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COMMENT

LOST SOULS: CONSTITUTIONAL IMPLICATIONS FOR THE DEFICIENCIES IN TREATMENT FOR PERSONS WITH MENTAL ILLNESS IN CUSTODY

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INTRODUCTION

The most recent study performed by the Justice Department's Bureau of Justice Statistics revealed that over half of all persons in penal custody have some form of mental illness, while the rate of mental illness within the general population is closer to one in ten.¹ This study also revealed that prison conditions for persons with mental health problems are quantifiably different than those for persons without mental problems.² For example, inmates with mental illness are twice as likely

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¹ DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 3 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

² See *id.* at 10.

to be injured in fights as compared to those without mental illness.³ Furthermore, even though all federal prisons and most state prisons and jails now provide some form of mental health services to inmates,⁴ most inmates with mental illness never receive treatment while in custody.⁵ In fact, less than one quarter of federal inmates and one third of state inmates with mental health problems receive treatment for their mental illness.⁶ Since mental illness can be exacerbated by prison conditions, proper diagnosis and treatment are essential for the well-being of persons with mental illness in custody.⁷

This Comment explores systemic deficiencies of access to mental health care in prison systems and the Eighth Amendment implications of those deficiencies. Because the Eighth Amendment prohibits, among other things, infliction of cruel and unusual punishments, when denial of adequate mental health care results in undue suffering, the conditions of confinement may violate the Constitution.⁸ Therefore, there must be mechanisms in place to ensure necessary treatment is provided while protecting individual rights.

Part I of this Comment addresses the duty a state owes to those it incarcerates (e.g., to provide food, clothing, recreation, education, medical care) and what standards exist for the provision of reasonable care and to ensure that prescribed care is in fact delivered. Part I also summarizes the history of prisoners' efforts to redress conditions of confinement and the standards that have developed for constitutional challenges. Part II focuses on the legal framework for Eighth Amendment challenges brought by prisoners and how the standard for evaluating those claims has evolved. Part III explores the problems persons with mental illness face in challenging the conditions of their confinement after *Estelle v. Gamble*,⁹ identifies the particular barriers to Eighth Amendment challenges for persons with mental health problems created by *Farmer v. Brennan*,¹⁰ and addresses the tension between

³ *Id.* ("A larger percentage of inmates who had a mental health problem had been injured in a fight since admission than those without a mental problem (State prisoners, 20% compared to 10%; Federal prisoners, 11% compared to 6%; jail inmates, 9% compared to 3%).")

⁴ *Id.* at 9.

⁵ *See id.*

⁶ *Id.* ("State prisoners who had a mental health problem (34%) had the highest rate of mental health treatment since admission, followed by Federal prisoners (24%) and local jail inmates (17%).")

⁷ *See* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1, 53 (2003), available at www.hrw.org/sites/default/files/reports/usa1003.pdf.

⁸ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

⁹ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994).

providing mental health care to the incarcerated and the right to refuse treatment. Part IV proposes three systemic changes, applicable to both prisons and the surrounding legal framework, that address the deficiencies and disparities in how the needs of inmates with mental health problems are managed.

I. HISTORY OF PRISONERS' RIGHT TO CHALLENGE ASPECTS OF CONFINEMENT

The Eighth Amendment establishes the constitutional limitations of imprisonment by prohibiting cruel and unusual punishment.¹¹ When a person is incarcerated, the incarceration or punishment cannot be grossly disproportionate to the underlying offense.¹² Gratuitous punishment, that which inflicts unnecessary pain and suffering on an inmate, or punishment that results in the deprivation of life violates the Eighth Amendment.¹³ However, the very nature of imprisonment necessitates conditions that are restrictive and even harsh; thus, conditions must be below societal standards of decency to raise constitutional concerns.¹⁴

A. STATES' DUTY OF CARE TO INMATES

Cruel and unusual punishment—as it relates to conditions of confinement—has evolved over the course of American history.¹⁵ Throughout American history, legislatures and courts have affirmed that persons in state custody must be provided basic necessities.¹⁶ Courts have long held that inmates, whose confinement and resulting deprivation of liberty prevent them from caring for themselves, are to be

¹¹ U.S. CONST. amend. VIII.

¹² *Weems v. United States*, 217 U.S. 349, 367 (1910) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”).

¹³ U.S. CONST. amend. VIII; *see also* *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (citing *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972)) (U.S. CONST. amend. XIV, § 1, makes Eighth Amendment protections applicable to states); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“[P]unishment must not involve the unnecessary and wanton infliction of pain.”).

¹⁴ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Atiyeh v. Capps*, 449 U.S. 1312, 1315-16 (1981); *see also* *Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (“Nothing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”).

¹⁵ *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

¹⁶ *See, e.g., Miller v. Cnty. of Dickinson*, 26 N.W. 31, 32 (Iowa 1885) (“The prisoner being in the custody of the sheriff, it was the duty of the latter to supply him with the necessities of life suitable to his condition . . .”); LA. REV. STAT. ANN. § 15:705 (Westlaw 2012) (originally enacted as LA. REV. STAT. ANN. §§ 2837, 3612 (1870)).

given basic necessities.¹⁷ In general, state laws dictated that food, clothing, and shelter must be supplied to prisoners in custody.¹⁸ Over time, the definition of necessities broadened to include protection from abuse and the provision of reasonable medical care.¹⁹ Since the late 1800s, several courts have held that the state is obligated to make necessary medical treatment available, whether it be in public hospitals or in prisons.²⁰ Medical care, as defined by lower courts, includes treatment for both physical and mental health, but the U.S. Supreme Court has not specifically addressed the issue of mental health care.²¹

¹⁷ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 198-201 (1989); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (citing *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)).

¹⁸ See, e.g., ALA. CODE § 14-6-19 (Westlaw 2011) (originally enacted as ALA. CODE § 243 (1852)); ALASKA STAT. ANN. § 33.30.011 (Westlaw 2012) (originally enacted as 1986 Alaska Sess. Laws, ch. 88, §6); CONN. GEN. STAT. ANN. § 18-7 (Westlaw 2012) (originally enacted as CONN. GEN. STAT. ANN. § 3002 (1949)); GA. CODE ANN. § 42-5-2 (Westlaw 2012) (originally enacted as 1956 Ga. Laws, No. 112, § 13, at 161, 171); IND. CODE ANN. § 11-10-3-2 (Westlaw 2012) (originally enacted as 1979 Ind. Acts, P.L. 120, ch. 3, at 487, 508); LA. REV. STAT. ANN. § 15:705 (Westlaw 2012) (originally enacted as LA. REV. STAT. ANN. §§ 2837, 3612 (1870)); MISS. CODE ANN. § 47-1-27 (Westlaw 2012) (originally enacted as MISS. CODE ANN. § 4070 (1930)); MO. ANN. STAT. § 221.120 (Westlaw 2012) (originally enacted as MO. ANN. STAT. § 9223 (Westlaw 1939)); NEB. REV. STAT. § 83-181 (Westlaw 2011) (originally enacted as 1969 Neb. Laws, ch. 817, § 12, at 3071, 3079); N.H. REV. STAT. ANN. § 30-B:4 (Westlaw 2012) (originally enacted as N.H. REV. STAT. ANN. § 89:1 (1988)); OKLA. STAT. ANN. tit. 11, § 34-105 (Westlaw 2012) (originally enacted as 1987 Okla. Sess. Laws, ch. 80, § 10, at 308, 316); OR. REV. STAT. ANN. § 169.076 (Westlaw 2012) (originally enacted as 1979 Or. Laws, ch. 487, § 6, at 595, 596); WYO. STAT. ANN. § 25-1-105 (Westlaw 2012) (originally enacted as 1890 Wyo. Sess. Laws, ch. 37, § 5, at 166, 167).

¹⁹ *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (“The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)); see also *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993); *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Estelle*, 429 U.S. at 103; *DeShaney*, 489 U.S. at 198-99.

²⁰ *Miller*, 26 N.W. at 32; *Malone v. Escambia Cnty.*, 22 So. 503, 504-05 (Ala. 1897); *Perkins v. Grafton Cnty.*, 29 A. 541, 541 (N.H. 1892); see also *Williams v. Treen*, 671 F.2d 892, 901 (5th Cir. 1982); *Duncan v. Duckworth*, 644 F.2d 653, 654 (7th Cir. 1981); *Ramos v. Lamm*, 639 F.2d 559, 574-75 (10th Cir. 1980); *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977) *cert. granted in part, rev'd in part sub nom.* *Alabama v. Pugh*, 438 U.S. 781 (1978); *Cruz v. Ward*, 558 F.2d 658, 661 (2d Cir. 1977); *Russell v. Sheffer*, 528 F.2d 318, 318 (4th Cir. 1975) (per curiam); *Runnels v. Rosendale*, 499 F.2d 733, 736 (9th Cir. 1974) (per curiam); *Blanks v. Cunningham*, 409 F.2d 220, 221 (4th Cir. 1969) (per curiam); *Spicer*, 132 S.E. at 293; *City of Tulsa v. Hillcrest Med. Ctr.*, 292 P.2d 430, 432-33 (Okla. 1956).

²¹ See *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (citing *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975)). *But see* *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (“Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the ‘primary cause of the violation of a Federal right,’ 18 U.S.C. § 3626(a)(3)(E)(i), specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental

The Supreme Court in *Estelle v. Gamble* formally confirmed that a person in custody must have all basic necessities furnished, including medical needs.²² However, courts are generally reluctant to hold that failure to provide adequate care rises to the level of cruel and unusual punishment.²³

The minimum standards for providing basic necessities have been refined over time, which evidences society's evolving standards of decency.²⁴ The standard for adequate medical care is based on professional judgment that meets minimal expectations of the applicable profession.²⁵ For medical care, most illnesses, diseases and injuries are quantifiable and objectively diagnosable.²⁶ However, when the diagnosis is subjective, doctors are given discretion unless their conduct is deemed malicious.²⁷ Therefore, for persons with mental illness where the diagnoses are almost exclusively subjective,²⁸ proving a failure to

health care.”). In *Brown v. Plata*, overcrowding was the dominant cause for several systemic Eighth Amendment violations, but the Court also alluded to mental health care.

²² *Estelle*, 429 U.S. at 103-04 (“The infliction of such unnecessary suffering [by denying medical care] is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that ‘(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.’” (quoting *Spicer*, 132 S.E. at 293)).

²³ See *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (stating that Eighth Amendment is implicated by the “unnecessary and wanton infliction of pain” and not an “inadvertent failure to provide adequate medical care” (quoting *Estelle*, 429 U.S. at 104, 105)); *Estelle*, 429 U.S. at 106 (“In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”); *Talal v. White*, 403 F.3d 423, 426 (6th Cir. 2005) (requiring that the prisoner demonstrate more than “mere discomfort or inconvenience”); *Bowring*, 551 F.2d at 48; *Haskew v. Wainwright*, 429 F.2d 525, 526 (5th Cir. 1970) (per curiam); see also *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (noting the scope of successful confinement challenges is limited to “deprivations of essential food, medical care, or sanitation” or “conditions intolerable for prison confinement”); *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000) (“[T]he inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.” (quoting *Farmer*, 511 U.S. at 834)); *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990) (stating there is no Eighth Amendment violation if the delay in treatment does not cause substantial harm); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979).

²⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁵ See, e.g., *McKee-Bey v. Mitchell*, 259 F. App'x 880, 883 (7th Cir. 2008) (stating prisoners are entitled to minimal expectations of a doctor's profession, and no constitutional violation exists if the doctor has met this minimum standard of medical care); *Brown v. Borough of Chambersburg*, 903 F.2d 274, 278 (3d Cir. 1990) (“[A]s long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights.”).

²⁶ See, e.g., Robert A. Aronowitz, *When Do Symptoms Become a Disease?*, 134 ANNALS INTERNAL MED. 803, 803 (2001).

²⁷ See *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (“When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.”).

²⁸ Mary Boyle, *The Problem with Diagnosis*, 20 PSYCHOLOGIST 290, 290 (2007).

diagnose and treat illness requires a more exacting standard than for failure to treat objectively discernible physical ailments.

Although prisoners have challenged everything from the type of food served to inadequate hygiene care,²⁹ the standards that courts have imposed on prisons for providing essential care are implemented only when there are systemic deficiencies that have repeatedly failed to be mitigated.³⁰ Traditionally, courts have deferred to prison institutions to create their own standards and to deal with challenges on an individualized basis.³¹ This deference was codified in the Prison Litigation Reform Act of 1995.³² In rare cases in which prisoners have successfully complained of systemic problems, courts have generally ordered plaintiffs and defendants to develop a remedial plan to address the constitutional violations.³³

B. DEVELOPMENT OF THE RIGHT TO CHALLENGE CONSTITUTIONAL VIOLATIONS DURING CONFINEMENT

Before the 1964 Supreme Court ruling in *Cooper v. Pate*,³⁴ prisoners had little recourse to challenge the conditions of their confinement,³⁵ despite the Eight Amendment's prohibition of cruel and unusual punishment, because challenges were limited to the sentencing and punishment phase.³⁶ In *Cooper*, an inmate made a novel challenge under 42 U.S.C. § 1983 when he was denied access to Muslim reading

²⁹ See, e.g., *Flanory v. Bonn*, 604 F.3d 249, 255 (6th Cir. 2010) (finding that denying a prisoner toothpaste for 337 days, resulting in gum disease and tooth extraction, "bespeaks an indifference to basic hygiene needs"); *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971) (evaluating a disciplinary bread-and-water diet and determining it to be "inconsistent with current minimum standards of respect for human dignity").

³⁰ See *Inmates of Allegheny Cnty. Jail v. Peirce*, 487 F. Supp. 638, 643 (W.D. Pa. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 33-35 (D.P.R. 1979).

³¹ See *Haskew v. Wainwright*, 429 F.2d 525, 526 (5th Cir. 1970) (per curiam).

³² 18 U.S.C.A. § 3626 (Westlaw 2012).

³³ See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1283 (N.D. Cal. 1995); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980), *abrogated on other grounds by Carr v. Newcomer*, No. 09-1080, 2009 U.S. Dist. Lexis 123559, at *22-23 (W.D. La. Dec. 21, 2009). *But see Feliciano*, 497 F. Supp. at 40 (where conditions were so unsanitary and dangerous to health and life, the court made an emergency order with detailed and specific remedial measures).

³⁴ *Cooper v. Pate*, 378 U.S. 546 (1964).

³⁵ See *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) ("The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead.").

³⁶ *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951) ("[I]t is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."); see also *Sarshik v. Sanford*, 142 F.2d 676, 676 (5th Cir. 1944) (per curiam); *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944).

material.³⁷ Section 1983 provides that no person may, under color of law, deprive another person of constitutional rights and privileges.³⁸ The U.S. District Court for the Northern District of Illinois granted the defendant's³⁹ motion to dismiss for failure to state a claim upon which relief could be granted, and the United States Court of Appeals for the Seventh Circuit affirmed.⁴⁰ However, the Supreme Court reversed, holding that the inmate's allegations that prison officials denied him permission to purchase religious publications and denied other privileges enjoyed by other prisoners stated a viable cause of action.⁴¹ Although this was a challenge based on a violation of the First Amendment, it opened the door for challenges based on other constitutional violations occurring during confinement, including Eighth Amendment violations.⁴² This significant holding departed from prior decisions that limited a prisoner's redress for Eighth Amendment violations to acts prior to confinement.⁴³

Since *Cooper*, there have been scores of § 1983 claims alleging violations of the Eighth Amendment.⁴⁴ Several of these cases exposed

³⁷ Cooper alleged the warden and others "denied permission to purchase and read Arabic and Swahili grammar books, from which Cooper hopes to learn to read Islamic works in the original; have denied permission to purchase and read the Koran; have denied permission to consult with ministers of his faith; have refused to allow Cooper and other inmates of his faith to attend religious services in their faith." *Cooper v. Pate*, 382 F.2d 518, 520 (7th Cir. 1967).

³⁸ 42 U.S.C.A. § 1983 (Westlaw 2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

³⁹ The defendant was the warden of the state penitentiary.

⁴⁰ *Cooper v. Pate*, 324 F.2d 165, 166-67 (7th Cir. 1963); see *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam).

⁴¹ See *Cooper*, 378 U.S. at 546.

⁴² Section 1983 has also been used to address violations of the First, Fifth, and Fourteenth Amendments. See, e.g., *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (prison inmate labor union brought § 1983 claim against prison officials challenging regulations that prohibited inmates from soliciting other inmates to join the union as a violation of First Amendment rights); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (inmates alleged that procedures used in prison disciplinary proceedings violated their rights to due process and equal protection under the Fourteenth Amendment).

⁴³ See *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951); *Sarshik v. Sanford*, 142 F.2d 676, 676 (5th Cir. 1944); *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944).

⁴⁴ See, e.g., *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972); see also *Schneekloth v. Bustamonte*, 412 U.S. 218, 261 n.14 (1973) (noting

conditions so deplorable that Congress enacted the Civil Rights of Institutionalized Persons Act in 1976.⁴⁵ This Act authorized the Attorney General to bring suits in federal court on behalf of persons institutionalized by the United States.⁴⁶ The Civil Rights of Institutionalized Persons Act and subsequent litigation resulted in dramatic improvements in prison conditions.⁴⁷

During this influx of § 1983 cases, the Supreme Court made significant holdings that affected the rights of prisoners with mental illness. In *Vitek v. Jones*, the Court declared unconstitutional a state statute that permitted the prison director to transfer a prisoner to a mental hospital for involuntary commitment if a psychologist found the prisoner to be mentally ill and could not be properly treated in prison.⁴⁸ The Supreme Court affirmed the district court's holding, stating that the transfer was "qualitatively different" from the punishment for the crime and required additional due process protections to comply with the Fourteenth Amendment.⁴⁹ Although grounded in due process, this case was important because the Court addressed the issue of persons with mental illness while in custody. In *Estelle v. Gamble*, the Supreme Court acknowledged the common-law tradition that a prison owes a duty to provide medical care to those in custody and stated that failure to do so could "result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency"⁵⁰

While many cases advanced reform of prison conditions and many problems uncovered by prison litigation were addressed, the trend was not unidirectional because the courts became overwhelmed with prison

civil rights prisoner petitions under 42 U.S.C. § 1983 had tripled from 1,072 to 3,348 from 1968 to 1973).

⁴⁵ Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. § 1997 et seq. (Westlaw 2012).

⁴⁶ *Id.*

⁴⁷ The Conference Committee noted that, as a result of litigation in which the Justice Department had participated, "conditions have improved significantly in dozens of institutions across the Nation: . . . barbaric treatment of adult and juvenile prisoners has been curbed; . . . and States facing the prospect of suit by the Attorney General have voluntarily upgraded conditions in their institutions . . . to comply with previously announced constitutional standards." H.R. REP. NO. 96-897, at 9 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.A.A.N. 787, 833.

⁴⁸ *Vitek v. Jones*, 445 U.S. 480 (1980).

⁴⁹ *Id.* at 493-94 ("A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections."). The due process protections included notice, a hearing before an independent decisionmaker, submission of evidence that formed the basis for the determination, and access to assistance for the prisoner. *Id.* at 496-97.

⁵⁰ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (citation omitted).

reform cases.⁵¹ Even though vindication of a prisoner's constitutional rights based on conditions of confinement only became possible in the second half of the twentieth century, the ability to successfully challenge violations of these rights has since been limited by the Supreme Court and Congress.

C. CHANGING DIRECTION: FROM PROMOTING TO RESTRICTING PRISONER LITIGATION

Within twenty years of providing prisoners a method for redress, the Supreme Court and Congress both acted to limit prisoner cases.⁵² The Supreme Court attempted to moderate the amount of prisoner cases in *Turner v. Safley*,⁵³ by declaring, “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”⁵⁴ *Turner* was a significant turning point in prison litigation. By adopting a rational-basis standard of review, the Supreme Court established that courts must show deference toward prison officials and policies when evaluating alleged constitutional violations.⁵⁵ Nearly a decade after *Turner*, Congress also acted to curtail prison cases by passing the Prison Litigation Reform Act of 1995.⁵⁶ This Act promotes *Turner*-style deference to the impact on operations when assessing violations, restricts the injunctive relief a court may grant for constitutional violations based on prison conditions, and requires that any relief given be as narrow as possible while still correcting the violation.⁵⁷ Together, *Turner* and the Prison Litigation

⁵¹ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1692 (2003) (indicating that before the passage of the Prison Reform Litigation Act suits brought by inmates outnumbered non-inmate suits).

⁵² The Court provided a method for redress via § 1983 with *Cooper* in 1964 and restricted redress in *Turner v. Safley* in 1987, whereas the legislature provided redress with the Civil Rights of Institutional Persons Act in 1976 and limited redress with the Prison Litigation Reform Act in 1995. See *Turner v. Safley*, 482 U.S. 78 (1987); 18 U.S.C.A. § 3626 (Westlaw 2012).

⁵³ *Turner*, 482 U.S. 78.

⁵⁴ *Id.* at 89.

⁵⁵ *Id.* (“In our view, such a standard is necessary if ‘prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.’” (quoting *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 128 (1977))).

⁵⁶ 18 U.S.C.A. § 3626 (Westlaw 2012).

⁵⁷ 18 U.S.C.A. § 3626(a)(1)(A) (Westlaw 2012) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”).

Reform Act created substantial impediments for prison condition challenges.

II. THE LEGAL FRAMEWORK FOR EIGHTH AMENDMENT CHALLENGES: THE *ESTELLE* TEST

In addition to *Turner* and the Prison Litigation Reform Act, the Court in *Estelle v. Gamble* established a standard with two distinct hurdles an inmate must overcome to prevail on an Eighth Amendment challenge.⁵⁸ In *Estelle*, the Court created a two-part test to establish a cruel-and-unusual-punishment claim. The test requires that (1) there has been a serious medical need, illness or injury, and (2) the defendant (state actor in claims brought under § 1983) has been deliberately indifferent.⁵⁹

Although the Supreme Court did not define “serious medical need,” several courts utilize the definition provided by the United States Court of Appeals for the Third Circuit in *Monmouth County Correctional Institutional Inmates v. Lanzaro*.⁶⁰ In this post-*Estelle* case, an inmate was prevented from terminating her pregnancy by systemic procedural delays.⁶¹ Based on the principle that a serious medical need is “one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay-person would easily recognize the necessity for a doctor’s attention,” the court held that the delay in access to abortion services constituted deliberate indifference to medical needs.⁶²

Other courts use the definition provided by the United States Court of Appeals for the Ninth Circuit in *McGuckin v. Smith*, where a prisoner brought suit after he failed to receive treatment for a massive herniation of his back for over three years.⁶³ The court held that a serious medical

⁵⁸ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵⁹ *Id.* at 103-04.

⁶⁰ *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (“A medical need is serious . . . if it is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor’s attention.” (internal quotation marks omitted)); see also *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 896-97 (6th Cir. 2004) (same); *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996) (same); *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990) (same).

⁶¹ *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d at 347.

⁶² *Id.*

⁶³ *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (“A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain’ The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a ‘serious’ need for medical treatment.”), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.

need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.⁶⁴ The prisoner's condition was considered severe, and the court stated that "the woefully inadequate medical treatment" may well have been the basis for a valid § 1983 claim.⁶⁵

The second half of the *Estelle* test considers the culpable state of mind of the defendant prison official or doctor.⁶⁶ The Supreme Court adopted the term "deliberate indifference" to classify the type of disregard or denial of serious medical needs, illness or injury of prisoners that violates the Eighth Amendment prohibition against cruel and unusual punishment.⁶⁷ The Court noted that acts or omissions by prison officials must be sufficiently harmful to show a deliberate indifference that offends the standards of decency.⁶⁸ Lower courts uniformly interpreted "deliberate indifference" to be measured under a recklessness standard; however, a split arose over how recklessness was to be determined. Some courts held that if the harm was sufficiently severe, such that it would be apparent to a reasonable person, then subjective knowledge could be imputed to the prison official.⁶⁹ However, other courts held that the recklessness standard required knowledge of the severe condition and the appropriate means to treat the condition, and the

1997); *see also* *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998); *Riddle*, 83 F.3d at 1202.

⁶⁴ *McGuckin*, 974 F.2d at 1059-60.

⁶⁵ *Id.* at 1062-63. The prisoner's claim ultimately failed because he filed suit against a prison medical doctor and a private orthopedic specialist who were not responsible for his care until seven months before he had surgery, and nothing in the record indicated either named defendant had anything to do with delaying treatment. *Id.*

⁶⁶ *Estelle v. Gamble*, 429 U.S. 97, 106-08 (1976).

⁶⁷ *Id.* at 104-05 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under s 1983." (citation and footnotes omitted)).

⁶⁸ *Id.* at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.").

⁶⁹ *Richardson v. Penfold*, 839 F.2d 392, 395 (7th Cir. 1988) ("Similarly, a prison official who acts with deliberate or callous indifference toward inmates violates the due process clause of the fourteenth amendment. A plaintiff can show deliberate indifference by proving that the prison official acted with actual intent or recklessness. A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position.") (citations and internal quotation marks omitted).

refusal or prevention of treatment.⁷⁰ In *Farmer v. Brennan*, the Supreme Court clarified that the recklessness standard is akin to criminal negligence, such that there must be actual, subjective awareness of the risk of harm.⁷¹

After *Turner*, *Estelle*, and the Prison Litigation Reform Act, bringing a successful Eighth Amendment claim is more difficult: the available remedies are narrower, and the process of obtaining redress is more protracted.⁷²

III. PROGRESSION OF “DELIBERATE INDIFFERENCE” ANALYSIS AND THE ABILITY OF PRISONERS WITH MENTAL ILLNESS TO CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT

A. EVOLUTION OF THE *ESTELLE* TEST

Since *Estelle*, several Supreme Court cases have considered challenges to prison conditions and specific harmful acts under 42 U.S.C. § 1983. These noteworthy cases explain the ongoing evolution of the criteria for “deliberate indifference” applied to prisoners’ Eighth Amendment challenges.⁷³

In *Rhodes v. Chapman*, an inmate challenged the practice of double-celling inmates to handle overcrowded prisons and claimed this practice constituted cruel and unusual punishment.⁷⁴ Although the Supreme Court held that the specific conditions in this particular prison did not rise to the level of a constitutional violation, the Court acknowledged that harsh conditions of confinement may constitute cruel and unusual punishment.⁷⁵ Justice Brennan’s concurring opinion went into great detail about the sordid history of prison conditions and the essential role of judicial scrutiny to ameliorate the constitutional violations of such

⁷⁰ *LaMarca v. Turner*, 995 F.2d 1526, 1535-36 (11th Cir. 1993) (“Because the Eighth Amendment requires a subjective standard, to demonstrate an official’s deliberate indifference, a plaintiff must prove that the official possessed knowledge both of the infirm condition and of the means to cure that condition, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant’s failure to prevent it.”) (internal quotation marks omitted).

⁷¹ *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994).

⁷² *See, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011).

⁷³ *Hope v. Pelzer*, 536 U.S. 730 (2002); *Farmer*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Whitley v. Albers*, 475 U.S. 312 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Rhodes v. Chapman*, 452 U.S. 337 (1981).

⁷⁴ *Rhodes*, 452 U.S. at 340.

⁷⁵ *Id.* at 347.

conditions.⁷⁶ *Rhodes* clarified that deliberate indifference could include a failure to address prison conditions.⁷⁷ By recognizing that the Eighth Amendment covers more than specific harmful acts toward prisoners and may include prison conditions,⁷⁸ the Court broadened the umbrella of the deliberate-indifference standard to encompass systemic conditions as well as practices.

Similarly, in *Wilson v. Seiter*, a prisoner brought a § 1983 claim alleging Eighth and Fourteenth Amendment violations because the cumulative conditions of the prison⁷⁹ constituted cruel and unusual punishment.⁸⁰ The prisoner asserted that after he provided notice of the conditions to the defendants,⁸¹ they failed to take remedial action.⁸² The Court modified its holding in *Rhodes* and held that a challenge to prison conditions must prove a deprivation of a specific and identifiable human need.⁸³

The *Wilson* Court also addressed a question that had developed from its holding in *Whitley v. Albers*, in which an Eighth Amendment challenge was brought by a prisoner who was shot by a guard during an attempt to quell a disturbance.⁸⁴ In *Whitley*, the Supreme Court focused on the culpability prong of the *Estelle* test rather than severity of the injury, by considering the situation the official faced when the injury occurred.⁸⁵ The Court held that express intent to inflict pain is not required, but in a situation where prison officials are attempting to restore discipline, there must be a showing of bad faith or malicious conduct for the purpose of causing harm.⁸⁶ The *Wilson* Court also clarified that the “obduracy, wantonness, or intent to cause harm”

⁷⁶ *Id.* at 353-364 (Brennan, J, concurring).

⁷⁷ *Id.* at 347 (majority opinion).

⁷⁸ *Id.*

⁷⁹ *Wilson v. Seiter*, 501 U.S. 294, 296 (1991). The prisoner complained about overcrowding, excessive noise, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing physically and mentally ill inmates with the general prison population. *Id.*

⁸⁰ *Id.*

⁸¹ Defendants were the director of the Department of Rehabilitation and Corrections and the prison warden.

⁸² *Wilson*, 501 U.S. at 296.

⁸³ *Id.* at 304.

⁸⁴ *Whitley v. Albers*, 475 U.S. 312 (1986).

⁸⁵ *Id.* at 320-21.

⁸⁶ *Id.* (“Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.” (internal quotation marks omitted)).

standard used in *Whitley* did not apply to prison condition cases, and the more lenient “deliberate indifference” standard was the proper standard to apply.⁸⁷ Moreover, the Court clarified that a cruel-and-unusual-punishment inquiry was not limited to the objective component, even though *Rhodes* turned on the objective portion of the inquiry.⁸⁸ Thus, a court considering a prisoner’s Eighth Amendment claim must ask whether the alleged wrongdoing was objectively “harmful enough”⁸⁹ to establish a constitutional violation, and whether “the officials act[ed] with a sufficiently culpable state of mind.”⁹⁰

The Court extended *Whitley* in the case *Hudson v. McMillian*, where an inmate brought an Eighth Amendment challenge claiming that a beating he received while in restraints constituted excessive force and cruel and unusual punishment.⁹¹ The Court held that if the injury was not severe, there could still be a viable Eighth Amendment challenge.⁹² Distinguishing *Whitley*, in which the officials were attempting to quell a disturbance, the *Hudson* Court noted that the prisoner was restrained and there were no exigent circumstances requiring the restoration of order.⁹³ However, even using the *Whitley* standard would yield the same conclusion, because the objective component of the inquiry is contextual and responsive to contemporary standards of decency.⁹⁴ “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated,” regardless of the extent of injury sustained.⁹⁵

The harm element from the first prong of the *Estelle* test was broadened to include latent effects of prison conditions in *Helling v. McKinney*, in which a prisoner brought a challenge based on being subjected to second-hand tobacco smoke.⁹⁶ The prisoner claimed that the prison officials were deliberately indifferent to the fact that they were jeopardizing his health, even though he had no current injury.⁹⁷ The Court rejected the contention that only deliberate indifference to “current” serious health problems of inmates is actionable under the

⁸⁷ *Wilson*, 501 U.S. at 302.

⁸⁸ *Id.* at 298.

⁸⁹ *Id.* at 303.

⁹⁰ *Id.* at 298.

⁹¹ *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

⁹² *Id.* at 7.

⁹³ *Id.* at 6-7.

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.* at 9.

⁹⁶ *Helling v. McKinney*, 509 U.S. 25, 27 (1993). The prisoner was assigned to a cell with another inmate who smoked five packs of cigarettes a day. *Id.*

⁹⁷ *Id.* at 27-28.

Eighth Amendment.⁹⁸ Although the Court remanded to permit the inmate an opportunity to prove his claim, it noted that the objective and subjective components of deliberate indifference would be difficult to establish.⁹⁹ If a person has been exposed to a risk of harm that she or he alleges is cruel and unusual punishment, the court must “assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”¹⁰⁰ For the subjective element, the Court noted that deliberate indifference “should be determined in light of the prison authorities’ current attitudes and conduct” to demonstrate that prison authorities are ignoring the possible dangers posed by a particular condition.¹⁰¹

In *Farmer v. Brennan*, the Supreme Court resolved a conflict that had developed among the circuits when applying the deliberate-indifference standard.¹⁰² A transwoman with breast implants and taking hormones was placed with the male general population, where she was allegedly raped and beaten in her cell by another inmate.¹⁰³ She claimed that the officials were deliberately indifferent to her safety because of their knowledge that she would be particularly vulnerable to sexual attacks.¹⁰⁴ The Court held that because the Eighth Amendment prohibits the infliction of cruel and unusual “punishment,” the classification of deliberate indifference necessitates a subjective standard in order to determine if an act or omission constitutes punishment.¹⁰⁵ Although the Court acknowledged that being violently assaulted in prison is not “part of the penalty that criminal offenders pay for their offenses against society,” without subjective knowledge (akin to criminal recklessness) there could not be a finding of deliberate indifference.¹⁰⁶ The Court went on to explain that the culpability requirement necessitates that the official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be

⁹⁸ *Id.* at 34.

⁹⁹ *Id.* at 36-37.

¹⁰⁰ *Id.* at 36.

¹⁰¹ *Id.* at 36-37.

¹⁰² *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); compare *Young v. Quinlan*, 960 F.2d 351, 360-61 (3d Cir. 1992) (holding deliberate indifference occurs when an official “knows or should have known of a sufficiently serious danger to an inmate”), with *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (holding that “deliberate indifference” requires a “subjective standard of recklessness”).

¹⁰³ *Farmer*, 511 U.S. at 829-31.

¹⁰⁴ *Id.* at 831.

¹⁰⁵ *Id.* at 837.

¹⁰⁶ *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)); *Farmer*, 511 U.S. at 837.

drawn that a substantial risk of serious harm exists, and he must also draw the inference.”¹⁰⁷

In *Hope v. Pelzer*, an inmate brought suit against prison guards, alleging that his Eighth and Fourteenth Amendment rights were violated when he was handcuffed to a hitching post while in leg restraints and left there for several hours without regular water or bathroom breaks.¹⁰⁸ The Court noted this was not an emergency situation, as in *Whitley*, and despite this, the prison officials “knowingly subjected him to a substantial risk of physical harm.”¹⁰⁹ Applying the subjective standard elucidated in *Farmer*, the Court explained that “[w]e may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.”¹¹⁰ Unfortunately, the Court did not indicate why the facts were obvious and sufficient to establish subjective knowledge, a point noted by the dissenting opinion.¹¹¹

Through case law, the Supreme Court has clarified that a viable claim may be based on prison officials’ deliberate indifference to both current conditions of confinement and the risk of future harm. However, because *Farmer* requires subjective knowledge of the condition or risk of harm, or harm so obvious that subjective knowledge can be imputed, persons with mental illness are rarely able to establish deliberate indifference despite the severity of their suffering.¹¹²

B. NECESSITY OF PROVIDING TREATMENT VERSUS RIGHT TO REFUSE TREATMENT

In the 1970s, several lower courts held that prisons have a duty to provide access to psychiatric treatment.¹¹³ However, in the post-*Farmer* and post-Prison Litigation Reform Act era, few challenges have produced a vindication of rights for persons with mental illness.

¹⁰⁷ *Id.* at 837.

¹⁰⁸ *Hope v. Pelzer*, 536 U.S. 730 (2002).

¹⁰⁹ *Id.* at 738.

¹¹⁰ *Id.* (citing *Farmer*, 511 U.S. at 842).

¹¹¹ *Hope*, 536 U.S. at 751 (Thomas, J., dissenting) (“What is ‘obvious,’ however, is that the Court’s explanation of how respondents violated the Eighth Amendment is woefully incomplete.”).

¹¹² See Lori A. Marschke, Comment, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 523-28 (2004).

¹¹³ See *Horn v. Madison Cnty. Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994) (“[P]sychological needs may constitute serious medical needs.”); *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (finding that failure to provide necessary psychological treatment to inmates with serious mental or emotional disturbances states a claim of deliberate indifference); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (stating that the law recognizes no distinction between physical and psychological medical services); see also *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (“A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills.”).

Additionally, many courts struggle with problems that arise when an inmate with mental illness asserts the constitutional right to refuse treatment.¹¹⁴

As high as the bar is for stating an Eighth Amendment claim based on improper medical care, the bar is even higher for persons with mental illness.¹¹⁵ There are no established criteria to determine what constitutes adequate mental health care, including mental health evaluations, which presents a significant difficulty in access to treatment.¹¹⁶ The Seventh Circuit determined that while measures such as professional health or suicide-risk evaluations after initial screening are desirable, they are not mandatory to establish constitutionally acceptable mental health care policies.¹¹⁷ As a result, access to a trained professional—who may be the only one to find that a serious mental health need is sufficiently obvious—is blocked because consistent requirements for regular evaluations have not been established.

Moreover, there is a natural tension between providing inmates with their mental health needs and their right to refuse treatment. Even when inmates have access to adequate care, often the result is to prescribe medications rather than to provide therapy or other forms of treatment.¹¹⁸ Inmates have the right to refuse medications, but that right may be overcome (and medication forced) if there is a safety or security risk.¹¹⁹

¹¹⁴ *Washington v. Harper*, 494 U.S. 210, 223 (1990).

¹¹⁵ See Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. at 523-28.

¹¹⁶ Fred Cohen, *Captives' Legal Right to Mental Health Care*, 17 LAW & PSYCHOL. REV. 1, 8 (1993) (“Without some anterior duty to diagnose—screen or classify are acceptable near-synonyms—then the right to care is a virtual nullity.”).

¹¹⁷ See *Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 532 (7th Cir. 2000). *But see Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980), *aff'd in part, rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982) (outlining six requirements to meet the minimum standard of constitutionally adequate care as follows: (1) The prison must have a systematic program of screenings and evaluations of prisoners in order to identify those who need mental health treatment; (2) Treatment for a prisoner must entail more than just segregation and close supervision; (3) The prison must employ enough trained mental health professionals to be able to identify and treat those suffering from serious mental disorders in an individualized manner; (4) Accurate, complete, and confidential records of the mental health treatment process must be maintained; (5) It is an unacceptable method of treatment to prescribe and administer “behavior-altering medications in dangerous amounts, by dangerous methods, or without acceptable supervision and periodic evaluation;” and (6) As a necessary component of any mental health treatment program, the prison must have a basic program for the identification, treatment, and supervision of suicidal prisoners).

¹¹⁸ See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 8-9 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>; HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1, 115-17 (2003), available at www.hrw.org/sites/default/files/reports/usa1003.pdf.

¹¹⁹ Compare *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990), with *Turner v. Safley*, 482 U.S. 78, 89 (1987), and *Washington v. Harper*, 494 U.S. 210, 223 (1990).

In *Washington v. Harper*, the Court concluded that when safety or security is in jeopardy, a state law authorizing involuntary treatment amounted to a constitutionally permissible “accommodation between an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others.”¹²⁰ In *Riggins v. Nevada*, the Court repeated that an individual has a constitutionally protected liberty “interest in avoiding involuntary administration of antipsychotic drugs,” which only an “essential” or “overriding” state interest might overcome.¹²¹

Although the Supreme Court has consistently held that prison officials may forcibly treat a mentally ill inmate with antipsychotic drugs only when “the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest,”¹²² the Court’s holding in *Sell v. United States* clarifies the procedural safeguards that balance competing interests between the state and the inmate when danger to self or others is not the case.¹²³ In *Sell*, the Court revisited the issue of a person’s right to refuse treatment while in custody and when that right must yield.¹²⁴ Mr. Sell was ordered by the magistrate to be hospitalized for treatment after a competency hearing that resulted in a finding that Sell was “mentally incompetent to stand trial.”¹²⁵ The purpose of the treatment was to determine whether there was a substantial probability that Sell would attain the capacity for his trial to proceed.¹²⁶ While in custody, the medical center staff recommended that Sell take antipsychotic medication but he refused.¹²⁷ Medical center authorities decided to allow involuntary medication, which Sell challenged in court.¹²⁸ The Court held that when an inmate does not pose a danger, the right to refuse treatment provides significant protections; the Court established the following guidelines:

First, a court must find that *important* governmental interests are at stake. . . . Second, the court must conclude that involuntary medication will *significantly further* those concomitant state

¹²⁰ *Harper*, 494 U.S. at 236.

¹²¹ *Riggins v. Nevada*, 504 U.S. 127, 134, 135 (1992).

¹²² *Harper*, 494 U.S. at 227.

¹²³ *Sell v. United States*, 539 U.S. 166, 169 (2003).

¹²⁴ *Id.*

¹²⁵ *Id.* at 171.

¹²⁶ *Id.* at 170-71.

¹²⁷ *Id.* at 171.

¹²⁸ *Id.* at 172.

interests. . . . Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. . . . Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.¹²⁹

The Court distinguished between when it is justifiable to involuntarily medicate for purposes related to the inmate's dangerousness and when refusal to take drugs puts the inmate's health gravely at risk.¹³⁰

However, the Court recently denied certiorari for an inmate who claimed prison officials imposed sanctions because he refused his HIV medications in protest against being transferred to a particular prison facility.¹³¹ Subsequently, he was subjected to hard labor in 100-degree heat despite repeated requests for lighter duty more appropriate considering his medical condition.¹³² Thus, the question remains unresolved whether there can be an Eighth Amendment challenge for punitive reactions to prisoners refusing treatment.¹³³

For persons with mental illness, much of the care is dependent on an accurate diagnosis, but symptoms may present differently at times, and many diagnoses have similar or overlapping features with other diagnoses.¹³⁴ Furthermore, persons with mental illness often have varying diagnoses from different clinical providers.¹³⁵ However, clinicians who are trained in recognizing and diagnosing mental illness are better able to identify signs and symptoms that require acute care.¹³⁶ Unlike prison officials who have no diagnostic training, medical professionals would have the requisite knowledge to satisfy the subjective prong of the deliberate-indifference test.

¹²⁹ *Id.* at 180-81.

¹³⁰ *Id.* at 181-82.

¹³¹ *Pitre v. Cain*, 131 S. Ct. 8 (2010).

¹³² *Id.* at 8 (Sotomayor, J., dissenting from denial of certiorari).

¹³³ *See id.* at 9.

¹³⁴ M. Katherine Shear et al., *Diagnosis of Nonpsychotic Patients in Community Clinics*, 157 AM. J. PSYCHIATRY 581, 581-87 (2000); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL (4th ed. 2000).

¹³⁵ Shear et al., *Diagnosis of Nonpsychotic Patients in Community Clinics*, 157 AM. J. PSYCHIATRY at 581.

¹³⁶ HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1, 103 (2003), available at www.hrw.org/sites/default/files/reports/usa1003.pdf.

If an inmate cannot rely on diagnosis or treatment because she or he lacks access to mental health professionals, the only option remaining to prove deliberate indifference is to establish that the suffering is so obvious a reasonable person could easily recognize the need for medical attention.¹³⁷ Unfortunately, for persons with mental illness, there may be no easily discernible symptom for the layperson to recognize even when the internal suffering is quite severe.¹³⁸ Given the difficulty for an untrained person to detect mental illness, as compared to a physical illness, a court may determine that a prison official is not deliberately indifferent to a prisoner's serious mental health need because that need is not sufficiently obvious to the prison official.¹³⁹ Additionally, prison security personnel would not easily detect mental illness because they are not adequately trained to recognize the symptoms that require psychiatric care.¹⁴⁰ The result of this inability of prison officials to detect mental suffering is that inmates may have severe suffering without the ability to prove deliberate indifference.

C. IMPACT OF *FARMER*'S SUBJECTIVE STANDARD ON THE OPERATION OF PRISONS

The Supreme Court in *Farmer* indicated that it was not concerned that the subjective standard would promote indifference to the health and safety needs of inmates.¹⁴¹ However, since *Farmer*, very few prison officials have been held liable under § 1983 despite deplorable conditions and treatment.¹⁴² This result raises the question: Does *Farmer*'s subjective standard promote indifference?¹⁴³ Several scholars who have addressed this question recommend abandoning *Farmer*'s

¹³⁷ See *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990).

¹³⁸ See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS at 75-76.

¹³⁹ See Christy P. Johnson, *Mental Health Care Policies in Jail Systems: Suicide and the Eighth Amendment*, 35 U.C. DAVIS L. REV. 1227, 1251 (2002) ("Courts may reason that, because mental illness affects the mind rather than the body, a layperson may not be able to identify a mental illness.").

¹⁴⁰ HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS at 76; see also *Estelle v. Gamble*, 429 U.S. 97, 110 n.3 (1976).

¹⁴¹ *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("We doubt that a subjective approach will present prison officials with any serious motivation to take refuge in the zone between ignorance of obvious risks and actual knowledge of risks." (internal quotation marks omitted)).

¹⁴² See STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES, A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE 1, 19 (2006), available at www.justdetention.org/pdf/in_the_shadows.pdf ("[T]he standard established under *Farmer v. Brennan* is so difficult to meet that few plaintiffs have been successful.").

¹⁴³ See *id.* (stating that *Farmer*'s subjective "standard also creates a perverse incentive for prison officials to deliberately ignore what is happening in their facilities").

subjective standard in favor of an objective standard.¹⁴⁴ However, this proposal is unworkable for persons with mental illness, because clinical assessment is subjective. The very issues that make deliberate indifference difficult to prove under a subjective standard will not be alleviated for persons with mental illness by using an objective standard. There are great discrepancies among clinicians in assessment and diagnoses, because the mental health assessment includes current symptoms that manifest differently for different people.¹⁴⁵ Therefore, an objective standard of what a reasonable person would do is, in effect, more difficult to apply than a subjective standard of what was actually known.

However, despite the rational justification for a subjective standard to determine deliberate indifference, in practice, prison officials untrained in mental assessments must decide whom to refer to clinicians.¹⁴⁶ For the subjective standard of *Farmer* to have some practical meaning as it relates to persons with mental illness, there must be some mechanism in place to ensure access to treatment. Necessity of medical treatment can best be determined by medical professionals, not prison officials. Given that the nature of confinement prevents inmates from caring for themselves, and that prison officials cannot be deliberately indifferent to mental conditions they cannot detect, prison staff needs to be adequately trained to recognize symptoms that require referral for psychiatric treatment.¹⁴⁷

¹⁴⁴ See, e.g., Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 711-15 (2010); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 948-54 (2009); Lori A. Marschke, Comment, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 528-32 (2004).

¹⁴⁵ PAULA T. TRZEPACZ & ROBERT W. BAKER, THE PSYCHIATRIC MENTAL STATUS EXAMINATION (1993).

¹⁴⁶ See Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. at 523; see also *Estelle v. Gamble*, 429 U.S. 97, 110 n.3 (1976) (Stevens, J., dissenting) ("When ill, the prisoner's point of contact with a prison's health care program is the sick-call line. Access may be barred by a guard, who refuses to give the convict a hospital pass out of whimsy or prejudice, or in light of a history of undiagnosed complaints.") (quoting Health Law Project, Univ. of Pa., Health Care and Conditions in Pa's State Prisons, in AM. BAR ASS'N COMM'N ON CORR. FACILITIES AND SERVS., MEDICAL AND HEALTH CARE IN JAILS, PRISONS, AND OTHER CORRECTIONAL FACILITIES: A COMPILATION OF STANDARDS AND MATERIALS 71, 81-82 (1974)).

¹⁴⁷ See HOLLY HILLS ET AL., NATIONAL INSTITUTE OF CORRECTIONS, EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 6 (2004), available at <http://static.nicic.gov/Library/018604.pdf> ("Illnesses such as schizophrenia, schizoaffective disorder, and major depression may affect inmates' ability to care for themselves and to comply with certain orders or procedures. People with major depression or bipolar disorder may exhibit aggression or irritability. Paranoia may result in an inmate's failure to relate well to others.

IV. PROPOSAL TO AMELIORATE BARRIERS PERSONS WITH MENTAL ILLNESS FACE IN REDRESSING SEVERE AND UNTREATED MENTAL SUFFERING WHILE IN CUSTODY

A. TRACKING MENTAL HEALTH

From the initial interaction with police prior to arrest through entry into prison custody, there are numerous opportunities to identify behavior that is indicative of mental illness. Often, police make a field assessment at the time of the arrest that indicates the presence of symptoms of mental health problems.¹⁴⁸ Some police, trained to provide crisis intervention services, act as liaisons with local mental health services rather than making arrests. This process is known as diversion.¹⁴⁹ Additionally, many states authorize pre-arraignment mental health examinations to determine if diversion is preferable.¹⁵⁰ Once a person is in police custody, for the purposes of arraignment, the magistrate may consider the person's mental health when determining bail.¹⁵¹ Individuals in jail awaiting trial may exhibit signs of mental illness after confinement. Mental health assessments can also occur before trial when either the prosecutor or defense attorney requests a competency hearing.¹⁵² During trial, mental health may be used to argue insufficient culpability, as an affirmative defense, and as mitigating evidence at the sentencing phase.¹⁵³ Thus, throughout the procedural phases of a criminal case, an individual's mental health problems can be,

People with schizophrenia may hear voices and have other problems that interfere with their ability to follow directions and behave as expected. In addition, mental illness can evoke fears, hostile reactions, and negative responses from other inmates and staff. Several studies describe inmates with mental disorders as having a disruptive effect in a prison environment.”)

¹⁴⁸ See MELISSA REULAND & JASON CHENEY, GAINS TECHNICAL ASSISTANCE & POLICY ANALYSIS CTR. FOR JAIL DIVERSION, ENHANCING SUCCESS OF POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS (2005), available at www.nami.org/Template.cfm?Section=cit2&template=/ContentManagement/ContentDisplay.cfm&ContentID=65062; Henry J. Steadman et al., *A National Survey of Jail Diversion Programs for Mentally Ill Detainees*, 45 HOSP. & COMMUNITY PSYCHIATRY 1109, 1109-13 (1994).

¹⁴⁹ Officers divert offenders with mental illness from the criminal justice system to community-based treatment. See REULAND & CHENEY, ENHANCING SUCCESS OF POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS at 33.

¹⁵⁰ Rick Ruddell, *Jail Interventions for Inmates with Mental Illnesses*, 12 J. CORRECTIONAL HEALTH CARE 118, 118-31 (2006).

¹⁵¹ Amy Watson et al., *Mental Health Courts and the Complex Issue of Mentally Ill Offenders*, 52 PSYCHIATRIC SERVICES 477, 477-81 (2001).

¹⁵² NORMAN POYTHRESS JR. ET AL., 15 ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES (2002).

¹⁵³ See, e.g., MODEL PENAL CODE § 4.01 et seq.

and often are, identified, and this information should be passed on to prison officials.

A formal mechanism should be established to ensure that all information relating to an inmate's mental health is collected and transmitted to the prison. Whenever mental health problems have been observed prior to or upon entry into prison custody, the inmate should be provided a mandatory comprehensive psychiatric evaluation by a psychiatrist, psychologist, or licensed clinician. The evaluator should have access to all records and reports produced by law enforcement and court-ordered evaluations, as well as any relevant prior medical records.¹⁵⁴ As part of the evaluation, the clinician must create a treatment program and notify prison staff of particular symptoms that indicate need for immediate treatment. Additionally, medical staff must regularly monitor individuals with mental health problems to ensure the treatment provided is adequate and effective. Medical staff should also provide prison officials with information related to the side effects of medication and symptoms of medicine toxicity.

B. MANDATORY AND UNIFORM TRAINING FOR PRISON STAFF

In order for treatment to be both available to and beneficial for persons with mental illness in custody, prison staff must be trained to identify symptoms that require acute care. Additionally, in cases in which symptoms of mental illness are not observed prior to entry into

¹⁵⁴ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. 45 C.F.R. § 164.512 (Westlaw 2012) is implicated by disclosure of medical information (by a health plan, a health-care clearinghouse or a health-care provider who transmits any health information in electronic form in connection with a covered transaction); however, 45 C.F.R. § 164.512(e), (f), (j), and (k) provide that disclosures to certain law enforcement officials, courts, and government agencies may be permissible. 45 C.F.R. § 164.512(k)(5) in particular permits disclosures to correctional institutions and in other law enforcement custodial situations. 45 C.F.R. § 164.512 (k)(5) provides:

(i) Permitted disclosures. A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual protected health information about such inmate or individual, if the correctional institution or such law enforcement official represents that such protected health information is necessary for: (A) The provision of health care to such individuals; (B) The health and safety of such individual or other inmates; (C) The health and safety of the officers or employees of or others at the correctional institution; (D) The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another; (E) Law enforcement on the premises of the correctional institution; and (F) The administration and maintenance of the safety, security, and good order of the correctional institution. (ii) Permitted uses. A covered entity that is a correctional institution may use protected health information of individuals who are inmates for any purpose for which such protected health information may be disclosed.

45 C.F.R. § 164.512 (k)(5) (Westlaw 2012).

custody but emerge after a period of time in prison, staff must have sufficient training to identify symptoms and facilitate referrals for appropriate evaluations and necessary treatment. Because prison officials observe and monitor prisoners for security purposes, these officials have been termed the “gate-keepers” for inmate access to mental health services.¹⁵⁵ Inmates may not be granted access to necessary treatment if the officials do not recognize the need.¹⁵⁶ Currently, there are no uniform mandatory minimum requirements for mental illness training throughout the prison system, and the result is inconsistent and ineffective training.¹⁵⁷ A national training standard or certification requirement is needed for all prison officials who interact with the prison population.¹⁵⁸

The training required should be designed to provide officials with sufficient knowledge of mental illness so that the subjective standard of *Farmer* has practical meaning as it relates to persons with mental illness. The minimum standard for all prison staff should include training on psychosis, recognizing signs of mental illness in younger prisoners ranging in age from eighteen to twenty-five,¹⁵⁹ and recognizing

¹⁵⁵ See Lori A. Marschke, Comment, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 523 (2004); see also *Estelle v. Gamble*, 429 U.S. 97, 110 n.3 (1976).

¹⁵⁶ See Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. at 536-39.

¹⁵⁷ See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1, 76 (2003), available at www.hrw.org/sites/default/files/reports/usa1003.pdf. Currently, mental-health training for security staff is lacking in many states, and in 2001, ten states reported not providing any training at all. A 2001 report by the National Institute of Corrections revealed that “[t]en prison systems claimed to include roughly four hours of mental health classes in their basic training package for new correctional officers, thirteen admitted to providing fewer than four hours, and only seven stated that they provided more than four hours of training.” NATIONAL INSTITUTE OF CORRECTIONS, PROVISION OF MENTAL HEALTH CARE IN PRISONS 9 (2001), available at <http://static.nicic.gov/Library/016724.pdf>; see also MIKI VOHRYZEK-BOLDEN, OVERVIEW OF SELECTED STATES’ ACADEMY AND IN-SERVICE TRAINING FOR ADULT AND JUVENILE CORRECTIONAL EMPLOYEES 53-61, tbl.9a (1999). California provides a three-hour course on “unusual inmate behavior.” No other state reported a similar course. Ohio and Tennessee each offered a course, lasting two and three hours, respectively, titled “managing manipulative inmate behavior.” Arizona, Nebraska, and Nevada provided officers with a course titled “con games.” Tennessee offered a three and a half-hour course in “psychological testing.” Under courses on health and welfare, only eight states—Arizona, Georgia, Hawaii, Michigan, New Mexico, Ohio, Pennsylvania, and Utah—offered courses specifically on “mental health issues/special needs inmates.” Aside from Michigan offering sixteen hours of training in this area, all other states ranged from between one hour and forty-five minutes to six hours.

¹⁵⁸ See, e.g., the National Institute of Corrections website, <http://nicic.gov/AboutTraining>, for training opportunities for local, state and federal corrections staff.

¹⁵⁹ For the majority of mental illnesses, onset occurs between the ages of eighteen and twenty-five. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL (4th ed. 2000).

symptoms of emergent mental distress among prisoners not previously identified as mentally ill.

C. MANDATORY REFERRALS

Whenever an inmate shows symptoms of mental distress, prison officials should be required to automatically refer the inmate to a trained clinician. Mandatory referrals would remove the need for prison officials to make assessments themselves and would safeguard and insulate officials from liability for deliberate-indifference claims. Prison officials would be subjected to the possibility of liability only if they refuse to comply with the mandatory referral protocol. Clinicians would be able to make appropriate assessments, including testing for malingering,¹⁶⁰ and to provide treatment plans that serve the needs of the inmates. Mandatory referrals also would safeguard inmates' right to refuse treatment. If an inmate refuses medication, the clinician can make the assessment of whether the inmate poses a danger to himself or others. When an inmate does not pose a threat the clinician must comply with the criteria set forth in *Sell*.¹⁶¹ By following mandatory referral protocols, prison officials would be safeguarded from liability, and inmates would be provided constitutional protections. Medical staff would be fully empowered to assess medical necessity, and prison officials would be able to maintain order without fear of exposing themselves to liability.

CONCLUSION

The number of persons with mental health problems in prisons and jails is staggering. Penal institutions have become *de facto* institutions for the treatment of persons with mental illness.¹⁶² Whenever an individual is deprived of liberty by the state and can no longer provide for his or her own basic needs, the state is obligated to provide necessary care. For persons with mental illness, basic care includes access to mental health treatment. Because failing to provide necessary care violates the Cruel and Unusual Punishment Clause of the Eighth

¹⁶⁰ Malingering is the intentional fabrication or gross exaggeration of physical or psychological symptoms in an effort to achieve a goal or avoid a punishment. *See id.*

¹⁶¹ *Sell v. United States*, 539 U.S. 166, 180-81 (2003).

¹⁶² *See* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1 (2003), available at www.hrw.org/sites/default/files/reports/usa1003.pdf ("In the United States, there are three times more mentally ill people in prisons than in mental health hospitals, and prisoners have rates of mental illness that are two to four times greater than the rates of members of the general public.").

Amendment, there must be mechanisms in place to ensure that adequate treatment is provided while protecting individual rights.

The Supreme Court has determined that proof of a deprivation of a constitutional right resulting from deliberate indifference to a serious medical need requires a subjective awareness of the risk of harm.¹⁶³ In order for this subjective standard to have any practical meaning for persons with mental illness, there must be mandatory psychiatric evaluations for inmates with a history of mental illness and appropriate treatment programs designed to accommodate their medical condition. Prison officials should be provided standardized training in psychosis, should be provided necessary information from clinical staff about side effects of individual treatment programs, and should automatically refer any inmate exhibiting signs of mental distress for clinical assessment and treatment. These proposals would ensure inmates access to treatment while protecting their right to refuse treatment. Making referral mandatory would relieve prison officials from making pseudo-clinical assessments to determine if referral is necessary and protect the safety of both inmates and prison officials. Unless an official fails to make the mandatory referral, she or he will have provided access to treatment, thereby establishing affirmative proof that she or he is not indifferent to a serious medical need. Ultimately, these proposed changes would protect persons with mental illness from cruel and unusual punishment by establishing procedures to mitigate the invisibility of their illness while insulating prison officials from liability on inmate claims of deliberate indifference. Increasing access to diagnosis and treatment would diminish unintended suffering. As a final protective mechanism, if a person in custody needs to seek redress from the courts, these proposals would reduce some of the barriers that inmates with mental illness face in challenging constitutional violations.

¹⁶³ Farmer v. Brennan, 511 U.S. 825, 826 (1994).