TOWARD ACCESSING HIV-PREVENTATIVE MEDICATION IN PRISONS

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ABSTRACT—The Eighth Amendment is meant to protect incarcerated individuals against harm from the state, including state inaction in the face of a known risk of harm. While the Eighth Amendment’s protection prohibits certain prison disciplinary measures and conditions of confinement, the constitutional ambit should arguably encompass protection from the serious risk of harm of sexual assault, as well as a corollary to sexual violence: the likelihood of contracting a deadly sexually transmitted infection like HIV. Yet Eighth Amendment scholars frequently question the degree to which the constitutional provision actually protects incarcerated individuals.

This Note draws on previous scholarship on cruel and unusual punishment and proposes a novel method for bringing an Eighth Amendment claim. This claim centers on advocating for access to preventative HIV medication in the form of a daily pill known as PrEP, utilizing a model litigant to ground the constitutional analysis and anticipate potential pitfalls. Through this novel claim, the Note joins the global movement to end the spread of HIV by protecting incarcerated communities from contracting the virus during their sentences.

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INTRODUCTION

It has become unremarkable to point out that the United States incarcerates more individuals than any other country. The United States’ history of mass incarceration and the proliferation of the “prison industrial complex” has been well-documented. In the 1970s and ’80s, the “War on Drugs” and “War on Crime” caused prison populations to skyrocket.

—Benjamin Franklin

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“An ounce of prevention is worth a pound of cure.”

—Benjamin Franklin

INTRODUCTION

It has become unremarkable to point out that the United States incarcerates more individuals than any other country. The United States’ history of mass incarceration and the proliferation of the “prison industrial complex” has been well-documented. In the 1970s and ’80s, the “War on Drugs” and “War on Crime” caused prison populations to skyrocket.


3 See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84 (2003) (“The term ‘prison industrial complex’ was introduced by activists and scholars to contest prevailing beliefs that increased levels of crime were the root cause of mounting prison populations. Instead, they argued, prison construction and the attendant drive to fill these new structures with human bodies have been driven by ideologies of racism and the pursuit of profit.”).


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Presently, nearly two million people are incarcerated in the United States.\(^4\) About a quarter of these people are in jail prior to conviction; limits on who can be granted bail, let alone who can afford it, cause many to be held for years despite no finding of guilt for their alleged crime.\(^5\) But whether it is pre- or post-conviction, incarceration has a dire impact on people’s lives.

One such impact of imprisonment is exposure to physical violence, as well as the lingering effects of this violence. In prison and jail alike,\(^6\) individuals are harmed in multiple ways. Rape and sexual assault, in particular, are rampant.\(^7\) The physical, emotional, and psychological violence of rape are serious concerns. Still, there are others. Sexually transmitted infections (STIs) can affect incarcerated individuals well after their sentences are over. Human immunodeficiency virus, known globally as HIV, is one especially deadly STI that can spread within a prison due to the significant risk of rape.\(^8\)

There are endless reasons why the spread of HIV in prison is concerning. For the sake of brevity, consider the following three: (1) HIV is fatal if left untreated and is chronic—there is currently no cure for HIV;


\(^5\) Id.

\(^6\) This Note exclusively discusses incarcerated individuals in prison, as those are the individuals for whom the Eighth Amendment directly applies. Prison populations are also where the empirical data is most available and reliable. Legislative change advocated for infra Section III.D should be expansive enough to apply to jails. However, the differing functions of jails versus prisons, i.e., jails as temporary while prisons permanent, may present unique issues beyond the scope of this Note.

\(^7\) See Prison Rape Elimination Act, 34 U.S.C. § 30301(2) (2003) (“[N]early 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”); Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, Sexual Violence Inside Prisons: Rates of Victimization, 83 J. URB. HEALTH 835, 836 (2006) (“Research suggests that rates of sexual victimization in prison may be as high as 41% or as low as less than 1%. . . . Male facilities have been found to have higher rates of sexual assault compared to female facilities.”). While this is a wide range and 1% appears low on its face, both the extensive range and its lower limit are likely due to the reluctance to report sexual assaults while in prison. See David M. Siegal, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter, 44 STAN. L. REV. 1541, 1545–46 (1992); 34 U.S.C. § 30301(6) (“Prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all.”).

\(^8\) See, e.g., Nancy Wolff & Jing Shi, Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath, 15 J. CORR. HEALTH CARE 58, 58 (2009) (noting that in a survey of around 6,000 male inmates, sexual assault occurred at a rate between 2% and 5%); Amy Nunn, Alexandra Cornwall, Jeannia Fu, Lauri Bazerman, Helen Loewenthal & Curt Beckwith, Linking HIV-Positive Jail Inmates to Treatment, Care, and Social Services After Release: Results from a Qualitative Assessment of the COMPASS Program, 87 J. URB. HEALTH 954, 955 (2010) (“Approximately 17% of HIV-positive Americans pass through the correctional system every year.”); 34 U.S.C. § 30301(7) (noting the higher infection rates within prisons for STIs and emphasizing that “HIV and AIDS are major public health problems within America’s correctional facilities”).
(2) carceral punishment is, in part, premised on the concept of just deserts—if an incarcerated individual must suffer a fatal, chronic illness which is not part of their sentence, justice may be subverted; and (3) most incarcerated individuals serve sentences of less than five years—in the short term, those who contract HIV in prison rejoin the general population. Many are unaware of their status due to the delayed onset of symptoms, general stigma around prison rape, and lack of systemic oversight to properly screen incarcerated individuals prior to release. Given the level of harm HIV poses as an incident to incarceration, the lack of constitutional remedy for such a situation is shocking.

Upon incarceration, the Eighth Amendment should protect against harm—either perpetuated or unaddressed by the state—when the risk is known. Understanding the serious risks of harm associated with sexual assault and the known likelihood of contracting a deadly STI like HIV from such sexual violence, the Eighth Amendment should protect against this category of risk as well. Yet scholars frequently question the degree to which the Eighth Amendment actually protects incarcerated individuals.

Professor Sharon Dolovich, a leading expert on prisons and punishment, criticizes the Supreme Court for failing to define the scope of when prison conditions are cruel enough to become a constitutional violation. This has allowed states to avoid their “carceral burden”: their “affirmative obligation to protect prisoners from serious physical and psychological harm.” This burden should require states to proactively remedy unsafe conditions to prevent unnecessary suffering. Nevertheless,
states often fail to meet this burden, and courts fail to hold them accountable under the Eighth Amendment.\footnote{See, e.g., Valentine v. Collier, 978 F.3d 154, 165 (5th Cir. 2020) (denying an Eighth Amendment claim against the state’s insufficient response to COVID-19 because “[t]he Eighth Amendment does not mandate perfect implementation,” only a reasonable effort). For more about how federal district and circuit courts have handled Eighth Amendment claims, see infra Section II.D.}

Likewise, Professor John Stinneford criticizes the Supreme Court’s misguided interpretation and application of the Eighth Amendment.\footnote{Unlike Professor Dolovich, Professor Stinneford takes a staunchly originalist approach to his construction of the Eighth Amendment. See Stinneford, supra note 11, at 1743 (“[R]estoring both the effectiveness and stability of the Cruel and Unusual Punishments Clause is a renewed recognition of the original meaning of the word ‘unusual.’”). By engaging with both poles of constitutional construction, I hope to develop a universally appealing argument for how the Eighth Amendment can be applied for the purposes of this Note.} Pointing to historical evidence, Stinneford reveals that the Framers understood the word “unusual,” as used in the Constitution, to be “a term of art that referred to government practices that are contrary to ‘long usage.’”\footnote{Id. at 1745.}

“Long usage” meant simply a practice continuously employed for “a very long time.”\footnote{Id.} Stinneford asserts that by electing to include protections against both cruel and unusual punishment, the Framers intended a comparative analysis: new punishment practices, unusual in the context of traditional punishments, were seen as likely crueler than previously existing punishments. To pass constitutional muster, these new punishments should be compared to conventional practices enjoying long usage to determine if they are “not merely unusual, but ‘cruel and unusual.’”\footnote{Id.}

This Note harmonizes Stinneford’s concept of novelty and Dolovich’s construction of a state carceral burden. At their intersection, this Note argues that the current practice enjoying long usage is toward the prevention of significant harm. The Court has constructed the Eighth Amendment to allow prisoners to seek relief when they are known to be at substantial risk of significant harm, even if that harm has not yet affected them.\footnote{See infra Part II.} In the context of HIV, refusal to provide access to new preventative treatment deviates from this long usage as it forces incarcerated people to remain exposed to contracting a deadly, chronic virus. Such refusal indicates the state’s willingness to let individuals under its care become infected with HIV and then slowly perish. That preventative medication is readily available yet denied by the state is an abandonment of the state’s carceral burden. Finally, the living constitutional approach underlying Dolovich’s theory further supports the notion that, according to contemporary standards of decency,
society would not tolerate exposure to contracting a deadly STI when preventative medication is readily available.

While adopting the framework of two prominent scholars, this Note takes a novel approach in proposing how to extend the Eighth Amendment protection reliably.21 The Note advocates for access to preventative HIV medication in the form of a daily pill known as PrEP. Because the known risk of contracting HIV by certain incarcerated populations requires providing access to medications to mitigate those risks, refusal by prison officials amounts to deliberate indifference to a probable and grave medical harm. Although bringing a constitutional claim to secure PrEP is limited, as it requires a one-to-one ratio of legal representation and client access, it is a start—and should not be the only tactic.22

While the overall goal would be to make preventative HIV medication accessible for all incarcerated individuals, this Note recognizes practical limitations to expanding Eighth Amendment protections and accordingly takes a more targeted and limited approach. Under the novel Eighth Amendment construction proposed, men who face a known, higher rate of sexual assault while incarcerated must be granted access to PrEP due to the significant risk of contracting HIV. For illustrative purposes, this Note utilizes a model litigant to discuss the limitations of bringing an Eighth Amendment claim of this nature. For this purpose, the model client is a young Black man incarcerated in a federal prison.23

Through using this model litigant, the Note acknowledges that Eighth Amendment claims are notoriously difficult to litigate and win. While the

21 See generally Amber M. Charles, Note, Indifference, Interruption, and Immunodeficiency: The Impact and Implications of Inadequate HIV/AIDS Care in U.S. Prisons, 92 B.U. L. Rev. 1979 (2012) (arguing that courts have misapplied Eighth Amendment jurisprudence when finding that the disruption to or inadequate administration of HIV and AIDS medications is not a constitutional violation). At the time of publication for Charles’s piece, no preventative medication for HIV had yet been approved for use. See infra Section I.B (discussing the development of preventative HIV medication). This Note, given subsequent medical advancements, approaches this problem from a different perspective that accounts for these pertinent changed circumstances.

22 While a class action may be another avenue for relief, analyzing how an advocate could satisfy Federal Rule of Civil Procedure 23’s requirements for class certification is beyond the scope of this Note, as is a discussion of the limits to equitable relief in the sphere of preventative medication. However, the litigation framework proposed in this Note may help pro se litigants, a significant contribution given that the vast majority of prisoners’ rights suits are filed pro se. See Richard H. Frankel & Alistair E. Newbern, Prisoners and Pleading, 94 WASH. U. L. Rev. 899, 901 (2016) (noting that in 2014, “92 percent of prisoner actions [were] brought pro se”).

23 Black men are disproportionately affected by HIV, both in and out of prison, and young men in prison are at greater risk of sexual violence. This may allow for a clearer showing of knowledge regarding the risk of harm. See infra Sections I.A, II.B. A similar client who could benefit from the legal framework proposed in this Note could be a man who openly has sex with other men while incarcerated. Both clients should have institutional records which can be relied upon to show knowledge.
text of the Eighth Amendment is short and direct, it is lofty in what it seeks to protect: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 24  The first two protections seem straightforward. 25 Yet the final protection has proven to be ephemeral, for what is cruel and unusual given that (in theory) punishment by its very nature must be undesirable to be an effective deterrent? 26 While the Supreme Court has come a long way in defining what constitutes cruel and unusual punishment, those advocating for the rights of the incarcerated still face limited success in bringing an Eighth Amendment claim. 27 In fact, Eighth Amendment claims prove so difficult to win that Professor Stinneford has gone so far as to claim that the protections of this amendment do not exist at all but are rather illusory windmills for legal advocates to tilt at. 28

Still, this Note encourages advocates to pursue Eighth Amendment claims, regardless of the challenges presented. This Note proceeds as follows: Part I frames the issue of HIV in prisons, emphasizing how the pattern of government inaction creates needless risk in our society. Part II describes the background for bringing an Eighth Amendment claim and highlights several hurdles that need to be circumvented for this advocacy to work. Part III outlines the proposal for securing access to preventative HIV medication: a novel legal framework that advocates can utilize to obtain access to HIV-preventative medication for their clients. Finally, the Note concludes by addressing systemic and societal barriers that complicate the mission of protecting the incarcerated community from the threat of contracting HIV. In so doing, I address why the Constitution may not provide the optimal solution to this issue and recommend other avenues—like legislative and private reform—to secure PrEP for incarcerated individuals.

24 U.S. CONST. amend. VIII (emphasis added).
25 Still, the Court’s path towards defining “excessive” has its own convoluted history that is beyond the scope of this Note.
27 See John F. Stinneford, The Illusory Eighth Amendment, 63 AM. U. L. REV. 437, 442–43 (2013) (“In cases involving imprisonment of adults, the Court applies an apparently irrebuttable presumption of constitutionality.”).
28 Id.
I. UNDERSTANDING HIV AND PREVENTATIVE MEDICATION IN PRISONS

To the general public, HIV does not pose the threat it once did. In 2012, the U.S. Food and Drug Administration approved the use of a preventative medication—PrEP—that could save countless lives.29 By inhibiting the spread of HIV, PrEP offered a realistic path toward eliminating the virus entirely. In theory, since PrEP is 99% effective at preventing the sexual transmission of HIV, if the populations most likely to get HIV take PrEP then HIV could be wiped out within a few generations.30 However, that is not what is happening. Those seeking PrEP struggled for many years to get the drug, as this lifesaving medication was not widely affordable or accessible.31 Now, PrEP and other HIV-prevention medications are covered by most insurance carriers, commercials advertising these drugs air regularly, and the stigma around taking PrEP has lessened.

While public policy has advanced to the point where PrEP is considerably more available, accessibility lags for one significant population: incarcerated individuals.32 Institutional barriers, such as cost and difficulty of administering the medication, inhibit access in prisons.33 Likewise, unsympathetic sentiments regarding incarcerated populations disincentivizes legislative reform to rectify the situation and significantly complicates public discourse. Consequently, it is necessary for legal advocates to intervene, as the system is moving too slowly to address the issue. By drawing on Eighth Amendment protections, attorneys may be able to successfully gain access to PrEP for their clients. The following Section discusses the history of the HIV and AIDS crisis in the United States, setting the stage for the necessary development of preventative medications—the subject of Section I.B.

30 While this may seem like a lofty claim, the Centers for Disease Control and Prevention have identified PrEP coverage as one of four key policy initiatives that “will have the greatest impact of ending the HIV epidemic in the United States by 2030.” Ending the HIV Epidemic in the U.S. (EHE), CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/endhiv/ehe-progress/index.html [https://perma.cc/3YXE-6BZD]. Following this logic, global access would have a similar impact.
33 See Teixeira da Silva & Bachireddy, supra note 32.
A. The History of HIV and the AIDS Crisis

HIV/AIDS was documented in the United States for the first time in 1981. 34 On June 5, 1981, the Centers for Disease Control and Prevention (CDC) released a public report describing “[p]neumocystis pneumonia in previously healthy, gay men in LA.” 35 But the true nature of this threat would take much longer to reveal itself. While the CDC was quick to form a task force to investigate the outbreak, it took the task force over a year to release its official, publicly available report. 36 In this report, the CDC coined the term “acquired immune deficiency syndrome (AIDS).” 37 It was also in this report that “homosexual or bisexual males” were first identified as the group most at risk of contracting AIDS. 38

For over a decade, the government’s responses to the AIDS epidemic ranged from undereffective to downright offensive. Audio recordings from Ronald Reagan’s press meetings in 1982 show that inquiries about the AIDS outbreak (based, in part, on misinformation) were met with derision and even laughter from other members of the press pool. 39 Press Secretary Larry Speakes responded that he had not “heard [Reagan] express concern” over the rising death count, and even went so far as to ask the inquiring journalist if he was infected with HIV: “I don’t have it. [Press pool laughter.] Do you?” 40 It was not until 1988 that the government alerted the public on a mass scale by mailing informational pamphlets to “every household in America—107 million copies in all.” 41 But by this time, an estimated 625,000 people had already contracted HIV. 42 These numbers were only the beginning of the horrors to come.

Despite increased efforts to supply the general population with accurate information about HIV/AIDS and how it spreads, the virus continued to plague marginalized populations. 43 Today, Black people are

34 HIV and AIDS Timeline, supra note 31.
35 Id.
36 Id.
37 Id.
40 Id.
41 HIV and AIDS Timeline, supra note 31.
42 Id.
disproportionately affected by HIV: despite making up about 13% of the U.S. population, Black people accounted for 40% of new HIV diagnoses in 2021.\textsuperscript{44} Black men who have sex with men, in particular, were the subpopulation accounting for the largest percentage of those infected with HIV in 2021, comprising 25% of newly infected individuals.\textsuperscript{45}

The increased risk of infection for Black men tracks to the carceral setting.\textsuperscript{46} Overall, about 1% of the federal prison population is documented to have contracted HIV.\textsuperscript{47} While this number may seem small, it still accounts for around 20,000 individuals. And again, those numbers only reflect the known cases of HIV within prisons. For the purposes of this Note, legal advocates with clients in the South can point to even worse statistics: in Florida, Mississippi, and Louisiana, over 2% of the prison populations have HIV.\textsuperscript{48} Unfortunately, the Bureau of Justice Statistics has not released data about the exact racial breakdown of the imprisoned population living with HIV since 2004. However, the 2004 report stated that 53% of the 15,400 incarcerated individuals comprising the dataset were Black.\textsuperscript{49} In part, this should be unsurprising. Black people are overrepresented within the U.S. prison population: despite making up only about 13% of the U.S. population, Black people account for 33% of incarcerated individuals.\textsuperscript{50} As such, over half of those reported to have contracted HIV come from only a third of the prison population; consequently, Black people bear the brunt of suffering under HIV in prisons.

The government has a habit of inaction towards marginalized communities within the carceral setting.\textsuperscript{51} Consider the lack of response to hepatitis C within prisons: as of 2022, 20% of incarcerated individuals have

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Emily Widra, \textit{New Data on HIV in Prisons During the COVID-19 Pandemic Underscore Links Between HIV and Incarceration}, PRISON POL’Y INITIATIVE (June 1, 2023), https://www.prisonpolicy.org/blog/2023/06/01/hiv_in_prisons/ [https://perma.cc/3ZLA-WB9J].
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} See, e.g., Siegal, \textit{supra} note 7, at 1546 (noting the suggestion of some commentators that prison officials’ actions may actually make rape within prisons easier to commit); Allison Minicky Middleton, \textit{Sentenced to a Painful, Preventable Death: The Changing Landscape Surrounding the Hepatitis C Epidemic Within the Justice System and Why Inmates Must Receive the Cure}, 90 MISS. L.J. 229, 238 (2020) (“Treating prisoners with hepatitis C has been a longstanding issue in the prison system, especially because many prisoners meet many of the risk factors of hepatitis C and are not being properly screened before they enter the prison population.”).
hepatitis C, the majority of which are Black and brown people.\textsuperscript{52} As with HIV, the difficulties of addressing hepatitis C change in the prison context. Both present issues of screening: given the massive amount of people moving through the carceral system, properly testing everyone alone overwhelms the human resources available to prison administrators.\textsuperscript{53} Additionally, once diagnosed, both are difficult to treat. Hepatitis C is treated through a regimen of antivirals—but unlike HIV, hepatitis C can be cured within a few weeks.\textsuperscript{54} Still, hepatitis C medication is costly and can place institutional burdens on prison officials. For example, guards must escort the incarcerated individuals to the medical wing when these guards may be needed elsewhere. However, given the requirements of the Eighth Amendment, ignoring this treatment is a constitutional violation.\textsuperscript{55} If prisons ably adjusted to the demands of administering hepatitis C medication, they must do the same for HIV-preventative medication.

Acknowledging the unique circumstances of HIV and AIDS risk for those in prison and the challenges posed to certain demographics, this Note employs a model client. Our client is a young Black man held in federal prison, due to the particularly notable impact HIV and AIDS have had on the Black gay community and the stark number of Black men currently incarcerated. After laying out crucial doctrinal groundwork in Part II, Part III discusses the specific contours of this model-client framework. The remainder of this Part focuses on the use and effective administration of PrEP in order to frame the underlying issue of how prison officials can effectively administer this medication.

\textbf{B. The Development of PrEP}

Despite the slow public response from the federal government, efforts to produce a treatment for HIV began shortly after its discovery in the 1980s.\textsuperscript{56} By 1985, clinical trials for an antiretroviral (ARV)\textsuperscript{57} began, and by


\textsuperscript{53} Middleton, supra note 51, at 239.

\textsuperscript{54} Id. at 237.

\textsuperscript{55} See id. at 249.


\textsuperscript{57} HIV is a virus that replicates by attaching to healthy cells, translating its viral RNA to DNA, creating “building blocks” for new viral cells through a process called protease catalysis, and replicating to flood the body with infected cells. See James Myhre & Dennis Sifris, \textit{Antiretrovirals Overview},
1987 the first ARV was approved for use.\(^{58}\) Early ARVs provided only short-term protection against the HIV/AIDS progression.\(^{59}\) Still, as of 1995, a combination of three publicly available ARVs reduced AIDS-related deaths by approximately 60% to 80%.\(^{60}\) Through a combination of effective treatment and public education, the spread of HIV was brought under control. The AIDS Crisis effectively ended, replaced by a global effort to end the spread of the disease entirely.\(^{61}\)

Finally, in 2012, HIV medication had advanced to the point where preventative treatment became available.\(^{62}\) The medication was a “[p]re-exposure prophylaxis (PrEP)” that could help prevent the spread of HIV.\(^{63}\) PrEP is lauded as 99% effective in reducing the risk of contracting HIV “when taken as prescribed” for certain sexual activities.\(^{64}\) PrEP works by causing the body to produce certain types of antibodies.\(^{65}\) These antibodies then block an enzyme produced by HIV—the enzyme that would otherwise allow the virus to replicate within the body.\(^{66}\)

However, these antibodies will not persist in the blood if one were to stop taking PrEP.\(^{67}\) For PrEP to achieve its 99% effective rate, doctors recommend taking it for at least a week to properly build up the antibody and reliably inhibit HIV’s replication process.\(^{68}\) It is also important, though not necessary, to take PrEP every day; studies have shown that the protective effects of PrEP continue even if a dose or two is missed.\(^{69}\) The routine-use nature of PrEP will help our hypothetical client, as prison administrators

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\(^{58}\) See Why the HIV Epidemic Is Not Over, supra note 56.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) PrEP for HIV Prevention in the U.S., supra note 32.

\(^{63}\) Id.

\(^{64}\) PrEP Effectiveness, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html [https://perma.cc/Z4XG-5XBL]. However, the effectiveness of PrEP for “people who inject drugs” is less clear; according to the CDC, PrEP can “reduce the risk of getting HIV by at least 74%” for these individuals. Id.


\(^{66}\) Id.

\(^{67}\) See PrEP Effectiveness, supra note 64.

\(^{68}\) See id. (noting that the seven-day effectiveness window only applies to receptive anal sexual activities, i.e., the recipient of insertive anal sex).

cannot claim they lack the human resources to administer PrEP. The medication can be incorporated into the general prison’s daily rounds for the population at large, and any need to delay or miss a dose for security reasons should not preclude granting access to PrEP in the first place.

While the creation of preventative medication was a milestone in and of itself, providing effective access to the drug proved to be an entirely different matter due to the stigma surrounding HIV and AIDS and the prohibitive cost of the medication. Public outcry against PrEP—centered on claims that it would only encourage further reckless sexual behavior—drove policymakers away from embracing the drug and allowed insurance providers to correlate taking PrEP with engaging in other risky behavior writ large, effectively disincentivizing the use of the medication. As a result, the high costs of the medication and sparse insurance coverage limited access.

To date, the CDC has made PrEP more readily available and legislation has corrected some prohibitions surrounding cost and insurance coverage. Still, ensuring the most at-risk populations actually receive and follow the appropriate treatment plan for PrEP has not been simple, attributable to both pragmatic and legal obstacles. To contextualize the legal barriers to adequate constitutional protection, Part II of this Note examines the Eighth Amendment before Part III demonstrates how the Eighth Amendment can be utilized to advocate for access to PrEP in prisons.

II. THE EIGHTH AMENDMENT: BACKGROUND AND DEVELOPMENT

The Eighth Amendment, in pertinent part, prohibits cruel and unusual punishment. Such a broad prohibition, nevertheless, has specificity in American jurisprudence, especially in constructing a successful claim. An Eighth Amendment claim has several key elements. Initially, litigants must show they risk suffering a serious medical harm or deprivation of a basic human need that goes against “contemporary standards of decency.”

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70 See Doron Dorfman, Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine, 109 CORNELL L. REV. 311, 313–14 (2024). For instance, insurance providers could charge a higher premium for individuals taking PrEP. Id. at 326.

71 PrEP for HIV Prevention in the U.S., supra note 32.

72 Id.

73 See id.

74 U.S. CONST. amend. VIII.

75 Estelle v. Gamble, 429 U.S. 97, 103–04 (1976). Though listed here as a single element, this standard gives insight into the difficulty of meeting the constitutional claim. A litigant must show both that the harm satisfies the medical or basic-human-need condition and that this harm goes against contemporary standards of decency.
Tracing the boundaries of this standard has been an ongoing process for the 
Court.\textsuperscript{76} This Part charts the various evolutions of the Eighth Amendment.

From there, this Part discusses the legal requirements for the remaining 
factors: knowledge of the risk of serious harm and failure to act to prevent it, 
also known as deliberate indifference.\textsuperscript{77} Establishing these elements can 
require Herculean efforts by legal advocates.\textsuperscript{78} Therefore, it will be necessary 
to assess how other Eighth Amendment claims for preventative care have 
fared amongst the lower courts in order to hypothesize the effectiveness of 
the novel approach proposed here. While constitutional law can create a neat 
framework, whether it is sturdy enough to survive scrutiny is another matter.

\textbf{A. Defining Cruel and Unusual Punishment}

Upon incarceration, a citizen’s constitutional rights are significantly 
weakened.\textsuperscript{79} But not the Eighth Amendment. In fact, it is only upon 
incarceration that the full protection of the Eighth Amendment is invoked: 
the government still may not inflict “cruel and unusual punishments,” even 
for the most heinous crimes.\textsuperscript{80}

In 1976, the Supreme Court expanded the protections granted under the 
Eighth Amendment in the landmark case of \textit{Estelle v. Gamble}.\textsuperscript{81} The Court 
recognized that the Eighth Amendment was intended to be flexible: “The 
Amendment embodies ‘broad and idealistic concepts of dignity, civilized 
standards, humanity, and decency . . .’ against which we must evaluate penal 
measures.”\textsuperscript{82} Because of this flexibility, it is not sufficient to create bright-
line rules for when certain punishments or conditions of confinement violate 
constitutional protections. Instead, courts must determine whether treatment

\textsuperscript{76} See, e.g., Stinneford, supra note 11, at 1749–57 (outlining the trajectory and limitations of the 

\textsuperscript{77} \textit{Estelle}, 429 U.S. at 106.

\textsuperscript{78} See, e.g., Brittany Glidden, \textit{Necessary Suffering?: Weighing Government and Prisoner Interests 
in Determining What Is Cruel and Unusual}, 49 AM. CRIM. L. REV. 1815, 1822 (2012) (“While this two-
part test has intrinsic appeal, a closer examination of its application reveals that it is not functioning as 
intended, and is creating negative consequences . . .”).

\textsuperscript{79} See, e.g., Turner v. Saferly, 482 U.S. 78, 89 (1987) (holding that alleged violations of incarcerated 
individuals’ constitutional rights are to be assessed under rational basis, rather than strict scrutiny).

\textsuperscript{80} U.S. CONST. amend. VIII; see \textit{Ingraham v. Wright}, 430 U.S. 651, 664 (1977) (noting that the 
Eighth Amendment manifests “an intention to limit the power of those entrusted with the criminal-law 
function of government”); \textit{Bell v. Wolfish}, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a 
pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that 
punishment may not be ‘cruel and unusual’ under the Eighth Amendment.”).

\textsuperscript{81} See 429 U.S. at 104–06.

\textsuperscript{82} Id. at 102 (quoting \textit{Jackson v. Bishop}, 404 F.2d 571, 579 (8th Cir. 1968)).
of incarcerated people by state officials comports with “the evolving standards of decency that mark the progress of a maturing society.” 83

With Estelle’s holding came a definitive standard outlining which treatment in prisons would be cruel and unusual punishment for the standards of decency at the time: deliberate indifference to an incarcerated person’s serious medical need which results in the “unnecessary and wanton infliction of pain.” 84 In other words, if a prison administrator knows that an incarcerated individual is suffering from a serious medical harm and that actor could have done something to prevent this suffering but does not, they have been deliberately indifferent. 85 This indifference violates contemporary standards of decency and therefore runs afoul of the Eighth Amendment.

Estelle establishes a two-prong test for alleging a violation of the Eighth Amendment that includes an objective and subjective component. 86 Under Estelle, a litigant must show that (1) prison officials acted with deliberate indifference (subjective) to a serious medical need and that (2) the litigant has consequently suffered the “unnecessary and wanton infliction of pain” (objective). 87

The Court reached this decision by stepping through a series of inferences drawn from the notion of what is and is not consistent with “contemporary standards of decency.” 88 In so doing, the Court espoused crucial dicta about the inescapable position of the incarcerated individual: “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” 89 For the first time, the Court noted that there is something significant about one’s incapacity to meet one’s own medical needs while incarcerated. And according to the Court, the Constitution requires the state to actually provide for the medical needs of those under its control.

The restrictions on prisoners’ liberty create an affirmative burden on the state to provide care. Here, the terms “unnecessary” and “wanton” do a great deal of work to define what is cruel and unusual. When an individual is placed in the custody of the state and has their rights, like the ability to freely seek medical treatment, so restricted as to either rely on the state or suffer unnecessarily, the state needs to step in. 90 Intentionally ignoring

83 Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
84 Id. at 103–04 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
85 Id.
87 429 U.S. at 104.
88 Id. at 103.
89 Id.
90 This is the carceral burden identified by Professor Dolovich. Dolovich, supra note 11, at 891.
a sincere medical need perpetuates unnecessary pain that serves no penological purpose. Such treatment is also wanton—prison officials should understand that denial of access will inevitably result in the infliction of pain for the incarcerated individual.

Initially, the Court limited their expansion of the Eighth Amendment to protect against the current infliction of pain—the extent to which the Constitution protects against the infliction of future pain remained an open question.91 The next Section further explains the two prongs of Estelle and then analyzes how the Constitution should be interpreted in regard to protecting against the infliction of future pain.

B. Clarifying the Objective and Subjective Prongs

Although J.W. Gamble, the incarcerated individual in Estelle, was unable to find specific relief in his case, his efforts nonetheless carved a path for litigants to bring Eighth Amendment claims effectively.92 Following Estelle, the Supreme Court clarified that for claims alleging cruel and unusual punishment resulting from conditions of confinement or denial of medical treatment, the objective component of a constitutional violation must show a serious medical need or deprivation of a human need.93 These needs relate to basic survival: adequate temperature, access to ventilation, reasonable safety, and treatment for chronic or debilitating illnesses and conditions.94 But other seemingly serious harms have not violated the Eighth Amendment—even solitary confinement requires a fact-dependent showing that it deprives one of a basic human need to be considered cruel and unusual punishment.95 While the Court has come a long way in expanding what

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91 See Estelle, 429 U.S. at 104–05 (holding that an Eighth Amendment violation now exists if prison officials intentionally deny, delay, or interfere “with the [medical] treatment once prescribed” (emphasis added)).
92 Id. at 107–08.
93 See Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981) (noting that the Constitution “does not mandate comfortable prisons” and therefore only deprivations of “minimal civilized measures of life’s necessities” violate the Eighth Amendment).
94 See Glidden, supra note 78, at 1824, 1826–27 (observing that various case law from the federal circuits requires such essentials as “food, clothing, shelter, medical care, and reasonable safety” in addition to “exercise and outdoor access,” though “[t]he Supreme Court has also maintained that this list is not exhaustive”).
95 Compare Wilkerson v. Stalder, 639 F. Supp. 2d 654, 682 (M.D. La. 2007) (finding that, under the specific circumstances, plaintiff’s claim of long-term solitary confinement was sufficient to implicate the Eighth Amendment and survive summary judgement), with Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471-PAB-KMT, 2011 WL 4552540, at *18–21 (D. Colo. Sept. 30, 2011) (finding that thirty years of solitary confinement was not sufficiently serious to satisfy the objective prong of an Eighth Amendment claim), and In re Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 471–72 (4th Cir. 1999) (finding that solitary confinement did not deprive incarcerated parties of a “basic human need”).
satisfies the objective prong of an Eighth Amendment claim, there remain many instances when the harm does not rise to the level of a constitutional violation. And the objective prong is only half the battle.

Litigants can raise an effective Eighth Amendment claim only if they establish the subjective factor of deliberate indifference in addition to the objective prong. Deliberate indifference can be shown through either action or inaction, yet one thing is clear: knowledge that such behavior will lead to harm is key to establishing deliberate indifference.\(^{96}\) Mere negligence does not imply wantonness.\(^{97}\) Put differently, unintentional acts or failures to act (absent proper notice) that lead to harm are not deliberate—and, therefore, cannot meet the standard of deliberate indifference.

Were this subjective burden not high enough, the Court also found that only actual knowledge of the risk of harm satisfies an Eighth Amendment claim.\(^{98}\) In Farmer v. Brennan, the Court draws an explicit line: “[T]he 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.”\(^{99}\)

But Farmer still offers hope. Justice David H. Souter noted in dicta that establishing the requisite knowledge is a question of fact which can be proven through evidence, “including inference from circumstantial evidence.”\(^{100}\) In fact, a judge or jury could draw an inference of subjective knowledge “from the very fact that the risk was obvious.”\(^{101}\) This justifies the premise that empirical evidence can be used to satisfy the subjective prong. While not a surefire approach, it provides another brick in building the Eighth Amendment claim.

Another piece of case law worth mentioning is Brown v. Plata, which established that the state is responsible for the welfare of those housed in its prisons and prison officials cannot shield themselves behind claims that the cost is prohibitive.\(^{102}\) The duty of providing adequate conditions under the

\(^{96}\) See Whitley v. Albers, 475 U.S. 312, 319 (1986) (“It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . . .”).

\(^{97}\) See Estelle, 429 U.S. at 105–06 (finding that “[m]edical malpractice does not become a constitutional violation” because it is “an inadvertent failure” rather than an intentional denial of treatment).


\(^{99}\) Id. (emphasis added).

\(^{100}\) Id. at 842.

\(^{101}\) Id.

\(^{102}\) 563 U.S. 493, 530, 545 (2011).
Eighth Amendment is the responsibility of the state and cannot be abrogated due to lack of funding.\textsuperscript{103}

C. Protecting Against Future Harm

As mentioned above, \textit{Estelle} only required state officials to address serious harms that were \textit{actually occurring}. The Supreme Court further expanded the protective scope of the Eighth Amendment in \textit{Helling v. McKinney} by allowing for causes of action alleging cruel and unusual punishment to be founded upon a claim of \textit{future} harm.\textsuperscript{104} Consequently, the Court allowed the possibility that the Eighth Amendment mandates preventative care. It also adds to the premise that subjective knowledge can be established from scientific studies and commonsense understanding.

\textit{Helling} centers on William McKinney, an incarcerated man. McKinney brought the lawsuit because he was exposed to environmental tobacco smoke (ETS), or secondhand smoke, while housed with another inmate who smoked five packs a day.\textsuperscript{105} He sought injunctive relief and damages for prison officials “subjecting him to cruel and unusual punishment by jeopardizing his health.”\textsuperscript{106} On appeal, the Ninth Circuit reversed the district court and found that McKinney had successfully stated a valid cause of action under the Eighth Amendment.\textsuperscript{107} Involuntary exposure to ETS could constitute a claim of cruel and unusual punishment if those levels “posed an unreasonable risk of harm to [McKinney’s] future health.”\textsuperscript{108} In so holding, the Ninth Circuit relied on “scientific opinion supporting [McKinney’s] claim that sufficient exposure to ETS could endanger one’s health.”\textsuperscript{109}

Previously, the Court had made it clear that an inmate must first show actual harm to prove cruel and unusual punishment.\textsuperscript{110} But the \textit{Helling} Court found that the Eighth Amendment can provide injunctive relief “even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.”\textsuperscript{111} In

\begin{thebibliography}{99}
\bibitem{103} Id.
\bibitem{104} 509 U.S. 25, 35 (1993).
\bibitem{105} Id. at 28.
\bibitem{106} Id.
\bibitem{107} Id. at 29.
\bibitem{108} Id. (emphasis added).
\bibitem{109} Id.
\bibitem{110} See Rhodes v. Chapman, 452 U.S. 337, 347–48 (1981) (“To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”).

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order to establish the objective prong of the *Estelle* test, it was well within the Court’s jurisprudence to rely on claims of future harm: “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition... on the ground that nothing yet had happened to them.”

To succeed on his Eighth Amendment claim, Mr. McKinney still needed to meet the demanding deliberate indifference standard established in *Estelle* and clarified in *Wilson v. Seiter*. To prove the objective factor of serious damage to his future health, “McKinney must show that he himself is being exposed to unreasonably high levels of ETS.” While scientific studies relied on by the Ninth Circuit helped when McKinney was still exposed to ETS, the fact that he had since been relocated to a different cell with far less ETS exposure rendered this factor moot by the time it reached the Court.

It is important to emphasize that such research, even if conditions were unchanged, would not alone be dispositive. Science may clearly indicate that exposure to certain conditions will result in a serious medical harm. But science’s expert perspective is not what matters most. The key is whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwilling to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.

To complicate matters further, the Court made clear that on remand the subjective factor must be assessed considering prison officials’ “current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals.” Considering that the prison had since implemented several policy changes to limit inmates’ involuntary exposure to ETS, the Court reasoned that it was unlikely McKinney would find his desired relief upon remand based on the Court’s holding.

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112 *Helling*, 509 U.S. at 33. This notion of protection against future risk of harm is essential to the argument that the Eighth Amendment includes preventative medications like PrEP.


114 *Helling*, 509 U.S. at 35 (emphasis added).

115 *Id.*

116 *Id.* at 36 (emphases added). It feels fair to say that Supreme Court Justices may not be the best assessors of what society writ large will and will not tolerate.

117 *Id.*

118 *Id.* at 36–37. Again, we see a lineage of Eighth Amendment claims advancing the ball while denying any actual relief to the aggrieved party.
D. Establishing Risk of Harm Post-Helling: Looking to Lower Courts

Regardless of the outcome for Mr. McKinney, Helling nonetheless expanded the potential for Eighth Amendment protection in prisoners’ rights litigation. Yet lower courts—and even the Supreme Court—continue to disagree on when the risk of future harm is sufficiently serious to violate the Eighth Amendment.119

One issue is that “courts struggle to define ‘substantial risk.’”120 Another is that some courts ignore Helling entirely and continue to require an “actual showing of harm” to state a valid Eighth Amendment claim.121 For example, a Wisconsin district court rejected an Eighth Amendment claim, finding that constant illumination within the cell had not yet led to a loss of sleep or other physical issues.122 Courts have likewise denied finding solitary confinement unconstitutional if the incarcerated person only relies on studies showing the risk of harm in general and cannot show any direct harm to themselves.123 Given the varied manner in which Helling has been applied (or how it has been explicitly ignored), it is difficult to say whether an Eighth Amendment claim advocating for access to PrEP would even survive a motion to dismiss.124

A review of circuit holdings post-Helling also shows an inconsistent application of the risk of harm analysis.125 This may be partly due to the extremely varied nature of Eighth Amendment claims that come before the

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119 See generally Stinneford, supra note 11 (noting the “wildly inconsistent rulings” from the Supreme Court regarding, for example, “proportionality in sentencing and the death penalty”).

120 Glidden, supra note 78, at 1826 (citing Elizabeth Alexander & David C. Fathi, Smoking, the Perception of Risk, and the Eighth Amendment, 13 ST. LOUIS U. PUB. L. REV. 691 (1994)).


124 For numerous examples of how courts disagree over which particular conditions create an actionable Eighth Amendment claim, see Glidden, supra note 78, at 1826–27 and accompanying footnotes. Glidden also notes that “[e]ven when a condition is generally accepted as sufficiently serious, the reason for its acceptance is rarely articulated.” Id. at 1827. For example, in Wilson v. Seiter, the Court merely notes that exercise is a “single, identifiable human need.” 501 U.S. 294, 304 (1991). This lack of clarity makes it difficult to anticipate how the novel claim presented in this Note will hold up in practice.

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

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courts.126 Conditions of extreme heat or cold in prisons seem to sufficiently satisfy concerns regarding the future risk of harm posed by such exposure, although this remains a highly fact-based inquiry.127 For example, in Ball v. LeBlanc, the Fifth Circuit remanded the case in part upon a finding that heat in death row cells posed a substantial risk of serious harm to inmates.128 Significantly, the Fifth Circuit relied on testimony from a medical doctor to support their holding: the doctor outlined how exposure to extreme heat can exacerbate symptoms of hypertension and diabetes, which could then lead to an increased risk of heat stroke.129 Although “no one at [the prison], including these plaintiffs, has ever had a heat-related incident and . . . these prisoner’s medical records do not show signs of heat-related illness,” that did not destroy their Eighth Amendment claim.130 According to the Fifth Circuit, which cited jurisprudence from the Second, Ninth, and Eleventh Circuits, “[t]o prove unconstitutional prison conditions, inmates need not show that death or serious injury has already occurred. . . . They need only show that there is a ‘substantial risk of serious harm.’”131

Yet a more recent Eighth Amendment claim of the substantial risk of harm from exposure to COVID-19 (which has killed over 1.1 million people in the United States alone at the time of this writing132) has been ignored by the Supreme Court. In 2020, litigation related to a Texas geriatric prison’s response to COVID-19 “revealed rampant failures by the prison to protect its inmates from [the virus].”133 In response, the district court issued a permanent injunction “requiring prison officials to implement basic safety procedures.”134 Pending appeal, however, the Fifth Circuit stayed the injunction.135

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126 See, e.g., Chavarria v. Stacks, 102 F. App’x 433, 436–37 (5th Cir. 2004) (constant illumination); Board v. Farnham, 394 F.3d 469, 485–87 (7th Cir. 2005) (black mold in ventilation system); Ferguson v. Cape Girardeau County, 88 F.3d 647, 650 (8th Cir. 1996) (denial of a bed).
127 See Walker v. Schult, 717 F.3d 119, 126 (2d Cir. 2013) (“It is well settled that exposing prisoners to extreme temperatures without adequate ventilation may violate the Eighth Amendment.”); Graves v. Arpaio, 623 F.3d 1043, 1049 (9th Cir. 2010) (“The district court did not err . . . in concluding that dangerously high temperatures that pose a significant risk to detainee health violate the Eighth Amendment.”); see also Chandler, 379 F.3d at 1294, 1297–98 (finding that “the Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation” yet denying an Eighth Amendment claim under the specific conditions).
128 792 F.3d 584, 593 (5th Cir. 2015).
129 Id.
130 Id.
131 Id. (citation omitted).
134 Id.
135 Id.
In dissent, Justices Sonia Sotomayor and Elena Kagan aptly point out that the Fifth Circuit’s analysis of the constitutional claim was “demonstrably wrong” when it ignored the undisputed serious medical risk that COVID-19 posed to “these especially vulnerable inmates.” 136 The Justices disagreed with the Fifth Circuit’s finding that prison officials took “reasonable ‘affirmative steps’” to respond to the outbreak: “Merely taking affirmative steps is not sufficient when officials know that those steps are sorely inadequate and leave inmates exposed to substantial risks.” 137 However, the majority of Justices refused to vacate the stay, offering no explanation for their decision. 138 As such, litigants must continue to question how and to what extent Helling’s risk of harm analysis will play out, even before the very Court that created it. When determining how best to build the argument for PrEP access, litigators should pay particular attention to the specific forum in which their claim will be heard and strategize accordingly.

Now that the legal standard has been defined for bringing an Eighth Amendment claim, it can be superimposed on the issue of HIV in prisons. Part III outlines the novel legal framework advocating for access to PrEP. Because of the difficulties described in Part II, our model client has been selected to better anticipate certain pitfalls inherent in an Eighth Amendment claim. Our client—a young Black man in federal prison—can benefit from certain inferences that may be unavailable for other demographics of incarcerated individuals. Still, common attributes can be extrapolated to other populations and identity groups.

III. ARGUING AN EIGHTH AMENDMENT VIOLATION

Combining the lessons from Helling, Farmer, and Plata creates an opportunity for our hypothetical client to assert that denial of access to PrEP constitutes cruel and unusual punishment under the Eighth Amendment. Such an argument requires meeting steep demands laid out by the Court.

For one, Helling emphasizes that even if the future harm alleged can be supported by studies and reports, the risk of harm must still be particular to the plaintiff for relief to be granted. 139 Current studies showing the high risk of HIV transmission among Black men within incarcerated populations can provide one piece of the equation to argue that prison officials carry the necessary culpability to require access to PrEP.

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136 Id.
137 Id. (emphasis added).
138 Id.
From there, individual plaintiffs within these subpopulations could advocate for access—but Farmer makes clear that the knowledge of risk must be directly shown for each litigant; reliance on data will only go so far. Plata carves out a glimmer of hope: institutions cannot claim that insufficient resources prevent them from administering PrEP if a court deems it necessary under the Eighth Amendment. But there are other meaningful institutional barriers and legislative pitfalls.

This Part begins by addressing why selecting this particular model client is valid and how this client can use Eighth Amendment jurisprudence to the fullest extent. It then progresses through the necessary elements of an Eighth Amendment claim, flexing at the weakest points to see if this claim will hold. The final Section of this Part addresses these institutional and legislative barriers and offers solutions beyond the Eighth Amendment.

A. Justifying Our Model Client

Framing this argument with a model client seems, in a way, perverse. Shouldn’t all incarcerated people have the same protection against exposure to HIV? While that is certainly true, the knowledge factor of the Eighth Amendment claim can be established from obvious inferences, as noted in Part II. Current studies and reports indicate that our model client faces a greater risk of sexual assault and, by proxy, possibly contracting HIV. In fact, one such study notes that simply being Black showed a positive correlation with HIV transmission. The use of data that is produced and reviewed by prison administrators can insulate against a grant of summary judgment, leaving it open to the factfinder to determine whether the known risks to our model client amount to a showing of knowledge. And by creating access to PrEP for one, it can further undo prison officials’ ability to lean on claims of administrative burdens. If prisons are forced to adjust incrementally, it could allow for at least an eventual solution. Presently, there is no solution at all.

And as for selecting a young Black man—why such an explicit characteristic? Again, the data supports it. When tracking who is most vulnerable to sexual assault, research has shown that those who are less physically imposing are at a higher risk. Professor David Siegal has found that victims of sexual assault in prisons are often “the younger, smaller, or less streetwise inmates”; another study identified “low body mass index” as

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141 See, e.g., Prison Rape Elimination Act, 34 U.S.C. § 30301(4) (2003) (“Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”).
Many of these conditions are based on stature and lived experience, and can therefore be associated with a wide array of attributes: very young, very old, relative smallness compared to other incarcerated people in a specific prison, and having a physical or cognitive limitation. This Note centers its analysis on a young Black man’s attempt to secure PrEP. But any litigant whose traits show they are more susceptible to sexual assault can likely benefit from the same inferential boost to their showing of knowledge.

B. Establishing the Objective Component

1. A Serious Risk of Future Harm

The serious effects of untreated HIV progressing to AIDS are well-known: a severely weakened immune system increases the risks of deadly infections, cancers, neurological complications, and kidney and liver disease. Yet simply alleging a serious medical need is insufficient when seeking preventative care. Passing this threshold factor for our purposes requires showing that levels of exposure to HIV pose an unreasonable risk. Further, that unreasonable risk of contracting HIV must be to the clients themselves.

Pure empirics will not help show that, generally, exposure rates are impermissibly high. The most recent data tracking HIV rates in prisons report a decline in male prisoners currently living with HIV. On the other hand, a comparative argument could show that, within prisons, exposure rates are far higher than those within the general population. The prevalence of HIV inside prisons is three times higher than outside them; arguably, this increased level of HIV combined with the individual circumstances facing our hypothetical client could satisfy the exposure-level requirement.

A risk to all cannot be a particularized risk to one. As such, it is unlikely that it would be possible to claim that the denial of access to PrEP for all incarcerated individuals violates the Eighth Amendment. While one would certainly think that a high risk of contracting HIV through rape or sexual assault is a risk that “is not one that today’s society chooses to tolerate,” that

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142 See Siegal, supra note 8, at 1545; HIV Transmission Among Male Inmates in a State Prison System—Georgia, 1992–2005, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 21, 2006), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5515a1.htm [https://perma.cc/R64L-B84D] (finding that HIV transmission due to sexual assault correlated in part with having a low body mass index in the specific prison under study).


145 Widra, supra note 46.
is not necessarily how the Court frames it.\textsuperscript{146} Consider the Court’s recent decision to not intervene in the Fifth Circuit’s COVID-19 case: when the risk is so diffuse, perhaps it becomes ubiquitous. However, the specific circumstances regarding the situation of our hypothetical client may be able to break through these limitations.

The prison population generally is overwhelmingly male and Black.\textsuperscript{147} Given that Black men are already at a disproportionately higher risk of contracting HIV than other subpopulations, it makes sense that those rates would track to the prison setting. In fact, one study out of a Rhode Island prison found that merely \textit{being Black} was considered an “important risk factor” for HIV transmission in the carceral setting.\textsuperscript{148} Results from a Georgia prison study reveal that incarcerated Black men within the facility contracted HIV at twice the rate as white prisoners.\textsuperscript{149} Though in need of updating, these results, coupled with other studies,\textsuperscript{150} emphasize that Black men—especially ones like our client—are at the highest risk of infection.\textsuperscript{151} Therefore, these and future studies could support a finding that being an incarcerated Black man, and particularly one whom studies show has vulnerabilities that indicate an increased likelihood of sexual assault, places them at a significant risk of contracting HIV and should warrant granting them access to PrEP.

But this empirical data has serious limits, although the prevalence of HIV among inmates is well-documented and regularly updated.\textsuperscript{152} A lack of current research tracking how HIV spreads within prisons creates a blind spot for advocates. The most recent and extensive survey of HIV infection \textit{post}-incarceration was conducted between 1992 and 2005 and focused on a single prison system in Georgia.\textsuperscript{153} That the study participants were only screened for HIV \textit{post}-incarceration is a serious limitation. It is unknown

\textsuperscript{147} Widra, \textit{supra} note 46.
\textsuperscript{148} Golrokhi et al., \textit{supra} note 140.
\textsuperscript{149} \textit{HIV Transmission Among Male Inmates}, \textit{supra} note 142.
\textsuperscript{151} Lara B. Strick & Jehan Z. Budak, \textit{HIV and Corrections}, NAT’L HIV CURRICULUM (Aug. 26, 2020), \url{https://www.hiv.uw.edu/go/key-populations/hiv-corrections/core-concept/all} [https://perma.cc/95PF-EUXM] (“In a study conducted among male inmates in a Georgia state prison system, intra-prison transmission of HIV was associated with male-male sex in prison . . . [being of the] Black race, and [having] low body mass index upon entry to prison.”).
\textsuperscript{152} See id. (noting that thirty-nine states have either mandatory or opt-out HIV testing during intake).
\textsuperscript{153} See \textit{HIV Transmission Among Male Inmates}, \textit{supra} note 142. While this study involved incarcerated people in seventy-three facilities, the limited geographic scope cautions against drawing too broad of inferences.
whether individuals entered prison already carrying HIV or if they contracted it within the prison. As such, understanding how HIV spreads in prisons remains a black box.

To provide a more robust foundation for this legal argument, advocacy must include scholarship investigating the rate at which HIV spreads within incarcerated communities. Drawing on principles from *Helling*, our client could assert that their level of exposure and risk of contracting HIV upon entering prison warrants access to preventative HIV medication. Still, our client must show that the risk of harm is particularized to *him*.

2. Violating Contemporary Standards of Decency

*Helling* also makes clear that proving a serious risk of future harm is not the only aspect of the objective factor of an Eighth Amendment claim. As the Court put it, to successfully advocate for access to PrEP, a litigant must establish that the “risk of which [the litigant] complains is not one that today’s society chooses to tolerate.” Part I highlighted the CDC’s prioritization of access to preventative HIV medication as one key pillar to eliminating the spread of HIV entirely. Denying access to preventative medications like PrEP to those most at risk seems to go directly against what the CDC would tolerate. Society’s condemnation of the deadly risks posed by HIV is clear in the global effort to eliminate the virus. Here, the scholarship explored in this Note can do real work to assist litigators in building a framework to present to courts.

C. Showing Deliberate Indifference

After meeting the objective prong’s requirements, our client must now satisfy the subjective prong. While establishing knowledge of the serious risk of harm can often prove difficult, here the specific identity of the model client may ease the path towards a successful constitutional claim.

1. Establishing Knowledge

Sex in prisons is universally prohibited. According to the Prison Rape Elimination Act National Standards, instances of sexual assault must be documented and reported. These institutional policies may provide an

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155 Id.
156 See *PrEP for HIV Prevention in the U.S.*, supra note 32 (“To end the HIV epidemic, we must ensure equitable access to HIV treatment and prevention, including PrEP.”). However, current PrEP coverage remains uneven across racial, ethnic, and age groups, and for transgender persons. *Id.*
157 See *Why the HIV Epidemic Is Not Over*, supra note 56 (detailing the creation of World AIDS Day and the continuing efforts of the organization to end HIV and AIDS around the world).
158 See *Tucker et al.*, supra note 150.
inroad for meeting the knowledge requirement for our client in particular. If prison officials are required to document instances of sexual assault for incarcerated individuals, then there is a clear record establishing that administrators know certain, individual people under their control have been harmed.160

One issue with establishing knowledge this way is that it irrationally requires one to wait to be harmed by a known risk before seeking relief. But now, under Helling, our client can argue that the record of knowledge established by prison administrators shows that someone of his demographic is known to be substantially at risk of sexual violence and, therefore, should have access to preventative medication as one form of protection.

For our client, this inference of direct knowledge is key. The Court has repeatedly denied Eighth Amendment claims because of an insufficient showing of direct knowledge to the individual litigant.161 After all, if there is no knowledge of the risk, how could officials be deliberately indifferent? Still, these reports may not be enough. The success of establishing the subjective prong will require proof that high-level administrators saw these reports and were aware of the risk to our client. That is ultimately for the fact finder to determine, but to survive summary judgment, advocates will need to supply a satisfactory showing of knowledge.

Direct knowledge is not the only weapon in our arsenal. Farmer gifts litigants with the ability to rely on prevalent scientific research and other studies to buoy a claim that prison officials knew of the risks posed to the incarcerated individual. This tactic has found some success in solitary confinement cases. The Third Circuit has found that an Eighth Amendment claim can survive a motion to dismiss simply by showing the knowledge of the risk was obvious.162 By relying on research to establish the exposure to the risk in question—namely, the heightened risk of contracting HIV while incarcerated—litigants may likewise be able to meet this difficult Eighth Amendment standard.163 This will prove invaluable in advocating for access

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160 See Tucker et al., supra note 150.
161 See Glidden, supra note 78.
162 See Palakovic v. Wetzel, 854 F.3d 209, 225–26 (3d Cir. 2017) (“Considering these factual allegations in light of the increasingly obvious reality that extended stays in solitary confinement can cause serious damage to mental health, we view these allegations as more than sufficient to state a plausible claim . . . to proceed to discovery.”).
163 See Strick & Budak, supra note 151, at 3 (“Epidemiologic surveys indicate the prevalence of HIV in 2021 was approximately 1.1% among persons in correctional facilities, which is markedly higher than the 0.3 to 0.4% HIV prevalence in the general United States population.”).
to PrEP for our client, as there have been numerous studies about the risks posed to his particular community.164

By combining the direct knowledge of the prevalence of sexual assault and HIV in their prisons, in addition to our client fitting a demographic where empirical data supports establishing risk of sexual assault which may result in contracting HIV, a court may find sufficient knowledge. Whether inaction in the face of this knowledge amounts to deliberate indifference, rather than a calculated cost–benefit analysis between the risk to our client and the security risks imposed, is the final element that must be met for an Eighth Amendment claim.

2. Disregarding That Knowledge

The argument is set up that prison officials are actively disregarding knowledge of the risk of HIV transmission by failing to make PrEP available. The nature and history of HIV infection amongst incarcerated individuals, along with the plethora of studies and government initiatives to reduce the spread of HIV, indicate such disregard. However, this argument may be too diffuse amongst the general prison population to prove effective in claiming a constitutional violation. By focusing on Black men similar to our client, prisoners’ rights advocates may be able to establish both the requisite knowledge of the risk, and conscious disregard of that risk, more effectively.

Recall Farmer: there, prison officials were told explicitly of the risk to Ms. Dee Farmer. They were also aware of studies that showed female transgender individuals, like Ms. Farmer, were at substantially increased risk of rape in men’s prisons. Here, our client can rely on a similar theory. The studies cited in this Part make clear that researchers have been focused on the seriousness of HIV transmission within prisons for decades. Further, legislation like the Prison Rape Elimination Act requires prison administrators to track instances of sexual assault among incarcerated individuals under their care. Combining these two observations, prison officials should know both who, specifically, has been a victim of sexual violence and that the risk of transmitting HIV is particularly correlated to certain demographics.

In summary, empirical studies support both the seriousness of the risk to our client of contracting HIV from sexual assault and that prison administrators are aware of the issue of HIV being spread at higher rates

164 See Nina Harawa & Adaora Adimora, Incarceration, African Americans, and HIV: Advancing a Research Agenda, 100 J. NAT’L MED. ASS’N 57 (2008); Tawandra L. Rowell-Cunsolo, Roderick J. Harrison & Rahwa Haile, Exposure to Prison Sexual Assault Among Incarcerated Black Men, 18 J. AFR. AM. STUD. 54 (2014) (“The findings also suggest that individual factors among incarcerated Black men, such as sexual minority status, may place them at an elevated risk for exposure to prison sexual assault.”); see also Golrokhi et al., supra note 140; HIV Transmission Among Male Inmates, supra note 142.
amongst Black men like our client. By ignoring these factors, administrators are being deliberately indifferent.

D. Final Hurdles: Legislative and Institutional Barriers

As shown above, establishing a successful Eighth Amendment claim is no small feat. Yet both legislative and institutional barriers present further stumbling blocks for our client. The legislature has lobbed its own procedural grenade into the mix: the Prison Litigation Reform Act of 1996 (PLRA).\textsuperscript{165} Additionally, prison officials are granted great deference in how they choose to run their facilities. If they claim that administering PrEP creates security risks, courts may accept this at face value. Therefore, legal advocates must conceptualize multiple strategies to not only meet the legal burden but also to anticipate and undermine prison administrators’ counterarguments.

1. Difficulties Posed by the Prison Litigation Reform Act

The PLRA, passed just three years after \textit{Helling}, has since limited incarcerated individuals’ ability to litigate and may present issues in advocating for access to PrEP. Plaintiffs must seek relief through a prison’s internal grievance process before they can seek relief from the courts.\textsuperscript{166} Plaintiffs must exhaust every available avenue for their claim to be met through internal review processes—for instance, our client would first need to ask for access to PrEP.\textsuperscript{167} If denied, under the PLRA, he would need to appeal this decision and ultimately present his argument before a prison tribunal.\textsuperscript{168} Only then can he seek relief under the Eighth Amendment. But this can be complicated when each facility may have a different process for requesting access to PrEP. Prison administrators may also not keep accurate records of these requests and procedural milestones. Even if our client does exhaust the internal mechanisms required under the PLRA, his claim will likely fail as a procedural matter if prison administrators have no record of these requests and reviews.

Supreme Court precedent may provide another saving grace. In \textit{Ross v. Blake}, the Court found that if a remedy is not available, exhaustion is not required.\textsuperscript{169} When “an administrative procedure . . . operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates,” the premise of exhaustion becomes moot.\textsuperscript{170} While still

\textsuperscript{166} 42 U.S.C. § 1997e.
\textsuperscript{167} \textit{Id}.
\textsuperscript{168} \textit{Id}.
\textsuperscript{169} 578 U.S. 632, 643 (2016).
\textsuperscript{170} \textit{Id}.
a fact-dependent issue, this holding may allow plaintiffs to access injunctive relief without wading through a prison’s internal grievance process.

Another potential hurdle is the strict manner in which courts can grant relief under the PLRA. Prospective relief for prisoners “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs” and must be “narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, [and achieved through] the least intrusive means necessary.”171 Preliminary injunctive relief, while adhering to the same rigid standards for prospective relief, must also “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system.”172 Even if litigants are successful in bringing an Eighth Amendment claim regarding access to PrEP, the limitations of the PLRA may inhibit the extent to which the relief plays out in practice. In other words, if granting access to PrEP undermines the safety of running the facility, it may be necessary but overly intrusive.

Legal advocates must ensure their clients have met the stiff requirements of the PLRA before seeking access to bring a constitutional claim. However, meeting these requirements risks unduly delaying access to PrEP simply because the client would need to wait the requisite number of days after filing his requests and appeals before turning to the courts. Even if our client were to take every precaution available, there is no guarantee he would not be the target of sexual violence from which he could contract HIV.

One additional concern would be retaliation against requests for PrEP. Prison administrators could choose to isolate at-risk individuals rather than provide PrEP, thus removing them from the serious risk of sexual violence. This concern alone could deter people from seeking this medication, especially since extended solitary confinement is not considered cruel and unusual.173 Legal advocates must be aware of the risk of retaliation toward their clients.

In light of hurdles created by the PLRA, legislators should step in and amend the PLRA, even though it may be deemed necessary to retain certain exhaustion provisions to limit the amount of litigation before courts. For instance, Congress could be stricter in requiring prison administrators to properly document internal proceedings so that exhaustion is feasible and subject them to oversight if they fail to do so. This would effectively eliminate its use as a defense, as each time a prison would raise it, it may subject that prison to a civil fine. Another possible change could be to create

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172 Id.
173 See supra Section II.B.
an exemption to exhaustion if the litigant can show a sufficient imminent risk of harm. While some may argue that this would effectively nullify the exhaustion provision and burden courts, there would be ways to limit the exemption to retain the spirit of the PLRA’s exhaustion requirement.

2. Overcoming Institutional Barriers

Although establishing a valid Eighth Amendment claim is already an uphill battle, prison policies add additional hurdles. Courts have repeatedly denied Eighth Amendment claims because of the deference granted to prison administrators to run their facilities as they see fit.\textsuperscript{174} And prison policy and practice directly conflict with advocating for preventative safe sex measures like PrEP. All prisons prohibit sex between inmates and any other individual at the facility—be that another inmate or a guard.\textsuperscript{175} As for practice, prison officials often treat reports of rape with disregard or outright derision.\textsuperscript{176} Perhaps these policies aspire to achieve safety goals, but this practice is clearly a violation of the prison’s carceral burden. Most importantly, though, both ignore the reality of sex in prisons and the ensuing risks.

Prisons should put aside these dated and harmful policies and practices and address the reality that not only prisons but also the general public should be protected from the spread of HIV. When incarcerated individuals are released back into the community, they may not be aware they have contracted HIV while incarcerated due to inadequate preventative measures. Therefore, the failure of prison administrators to protect their incarcerated populations from contracting HIV exposes the entire population to the threat of HIV. By granting access to preventative medication, state carceral officers can further promote the general welfare.

One final avenue for advocates is to criticize private healthcare providers servicing many prison systems. Wexford Health Sources, Inc. (Wexford) is one such provider; it currently services the Illinois prison

\textsuperscript{174} See \textit{supra} Section II.D.

\textsuperscript{175} See \textit{Deterring Staff Sexual Abuse of Federal Inmates}, OFF. OF THE INSPECTOR GEN. (Apr. 2005), https://oig.justice.gov/sites/default/files/archive/special/0504/index.htm [https://perma.cc/NP7E-AVGV] (“According to federal law, all sexual relations between staff and inmates are considered abuse. Even if a sexual act would have been considered consensual if it occurred outside of a prison, by statute it is criminal sexual abuse when it occurs inside a prison.” (citing 18 U.S.C. § 2243(c))).

system.\textsuperscript{177} Wexford has come under intense scrutiny over its poor services.\textsuperscript{178} Putting private pressure on Wexford could encourage them to amend their policies and prompt private reform to allow for access to PrEP. Wexford’s current policy states that it provides special medical programs for HIV.\textsuperscript{179} Arguably, this should include access to PrEP, which explicitly prevents the further spread of HIV. Advocates can pressure Wexford to amend their future contracts to approve access to prophylactic HIV medications like PrEP explicitly.

Still, if an Eighth Amendment claim seems difficult, so too do the alternatives proposed above. But given the subject of this Note, success will be well worth the effort. Our model client, and all incarcerated people, should be able to obtain the preventative care they desire. If the state constricts individuals such that they cannot secure the protection against HIV transmission that they otherwise would, then the state bears a carceral burden to provide such protection. By taking a multiprong, multidimensional approach to prisoners’ rights advocacy, perhaps all incarcerated individuals can access HIV-preventative medication.

CONCLUSION

One systemic barrier that will likely prove most difficult to overcome is the sheer deference paid to prison administrators, who often refuse to implement beneficial programming by claiming it would decrease safety in prison. The nature of PrEP administration may feed into this narrative. PrEP should be taken daily to be effective, and studies show that PrEP’s efficacy is at its highest when taken at roughly the same time each day.\textsuperscript{180} Given the daily challenges of operating a prison, prison officials have a fertile claim that administering a drug like PrEP to a large prison population may be too cumbersome to allow for the facility to operate safely. However, prisons cannot insulate themselves from an Eighth Amendment claim simply by stating that lack of funding or improperly staffed facilities preclude the administration of treatment—\textit{Plata} makes that clear.

\textsuperscript{177} See Shannon Heffernan, \textit{Despite Horror Stories and Deaths, Will Illinois Keep Expensive Prison Health Care Company?}, WBEZ Chit. (July 6, 2023), https://www.wbez.org/stories/wexfords-health-contract-in-illinois-prisons-expired/37652269-67e1-47c5-a4b1-a1904caea1be [https://perma.cc/79N7-UVVD] (noting that Illinois’s original contract with Wexford had expired as of 2021, but the state was continuing to pay for poor care and would like to renew their contract with Wexford).

\textsuperscript{178} See id.

\textsuperscript{179} See Contract Between the State of Illinois and Wexford Health Sources, Inc. § 1.4.3.2 (2021) (on file with Northwestern University Law Review) ("[Wexford’s] special medical program shall service a broad range of health problems including . . . HIV . . . ").

\textsuperscript{180} See \textit{PrEP Effectiveness}, supra note 64.
Preventative HIV treatment continues to make monumental strides. Recently, a new injectable form of PrEP has been made available and is shown to have similar levels of efficacy in preventing infection.¹⁸¹ Further, this injection is only administered once every two months—making the administration of this preventative medication far easier for prison officials to manage.¹⁸² Social awareness about effective preventative medication is also increasing. As the general population is normalized to the use of HIV-preventative medicine, the premise that denial of the drug cuts against contemporary standards of decency likewise increases. Given the pace of these developments, it seems only a matter of time before prophylactic HIV medication is mandatory in prisons.

But as advocates wait for that moment, incarcerated individuals continue to be infected with HIV, which they carry for life—many well beyond their prison sentences. The Eighth Amendment could prevent incarcerated individuals from suffering punishments beyond their sentences. Prison officials must act now to allow effective access to PrEP, and prisoners’ rights advocates can use the Eighth Amendment to demand such access—even if they must start by focusing on the most at-risk populations, like our hypothetical client. By gaining access for the few, the premise that providing access is too institutionally burdensome is weakened. In this way, the door for others to secure the same protection can open.

¹⁸² Id.