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## COMMENT

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### CRUEL AND UNUSUAL CONSTRUCTION: THE EIGHTH AMENDMENT AS A LIMIT ON BUILDING PRISONS ON TOXIC WASTE SITES

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*Over the last four decades, the United States has witnessed the emergence of a leviathan prison industrial complex. Eager to restore stagnating economies previously driven by coal-mining operations, many rural communities sought to take advantage of this prison-building boom through bids for facility construction contracts. As a result, a startling number of prisons have been built on active and former coal mines, coal ash dumps, and other environmentally hazardous locations. Long-term confinement in facilities located in, on, and near such locations poses severe and demonstrable health risks to the inmate populations through exposure to polluted air and water twenty-four hours a day, seven days a week, for the duration of their sentences.*

*This Comment examines the doctrinal promise of a lawsuit to enjoin the construction of prisons on toxic waste sites based on the Eighth Amendment, before inmates are exposed to dangerous and sometimes fatal living conditions. Specifically, it asks whether planning to build a prison in a location bearing environmental risks known to cause serious illness and death constitutes cruel and unusual punishment. Despite certain obstacles, this Comment contends that the Supreme Court's conditions-of-confinement jurisprudence bears the weight of such a claim. Due in*

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large part to the tireless efforts of prisoners' rights organizations and activists, there is ample evidence demonstrating that inmates confined in facilities on or around toxic waste sites are developing exposure-related illnesses at alarming rates. Accordingly, planning to build a prison in a location with identical risks raises serious concerns under the Eighth Amendment.

The import of this situation was perhaps best articulated by the Human Rights Defense Center, a prisoners' rights organization actively engaged in putting an end to this disturbing trend: "If we can recognize the problem with forcing people to live in close proximity to toxic and hazardous environmental conditions, then why are we ignoring prisoners who are forced to live in detention facilities impacted by such conditions?" This Comment seeks not only to recognize the problem with forcing people to live in such conditions, but also to engage with a potential, albeit imperfect, solution.

INTRODUCTION .....	743
I. THE PROBLEM: PRISONS IN UNSAFE LOCATIONS .....	746
A. <i>The State Correctional Institution at Fayette (SCI Fayette),         (LaBelle, Pennsylvania)</i> .....	748
B. <i>Forthcoming: United States Penitentiary Letcher         (USP Letcher), (Roxana, Kentucky)</i> .....	748
II. CRUEL AND UNUSUAL PRISON CONDITIONS: THE CASE LAW ...	750
A. <i>Development of the Objective and Subjective Requirements</i> .....	752
B. <i>Future Harm and Deliberate Indifference</i> .....	755
1. <i>Helling: Exposure to Unsafe Conditions</i> .....	755
2. <i>Farmer: Reconciling Wilson with Hutto and Rhodes</i> .....	756
C. <i>Brown v. Plata: System-Wide Violations</i> .....	758
III. APPLYING THE LEGAL FRAMEWORK .....	762
A. <i>Objective Requirement: The Evidence</i> .....	764
1. <i>SCI Fayette</i> .....	764
2. <i>Letcher County</i> .....	767
B. <i>Subjective Test: Deliberately Indifferent Design</i> .....	769
1. <i>SCI Fayette</i> .....	769
2. <i>Letcher County</i> .....	770
3. <i>Subjectivity and Prospective Relief: An Uneasy Fit</i> .....	771
IV. LIMITATIONS AND SOLUTIONS .....	773
A. <i>Federal Courts: The PLRA and Justiciability</i> .....	773
1. <i>Standing and Ripeness: Limits on Entry</i> .....	773
2. <i>The PLRA: Limits on Remedies</i> .....	777
B. <i>State Courts: A Solution Through Subsidiarity</i> .....	779
CONCLUSION .....	782

“When the prison gates slam behind an inmate, he does not 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; his yearning for self-respect does not end; nor is his quest for self-realization concluded.”<sup>1</sup>

## INTRODUCTION

The story of mass incarceration in America is not a new one.<sup>2</sup> Over the last four decades, the number of incarcerated individuals in the United States has risen from approximately 300,000 to more than two million,<sup>3</sup> constituting the highest incarceration rate among “countries comparable to the United States.”<sup>4</sup> By the time this figure peaked in the late 2000s,<sup>5</sup> it was well established that prison overcrowding had grown to become a problem of constitutional

<sup>1</sup> *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring).

<sup>2</sup> While it is commonly understood that the United States is “in the midst of the largest criminal justice experiment ever undertaken,” the origin, function, and normative appraisals of this phenomenon are hotly contested. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 169 (2013). Compare BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* 170-74 (2008) (concluding that critics’ concerns about the prison “buildup” were overstated and that prison conditions actually improved to meet the needs of the growing incarcerated population), with MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) (arguing that society “label[s] people of color ‘criminals’” as a proxy for racial discrimination because “it is no longer socially permissible to use race, explicitly”), and JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* 6 (2014) (attributing overcrowding to arrest and plea bargain policies).

<sup>3</sup> See RYAN S. KING ET AL., *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* 1 (2005) (“[T]he number of people in prisons and jails [increased] from 330,000 in 1972 to 2.1 million [in 2005].”). The Bureau of Justice Statistics (BJS) estimates that the total incarcerated population in the United States in 2011 was 2,239,800. LAUREN E. GLAZE & ERIKA PARKS, *BUREAU OF JUSTICE STATISTICS, NCJ 239972, CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2011, at 3 (2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf> [<https://perma.cc/4C5A-58SA>]. The precise figure varies depending on how “incarcerated” is defined. BJS’s definition, for example, “[i]ncludes local jail inmates and prisoners held in the custody of state or federal prisons or privately operated facilities.” *Id.* at 3 tbl.2.

<sup>4</sup> See Tyjen Tsai & Paola Scommegna, *U.S. Has World’s Highest Incarceration Rate*, *POPULATION REFERENCE BUREAU* (Aug. 2012), <http://www.prb.org/Publications/Articles/2012/us-incarceration.aspx> [<https://perma.cc/3W6W-7T8T>] (noting that while “the natural rate of incarceration for countries comparable to the United States tends to stay around 100 prisoners per 100,000 [residents][,] [t]he U.S. rate is 500 prisoners per 100,000 residents . . .”); see also ROY WALMSLEY, *WORLD PRISON BRIEF, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2* (11th ed. 2016) (counting the United States among “[t]he countries with the highest prison population rate,” with 698 prisoners per 100,000 people). The only country with a higher prison population rate is Seychelles, with 799 prisoners per 100,000 people. *Id.* However, with a total population of only 93,186, Seychelles is not a country comparable to the United States, which has a population of 323,995,528. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119r-ank.html> [<https://perma.cc/C9Y2-7TF4>] (last updated July 2016).

<sup>5</sup> *THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS* 1 (2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/3EVG-Q4ZQ>].

proportions—specifically, a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>6</sup>

To keep up with surging inmate populations, an unprecedented number of prisons have been constructed over the past thirty-five years and “[f]or a time in the mid-1990s, . . . a new U.S. prison opened every 15 days on average.”<sup>7</sup> In particular, formerly coal-dependent rural communities began recruiting prison facilities in the hopes that construction and subsequent operations would jumpstart waning economies.<sup>8</sup> While prison-based development is not by any means guaranteed to generate economic value,<sup>9</sup> this Comment is concerned with a disturbing pattern that has emerged as a result of such attempts at economic development: prisons are being built on environmentally unsound lands, bearing potentially lethal health effects for inmates.<sup>10</sup> In a letter to the Environmental Protection Agency (EPA), one prisoners’ rights organization

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6 U.S. CONST. amend. VIII. By the early 1980s, courts had “repeatedly characterized crowding as an unconstitutional condition of confinement.” Peter Finn, *Judicial Responses to Prison Crowding*, 67 JUDICATURE 318, 321 (1984). Accordingly, “31 states were under court order to remedy crowded conditions” by the end of 1982. *Id.*

7 SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, ECONOMIC IMPACTS OF PRISON GROWTH 15 (2010); *see also id.* (“The federal government, states, and localities have financed and built hundreds of new prisons during the past three decades in what may be one of the more concerted public works projects in recent history.”).

8 *See* Robert C. Turner & David Thayer, *Yes in My Backyard! Why Do Rural Communities Use Prison Based Economic Development Strategies?* 2 (undated) (unpublished manuscript), [http://www.skidmore.edu/~bturner/Prisons%20ED\\_strategy.pdf](http://www.skidmore.edu/~bturner/Prisons%20ED_strategy.pdf) [<https://perma.cc/JKL3-DWV5>] (“In the 1990s, rural America experienced a dramatic prison-building boom, with 245 prisons opening in 212 of the nation’s 2,290 rural counties . . .”); *id.* at 3 (“The unlikely emergence of prisons as a rural economic development strategy is the product of the convergence of two seemingly unrelated trends: the economic downturn in rural America and the dramatic increase in the U.S. prison population.”); *see also* Eric Markowitz, *Poison Prison: Is Toxic Dust Sickening Inmates Locked Up in Coal Country?*, PRISON LEGAL NEWS (May 27, 2015), <https://www.prisonlegalnews.org/news/2015/may/27/poison-prison-toxic-dust-sickening-inmates-locked-coal-country/> [<https://perma.cc/FAA9-RGE6>] (“[T]here’s a reason former coal towns welcome prisons: money . . . . Affluent towns almost never allow prisons to be built near residents. But coal towns like LaBelle, where the per capita income is \$18,797, are more open to the idea.”). *See generally* Amy K. Glasmeier & Tracey L. Farrigan, *The Economic Impacts of the Prison Development Boom on Persistently Poor Rural Places*, 30 INT’L REGIONAL SCI. REV. 274 (2007) (summarizing the effects of prison development in rural communities).

9 *See* KIRCHHOFF, *supra* note 7, at 32-33 (describing the vastly different experiences of two small towns that relied on prison construction as an economic development tool); *see also* Tracy Huling, *Building a Prison Economy in Rural America* (describing lesser known drawbacks and risks of prisons as an economic development strategy, including the fact that most prison jobs go to people outside the community, that such jobs have high turnover rates, and that prisoners themselves may “displace low-wage workers in struggling rural areas”), in FROM INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197, 201-04 (Marc Mauer & Meda Chesney-Lind, eds., 2002).

10 *See Facts*, NATION INSIDE: PRISON ECOLOGY PROJECT, <https://nationinside.org/campaign/prison-ecology/facts/> [<https://perma.cc/H2NP-6XTG>] (providing numerous examples of potentially fatal environmental conditions throughout the nation’s prisons, including repeated methane gas explosions at Rikers Island jail in New York City, airborne coal ash toxins at a state prison in Pennsylvania, and water contamination at detention facilities across the country).

framed the issue as follows: “If we can recognize the problem with forcing people to live in close proximity to toxic and hazardous environmental conditions, then why are we ignoring prisoners who are forced to live in detention facilities impacted by such conditions?”<sup>11</sup>

The Eighth Amendment and the Supreme Court’s conditions-of-confinement jurisprudence<sup>12</sup> might provide a reprieve, and a path, to enjoin the construction of prisons slated for toxic waste sites and thereby avoid the corresponding health risks altogether. Investigation into the Eighth Amendment implications of the environmental conditions at the State Correctional Institute at Fayette (SCI Fayette) in LaBelle, Pennsylvania, which was built adjacent to a coal mining site,<sup>13</sup> is ongoing.<sup>14</sup> This Comment contends that the doctrinal basis upon which advocates have challenged the conditions at SCI Fayette is equally applicable to the forthcoming construction of the United States Penitentiary Letcher County (USP Letcher), a new federal prison in Kentucky, also destined for construction atop a coal mine.<sup>15</sup> Litigants could argue that the decision to move forward despite known risks and hazards associated with this location violates the Eighth Amendment on a theory of deliberately indifferent design.

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<sup>11</sup> Letter from Paul Wright, Exec. Dir., Human Rights Def. Ctr., to Charles Lee, Deputy Assoc. Assistant Adm’r for Env’tl. Justice, USEPA 2 (July 14, 2015), <https://www.humanrightsdefensecenter.org/media/publications/EJ%202020%20HRDC%20Prison%20Ecology%20comment%20to%20EPA%20with%2091%20sign%20ons%20FINAL.pdf> [<https://perma.cc/9L6G-P28A>] [hereinafter HRDC Letter to EPA].

<sup>12</sup> See *infra* Section II.A. For a comprehensive review of the evolving relationship between the Eighth Amendment and prison conditions, see generally Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

<sup>13</sup> Markowitz, *supra* note 8.

<sup>14</sup> See Raven Rakia, *Coal Ash May Be Making Pennsylvania Inmates Sick, and Now They’re Fighting to Shut Their Prison Down*, VICE (May 4, 2015, 8:00 PM), [https://www.vice.com/en\\_us/article/ashes-to-ashes-0000651-v22n5](https://www.vice.com/en_us/article/ashes-to-ashes-0000651-v22n5) [<https://perma.cc/Q84E-TB78>] (noting that the Abolitionist Law Center (ALC) plans to expand a previously conducted survey of SCI Fayette inmates because they were “unsatisfied” with the Pennsylvania Department of Corrections’ findings that the air quality at SCI Fayette was “healthy”); see also Deidre Fulton, *No Escape: Alarming Cancer Rates at Prison Built Next to Toxic Coal Dump*, COMMON DREAMS (Sept. 2, 2014), <http://www.commondreams.org/news/2014/09/02/no-escape-alarming-cancer-rates-prison-built-next-toxic-coal-dump> [<http://perma.cc/4S4L-TJZ6>] (stating that a report issued by the ALC and two partner organizations contend SCI Fayette’s location may violate the Constitution by virtue of inmates’ exposure to toxicants); Emily Petsko, *Report Alleges Link Between Fly Ash, Health Problems at SCI-Fayette*, OBSERVER-REP. (Sept. 5, 2014), <http://www.observer-reporter.com/article/20140905/NEWS01140909723> [<https://perma.cc/NS3M-S8YS>] (reporting that, according to a volunteer from the Human Rights Coalition, “a positive link between the coal dump and health effects could be grounds for a lawsuit”).

<sup>15</sup> Press Release, Ctr. for Biological Diversity, Kentucky Prison Project Opposed Over Threats to Endangered Wildlife, Water and People (July 31, 2015), [https://www.biologicaldiversity.org/news/press\\_releases/2015/letcher-county-prison-07-30-2015.html](https://www.biologicaldiversity.org/news/press_releases/2015/letcher-county-prison-07-30-2015.html) [<https://perma.cc/JMD7-UX32>] [hereinafter Ctr. for Biological Diversity Press Release].

Part I explores the increasing trend of building prisons on environmentally toxic locations, with attention to the history and environmental circumstances of SCI Fayette and USP Letcher. Part II examines the Eighth Amendment framework as it has developed from the 1970s to present day, the span of decades that have seen the most rapid increase in prison population in United States history.<sup>16</sup> Building upon a report issued by the Abolitionist Law Center (ALC),<sup>17</sup> Part III fits the environmentally hazardous conditions at SCI Fayette into the legal framework described in Part II. Part III also applies the Eighth Amendment framework to the planned construction in Letcher County, arguing that the environmental hazards inherent to the location render the prison's design unconstitutional.<sup>18</sup> Part IV examines the practical limitations of an Eighth Amendment claim based on prospective harm—including challenges posed by federal justiciability doctrines and the Prison Litigation Reform Act of 1995 (PLRA)<sup>19</sup>—and proposes that state courts may prove a potential solution to these obstacles. The Comment concludes by considering whether constitutional litigation makes sense for advocates from a strategic standpoint, as compared to other potential methods.

While “the Constitution does not mandate comfortable prisons,”<sup>20</sup> the Eighth Amendment is animated by the respect for the “human dignity inherent in all persons.”<sup>21</sup> This Comment contends that when the government knowingly houses prisoners in demonstrably dangerous facilities, it fails to fulfill its obligations to provide for prisoners' basic needs such that “the courts have a responsibility to remedy the resulting Eighth Amendment violation.”<sup>22</sup>

## I. THE PROBLEM: PRISONS IN UNSAFE LOCATIONS

In recent years, an alarming number of prisons have been built throughout the country on or near environmentally hazardous sites.<sup>23</sup> Many of these prisons

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<sup>16</sup> See THE SENTENCING PROJECT, *supra* note 5 (displaying a graph that depicts the growth in the prison population every four years from 1934 through 2014).

<sup>17</sup> The ALC is a public interest law firm based in Pittsburgh, Pennsylvania, “organized for the purpose of abolishing class and race based mass incarceration in the United States.” *About, ABOLITIONIST L. CTR.*, <http://abolitionistlawcenter.org/about/> [https://perma.cc/Z3J7-3ZRA]. In 2014, the ALC published a report that advanced Eighth Amendment arguments to examine “potential legal action in support of prisoners at SCI Fayette.” DUSTIN S. MCDANIEL ET AL., *ABOLITIONIST LAW. CTR., NO ESCAPE: EXPOSURE TO TOXIC COAL WASTE AT STATE CORRECTIONAL INSTITUTION FAYETTE* 21 (undated).

<sup>18</sup> See *infra* subsection II.B.2 for a discussion of the Eighth Amendment's scienter requirements.

<sup>19</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

<sup>20</sup> *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

<sup>21</sup> *Brown v. Plata*, 563 U.S. 493, 510 (2011).

<sup>22</sup> *Id.* at 511.

<sup>23</sup> See *supra* note 10 and accompanying text. However, only thirty years ago, the idea of building a prison on a toxic waste site was considered “egregious.” In Pennsylvania, for example, a proposal

are located in close proximity to “superfund” sites, which are “uncontrolled or abandoned hazardous-waste sites” governed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).<sup>24</sup> Other prisons have been built on and near “brownfield” sites, defined as property for which expansion, redevelopment, or reuse “may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”<sup>25</sup> Brownfield sites are also governed by CERCLA.<sup>26</sup> To regulate Superfund sites, CERCLA gives the EPA the “power to seek out those parties responsible for any release and assure their cooperation in the cleanup.”<sup>27</sup> Imploring the Agency to consider its unique position to address the distinct “circumstances of prisoner populations,” the Human Rights Defense Center (HRDC) identified a number of prisons on or near superfund and other hazardous sites for the EPA in a July 2015 letter.<sup>28</sup> The discussion of SCI Fayette and USP Letcher contained therein provides helpful context for the Eighth Amendment analysis that follows.<sup>29</sup>

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by a private company to build a maximum security prison on a toxic waste site led a spokesperson for the Pennsylvania Department of Corrections to comment, “If it were a state facility, we certainly would be concerned about the grounds where the facility is located.” Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 325, 327 (1986) (internal quotation marks omitted); see also *id.* (referring to the proposal as “[o]ne example of the potentially egregious effects of reducing accountability and regulation” of privatizing corrections).

<sup>24</sup> *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA: ENFORCEMENT, <https://www.epa.gov/laws-regulations/summary-comprehensiv-e-environmental-response-compensation-and-liability-act> [<https://perma.cc/P4FW-4BBL>] [hereinafter *Summary of CERCLA*] (last updated Feb. 8, 2016); see also Alejandra Roman, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, UNITED STATES, ENCYCLOPEDIA EARTH (Apr. 14, 2011), <https://web.archive.org/web/20160401092048/http://www.eoearth.org/view/article/151409> [<https://perma.cc/X4XS-AEKS>] (“[CERCLA] is the main federal law of the United States that addresses the clean up of hazardous substances.”).

<sup>25</sup> *Brownfield Overview and Definition*, EPA: BROWNFIELDS, <http://www.epa.gov/brownfields/brownfield-overview-and-definition> [<https://perma.cc/9RPW-24QG>] (last updated Aug. 3, 2016).

<sup>26</sup> See *Brownfields Laws and Regulations*, EPA: BROWNFIELDS <https://www.epa.gov/brownfields/brownfields-laws-and-regulations> [<https://perma.cc/2C6T-GK9E>] (last updated Aug. 3, 2016) (explaining how CERCLA was amended to provide “funds to assess and clean up brownfields”).

<sup>27</sup> *Summary of CERCLA*, *supra* note 24.

<sup>28</sup> HRDC Letter to EPA, *supra* note 11, at 2, 5-8.

<sup>29</sup> From the long list of examples the letter provided, I chose to focus on SCI Fayette and Letcher County because of (1) the similarity of SCI Fayette’s location to the planned site for Letcher County and (2) because the evidence gathered by the ALC about the health conditions of inmates at SCI Fayette forms a basis for the deliberately indifferent design theory that I propose. Those not included here are Orleans Parish Prison, Escambia County Jail, South Central Regional Jail, Sing Sing Correctional Facility, Rikers Island jail, thirteen Colorado prisons, Avenal and Pleasant Valley State Prisons, Kern Valley State Prison, Wallace Pack Unit, Victorville Federal Correctional Complex, and Northwest Detention Center. *Id.* at 5-8.

A. *The State Correctional Institution at Fayette*  
(*SCI Fayette*), (*LaBelle, Pennsylvania*)

SCI Fayette is located in LaBelle, Pennsylvania, a town once home to “one of the largest coal preparation plants in the world.”<sup>30</sup> The Commonwealth of Pennsylvania purchased the plot of land upon which SCI Fayette now sits from Matt Canestrone Contracting (MCC),<sup>31</sup> which continues to operate a coal ash dump on the land directly abutting SCI Fayette.<sup>32</sup> Proximity to coal has verifiable negative health consequences, as “fugitive dust”—the “[w]indblown particulates from dry disposal”<sup>33</sup>—puts those nearby at risk of arsenic exposure.<sup>34</sup> SCI Fayette has been the subject of investigation by the ALC, which has uncovered patterns of illness among inmates that correspond to coal ash poisoning.<sup>35</sup> Specifically, the ALC found that over eighty-one percent of responding prisoners reported respiratory, throat, and sinus conditions; sixty-eight percent of responding prisoners experienced gastrointestinal problems; eleven prisoners died from cancer at SCI Fayette between January 2010 and December 2013; and that another six prisoners have reported being diagnosed with cancer while at the prison.<sup>36</sup> Not surprisingly, some estimate that since 1999, the Pennsylvania Department of Environmental Protection has issued nine notices of violation to MCC for failing to cover its trucks hauling coal ash waste.<sup>37</sup>

B. *Forthcoming: United States Penitentiary Letcher*  
(*USP Letcher*), (*Roxana, Kentucky*)

After nearly a decade of lobbying, the Letcher County Planning Commission succeeded in bringing another federal prison to Central Appalachia, which “has

<sup>30</sup> Markowitz, *supra* note 8.

<sup>31</sup> *See id.* (noting that the Commonwealth repurchased the land for \$575,000 in 2000).

<sup>32</sup> *See* MCDANIEL ET AL., *supra* note 17, at 15 (explaining that the prison is “directly adjacent to MCC’s coal ash dump” and at least one slurry pond).

<sup>33</sup> BARBARA GOTTLIEB ET AL., PHYSICIANS FOR SOC. RESPONSIBILITY AND EARTHJUSTICE, COAL ASH: THE TOXIC THREAT TO OUR HEALTH AND ENVIRONMENT 12 (2010).

<sup>34</sup> *See id.* at 2 (“In addition to drinking water, arsenic can enter the body via . . . [i]nhaling . . . coal ash fugitive dust.”).

<sup>35</sup> *See* Mumia Abu-Jamal, *Pollution Prison in Pennsylvania*, PRISON LEGAL NEWS (June 3, 2015), <https://www.prisonlegalnews.org/news/2015/jun/3/pollution-prison-pennsylvania/> [<http://perma.cc/G2TD-925W>] (noting the ALS’s finding that the prison “caused or was a significant contributor to nearly a dozen cancer deaths and serious life-threatening diseases and disorders” and explaining that that the “culprit . . . is the wide array of chemicals in the surrounding dump site from the fly ash and coal waste”); *see also* GOTTLIEB ET AL., *supra* note 33, at vii (“[C]oal ash toxics have the potential to injure all of the major organ systems, damage physical health and development, and even contribute to mortality.”).

<sup>36</sup> MCDANIEL ET AL., *supra* note 17, at 1-2. *See generally* Fulton, *supra* note 14 (summarizing the findings of the ALC report).

<sup>37</sup> Markowitz, *supra* note 8.

become one of the most concentrated areas of new prison growth.”<sup>38</sup> On February 25, 2016, Attorney General Loretta Lynch confirmed that the Bureau of Prisons (BOP) would move forward with plans to construct a federal prison in Letcher County, which is anticipated to house over 1000 inmates.<sup>39</sup> The location is a mountaintop removal coal mine site,<sup>40</sup> which shares many of the toxic features making prisoners sick at SCI Fayette.<sup>41</sup>

In economically depressed former coal towns, “hearing a federal prison could bring hundreds of new jobs is great news for many.”<sup>42</sup> But the proposed Letcher County prison prompted almost 100 social justice, environmental, and prisoners’ rights organizations to write to the EPA “urging it to include the 2.3 million people incarcerated in the United States in its ‘Environmental Justice 2020 Action’ agenda.”<sup>43</sup> The letter asserted that prisoners, who are “almost entirely low-income” and “constitute the most vulnerable and overburdened demographic of citizens in the country,” should be included “both in the permitting of prisons themselves and the permitting of other industrial facilities operating in proximity to prisons.”<sup>44</sup> However, USP Letcher is no longer a proposal. While shovels have not yet hit the dirt, as one reporter noted, “[I]t’s only a matter of time before inmates are booked in Roxana, Kentucky.”<sup>45</sup>

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38 Sylvia Ryerson, *Speak Your Piece: Prison Progress?*, DAILY YONDER: BEYOND COAL (Feb. 20, 2013), <http://www.dailyyonder.com/speak-your-piece-prison-progress/2013/02/20/5651/#comments> [https://perma.cc/JAJ2-6YWJ]. USP Letcher “will be the fourth new federal prison to come to eastern Kentucky, and the sixth federal prison built in Central Appalachia, since 1992—in addition to many new state prisons.” *Id.*

39 Alix Casper-Peak, *Federal Prison Coming to Letcher County*, MOUNTAIN NEWS WYMT (Feb. 26, 2016, 1:52 PM), <http://www.wyvt.com/content/news/Federal-prison-coming-to-Letcher-County-370050921.html> [http://perma.cc/HF8N-ARE9].

40 See Ctr. for Biological Diversity Press Release, *supra* note 15 (describing the proposed location as an unsafe facility “built on a mountaintop-removal coal-mine site”).

41 Prisoners are not the only ones getting sick; LaBelle residents and guards at SCI Fayette have complained of similar health complications. See Markowitz, *supra* note 8 (“For years, local LaBelle residents, and more recently prison guards at Fayette, have complained that the site has been making them sick.”); Kevin Williams, *Poisonous Lands: Pennsylvania Prison Built Next to Toxic Dump*, ALJAZEERA AM. (Feb. 25, 2016, 5:00 AM), <http://america.aljazeera.com/articles/2016/2/25/prison-pennsylvania-toxic-dump.html> [https://perma.cc/ZEC3-S3FJ] (reporting instances of prison guards being diagnosed with cancer).

42 Casper-Peak, *supra* note 39.

43 Panagioti Tsolkas, Opinion, *Federal Prison in Letcher County Wrong for Region, Environment, Prisoners*, LEXINGTON HERALD-LEADER (Aug. 31, 2015, 12:00 AM), <http://www.kentucky.com/opinion/op-ed/article42610920.html> [http://perma.cc/5B4G-BVGJ]. The EJ 2020 Action Agenda is an EPA strategy to “make our vulnerable, environmentally burdened, and economically disadvantaged communities healthier, cleaner and more sustainable places in which to live, work, play and learn.” *About EJ 2020*, EPA, <https://www.epa.gov/environmentaljustice/about-ej-2020#about> [https://perma.cc/M598-BVAN] (last updated Oct. 27, 2016).

44 HRDC Letter to EPA, *supra* note 11, at 2-3; see also *id.* at 5 (“Our position is that the DOJ, as a participating agency in the implementation of [EJ 2020], should require prisoner populations to be explicitly included in the . . . process.”).

45 Casper-Peak, *supra* note 39.

## II. CRUEL AND UNUSUAL PRISON CONDITIONS: THE CASE LAW

Under the Eighth Amendment to the United States Constitution, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>46</sup> More than 200 years after its adoption, the final clause, the Cruel and Unusual Clause, continues to generate fundamental questions: “What does it mean for a punishment to be ‘cruel and unusual’? How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is ‘unusual’?”<sup>47</sup> Historically, the prohibition of cruel and unusual punishment was primarily considered to assess the constitutionality of particular criminal sanctions.<sup>48</sup> The majority of standards articulated by the Supreme Court in the Eighth Amendment context highlight the Clause’s historical function as an interdiction against cruel and unusual punishments imposed by a sentencing tribunal.<sup>49</sup> For example, “[t]he prohibition . . . has been held to forbid punishments that are ‘grossly disproportionate’ to the crime; that are ‘totally without penological justification’; that ‘involve the unnecessary and wanton infliction of pain’; and that are inconsistent with ‘evolving standards of decency.’”<sup>50</sup>

Prison conditions were not considered to have Eighth Amendment implications until long after its ratification. Before the 1970s, courts had intentionally declined to address prison issues, subscribing to the so-called “hands-off doctrine,” which called for “deference to the legislatures.”<sup>51</sup> However, modern courts now overwhelmingly agree that the Eighth Amendment also operates as a limit on the administration of criminal sentences—“the *way* the state executes otherwise constitutional punishments.”<sup>52</sup> This evolution was prompted by an

<sup>46</sup> U.S. CONST. amend. VIII.

<sup>47</sup> Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii> [<https://perma.cc/DB4N-PB58>].

<sup>48</sup> See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“[T]he primary concern of the drafters was to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.” (alterations in original) (quoting Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969))).

<sup>49</sup> See Dolovich, *supra* note 12, at 884 (2009) (“To the extent that the Supreme Court has considered what makes a punishment cruel, it has done so primarily in assessing criminal sanctions.”).

<sup>50</sup> *Id.* at 883-84 (2009) (footnotes omitted) (first quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977); then quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); and then quoting *Gregg*, 428 U.S. at 173; and then quoting *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002)).

<sup>51</sup> Stacy Lancaster Cozad, Note, *Cruel but Not So Unusual: Farmer v. Brennan and the Evolving Standards of Decency*, 23 PEPP. L. REV. 175, 179 (1995). Essentially, the doctrine “stated that the federal government had no legal standing to interfere in the operations of state institutions.” Robert T. Sigler & Chadwick L. Shook, *The Federal Judiciary and Corrections: Breaking the “Hands-Off” Doctrine*, 7 CRIM. JUST. POL’Y REV. 245, 245 (1995).

<sup>52</sup> Dolovich, *supra* note 12, at 884 (emphasis added). As Dolovich contends, this extension was a practical necessity: “If the prohibition on cruel punishment is to mean anything in a society where incarceration is the most common penalty for criminal acts, it must also limit what the state can do

unprecedented increase in the number of petitions for relief from substandard conditions of confinement during the same period of time that the prison population increased exponentially.<sup>53</sup> Courts throughout the country were faced with a relatively new breed of Eighth Amendment claims alleging cruel and unusual prison conditions related to overcrowding and had the task of addressing conditions approaching the unimaginable.<sup>54</sup>

In landmark decisions such as *Holt v. Sarver*,<sup>55</sup> *Rhem v. Malcolm*,<sup>56</sup> and *Ruiz v. Estelle*,<sup>57</sup> courts responded to deplorable correctional environments and issued injunctions ordering “agencies to improve these conditions or face remedies ranging from stiff fines to mass releases of prisoners.”<sup>58</sup> For its part, the Supreme Court “ushered in the modern jurisprudence of inmates’ rights,” making it clear that conditions of confinement were subject to Eighth Amendment scrutiny in a line of cases starting with *Estelle v. Gamble*.<sup>59</sup>

The following Section tracks the Court’s conditions-of-confinement doctrine and the development of the present standard. The analysis entails an objective and

to prisoners over the course of their incarceration.” *Id.* at 885. *But see* *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (“Some 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 . . .”).

<sup>53</sup> See Finn, *supra* note 6, at 321 (“Since [1971], no region in the country has been unaffected by . . . court orders to eliminate substandard conditions of confinement, including crowding. By 1976, over 19,000 petitions for relief had been filed in federal courts, representing over 15 per cent [sic] of the entire civil case filings.”).

<sup>54</sup> See Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU. L. REV. 373, 374 (1995) (“Increased prison population has not resulted in increased prison capacity. Paradoxically, even when states have undertaken massive building programs, they have often ended up putting more people in prison, further contributing to overcrowding. Conditions that were already deplorable have only continued to worsen.”).

<sup>55</sup> See 309 F. Supp. 362, 372-73 (E.D. Ark. 1970) (holding that conditions in Arkansas penitentiary operations violated the Eighth Amendment and concluding that “confinement itself within a given institution may amount to a cruel and unusual punishment . . . where [it] is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people”), *aff’d and remanded*, 442 F.2d 304 (8th Cir. 1971).

<sup>56</sup> See 371 F. Supp. 594, 636 (S.D.N.Y. 1974) (holding the “dismal conditions” of the Manhattan House of Detention for Men (the Tombs) subjected inmates to cruel punishment, violated the Constitution, and “would shock the conscience of any citizen who knew of them”), *opinion supplemented*, 377 F. Supp. 995 (S.D.N.Y. 1974), *aff’d and remanded*, 507 F.2d 333 (2d Cir. 1974).

<sup>57</sup> See 503 F. Supp. 1265, 1338, 1367 (S.D. Tex. 1980) (holding that conditions at certain facilities of the Texas Department of Corrections violated the Eighth Amendment due to overcrowding and inadequate health care, among other conditions), *aff’d in part and vacated in part*, 679 F.2d 1115 (5th Cir. 1982).

<sup>58</sup> See Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT’G REP. 236, 236 (2012) (discussing the watershed prison conditions decisions of the 1970s that made federal courts the “last refuge for prisoners”). Deitch argues that for forty years, federal “courts have provided a wedge in the steel doors of prisons and jails, preventing them from being entirely sealed off from external view.” *Id.*

<sup>59</sup> Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1010 (2013) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

subjective component, both of which must be established in order to substantiate a prison conditions claim. The objective prong requires a showing that a condition is sufficiently serious so as to deprive a prisoner “minimal civilized measure of life’s necessities.”<sup>60</sup> The subjective prong requires a plaintiff-inmate to demonstrate that a given deprivation is the result of deliberate indifference on the part of prison officials—that officials both knew of and disregarded “an excessive risk to inmate health or safety.”<sup>61</sup>

#### A. *Development of the Objective and Subjective Requirements*

*Estelle v. Gamble* is one of the first prison conditions cases taken up by the Court.<sup>62</sup> The plaintiff in *Estelle*, inmate Gamble, brought an Eighth Amendment claim based on the inadequate medical care he received for a back injury sustained after a 600-pound bale of cotton fell on him during a work assignment at the prison.<sup>63</sup> After repeated ineffective treatments, a stint in solitary confinement for refusing to work, and a lack of medical attention despite chest pains and “blank outs,” Gamble sued two Texas Department of Corrections officials and the prison’s medical director.<sup>64</sup>

In its first major doctrinal shift away from the hands-off doctrine, the Court recognized that sufficiently harmful prison conditions, including the denial of medical care, could amount to a violation of the Eighth

<sup>60</sup> *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

<sup>61</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>62</sup> Decided in 1976, *Estelle* marked a break with the past, as the Eighth Amendment had remained “largely dormant for a century” prior. William J. Rold, *Thirty Years After Estelle v. Gamble: A Legal Retrospective*, 14 J. CORRECTIONAL HEALTH CARE 11, 13 (2008). Still, there are a variety of cases to which scholars have attributed the origins of the Court’s prison conditions doctrine. See, e.g., Lorena O’Neil, *The Prisoners’ Rights Movement of the 1960s*, FLASHBACK: OZY (Apr. 11, 2014), <http://www.ozy.com/flashback/the-prisoners-rights-movement-of-the-1960s/30583> [https://perma.cc/GF/H8-JRFT] (noting that at least one prominent constitutional law scholar located the origin of the Court’s prison conditions doctrine with the Court’s decision in *Cooper v. Pate*, 378 U.S. 546 (1964), more than a decade before *Estelle*).

<sup>63</sup> *Estelle v. Gamble*, 429 U.S. 97, 98-99, 101 (1976). Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 907 (1977) (noting that *Holt v. Sarver* “tentatively brought the more prosaic conditions of confinement within the ken of eighth amendment review”).

<sup>64</sup> *Id.* at 100-01. Gamble filed a handwritten pro se complaint under 42 U.S.C. § 1983. *Id.* at 98-99. Prisoners often file “section 1983” suits to challenge conditions of confinement. See Frank J. Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 292 (1983) (“Although state prisoner litigation in the federal courts has greatly increased, the increase has been attributable largely to section 1983 conditions-of-confinement litigation . . . .”); see also Cozad, *supra* note 51, at 177 n.17 (“A prisoner may bring an action directly under the auspices of the Eighth Amendment or under § 1983 . . . .”).

Amendment's prohibition against cruel and unusual punishment.<sup>65</sup> *Estelle* marked the Court's willingness to ensure the conditions of American prisons satisfied constitutional mandates. However, the Court also, "for the first time, required deliberate indifference in assessing cruel and unusual punishment claims."<sup>66</sup> In dismissing Gamble's claims against the medical director of the prison, the Court noted that he had been "seen by medical personnel on 17 occasions spanning a three-month period" and that the treatment he received was "[a]t most . . . medical malpractice."<sup>67</sup> Reasoning that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," the Court held that only "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" violate the Eighth Amendment.<sup>68</sup> Two years after *Estelle*, in *Hutto v. Finney*, the Court stated definitively that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under [the] Eighth Amendment."<sup>69</sup>

Following its inception, the conditions-of-confinement doctrine dealt exclusively with the objective prong of the analysis—whether the conditions complained of were sufficiently serious—leaving the mental requirement noted in *Estelle* untouched for many years. In its next two major prison conditions decisions, *Hutto* and *Rhodes v. Chapman*,<sup>70</sup> the Court refined the contours of the objective component. Specifically, the Court reached opposite conclusions on the objective prong, making these decisions helpful benchmarks in the early prison conditions cases.

First, in *Hutto*, the Court held that the conditions in Arkansas prisons constituted cruel and unusual punishment, with a particular focus on punitive isolation:

Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. At night the prisoners were given mattresses to spread on the floor. Although

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<sup>65</sup> See *Estelle*, 429 U.S. at 103-04 (noting that "denial of medical care may result in pain and suffering" that serves no penological purpose, thereby causing the type of "unnecessary and wanton infliction of pain" that the Eighth Amendment proscribes (internal quotation marks omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion))). While the Court dismissed Gamble's complaint against Dr. Gray, his treating physician and the medical director of the Corrections Department, it remanded the case on the question of whether Gamble stated a claim against *Estelle* and Husbands, the Director of the Department of Corrections and the warden of the prison, respectively. *Id.* at 108.

<sup>66</sup> Cozad, *supra* note 51, at 180.

<sup>67</sup> *Estelle*, 429 U.S. at 107.

<sup>68</sup> *Id.* at 106.

<sup>69</sup> 437 U.S. 678, 685 (1978). This case started as *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), which is discussed above. See *supra* note 55.

<sup>70</sup> 452 U.S. 337 (1981).

some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of “grue,” a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.<sup>71</sup>

The Court upheld the district court’s finding that punitive isolation was cruel and unusual based exclusively on objective factors, without referring to an intent requirement.<sup>72</sup>

In *Rhodes*, the Court revisited the objective prong once again, but this time held against the plaintiff-inmate class. The Court held that “[t]he double celling [arrangement in which two prisoners shared a cell that was] made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation.”<sup>73</sup> Once again, the Court did not reach the state of mind question, which indicates that the objective prong determination was dispositive on the Eighth Amendment question.

The Court finally readdressed deliberate indifference in the prison conditions context in 1991. In *Wilson v. Seiter*, a 5–4 decision, the Court held that the mental element articulated in *Estelle* applied to all conditions-of-confinement cases.<sup>74</sup> Wilson’s complaint alleged unconstitutional “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 physically ill inmates.”<sup>75</sup> The Court made clear that to qualify as unconstitutional “punishment” under the Eighth Amendment, the challenged practice had to be carried out with intent.<sup>76</sup> After *Wilson*, any “prisoner claiming that conditions of confinement

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<sup>71</sup> *Hutto*, 437 U.S. at 682–83 (footnote and citations omitted).

<sup>72</sup> See Amy Newman, *Eighth Amendment—Cruel and Unusual Punishment and Conditions Cases*, 82 J. CRIM. L. & CRIMINOLOGY 979, 987 (1992) (“[I]n [*Hutto*,] the Court upheld a District Court’s limitation of punitive isolation based solely on objective criteria.”). Years later, the Court attributed the absence of an explicit intent discussion to the fact that “punitive isolation” inherently involves punitive intent. *Id.* at 987 n.67 (internal quotation marks omitted) (citing *Wilson v. Seiter*, 111 S. Ct. 2321, 2324 n.2 (1991)).

<sup>73</sup> *Rhodes*, 452 U.S. at 348.

<sup>74</sup> See 501 U.S. 294, 303 (1991) (“Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the ‘deliberate indifference’ standard articulated in *Estelle*.” (alteration in original) (internal quotation marks omitted) (quoting *LaFaut v. Smith*, 834 F.2d 389, 391–92 (4th Cir. 1987))).

<sup>75</sup> *Id.* at 296.

<sup>76</sup> See *id.* at 300 (“The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted

constitute[d] cruel and unusual punishment [had to] show a culpable state of mind on the part of prison officials.”<sup>77</sup>

*Estelle, Hutto, Rhodes, and Wilson* have given shape to the prison conditions analysis: Conditions of confinement are indisputably subject to Eighth Amendment scrutiny, but a plaintiff-inmate must demonstrate that the conditions resulted in a sufficiently serious deprivation closer to the facts of *Hutto* (punitive isolation) than to *Rhodes* (double celling). Additionally, a plaintiff-inmate has to prove intent on the part of prison officials before conditions will be considered “punishment” under the Eighth Amendment.

### B. Future Harm and Deliberate Indifference

While the aforementioned cases answered some questions, they generated more: Must harm have already occurred for it to be sufficiently serious, or could an imminent risk of harm suffice? What was the scienter requirement within the subjective analysis? Who exactly must have acted with intent? In the early 1990s, the Court addressed these questions in *Helling v. McKinney*<sup>78</sup> and *Farmer v. Brennan*,<sup>79</sup> respectively.

#### 1. *Helling*: Exposure to Unsafe Conditions

In *Helling*, the Court addressed whether a complaint based on imminent harm, as opposed to past or present deprivation, could support a claim under the Eighth Amendment. Answering in the affirmative, the Court held that a prisoner demonstrating “a condition of confinement that is sure or very likely to cause serious illnesses and needless suffering” states a cognizable claim under the Eighth Amendment.<sup>80</sup> In *Helling*, inmate McKinney filed a pro se civil rights complaint against various prison officials after being “assigned to a cell with another inmate who smoked five packs of cigarettes a day.”<sup>81</sup> Seeking both injunctive relief and damages, McKinney “complained of certain health problems allegedly caused by exposure to cigarette smoke.”<sup>82</sup> The Ninth Circuit below had found that it was objectively “cruel and unusual punishment to house a prisoner in an environment *exposing* him to levels of [environmental tobacco smoke, or secondhand smoke] that pose an unreasonable

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is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”).

<sup>77</sup> *Id.* at 296.

<sup>78</sup> 509 U.S. 25 (1993).

<sup>79</sup> 511 U.S. 825 (1994).

<sup>80</sup> *Helling*, 509 U.S. at 33.

<sup>81</sup> *Id.* at 28.

<sup>82</sup> *Id.*

risk of harming his health.”<sup>83</sup> The State argued that the Eighth Amendment did not apply absent proof of *current* medical problems caused by the secondhand smoke because the Eighth Amendment “does not protect against prison conditions that merely threaten to cause health problems in the future, no matter how grave and imminent the threat.”<sup>84</sup>

The Court disagreed, ultimately citing *Hutto* in support of its holding that the Eighth Amendment protects against *exposure* to harm.<sup>85</sup> The Court reiterated *Hutto*’s holding that the Eighth Amendment provided a remedy for prisoners forced to endure cramped isolation cells with other prisoners suffering various infectious diseases even absent an allegation that they would suffer immediate harm or that the exposure to the diseases would necessarily lead to the transfer of infection.<sup>86</sup> The Court drew a helpful analogy to illustrate the point: “We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.”<sup>87</sup>

Under *Helling*, an inmate’s exposure to unsafe conditions that threaten to cause health problems in the future is unquestionably a cognizable claim under the Eighth Amendment.<sup>88</sup> Against the backdrop of the Court’s conditions-of-confinement jurisprudence, the Court concluded, “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”<sup>89</sup>

## 2. *Farmer*: Reconciling *Wilson* with *Hutto* and *Rhodes*

The Court next addressed the issue it had left unanswered since *Wilson*—namely, the precise scienter standard for prison conditions cases.<sup>90</sup> In *Farmer v. Brennan*, the Court adopted a deliberate indifference test under which a prison official cannot not be liable under the Eighth Amendment unless he disregards “an excessive risk to inmate health or safety.”<sup>91</sup> To meet this

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<sup>83</sup> *Id.* at 30 (emphases added).

<sup>84</sup> *Id.* at 32-33.

<sup>85</sup> *Id.* at 33.

<sup>86</sup> *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)).

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition.”).

<sup>89</sup> *Id.*

<sup>90</sup> Cozad notes that the Court’s omission of a definition created a problem in the lower courts, which were applying varying deliberate indifference standards. *See Cozad, supra* note 51, at 187-88 (“The problems created by this omission become evident when one reviews lower court cases attempting to apply this standard . . . [T]he Tenth Circuit . . . requir[ed] . . . ‘actual knowledge of impending harm’ . . . [O]ther circuits allow[ed] knowledge to be imputed . . . The Third and Ninth Circuits appl[ied] a ‘known or should have known’ standard.” (footnotes omitted)).

<sup>91</sup> *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Implicitly, the Court also reaffirmed its holding in *Helling* by describing the harm there as “an excessive risk.” *Id.* at 843.

standard, a prison official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>92</sup>

The petitioner in *Farmer* was a preoperative transsexual who filed a *Bivens* action, claiming prison officials had been deliberately indifferent to his safety from sexual attacks by placing him in a penitentiary with “a history of inmate assaults, . . . despite knowledge that petitioner, . . . a transsexual who ‘projects feminine characteristics,’ would be particularly vulnerable to [such] attack[s].”<sup>93</sup> Within weeks of his transfer from a correctional institute to a penitentiary,<sup>94</sup> he was beaten and raped by another inmate in his own cell.<sup>95</sup> Farmer in turn sought compensatory and punitive damages, as well as injunctive relief “to bar his further confinement in any penitentiary.”<sup>96</sup> But the Court rejected Farmer’s argument that it should apply a purely objective test,<sup>97</sup> instead reaffirming its holding in *Wilson* that Eighth Amendment claims require both a subjective and objective showing of culpability.<sup>98</sup> The Court ultimately remanded the case because the record indicated that the district court below erred by basing its conclusion that prison officials were not aware of the danger Farmer was facing solely on Farmer’s failure to give “advance notice” to the officials regarding his safety concerns.<sup>99</sup>

At first blush, *Wilson* and *Farmer* may seem inconsistent with the Court’s analysis in *Hutto* and *Rhodes*—two cases in which a ruling on the objective requirement seemingly obviated the need to address the subjective component.<sup>100</sup> However, a footnote in *Farmer* provides insight into this apparent inconsistency:

If . . . the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 831.

<sup>94</sup> While the “record before [the Court was] unclear about the security designations of the two prisons [at the time of Farmer’s transfer], penitentiaries are typically higher-security facilities that house more troublesome prisoners than federal correctional institutes.” *Id.* at 830.

<sup>95</sup> *Id.*

<sup>96</sup> Cozad, *supra* note 51, at 189.

<sup>97</sup> See *Farmer*, 511 U.S. at 837 (“We reject petitioner’s invitation to adopt an objective test for deliberate indifference.”).

<sup>98</sup> See *id.* at 838 (“[I]t was no accident that we said in *Wilson* and repeated in later cases that Eighth Amendment suits against prison officials must satisfy a ‘subjective’ requirement.” (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991))).

<sup>99</sup> See *id.* at 848 (“[T]he failure to give advance notice is not dispositive.”).

<sup>100</sup> See *supra* notes 70–73 and accompanying text.

abate an intolerable risk of which they are aware could claim to be subjectively blameless . . . .<sup>101</sup>

This commentary clarifies an important dynamic with respect to the objective and subjective components; namely, that the objectivity of a risk informs the plausibility of an official's claim to ignorance of that risk.<sup>102</sup> That is, "if the risk is 'longstanding, pervasive, [and] well-documented' and the circumstances suggest that the prison official had been exposed to the information, this could be sufficient for a finding that the official had actual knowledge of the risk."<sup>103</sup>

After *Farmer*, an inmate could be certain of the following: the Eighth Amendment offered protection against exposure to the risk of sufficiently serious harm and required a demonstration that prison officials were both aware of and disregarded that risk. But once prison officials are made aware of objectively intolerable risks—because they are pervasive and well-documented or declared so by a court of law—prison officials will have difficulty claiming ignorance.

### C. *Brown v. Plata: System-Wide Violations*

Prison litigation stagnated for nearly fifteen years following the enactment of the PLRA in 1996, which restricted the ability of federal courts to intervene in prison conditions cases.<sup>104</sup> At the same time, the incarcerated population in the United States reached its peak.<sup>105</sup> Inmates continued to file federal civil rights claims in the lower courts, albeit at a much slower pace,<sup>106</sup> but it remained unclear what effect the new statutory restrictions, changes in the composition of the Court, and time would have on the Court's prison conditions analysis. Then in 2011, the Supreme Court took one of the most significant Eighth Amendment prison conditions cases to date.<sup>107</sup> In *Brown v. Plata*, the Court

<sup>101</sup> 511 U.S. at 846 n.9.

<sup>102</sup> The Court also alluded to this relationship in *Wilson*. There, the Court attributed the absence of an intent discussion in *Hutto* to the inherent punitive intent of punitive isolation. Newman, *supra* note 72. Thus, the Court reasoned that the objective harm informed the subjective analysis.

<sup>103</sup> Gutterman, *supra* note 54, at 394-95 (alteration in original) (quoting *Farmer v. Brennan*, 114 S. Ct. 1970, 1981 (1994)).

<sup>104</sup> See *infra* subsection IV.A.2.

<sup>105</sup> See GLAZE & PARKS, *supra* note 3, tbl.2 (showing that the number of incarcerated individuals grew from 1,937,500 in 2000 to 2,239,800 in 2011). For a discussion about the relationship between overcrowding and the enactment of the PLRA, see generally Elizabeth Alexander, *A Troubling Response to Overcrowded Prisons: The Prison Litigation Reform Act of 1995*, 3 CIV. RTS. J., Fall 1998, at 25.

<sup>106</sup> See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156 (2015) ("In 1996, the PLRA immediately transformed the litigation landscape. After a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade (although the increasing incarcerated population meant that the resulting number of filings increased a bit).").

<sup>107</sup> See Schlanger, *supra* note 2, at 165 (noting that the case "marked an important milestone in American institutional reform litigation").

affirmed a district court order requiring California to reduce its prison population as a remedy for the extensive and longstanding constitutional deficiencies in its prisons.<sup>108</sup> For the first time since 1978, and despite the PLRA's cabining of judicial oversight of prison administration, "the Court ratified a lower court's crowding-related order in a . . . prison case."<sup>109</sup>

The *Plata* litigation started as two separate cases, with each class of plaintiffs alleging that overcrowding created unconstitutional conditions in their respective prisons.<sup>110</sup> At time of trial, California's prisons had been operating at approximately 200% of design capacity for about eleven years.<sup>111</sup> A three-judge court, specially convened under the authority of the PLRA, presided over the consolidated cases.<sup>112</sup> That panel ordered California to reduce its prison population to 135.7% of design capacity within two years.<sup>113</sup> In reviewing the panel's decision, the Court pointed to the abhorrent living conditions created by chronic overcrowding in California prisons, including,

- 200 prisoners living in a gymnasium, monitored by as few as two or three correctional officers;<sup>114</sup>
- as many as fifty-four prisoners sharing a single toilet;<sup>115</sup>
- suicidal inmates being "held for prolonged periods of time in telephone-booth-sized cages without toilets;"<sup>116</sup>
- a suicide rate nearly eighty percent higher than the national average for prison populations;<sup>117</sup>
- up to fifty sick inmates being held together in a "twelve-by-twenty-foot cage for up to five hours awaiting [medical] treatment;"<sup>118</sup>
- and worst of all, the fact that "on average, an inmate in one of California's prisons needlessly die[d] every six to seven

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<sup>108</sup> *Brown v. Plata*, 563 U.S. 493, 502 (2011).

<sup>109</sup> Schlanger, *supra* note 2, at 165.

<sup>110</sup> *Plata*, 563 U.S. at 500.

<sup>111</sup> *Id.* at 502.

<sup>112</sup> *Id.* at 509.

<sup>113</sup> *Id.* at 509-10.

<sup>114</sup> *Id.* at 502.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 503; *see also id.* at 504 ("A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had 'no place to put him.'").

<sup>117</sup> *Id.*; *see also id.* ("[A] court-appointed Special Master found that 72.1% of suicides involved 'some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.'").

<sup>118</sup> *Id.*

days due to constitutional deficiencies in the . . . medical delivery system”—or, one death per week.<sup>119</sup>

California’s prison system easily satisfied the objective requirement of the prison conditions analysis. In addition to the ongoing health and safety risks, inmates routinely contracted serious illnesses, and the prison experienced a number of preventable deaths. Notably, the Court did not base its holding on deficiencies in providing care on any single occasion. Rather, operating within the future harm framework,<sup>120</sup> the Court found that the conditions in California prisons constituted systemwide violations that subjected *all* inmates to a substantial risk of being denied medical care.<sup>121</sup>

It is less obvious, given *Wilson* and *Farmer*, how the Court resolved the subjective analysis. It seems likely that the Court ultimately bypassed this analysis based on the relationship between the objective and subjective requirements, explained by the Court in *Farmer*.<sup>122</sup> That is, after more than a decade of litigation, California prison officials could not plausibly plead ignorance to the serious deprivations taking place under their watch. Moreover, the State arguably conceded knowledge of the persisting unconstitutional conditions via its request for *more* time to comply with previous orders.<sup>123</sup> Still, for purposes of this Comment, it is instructive to review the subjective prong inquiry conducted by one of the lower courts in one of the cases eventually consolidated in *Plata* before the litigation itself arguably rendered the question moot.<sup>124</sup>

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<sup>119</sup> *Id.* at 507-08.

<sup>120</sup> *See id.* at 532 (“Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect *future* class members who *will develop* serious physical or mental illness.” (emphases added)); *see also supra* Section II.B (summarizing case law utilizing the future harm framework).

<sup>121</sup> *See id.* at 545 (“The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment.”). Justice Scalia, however, rejected the Court’s holding, arguing that “a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future.” *Id.* at 563 (Scalia, J., dissenting). According to Scalia, “[T]he persons who have a constitutional claim for denial of medical care are those who are denied medical care—not all who face a ‘substantial risk’ (whatever that is) of being denied medical care.” *Id.* at 551.

<sup>122</sup> *See supra* note 101 and accompanying text.

<sup>123</sup> *Plata*, 563 U.S. at 513 (majority opinion) (“The State contends that it was error to convene the three-judge court without affording it more time to comply with the prior orders in *Coleman* and *Plata*.”).

<sup>124</sup> Justice Alito’s dissent in *Plata* criticized the majority’s reliance on *Coleman* for the subjective prong evidence, citing *Farmer* and *Helling* for the proposition that deliberate indifference must be examined “‘in light of the prison authorities’ *current* attitudes and conduct,’ which means . . . ‘at the time suit is brought and persisting thereafter.’” *Id.* at 567 (Alito, J., dissenting) (citation omitted) (first quoting *Helling v. McKinney*, 509 U.S. 25, 36 (1993); then quoting *Farmer v. Brennan*, 511 U.S. 825, 845 (1994)). He also noted that the three-judge panel in *Coleman* “relied heavily on outdated information and findings and refused to permit California to introduce new evidence,” *id.*

The analysis in *Coleman v. Wilson* took up the *Farmer* Court's observation that prison officials could not claim ignorance to obvious and known risks.<sup>125</sup> In *Coleman*, prisoners suffering from serious mental diseases brought suit in the Eastern District of California, seeking both declaratory and injunctive relief.<sup>126</sup> The defendant-officials included, among others, then-Governor of California Pete Wilson, then-Assistant Deputy Director for Health Care Services for the California Department of Corrections (CDC), Dr. Nadim Khoury, and then-Chief of Psychiatric Services for CDC, Dr. John Zil.<sup>127</sup> After finding the plaintiff-inmates had met the objective component of their cruel and unusual prison conditions claim, citing many of the same detestable circumstances that persisted through the 2011 *Plata* litigation,<sup>128</sup> the court turned to the knowledge requirement. The *Coleman* court noted that the officials bore the burden of proving their ignorance<sup>129</sup> and then addressed each of the respondent's deliberate indifference defenses, in turn.

First, putting the defendant's arguments in context, the court reiterated that CDC inmates faced "objectively intolerable" risks: "seriously mentally ill inmates ha[d] languished for months, or even years, without access to necessary care[,] . . . suffer[ed] from severe hallucinations, . . . decompensate[d] into catatonic states, and . . . suffer[ed] the other sequela to untreated mental disease."<sup>130</sup> Next, the court addressed Dr. Khoury's and Dr. Zil's defense that they could not be considered deliberately indifferent to these serious risks and injuries because they lacked "power or authority to change any aspect of the delivery of mental health care to inmates."<sup>131</sup> Rejecting this argument on two grounds, the court first noted that "even if true, . . . lack of power does not necessarily contraindicate scienter."<sup>132</sup> Second, the court concluded that the evidence indicating the doctors had no authority to hire additional medical personnel "[did] not speak to the many other areas within the scope of [their] authority that affect[ed] the delivery of constitutionally adequate care to class members."<sup>133</sup>

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at 567, and that the majority "repeat[ed] the lower court's error of reciting statistics that [we]re clearly out of date." *Id.* at 567, 570.

<sup>125</sup> 912 F. Supp. 1282, 1316 (E.D. Cal. 1995).

<sup>126</sup> *Id.* at 1293.

<sup>127</sup> *Id.*

<sup>128</sup> The court cited, for example, a magistrate judge's prior factual findings of "significant and unacceptable delays' in inmate access . . . to mental health care;" inadequate medication management; inadequate implementation of a suicide-watch program; and ultimately, "a systemic failure to provide adequate mental health care [to] thousands of class members [who] suffer[ed] present injury and [were] threatened with great injury in the future." *Id.* at 1308-09, 1315.

<sup>129</sup> The court cited the reasoning in *Farmer* for this proposition. *Id.* at 1316 (citing *Farmer v. Brennan*, 114 S. Ct. 1970, 1982 (1994)).

<sup>130</sup> *Id.* at 1317.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

Finally, the court rebuffed defendant Wilson's contention that there was no evidence establishing his knowledge of the long-standing systemic deficiencies. Given Wilson's "official responsibilities," the court found his plea of ignorance regarding information with which the Governor was "duty bound to be familiar . . . [to be] remarkable."<sup>134</sup> The court found that in any event, Wilson failed to support his assertion that he was unaware of the evidence received during the case, including a report "produced pursuant to a legislative mandate" and another commissioned by the CDC itself.<sup>135</sup> Citing *Farmer*, the court found Wilson's claimed lack of awareness following "five years of litigati[on]" to be implausible.<sup>136</sup>

### III. APPLYING THE LEGAL FRAMEWORK

This Part applies the prison conditions framework set forth in Part II to assess potential inmate claims against SCI Fayette and USP Letcher. The first step is to identify the specific harm or deprivation at issue under the objective prong. The ALC's investigation of SCI Fayette produced evidence that satisfies this prong and demonstrates that inmates' constant exposure to toxic coal sites constitutes sufficiently serious and intolerable conditions.<sup>137</sup> These findings have implications beyond SCI Fayette. Prisons contracted for locations with similar environmental profiles—such as USP Letcher—pose comparable risks for future inmates.<sup>138</sup> These imminent hazards raise Eighth Amendment concerns under the future harm analysis first articulated in *Helling*.<sup>139</sup>

The second step is the subjective inquiry, required in every case involving allegedly cruel and usual prison conditions under *Wilson*.<sup>140</sup> The objective-subjective dynamic described by the Court in *Farmer*<sup>141</sup> and the application of that logic in *Coleman*, which was ultimately adopted in *Plata*,<sup>142</sup> indicate that scienter can be established through evidence that a particular risk was well-documented and longstanding.<sup>143</sup> SCI Fayette officials are well aware that the prison's proximity to the coal ash dump has been linked to serious and ongoing

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (citing *Farmer*, 114 S. Ct. 1970, 1984 n.9 (1994)).

<sup>137</sup> See *infra* text accompanying note 155; see also *supra* notes 35–36 and accompanying text.

<sup>138</sup> See *supra* text accompanying note 15.

<sup>139</sup> See *supra* subsection II.B.1.

<sup>140</sup> See *supra* text accompanying notes 74–77.

<sup>141</sup> See *supra* text accompanying note 101.

<sup>142</sup> The Court adopted this logic insofar as it agreed the conditions violated the Eighth Amendment. In other words, if the Court did not accept *Coleman*'s subjective prong analysis, a requisite component of all prison conditions claims, one would expect, at the very least, a discussion of that issue. If the Court did not agree that the subjective prong was satisfied, it could not, under *Wilson*, have found the conditions violated the Eighth Amendment.

<sup>143</sup> See *supra* text accompanying note 103.

inmate health problems: prisoners' rights organizations have sent specific and detailed information to the BOP chronicling the risks inherent to the prison's location,<sup>144</sup> which has also caught the attention of various media outlets.<sup>145</sup> Officials responsible for the bidding and contracting of USP Letcher are likewise well-informed of the risks posed by the prison's planned location atop a coal mine. In addition to letters and reports from various human rights organizations,<sup>146</sup> the construction plans have been the subject of public debate and protest.<sup>147</sup>

Ultimately, however, the following application brings to light a mismatch between the subjective prong of the prison conditions analysis, as it has been developed by the Court, and suits seeking injunctive relief. While the scienter requirement may perform an important limiting function with respect to claims for damages based on past injury, it does no such work when applied to actions for prospective relief. This mismatch is particularly conspicuous when prison officials and guards are themselves subjected to and complain of the very same conditions to which a prisoner's claim is addressed.

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<sup>144</sup> See, e.g., Letter from Paul Wright, Exec. Dir., Human Rights Def. Ctr., to Isaac Gaston, Site Selection Specialist, Bureau of Prisons 7 & n.27 (Mar. 30, 2015), <https://www.humanrightsdefensecenter.org/media/publications/Letcher%20Co%20KY%20HRDC%20comment%20on%20BOP%20Draft%20EIS%203-30-15.pdf> [<https://perma.cc/QWS4-FTFP>] [hereinafter HRDC Letter to BOP] (citing the ALC's report following its investigation at SCI Fayette for the proposition that "[p]risons located near coal mining waste facilities can result in widespread prisoner health problems").

<sup>145</sup> See, e.g., Benny Becker, *The Prison Builder's Dilemma: Economics and Ethics Clash in Eastern Kentucky*, WOUB DIGITAL (Aug. 1, 2016), <http://woub.org/2016/08/01/the-prison-builders-dilemma-economics-and-ethics-clash-in-eastern-kentucky/> [<https://perma.cc/9J6H-G4N6>] (recounting the intense debates among the local community about "what role prisons should play in the region's future"); Alejandro Davila Fragoso & Carimah Townes, *Kentucky Lawmakers Want to Revitalize Coal County by Building a Prison*, THINKPROGRESS (June 16, 2016), <https://thinkprogress.org/kentucky-lawmakers-want-to-revitalize-coal-country-by-building-a-prison-73e2b5c1e166#.f6t8k23ga> [<https://perma.cc/7SE9-G2N7>] (describing how the "dangerous—and sometimes deadly—toxins" associated with mountaintop coal removal sites such as the planned Letcher County facility will put "[a]ny prisoners confined there . . . at risk of exposure and a long list of chronic health problems"); Bill Estep, *Supporters Hope Construction of \$444 Million Prison in Letcher County Starts This Year*, LEXINGTON HERALD-LEADER (Feb. 25, 2016, 4:52 P.M.), <http://www.kentucky.com/news/state/article62492807.html> [<https://perma.cc/F4F4-33NQ>] (reporting that "[s]everal groups have argued [that] the Bureau of Prisons did not do an adequate environmental assessment" of the Letcher County site).

<sup>146</sup> See HRDC Letter to BOP, *supra* note 144, at 7 (objecting to the BOP's Environmental Impact Statement (EIS) filed for the prison because "[d]espite the self-evident concerns that arise from housing over 1,200 people at a former mining site surrounded by active coal mines, the EIS is completely devoid of any discussion on potential impacts to prisoners").

<sup>147</sup> See, e.g., John Washington, *When Prisons Are Toxic to Both Humanity and the Environment*, IN THESE TIMES (July 6, 2016), <http://inthesetimes.com/article/19264/coal-and-unusual-punishment> [<https://perma.cc/4PSH-V5ZY>] (describing activists' march to the BOP's D.C. headquarters to protest "[t]he construction of prisons and jails on toxic sites[,] . . . a widespread, but typically overlooked, problem").

## A. Objective Requirement: The Evidence

## 1. SCI Fayette

The experience of inmates at SCI Fayette and the evidence corroborating those experiences demonstrate the broader point that prisons built on toxic waste sites—and particularly on coal mine sites—result in objectively cruel and unusual prison conditions. SCI Fayette is a maximum-security prison connected to an adjacent coal waste dump.<sup>148</sup> Surrounded by “about 40 million tons of waste, two coal slurry ponds, and millions of cubic yards of coal combustion waste,” SCI Fayette is “inescapably situated in the midst of a massive toxic waste dump.”<sup>149</sup> Exposure to toxic coal waste has been shown to cause elevated risk for urinary tract cancer, increased blood pressure, lung cancer, anemia, stomach cancer, skin ulcers, asthma and wheezing, nose ulcers, nervous system damage, hypertension, vomiting and diarrhea, paralysis, and even death.<sup>150</sup>

The ALC has persuasively argued that conditions at SCI Fayette satisfy the objective requirements of the Eighth Amendment prison conditions analysis.<sup>151</sup> In response to increasing reports of adverse health symptoms by inmates, the ALC, in coordination with the Human Rights Coalition (HRC)<sup>152</sup> and the Center for Coalfield Justice (CCJ),<sup>153</sup> launched an investigation into the declining health of prisoners at SCI Fayette and its connection to environmental pollution.<sup>154</sup> The report that ensued, *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette*, compiled the preliminary findings gleaned from interviews with SCI Fayette inmates and the related investigation. The results showed that prisoners were experiencing abnormally high rates of illnesses

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<sup>148</sup> Emily Atkin, *40 Million Tons of Toxic Coal Waste Sit Next to Prison with Alarming Rates of Illness*, THINKPROGRESS (Sept. 5, 2014), [http://www.skidmore.edu/~bturner/Prisons%20\\_ED\\_strategy.pdf](http://www.skidmore.edu/~bturner/Prisons%20_ED_strategy.pdf) [https://perma.cc/4ULX-X74T].

<sup>149</sup> MCDANIEL ET AL., *supra* note 17, at 1 (internal quotation marks omitted).

<sup>150</sup> See GOTTLIEB ET AL., *supra* note 33, at 1-4 (summarizing the “effects on the human body that can be caused by exposure to nine of the most common toxic contaminants in coal ash”); *see also id.* at 5 fig.1 (depicting the health impacts of coal toxicants and the specific body parts affected by the various toxicants).

<sup>151</sup> See MCDANIELET AL., *supra* note 17, at 18 (“[A]n injury to a prisoner’s health caused by exposure to environmentally toxic living conditions such as those present at SCI Fayette meets the objective requirement of an Eighth Amendment claim, provided that the harm is ‘sufficiently serious.’”).

<sup>152</sup> The Human Rights Coalition is a statewide prisoners’ rights group headquartered in Pennsylvania, predominantly made up of “prisoners’ families, prisoners, ex-offenders, and supporters.” *About HRC*, HUM. RTS. COALITION, <http://hrcoalition.org/about> [https://perma.cc/HD98-DPS9].

<sup>153</sup> The Center for Coalfield Justice is a Pennsylvania based–environmental justice group, whose mission is “[t]o improve policy and regulations for the oversight of fossil fuel extraction and use . . . and to protect public and environmental health.” *What We Do*, CTR. FOR COALFIELD JUST., <http://coalfieldjustice.org/about/> [https://perma.cc/BXQ3-YXMF].

<sup>154</sup> MCDANIEL ET AL., *supra* note 17, at 1.

“revealing a pattern of symptomatic clusters consistent with exposure to toxic coal waste.”<sup>155</sup> The findings demonstrate a correlation between inmates’ reported symptoms and those typically associated with prolonged exposure to toxic coal waste.<sup>156</sup> Specifically,

- More than 81% of responding prisoners (61/75) reported respiratory, throat, and sinus conditions, including shortness of breath, chronic coughing, sinus infections, lung infections, chronic obstructive pulmonary disease, extreme swelling of the throat, as well as sores, cysts, and tumors in the nose, mouth, and throat.
- 68% (51/75) of responding prisoners experienced gastrointestinal problems, including heart burn, stomach pains, diarrhea, ulcers, ulcerative colitis, bloody stools, and vomiting.
- 52% (39/75) reported experiencing adverse skin conditions, including painful rashes, hives, cysts, and abscesses.
- 12% (9/75) of prisoners reported either being diagnosed with a thyroid disorder at SCI Fayette, or having existing thyroid problems exacerbated after transfer to the prison.
- Eleven prisoners died from cancer at SCI Fayette between January 2010 and December of 2013. Another six prisoners have reported being diagnosed with cancer at SCI Fayette, and a further eight report undiagnosed tumors and lumps.<sup>157</sup>

These findings, while certainly relevant, ultimately leave causality unverified. Prisoners, for example, may experience disproportionately poor health as a demographic, rather than by virtue of specific environmental factors.<sup>158</sup> But while causality is “extremely difficult to prove . . . in these types of situations,”<sup>159</sup> the ALC provides an instructive point of comparison: “Unlike reports of health problems from prisoners at other Pennsylvania . . . prisons, most SCI Fayette prisoners discuss symptoms and illnesses that *did not emerge until they arrived*

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The ALC reports that typical symptoms of such exposure include “respiratory, throat and sinus conditions; skin irritation and rashes; gastrointestinal tract problems; pre-cancerous growths and cancer; thyroid disorders; other symptoms such as eye irritation, blurred vision, headaches, dizziness, hair loss, weight loss, fatigue, and loss of mental focus and concentration.” *Id.*

<sup>157</sup> *Id.* at 1-2.

<sup>158</sup> See LAURA M. MARUSCHAK & MARCUS BERZOFKY, BUREAU OF JUSTICE STATISTICS, NCJ 248941, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, 1 (rev. 2016) (finding that “inmates were more likely than the general population to report ever having a chronic condition of infectious disease”).

<sup>159</sup> Markowitz, *supra* note 8.

at *SCI Fayette*.”<sup>160</sup> The ALC ultimately concluded that “the declining health of prisoners at SCI Fayette is indeed caused by the toxic environment surrounding the prison,” but conceded that confirming this relationship would require “[a] substantial mobilization of resources for continued investigation.”<sup>161</sup>

Applying the prison conditions case law to these preliminary findings, the ALC determined that the conditions at SCI Fayette could satisfy the objective requirement in either of two ways. First, the conditions violate the Eighth Amendment given the harms that inmates are currently experiencing. The current state of affairs is “sufficiently serious” so as to deprive inmates of an identifiable human need—namely, non-poisonous living conditions.<sup>162</sup> In other words, the deprivations at SCI Fayette are closer to the punitive isolation in *Hutto* than they are to the double ceiling in *Rhodes*. Present harm could thus be established “[i]f the coal refuse and ash pollution surrounding SCI Fayette can be proven to a reasonable scientific certainty to be the cause of an individual’s ill health.”<sup>163</sup>

Second, these conditions violate the Eighth Amendment’s objectivity requirement on an exposure theory. An inmate need not “await a tragic event” before bringing an Eighth Amendment claim.<sup>164</sup> As the ALC submits, “If a body of evidence can be developed showing that *any* prisoner at SCI Fayette is being exposed to a substantial risk of serious harm based on the possibility that he will develop a ‘sufficiently serious’ health problem, the state will be constitutionally prohibited from confining prisoners [there].”<sup>165</sup> Like the exposure to infectious disease in *Hutto* and the exposure to secondhand smoke in *Helling*, exposure to toxic coal waste at SCI Fayette could prove an intolerable risk of harm to inmates there.

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<sup>160</sup> MCDANIEL ET AL., *supra* note 17, at 2 (emphasis added).

<sup>161</sup> *Id.* Necessary resources in a suit brought against the prison would include expert analysis and testimony, “including studies by epidemiologists and environmental toxicologists.” *Id.* at 19. The ALC posits that the “evidence gathered to date” provides “a sound basis for seeking financial and scientific resources that will enable prisoners and their advocates to develop evidence of the potential and actual harms imposed on them.” *Id.*

<sup>162</sup> *Id.* at 18 (internal quotation marks omitted) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

<sup>163</sup> *Id.*

<sup>164</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

<sup>165</sup> MCDANIEL ET AL., *supra* note 17, at 18-19. This logic was endorsed by the Court in *Plata*. See *Brown v. Plata*, 563 U.S. 493, 532 (2011) (“Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness.”).

## 2. Letcher County

USP Letcher presents unique Eighth Amendment issues because the prison has not yet been built.<sup>166</sup> Currently, there are no inmates in Letcher County being exposed to substantially serious health risks. However, the reasoning behind the future harm holdings—that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”<sup>167</sup>—forms the doctrinal basis for enjoining the construction of a prison in an environmentally hazardous location. It is difficult to imagine that the future harm analysis would distinguish between current exposure at SCI Fayette and inevitable exposure at USP Letcher.

The environmental circumstances of Roxana, the community in which officials plan to build the Letcher County prison,<sup>168</sup> are strikingly similar to those of LaBelle, Pennsylvania, home to SCI Fayette. Like LaBelle, Roxana has been significantly impacted by coal mining activities.<sup>169</sup> Indeed, Letcher County may prove to be an even more troublesome location than LaBelle, as it is “in the heart of central Appalachian coalfields,” which had been extracting coal from the “most accessible” seams for decades.<sup>170</sup> Thus, USP Letcher presents future inmates with a nearly identical risk of exposure to coal toxicants that inmates at SCI Fayette already endure. The causal link between toxic exposure and negative health impacts are also potentially stronger in Letcher County, as researchers have found that “[a]mong West Virginia adults, residential proximity to heavy coal production was associated with poorer health status and with higher risk for cardiopulmonary disease, chronic lung disease, hypertension, and kidney disease,” even after controlling for other contributing factors such as smoking, obesity, age, gender, income, education, and the “presence or absence of health insurance.”<sup>171</sup>

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<sup>166</sup> As of August 1, 2016, “[t]he Bureau of Prisons has not yet issued a final decision [as to whether and when the prison will be built],” but the federal budget does include a \$444 million allocation.” Becker, *supra* note 145.

<sup>167</sup> *Helling*, 509 U.S. at 33.

<sup>168</sup> See Casper-Peak, *supra* note 39.

<sup>169</sup> See CAPACITY PLANNING AND CONSTR. BRANCH, FED. BUREAU OF PRISONS, REVISED FINAL ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED UNITED STATES PENITENTIARY AND FEDERAL PRISON CAMP: LETCHER COUNTY, KENTUCKY § 5.2.1 (2016) (“The topography at the Roxana site has been significantly impacted by mountaintop removal coal mining.”).

<sup>170</sup> Becker, *supra* note 145.

<sup>171</sup> Michael Hendryx & Melissa M. Ahern, *Relations Between Health Indicators and Residential Proximity to Coal Mining in West Virginia*, 98 AM. J. PUB. HEALTH 669, 669-70 (2008).

In its March 2015 letter to the BOP, the HRDC enumerated the risks a prison in Roxana could pose to its future occupants.<sup>172</sup> These risks mirror those of SCI Fayette: respiratory illness, gastrointestinal problems, dermatological conditions, thyroid disorders, and higher cancer mortality rates.<sup>173</sup> Indeed, numerous studies corroborate the serious health hazards associated with exposure to areas heavily impacted by coal mining.<sup>174</sup>

A suit to enjoin a not-yet-constructed prison based on cruel and unusual conditions requires an extension of the reasoning in *Hutto*, *Helling*, and *Plata*. In each of these cases, *exposure to* and *risk of* future harm created by prison conditions formed the basis of the Eighth Amendment claim; actual harm was immaterial. In *Hutto*, the Court agreed with the lower court that exposure to infectious disease through close confinement and the indiscriminate redistribution of mattresses between sick and healthy inmates required a constitutional remedy.<sup>175</sup> In *Helling*, exposing an inmate to the health risks that come with sharing a cell with a five-pack-a-day smoker was held unconstitutional.<sup>176</sup> In *Plata*, the extreme deficiencies and inadequacies of the prison's medical delivery system created an intolerable risk of harm to *all* inmates, systemwide.<sup>177</sup>

These cases have profound implications for the planned Letcher County construction. Currently, no inmates face conditions giving rise to an intolerable risk of harm, but they soon will. In light of the Court's future harm cases, it would be odd to prohibit an injunction until an inmate is actually exposed to the harm.

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<sup>172</sup> See HRDC Letter to BOP, *supra* note 144, at 7 ("Scientific literature makes clear that there are health risks connected with simply living in proximity to coal mining, especially surface mines that are common in Eastern Kentucky.")

<sup>173</sup> *Id.* In fact, the HRDC cited the ALC's Report on SCI Fayette to explain that "prisons located near coal mining waste facilities can result in widespread prisoner health problems." *Id.* at 7 & n.27. See *supra* notes 156–57 and accompanying text for a description of the health issues that prisoners at SCI Fayette experience.

<sup>174</sup> See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION & NAT'L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, DEP'T OF HEALTH & HUMAN SERVS., CURRENT INTELLIGENCE BULLETIN 64, COAL MINE DUST EXPOSURES AND ASSOCIATED HEALTH OUTCOMES: A REVIEW OF INFORMATION PUBLISHED SINCE 1995, at 32 (2011) (concluding that "every effort needs to be made to reduce exposures . . . to . . . coal mine dust"); Michael Hendryx & Melissa M. Ahern, *Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost*, 124 PUB. HEALTH REP. 541, 547 (2009) (finding that "mortality rates were higher every year from 1979 through 2005 in Appalachian coal mining areas compared with other areas of Appalachia or the nation," with the "highest mortality rates in areas with the highest levels of mining").

<sup>175</sup> *Hutto v. Finney*, 437 U.S. 678, 682–83 (1978).

<sup>176</sup> See *Helling v. McKinney*, 509 U.S. 25, 35 (1993) ("McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have . . . exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health.")

<sup>177</sup> See *Brown v. Plata*, 563 U.S. 493, 531 (2011) ("Even prisoners with no present . . . illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care.")

Rather, the risk becomes sufficiently imminent to substantiate a claim once the first inmate is sentenced to serve time at USP Letcher.<sup>178</sup>

Enjoining operations before prisoners begin serving time is the necessary remedy. As the Court noted in *Plata*, systemwide relief is required where “[r]elief targeted only at the present members of the plaintiff class[.]”—here, the first inmate(s) booked or perhaps planned for transfer to USP Letcher—“may . . . fail to adequately protect future class members who will develop serious physical or mental illness.”<sup>179</sup> Before long, more than 1100 inmates locked in the Letcher County prison will be subjected to the same or similar risks facing the prisoners currently housed at SCI Fayette.<sup>180</sup> The only remedy to preclude their exposure to these unconstitutional conditions of confinement is a wholesale shutting down of operations.

### B. Subjective Test: Deliberately Indifferent Design

#### 1. SCI Fayette

In its report on SCI Fayette, the ALC also analyzed the subjective prong of the prison conditions framework, noting that the law requires proof that prison officials failed to take measures to eliminate known risks to prisoners’ health.<sup>181</sup> In accordance with the Court’s objective–subjective dynamic noted in *Farmer*, the ALC believes that medical records and prisoner grievances could create a sufficient record of knowledge to show that Pennsylvania Department of Corrections (PADOC) officials knew of or should have known of health risks associated with the prison’s location.<sup>182</sup> Crucially, the ALC also maintained that “PADOC officials’ awareness that SCI Fayette was built on and around a toxic dump would demonstrate actual knowledge of a risk of adverse health consequences from imprisoning people at the site.”<sup>183</sup> This second point has broad implications for the future of the current framework in that it provides an avenue for litigants to prove subjective intent even before a single individual (i.e., a guard or an inmate) is exposed to toxic conditions—in other words, proof of deliberately indifferent *design*.<sup>184</sup> The

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<sup>178</sup> The future harm strategy introduces questions of standing and ripeness. See *infra* subsection IV.A.1.

<sup>179</sup> *Plata*, 563 U.S. at 532.

<sup>180</sup> See *Estep*, *supra* note 145 (noting that the prison will house 1200 inmates).

<sup>181</sup> *MCDANIEL ET AL.*, *supra* note 17, at 19.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Here, I expand on the idea of “prisons designed with deliberate indifference,” coined by Jonathan Simon, to refer to “hyper-overcrowding” in California prisons. See *SIMON*, *supra* note 2, at 6-7 (noting that the combination of various factors produced “a toxic cocktail: an epidemic of chronic disease and mental illness among prisoners combined with permanent hyper-overcrowding in prisons designed with deliberate indifference to the humanity of their occupants”).

argument proceeds as follows: officials' ex ante knowledge that a prison is being constructed on a toxic waste site satisfies the deliberate indifference standard by virtue of their disregard for the inevitable harms that follow from housing inmates in such a location.

The viability of a deliberately indifferent design theory is significant in this context because it locates prison officials' intent prior to operation. This, in turn, would have major implications for the applicability of the Eighth Amendment to prison siting and construction as inevitable precursors to unconstitutional prison conditions.

## 2. Letcher County

A claim to enjoin USP Letcher construction under the Eighth Amendment could succeed on the theory that the prison is being designed with deliberate indifference to its future occupants. Litigants could offer evidence that various studies and reports have alerted officials to the hazards of the planned location. For example, evidence that the HRDC alerted relevant officials to the situation at SCI Fayette demonstrates the officials' disregard for known and realized risks associated with construction on sites affected by coal mining.<sup>185</sup> Their decision to move forward notwithstanding this and other information could play a significant role in the subjective prong analysis.

This strategy is an amplification of the Court's discussion in *Farmer* about the requisite plausibility of a lack of knowledge defense.<sup>186</sup> There, the Court held that the prison-official defendants, following years of litigation that included a long discovery period, could not plausibly claim ignorance of substantial health risks to inmates. In *Plata*, the Court relied on similar logic when it accepted the lower court's finding that California officials could not claim ignorance after being made aware of the risks to inmates through reports tendered by the plaintiff-inmates.

Various human rights, social, and environmental justice organizations have explored the constitutional and policy implications of prisons built on toxic waste sites.<sup>187</sup> This information is not only publicly available but, in some instances, has been addressed directly to the prison officials tasked with managing correctional facilities in the United States.<sup>188</sup> The officials responsible

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<sup>185</sup> See *supra* notes 172–73 and accompanying text.

<sup>186</sup> See *supra* note 101 and accompanying text.

<sup>187</sup> See, e.g., Laura L. Cepero, *Toxic Traps: Environmental Hazards Threaten Two Federal Supermax Prisons*, COUNTERPUNCH (Sept. 8, 2015), <http://www.counterpunch.org/2015/09/08/toxic-traps-environmental-hazards-threaten-two-federal-supermax-prisons/> [<http://perma.cc/L63H-3GPU>] (“A *Solitary Watch* investigation into the sites of the federal government’s two ‘supermax’ facilities—the first open for two decades, the second slated to open soon—reveals a number of possible serious environmental hazards.”).

<sup>188</sup> See *supra* note 145 and accompanying text.

for vetting, planning, and designing the Letcher County prison—like Governor Wilson in *Coleman*—have a duty to be familiar with such information.<sup>189</sup> Even absent an explicit duty, however, officials could hardly deny actual knowledge of the risks that inmates will face living atop a former coal mine.

A deliberate indifference design theory allows plaintiffs to argue that officials who proceed with construction in the face of knowledge that constructing a prison in a given location carried serious health risks may not then claim ignorance of those risks. Although this theory would extend the current framework, the Court's prison conditions jurisprudence supports such an expansion. Given that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them,"<sup>190</sup> it seems equally odd to deny an injunction to plaintiffs who can prove that the prison to which they have been sentenced will expose them to life-threatening conditions merely because nothing has happened yet.

### 3. Subjectivity and Prospective Relief: An Uneasy Fit

While I have endeavored to show that plaintiffs seeking an injunction *can* meet the subjective element of a deliberate indifference claim, there are reasons to question whether the subjective prong should even apply in prospective relief cases. For example, the subjective test would likely preclude an Eighth Amendment damages claim brought by an inmate injured in an accidental boiler explosion. And indeed, assuming proper maintenance and assuming that the prison was not aware the boiler would explode, this appears to be the correct result. The injury could not properly be considered "punishment." This logic, however, does not apply if the boiler has repeatedly exploded. Once a court is satisfied that the risk of future explosions is sufficiently serious, prison officials' state of mind should not matter. Surely no official *hoped* that the boiler would explode. Whether officials *knew of* and *disregarded* that risk is immaterial with respect to whether the boiler should be removed.<sup>191</sup> However, the absence of intent has no conceivable bearing on the objective risk the boiler continues to pose. The injunctive question—whether the boiler should be removed as a cruel and unusual living condition—is answered by the

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<sup>189</sup> Under federal law, the BOP, "under the direction of the Attorney General," is charged with "protect[ing]," providing "suitable quarters" for, and ensuring "the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2)–(3) (2012).

<sup>190</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

<sup>191</sup> The awkwardness of the deliberate indifference application in this hypothetical illustrates how the subjective inquiry does not map well onto circumstances calling for prospective relief.

objective inquiry alone. That is, the risk of explosion alone determines whether relief should be granted prospectively.<sup>192</sup>

The boiler example highlights another practical challenge of applying a knowledge requirement in this context—specifically, that many risky conditions threaten both inmates and guards. This conundrum is especially pronounced with respect to toxic prison locations. The relevance of the subjective inquiry is particularly strained in this context because officials are also adversely affected by constant exposure to contaminated air, fugitive dust, and poor ventilation. While the subjective inquiry impliedly assumes that guards and inmates will be on opposite sides of the given condition (i.e., it presupposes guard-on-inmate violence), the environmental context demonstrates the error in this supposition.

In fact, a number of guards working in SCI Fayette have developed illnesses similar to those contracted by inmates.<sup>193</sup> This development has prompted the union representing state corrections officers to “conduct a health survey of present and former members working at SCI Fayette and three other prisons built near coal ash disposal or coal mining operations.”<sup>194</sup> Eric Garland, a guard inside the prison, was diagnosed with hyperthyroidism in 2010.<sup>195</sup> Garland recalled that other prison guards “have contracted kidney cancer, a not very common cancer that can [be] linked to the consumption of cadmium and arsenic.”<sup>196</sup> As for his own condition, Garland reports, “The medicine I take helps it, but I worry about cancer a good bit.”<sup>197</sup>

In sum, the Court’s reasoning in the prison conditions cases supports the concept of deliberately indifferent design as an avenue for litigants to satisfy the

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<sup>192</sup> This distinction—in fact, this hypothetical—was considered and rejected by the Court in *Wilson*:

[Petitioner] acknowledges . . . that if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm. Petitioner, and the United States as *amicus curiae* in support of petitioner, suggests that we should draw a distinction between “short-term” or “one-time” conditions (in which a state-of-mind requirement would apply) and “continuing” or “systemic” conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction.

*Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (citation omitted). In light of subsequent decisions, however, this distinction merits reexamination. In this context, the distinction between “one-time” and “systemic” is not necessarily based on the temporality or frequency of the condition, but whether the remedy necessary to cure the constitutional defect is retrospective or prospective.

<sup>193</sup> See Don Hopey, *State, Corrections Union Investigate Health at Prisons by Coal Sites*, PITTSBURGH POST-GAZETTE (Sept. 17, 2014, 12:00 AM), <http://www.post-gazette.com/local/south/2014/09/17/Officials-investigate-health-at-prisons-by-coal-sites/stories/201409170030> [<https://perma.cc/PW9L-VAB9>] (noting that several guards at SCI Fayette had contracted of “kidney, thyroid and breast cancers”).

<sup>194</sup> *Id.*

<sup>195</sup> Rakia, *supra* note 14.

<sup>196</sup> Williams, *supra* note 41 (internal quotation marks omitted).

<sup>197</sup> *Id.* (internal quotation marks omitted).

scienter requirement even before they are actually exposed to life-threatening environmental conditions. But this is a hoop through which plaintiff-inmates should not have to jump. The intent requirement developed by the Court in the later prison conditions cases proves an uneasy fit when applied to prospective relief cases. While it is unclear why officials' subjective intent should have any bearing on the question of whether an existing condition should be remedied, it is particularly perplexing to require such a showing when guards themselves are subject to the same life-threatening conditions.

#### IV. LIMITATIONS AND SOLUTIONS

The viability of an Eighth Amendment claim to enjoin the construction of a prison on land with serious and known environmental risks depends in part on where the claim is litigated—state or federal court. In federal court, there are two primary limitations that make success unlikely: justiciability requirements, including standing and ripeness, and the PLRA. In contrast, state courts are bound by neither the demanding standing and ripeness requirements for federal claims nor the strictures of the federal PLRA, making them the better alternative, albeit with their own limitations and complications. While state courts cannot intervene in the administration of federal facilities, the vast majority of inmates are housed in state prisons and local jails.<sup>198</sup> State courts are also better situated to address the practical challenges facing prison administrators, such as budgetary constraints, with which state judges have a more natural familiarity.

##### A. *Federal Courts: The PLRA and Justiciability*

###### 1. Standing and Ripeness: Limits on Entry

In an Eighth Amendment suit to enjoin the construction of a prison, there will be not be current inmates to bring the claim.<sup>199</sup> This circumstance raises questions under Article III, which limits its grant of judicial power to “[c]ases” and “[c]ontroversies.”<sup>200</sup> The most likely plaintiffs in a suit to stop construction of USP Letcher would include the first individuals anticipated to serve time there, perhaps partnered with and represented by organizations

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<sup>198</sup> See GLAZE & PARKS, *supra* note 3, at 8 (reporting that the total number of federal prisoners in 2011 was 214,774 while the total number of those in state prisons and local jails was 2,038,104).

<sup>199</sup> Indeed, a primary objective of the proposed litigation posture is to avoid inmates ever being placed in a facility that would expose them to toxic conditions.

<sup>200</sup> See U.S. CONST. art. III, § 2, cl. 1 (limiting the judicial power of the United States to “[c]ases” and “[c]ontroversies”).

such as the ALC or the HRDC.<sup>201</sup> To reach the merits of the case, however, these parties would need to establish that they have standing to bring the case—a doctrine “that developed out of ‘some basic sense that not everyone who wanted to go to court could do so.’”<sup>202</sup> This Comment does not comprehensively review the nuances of the Court’s standing requirements,<sup>203</sup> focusing instead on the features that could pose challenges here.

Generally, plaintiffs have the burden of establishing standing.<sup>204</sup> Standing incorporates three constitutionally mandated requirements—*injury in fact*, *causation*, and *redressability*<sup>205</sup>—and a set of “prudential” requirements—those derived from *separation-of-powers* concerns.<sup>206</sup> While the envisioned class of litigants might readily meet each constitutional component, principles of prudential standing could possibly preclude the claim.

Particularly inhibiting, prudential considerations would likely foreclose third-party standing in this context such that an interested organization could

<sup>201</sup> This might include the recently convicted or inmates scheduled to be transferred from other facilities. Inmates from other facilities may, for example, be scheduled for transfer to USP Letcher as a function of “[p]opulation [m]anagement” if “it is necessary to impose a moratorium or population cap on [their current] institution to avoid or reduce overcrowding.” Fed. Bureau of Prisons, U.S. Dep’t of Justice, *Inmate Security Designation and Classification Classification* ch. 7, at 15 (2006), [https://www.bop.gov/policy/progstat/5100\\_008.pdf](https://www.bop.gov/policy/progstat/5100_008.pdf) [<https://perma.cc/MJY5-7SMX>] [hereinafter *Inmate Security Designation*]. For more information about BOP’s designation process, including initial designation decisions and inmate transfer decisions, see generally *Inmate Security Designation*, *supra*.

<sup>202</sup> William I. Stewart, Comment, *How to Avoid the Standing Problem in Floyd: A Relaxed Approach to Standing in Class Actions*, 164 U. PA. L. REV. 1509, 1511 (2016) (quoting LARRY W. YACKLE, *FEDERAL COURTS* 322 (3d ed. 2009)).

<sup>203</sup> For a detailed discussion of the Court’s standing requirements, see 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.10–.16 (3d ed. 2008); *Leading Cases, Standing—Civil Procedure—Lexmark International, Inc. v. Static Control Components, Inc.*, 128 HARV. L. REV. 321 (2014).

<sup>204</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

<sup>205</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>206</sup> JEFFREY S. GUTMAN, *SERGEANT SHRIVER NAT’L CTR. ON POVERTY LAW, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS* § 3.1.B.4, <http://federalpracticemanual.org/node/19#4> [<https://perma.cc/7DML-RTSG>] (last updated 2016). The fault lines between constitutionally mandated and prudential standing requirements are debated. See Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 Duke J. Const. L. & Pub. Pol’y 149, 154 (2014) (noting that after the Court’s decision in *Lexmark*, “there may simply be no more ‘generalized grievance’ rule distinct from the constitutional minimum of a ‘concrete injury’”); see also Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1126 (1994) (emphasizing the need for clarification from the Court with respect to constitutional and prudential limitations on standing and arguing that the “Court’s overreaching constitutional analysis prevents the lower courts from examining countervailing issues, thereby harming the courts when . . . issues militate in favor of granting standing”). Courts, too, have long intimated confusion with respect to demarcating constitutional from non-constitutional standing limitations. See, e.g., *City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 235 (9th Cir. 1980) (expressing “some confusion as to whether the ‘abstract injury’ standing bar is constitutional, or instead prudential”).

not “raise [future inmates’] legal rights.”<sup>207</sup> This would prohibit, for example, the ALC or the HRDC from seeking an injunction on behalf of future USP Letcher inmates,<sup>208</sup> save for the limited potential of associational standing, which allows a group to sue on behalf of its members.<sup>209</sup> Associational standing would likely prove unsuccessful in light of *Kowalski v. Tesmer*, where the Court found that two criminal defense attorneys lacked standing to challenge a state’s process for appointing appellate counsel on behalf of Michigan’s indigent defendants.<sup>210</sup> The reasoning in *Kowalski* casts doubt on the possibility that organizations like the ALC or the HRDC would meet associational standing requirements. In declining to reach the merits of the procedural requirement at issue, the Court emphasized that “[t]he only challengers before [it] [we]re two attorneys who s[ought] to invoke the rights of hypothetical indigents to challenge the procedure.”<sup>211</sup> This language does not bode well for organizations seeking to invoke the rights of hypothetical prisoners to challenge the toxic conditions of confinement.<sup>212</sup>

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<sup>207</sup> GUTMAN, *supra* note 206, § 3.1.A. Third-party standing generally requires a showing that (1) “the party asserting the right ha[ve] a ‘close’ relationship with the person who possess the right” and (2) that “there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). While the prohibition against third-party standing is not absolute, the Court does “not look[] favorably upon third-party standing” in most circumstances. *See id.* (describing the few categories of cases in which the Court “ha[s] been quite forgiving,” including the First Amendment and circumstances in which “enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of the third parties’ rights” (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975))).

<sup>208</sup> *See Craig v. Boren*, 429 U.S. 190, 193 (1976) (noting that “restrictions on third-party standing” are “designed to minimize unwarranted intervention into controversies”).

<sup>209</sup> *See* GUTMAN, *supra* note 206, § 3.1.C (defining associational standing as “an exception to the general prohibition on third-party standing”).

<sup>210</sup> 543 U.S. at 134.

<sup>211</sup> *Id.* at 127.

<sup>212</sup> The parallels between the relationship the ALC or HRDC would have to future USP Letcher County inmates—and the relationship the attorneys in *Kowalski* had to “yet unascertained Michigan criminal defendants,” are telling. *Id.* at 130. For example, to demonstrate a sufficiently “close” relationship, the attorneys in *Kowalski* invoked the attorney–client relationship, which the Court had found to be adequate in other cases. *See id.* at 130–31 (citing cases in which the attorney–client relationship sufficed to confer third-party standing, including *Department of Labor v. Triplett*, 494 U.S. 715 (1990) and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)). The hindrance analysis presents more complicated questions, as the ability of the future inmates to assert their own constitutional rights is bound up with the ultimate question; if the Court recognized future inmates’ constitutional right to be free from potential incarceration in a toxic facility, future inmates may be hindered from advancing that interest because they will not have occasion to challenge the location until they are sentenced to serve time there (or learn that they are to be transferred there). Considering the federal designation process “is normally completed within seven working days from the date the [BOP’s Designation and Sentence Computation Center] receives all case documents,” convicted defendants would have an impracticably small window of time to contact and retain counsel and prepare filings. Alicia Vasquez & Todd Bussert, *How Federal Prisoners Are Placed: Shedding Light on BOP’s Inmate Classification and Designation Process*, CRIM. JUST., Spring 2016, at 19,

As an organizational challenge to the construction of USP Letcher would closely resemble the claims asserted in *Kowalski* and would thus have little chance of success, the most likely plaintiffs with standing to sue to enjoin construction would be future inmates. The practical implications of this conclusion present a problem: by the time inmates are booked at USP Letcher, construction will likely be rather far along or complete.<sup>213</sup> At this point, the parties would likely be seeking cessation of operations, as opposed to enjoining construction. However, as discussed more fully below,<sup>214</sup> the practical timing limitations does not mean the endeavor would be in vain. Were the prospect of an injunction looming over the officials and administrators responsible for the prison construction, the potential for sunk costs may bring construction to a halt far in advance of litigation.<sup>215</sup>

While standing doctrine governs *who* may bring a particular suit, the related doctrine of ripeness governs *when* it is appropriate to bring such a suit.<sup>216</sup> Ripeness limitations seek to prevent adjudication over “contingent future events that may not occur as anticipated, or indeed may not occur at all.”<sup>217</sup> Ripeness overlaps with the standing doctrine’s injury-in-fact analysis in that both aim to prevent litigation regarding overly speculative injury.<sup>218</sup> Notably, “when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay.”<sup>219</sup>

The intersection of ripeness and the Eighth Amendment future harm analysis raises interesting and difficult questions. Insofar as the scope of the right at issue defines the universe of ripe claims, the Court’s recognition of exposure as a cognizable harm in the prison conditions context informs the ripeness analysis. When exposure *is* the injury, ferreting out cases because they rely on “contingent future events” becomes tricky business, as the concept of exposure-as-injury necessarily entails the idea of a future contingent event (i.e., future illness as a result of toxic exposure). In any event, it is clear that the ripeness

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20. This (1) assumes a level of legal sophistication that is unrealistic among the potential litigants, see, e.g., John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 (2001) (referring to “the mostly uneducated, unsophisticated, and legally uncounseled population of the prisons”); and (2) risks violation of the asserted right in the meantime (by placement or transfer).

213 This issue might play a role in the third-party standing analysis. See *supra* note 207.

214 See *infra* note 258 and accompanying text.

215 This is especially likely considering the generally poor economies of towns in the business of recruiting federal prison construction, including Letcher County.

216 GUTMAN, *supra* note 206, § 3.2.

217 *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

218 GUTMAN, *supra* note 206, § 3.2.

219 *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003).

requirement does not nullify the Court's substantive holding that inmates need not await a tragic event in order to state a claim under the Eighth Amendment.

The crucial question here is how far that exposure extends, and whether courts would be amenable to the argument that being sentenced to serve time at USP Letcher (or being scheduled for transfer there) constitutes sufficient exposure to toxic conditions, and thus a cognizable injury under the Eighth Amendment. The reasoning essentially boils down to an inevitable-exposure-to-exposure argument—that designation at USP Letcher will inevitably expose inmates to toxic exposure. The evidence relevant to the objective analysis of the prison conditions analysis would thus militate in favor of finding the Letcher County claim to be ripe, assuming sufficient evidence was presented to firmly establish causation.<sup>220</sup>

## 2. The PLRA: Limits on Remedies

In 1996, Congress, through the PLRA, limited federal courts' ability to intervene in prison administration.<sup>221</sup> Passed as a response to the judiciary's expanded role in addressing prison conditions,<sup>222</sup> as recounted in Part II, the PLRA established criteria that an inmate must meet before a court can even hear the claim. Some of the more important criteria include an exhaustion requirement, filing fees, a three-strikes provision, and a physical injury requirement. Specifically,

- a prisoner must first exhaust all available internal prison grievance processes;<sup>223</sup>
- an inmate who qualifies to proceed *in forma pauperis* must nevertheless pay a filing fee, including an initial partial fee and, if necessary, subsequent monthly payments for the remainder;<sup>224</sup>
- an inmate may not bring a claim if he or she has, on three prior

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<sup>220</sup> See *supra* note 161 and accompanying text.

<sup>221</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.)

<sup>222</sup> See *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (“Beyond doubt, Congress enacted [PLRA’s exhaustion requirement] to reduce the quantity and improve the quality of prisoner suits . . .”).

<sup>223</sup> 42 U.S.C. § 1997e(a) (2012).

<sup>224</sup> 28 U.S.C. § 1915(b)(1)–(2) (2012). Still, the initial fee will not be exacted if the prisoner has no means to pay it, *id.* § 1915(b)(4), and no monthly installments are required unless the prisoner will have more than \$10 in his account after paying the fee. *Id.* § 1915(b)(2). Otherwise, however, the initial filing fee cannot be waived. See Amy Howe, *Argument Preview: Filing Fees and Payments Under the Prison Litigation Reform Act*, SCOTUSBLOG (Nov. 3, 2015, 7:58 PM), <http://www.scotusblog.com/2015/11/argument-preview-filing-fees-and-payments-under-the-prison-litigation-reform-act/> [<https://perma.cc/3Q24-BJ4G>] (“Instead of waiving the fees for prisoners, the [PLRA] does the opposite. It requires indigent prisoners to pay the filing fees for their lawsuits by paying part up front and then making monthly installment payments of twenty percent of their previous month’s income until the fees are paid in full.”).

- occasions, brought a claim that was ultimately dismissed on the grounds of being frivolous, malicious, or failing to state a proper claim;<sup>225</sup> and
- an inmate must prove physical injury in addition to mental or emotional harm.<sup>226</sup>

Most importantly for this Comment, the PLRA also circumscribes federal courts' ability to grant prospective injunctive relief such as prison population reduction orders. Specifically, the PLRA requires that prospective remedies be as narrowly tailored as possible: "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."<sup>227</sup> In addition, before a court issues a prisoner release order, a court must have first "entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right [at issue]"<sup>228</sup> and must determine that "crowding is the primary cause of the violation of [that] right."<sup>229</sup>

Notwithstanding these limitations, the Court in *Plata* approved a prison population reduction order, demonstrating that the PLRA does not completely handcuff federal courts with respect to prospective injunctive relief.<sup>230</sup> The Court reasoned that the constitutional violations at issue could not be remedied without a reduction because overcrowding was their primary cause.<sup>231</sup> The order could not be more narrowly tailored because the violation

<sup>225</sup> *Id.* § 1915(g). Notably, some courts have held that claims dismissed prior to PLRA's enactment are counted against the three-strike limit. *See, e.g., In re Ibrahim v. District of Columbia*, 208 F.3d 1032, 1033 (D.C. Cir. 2000); *Welch v. Galie*, 207 F.3d 130, 132 (2d Cir. 2000).

<sup>226</sup> 42 U.S.C. § 1997e(e). Courts faced with the question have held that the physical injury requirement only applies to money damages, not to injunctive or declaratory relief. *See, e.g., Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) ("[The PLRA] prohibits only recovery of . . . [psychological] damages . . . absent a physical injury."); *Perkins v. Kan. Dept. of Corr.*, 165 F.3d 803, 808 (10th Cir. 1999) ("Our research reveals that only two circuits have considered whether [the PLRA's physical injury requirement] limits claims for injunctive or declaratory relief, and both have concluded that it does not" (citing *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459, 462-63 (7th Cir. 1997))).

<sup>227</sup> 18 U.S.C. § 3626(a)(1)(A) (2012). For a brief discussion of the relationship between the PLRA's limits on ongoing injunctive relief and justiciability, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92 (7th ed. 2015) (describing *Miller v. French*, 530 U.S. 327 (2000), which held that Congress had the "authority 'to alter the prospective effect of previously entered injunctions' . . . where Congress validly alters the substantive law on which an injunction was predicated . . . without Congress' having impermissibly revised a 'final' judgment").

<sup>228</sup> 18 U.S.C. § 3626(a)(3)(A)(i).

<sup>229</sup> *Id.* § 3626(a)(3)(E)(i).

<sup>230</sup> *See supra* Section II.C.

<sup>231</sup> *Brown v. Plata*, 563 U.S. 493, 502 (2011).

had only one possible remedy. In this way, *Plata* leaves the door open for enjoining prison construction on a toxic waste site. There is only one way to remedy the violation of the federal right at issue—halting construction and ceasing operations. While extreme, the remedy cannot be any more narrowly tailored because the unconstitutional prison condition inheres in the location itself. Nor do the expansive effects of this injunction preclude it from being narrowly tailored. As the Court noted in *Plata*, a remedy “does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class.”<sup>232</sup> The Court’s rationale with respect to the systemwide violations in medical care in California’s prisons applies to future USP Letcher inmates with equal force: “On any given day, prisoners . . . may become ill, thus entering the plaintiff class.”<sup>233</sup>

### B. *State Courts: A Solution Through Subsidiarity*

In light of the limitations on federal courts’ ability to hear and provide remedies in suits to enjoin the construction of a prison on a toxic site, the state forum likely proves a more attractive option for potential plaintiffs. Claims are still cognizable in state court because the Eighth Amendment’s prohibition against cruel and unusual punishment applies to the states through the Fourteenth Amendment.<sup>234</sup> Yet, state courts are bound neither by the stringent justiciability doctrines of the federal courts nor the strictures of the PLRA.<sup>235</sup> Moreover, since the majority of American prisoners are housed in state prisons and local jails,<sup>236</sup> state courts have authority over more potentially at-risk inmates.

First, state justiciability doctrines are more generous because they are not tied to Article III separation-of-powers concerns.<sup>237</sup> For example, though federal justiciability doctrines prohibit advisory opinions, “some state courts play an

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<sup>232</sup> *Id.* at 531.

<sup>233</sup> *Id.* at 520.

<sup>234</sup> *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962) (“[A] state law which . . . inflicts a cruel and unusual punishment . . . violat[es] . . . the Fourteenth Amendment.”); *see also id.* at 675 (Douglas, J., concurring) (explaining that the Eighth Amendment applies to the states “by reason of the Due Process Clause of the Fourteenth Amendment” (citing *Francis v. Resweber*, 329 U.S. 459, 463 (1947))).

<sup>235</sup> *See* 18 U.S.C. § 3626(d) (2012) (explaining that the PLRA does “not apply to relief entered by a State court based solely upon claims arising under State law”).

<sup>236</sup> *See supra* text accompanying note 198.

<sup>237</sup> For a detailed comparison of justiciability in the state and federal systems, see generally Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

explicit and accepted advisory role in their relations with the other branches.”<sup>238</sup> Unlike the federal system, states that permit advisory opinions allow greater interaction among the branches, “allow[ing] the branches to signal to each other that problems require special attention.”<sup>239</sup> This structure promotes interbranch communication, fostering a better environment for a court to enjoin prison construction as a “signal” to the legislature that this problem requires special attention.<sup>240</sup> As opposed to the federal restriction on “widely shared grievances,”<sup>241</sup> state courts have broader ability and authority to address different environmental problems, including planned prison construction. Specifically, “some states have standing rules that afford citizens, taxpayers, and legislators roles in vindicating shared state constitutional interests.”<sup>242</sup>

Second, as a federal statute, the PLRA does not bind state courts; state courts, therefore, might have greater latitude in fashioning a remedy, including enjoining construction.<sup>243</sup> This solution is complicated by the fact that many states have parallel PLRA statutes. Anticipating a shift in prison litigation from federal court to state court following the enactment of the PLRA, “the National Association of Attorneys General pushed hard for state PLRAs” such that “all but a few states now have some kind of system that specially regulates inmate access to *state* court.”<sup>244</sup>

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<sup>238</sup> *Id.* at 1845; *see also id.* at 1845-46 (noting that eight state constitutions “authorize the judiciary to give advice when the legislature or governor so requests” and that three states assign this power statutorily).

<sup>239</sup> *Id.* at 1847.

<sup>240</sup> Hershkoff describes the following Kentucky Supreme Court decision that highlights the ways in which broader standing rules can facilitate advantageous intrastate interaction. In the 1980s, Kentucky was one of several states pursuing investment by Toyota through “incentives and subsidies such as infrastructure improvements, labor assistance, and tax breaks.” *Id.* at 1858. Kentucky won the bidding contest through “a mix of financing with public and private ownership [that required] special legislation.” *Id.* In anticipation of criticism regarding the winning program’s constitutionality, the agreement included a mandate that the state “take such actions as may be required for the validation through judicial proceedings of any legislation which may be enacted by the General Assembly.” *Id.* at 1859 (internal quotation marks omitted). In response, the Governor filed a declaratory judgment action. *Id.* The Kentucky Supreme Court, in a 4–3 decision, upheld the Kentucky–Toyota agreement as constitutional, thereby facilitating the transaction. *Id.* (citing *Hayes v. State Prop. & Bldgs. Comm’n*, 731 S.W.2d 797, 799 (Ky. 1987)).

<sup>241</sup> *See id.* at 1853 (noting that litigants “cannot use the federal court merely to air generalized complaints that others share”).

<sup>242</sup> *Id.* at 1854.

<sup>243</sup> At the outset of this brief discussion, it is important to note that “because prison reform cases have been concentrated in federal court, little scholarly attention has been paid to state laws that address or substantially affect prisoner litigation.” Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After The Prison Litigation Reform Act*, CARDOZO L. REV. 645, 662–63 (2008).

<sup>244</sup> Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1632 (2003). For a list of parallel state prison litigation reform laws as of 2003, *see id.* at 1635–36 n.272.

However, while “[s]tate PLRAs generally seem to apply very broadly,”<sup>245</sup> inmates still likely have a better chance at success in state court. States have greater latitude to construe their respective prison reform legislation more narrowly than their federal counterparts.<sup>246</sup> And while relatively few, there are still some states that have not enacted prison litigation-limiting laws.<sup>247</sup>

Most importantly for this Comment, state legislatures have been least active with respect to enacting parallel prospective relief provisions, leaving room for litigants to seek broad injunctive relief.<sup>248</sup> Still, there is reason to doubt that this theoretical possibility has much practical significance for litigants on the ground, as “most state courts do not have a history of granting broad relief to inmates beyond relieving constitutional violations.”<sup>249</sup> As one commentator has speculated, this difference is more likely a reflection of the fact that state legislatures do not need explicit prospective relief-limiting legislation because state judges are already unlikely to “engag[e] in lengthy supervision of prison conditions litigation.”<sup>250</sup>

Another role that state courts might play in post-PLRA prison litigation involves the enforcement of private settlement agreements made during federal proceedings.<sup>251</sup> A private settlement agreement, unlike consent decrees,<sup>252</sup> need “not comply with the limitations on relief set forth in [the PLRA].”<sup>253</sup> Crucially, however, such agreements are only permissible “if [its] terms . . . are not

<sup>245</sup> Sasha Volokh, *Suing Public and Private Prisons: The Role of the Prison Litigation Reform Act*, WASH. POST: VOLOKH CONSPIRACY (Feb. 20, 2014), [https://www.washingtonpost.com/news/vo-lokh-conspiracy/wp/2014/02/20/suing-public-and-private-prisons-the-role-of-the-prison-litigation-reform-act/?utm\\_term=.8275c8ea9874](https://www.washingtonpost.com/news/vo-lokh-conspiracy/wp/2014/02/20/suing-public-and-private-prisons-the-role-of-the-prison-litigation-reform-act/?utm_term=.8275c8ea9874) [<https://perma.cc/QD5B-YWCJ>].

<sup>246</sup> See, e.g., *Adamson v. Corr. Med. Servs., Inc.*, 753 A.2d 501, 516 (Md. 2000) (holding that Maryland’s Prison Litigation Act did not mandate exhaustion of administrative remedies prior to filing suit in state court against a private corporation contracted to provide medical care to inmates); *State ex rel. Henderson v. Raemisch*, 790 N.W. 2d 242, 248 (Wis. Ct. App. 2010) (allowing a prisoner to bring a claim despite four previous *partial* dismissals because there is “no clear agreement among the federal circuits on the answer to the question of whether a partial dismissal counts as a strike” under the federal PLRA).

<sup>247</sup> See Volokh, *supra* note 245 (noting that “an inmate may find himself in some PLRA gap . . . because his state has no PLRA”).

<sup>248</sup> See Brill, *supra* note 243, at 678 & n.175 (noting that by 2008, “limitations on prospective relief ha[d] only been adopted in [a] few states,” including Alaska and Michigan).

<sup>249</sup> *Id.* at 678.

<sup>250</sup> *Id.*

<sup>251</sup> See 18 U.S.C. § 3626(c)(2) (2012) (allowing parties to enter into private settlement agreements).

<sup>252</sup> Before the PLRA, consent decrees were the primary mode through which parties to federal prison litigation settled. See Brill, *supra* note 243, at 660-61 (“[C]onsent decrees to remedy constitutional violations and inhumane conditions had dominated the prison landscape since the 1970’s.”). However, consent decrees are subject to the PLRA’s limitations on remedy-fashioning such as narrow tailoring. See 18 U.S.C. § 3626(c)(1) (“In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth [by the PLRA].”).

<sup>253</sup> *Id.* § 3626(c)(2)(A).

subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.”<sup>254</sup> In other words, agreements are not enforceable in federal court. Instead, the drafters made clear that state courts would handle claims related to breach of contract: “Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.”<sup>255</sup>

Policy reasons might also favor raising these claims in state courts. State courts are better positioned than their federal counterparts to address prison conditions claims because of prisons’ central role in local economies, and even state and local elections.<sup>256</sup> State courts are also naturally better acquainted with the economic concerns that often drive prison construction in areas like Letcher County in the first place. Of course, this proximity to local fiscal and political concerns also introduces the possibility that state judges are ill-suited to render judgments related to potentially economy-destabilizing injunctions.

While I do not attempt to tackle the differences between federal and state justiciability doctrines or the justifications for distinguishing between them, this Section is meant to provide general context for the injunctive action I envision. In sum, the relationship between broad justiciability doctrines and interbranch communication, the remedy-shaping flexibility available to state courts in contrast to PLRA-bound federal courts, states’ superior knowledge of the complexities of the local economy, and the fact that the majority of the incarcerated population is housed in state prisons all weigh in favor of choosing a state court for a suit to enjoin the construction of a prison on a toxic waste site.

## CONCLUSION

This Comment has advanced a constitutional approach to remedying the troubling trend of prison construction on toxic waste sites. Having posited the doctrinal promise of that approach, the analysis does not answer the

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* § 3626(c)(2)(B).

<sup>256</sup> Some have argued that states are the appropriate venue for prison reform litigation. *See, e.g.,* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 18 (1998) (“Standard doctrine holds that states have the right to make their own decisions in a variety of fields, and corrections was widely recognized as one of the fields most unambiguously assigned to state authority. But in the prison reform cases, federal courts imposed nationally defined rules on state prisons.”). Others disagree. *See, e.g.,* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 7-8 (2008) (submitting that “federalism was used by the conservative Congress of the 1990s . . . [to] greatly restrict[] access by prisoners to federal courts in the [PLRA]” and that “[t]he values traditionally invoked to justify federalism—states are closer to the people, states serve as a barrier to tyranny by the federal government, states are laboratories for experimentation[,] . . . are of little use in constitutional decision making”).

equally—or perhaps more important—question of its comparative or strategic value. Addressing prison conditions may be best left to the democratic process.

While this Comment has focused on a specific litigation strategy for securing an injunction, the actual value of this approach is ultimately measured by the prospect of victories on behalf of specific classes of inmates. The true value of such a claim is the potential role it could play in the broader political system. A constitutional claim based on cruel and unusual prison construction could compensate for the general lack of political will that might otherwise prompt reform in this area.<sup>257</sup> Drawing on principles fundamental to tort law, this claim would operate as a deterrent to choosing risk-laden prison sites while incentivizing public officials to choose safer locations.<sup>258</sup> With the specter of an adverse Eighth Amendment decision looming, officials may think more carefully about bidding for a prison that might subject municipalities to enormous liability and sunk costs.

Nevertheless, while constitutional litigation is just one of many ways to effect prison reform, it is one worthy of consideration by advocates and officials alike, as it is incumbent upon the members of a free society to resist the temptation to let out of sight mean out of mind. For indeed, “the moral test of government is how that government treats those who . . . are in the shadows of life.”<sup>259</sup>

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<sup>257</sup> Here I refer to “a mentality shared by many: Why care about the rights of those who didn’t care about the rights of their victims?” David L. Hudson Jr., *Why I Care About Prisoner Rights*, FIRST AMEND. CTR. (May 25, 2011), <http://www.firstamendmentcenter.org/why-i-care-about-prisoner-rights> [<https://perma.cc/D9W8-GNSX>]; see also Mary Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997) (“Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime.”).

<sup>258</sup> See, e.g., Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854 (2001) (arguing, in the context of qualified immunity for police officers, that constitutional tort remedies have a deterrent effect with respect to “the undesirability of dragging public officials through a difficult legal process” and related “political costs”).

<sup>259</sup> Linda Rosenberg, Plenary Address at the 41st National Council Mental Health and Addictions Conference (May 2, 2011), published in part in *Be the Change*, 38 J. BEHAV. HEALTH SERVS. & RES. 281, 281 (2011).

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