails are convicted prisoners and that over 80,000 state prisoners are housed in jails). Post-conviction prisoners may be confined in jail while they await sentencing or if they are convicted of a misdemeanor or a low-level felony. *Id.* Furthermore, jails often do no separate pretrial detainees from convicted prisoners, finding it safer to mix the populations. *Id.*

100 *Compare, e.g.*, Murray v. Johnson, 367 F. App'x 196, 198 (2d Cir. 2010) (holding deliberate indifference requires a pretrial detainee to prove subjective intent), *and* Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (per curiam), *with* Aldani v. Johnson, 609 F.3d 858, 865–66 (6th Cir. 2010) (applying objective reasonableness test to excessive force claim), *and* Young v. Wolfe, 478 F. App'x 354, 356 (9th Cir. 2012) (holding that the lower court judge correctly gave an Eighth Amendment excessive force instruction for a pre-trial detainee that brought a Fourteenth Amendment claim).

101 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015).

102 *See id.* at 2473.

103 *Id.*

104 *See id.* at 2475.

105 *See id.*

106 *See id.*

107 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015).

108 *Compare, e.g.*, Nam Dang *ex rel.* Dang v. Sheriff, Seminole Cty. Fla., 871 F.3d 1272, 1279–80 (11th Cir. 2017) (holding *Kingsley* only applies to pretrial detainee excessive force claims), *with*

Kingsley narrowly, holding that *Kingsley* only applies to excessive-force claims—not medical-care claims.[109] But the Second, Sixth, Seventh, and Ninth Circuits read *Kingsley* more broadly.[110] Those circuits maintain that *Kingsley* applies to both excessive-force claims *and* to medical-care claims.[111]

Take the Seventh Circuit's opinion in *Miranda v. County of Lake*.[112] There the court held that "medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*."[113] Rather than reading *Kinglsey* as limited to its facts, the Seventh Circuit concluded that a different constitutional standard is warranted for all pretrial detainee claims.[114] The *Kinglsey* Court had held that pre-trial detainee claims arise under the Due Process Clause of the Fourteenth Amendment and, unlike the Eighth Amendment, the Due Process Clause contains no reference to punishment.[115] And if all pretrial detainee claims arise from the same source— the Due Process Clause—then the same standard of liability should apply to all pretrial detainee claims regardless of whether the claim is for excessive force or inadequate medical care.[116]

The Seventh Circuit's interpretation of *Kingsley* is the more reasonable reading of the case. Other than the fortuitous fact that *Kingsley* involved with an excessive-force claim rather than a medical-care claim, *Kinglsey* offers no other basis for distinguishing between these two types of claims. In fact, *Kingsley* may even suggest that there is no basis for distinguishing between pretrial detainee claims and convicted prison claims. As explained above, *Kingsley*—at least in part—reasoned that courts should not apply the traditional *Estelle* standard to pretrial detainee claims because pretrial detainee claims arise from the Fourteenth Amendment Due Process Clause—not the Eighth Amendment. But why should prisoner medical-care claims arise out of the Eighth Amendment and not the Due Process Clause?

Miranda v. County of Lake, 900 F.3d 335, 350–52 (7th Cir. 2018) (holding *Kingsley* applies to both excessive force and medical-care claims).

109 *See, e.g.*, *Sheriff, Seminole County*, 871 F.3d at 1279 (holding that pretrial detainee's medical-care claim is evaluated under the same standard applied under the Eighth Amendment).

110 *See* Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018); *Miranda*, 900 F.3d at 350–52; Gordon v. County of Orange, 888 F.3d 1118, 1123–25 (9th Cir. 2018); Darnell v. Pineiro, 849 F.3d 17, 34–35 (2d Cir. 2017).

111 *Id.* (emphasis added). *See Richmond*, 885 F.3d at 938 n.3; *Miranda*, 900 F.3d at 350–52; *Gordon*, 888 F.3d at 1123–25; *Darnell*, 849 F.3d at 35–35.

112 900 F.3d 335 (7th Cir. 2018).

113 *Miranda*, 900 F.3d at 352.

114 *See id.*

115 *See id.*

116 *See id.*

IV. AN ARGUMENT FOR THE DUE PROCESS CLAUSES IN PLACE OF THE EIGHTH AMENDMENT

Whether the objective standard adopted in *Kingsley* should also apply to convicted prisoners is a door that the Court explicitly left open.[117] Many commentators have offered compelling arguments as to why the same objective standard should apply to prisoners based on varying interpretations of the Eighth Amendment.[118] However, none have considered the propriety of analyzing prisoner claims within the Eighth Amendment framework in the first place. Granted, *Estelle* provides precedent for doing so, but forty-four years have passed since *Estelle* was decided, and both the prison and doctrinal landscape have changed drastically in the intervening years. With that in mind, it may be time to for the Supreme Court to take a second look at the merits of grounding prisoner claims in the Eighth Amendment. Grounding both prisoner and pretrial detainee claims in the liberty component of the Due Process Clause, and applying the *Kingsley* objective standard instead of the *Estelle* deliberate indifference standard, would be more consistent with constitutional doctrine and would yield normative benefits for correctional facilities, inmates, and society as a whole.

A. The Eighth Amendment is an Inappropriate Source

The Eighth Amendment has been applied in three contexts: (1) as a limit to "the kinds of punishment that can be imposed on those convicted of crimes"; (2) as a prohibition against "punishment grossly disproportionate to the severity of the crime"; and (3) as a substantive limitation on what can be designated a criminal act punishable by law.[119] The Supreme Court classified the *Estelle* decision as falling in the first category—as a limit on the kind of punishment that can be imposed.[120] But when the state sentences an individual to prison, the federal government incarcerates the individual with the expectation that adequate healthcare will be provided during the prison term.[121] The denial of medical care is not an explicit condition of incarceration—any failure to provide medical care is hence incidental and unintended by the government .[122] Prior to *Estelle*, the Cruel and Unusual Punishment Clause applied specifically to punishment formally meted out by the *state* (i.e. judges and legislatures) rather than punishment administered by *individuals*.[123] Because the denial of medical care cannot be understood as a

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117 *Id.* at 2476 ("We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.").

118 *See* Marschke, *supra* note 68; Schlanger, *supra* note 55; Cohen, *supra* note 72.

119 Ingraham v. Wright, 430 U.S. 651, 667 (1977).

120 *See id.*

121 *See* Thompson & Eldridge, *supra* note 9.

122 *See id.* "The state" refers to judges and legislatures who define crimes and punishment.

123 *See* Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., dissenting).

punishment formally administered by the state, *Estelle* expanded the scope of the Clause to cover punishment not explicitly sanctioned by the legislature or judiciary.

In *Estelle v. Gamble*, the Court stretched the meaning of the Cruel and Unusual Punishments Clause to encompass punishment inflicted by individual prison staff.[124] As noted above, the type of punishment formally imposed by the state is incarceration, not incarceration without access to medical care. I do not make this distinction to argue that prisoners should not have a constitutional right to medical care. I suggest only that this constitutional right should be not be grounded in the Eighth Amendment. Grounding prisoner medical-care claims in the Cruel and Unusual Punishment Clause exceeds the Clause's language and original purpose.

i. Original Purpose of the Eighth Amendment

The Supreme Court summarized the history and original purpose of the Cruel and Unusual Punishment Clause in *Ingraham v. Wright*.[125] The Framers intended the Eighth Amendment to serve as a continuation of a similar clause within the 1689 English Bill of Rights.[126] The clause was included in the 1689 English Bill of Rights in response to brutal punishments English judges and the monarchy commonly inflicted.[127] When framing the Constitution, the Framers had the same concern as their ancestors who had drafted the English Bill of Rights.[128] When commenting on the underlying purpose of the Clause, the Supreme Court has stated that "the principal concern of the . . . Framers appears to have been with the *legislative definition* of crimes and punishments."[129] The Framers' concern reflects the idea that the Eighth Amendment was intended to restrict the government from imposing cruel and unusual types of punishment in retribution for criminal acts.[130] In brief, the Framers intended the Amendment to impose a negative obligation upon the government—not to impose any affirmative obligation to act.

It was not until *Estelle* that the Supreme Court interpreted the Cruel and Unusual Punishment Clause as placing an affirmative obligation to act on the state—more specifically—the obligation to provide medical care.[131] In *Estelle*, the

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124 *See* 429 U.S. 97, 104 (1976).

125 *See* 430 U.S. 651, 659–61 (1977).

126 *Id.* at 664.

127 *See id.*

128 *See id.* at 665 ("The Americans who adopted the language of . . . the English Bill of Rights . . . feared the imposition of torture and other cruel punishments . . . by judges . . . [and the] legislatures . . . .").

129 *Id.* (emphasis added).

130 Wilson v. Seiter, 501 U.S. 294, 300 (1990) (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

131 *Compare* DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 198 (1989) (holding that the government assumes an affirmative duty to provide medical care under the Cruel and Unusual Punishment Clause when it incarcerates citizens for crimes), *with* Hudson v. McMillian, 503 U.S. 1, 18 (1992) ("Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a

Supreme Court justified the departure from prior precedent by reasoning that the failure to provide medical care could produce the type of pain the Cruel and Unusual Punishments Clause was designed to prohibit.[132] The Court explained that denying medical care could "produce physical torture or a lingering death" that would otherwise be inconsistent with any penological purpose.[133] Yet the Court neglected to consider that the Eighth Amendment was originally not concerned with pain generally, but pain specifically proscribed by the legislature as a consequence for criminal conduct.[134] And the pain from denial of adequate medical care is pain generally; it is not pain proscribed by the legislature as a consequence for criminal conduct.[135] In short, *Estelle*'s applying the Eighth Amendment to denial-of-medical-care claims marked a significant departure from the Amendment's original purpose.

ii. Textual Analysis

Furthermore, the text of the Eighth Amendment does not support *Estelle*'s holding. The word "punishment" standing alone could certainly refer to the denial of medical care; however, the word must be defined in context, not in isolation.[136] Under the dictionary definition of "punishment," a prison guard who retaliates against an obnoxious inmate by neglecting to deliver his pain medication could be said to be "punishing" the inmate.[137] But given the external context in which the word "punishment" appears, it should not be defined so broadly.[138]

First, in interpreting the meaning of the word "punishment," as it is used in the Eighth Amendment, one must consider that the word appears in the Bill of Rights. The Bill of Rights exists to limit the power of the government, not the power of private actors.[139] Second, turning to the Eighth Amendment itself, the whole text

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crime.") (Thomas, J., dissenting). These cases provide a helpful illustration of how the Court in *Estelle* stretched the traditional understanding of the Eighth Amendment. As noted by Justice Thomas in *Hudson v. McMillian*, the Eighth Amendment was not read to impose affirmative obligations on the government prior to the Court's decision in *Estelle*. *Hudson*, 503 U.S. at 18.

132 *See* 429 U.S. 97, 103 (1976).

133 *Id.* (citing In Re Kemmler, 136 U.S. 436, 447 (1890)) (internal quotation marks omitted).

134 *See Ingraham*, 430 U.S. at 667–68 (holding that Cruel and Unusual Punishments Clause does not apply to public schools because it is concerned solely with punishment for the violation of criminal statutes).

135 *See* Thompson & Eldridge, *supra* note 9.

136 *See* Merit Management Group v. FTI Counseling, Inc., 138 S. Ct. 883, 893 (2018) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)) (noting that when construing a statute, courts look to both the language itself and the specific context in which it is used to determine plain meaning).

137 For example, Webster's New World Dictionary defines punishment as a noun meaning "harsh treatment." *Punishment*, WEBSTER'S NEW WORLD DICTIONARY (Pocket Books Paperback ed., 1995). Given such broad meaning, the word "punishment" could refer to numerous things.

138 *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 898 (2009) (arguing that "punishment" should be read as prohibiting cruel and unusual punishment inflicted formally by the state as a penalty for crimes).

139 Nelson v. County of Los Angeles, 362 U.S. 1, 10 (1960) (Brennan, J., dissenting) ("The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures that the Framers thought[sic] should not be used.").

clearly refers to activities solely within the purview of the state, not a private actor.[140] Hence "punishment" should be understood as referring to punishment imposed by the government. Indeed, in most legal contexts, the word punishment is understood to refer to "a sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law."[141]

The Supreme Court seems to support this interpretation of the word punishment. In *Farmer v. Brennan*, a Majority of the Court noted that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[142] In concurrence with the Majority, Justice Thomas noted that "from the time of the founding through the present day, [punishment] has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'"[143]

In brief, the denial of medical care is separate from the type of punishment the state has chosen to inflict, and it is not something the state intends to inflict when incarcerating offenders.[144] Thus, denial of medical care should not be considered punishment within the Eighth Amendment framework.

iii. Returning to Original Meaning

The Supreme Court's struggle to interpret "punishment" in the prisoner medical-care claim context over decades illustrates the utility of an originalist interpretation of the Cruel and Unusual Punishment Clause.[145] Some members of the Court have emphasized that the word "punishment" requires a showing of subjective intent on the part of the prison official.[146] In *Wilson v. Seiter*, Justice Scalia held that the clause has a subjective component because the literal definition of the word "punishment" is "to chastise or deter."[147] Thus, Justice Scalia concluded,

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140 *See Bail*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bail as a security required to be given to the court for the release of a criminal defendant who must appear in court at a future time); *Excessive Fine*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining excessive fine imposed by the government in consequence of a crime that is excessive in proportion to the crime).

141 *Punishment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

142 *Id.*

143 *Id.* at 859 (Thomas, J., concurring).

144 *Estelle v. Gamble*, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting).

145 *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (evaluating overcrowded prison conditions entirely objectively and devoting no words to intent); Bell v. Wolfish, 441 U.S. 520, 538 (1979) (holding that intent to punish or objective unreasonableness can establish liability); Hutto v. Finney, 437 U.S. 678, 685–87 (1978) (holding that objectively horrendous conditions constituted cruel and unusual punishment). *But see* Wilson v. Seiter, 501 U.S. 294, 298 (1991) (holding that in prison condition cases, prisoners must demonstrate officials acted with subjective intent).

146 *E.g.*, *Wilson*, 501 U.S. at 300 ("If the pain inflicted in not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

147 *Id.*

"[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[148]

Other members of the Court, however, have opined that any standard of liability should be entirely objective because the Eighth Amendment concerns the nature of the punishment inflicted, not the mens rea of those inflicting it.[149] In the 1981 case *Rhodes v. Chapman*, Justice Powell evaluated the challenged prison conditions entirely objectively, devoting no words to subjective intent.[150] Scholars have supported this objective approach, arguing that living in prison and enduring all its attendant conditions is the "punishment" for Eighth Amendment purposes.[151]

At bottom, considering the plain language and original purpose of the Eighth Amendment, the Cruel and Unusual Punishment Clause should not cover denial of medical-care claims. The original purpose of the Amendment was to impose a negative obligation on the state, limiting its discretion on what types of punishments it could use to punish criminals. The Cruel and Unusual Punishment Clause should be read according to its original purpose and to the context in which it appears. This is not to say I do not think that prisons have an obligation to provide adequate medical care to prisoners; I do. That is the primary concern of this Note. My sole contention is that a prison's obligation to provide adequate medical care need not be examined under the Cruel and Unusual Punishments Clause.

B. Due Process Rights

Since *Estelle*, the Supreme Court has recognized that, whenever the state undertakes certain custodial roles with respect to an individual, it creates a "special relationship" that—under a due process framework—places an affirmative obligation on the state to provide for that person's safety and general well-being.[152] In *DeShaney v. Winnebago County Department of Social Services*, the Court held that the government assumes an affirmative duty to protect a person whenever it deprives a person of their of her freedom to act on his or her own, regardless of the circumstances of confinement.[153] Scholars have referred to this rule as the "law of captives' rights."[154]

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148 *Id.*

149 *E.g.*, *Bell,* 441 U.S. at 567 (J., Marshall, dissenting).

150 Schlanger, *supra* note 55, at 377.

151 *See* Dolovich, *supra* note 138, at 907 (2009); *see also Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("Prison brutality . . . is part of the total punishment to which the individual is being subjected for his crime and such, is a proper subject for Eighth Amendment scrutiny.") (internal quotation omitted).

152 M. D. by Stukenberg v. Abbott, 907 F.3d 237, 249 (5th Cir. 2018) (citing *DeShaney*, 489 U.S. at 200).

153 489 U.S. at 200.

154 Cohen, *supra* note 72, at 1 ("The term captive refers to a person in the physical custody of the government, before trial or after conviction and a sentence of incarceration, or after civil commitment . . . ."). When referring to someone who has been detained by the government (regardless of the purpose for her confinement) I will use the noun "captive."

The Court has stated that "[t]he affirmative duty to protect [captives] arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[155] Thus, regardless of why the government confines a captive, the Constitution imposes a duty upon the government to assume responsibility for that captive's safety and well-being.[156]

Applying this rule, the Supreme Court has identified a substantive due process right to medical care for pretrial detainees, immigrants, the involuntarily civilly committed, and children in federal custody.[157] In instances where an involuntarily committed person or foster child is taken into the government's custody, the affirmative duty to provide medical care arises from the Due Process Clause of the Fourteenth Amendment.[158] It is only when the captive is a convicted prisoner that the right stems from the Cruel and Unusual Punishment Clause.[159]

Because the language of the two clauses is not coextensive,[160] the Supreme Court has articulated different standards of liability for prisoners and other similarly situated captives.[161] Under the Cruel and Unusual Punishment Clause, the Court places far more emphasis on the government actor's subjective state of mind,[162] whereas under the Due Process Clauses, the Court generally looks only for objective unreasonableness.[163]

For example, in *Youngberg v. Romeo*, the Court held that in claims brought by involuntarily committed persons, plaintiffs need only show that the state failed to exercise professional judgment in rendering care—not deliberate indifference.[164] The Court declined to apply the *Estelle* deliberate indifference standard, reasoning that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[165] Likewise, in *Kingsley v. Hendrickson*, the Court held that pretrial detainee claims stem from the Fourteenth

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155 *DeShaney*, 489 U.S. at 200.

156 *Id.* at 199–200.

157 *See, e.g.*, *M. D. ex rel. Stukenberg*, 907 F.3d at 249.

158 *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 320–21 (1982) (holding that the involuntarily committed have a due process right to minimally adequate training); Yvonne L. *ex rel.* Lewis v. N.M. Dept. of Human Servs., 959 F.2d 883, 893–94 (10th Cir. 1992) (holding that foster children in state custody have rights under the due process clause akin to those afforded to the involuntarily committed in *Youngberg*).

159 *See* Ingraham v. Wright 430 U.S. 651, 671–72 (1977) (holding that corporate punishment in public schools implicates constitutionally protected liberty interest under the Due Process Clause, but that the Eighth Amendment is an inappropriate source of liability); Spivey v. Elliot, 29 F.3d 1522, 1526 (11th Cir. 1995) (holding that residential school owed its student an affirmative duty under the Due Process Clause to protect that student from harm).

160 *See supra* Part II.

161 *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015); Miranda v. County Lake, 900 F.3d 335,352 (7th Cir. 2018).

162 *Kingsley*, 135 S. Ct. at 2475.

163 *See e.g.*, *id.*

164 457 U.S. at 312.

165 *Id.* at 321–22.

Amendment Due Process Clause, which mandates an "objective unreasonableness" standard because unlike convicted prisoners, pretrial detainees "cannot be punished at all."[166]

Why are prisoner claims brought under the Eighth Amendment instead of the liberty component of the Due Process Clause? The Court bases the bifurcation on the purpose of prisoners' confinement, which is punishment for a crime.[167] But as discussed above, the denial of medical care is not the formal punishment imposed by the state in retribution for a crime—thus it should not be considered a "punishment" warranting Eighth Amendment scrutiny. Furthermore, because convicted prisoners are similarly situated to other captives, the same standard should apply equally to all captives. For these reasons, the Court should ground prisoner claims in the Due Process Clause and apply the objective unreasonableness standard laid out in *Kingsley*.

i. Similarly Situated Captives

Because prisoners are equally reliant on the government for medical care as pretrial detainees and involuntarily committed persons, the Due Process Clauses and the objective standard should apply uniformly.

In the Equal Protection context, when two groups are similarly situated, the Supreme Court has held that they should be treated alike.[168] Generally, to qualify as similarly situated, groups need only share characteristics related to the claimed service.[169] Prisoners, pretrial detainees, and the involuntarily committed share the characteristic of being in the custody of the state and being deprived of their personal autonomy.[170] Because of these characteristics, no group of captives is any less dependent on the state to provide them medical care.[171] In spite of this equal reliance on the state, the Court distinguishes prisoners from pretrial detainees and the involuntarily committed based on criminality. Distinguishing prisoners based on criminality, however, conflicts with other Supreme Court precedent.

Consider *Baxtron v. Herold* for example.[172] In *Baxstrom v. Herold*, the Supreme Court held that prisoners with mental illness are entitled to the same civil commitment procedures as everyone else, regardless of prisoner's criminality.[173]

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166 135 S. Ct. at 2475.

167 Bell v. Wolfish, 441 U.S. 520, 535 (1979).

168 City of Cleburne, Tex. v. Cleburne Living Ctr, 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). Though I am not suggesting applying a different standard to prisoners runs afoul of the Equal Protection Clause, this maxim is helpful to understanding the logic behind adopting the same standard for both prisoners and pretrial detainees.

169 Rose Carmen Goldberg, *The Antidotes to the Double Standard: Protecting the Healthcare Rights of Mentally Ill Inmates by Blurring the Line Between Estelle and Youngberg*, 16 YALE J. HEALTH POL'Y L. & ETHICS 111, 126 (2016).

170 *See* Cohen, *supra* note 72, at 1.

171 *See* Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals.").

172 *See generally* 383 U.S. 107 (1996)

173 *See* Goldberg, *supra* note 169, at 127–28.

The Court held that applying a different standard to mentally-ill prisoners was "arbitrary" because criminality is not relevant to mental-health treatment.[174] Given the Court's holding in *Baxstrom*, it is difficult to understand why in other cases the Court has suggested that prisoners are less entitled to hold prison officials accountable because of their criminality.[175] If the Supreme Court were to reconsider the *Estelle* standard with reference to *Kinglsey*, *Baxstrom*, *Youngberg*, and *DeShaney*, it would find a sound legal basis to hold that all claims—regardless of the claimant's status as a prisoner, pretrial detainee, or involuntarily committed patient—should proceed under the Due Process Clause.

ii. Policy Reasons Why *Kingsley* Objective Standard Should Apply to Prisoners

Aside from the legal justifications for evaluating denial of medical care claims under the Due Process Clause and applying an objective standard to measure culpability, there are three compelling reasons to do so from a public policy perspective.

First, applying a uniform standard could make it easier for prison and jail officials to comply with the Constitution. Under the current constitutional framework, prisoners and pretrial detainees are separated into distinct categories, with their claims treated under different constitutional doctrine.[176] In reality, however, prisoners and pretrial detainees are not so distinct.[177] In fact, prisoners and pretrial detainees are often mixed together within correctional facilities.[178] Of the nearly 750,000 people housed in American jails, over a third are convicted prisoners; the rest are pretrial detainees.[179] Prisoners may be confined in a jail with pretrial detainees while awaiting sentencing.[180] In other cases, prisoners—if convicted of a misdemeanor or a low-grade felony—may serve their sentence out in jail alongside pretrial detainees.[181] To make matters worse, many state jails have no mechanism in place to separate pretrial detainees from convicted prisoners.[182] Instead, these jails base housing assignments on individualized risk and supervision factors rather than on an inmate's status as prisoner or pretrial detainee.[183]

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174 *Id.*; Baxstrom v. Herold, 383 U.S. 107, 110 (1966) ("We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed.").

175 *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015) ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'").

176 *See generally supra* notes 160–66 and accompanying text.

177 *See* Schlanger, *supra* note 55, at 425.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

Because correctional facilities pay little attention to whether an inmate is a pretrial detainee or convicted prisoner and do not have a process to separate them, applying separate constitutional standards to these two groups is difficult in practice. Notably, commentators have revealed that jail and prison officials have a hard time creating and administering prison healthcare policy with a liability standard applying to some of the inmates they house, but not to others.[184] If a uniform constitutional standard were to apply to both pretrial detainees and convicted prisoners, prison and jail officials would have a much easier time managing their facilities.

To be sure, an objective standard would make it easier for plaintiff-inmates to hold prisons civilly liable. But, by making their constitutional duties more clear, a uniform standard applicable to both pretrial detainees and convicted prisoners would allow prison officials to know what is necessary to avoid litigation in the first place.

Second, increasing plaintiff success in litigation will presumably encourage more lawyers to take on inmate cases, which would afford vulnerable, prisoners with mental illness protection against potential abuses.

Prisons in the United States are not independently monitored,[185] therefore, prisoners must usually rely on litigation to enforce their constitutional rights. Even though prisoners must rely on litigation, statistics show that prisoner-plaintiffs not only lose more cases than regular plaintiffs—they lose faster.[186] In 2012, out of all prisoner civil-right cases, a pretrial decision was made in favor of defendant 85% of the time, while a pretrial decision was made in favor of the plaintiff only 0.5% of the time.[187] When filing pro se, a plaintiffs odds at success are even worse: in 2012 courts denied pro-se inmate civil-rights claims 95% of the time.[188] And because few lawyers are willing to take on inmate cases,[189] the overwhelming majority of inmate claims proceed pro se.[190]

There are several reasons that few lawyers willing to take on inmates as clients.[191] For starters, most lawyers are compensated for prison work through contingency fees,[192] and recent legislative enactments have placed stringent caps on these fees.[193] Also, lawyers have a difficult time communicating with a client who is

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184 *Id.* at 425–26.

185 Turner, *supra* note 66, at 412.

186 *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1588–89 (2003).

187 Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 165 (2015).

188 *Id.* at 167; *see also* Shapiro & Hogle, *supra* note 14, at 2058 (noting that in 2012, prisoners won their cases only fifty-seven times, and that the total damages awarded to these fifty-seven prisoners barely broke $1 million).

189 Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 476–77 (2018).

190 Shapiro & Hogle, *supra* note 14, at 2048.

191 *See* Shapiro & Hogle, *supra* note 14, at 2049.

192 *Id.*

193 *Id.*

behind bars, which makes it difficult to build a winning case.[194] Lastly, the pro-prison *Estelle* standard makes these cases particularly unattractive.

The Supreme Court cannot alter legislative enactments or make it easier for lawyers to communicate with prisoners. But it can do something about the pro-prison *Estelle* standard. If the Court applied an objective standard to both pretrial detainee and prisoner medical-care claims, attorneys could more easily hold prisons liable for failing to provide adequate medical care.[195] If it were easier to establish liability, more lawyers may be compelled to take on prison-condition cases despite the difficulties in representing a client who is behind bars.[196] With more lawyers in the prison-litigation arena and a less deferential constitutional standard, more plaintiffs could recover when denied healthcare. And increased litigation would put needed pressure on prisons to implement policies to ensure that every prisoner is receiving adequate healthcare.[197] As courts have long held, the threat of damages "encourage[s] those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements of constitutional rights."[198]

The third public-policy reason for abandoning the *Estelle* standard is that ensuring prisoners with mental illness are receiving adequate healthcare would yield economic benefits. Statistics indicate that prisoners with mental illness are confined in prisons for longer lengths of time than those without mental illness.[199] They are often described as being caught in a "revolving door" cycle with the corrections system.[200] The National Alliance on Mental Illness reported that up to 40% of adults who have serious mental illness will come into contact with the United States criminal justice system at some point in their lives, and records

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194 Rovner, *supra* note 189, at 476–77. There are many drawbacks that disincentivize lawyers from taking inmates on as clients. For example, lawyers who represent inmates often face reproach from the public for representing an unpopular group. Furthermore, there are many logistical difficulties rendering it unduly burdensome for the lawyer to provide representation. For example, substantial barriers exist to even basic communication. Telephone calls may take days to arrange, and email—if available—is not confidential.

195 *See* Shapiro & Hogle, *supra* note 14, at 2043.

196 Judicial interpretations of prisoners' constitutional claims have made prisoners' rights cases very difficult to win. Under the Eighth Amendment, a prison condition is not unconstitutional unless it amounts to "the wanton and unnecessary infliction of pain." Rovner, *supra* 189, at 477 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

197 NATIONAL INSTITUTE OF CORRECTIONS, INMATE LITIGATION: RESULTS OF A NATIONAL SURVEY 11 (2003) ("[T]he results of this survey establish that litigation remains extremely important to correctional administrators. It is clear that agencies continue to respond to the fact and prospect of damage and injunctive actions by seeking to avoid lawsuits, by hiring various kinds of staff to respond to litigation, and by reforming policy and supervision in areas that turn out to pose litigation risks.").

198 Shapiro & Hogle, *supra* note 14, at 2059 (quoting Owen v. City of Independence, 445 U.S. 622, 652 (1980)).

199 *Jailing People with Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Advocacy/Policy-Priorities/Divert-from-Justice-Involvement/Jailing-People-with-Mental-Illness (last visited June 6, 2020).

200 Turner, *supra* note 66, at 416–17.

indicate that people with mental illness are arrested far more frequently than people without mental illness.[201] More arrests and longer terms of confinement mean more taxpayer money spent to house these inmates.[202] Putting pressure on prisons to provide adequate treatment could allow many prisoners with mental illness to be released into society while limiting the chances of recidivism.[203] To the best of the author's knowledge, the amount of money that could be saved in the long-run by increasing mental health care resources has not been demonstrated empirically, but the costs of failing to do so have. Various commentators have demonstrated the substantial cost the "revolving-door cycle" accumulates.[204] If civil litigation pressured prisons to increase their mental-health care resources and free people with mental illness from the revolving-door cycle, a substantial amount of money and resources could be saved in the long-run.

CONCLUSION

In his address to the American Bar Association, Justice Anthony Kennedy had this to say about prisoners in America:

> We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure, the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes; still, the prisoner is a person; still, he or she is part of the family of humankind.[205]

Inmates with mental illness are one of society's most vulnerable populations, but concern for their well-being is frequently brushed aside. Certainly, many would say that harsh prison conditions are a moral desert for committing a criminal act.[206] As Justice Kennedy explains in his speech, it is easy to forget that inmates have been deprived of their liberty but not their humanity. In a similar vein, Nelson Mandela once 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 . . . ."[207]

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201 *Id.* at 417.

202 *Id.*

203 *Id.* A successful reduction of the number of inmates with mental illness would arguably make correctional facilities easier to manage. *See* Mulvey & Schubert, *supra* note 34, at 237. Inmates with mental illness are far more likely to be involved in assaults, which inevitably distracts prison staff from taking care of their regular duties. *Id.*

204 *See* COLE ET AL., *supra* note 47, at 374 (8th ed. 2015).

205 Anthony M. Kennedy, Assoc. J., U.S., Speech by Justice Anthony Kennedy at ABA Annual Meeting (Aug. 9, 2003), https://www.documentcloud.org/documents/325931-dcom5.html.

206 *See generally* John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUMAN BEHAVIOR 659 (2000) (illustrating what motivates society to incarcerate its members as a consequence for committing crime).

207 *See* Brittany Glidden, *Necessary Suffering: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual,* 49 AM. CRIM. L. REV. 1815, 1815 (2012) (quoting NELSON MANDELA, LONG WALK TO FREEDOM 174–75 (1994)).

Of course, I do not contend that the Supreme Court could unilaterally solve the mental health crisis in prisons with the drafting of one opinion. This issue is assuredly far too complex for the judicial system to solve on its own. To bring about full and lasting change, legislative action will undoubtedly be necessary. However, the Supreme Court can play a significant role in the solution by updating the constitutional doctrine to comport with the realities of the modern prison environment. Analyzing claims under the Due Process Clause and implementing a purely objective standard would better protect inmates with mental illness against abuses and would put needed pressure on correctional facilities and legislatures to take action to ensure all prisoners receive adequate treatment.