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Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals

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Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals

Nicole B. Godfrey[*]

ABSTRACT

As the COVID-19 pandemic wreaked havoc on American society in the spring of 2020, advocates for incarcerated people began sounding alarm bells alerting society to the impending devastation for incarcerated people once the coronavirus scaled the prison walls. For too many incarcerated people, the alarms fell on deaf ears and the COVID-19 pandemic has had life-shattering consequences for thousands of individuals locked inside American prisons. But to anyone with an understanding of the historical realities of and legal parameters around the American carceral state, the devastation came as no surprise.

Since the 1980s, America has led the world in imprisoning its own citizens, and, to many, American justice means locking human beings in overcrowded cages and throwing away the key. This Article explores how American criminal "justice" has created a system wherein three interconnected strands of indifference render incarcerated people particularly vulnerable to devastating harms like those associated with the COVID-19 pandemic. First, the sheer enormity of the American carceral state has led to the creation of prison bureaucracies that operate with institutional indifference to the lives of the incarcerated. Sympathetic to the complex task of administering enormous prison systems, the federal judiciary has

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created a doctrine of judicial indifference to harms experienced to incarcerated people. Finally, the Article explores how a general societal indifference to the lives of incarcerated individuals in particular and marginalized groups in general has allowed the institutional and judicial indifference to develop and proliferate. The Article posits that the damaging consequences of the COVID-19 pandemic on the incarcerated population are directly tied to these interwoven indifferences and calls on widespread reform and decarceration to avoid future cautionary tales.

TABLE OF CONTENTS

INTRODUCTION

It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.[1]

Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsberg, issued the above-quoted clarion call to protect the lives of

[1] Valentine v. Collier, 140 S.Ct. 1598, 1601 (2020) (Sotomayor, J., statement respecting the denial of application to vacate stay).

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incarcerated people on May 14, 2020.[2] At that point, the COVID-19 pandemic had brought American society to a standstill for a little more than two months, and it had begun to wreak havoc on American prisons nationwide.[3] Despite Justice Sotomayor's hopes that the nation's prisons might avoid becoming cautionary tales, the realities of and legal doctrines governing the American system of mass incarceration all-but-insured that American prisons would become a site of mass casualty to the COVID-19 pandemic. This Article explains why.

Let's start by looking at how the pandemic impacted one prison—Arkansas's Cummins Unit—among the nation's approximately 2,000.[4] Established in 1902, the Cummins Unit is an Arkansas prison that sits on nearly 18,000 acres of farmland that used to be a cotton plantation.[5] Built to incarcerate 1,876 men, the prison confines 1,950 today.[6] The men incarcerated at Cummins work in all manner of prison jobs; some work the fields in a manner all-too reminiscent of the slaves who worked the plantation during the antebellum era.[7] More than one-hundred men living in the

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[2] *See generally id*.

[3] Greg Stohr, *Supreme Court Rejects Texas Inmates on Covid-19 Prevention*, BLOOMBERG LAW (May 14, 2020), available at https://news.bloomberglaw.com/us-law-week/supreme-court-rejects-texas-inmates-on-covid-19-prevention-steps (noting that more than 20,000 incarcerated people had been infected and more than 300 had died at that point in the pandemic).

[4] HOMER VENTERS, LIFE AND DEATH IN RIKERS ISLAND 9 (2019) (noting that "[t]here are currently about 3,000 jails and 2,000 prisons in the United States).

[5] Molly Minta, *Incarcerated, Infected, and Ignored: Inside an Arkansas Prison Outbreak*, THE NATION (June 17, 2020), https://www.thenation.com/article/society/cummins-prison-arkansas-coronavirus/. Like many states in the south, Arkansas used the post-Reconstruction era to repurpose its antebellum-era slave plantations into prisons that would set the stage for the continued subjugation of Black people. *See*, *e.g.*, CALEB SMITH, THE PRISON & THE AMERICAN IMAGINATION 136 (2009) ("In the aftermath of Reconstruction and the Civil War amendments, Southern states dismantled the old structure and recomposed its elements into a kind of hybrid, the "prison farm," at sites like Angola, Cummins, and Parchman.").

[6] Minta, *supra* note 2.

[7] *See* Rachel Aviv, *Punishment by Pandemic*, THE NEW YORKER (June 15, 2020), https://www.newyorker.com/magazine/2020/06/22/punishment-by-pandemic?utm_source=nl&utm_brand=tny&utm_mailing=TNY_Daily_061720&utm_campaign=aud-

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Cummins Unit go to work each day as part of what is known as the "Hoe Squad."[8] Unpaid, these men "pile into an open trailer" each morning, sitting side-by-side, "shoulder to shoulder, hip to hip" as "a tractor pulls them deep into the prison's fields" where they "pull weeds, dig ditches, and pick cotton, cucumbers, and watermelons."[9] When one man asked an officer why the men working the fields had to use "gardening tools rather than modern farming technology," the prison official told him, "We don't want your brain. We want your back."[10] After returning from the fields or other warehouse jobs, the incarcerated men live in open barracks, with beds that are about three feet apart.[11] Prison officials send them to the chow hall "three to four barracks' worth of men" at a time.[12] In short, the men living in the Cummins Unit are forced to live and work in extremely close quarters—an environment ripe to incubate any highly infectious disease like COVID-19.[13]

By early-to-mid March, prison officials knew that, before long, the coronavirus would enter the Cummins Unit, wreaking

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dev&utm_medium=email&bxid=5bea00133f92a404693b30df&cndid=24589382&hasha=ae98c54650a6d318d4b1b23bef2c2c47&hashb=84d7a5f6a55815e28f93e45db8f640d5da1ef844&hashc=f28ed463f5d76f991ea2ad4b215da6b49b8610c11fbe8af108bd9baea9b53df6&esrc=AUTO_PRINT&utm_term=TNY_Daily (describing the unpaid labor of the "Hoe Squad" and the patrol provided by the "field riders"). While today, the "field riders" patrol is made up of "officers on horseback," *id*., Arkansas ran its prisons using a "trusty" system until well into the 1960s. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 313 (1993). The "trusty" system allowed Arkansas to inexpensively run its prisons by granting power to certain "favorite" incarcerated people who would be charged with overseeing the rest of the incarcerated population. *Id*. ("In Cummins prison, in Arkansas, for example, there were 'only 35 free world employees' for 'slightly less than 1,000 men.' This was a cheap way to run a prison, but hardly enlightened penology.") (internal quotations omitted).

[8] Aviv, *supra* note 4.

[9] *Id*.

[10] *Id*.

[11] *See* Minta, *supra* note 2 (describing how one prisoner, who is 5'9", is able to touch the beds next to him when laying on his back and extending his arms outward).

[12] *Id*.

[13] Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus 'Incubators'*, NPR (Mar. 13, 2020), available at https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators.

Electronic copy available at: https://ssrn.com/abstract=3920518

havoc on the incarcerated population, yet still insisted that the Hoe Squad report to work in the crowded trailer without any safety precautions.[14] As the men living in Cummins Unit learned of the COVID-19 pandemic and its risks in late March, some refused to report to work.[15] In response, the prison disciplined them,[16] even though by the time of the work strike, "Asa Hutchinson, the governor of Arkansas, had asked that businesses cease 'nonessential functions.'"[17] Meanwhile, in seeming recognition of the coming impact of the pandemic on the prison, the director of Arkansas's prisons instructed the facility wardens to "prepare a portion/area of your punitive isolation areas to house inmates effected by the CoronaVirus,"[18] and the incarcerated people required to work in Cummins's garment factory began to "manufacture masks that would be distributed throughout the state's prison system."[19]

This contradictory behavior on the part of prison officials continued even after the first Cummins staff member tested positive for the virus on April 1.[20] Despite the positive test, prison officials did not administer mass tests to Cummins's incarcerated population, nor did they track "which or how many of its employees tested positive."[21] Even when prisoners began exhibiting symptoms of COVID-19, the prison failed to take steps to limit an outbreak.[22] Instead, prison officials ignored the complaints of symptomatic

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[14] By late March, the Centers for Disease Control (CDC) issued interim guidance meant to assist prison officials seeking to protect the health and safety of incarcerated persons, prison staff, and the general public. *See generally* Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. That interim guidance included a direction that everyone, including incarcerated people, should be wearing masks in correctional facilities. *Id*.

[15] Aviv, *supra* note 4 (describing how the group of men assigned to the "Hoe Squad" lay down on their beds when officers called their names for work).

[16] *Id*. (recounting that the "men were disciplined for 'unexcused absence'—a violation that carries a punishment of up to fifteen days in isolation").

[17] *Id*.

[18] *Id*.

[19] Minta, *supra* note 2.

[20] *Id*.

[21] *Id*.

[22] *Id*.

Electronic copy available at: https://ssrn.com/abstract=3920518

prisoners, all but guaranteeing the rapid spread of the virus among the incarcerated population.[23] For example, on April 10, a man incarcerated at Cummins "went to the infirmary with a severe headache and other symptoms he feared were signs of Covid-19."[24] After informing prison officials that he had a "real bad case of diarrhea" and had lost his senses of smell and taste, prison officials gave him two Tylenol and sent him back to his crowded barracks.[25]

Four days later, as the number of symptomatic prisoners increased, Arkansas prison officials finally began mass testing at Cummins.[26] But even in the face of mass testing, prison officials ignored public health guidance on necessary safety precautions to limit the spread. For example, in one barracks, four nurses administered forty-six tests without changing their gloves.[27] Unsurprisingly, then, by April 25, 2020, eight hundred and twenty-six incarcerated men and thirty-three staff members tested positive for the virus.[28]

But prison officials did not inform all prisoners of their positive result right away or take steps to quarantine infected people. One person reported that after mass testing in his barracks, "a sergeant later shouted into the barracks, 'Y'all are negative.'"[29] This person, who noticed he could not smell anything when another man "defecated a few feet away from him," remained skeptical and asked a family member to call the prison to find out the true results of his test.[30] He was positive.[31]

Despite the mass outbreak at Cummins, incarcerated people, former staff members, and current staff members reported a shocking level of indifference to the health of those infected. Former staff members confirmed a practice of shredding sick call requests rather than responding to them,[32] and current staff members reported

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[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Aviv, *supra* note 54.
[28] Aviv, *supra* note 64.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.

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seeing prison grievances in bathroom trash cans.[33] One former nurse of the Arkansas prison system confirmed: "The mentality of the infirmary is: these individuals are worthless."[34] One incarcerated person, twenty-nine-year-old Derick Coley, saw a nurse at Cummins on April 15; the nurse "noted that he was too weak to walk and his blood-oxygen level was ninety, which would typically indicate that a patient should be hospitalized."[35] Rather than send Mr. Coley to the hospital, the nurse sent him "to the Hole, where he remained for seventeen days. His vitals were never recorded again."[36] The men confined next to Mr. Coley in the segregation unit begged staff to take him to the infirmary because he couldn't breathe, but staff members just kept walking by his cell, ignoring him.[37] When officers finally came to his cell—"not to check on him but to clear it so that someone else could move in"—Mr. Coley collapsed.[38] Prison officials handcuffed him, placed him in a wheelchair, and took him to the infirmary, where he "was 'worked on and then passed away,'" according to the coroner's report.[39] At the time of his death, the prison had no doctor on duty, so the infirmary staff called the doctor on call, William Patrick Scott, whose "medical license has been suspended three times."[40]

Unfortunately, Mr. Coley's story is neither unique to him, to the Cummins Unit, or to the Arkansas prison system. By May 3, 2020, just one month after the first Cummins staff member tested positive for COVID-19, four incarcerated people had died of

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[33] *Id*. A grievance is a formal complaint lodged by an incarcerated person related to conditions within a carceral facility. An incarcerated person is required by the Prison Litigation Reform Act to exhaust administrative remedies prior to filing suit in federal court. *See Jones v. Bock*, 549 U.S. 199, 211 (2007). Exhaustion generally requires the filing of a grievance using the prison system's requirements and following the prison system's procedures through to completion. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006) (cautioning that incarcerated people "must complete the administrative review process in accordance with the applicable procedural rules" in order to properly exhaust).

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*.

Electronic copy available at: https://ssrn.com/abstract=3920518

COVID-19 complications and nearly half of the incarcerated population tested positive for the disease.[41] By June 9, 2020, just a month later, eleven people had died in the Cummins Unit alone,[42] and by September 2020, 39 people had died throughout the Arkansas prison system.[43] To date, 11,425 people incarcerated in Arkansas prisons have contracted COVID-19, and 52 people have died.[44] Across the country, 398,627 people incarcerated in American prisons have contracted COVID-19, and 2,715 people have died.[45]

Prisons across the country have faced outbreaks like the outbreak at Cummins. At the Marion Correctional Institution in Ohio, more than 80 percent of the incarcerated population tested positive for COVID-19.[46] In Wisconsin, nearly 8 percent of the incarcerated population—more than 6,700 people—in the Wisconsin Department of Corrections contracted COVID-19 by November 2020.[47] By February 2021, that number had risen to

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[41] *4 Cummins Unit inmates die due to COVID-19*, 4029 NEWS (May 3, 2020), available at https://www.4029tv.com/article/2-cummins-unit-inmates-die-due-to-covid-19/32353084 (noting the deaths of four incarcerated people at Cummins); *see also Frazier v. Kelley*, 460 F.Supp.3d 799, 811 (E.D. Ark. 2020) (finding that 856 people (of the 1,950, *see supra* at 2) in Cummins contracted COVID by April 27, 2020).

[42] Anna Stitt, *COVID-19 Inside Arkansas Prisons: The Death of Derick Coley*, KUAR (June 9, 2020), available at https://www.ualrpublicradio.org/post/covid-19-inside-arkansas-prisons-death-derick-coley.

[43] John Moritz, *Virus deaths at 39 in state's prisons; 11 inmates were eligible for parole*, ARKANSAS DEMOCRAT GAZETTE (Sept. 8, 2020), available at https://www.arkansasonline.com/news/2020/sep/08/virus-deaths-at-39-in-states-prisons/.

[44] The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (Last Updated 4:50 P.M. on Jul. 1, 2021), available at https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.

[45] *Id*.

[46] Jenny E. Carroll, *Pretrial Detention in the Time of Covid-19*, 115 NORTHWESTERN UNIV. L. REV. 59, 62-63 (2020) (noting that health experts warned "that the contagion ha[d] begun to spread to the communities surrounding the prison where guards and other staff live").

[47] Rich Kremer, *More Than 8 Percent of State's Prison Population Currently Infected with COVID-19*, WISCONSIN PUBLIC RADIO (Nov. 6, 2020), available at https://www.wpr.org/more-8-percent-states-prison-population-currently-infected-covid-19.

Electronic copy available at: https://ssrn.com/abstract=3920518

10,831 people (3 in 7) in Wisconsin's prisons, a rate 4.4 times greater than the rate in Wisconsin overall.[48] In all, the COVID-19 case rate for incarcerated people reached 5.5 times higher than the national case rate in the United States by June 2020.[49] Incarcerated people have faced a mortality rate that is 45% higher than the overall rate.[50]

In addition to the illness and death that accompanies an outbreak, conditions in the prisons that are experiencing an outbreak are often abysmal. For example, at Sterling Correctional Facility in Colorado, outbreaks have been accompanied by extensive lockdowns, during which incarcerated people are locked down in their cells without access to showers or the bathroom.[51] At times, these lockdowns last 72-hours without access to a shower and with limited meals.[52] Colorado is not alone in utilizing lockdowns as a tool to manage the pandemic in its prisons.[53] Moreover, in those facilities facing rampant infection rates, incarcerated people who fall ill are not receiving the care necessary to adequately treat COVID-19 and its attendant comorbidities.[54] In short, American

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[48] The Marshall Project, *supra* note 41. For comparison, the infection rate for the incarcerated population in Arkansas is 6.1 times the rate in Arkansas overall, while the rate in Ohio's prisons is 2.4 times the overall rate for the state. *Id.*

[49] Brendan Saloner, Kalind Parish, Julie A. Ward, et. al., Research Letter, *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA NETWORK (July 8, 2020), available at https://jamanetwork.com/journals/jama/fullarticle/2768249.

[50] Moe Clark, *Vaccination rates in Colorado prisons remain low as COVID-19 cases spike across the state*, COLORADO NEWSLINE (Aug. 3, 2021), available at https://coloradonewsline.com/2021/08/03/vaccination-rates-in-colorado-prisons-remain-low-as-covid-19-cases-spike-across-the-state/.

[51] Moe Clark, *'It was just chaos': Former Sterling prison guard says COVID protocols were not enforced*, COLORADO NEWSLINE (Nov. 12, 2020), available at https://coloradonewsline.com/2020/11/12/sterling-correctional-facility-covid-protocols-ignorned/.

[52] *Id*.

[53] *See* Nicole B. Godfrey & Laura L. Rovner, *COVID-19 in American Prisons: Solitary Confinement is Not the Solution*, 2 ARIZ. ST. L.J. ONLINE 127, 135-36 (2020) (noting that prison systems are turning to solitary confinement to address the harms posed by the COVID-19 pandemic).

[54] Carlos Franco-Paredes, Michael Aaron Vrolijk, & Eniola Oquindipe, *Imprisoned on the COVID-19 Death Row*, BMJ BLOGS (Nov. 2, 2020), available at https://blogs.bmj.com/medical-humanities/2020/11/02/imprisoned-on-the-covid-19-death-row/ (once incarcerated people become ill, "they are unable to receive adequate and timely medical care").

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prisons have become cautionary tales in both their lack of preparation and their response to the pandemic, at a cost of thousands of lives and the untold suffering of hundreds of thousands.

This Article posits that American prisons were doomed to be cautionary tales from the start of the pandemic due to three interwoven strands of indifference faced by incarcerated people in this country. First, the sheer enormity of the American carceral state[55] has led to an institutional indifference to the lives incarcerated individuals. American prisons are crowded, unhygienic, and violent.[56] Prison officials focus their energy on security and control rather than rehabilitation and health.[57] While the past half century has seen a rapid expansion in incarceration,[58] prison systems have done little to account for "the many ways in which incarcerated people face new risks of injury, sickness, and death behind bars. The deaths, injuries, sickness, and trauma *caused*

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[55] VENTERS, *supra* note 4 at 9 (noting that "[t]here are currently about 3,000 jails and 2,000 prisons in the United States).

[56] *See*, *e.g.*, Carroll, *supra* note 43 at 73 (noting that "prisons are infamous for overcrowding"); Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1580 (2019) (noting the overcrowding inherent to the American prison system); Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html (explaining that toilet tanks double as sinks "for hand washing, tooth brushing and other hygiene").

[57] VENTERS, *supra* note 4 at 6 (warning that "[h]ealth care is not a top priority in prison" because "health systems in jail and prison are usually designed and controlled by people who aren't health experts"); *see also id*. at 2 (noting that prisons and jails "are paramilitary settings, where the group that has the health data is usually under the control of the security service").

[58] Leipold, *supra* note 14 at 1580 (recounting the "familiar" story of the U.S. incarceration rate:

> The United States incarcerates more people than anyone else in the world, both in absolute terms and per capita. The United States has less than 5% of the world's population but 20% of the world's prison inmates. There are 2.1 million people behind bars in this country, which is almost one in every 100 adults. Many prisons are overcrowded, at times unconstitutionally so. Given these facts, it is not surprising that the phrase "mass incarceration" is routinely used to describe the American approach to crime and punishment.)

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by incarceration" are wholly ignored.[59] The COVID-19 pandemic has brought this institutional indifference to the fore and highlighted the myriad ways prisons as institutions ignore the plight of the incarcerated.

Second, the muddled Eighth Amendment doctrine applied to claims challenging prison conditions[60] is the result of overwhelming judicial indifference to the lives of the incarcerated. This judicial indifference arises in part from the overwhelming deference the judiciary affords to prison officials[61] and in part from a misdirected focus on punishment—and a concomitant focus on intent—in cases challenging prison conditions.[62] By examining the series of cases in

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[59] VENTERS, *supra* note 4 at 3.

[60] Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 153 (2020).

[61] Godfrey & Rovner, *supra* note 49 at 140-43.

[62] *Id*. at 137-40. Incarcerated people seeking to enjoin ongoing harms posed by prison conditions must meet an exacting, two-part test colloquially known as the deliberate indifference standard. Farmer v. Brennan, 511 U.S. 825, 835 (1994). First, the prisoner must demonstrate that the condition being challenged is "sufficiently serious" in order to satisfy the objective prong of the Eighth Amendment inquiry. *Id*. A sufficiently serious condition is a condition that results in the deprivation of basic human needs, Rhodes v. Chapman, 452 U.S. 337, 347 (1981), like "food, clothing, shelter, medical care, and reasonable safety." DeShaney v. Winnebago Cty. Dep't of Social Servs., 489 U.S. 189, 199-200 (1989) (citing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)). Incarcerated people need not wait for harm to befall them before seeking judicial relief from unsafe prison conditions—the Supreme Court has made clear that the Eighth Amendment protects against the risk of future harms. Helling v. McKinney, 509 U.S. 25, 33 (1993). Second, in order to satisfy the subjective prong of the Eighth Amendment inquiry, an incarcerated person must prove that the person or entity being sued exhibited deliberate indifference to the serious condition being challenged. *Farmer*, 511 U.S. at 834. In other words, an incarcerated plaintiff must prove that the defendant being sued knew of the risk posed by the challenged condition but disregarded that knowledge by failing to take reasonable measures to abate the risk. *Id*. at 897.

In prior work, I have argued that application of this standard is nearly impossible in cases seeking injunctive relief. Godfrey, *supra* note 59 at 153. In particular, I argued that the type of proof necessary to demonstrate deliberate indifference of an entity is unclear, and I proposed the courts look to certain categories of proof to demonstrate the entity's knowledge of the risks posed by a challenged condition. *Id*. at 186-95. Here, I seek to build upon this prior work by examining how the federal courts arrived at the deliberate indifference standard for prison conditions claims. In so examining, I demonstrate that the standard grew out of an undue focus on the word "punishments" in the Eighth

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which the Supreme Court developed the modern Eighth Amendment doctrine that is applied in prison conditions cases, I demonstrate that the doctrine developed from an undue judicial concern in protecting prison officials at the expense of incarcerated lives. The net result of this undue protection of prison officials is that courts are willing to leave horrific prison conditions undisturbed so as to avoid prison officials' liability.[63]

Finally, the reason that the institutional and judicial indifference described above have been allowed to proliferate is a general societal indifference to the lives of the incarcerated. In part, this indifference is just a continuation of the societal indifference to the poor and minorities, traditionally disfavored groups who are disproportionately entangled in the American criminal system.[64] But societal indifference to the incarcerated also stems from a general attitude that prison *should* be harsh so incarcerated people must *deserve* the cruelty they experience in American prison systems.[65]

Amendment's cruel and unusual punishments clause. By focusing too much on the word "punishment," the Court ignored the reality that incarceration *is the punishment* at issue in conditions case. The only true question before the Court in a conditions case is whether the conditions at issue in a particular prison are such that *incarceration has become an unconstitutional punishment*. *See* Part II., *infra*.

[63] *See* Part II., *infra*.

[64] Leipold, *supra* note 14 at 1582 (noting that "high levels of imprisonment disproportionately affect the poor and minorities" and positing that "criminal justice policies . . . are created and enforced *because* they have this effect—imprisonment as a form of social control of disfavored groups"); *see also* James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1063 (1997) (hypothesizing that the "warehouse prison" reflects a "paradigm shift" that "changed the target of punishment from the body of the offender to his personhood. By subjecting inmates to coerced and regimented idleness, the warehouse prison signifies that offenders are unworthy of activities imparting social value and self-esteem").

[65] Leipold, *supra* note 14 at 1585 (noting that

> [p]rison *is* harsh, but we have taken most of the other punishment options (shaming, banishment, corporal) off the table, leaving the remaining choices as either being inapplicable in many cases (economic sanctions, restorative measures), too expensive (intensive rehabilitation), or not sufficiently harsh to satisfy retributive or deterrence goals (community supervision, home confinement, community service)

and that "many believe that the harshness of incarceration is a feature rather than a flaw—the worse the prison conditions, the greater the incentive for people to avoid the underlying behavior").

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Compounding these attitudes, American prison systems are notoriously resistant to transparency,[66] leaving the American public with little idea of what really goes on behind prison walls.[67]

This Article proceeds in three parts. First, the Article describes the institutional indifference inherent to modern American prison systems and how the modern, bureaucratic prison state strips incarcerated people of their identity in an effort to maintain its indifference. Part II provides an historical overview of the text and purpose of the Eighth Amendment and a survey of the cases creating the current Eighth Amendment doctrine as applied to prison conditions. Through this survey, Part II demonstrates that current Eighth Amendment doctrine is the result of an undue focus on the subjective intent of prison officials rather than the harms experienced by prisoners. This part concludes that this undue focus arises from long-standing judicial indifference to incarcerated lives. Finally, Part III examines how both the institutional and judicial indifference described in Parts I and II result from a general societal indifference to the lives of the incarcerated. The Article concludes with a call for reform of the American carceral system to overcome the institutional, judicial, and societal indifference discussed to create a system that is truly just.

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[66] VENTERS, *supra* note 4 at 10 (noting that the resistance to transparency is the product of both the "paramilitary nature of the setting" and the "role of litigation in improving jail conditions").

[67] *See generally* Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html (discussing lack of transparency in American prisons); Nicole B. Godfrey, *"Inciting a Riot": Silent Sentinels, Group Protests, and Prisoners' Petition and Associational Rights*, 43 SEATTLE UNIV. L. REV. 1090, 1091-92 (2020) (discussing the importance of hearing the voices and stories of those living inside prison walls in discussions of criminal system reform); Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460-64 (2018) (discussing the invisibility of prisons as compared to other aspects of the criminal system); Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462-66 (2014) (discussing problems inherent to the lack of transparency in penal institutions).

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I. INSTITUTIONAL INDIFFERENCE: THE BUREAUCRATIC PRISON STATE

One of the inherent difficulties in talking about the American prison system as an institution is that there's not one American carceral system.[68] Rather, each state and the federal government operate separate systems of incarceration.[69] However, there are some common features that permeate each of these systems, and it is those common features that create the institutional indifference that made American prisons ripe for disaster wen the COVID19 pandemic began.

First, many prison systems are overcrowded and have been for decades.[70] Even those that are not operating at full or greater-than-full capacity, are still crowded, even if not "overly" so.[71] According to the Prison Policy Initiative, "41 states are currently operating at 75% of their capacity, with at least nine of those state prison systems and the federal Bureau of Prisons are still operating at more than 100%. Only one state—Maine—has a current prison population below 50% of their capacity."[72] Importantly, some prison systems have changed the way they calculate their capacity in recent years.[73] Rather than report their capacity as a measurement of the number of prison beds anticipated in the original design of a prison, these systems instead report capacity as a measurement of the number of beds that "can be squeezed into a facility."[74] But no matter the method of measurement, one thing is certain: most

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[68] Godfrey, *supra* note 59 at 162-63.
[69] *Id*. at 163 (discussing the expansion of the federal and state prison systems in the late-nineteenth to early-twentieth century).
[70] Emily Widra, *Since you asked: Just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now?*, PRISON POLICY INITIATIVE (Dec. 21, 2020) (noting that nine states' and the federal government's prison systems "were operating at 100% capacity or more" before the pandemic).
[71] *Id*.
[72] *Id*.
[73] MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 41 (2015).
[74] *Id*.

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American prisons have nowhere near enough space "to allow for adequate social distancing or medical isolation and quarantine."[75]

Second, prison systems operate as paramilitary bureaucracies where medical care, mental health care, education, programming, and housing classifications decisions are made in a manner that fails to account for the incarcerated person as an individual.[76] The prison bureaucratic state allows prison systems to ignore systemic problems by attributing tragic outcomes either to incarcerated people themselves or "a few bad apples" among the prison staff.[77] In the COVID-19 pandemic, the flaws in this approach are obvious when one examines the individual stories of the men and women who have died in prison after being infected with the coronavirus.[78]

Finally, prison systems operate to strip incarcerated people from any sense of individualized identity by creating routinized

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[75] Widra, *supra* note 69.

[76] *See*, *e.g.*, VENTERS, *supra* note 4 at 20 (noting how the "paramilitary nature of health care in jails and prisons" leads prison officials to "do [their] best to link the death [of an incarcerated person] to a personal failing by the deceased patient or chalk it up to a few bad apples when staff abuse or neglect is clearly implicated").

[77] *Id*.

[78] *See supra*, Introduction at 7-8 (discussing the death of Mr. Coley at Cummins Unit); Mahita Gajanan, *Federal Inmate Dies of Coronavirus After Giving Birth While on Ventilator*, TIME (Apr. 29, 2020, 10:52 AM EDT), available at https://time.com/5829082/female-inmate-covid-19-birth-ventilator/ (describing the plight of Andrea Circle Bear who died at a federal medical center in Fort Worth, Texas after contracting the coronavirus); Jack Rodgers, *Texas Geriatric Prison Ravaged by Virus Dodges Injunction*, COURTHOUSE NEWS SERVICE (Nov. 16, 2020), available at https://www.courthousenews.com/texas-geriatric-prison-ravaged-by-virus-dodges-injunction/ (recounting how 19 incarcerated people died in 116 days in the Pack Unit in Texas, including Alvin Norris, who died before prison officials "took any proactive measures to suppress Covid-19 infections"); Lance Benzel, *Before dying of COVID-19, Sterling prison inmate deprived of care, former resident says*, THE GAZETTE (May 23, 2020), available at https://gazette.com/news/before-dying-of-covid-19-sterling-prison-inmate-deprived-of-care-former-resident-says/article_fe7b4ffc-9bb6-11ea-af4e-bf041c54b3c4.html (describing how 86-year-old David Grosse had only other incarcerated people to care for him in his final days in the prison's ward for military veterans and explaining that prison officials "declined to bring him to the clinic" because he did not have a fever, despite that he was soiling himself and not eating).

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patterns of daily life.[79] Endemic to this routinized system is a tribalism that further solidifies the only identities that matter as prison officials on the one hand, incarcerated people on the other.[80] This tribalism leads to an institutionalized unwillingness to identify and reform systemic failures in order to protect the health and safety of individual people who are incarcerated.[81]

In the following three sections, this Part discusses each of these three common features of American prisons and how those features help create the institutionalized indifference inherent to systems of incarceration in this country. Part I.A. discusses how America grew to become the world leader in incarceration, locking up more of our own citizens than any other nation in the world. Part II.B. then examines the bureaucratic prison state and how prison bureaucracy normalizes indifference to serious harms suffered by the incarcerated population. Finally, Part III.C. analyzes how the purposeful stripping of identity that occurs in American prisons perpetuates the institutional indifference to individual lives.

A. Incarceration Nation

The United States first began to turn to incarceration as its primary system of punishment in the decades following the American Revolutionary War.[82] This new mode of punishment derived from a sense that society must separate its deviants in order to root out the causes of crime, and most states opened at least one penitentiary in the decades leading up to the Civil War.[83] After the Civil War, states sought to design prisons that could maximize the

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[79] Norval Morris, *The Contemporary Prison: 1965-Present*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 202, 202 (Norval Morris & David J. Rothman, eds., 1995) (describing modern prisons as places of "deadening routine punctuated by bursts of fear and violence" and places of "a relentlessly unchanging, grimly gray routine).

[80] VENTERS, *supra* note 4 at 10 (describing prison tribalism as creating a system wherein allegiance to a particular group supersedes the greater good, particularly in times of conflict or friction).

[81] *See generally id*.

[82] Godfrey, *supra* note 59 at 160-61.

[83] *Id*. at 161-62.

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number of people confined while saving money on administration.[84] The results of this focus on maximizing prison beds at the lowest possible monetary cost remains visible in American prison systems today.

By the 1930s, most states and the federal government operated prisons known colloquially as the "Big Houses" because of the sheer number of men confined inside the prison gates.[85] But within a few decades, those "Big Houses" proved insufficient to house the country's exploding prison population.[86] Between 1970 and 1980, the prison population doubled; between 1981 and 1995, it doubled again.[87] And the population growth continued, creating the "story [that] is now sadly familiar. The United States incarcerates more people than anyone else in the world, both in absolute terms and per capita."[88] This population growth led to severe overcrowding, leading prison officials to begin placing two or three people into prison cells built for just one person.[89] While recent years have begun to see a slight decrease in the prison population,[90] many prison systems remain operating at or near capacity, as discussed above.

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[84] Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 169, 170 (Norval Morris & David J. Rothman, eds., 1995) (explaining that states constructing new penitentiaries were driven "by how to confine the largest number of [people] at the lowest possible cost").

[85] Godfrey, *supra* note 59 at 163, citing Rotman, *supra* note 83 at 185 ("Big Houses were prisons that held, on average, 2,500 men, prisons such as San Quentin in California, Sing Sing in New York, Stateville in Illinois, and Jackson in Michigan").

[86] Morris, *supra* note 78 at 211 (noting the crisis of overcrowding that followed the population growth in American prisons).

[87] *Id*.

[88] Leipold, *supra* note 14 at 1580.

[89] Morris, *supra* note 78 at 212.

[90] Leipold, *supra* note 14 at 1580-81, 1620 (cataloguing reform efforts undertaken by the state and federal government and the concomitant decrease in prison population and crime rate). While overall incarceration has begun to decrease, "[i]ncarceration of women has increased dramatically in recent decades, growing at twice the pace of men's incarceration." Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J. FORUM 772, 775 (2019). Many of the harms associated with this increase in incarceration fall disproportionately on Black women and children. *Id*. at 775-77.

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The harms associated with the crowded living conditions of modern prisons are well-known.[91] Crowded conditions lead to increased violence, and prison studies confirm that prison overcrowding can lead to detrimental impacts for particularly vulnerable incarcerated populations ("e.g., those in bad health or having severe psychiatric disorders, older people").[92] Crowded prisons also have problems providing adequate medical care to people behind bars.[93] Prison crowding limits the programming and educational opportunities available to incarcerated people,[94] and it reduces the availability of visitation for people confined behind prison walls.[95] The decrease in programming and education often occurs despite engorged budgets allegedly responsive to the larger prison population.[96]

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[91] Widra, *supra* note 69.

[92] *Id*.; *see also* Stéphanie Baggio, Nicolas Peigné, Patrick Heller, Laurent Gétaz, Michael Liebrenz, & Hans Wolff, *Do Overcrowding and Turnover Cause Violence in Prisons*? FRONTIERS IN PSYCHIATRY (Jan. 24, 2020), available at https://www.frontiersin.org/articles/10.3389/fpsyt.2019.01015/full.

[93] Widra, *supra* note 69; *see also* Amy Miller, *Overcrowding in Nebraska's Prisons is Causing a Medical and Mental Health Care Crisis*, ACLU (Aug. 16, 2017), *available at* https://www.aclu.org/blog/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-nebraskas-prisons-causing (recounting "inexplicable failures of the most basic medical care," including "a man with epilepsy who has landed in the hospital several times because he didn't receive seizure medication" and a rape victim who reported her rape upon entering prison, was given a routine physical exam, but "staff somehow missed the fact she was pregnant until she unexpectedly went into labor").

[94] Widra, *supra* note 69; *see also* United States Government Accountability Office (GAO), *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* 19-21 (Sept. 2012), *available at* https://www.gao.gov/assets/650/648123.pdf (recounting the decrease in programming and educational opportunities, "resulting in waiting lists and inmate idleness," caused by federal prison population growth).

[95] *Id*. at 21 (explaining that BOP facilities have "visiting space to accommodate the number of inmates that the facility was designed to house and a visitor capacity to enable staff to manage the visitation process. The infrastructure of the facility may not support the increase in visitors as a result of the growth of the prison population.").

[96] *See* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 793 (2019) (explaining that the "federal prison population increased from 24,640 in 1980 to 185,617 in 2017" and that even though the BOP budget "has grown, "crowding out" other Department of Justice

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Thus, prison officials knew of the harms associated with the sheer number and close proximity of people living in carceral facilities well before the pandemic. In fact, public health officials have known for decades that prisons made for easy "breeding grounds for all sorts of communicable diseases."[97] Despite this knowledge, prison systems proved ill-equipped to handle the effects of the COVID-19 pandemic on the incarcerated population. In September 2020, incarcerated people were experiencing an infection rate four times higher than the general population and a death rate twice as high.[98] The import of these statistics, particularly on marginalized communities, can be slightly misleading, however, because they fail to account for three important facts: first, Black Americans are twice as likely to die from COVID-19.[99] Second, Black Americans "are incarcerated five times more often than white Americans."[100] Finally, "people in prison are more likely to be male and younger than a non-incarcerated individual."[101]

In sum, there can be no doubt that American prisons are "COVID-19 hotspots"[102] and that the pandemic has been devastating to the incarcerated population, particularly Black incarcerated men. Stuck inside overcrowded facilities, these people had no control over whether and when they might be exposed to the virus. Their safety remained in the hands of their captors, prison officials who work within the prison bureaucratic state that

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(DOJ) priorities, the federal prison system has still largely failed to implement evidence-based rehabilitation programs").

[97] Widra, *supra* note 69; *see also* James Hamblin, *Mass Incarceration is Making Infectious Diseases Worse*, THE ATLANTIC (July 18, 2016), *available at* https://www.theatlantic.com/health/archive/2016/07/incarceration-and-infection/491321/ (noting the prevalence of infectious diseases among the incarcerated population—"4 percent have HIV, 15 percent have hepatitis C, and 3 percent have active tuberculosis"—and pointing to the carceral system as "a primary reason that these diseases can't be eliminated globally").

[98] Widra, *supra* note 69; *see also* Kevin T. Schnepel, *Covid-19 in U.S. State and Federal Prisons*, NATIONAL COMMISSION ON COVID-19 AND CRIMINAL JUSTICE 5, 9 (Sept. 2020), *available at* https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/FINAL_Schnepel_Design.pdf.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 6.

[102] *Id*. at 15.

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developed in response to the exploding prison population in the latter half of the twentieth century. The impact that prison bureaucracy has on the lives of incarcerated people is the focus of the next section.

B. The Prison Bureaucracy

As the incarcerated population grew, so too did the need for people to run the prisons.[103] This prison population explosion also transformed prison systems into modern bureaucracies, replete with overarching "rules and regulations that bind the organization together."[104] Many viewed this move toward bureaucratization of the carceral state as a good thing, and it is hard to argue that prison should operate without written rules and regulations.[105] However, the structures of bureaucracy can also allow individual officials to skirt responsibility when things run amok, thereby allowing harms to individuals subject to the bureaucratic state to go unchecked.[106]

Before turning to these dangers of bureaucracy, however, it is first important to have a basic understanding of features of

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[103] Malcom M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 456 (2004) (discussing the growth of the number of prisons and guards in the final three decades of the twentieth century).

[104] *Id*. Civil rights litigation focused on protecting the rights of the incarcerated also contributed to the creation of the modern, bureaucratic, penal administrative state. *Id*. at 455 (explaining that different prison reform efforts "were part of a process designed to drag pre- and under-bureaucratic (and at times, feudal) criminal justice institutions into the modern administrative world"). *See also* Godfrey, *supra* note 59 at 164-65 (discussing the beginning of the modern prisoners' rights litigation movement).

[105] Feely & Swearingen, *supra* note 102 at 455 (quoting James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, *1960-1980*, *in* 2 CRIME AND JUSTICE 430, 458 (Michael Tonry et al. eds., 1980)) (noting that prison systems in the 1960s and 1970s had "no written rules and regulations" but instead used "daily operating procedures . . . passed on from one generation to the next," resulting in an "ability of the administration to acts as it pleased," ensuring "its almost total dominance of the mates").

[106] *See* Dan Luban, Alan Strudler, & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2352 (1992) (discussing the reoccurring epistemological excuse of "I didn't know" that comes naturally "to those who commit wrongs in a bureaucratic setting").

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bureaucracies in general and prison bureaucracies in particular. Malcom M. Feeley and Van Swearingen have succinctly described Max Weber's summary of the key elements of bureaucracy:

> Compared to other forms of organization . . . modern bureaucracy is defined by a rationalized set of rules and regulations that bind the organization together. Every office is arranged in a clear hierarchy of superordination and subordination, with employees subject to a rigid and systematic set of policies designed to maintain control and discipline when necessary. Offices within the bureaucracy are characterized by their fixed and definite division of organization responsibility and are staffed by highly trained officials who are appointed by merits, have set salaries and pensions, secure careers, and duties that are clearly separated from their private life.[107]

Feeley and Swearingen also aptly summarize Victor Thompson's application of Weber's ideas to the American administrative state and identify several additional characteristics of the modern American bureaucracy.[108]

In total, this discussion will focus on five characteristics of bureaucracies identified by Weber and Thompson and applicable to the modern American carceral state. *First*, the American carceral state has a clearly defined organizational structure with clear divisions of power and responsibility.[109] Every state prison system and the Federal Bureau of Prisons have a hierarchy of prison administration.[110] At the top of the prison hierarchy is the director

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[107] Feeley & Swearingen, *supra* note 102 at 456 (citing MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 650-78, 957, 973 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968)).

[108] Feeley & Swearingen, *supra* note 102 at 456-57 (citing VICTOR A. THOMPSON, MODERN ORGANIZATION 10-24 (1961)). Four of those additional characteristics are relevant to this discussion: (1) routinization of organizational activity, (2) classification of persons, (3) slowness to act or to change, and (4) "preoccupation with the monistic ideal—the system of superior and subordinate relationships in which the superior is the only source of legitimate influence upon the subordinate." Feeley & Swearingen, *supra* note 102 at 457. The other American characteristics of bureaucracy identified by Thompson are factoring the general goal into subgoals, formalistic impersonality, and categorization of data. *Id*.

[109] *Id*. at 457.

[110] *Id*. at 457-58. *See also* Morris, *supra* note 78 at 226.

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of the prison system, a position usually appointed by the governor or, in the case of the federal system, by the President.[111] The organizational structure that each system director commands varies slightly depending on the size and responsibility of each particular system.[112] For example, the Federal Bureau of Prisons is organized into separate divisions focused on subject matter as well as separate geographical regions meant to provide oversight and support to the prisons within that region.[113] Most state systems, in contrast, are organized into divisions based on specific subject matter.[114]

Below this broad administrative structure sitting atop the prison system as a whole are the people responsible for running particular prisons, usually known as wardens.[115] Wardens are responsible for the staff members who actually work in the prisons: the administrative, custodial, and programming staff.[116] The vast majority of prison officials are custodial, or security, staff, but the division between those responsible for security and those responsible for programming or administration is largely farcical.[117]

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[111] *Id*. at 226; *see also* Rotman, *supra* note 83 at 167 (discussing the federal prison system's transition from no central organizing body to a civil service system).

[112] Feeley & Swearingen, *supra* note 102 at 457.

[113] Federal Bureau of Prison, "About Our Agency," *available at* https://www.bop.gov/about/agency/organization.jsp.

[114] *See*, *e.g.*, "Alabama Department of Corrections Organizational Chart," *Organization and Objectives*, Administr[a]tive Regulation Number 002 (Feb. 7, 2012), available at http://www.doc.state.al.us/docs/AdminRegs/ar002.pdf; Alaska DOC Organization Charts, available at https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=89623; Arizona Dep't of Corrections Rehabilitation & Reentry, available at https://corrections.az.gov/sites/default/files/documents/PDFs/adcrr-dir-org-charts_091720.pdf; Arkansas Department of Corrections Organizational Chart, available at https://doc.arkansas.gov/correction/about-us/organizationsl-chart/; Colorado Dep't of Corrections, available at https://drive.google.com/file/d/1bxKHyOXh6MXIY4GWss0GPuigci2E7baD/view.

[115] Morris, *supra* note 78 at 226.

[116] *Id*.

[117] *Id*. at 226-27; *see also see also* Eric Katz, *Federal Prison Employees Fear Staff Shortages and Mass Reassignments as COVID-19 Cases Spike*, GOVERNMENT EXECUTIVE (Dec. 1, 2020), available at https://www.govexec.com/workforce/2020/12/federal-prison-employees-fear-staff-shortages-and-mass-reassignments-covid-19-cases-spike/170399/ (noting the federal prison system's practice of augmentation, whereby non-custodial staff

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Indeed, the most important divisions within the prison itself are those created by the prison's top-down, hierarchical structure that is modeled off of paramilitary organizations.[118] Accompanying this structure is an understanding that a subordinate staff person's only legitimate source of direction must come from his, her, or their superior.[119] This can create confusion in prison systems, however, when administrative supervisors—*e.g.*, those responsible for running the medical or mental health programs—issue orders to security staff related to an individual's treatment.[120] This type of confusion can also contribute to the tendency to pass the blame when something goes wrong for a particular incarcerated individual in a prison facility, discussed in more detail below.[121]

The second and third characteristics of bureaucratic systems that can be seen in the American cultural state are interrelated. *Second*, the American carceral state is theoretically bound by a set of rules and regulations.[122] *Third*, these rules and regulation are, in theory, used to routinize organizational activity.[123] The reason I use the terms "theoretically" and "in theory" to describe these two characteristics are important. While it is true that almost every

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are "augmented" to perform duties of security staff and justifying such practice by pointing to the fact "all staff are trained as correctional officers"). Prison officials have any overwhelming "us vs. them" mentality wherein it remains of utmost importance that they remain separate from "the criminal element they supervise." Anthony Gangi, *Yes, corrections officers are law enforcement officers*, CORRECTIONS1, *available at* https://www.corrections1.com/corrections-jobs-careers/articles/yes-corrections-officers-are-law-enforcement-officers-ZZ9odttfoVCthDZv/ (explaining that in the correctional officers' view, the lack of acceptance by the broader law enforcement community as a separation "from their brothers/sisters in blue [that] brings them closer to the offenders in their charge").

[118] Marvin Preston, *What is "Paramilitary"?*, CORRECTIONS.COM, available at http://www.corrections.com/news/article/24159-what-is-paramilitary (describing the established ranking system in most prison systems as including line staff (corrections officers), supervisors (corporals and sergeants), and managers (lieutenants, captains, and majors)).

[119] *See id.*; *see also* Feeley & Swearingen, *supra* note 102 at 457.

[120] Preston, *supra* note 117 (noting that "line staff" can be confused about the necessity of following orders from non-security staff).

[121] *See* VENTERS, *supra* note 4 at 10.

[122] Feeley & Swearingen, *supra* note 102 at 459.

[123] Feeley & Swearingen, *supra* note 102 at 464.

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corrections system in the country has a codified system of rules meant to govern the operation of the system, many systems have found ways to "circumvent" the rules and their process by implementing specific practices at their facilities that are unique to the specific security and programming concerns of a particular facility.[124] What this means, practically speaking, is that while prison systems can often enact rules and regulations that, on their face, are meant to protect the health and safety of individuals who are incarcerated, those rules may not always be fully followed at the institutional level. This problem can be compounded by the fluid nature of who is occupying leadership positions at any given time. Because the commissioners or directors of prison systems are appointed positions, whomever is filing those positions is necessarily influenced by the political whim of the current executive.[125] This means that a reform-minded leader may struggle to find buy-in from lower-level staff when implementing any changes to the system, or, conversely, a reform-minded lower-level staff may not be able to implement reforms without buy-in from the current prison administration.[126]

Fourth, the American carceral state relies upon the classification of incarcerated individuals.[127] The federal prison system became the first prison system to create a classification system for incarcerated people.[128] Classification systems allow prisons to assign people "to specific institutions, units, and cells according to their propensity for violence, length of sentence,

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[124] *Id*. at 460.

[125] Morris, *supra* note 78 at 227 (describing the problem inherent to the "lack of continuity in leadership at the director level).

[126] *See*, *e.g.*, Michelle Theriault Boots, *'It was Working': The Rise (and Fall) of an Alaska Prison Reformer*, THE CRIME REPORT, *available at* https://thecrimereport.org/2020/03/06/it-was-working-the-rise-and-fall-of-an-alaska-prison-reformer/ (detailing experience of a prison superintended in Alaska who had backing to try an experimental re-entry unit from one prior commissioner only to have that backing dropped upon entry of the new commissioner).

[127] Feeley & Swearingen, *supra* note 102 at 463.

[128] Rotman, *supra* note 83 at 167 (noting that the first director of the Federal Bureau of Prisons implemented "a number of important improvements," including developing a system that "made classification far more systematic in federal than in state facilities").

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criminal history, and the like."[129] While in some instances classification may afford more protection to incarcerated individuals,[130] it has also lead to the creation of so-called "prison[s] of last resort," where so-called intractable people can be sent when the prison system cannot find another place for them.[131] While these so-called supermax prisons were meant to reduce violence in prison systems,[132] recent studies have demonstrated that these facilities did not reduce misconduct or violence.[133] This means that tens of

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[129] Feeley & Swearingen, *supra* note 102 at 464.

[130] *Id*.

[131] Rotman, *supra* note 83 at 167 (describing the Federal Bureau of Prisons' first last-resort prison, Alcatraz).

> In 1934, Alcatraz was awarded this distinction. Its purpose was to isolate the criminal of the "vicious and irredeemable type," those with no hope of rehabilitation. Prisoners for Alcatraz were selected from other federal prisons and were transferred back to other prisons before their release. Alcatraz inmates had virtually no privileges and little contact with the outside world. To prevent secret messages, officials never allowed prisoners to receive original copies of their mail, only transcribed ones. In the early years, conversation among inmates was prohibited except when indispensable. To compensate for these restrictions, Alcatraz had a fairly extensive library with many classics, and its food was above the average. Although the rest of the federal system was overcrowded, Alcatraz maintained its original purpose as a jail for the worst of the worst, a purpose that resulted in a surplus of beds. During the thirty years Alcatraz was in use, it housed a total of only 1,557 prisoners, with the highest average of daily prisoners occurring in 1937 at 302. Because of deterioration of the physical plant, Alcatraz was closed in 1963 and was replaced by the federal penitentiary at Marion, Illinois.

Id. at 167-68. In the early 1990s, the ADX in Florence, Colorado, replaced Marion as the BOP's prison of last resort. *See* Raymond Luc Levasseur, *Trouble Coming Every Day: ADX—The First Year 1996*, *in* THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS 47, 50 (Joy James, ed., 2005) (describing the construction of ADX, slated to replace Marion); *see also* James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1017 n. 92 (1997) (describing ADX as "a 'high tech' concrete dungeon [that] houses inmates in cells that prevent them from having eye contact with other inmates") (other citations omitted).

[132] Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1341-42 (2006).

[133] B. Steiner & C.M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of*

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thousands of individuals have languished in conditions of solitary confinement with little penological justification.[134]

Fifth, the American carceral state is slow to reform.[135] Whether through litigation or legislation, reforms to carceral systems are usually incremental, contentious, and remain ongoing.[136] That means that when faced with a new threat like the COVID-19 pandemic, prison systems are slow to find ways to respond in a way that will save lives.[137]

Overall, these five characteristics of the bureaucracies of the American carceral state all too often cause individualized harms to the people subject to the whims of those bureaucracies—incarcerated people—that are not readily attributable to any individual prison officials.[138] In other words, the bureaucratic system itself allows for the "compartmentalization, mutual buckpassing, and deniability" necessary to allow people operating within bureaucracies to stand idly by as real, concrete, serious harms befall other human beings.[139] These harms can result from officials' mechanical adherence to duty, process, or policy without regard for "what the fulfillment of his or her duty might entail."[140] In other

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the Evidence, Restrictive Housing the U.S.: Issues, Challenges, and Future Directions 165, 179 (2016).

[134] Godfrey & Rovner, *supra* note 49 at 130-33 (cataloguing the harms of solitary confinement); *see also* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 747-49 (2015) (discussing the overuse of solitary confinement in American prisons).

[135] Feeley & Swearingen, *supra* note 102 at 457.

[136] *Id*. at 465. *See also* Michelle Chen, *The Growing Fight Against Solitary Confinement*, THE PROGRESSIVE (Jan. 13, 2020), *available at* https://progressive.org/dispatches/the-growing-fight-against-solitary-confinement-chen-200113/ (cataloguing the long fight in several statues to curb the use of solitary confinement in the prison system).

[137] *Covid-19 Prisoner Releases Too Few, Too Slow*, HUMAN RIGHTS WATCH (May 27, 2020), *available at* https://www.hrw.org/news/2020/05/27/covid-19-prisoner-releases-too-few-too-slow (criticizing prison systems worldwide from delaying releases, thereby "contributing to preventable suffering and death").

[138] *See* Luban, et al., *supra* note 105 at 2355 (attributing lack of individual accountability for organizational harms to the "fragmentation of knowledge and responsibility" that occurs in bureaucratic organizations).

[139] *Id*.

[140] *Id*. at 2354. The paradigmatic example of the horror that can follow rigid adherence to bureaucratic duty is, of course, Nazism: "perhaps the single most

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words, the characteristics of bureaucracy inherent to American prison systems—the clearly defined organizational structure with specific divisions of power and responsibility and specific rules and regulations that govern that power and responsibility—result in situations where individual bureaucrats feel bound to follow rigid structures and policies rather than respond to individualized problems or harms that present themselves.[141] Thus, the harms that befall people who are incarcerated are not always, or even usually, attributable to rogue prison officials but rather to the failures of the system itself.

Take, for example, the death of Mr. Coley in the Cummins Unit in Arkansas discussed above. A series of systemic failures, not *wholly* attributable to the actions of individual prison officials, worked together to cause his death: the failure of the system to set up protocols to protect incarcerated people from the virus's spread, the failure of the of the system to find ways to *treat* rather than isolate people who contracted the virus, and the failure of any number of line staff to check-on Mr. Coley in his isolation cell. These types of systemic failures are what I call institutional indifference: the ways in which the prison bureaucracy allows individual prison officials to claim ignorance of the plight of individual incarcerated people by hiding behind bureaucratic norms.[142]

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salient characteristic of the Nazi crimes was their bureaucratic nature. They were committed, not by a lawless gang of criminals, but by a regularly functioning state bureaucracy executing official policies." *Id*.

[141] *Cf. id*. at 2359 ("The horror of Nazism are without parallel, but the bureaucratic pattern of organizations that fragment the knowledge required for moral decisionmaking is common to large institutions throughout contemporary society.").

[142] Luban, et al., *supra* note 105 at 2352, call the ability of individual bureaucratic officials to claim they didn't know about the harms occurring around them the epistemological excuse. They

> argue (1) that bureaucracies function (often by design) to permit their functionaries to truthfully plead the excuse "I didn't know!"; (2) that traditional accounts of moral responsibility typically recognize this epistemological excuse; and (3) that it is therefore very difficult to find a work able account of moral responsibility within bureaucratic institutions.

Id.

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This institutional indifference is compounded by the prison system's prioritization of "control and security over humanity."[143] The precedence of security over all else is evidence in any number of common, modern prison practices, including the prevalence of supermax prisons,[144] the intrusive and frequent nature of body cavity searches,[145] the ban on unions of incarcerated workers,[146] and the wide-ranging book, speech, and communications bans that deprive incarcerated people of participation in political discourse and the marketplace of ideas.[147] Because most prison policies are developed in secret,[148] are justified by vague references to maintaining a prison's "social order" when exposed,[149] and are

[143] Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1673 (2019) (noting that moderate efforts to reform prisons will always fall short because they do not address the "structural and cultural transformations" required to support change).

[144] *See*, *e.g.*, Robertson, *supra* note 130 at 1017 n. 92.

[145] *See*, *e.g.*, Melvin Gutterman, *Prison Objectives and Human Dignity: reaching a Mutual Accommodation*, 1992 B.Y.U. 857, 910 (1992) (doubting the veracity that visual body cavity searches are *only* for security and "not also to purposefully demoralize and humiliate the inmate.").

[146] James Tager, *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation's Largest Book Ban* 30 (2019), available at https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf (recounting the efforts of prison officials to stymie the efforts of incarcerated people to organize). *See also* Godfrey, *supra* note 66 at 1132-35 (describing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977)).

[147] *See generally* Evan Bianchi & David Shapiro, *Locked up, Shut up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1, 3 (2018) (describing the implications of limiting the speech of incarcerated people in light of the most common rationales that justify free speech—the marketplace of idea, democracy legitimation, the checking power of free speech, and self-fulfillment). The net effect of prison censorship policies "is that in the aggregate, people who are richer, whiter, and not incarcerated, will enjoy greater access to the marketplace of ideas than others. *Id*. at 20.

[148] Tager, *supra* note 145 at 1 (noting the lack of "public visibility into how [prison censorship] policies are considered, adopted, and implemented").

[149] *Id*. at 5.

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largely free from judicial review,[150] "prison officials inevitably err on the side of too little freedom."[151]

In sum, the institution's prioritization of security over humanity solidifies the authoritarian nature of the modern American carceral bureaucracy.[152] When prison systems limit both the speech that may leave a facility and the speech that may enter a facility, they are both monopolizing the sources of public information about prisons[153] and limiting the sources of information and knowledge for the people inside.[154] The net effect of these types of restrictions is to create a system of forced idleness in that prison becomes not only a place that physically separates incarcerated people from the outside world but also removes them from broader societal conversations.[155] This latter removal signals to incarcerated people that they "are unworthy of activities imparting social value and self-esteem,"[156] and leads to the last feature of institutional indifference I want to discuss: the systematic deprivation of identity inherent to the American carceral state.

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[150] *See infra*, Part II.A. (discussing judicial deference to prison officials). The "central evil" of this lack of judicial review is the unchecked "administrative discretion granted to the poorly trained personnel who deal directly with prisoners." Gutterman, *supra* note 144 at 900.

[151] Tager, *supra* note 145 at 3.

[152] *See* Erwin Chemerinksy, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999) (noting that prisons, by their very nature, are the "places where serious abuses of power and violations of rights are likely to occur").

[153] Bianchi & Shapiro, *supra* note 146 at 22 ("Without prisoners' speech, public information about prisons would come primarily from prison officials themselves. Speech in prisons is especially fragile because limited checks on officials' behavior increase the risk of retaliation"); *see also* Part III.B., *infra*.

[154] *See, e.g.*, Sanchez, *supra* note 142 at 1673 (noting the importance of education to incarcerated people and the view of prison staff that education interferes with their "job"). To Sanchez, "college education is to the imprisoned what learning to read and write was to the enslaved—it is central to the abolition movement." *Id*. at 1672.

[155] *See* Robertson, *supra* note 130 at 1063 (noting the "paradigm shift" in American punishment that "changed the target of punishment from the body of the offender to his personhood").

[156] *Id*.

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C. Stripping Incarcerated People of Identity

By separating people from society in self-contained mini-societies (a.k.a., prisons), the United States has already created a whole new class of other (a.k.a., the incarcerated). In so doing, American society has added an identity label onto the people it locks up, but the more insidious impact of this identity label is that it is meant to supersede all other identity labels a person may hold.[157] It is also meant to be a stigmatic identity,[158] an identity that makes the dehumanizing features of the prison seem justified to those responsible for maintaining the system of incarceration.[159] In the early days of the American penitentiary system, this identity was intricately interrelated with the legal concept of "civil death—the legal and ritual processes that produced the figure of the prisoner as the living dead."[160]

> [C]ivil death reduced the criminal citizen to the condition of an abject "other," the negative image of the citizen-subject. The citizen was free; the prisoner was bound and contained. The citizen was a transcendent spirit or a reasoning mind; the prisoner was an offensive body vulnerable to violence and deprivation. The citizen belonged to the human community; the prisoner was a monstrous exile, beyond the pale of humanity, without a claim to legal personhood. Divested of rights and exiled from the body politic, he was unprotected, infinitely vulnerable and pliable. He could be whipped or gagged, confined to solitude, deprived of food, or subjected to whatever other torments prison officials deemed necessary either to his correction or to the orderly

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[157] James, *supra* note 89 at 774 (explaining how the "criminal legal system threatens even one's identity as a mother").

[158] Robertson, *supra* note 130 at 1033 (noting that the "coerced and regimented idleness" of the warehouse prison becomes a "'stigma symbol,' a sign that represents the debased identity of the inmate population").

[159] *See*, *e.g.*, PATRICK ELLIOT ALEXANDER, FROM SLAVE SHIP TO SUPERMAX: MASS INCARCERATION, PRISONER ABUSE, AND THE NEW NEO-SLAVE NOVEL 112 (2018) (describing Mumia Abu-Jamal's description of the "U.S. supermax prototype as "dehumanization *by design*") (emphasis in original); *see also* Smith, *supra* note 5 at 29 ("Dehumanization, then, is no excess or exception; it is the very premise of the American prison").

[160] *Id*. at 39.

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> functioning of the institution. . . .Civil death justified a virtually unlimited exploitation and discretionary violence against the living entombed.[161]

And while the notion of civil death of the incarcerated has largely been abandoned as courts began to recognize that people imprisoned retained some rights,[162] the general attitude underlying the concept continues to pervade the institutional culture and practices of many American prison systems.[163]

Thus, while the theoretical rights of the incarcerated expanded in the final decades of the twentieth century, the perception of the incarcerated held by institutional actors remains largely the same—incarcerated individuals are a mere number amidst the thousands of numbers subjected to the social control of the state.[164] But what gets lost in the institutional bureaucracy of the prison is the individual and his, her, or their stories and voice.[165]

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[161] *Id*. at 39-40.

[162] *See*, *e.g.*, Bianchi & Shapiro, *supra* note 146 at 3 (" . . . as Justice Marshall wrote: "When the prison gates slam behind an inmate, he does lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions . . . .") (quoting Procunier v. Martinez, 416 U.S. 396, 428 (1974) (Marshall, J., concurring)).

[163] *See*, *e.g.*, Laura Rovner, *"Everything Is at Stake if Norway is Sentenced. In that Case, We Have Failed": Solitary Confinement and the "Hard" Cases in the United States and Norway*, 1 UCLA CRIMINAL JUSTICE LAW REVIEW 1, 85 (2017) (noting that the practice of solitary confinement "violates the sacredness of the human person"); Philip Fornaci, Alan Pemberton, & Michael Beder, *Criminal Justice in the Courts of Law and Public Opinion*, 62 HOW. L.J. 125, 139 (2018) (commenting on how the prison system "necessarily and irrevocably leads to the deprivation of the humanity of prisoners, guards, and the community").

[164] *See* Morris, *supra* note 78 at 203 (describing how he created the "diary of prisoner #12345"—"the diary of a one day and one night in the life of a typical prisoner in a typical prison adjacent to a typical industrial city").

[165] *Cf.* Sanchez, *supra* note 142 at 1653-1654 (discussing the need for scholars to account for the person stories, narratives, and perspectives of people impacted by prison in order to "shed light on the inhumanity that goes on inside of prison, the social problems that lead to prison, and the humanity of those impacted by prison"); *see also* Gutterman, *supra* note 144 at 906 ("Today, as at the beginning, the most serious social consequence of the prison system is the disintegration of the human personality of those committed to its confines"); Colin Kaepernick, *The Demand for Abolition*, Abolition for the People, MEDIUM, *available at* https://level.medium.com/the-demand-for-abolition-979c759ff6f ("The young men there [on Rikers Island] explained the dehumanizing conditions in the prison

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The exploding prison population of the last half-century has led to the creation of a bureaucratic carceral state that sacrifices the identities of the individuals incarcerated for purported institutional security and order. By prioritizing institutional order over individual welfare, the modern prison bureaucracy operates in a state of institutional indifference to the lives of the people held captive behind prison walls. In times of emergency or uncertainty, like the COVID-19 pandemic, this indifference inevitably leads to individual harms that are above and beyond the anticipated harms attendant to incarceration. For people like Mr. Coley in Arkansas, who couldn't seem to fight through the bureaucratic maze of the Arkansas Department of Corrections to obtain adequate protection and medical care, such institutional indifference leads to the ultimate harm: loss of life. It is for those harms that one might think the judiciary should stand at the ready to halt and correct, but for reasons discussed in the next section, the legal doctrines protecting the incarcerated ignore those harms to protect the institutionalized indifference of prison officials.

II. JUDICIAL INDIFFERENCE: JUDICIAL DEFERENCE AND THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS

Despite the lack of care afforded Mr. Coley and others like him confined to the Cummins Unit in Arkansas, a lawsuit filed by the Arkansas American Civil Liberties Union, Disability Rights Arkansas, and the N.A.A.C.P. Legal Defense and Education Fund has been thus-far unsuccessful.[166] Advocates pointed to the following facts, among others, to request that "the prison take more precautions, including releasing some people to home confinement":

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that range from denial of literature to physical assault. They have been criminalized and caged, in most cases, for being redlined into economic despair. Forever emblazoned in my memory are the words of one of the young Black me: "You love us when no one else does." The young brother was seeking love. He was seeking care. He was seeking a space that valued his life.").

[166] Aviv, *supra* note 7 (noting that the lawsuit argued "that the Arkansas prison system had displayed deliberate indifference to prisoners' welfare").

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> Cummins has had the tenth-largest coronavirus outbreak in the nation—nine hundred and fifty-six people, including sixty-five staff members, have tested positive—but the Division of Correction has made only minimal steps to contain it. The [incarcerated people] aren't given access to alcohol-based hand sanitizer, even though the medical director of infectious diseases for the state's Department of Health has advocated for its use. 'Maybe science will take precedence now in current situation,' he wrote, in an e-mail to the secretary of the department. Men are still sleeping in open barracks, less than three feet apart.[167]

In response to the advocates' request, the Arkansas attorney general "argued that the risks to prisoners were not 'so great that they violate standards of decency,' nor were they 'ones that today's society does not tolerate.'"[168] United States District Court for the Eastern District of Arkansas Judge Kristine Baker agreed, denying the request for emergency relief and cautioning that "federal courts should 'approach intrusion into the core activities of the state's prison system with caution.'"[169] Such a result is not surprising when viewed in light of the Supreme Court's Eighth Amendment jurisprudence governing the constitutionality of prison conditions and federal courts' general policy of deference to prison officials.

The text of the Eighth Amendment is a mere sixteen words: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[170] The Eighth Amendment doctrine governing claims challenging prison conditions derives from the last six words of the amendment: the Cruel and Unusual Punishments Clause.[171] While federal courts

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[167] *Id*. (noting that "[a] spokesperson for the Department of Corrections told [the reporter] in an e-mail that if [prisoners] in every other bed follow new instructions to sleep with their feet in the spot typically occupied by their heads, their faces will be 'separated by 6 feet from the next [prisoner's] pillow'").

[168] *Id*.

[169] *Id*.

[170] U.S. CONST. amend VIII.

[171] *Farmer*, 511 U.S. at 832 (explaining that the Cruel and Unusual Punishments Clause both places restraints and imposes duties on prison officials). The Cruel and Unusual Punishments Clause, drawn nearly verbatim from Article Ten of the English Bill of Rights, "became part of the American Bill of Rights in 1791." COLIN DAYAN, THE STORY OF CRUEL & UNUSUAL 6 (2007). While scholars

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declined to entertain constitutional claims challenging prison conditions for more than a century after the adoption of the Bill of Rights,[172] the Supreme Court articulated and developed the modern doctrine in a series of cases beginning in 1976 and ending in 1994.[173] Since then, lower courts have struggled to uniformly apply the doctrine, and scholars have almost unanimously criticized it as illogical, inconsistent, and unjust.[174] As I explain below, part of the

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debate the intention of the English parliamentarians in drafting Article 10, most scholars accept that the American Framers intend for the clause to prohibit certain methods of punishment. *See* Godfrey, *supra* note 59 at 158-59 (discussing scholarly debate around the intent of the drafters in both England and the United States).

[172] Godfrey, *supra* note 59 at 165 (describing the "hands-off" doctrine that governed federal courts' review of prison conditions).

[173] *See Estelle*, 429 U.S. at 104 (holding that deliberate indifference to serious medical needs violates the Eighth Amendment); Hutto v. Finney, 437 U.S. 678, 685 (1978) (leaving undisturbed district court's finding that conditions in Arkansas' prisons violated the Eighth Amendment); *Rhodes*, 452 U.S. at 346 (focusing on objective effects of double-celling to determine that practice did not violate the Eighth Amendment); Whitley v. Albers, 475 U.S. 312, 319 (1986) (holding, in the context of an excessive force case, that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause"); Wilson v. Seiter, 501 U.S. 294, 299-300 (1991) (confirming that a two-part test, consisting of objective and subjective components, characterized every Eighth Amendment claim); Hudson v. McMillian, 503 U.S. 1, 5 (1992) (upholding the rule that "the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment") (internal quotations omitted); *Helling*, 509 U.S. at 33 (confirming that Eighth Amendment protects against future harm); *Farmer*, 511 U.S. at 841 (defining deliberate indifference as those instances where a prison official knows of a risk of harm attendant to a prison condition but fails to take reasonable steps to abate the risk).

[174] Godfrey, *supra* note 59 at 186 (criticizing the application of the current doctrine in cases seeking injunctive relief); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 428 (2018) (criticizing the Eighth Amendment doctrine's focus on the subjective intent of prison officials rather than the objective harms inflicted on the incarcerated); Erin E. Braatz, *The Eighth Amendment Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 426 (2016) (criticizing Eighth Amendment doctrine for failing to fully account for the contextual history of punishments utilized in early America); Brittany Glidden, *Necessary Suffering?: Weighing the Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1821 (2012) (criticizing the unpredictability of application of current Eighth Amendment doctrine); Sharon

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challenge with the standard is that it developed out of a judicial refusal to acknowledge that in prison conditions cases, the punishment at issue is *incarceration* itself.

A. Ignoring Incarceration as Punishment

The Supreme Court first considered how the Eighth Amendment might apply to prison conditions claims in the 1976 case of *Estelle v. Gamble*.[175] *Estelle*, viewed by many as an improvident grant of certiorari by the Supreme Court,[176] established that "deliberate indifference to serious medical needs constitutes 'the unnecessary and wanton infliction of pain[,]' . . . proscribed by the Eighth Amendment."[177] In reaching this conclusion, the Court identified four types of punishments "repugnant to the Eighth Amendment": (1) those "incompatible with 'the evolving standards of decency that mark the progress of a maturing society;'"[178] (2) those "which 'involve the unnecessary and wanton infliction of pain;'"[179] (3) those which are "grossly disproportionate to the

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Dolovich, *Cruelty*, *Prison Conditions, and the Eighth Amendment*, 84 N.Y.U.L. REV. 881, 890 (2009) (criticizing Eighth Amendment doctrine's undue focus on what constitutes punishment rather than what is cruel). John F. Stinneford, in a series of articles, has also criticized current Eighth Amendment doctrine for being untethered to the original meaning of the words comprising the clause. *See* John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 48-55 (2020) (hereinafter Stinneford, *Experimental Punishments*); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 502 (2017) (hereinafter Stinneford, *Original Meaning of Cruel*); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753-54 (2008) (hereinafter Stinneford, *Original Meaning of Unusual*).

[175] 429 U.S. 97 (1976).

[176] *See*, *e.g.*, *Estelle*, 429 U.S. at 115 (Stevens, J., dissenting) (expressing puzzlement at the Court's decision to grant certiorari); Schlanger, *supra* note 29 at 369 (noting that *Estelle* "was quite a low-profile case—no amicus briefs were filed, and the *New York Times* described the majority opinion as 'generally stat[ing] the law as it has been developing in the lower Federal courts") (quoting Lesley Oelsner, *Prison Medical Care Assayed by Justices*, N.Y. TIMES, Dec. 1, 1976, at D24, *available at* http://www.nytimes.com/1976/12/01/archives/prison-medical-care-assayed-by-justices-deliberate-indifference-is.html).

[177] *Estelle*, 429 U.S. at 103.

[178] *Id*. at 102, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

[179] *Estelle*, 429 U.S. at 103, quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

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severity of the crime;"[180] and (4) those which transgress the "substantive limits of what can be made criminal and punished."[181] The Court determined that *Estelle* did not involve the last two types of punishment and therefore focused its inquiry on the first two.[182] Turning to the first two types of punishment, the Court determined that when the government is *punishing someone by incarceration*, it must provide medical care to that person because failing to do so will result in, at worst, "physical torture or a lingering death" or, at best, "pain and suffering which no one suggests would serve any penological purpose."[183]

Importantly, the Court appeared to recognize that the "punishment" at issue in *Estelle* is incarceration itself, and the question posed to the Court is whether the *pro se* prisoner's allegations of inadequate medical care are cruel and unusual such that the punishment becomes unconstitutional. However, this recognition becomes muddled by the Court's decision to reassure prison officials that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment."[184] To make this reassurance, the Court analogized the inadvertent failure to provide adequate medical care to the circumstances at issue in *Louisiana ex rel. Francis v. Resweber*.[185] In *Resweber*, Louisiana had sentenced Willie Francis, a Black man, to death, but a mechanical malfunction "thwarted" the state first attempt to electrocute him.[186] Mr. Francis "petitioned the Supreme Court, arguing that a second attempt to execute him would be unconstitutionally cruel," and the Court denied Mr. Francis' petition, reasoning that because the failure of the first attempt was an "unforeseeable accident,"[187] trying again did not amount to cruel and unusual punishment even though "it might produce added

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[180] *Estelle*, 429 U.S. at 103, n. 7, quoting *Gregg*, 428 U.S. at 173.
[181] *Estelle*, 429 U.S. at 103, n. 7, quoting *Robinson v. California*, 370 U.S. 660, 667 (1962).
[182] *Estelle*, 429 U.S. at 103, n. 7.
[183] *Estelle*, 429 U.S. at 103, quoting *In re Kemmler*, 136 U.S. 436, 447 (1890) and citing *Gregg*, 428 U.S. at 173.
[184] *Estelle*, 429 U.S. at 105.
[185] *Id.* at 105-06, citing *Resweber*, 329 U.S. 459, 464, 470 (1947).
[186] DAYAN, *supra* note 26 at 27; *see also*, *Estelle*, 428 U.S. at 105.
[187] *Resweber*, 329 U.S. at 464.

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anguish."[188] Similarly, according to the Court, an act of mere negligence with regard to medical care could not be cruel and unusual under the Constitution.[189]

Presciently, Justice Stevens, in dissent, predicted that the *Estelle* majority's focus on "the accidental character of the first unsuccessful attempt to electrocute the prisoner" in *Resweber*, and "its repeated references to 'deliberate indifference' and the 'intentional' denial of adequate medical care" would attach unwarranted significance to the "subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted."[190] While Justice Stevens hinted that the remedies available against a particular defendant might depend on his subjective intent, he insisted that the question of "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it."[191] Referencing a prisoner-of-war camp from the civil war, Justice Stevens pointed out: "Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman."[192]

Two years after *Estelle*, in 1978, the Supreme Court again considered a case involving an Eighth Amendment challenge to prison conditions.[193] *Hutto v. Finney* arose from a series of cases challenging the conditions of the Arkansas prison system—including the Cummins Unit discussed *supra*—during the 1960s.[194] By the time the case reached the Supreme Court, the United States District Court for the Eastern District of Arkansas had issued a series of remedial orders meant to correct the unconstitutional conditions

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[188] *Estelle*, 428 U.S. at 105.
[189] *Id*. at 106.
[190] *Id*. at 116 (Stevens, J., dissenting).
[191] *Id*. at 116.
[192] *Id*. at 116-17.
[193] *Hutto*, 437 U.S. at 685.
[194] *Id*. at 680, n. 2 (noting that the case at issue in *Hutto* began as *Holt v. Sarver*, 300 F.Supp. 835 (E.D. Ark. 1969) ("*Holt I*"), a sequel to *Talley v. Stephens*, 247 F.Supp. 683 (E.D. Ark. 1965) and *Jackson v. Bishop*, 268 F.Supp. 804 (E.D. Ark. 1967), *vacated* 404 F.2d 571 (8th Cir. 1968)). Judge Jesse Smith Henley, the Chief Judge of Eastern District of Arkansas when the cases began in 1965, handled all of these cases, even by special designation after his appointment to the United States Court of Appeals for the Eighth Circuit in 1975. *Id.*

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it characterized as creating "a dark and evil world completely alien to the free world."[195] While the Supreme Court's inquiry focused on the propriety of two aspects of the relief ordered by the district court,[196] the district court's orders rested on a finding that the conditions in Arkansas's prisons violated the Eighth Amendment.[197] In reaching its decision on the remedial issues before it, the Supreme Court reiterated that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."[198] Again, then, the Court implicitly acknowledged that the *punishment* examined by the district court was incarceration, and the district court found that the *conditions* of that incarceration rendered the punishment of imprisonment cruel and unusual.[199]

Because *Hutto* presented an issue related only to remedy, the Supreme Court did not directly consider the question of when prison conditions render the punishment of incarceration unconstitutional until the 1981 case of *Rhodes v. Chapman*.[200] Relying on *Hutto*, the

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[195] *Hutto*, 437 U.S. at 681, quoting *Holt v. Sarver*, 309 F.Supp. 362, 381 (E.D. Ark. 1970) (*"Holt II*").

[196] *Hutto*, 437 U.S. at 680-81.

[197] *Id*. at 681-83.

[198] *Id*. at 685.

[199] *Id*.; *see also Holt II*, 309 F.Supp. at 372-373. Indeed, the district court's conception of the Eighth Amendment supports this conclusion:

> It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular [person] is subjected to a punishment directed at him as an individual. In the Court's estimation confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular [person] may never personally be subject to any disciplinary action. To put another way, while confinement, even at hard labor and without compensation, is not considered to be necessarily a cruel and unusual punishment it may be so in certain circumstances and by reason of the conditions of the confinement.

Id. Thus, the question considered by the district court involved not whether the challenged conditions amounted to *punishment* but rather whether the conditions could be understood as cruel and unusual such that the punishment of incarceration became unconstitutional.

[200] *Rhodes*, 452 U.S. at 344-45 (noting the case presented the first time the Court would consider "the limitation that the Eighth Amendment, which is applicable

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Court reiterated that incarceration "is a *form* of punishment subject to scrutiny under the Eighth Amendment standards,"[201] and it defined the dispute at issue as a question of whether "the conditions of confinement at a particular prison constituted cruel and unusual punishment."[202] Drawing on Eighth Amendment standards articulated in other contexts, the Court reiterated that federal courts must rely on "objective indicia" when determining whether a particular punishment is cruel and unusual.[203] Underscoring the "flexible and dynamic"[204] nature of the Eighth Amendment inquiry, the Court maintained that no "static 'test'" could be applied to "determine whether conditions of confinement are cruel and unusual."[205] Reiterating the four types of punishment identified in *Estelle* as violative of the Eighth Amendment,[206] the Court held that "[c]onditions [that] deprive inmates of the minimal civilized measures of life's necessities" violate the Eighth Amendment.[207]

Applying this new rule to the case before it, the Court examined whether the system of double-celling utilized by the Southern Ohio Correctional Facility created cruel and unusual conditions of confinement.[208] To make this determination, the Court examined whether the "double celling made necessary by the unanticipated increase in prison population" led to "deprivations of essential food, medical care, or sanitation" (i.e., the minimal civilized measures of life's necessities).[209] The Court concluded that the findings of fact articulated by the district court amounted to no such deprivations.[210] The Court then went on, however, to recognize

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to the States through the Fourteenth Amendment, imposes upon the conditions in which a State may confine those convicted of crimes") (citing *Robinson v. California*, 370 U.S. 660 (1962)).

[201] *Rhodes*, 452 U.S. at 345 (quoting *Hutto*, 437 U.S. at 685).

[202] *Rhodes*, 452 U.S. at 345.

[203] *Id*. at 346, citing *Gregg*, 428 U.S. at 176-187; *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (plurality opinion).

[204] *Rhodes*, 452 U.S. at 345, quoting *Gregg*, 428 U.S. at 171.

[205] *Rhodes*, 452 U.S. at 346, citing *Trop*, 356 U.S. at 101.

[206] *Rhodes*, 452 U.S. at 346-47, n. 12; *see also supra* at XX.

[207] *Rhodes*, 452 U.S. at 347.

[208] *Id*. at 339-40; 347-48.

[209] *Id*. at 348. The Court also included safety among its list of life's necessities. *Id*. (noting the lack of increased violence).

[210] *Id*.

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that the practice of double celling did deprive incarcerated people of job and educational opportunities.[211] The Court concluded that such deprivations, however, did "not inflict pain, much less unnecessary and wanton pain."[212] Seemingly, then, the deprivations could not be deemed cruel and unusual. Rather than draw this conclusion, though, the Court instead concluded that "deprivations of this kind simply are not *punishments*."[213] This conclusion muddled the issue presented to the Court, which focused on whether the conditions at issue were cruel and unusual[214] not whether the conditions amounted to a punishment above-and-beyond the punishment of incarceration itself. This type of confusion—as to whether the issue presented in prison conditions cases involves a question of what is cruel and unusual versus what is punishment—continued to shape Eighth Amendment doctrine over the course of the next decade and muddles the current doctrine's application today.[215]

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[211] *Id*.
[212] *Id*.
[213] *Id*. (emphasis added).
[214] *Id*. at 346.
[215] Importantly, the concurring and dissenting opinions in *Rhodes* cautioned that the majority opinion may be read "as a retreat from careful judicial scrutiny of prison conditions." *Id*. at 353 (Brennan, J., concurring in the judgment). Justice Brennan, joined by Justices Blackmun and Stevens, reiterated the importance of judicial intervention to correct unlawful prison conditions in order to ensure "constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons." *Id*. at 354. Acknowledging the pressing problems posed by "[o]vercrowding and cramped living conditions," *id*. at 356, and the public apathy toward and political powerlessness of prisoners, *id*. at 358, Justice Brennan noted the important role judicial intervention plays in remedying, albeit slowly, unconstitutional conditions of confinement, *id*. at 359. Justice Brennan recognized the federal courts' role "[i]n determining when prison conditions pass beyond legitimate punishment and *become cruel and unusual*." *Id*. at 364. To fulfill that role, Justice Brennan suggested that the focus of the Court's inquiry should be on the conditions' "effect upon the imprisoned." *Id*., quoting *Laaman v. Helgemoe*, 437 F.Supp. 269, 322-23 (D. N.H. 1977). To Justice Brennan, "[w]hen the cumulative impact of the conditions of incarceration threaten the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the conditions at issue violate the Constitution. *Id*. at 364, quoting *Laaman*, 437 F.Supp. at 323. Finding that the evidence considered by the district court failed to demonstrate serious harm to the prisoners confined to the Southern Ohio Correctional Facility, Justice Brennan ultimately concurred in the judgment of the Court. *Id*. at 368.

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The next Supreme Court decision to consider the Eighth Amendment's application in the prison setting further compounded the confusion inherent in the majority's decision in *Rhodes*. In the 1986 *Whitley v. Albers* case, the Court considered what standard governs a prisoner's claim that a prison official subjected him to cruel and unusual punishment through the use of excessive force.[216] While the *Whitley* Court acknowledged that prior Eighth Amendment precedent refused to require "an express intent to inflict injury" to find a constitutional violation,[217] the Court ultimately deviated from this maxim when it articulated the excessive force standard.[218] Citing *Ingraham v. Wright*[219] for the proposition that "[n]ot every governmental action affecting the interests or well-

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Justice Blackmun wrote a separate concurrence to caution against the adoption of "a policy of general deference" to prison administrators. *Id*. at 369. Finally, Justice Marshall, in dissent, cautioned that the majority decision may "eviscerate the federal courts' traditional role of preventing a State from imposing cruel and unusual punishment through its conditions of confinement." *Id*. at 375. Finding that the district court and court of appeals had faithfully discharged their role in redressing deplorable conditions, Justice Marshall would have left the injunction entered by the District Court requiring single-celling undisturbed. *Id*. at 377.

[216] *Whitley*, 475 U.S. at 314. Justice O'Connor, who wrote the 5-4 majority opinion, framed the question presented the Court a little differently:

> This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.

Id. The dissent, written by Justice Marshall and joined by Justices Brennan, Blackmun, and Stevens, took issue with this framing, and accused the majority of conflating questions of fact that "are likely to be hotly contested" with the choice of a legal standard. *Id*. at 329.

> It is inappropriate, to say the least, to condition the choice of a legal standard, the purpose of which is to determine whether to send a constitutional claim to the jury, upon the court's resolution of factual disputes that in many cases should themselves be resolved by the jury.

Id. Despite the dissent's narrow view of the question decided by the *Whitley* majority, lower federal courts have since uniformly applied *Whitley*'s "malicious and sadistic" standard to cases involving the use of excessive force by prison officials.

[217] *Id*. at 319.

[218] *Id*. at 319, 320-21.

[219] 430 U.S. 651, 670 (1977). *Ingraham* involved a challenge to the use of corporal punishment at a junior high school, and the Court concluded that such a challenge could not fall under the purview of the Eighth Amendment. *See generally* Raff Donelson, *Who Are the Punishers*? 86 UMKC L. REV. 259 (2017).

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being of a prisoner is subject to Eighth Amendment scrutiny,"[220] the Court once-again conflated the inquiry into what the punishment being challenged is with the inquiry as to whether that punishment is cruel and unusual.[221] In *Whitley*, the Court articulated that the Eighth Amendment standard in cases challenging the use of force involves the question of "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[222] The Court identified several factors relevant to the malicious and sadistic inquiry, including the need for the application of force, the relationship between the need for force and the amount of force used, the extent of the injury, the threat to the safety of staff and prisoners, and any efforts made to temper the severity of the response.[223]

In contrast to the majority opinion, the dissent in *Whitley* would have maintained a focus on objective indicia to determine whether a particular punishment (i.e., incarceration) has been rendered cruel and unusual by internal prison conditions. To the dissenting justices, the correct Eighth Amendment standard to apply

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[220] *Whitley*, 475 U.S. at 319.

[221] This may not be the exact same analytical problem that I've identified in *Rhodes* (and subsequent conditions cases). In general, the problem with the Eighth Amendment doctrine is that it has developed an unnecessary focus on intent because it has been focused (erroneously) on whether the conditions being challenged are punishment rather than whether the incarceration (i.e., the punishment) is cruel and unusual because of certain conditions. But it may be in cases of excessive force that the punishment inquiry is not wrong because the force is not necessarily attendant to the punishment (incarceration), whereas with conditions challenges the conditions are attendant to the incarceration. So, in excessive force cases, there may be a necessary inquiry into the intent of the force, and we'll need to draw on how the court defines punishment in cases like *Ingraham* and *Bell v. Wolfish*. This could also require an inquiry into whether the doctrine should be different when the challenge involves "conduct" of a prison official rather than mere "conditions" within a prison. *See Whitley*, 475 U.S. at 319 (holding, without citation, that "[t]o be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety"). This inquiry, however, is beyond the scope of this Article.

[222] *Id*. at 320-21, quoting *Johnson v. Glick*, 481 F2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

[223] *Whitley*, 475 U.S. at 321.

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in a case of excessive force would have been "the 'unnecessary and wanton' standard,"[224] application of which would require consideration of the "circumstances of the plaintiff's injury, including whether it was inflicted during an attempt to quell a riot and whether there was a reasonable apprehension of danger."[225] While the dissent did not fully articulate how the "unnecessary and wanton standard" would apply beyond the facts at issue in *Whitley*, it is clear that the focus of the inquiry for those justices would be the totality of the objective circumstances not the subjective intent of prison official defendants.[226]

The 1991 decision in *Wilson v. Seiter*[227] brought to a head the question of whether an Eighth Amendment challenge to prison conditions required a subjective showing as to the intent of prison officials. The case involved a challenge lodged by Pearly L. Wilson, a man incarcerated by the State of Ohio at the Hocking Correctional Facility (HCF) in Nelsonville, Ohio.[228] Mr. Wilson challenged HCF's "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physical ill [prisoners]."[229] The question presented involved whether Mr. Wilson had to demonstrate "a culpable state of mind on the part of prison officials, and, if so, what state of mind is required" in order to prove his Eighth Amendment claims.[230]

In a 5-4 decision written by Justice Scalia, the Court held that *Estelle*, *Rhodes*, and *Whitley* "mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."[231] To support its conclusion, the majority highlighted that the Eighth Amendment "bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing

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[224] *Id*. at 329.
[225] *Id*.
[226] *Id*.
[227] *Wilson*, 501 U.S. at 300.
[228] *Id*. at 296.
[229] *Id*.
[230] *Id*.
[231] *Id*. at 299.

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judge, some mental element must be attributed to the inflicting officer before it can qualify."[232, 233] To the majority, then, the conditions attendant to incarceration could only be challenged under the Eighth Amendment if they amounted to punishment above and beyond the punishment of incarceration itself.

Justice White, joined by Justices Marshall, Blackmun, and Stevens, concurred only in the judgment[234] and criticized the majority's understanding of the *punishment* at issue in prison conditions cases.[235] Justice White first pointed to the *Hutto* Court's acknowledgment "that the conditions of confinement are part of the punishment that is subject to Eighth Amendment scrutiny."[236] The concurrence then drew on the Court's analysis in *Rhodes* to conclude that

> *Rhodes* makes it crystal clear, therefore, that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is 'formally meted out *as punishment* by the statute or

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[232] *Id*. at 300 (emphasis in original). The Court made this point as support for its disregard of an argument put forth by Mr. Wilson and the United States as *amicus curiae* that suggested conditions claims could be distinguished into two categories: (1) "'short-term' or 'one-time' conditions (in which a state-of-mind requirement would apply) and [(2)] 'continuing' or 'systemic' conditions (where official state of mind would be irrelevant)." *Id*. The Court saw no logical or practical use in such a distinction but recognized that "[t]he long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id*.

[233] The *Wilson* Court also clarified that that prisoners could not lodge challenges to something "so amorphous as 'overall conditions'" unless those conditions create a "specific deprivation of a single human need." *Id*. at 305. Thus,

> [*s*]*ome* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need, such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.

Id. at 304.

[234] The majority vacated the decision of the Sixth Circuit and remanded the case for reconsideration. *Id*. at 306. The Sixth Circuit had previously affirmed the district court's grant of summary judgment to prison officials, concluding that Mr. Wilson had to meet *Whitley*'s obduracy and wantonness requirement. *Id*. at 296.

[235] *Id*. at 307 (White, J., concurring).

[236] *Id*.

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> the sentencing judge,'—we examine only the objective severity, not the subjective intent of government officials.[237]

In addition to criticizing the departure from precedent inherent in the majority's adoption of an intent requirement, the concurrence predicted (rightly) that intent may be impossible to prove in many prison conditions cases, in part because of the institutional indifference outlined in Part I.[238]

> Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system . . . . having chosen imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the 'contemporary standards of decency' required by the Eighth Amendment.[239]

Citing to the United States' brief as *amicus curiae*, Justice White cautioned that inhumane prison conditions will be insulated from judicial review because of the majority's requirement that the prisoner-plaintiffs engage in "an unnecessary and meaningless search for 'deliberate indifference.'"[240] Notably, neither the

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[237] *Id*. at 309.

[238] *Id*. at 310.

[239] *Id*. at 310-11, citing *DeShaney*, 489 U.S. at 198-200.

[240] *Id*. at 311. The United States, as *amicus curiae*, argued that "seriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." *Wilson v. Seiter*, Brief for United States as *Amicus Curiae* at 19. A relic of another era, the United States' position in *Wilson* stands in stark contrast to the position taken by the Solicitor General in the COVID-19 cases. *See* Williams v. Wilson, Application for a Stay of the Injunction Issued by the United States District Court for the Northern District of Ohio and for an Administrative Stay, 19A1041, United States Supreme Court (May 20, 2020) at 32, available at https://www.supremecourt.gov/DocketPDF/19/19A1041/143923/20200520154328301_Wilson%20Stay%20Application%20final.pdf.

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majority nor concurrence defined what is meant by deliberate indifference, instead leaving that question for another day.

In the term following *Wilson*, the Supreme Court heard another Eighth Amendment case; this one focused on the inquiry relevant to a claim of excessive force.[241] In *Hudson v. McMillian*, Keith Hudson alleged that three officers at the Louisiana State Penitentiary in Angola, Louisiana used excessive force on him during the early morning hours of October 30, 1983.[242] Mr. Hudson claimed that one officer punched him in the mouth, eyes, chest, and stomach while the second officer held him in place and the third officer, a supervisor, looked on, telling the first two officer "not to have too much fun."[243] As a result of the beating, Mr. Hudson "suffered minor bruises and swelling of his face, mouth, and lip," and he had loosened teeth and a cracked dental plate.[244] The district court found the three officers violated Mr. Hudson's rights and awarded him $800 in damages.[245] The Fifth Circuit reversed, holding that Mr. Hudson "could not prevail on his Eighth Amendment claim because his injuries were 'minor' and required no medical attention."[246] The Supreme Court granted certiorari and reversed.[247]

The *Hudson* Court announced three important rules in support of reversal. First, the Court made clear that the standard articulated in *Whitley*—"whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm"—applies in *all* prison excessive forces cases.[248] Second, the Court determined that because contemporary standards of decency are violated *whenever* "prison officials use force maliciously and sadistically to cause harm," a prisoner can bring an excessive force claim whether or not he suffered significant injury.[249] Third, the Eighth Amendment does not protect *de minimis*

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[241] *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *Id*.
[246] *Id* at 5.
[247] *Id*. at 5, 12.
[248] *Id*. at 6-7.
[249] *Id*. at 9.

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uses of physical force, so long as the "force is not of a sort '"repugnant to the conscience of mankind."'"[250]

Notably, in announcing these rules, the Court declined to consider the prison officials' argument that "their conduct cannot constitute an Eighth Amendment violation because it was 'isolated and unauthorized.'"[251] In other words, the Court refused to consider whether rogue acts of prison officials fall outside the purview of the Eighth Amendment because such acts cannot fall within "the scope of 'punishment' prohibited by the Eighth Amendment."[252] This refusal is inconsistent with the Court's singular focus on what constitutes *punishment* in *Wilson*.

Justice Thomas, joined by Justice Scalia, penned a dissent in *Hudson* focused on the majority's "expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent."[253] Once again harkening on the perceived distinction between punishment meted out by statute or judge versus punishment attendant to incarceration, Justice Thomas reminded us that the Eighth Amendment traditionally did not apply "generally to any hardship that might befall a prisoner during incarceration."[254] Therefore, because the Eighth Amendment only applies to "that narrow class of deprivations involving 'serious' injury inflicted by prison officials acting with a culpable state of mind," Justice Thomas would hold that a use of force that causes only insignificant harm does not amount to cruel and unusual punishment.[255] In Justice Thomas' view, then, "our society has no expectation that prisoners will have 'unqualified' freedom from force, since forcibly keeping prisoners in detention is what prisons are all about."[256] Therefore, the *Hudson* dissent points to the inconsistency in Eighth Amendment doctrine that requires a showing of seriousness of harm in medical care cases but not in excessive force cases.[257]

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[250] *Id*. at 9-10, quoting *Whitley*, 475 U.S. at 327.
[251] *Id*. at 11.
[252] *Id*.
[253] *Id*. at 28 (Thomas, J., dissenting).
[254] *Id*. at 18.
[255] *Id*. at 18, 20.
[256] *Id*. at 26.
[257] *Id*.

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In the Court's next term, it heard the *Helling v. McKinney* case, which involved a Nevada prisoner's claim that prison officials subjected him to cruel and unusual punishment by housing him with another prisoner who smoked.[258] Mr. McKinney, the Nevada prisoner, reached trial on two issues: "(1) whether [he] had a constitutional right to be housed in a smoke-free environment, and (2) whether [the prison officials] were deliberately indifferent to [his] serious medical needs." At trial, the district court granted the prison officials' motion for a directed verdict, concluding that Mr. McKinney had no constitutional right to be housed in a smoke free environment and that he had not presented sufficient evidence to demonstrate "medical problems that were traceable to cigarette smoke or deliberate indifference to them."[259] The Ninth Circuit reversed the decision of the district court, holding that the court "erred by directing a verdict without permitting [Mr. McKinney] to prove that his exposure to [cigarette smoke] was sufficient to constitute an unreasonable danger to his future health."[260] The prison officials sought Supreme Court review of this decision, but, in the interim, the Court decided *Wilson* and, therefore, remanded the case to the Ninth Circuit for reconsideration in light of *Wilson*.[261] The Ninth Circuit acknowledged that *Wilson* added a subjective element to Mr. McKinney's claim, but it did not otherwise change its prior decision, which concerned the objective component of the Eighth Amendment claim (i.e., whether a prisoner-plaintiff might be able to meet the objective component of the claim by demonstrating an unreasonable risk to his future health).[262] The prison officials again sought review from the Supreme Court.

The Court granted certiorari and affirmed in an opinion by Justice White (who wrote the dissent in *Wilson*), holding that the Eighth Amendment protects incarcerated people from future harm.[263] In reaching this holding, the Court reiterated that "the treatment a prisoner receives in prison and the conditions under he

[258] *Helling*, 509 U.S. at 28.
[259] *Id*. at 28-29.
[260] *Id*. at 29.
[261] *Id*.
[262] *Id*.
[263] *Id*. at 33.

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is confined are subject to scrutiny under the Eighth Amendment."[264] Implicitly, then, the Court harkened back to the pre-*Wilson* days when it viewed conditions claims as challenging not the punishment of incarceration itself but whether the conditions at issue rendered such punishment unconstitutional.[265]

Justice Thomas, joined by Justice Scalia, dissented once again.[266] This time Justice Thomas strongly intimated that he would overturn *Estelle* if presented the question, and he reiterated and expanded upon his belief that prison conditions are not and cannot be punishment protected by the Eighth Amendment.[267] He criticized the Court's prior decisions, beginning with *Estelle*, for never examining whether the Eighth Amendment's text and purpose supported the conclusion that the amendment's protections should protect against prison deprivations.[268] To Justice Thomas, "the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose 'punishment.'"[269] Therefore, the entirety of the Court's Eighth Amendment jurisprudence with regard to prison conditions claims should be overturned.[270]

The final case that forms the Supreme Court's doctrine around Eighth Amendment claims challenging prison conditions is *Farmer v. Brennan*.[271] *Farmer* reached the Court in 1994 and involved a challenge to prison conditions brought by Dee Farmer, a transgender woman living in men's prisons operated by the Federal Bureau of Prisons (BOP).[272] Ms. Farmer sued the BOP and several individual prison officials after being brutally raped and assaulted in the spring of 1989.[273] In her complaint, Ms. Farmer alleged that the prison official defendants transferred her to a high security penitentiary "or placed [her] in its general population despite

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[264] *Id*. at 31.
[265] *See supra* at XX.
[266] *Helling*, 509 U.S. at 37-42 (Thomas, J., dissenting)
[267] *Id*. at 40, 42.
[268] *Id*. at 42.
[269] *Id*. at 40.
[270] *Id*. at 40-42.
[271] 511 U.S. 825 (1994).
[272] *Id*. at 829.
[273] *Id*. at 830.

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knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a [transgender woman] who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack by" other people incarcerated in the penitentiary.[274] Ms. Farmer claimed that these allegations demonstrated deliberate indifference to her safety and therefore stated a claim under the Eighth Amendment.[275]

After the district court granted summary judgment to the defendants, finding that Ms. Farmer needed to show they had "'actual knowledge' of a potential danger and the Seventh Circuit summarily affirmed without opinion, the Supreme Court granted certiorari to finally define the test for deliberate indifference.[276] Justice Souter, writing for the majority, first reiterated that Eighth Amendment prison conditions cases require a showing that a prison official has a "sufficiently culpable state of mind," which means "'deliberate indifference' to inmate health or safety."[277] He then went out to define the "proper test for deliberate indifference."[278]

After first describing how the Court used the term deliberate indifference in the cases described above,[279] it concludes that the term must mean "something more than mere negligence" and "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[280] Settling on the conclusion that deliberate indifference must mean something akin to recklessness, the Court ultimately determined that prison officials can only be held liable for disregarding conditions or risks of which they are subjectively aware.[281] In reaching this conclusion, the Court again focused on the idea that the Eighth Amendment only "outlaws cruel and unusual 'punishments.'"[282]

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[274] *Id*. at 830-31.
[275] *Id*. at 831.
[276] *Id*. at 832.
[277] *Id*. at 834, quoting *Wilson*, 501 U.S. at 297, 302-03.
[278] *Farmer*, 511 U.S. at 835.
[279] *Id*. at 835.
[280] *Id*.
[281] *Id*. at 841.
[282] *Id*. at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

> An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm

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Justice Blackmun, concurring, recognized the Court's undue focus on the word punishment and reiterated that, in his view, "inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind."[283] Concerned with the pervasive violence in American prisons, Justice Blackmon highlighted his concern that, for many incarcerated people, the punishment of incarceration "degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials."[284] He then went on to criticize *Wilson*'s conclusion that "only pain that is intended by a state actor to be punishment is punishment."[285] Rather than recognize that incarceration *is the punishment* in prison conditions cases, Justice Blackmon instead focused his criticism on the idea that someone cannot experience punishment unless a state actor intends for it to be so.[286] He also took issue with the *Wilson* Court's "myopic focus on the intentions of *prison officials*," which he saw as plainly ignoring the type of institutional indifference that can arise from the modern American system of punishment.[287] Justice Stevens wrote a short, paragraph

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> does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for condemnation, cannot under our cases be condemned as the infliction of punishment.

Id. at 837-38.

[283] *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring). Justice Blackmun went on to criticize the Court's holding in *Wilson*, "to the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with the Cruel and Unusual Punishments Clause." *Id*.

[284] *Id*. at 853.

[285] *Id*. at 854.

[286] *Id*. at 854-55 (finding the *Wilson* Court's analysis "fundamentally misguided," explaining that "'[p]unishment' does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' regardless of whether a state actor intended the cruel treatment to chastise or deter.")

[287] *Id*. at 855-56 (pointing to Ninth Circuit Judge Noonan's observations on the Framers' concern "*with the cruelty that came from bureaucratic indifference to the conditions of confinement*") (quoting Jordan v. Gardner, 986 F.2d 1521, 1544 (9th Cir. 1993)); *see also supra–Part* I.B.

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long, separate concurrence reiterating his belief that cruel and unusual punishment does not require a specific subjective motivation from a prison official.[288]

Finally, Justice Thomas wrote a separate concurrence, agreeing only in the judgment of the *Farmer* majority.[289] Reiterating his view that only judges and juries inflict punishment, Justice Thomas once again asserted that "[c]onditions of confinement are not punishment in any recognized sense of the term."[290] To him, then, *Farmer* presented an easy case: "[b]ecause the unfortunate attack that befell petitioner was not part of [her] sentence, it did not constitute 'punishment' under the Eighth Amendment."[291]

As in *Wilson*, the *Farmer* Court's focus once again ignores that the punishment at issue in prison conditions cases is *incarceration* itself, and the only question truly being presented is whether or not the conditions at issue in any given case have evolved such that they can now be deemed cruel and unusual.[292] However, the Court's continued failure to recognize that incarceration is the punishment prisoner-plaintiffs are concerned with in conditions cases is no surprise when viewed in light of the overwhelming deference it and the broader federal judiciary have afforded prison officials for the past half-century.

B. Deference to Prison Officials

While not explicitly part of the Eighth Amendment prison conditions test, judicial deference to prison officials permeates federal court decisions applying the doctrine.[293] This is no doubt a consequence of the explicit deference that is written into the other

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[288] *Id*. at 858 (Stevens, J., concurring).
[289] *Id*. at 858 (Thomas, J., concurring).
[290] *Id*. at 859.
[291] *Id*. at 859.
[292] *See* Dolovich, *supra* note 173 at 890. The *Farmer* Court also goes one to explain why, in its view, the "objective" deliberate indifference test developed in *City of Canton v. Harris*, 489 U.S. 378, 378 (1989), is inapplicable in prison conditions cases. *See* Godfrey, *supra* note 59 at 172-74 for a discussion of the *Farmer* Court's treatment of *Harris*.
[293] Glidden, *supra* note 173 at 1832-33 (describing how and in what frequency federal courts defer to the judgment of prison officials in prison conditions cases).

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doctrines governing constitutional claims brought by incarcerated people.[294] In non-Eighth Amendment constitutional challenges to prison policies, the Supreme Court has gone to great pains to explain the complexity and intractability of the problems confronting those who run American prisons.[295] Using those justifications, the Court has developed a doctrine that explicitly accounts for its desire to largely defer to the choices made by prison officials in running American prisons.[296]

In the context of the Eighth Amendment, the Court has expressly rejected a doctrine that openly incorporates deference into the relevant standard.[297] Nonetheless, "in practice, both it and the lower courts often defer to prison officials in claims analyzing claims of cruel and unusual punishment."[298] Moreover, the deliberate indifference standard itself—even if only implicitly—developed from a clear concern that a standard that did not require a showing of intent might lead to increased liability of prison officials and increased judicial intrusion into the operation of

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[294] Godfrey & Rovner, *supra* note 49 at 140-4 (discussing the doctrine of deference in certain constitutional claims brought by incarcerated people).

[295] *See*, *e.g.*, Procunier v. Martinez, 415 U.S. 396, 413-14 (1974) (explaining the policy justifications that inform the doctrine of deference as follows:

> [T]he problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government . . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.).

[296] Bianchi & Shapiro, *supra* note 146 at 7 (describing the *Turner* standard and the Court's view of the need for a deferential standard); *see also Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

[297] *See* Godfrey & Rovner, *supra* note 49 at 141 (noting that

> the Court has expressly rejected reasonable-relationship review for Eighth Amendment claims, finding that "the full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes." Accordingly, "deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.")

(quoting Johnson v. California, 543 U.S. 499, 511 (2005) (quoting Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979))).

[298] Godfrey & Rovner, *supra* note 49 at 141-42.

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prisons. As the prior section outlines, the current Eighth Amendment doctrine places undue focus on the subjective intent of prison officials because of a misplaced concern of ensuring that conditions being challenged in prison conditions cases amounted to punishment. But this undue focus can create situations where ongoing harms inside prisons go uncorrected either because an incarcerated person cannot prove the subjective intent of an individual prison official or the institutional intent of the prison system itself.[299]

The problem of uncorrected ongoing harms in prison conditions cases is playing out acutely in judicial responses to Eighth Amendment claims relating to the COVID-19 pandemic.[300] A close look at the decisions of federal courts in these cases reveals a judiciary concerned with maintaining its deference to prison officials, even in the face of ongoing harm and suffering.[301] Take, for example, the decision of the United States District Court for the Eastern District of Arkansas on the Arkansas' prison system's response to the COVID-19 pandemic in the Cummins Unit, discussed at the beginning of this Part. In that case, Judge Kristine Baker explicitly acknowledged that the number of infected people in Arkansas' prisons (incarcerated people and staff alike) had increased during the "few weeks" the case had been pending prior to her decision on the plaintiffs' request for a preliminary injunction.[302] Despite this acknowledgment, and a recognition that the plaintiffs had presented evidence of staff not wearing masks and gloves,[303] incarcerated people not wearing masks as directed,[304] a prohibition on alcohol-based hand sanitizer,[305] a months-long delay

[299] *See* Glidden, *supra* note 173 at 1833-37 (describing the problems with ongoing harms and institutional intent under the current Eighth Amendment conditions test); *see also* Godfrey, *supra* note 59 at 186-87 (discussing the difficulty of proving institutional intent in Eighth Amendment conditions cases seeking injunctive relief).
[300] Godfrey & Rovner, *supra* note 49 at 142.
[301] Godfrey & Rovner, *supra* note 49 at n.99 (detailing cases wherein courts explicitly deferred to prison officials' judgment and response to the pandemic, despite rising infection and death rates).
[302] Frazier v. Kelley, 460 F.Supp.3d 799, 842 (E.D. Ark. 2020).
[303] *Id*. at 838.
[304] *Id*.
[305] *Id*. at 839.

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in implementing guidance from the Centers for Disease Control on social distancing,[306] the denial of care and testing of incarcerated people displaying COVID-19 symptoms,[307] a lack of follow-up care for those with COVID-19,[308] a lack of aid from prison staff who observe incarcerated people "too weak to care for themselves or to seek medical care,"[309] and the presence of positive, asymptomatic staff at work,[310] the Court declined to grant the incarcerated plaintiffs preliminary relief.[311] In reaching this conclusion, the Court determined the plaintiffs could not meet their burden to establish deliberate indifference[312] and declined to intrude "into the core activities of the state's prison system."[313] At the time Judge Baker issued her order on May 19, 2020, at least four incarcerated people had already died in Arkansas' prisons.[314] Less than a month later, seven more people had died.[315] And while the incarcerated plaintiffs are still litigating their case, the death rate in Arkansas prisons has continued to rise, with more than fifty people now dead.[316]

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Eighth Amendment doctrine is built to sustain judicial indifference to the suffering, harm, and death of the incarcerated. The doctrine ignores the Eighth Amendment's textual purpose: to prevent cruel and unusual punishments by the state. In our current criminal system, criminal courts mete out punishment as a sentence of incarceration, usually for a term of years. That term of years is meant to be served in self-contained societies created by the state—

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[306] *Id*. at 839-40.
[307] *Id*. at 841.
[308] *Id*.
[309] *Id*.
[310] *Id*. at 842.
[311] *Id*. at 846.
[312] *Id*. at 837 (noting that "the Court concludes that plaintiffs have not demonstrated a likelihood of success on the subjective prong of their Eighth Amendment claim").
[313] *Id*. at 846.
[314] *See generally id*.; *see also supra* Introduction.
[315] *Id*.
[316] *Id*.

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i.e., prisons. While those sentences do not have to be comfortable,[317] the conditions in which they are served cannot be inhumane nor can they fundamentally alter the punishment meted out by the state.[318] However, under current doctrine, inhumane prison conditions will be found perfectly constitutional by the federal courts so long as an incarcerated plaintiff is unable to prove that prison officials knowingly imposed those conditions despite knowledge of the risk of harm. This outcome can be seen in the myriad cases around the country challenging prison conditions since the outbreak of the COVID-19 pandemic. In those cases, plaintiffs have presented ample evidence that the self-contained societies created by the state have become so toxic that they are becoming death traps, thereby transforming the state-sanctioned punishment into an extrajudicial death sentence for some incarcerated people, even in prison systems where officials are taking steps to mitigate the risk posed by the virus.

Such a result should not be sustained under the Eighth Amendment. But the COVID-19 pandemic has seen this result upheld time-and-again because Eighth Amendment doctrine encapsulates an inherent indifference to suffering that cannot be attributed to the intentions of an individual defendant. Even where prison officials are well-motivated individuals, conditions that pose a risk of death *should* be unconstitutional. Under our current system, they are not because the doctrine governing conditions claims is inherently indifferent to the suffering of incarcerated people. Thus, the doctrine creates the second strand of indifference that primed American prison systems for disaster during the COVID-19 pandemic: judicial indifference.

III. SOCIETAL INDIFFERENCE: OUT OF SIGHT, OUT OF MIND

The final strand of indifference that has amplified the harms experienced by incarcerated people during the course of the COVID-19 pandemic is the general societal apathy toward people behind bars. This indifference stems from the broader societal indifference to the poor and marginalized.

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[317] *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).
[318] *Farmer*, 511 U.S. at 839.

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> Class and classism matter here; this isn't something that springs up out of nowhere. We treat being poor, being from the inner city, being from the country as reasons to be ashamed even though no one controls the circumstances of their own birth. We look at places that are being starved of resources, where being tough is a matter of survival, and then we say, "In order to have safety, financial stability, housing that isn't subpar, you have to be willing to cut away everything that made you," and when some people can't or won't do that we punish them for it. It's assimilation, not acculturation, that is demanded of people who are already sacrificing, already making hard choices.[319]

It is no secret that the vast majority of people that we lock up in this country are poor people of color who belong to historically disadvantaged groups.[320] Undoubtedly because the incarcerated population comes from these groups, American society tends to "blame the incarcerated for whatever might happen to them behind bars. These are bad guys, just getting what they deserve, or so we think."[321]

Compounding this attitude, mainstream American society has little understanding of what goes on inside American prison walls due to the prison systems' lack of transparency.[322] While the United States incarcerates nearly 2.2 million people, "the indignities suffered each day by the human beings living in American prisons and jails occur largely out of sign from the general public."[323] This lack of transparency deprives the American public of the ability to critically assess whether the societal attitude of "they deserve what they get" actually withstands scrutiny when the public learns what

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[319] MIKKI KENDALL, HOOD FEMINISM: NOTES FROM THE WOMEN THAT A MOVEMENT FORGOT 139 (2020).

[320] GOTTSCHALK, *supra* note 72 at 4 (noting that the "carceral state has disproportionately hurt African American men. But it also has been targeting a rising number of people from other historically disadvantaged groups," including women, Hispanics, and poor whites).

[321] VENTERS, *supra* note 4 at 1.

[322] Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1, 1 (2019) (arguing that "[j]ail and prison conditions matter because they are involuntary homes for millions of people without meaningful public oversight, transparency, or accountability").

[323] Godfrey, *supra* note 66 at 1115.

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"what they get" actually means for incarcerated individuals. In other words, the American public has little means to examine whether the punishment occurring through incarceration matches the imagined punishment meted out at a criminal sentencing. For example, as Andrea Armstrong acutely observes,

> [i]t would be barbaric for a judge to order a person to be sexually violated as a consequence of a crime. Is it any less barbaric if it happens incidental to lawful imprisonment? The same could be said for people denied medical and mental health care. Serving a certain amount of time in jail or prison is the intended punishment, not death or injury by neglect.[324]

While we can of course not know how the American public might react if it knew of the true conditions within the nation's prisons, we may never learn if prisons remain "the black boxes of our society."[325]

One thing we have learned, however, from the Black Lives Matter movement, is that when brave passerby record police officers and make those recordings public, people start to pay attention.[326] "But what about places in the United States where people can't have cellphone cameras and the state-sponsored violence against Black people is often ignored or never revealed to the public? This happens in prisons all the time."[327] What is going on in prisons is not visible to the public in the same way that the tragic killings of Black and brown men has been in recent years, but it is equally as problematic.[328] But society has granted itself "permission to look away from the truth" because it views incarcerated people as "disposable."[329] In other words, society has embraced stripping incarcerated people of their individual identity and instead prefers to refer to the incarcerated in collective terms. Like the institutional

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[324] Armstrong, *supra* note 321 at 18.
[325] Dewan, *supra* note 66.
[326] Johnny Perez, *As we work to make Black Lives Matter, let's remember that incarcerated lives matter, too*, USA TODAY (Aug. 30, 2020), *available at* https://www.usatoday.com/in-depth/opinion/policing/2020/08/30/we-work-make-black-lives-matter-remember-prison-lives-matter-too/3313709001/.
[327] *Id*.
[328] *Id*.
[329] *Id*.

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and judicial indifference described in prior sections, this societal indifference created and perpetuated a system wherein our prisons stood doomed to be cautionary tales from the start of the COVID-19 pandemic.[330]

CONCLUSION

From the start of the COVID-19 pandemic, incarcerated people and their advocates knew that the pandemic would prove devastating to the incarcerated unless the prisons, the courts, and society took dramatic and immediate steps to depopulate the prisons.[331] Yet, the institutional indifference of the prison systems themselves, the judicial indifference of the doctrine governing incarcerated people's requests for emergency relief, and the societal indifference of the American public and its attitude toward the incarcerated combined to make depopulation efforts nearly impossible.

In describing these three interwoven causes of the failure to protect incarcerated lives during the pandemic, I used the term indifference purposefully. Derived from the constitutional doctrine meant to protect people from cruel and unusual incarceration (the punishment most utilized by the American criminal system), the word indifference holds special meaning in the carceral context. Under the current state of the law, an incarcerated person can only gain protection from cruel and unusual prison conditions when they can demonstrate that the cause of those conditions is the deliberate indifference of prison officials. But what I've tried to demonstrate in the above discussion is that the entire carceral system is built upon and sustained by these three strands of indifference: institutional, judicial, and societal. And because these three strands of indifference are structural in nature, it can be no surprise that they operate to create cruel and unusual results—i.e., unnecessary

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[330] *See generally id*. (describing how times of uncertainty lay bare how incarcerated people "have less of a right to live with as much respect and humanity as everyone else").

[331] Kaste, *supra* note 13; *see also* Stacy Weiner, *Prison should not be a COVID-19 death sentence*, AAMC (Aug. 27, 2020), *available at* https://www.aamc.org/news-insights/prison-should-not-be-covid-19-death-sentence.

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harms—in the face of an emergency like the pandemic. Ultimately, the continued existence of these three strands of indifference—despite demonstrable evidence of the daily suffering occurring within our modern punishment regime—lends itself to the conclusion that they are nothing short of deliberate.

While this Article has been largely descriptive in its assessment of the strands of indifference that combined to create the cautionary tales of American prisons, I plan to provide prescriptive policy and jurisprudential reforms in future work aimed at eliminating these strands of indifference. But, any reform efforts must be informed by the lessons of abolitionists, who have explained to us that reform efforts "must be a cultural intervention,"[332] that the modern prison developed from reform efforts rooted "in the paradigmatic national power relations of racial chattel" and has remained "stubbornly brutal, violent and inhumane" through successive reform efforts,[333] that conceptions of justice must expose hypocrisy "entrenched in existing legal practices,"[334] and that a radical reorganization of American society is necessary to truly dismantle the "issues of systemic and structural racism" that "should have been addressed more than 100 years ago."[335] If we are to truly dismantle the strands of interwoven indifference that allowed American prisons to become the epicenters of the pandemic, we must take seriously the calls of these abolitionists and think critically about how we can build a system of justice that might allow us to avoid future cautionary tales.

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[332] Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1694 (2019).

[333] Dylan Rodríguez, *Abolition as a Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1581-82, 1597 (2019) (quoting Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things . . .*, TRUTHOUT (Mar. 21, 2014)).

[334] Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019).

[335] Angela Y. Davis, *Why Arguments Against Abolition Inevitably Fail*, Abolition for the People, MEDIUM (Oct. 6, 2020).

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