

# THE SUPREME COURT’S JUDICIAL DEHUMANIZATION AND ITS EFFECT ON STATE PRISON CONDITIONS

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#### INTRODUCTION

In 1970, following decades of a “hands-off” approach towards conditions of confinement complaints made by incarcerated persons, Judge J. Smith Henley of the Eastern District of Arkansas held Arkansas’s entire state prison system violated the Eighth Amendment.<sup>1</sup> This was significant; in the following years, a ripple effect of this decision prompted judges across the country to either soften or abandon their hands-off posture.<sup>2</sup> These judicial efforts, however, may have been in vain. Fifty years later, on December 9, 2020, the Department of Justice filed suit against the State of Alabama and the Alabama Department of Corrections. The Government alleged various violations of the Eighth and

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<sup>1</sup> Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 133, 134-35 (Meghan J. Ryan & William W. Berry, III eds., 2020) [hereinafter *Evading the Eighth Amendment*].

<sup>2</sup> *Id.* at 135 (“In the ensuing decades, prison officials in Alabama, Georgia, Louisiana, Mississippi and countless other states found themselves in the same situation as their Arkansas counterparts.”). As noted by Professor Dolovich, the affected states were primarily former slave states, establishing a connection between slavery and incarceration; the hands-off posture implicitly encouraged brutality against black inmates in the years following emancipation. *Id.* at 135 n.14. While racial bias is a significant factor in the dehumanization of incarcerated persons, this Article will not explicitly discuss it.

Fourteenth Amendments, including the “fail[ure] to provide safe conditions of confinement.”<sup>3</sup>

This begs the question, why did state prison conditions not improve over the past five decades?<sup>4</sup> The answer may lie deep within America’s social subconscious.

The posture of the judiciary towards conditions of confinement claims and society’s perception of incarcerated persons are intrinsically entwined in the United States. Inherently, criminal justice policy elicits emotional responses.<sup>5</sup> In return, politicians capitalize on these emotions by passing punitive policies that have no basis in science or empirical data.<sup>6</sup> These attitudes are mirrored in the posture of the Supreme Court towards conditions of confinement claims.

In the late 1970s and early 1980s, the Supreme Court began to carve out a path for incarcerated persons to challenge their conditions of confinement under the Eighth Amendment.<sup>7</sup> In the early 1990s, however, the Court changed its position. The Court

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<sup>3</sup> Complaint at ¶ 1, *United States v. Alabama*, No. 20-cv-01971 (N.D. Ala. filed Dec. 9, 2020).

<sup>4</sup> While constitutional victories for incarcerated persons have occurred regarding their conditions of confinement, these victories are rare, especially when dealing with temperature-related claims, as this Article will discuss. *Compare* *Brown v. Plata*, 563 U.S. 493, 545 (2011) (holding that the overcrowding of California prisons constituted an Eighth Amendment violation), *with* *Chandler v. Crosby*, 379 F.3d 1278, 1297-98 (11th Cir. 2004) (holding that the cell temperatures in a Florida prison, which averaged eighty-five to eighty-six degrees during the summer months, while reaching ninety-five degrees or higher on multiple occasions, did not meet the objective component of an Eighth Amendment claim).

<sup>5</sup> See Aaron Rappaport, *The Institutional Design of Punishment*, 60 ARIZ. L. REV. 913, 916 (2018) (“Criminal justice policy evokes strong emotions, which make it hard to think through policy questions in a reasoned and principled manner.”).

<sup>6</sup> See Jason J. Ben, *America’s Need to Explore Alternatives to Incarceration: Can America Purport to Be the “Land of the Free” When It Currently Is the World’s Leading Incarcerator?*, 30 S.U. L. REV. 349, 359-60 (2003) (discussing politicians capitalizing on public fear to pass “tough on crime” legislation that is “disconnected from empirical knowledge”); see also RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 4-5 (2019) (“Politicians, for their part, will consistently seek to gain an electoral advantage by catering . . . and pandering to public anxiety . . .”).

<sup>7</sup> See *Evading the Eighth Amendment*, *supra* note 1, at 147-48 (“[W]ith *Gamble* and *Rhodes*, the Court charted a course toward doctrinal standards that closely tracked prison officials’ non-negotiable constitutional obligation to fulfill the state’s carceral burden, on terms – i.e., via the totality of conditions approach – that would have acknowledged the humanity of people in prison.”).

drew a firm but arbitrary line between Eighth Amendment claims challenging a punishment (e.g., the death penalty) and Eighth Amendment claims challenging a condition of confinement (e.g., an overheated cell). The basis for this newfound distinction was the argument that the Eighth Amendment only prohibits cruel and unusual *punishment*, not cruel and unusual *conditions*.<sup>8</sup> Now, a mindset of “deliberate indifference” on behalf of prison officials must be proven for a claimant to have a viable conditions of confinement claim.<sup>9</sup>

This subjective requirement, coupled with laws like the Prison Litigation Reform Act,<sup>10</sup> made it exponentially harder for incarcerated individuals to challenge their conditions of confinement judicially. As it currently stands, unconstitutional and inhumane prison conditions can regularly exist, so long as a defendant is ignorant of the dangerousness of the condition. As a result, there is a drought of injunctive relief available to claimants. This drought, as proposed by this Article, is the culmination of judicial, legislative, and societal dehumanization.

Part I of this Article reviews the myriad ways in which societal dehumanization affects incarcerated persons. Part II begins by detailing the relationship between public perception, news media, politics, and criminal justice policy. Part II then argues the steps taken by the legislature to limit litigation initiated by incarcerated persons are a direct result of societal dehumanization. Part III starts by tracing the judicial history of conditions of confinement claims. Part III next examines how the judiciary’s posture towards conditions of confinement claims is the result of societal dehumanization and internalized public attitudes.<sup>11</sup> Finally, Part IV discusses potential ways to overcome societal dehumanization,

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<sup>8</sup> See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 895 (2009) [hereinafter *Cruelty, Prison Conditions, and the Eighth Amendment*] (“The *Farmer* majority based its holding on the language of the Eighth Amendment, specifically the requirement that the challenged treatment constitute ‘punishment[.]’ As the Court put it, ‘[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”).

<sup>9</sup> See *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

<sup>10</sup> 42 U.S.C. § 1997e.

<sup>11</sup> While the discussion surrounding conditions of confinement claims is applicable to all prison conditions, for purposes of this Article, the focus will be on temperature-related claims.

enact meaningful change, and ensure humane conditions in state prisons nationwide.

#### I. SOCIETAL DEHUMANIZATION OF INCARCERATED PERSONS

Imprisonment plays an important role in any civilized society. There is no order without law, and no country in the world emphasizes the importance of law, and thus imprisonment, more than the United States. The United States single-handedly accounts for twenty percent of the world's incarcerated population, even though the United States makes up less than five percent of the world's population.<sup>12</sup> This unwavering emphasis on punitive justice resulted in the United States having double to triple the recidivism rates of other developed countries.<sup>13</sup> This kingdom of imprisonment sculpted a society with a ferocious appetite for retribution and gratuitous apathy towards offenders—a dangerous blend for incarcerated persons and their conditions of confinement. The reason for this societal attitude is, in part, due to dehumanization.

Dehumanization of incarcerated persons occurs in many forms. Thus, dehumanization does not fix itself to one moment of incarceration. It is always present, with the various forms undulating and influencing societal perceptions at different times, from sentencing and beyond. What follows in this section is a brief—but not exhaustive—examination of the forms of dehumanization that incarcerated persons face. Limited research on the topic currently exists, and other forms of dehumanization likely affect incarcerated individuals.

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<sup>12</sup> Peter Wagner & Wanda Bertram, "What Percent of the U.S. Is Incarcerated?" (*And Other Ways to Measure Mass Incarceration*), PRISON POLY INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> [<https://perma.cc/6ZT5-6ZYU>].

<sup>13</sup> Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POL. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/> [<https://perma.cc/3P3H-YP5F>].

A. *Social Exclusion Through Dehumanization*

In its simplest form, dehumanization is “the denial of full humanness to others.”<sup>14</sup> Researchers propose that offender dehumanization begins when individuals “commit[] acts that are not condoned by the community.”<sup>15</sup> As a consequence of committing criminal acts, offenders are “dehumanized and excluded from the human moral circle” by society.<sup>16</sup> This expulsion from the human moral circle further results in society categorizing offenders as “subhuman.”<sup>17</sup> Because they are viewed as subhuman, harsh punishment and ill-treatment towards offenders becomes socially acceptable.<sup>18</sup> In other words, as offenders are essentially per se dehumanized when they commit a criminal act, punitive incarceration policies and conditions are overwhelmingly met with public approval and support.<sup>19</sup>

As one in seven incarcerated persons in the United States are serving a life sentence,<sup>20</sup> the American prison system embraces an exclusionist ideology rather than one of a reintregationist system.<sup>21</sup>

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<sup>14</sup> Jason C. Deska et al., *Dehumanizing Prisoners: Remaining Sentence Duration Predicts the Ascription of Mind to Prisoners*, 46 PERS. & SOC. PSYCH. BULL. 1614, 1614 (2020).

<sup>15</sup> Milica Vasiljevic & G. Tendayi Viki, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, in HUMANNESS AND DEHUMANIZATION 129, 133 (Paul G. Bain, Jeroen Vaes & Jacques-Philippe Leyens eds., 2014).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (“Once expelled from the human moral circle, and assigned as savage subhumans, offenders can then be harshly punished and ill-treated for what they have done.”).

<sup>19</sup> *Id.* at 135. Further, dehumanization is related to moral disengagement, which is responsible for society’s justification for its punitive views and behavior towards those in the moral outgroup. *Id.* at 132.

<sup>20</sup> Josh McGhee, *Over 200,000 People Are Serving Life in U.S. Prisons. These are the Consequences.*, INJUSTICE WATCH (Feb. 25, 2021), <https://www.injusticewatch.org/news/prisons-and-jails/2021/sentencing-project-report-life-imprisonment/> [https://perma.cc/7VRE-JFY9].

<sup>21</sup> A reintregationist system is one in which the “focus is on reintegrating prisoners . . . [by] foster[ing] opportunities to make amends and embrac[ing] the humane importance of second chances.” Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 68 (2016). Conversely, an exclusionist system is one in which society has deemed the incarcerated irredeemable, either because they deserve death or have no hope to change. *Id.*

Parole is limited, and sentences are longer.<sup>22</sup> This is arguably the modern equivalent of banishment.<sup>23</sup> Perhaps one of the more detrimental effects of this banishment mentality is the stripping of educational opportunities during imprisonment, making it more difficult for incarcerated individuals to successfully enter back into society.<sup>24</sup> As a result, there is a physical and mental cost for those in the American prison system, as well as an exorbitant financial cost to the taxpayers on the outside.<sup>25</sup> As discussed more fully *infra*, this appears to be a price society is willing to pay, as those who are incarcerated are cast away into society's outgroup—and society is conditioned to want them to remain there.<sup>26</sup>

### 1. Dehumanizing Language and Its Effects

One does not need to look much further than the language used to describe offenders and incarcerated persons to see how normalized dehumanization has become. The type of dehumanization these individuals most often face is animalistic dehumanization, which is the “denial of uniquely human

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<sup>22</sup> McGhee, *supra* note 20 (“The increase in people serving life in prison has been driven by policy changes and revisions to the law that made sentences longer and limited parole.”).

<sup>23</sup> Hamilton, *supra* note 21, at 68 (“A life sentence may represent the modern equivalent of banishment.”).

<sup>24</sup> See John J. Lennon, *How Biden Killed Prison Education*, THE ATL. (Nov. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/11/how-biden-killed-educational-opportunity-prisons/601120/> [<https://perma.cc/XYX5-6LAH>] (discussing how the Violent Crime Control and Law Enforcement Act led to the “ban on incarcerated individuals receiving Pell Grants,” the removal of college programs in prisons, and the requirement to “keep violent offenders in prison for at least 85 percent of their sentence, without regard for the individual’s behavior or rehabilitation efforts”). A 2019 report determined that a full repeal of the Pell Grant provision of the Act would result in hundreds of thousands of incarcerated individuals becoming eligible for higher education. With education back in prisons, recidivism rates would likely drop as well. *Id.*

<sup>25</sup> The average cost to incarcerate one individual in federal prison for the 2020 fiscal year was \$39,158. Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49,060 (Sept. 1, 2021). States spend between \$60,000,000 and \$8,000,000,000 dollars annually on incarceration, averaging between \$14,000 and \$70,000 per inmate. Ronnie K. Stephens, *Annual Prison Costs a Huge Part of State and Federal Budgets*, INTERROGATING JUST. (Feb. 16, 2021), <https://interrogatingjustice.org/prisons/annual-prison-costs-budgets/> [<https://perma.cc/728S-ZPF3>]. Interestingly, a repeal of the Pell Grant provision, detailed in note 24, would save “states a combined \$365.8 million per year.” Lennon, *supra* note 24.

<sup>26</sup> See discussion *infra* Part II.

characteristics such as civility and moral sensibility.”<sup>27</sup> It quickly becomes apparent that this is why society often labels them as “monsters” or “animals.”<sup>28</sup> Indeed, even after reentering society, they cannot shed dehumanizing titles like “ex-prisoner” and “ex-convict.”<sup>29</sup>

Society views these individuals as engaging in behavior that directly violates what it means to be intrinsically human; therefore, incarcerated persons must be assigned animalistic terms.<sup>30</sup> The effects of this dehumanization, importantly, do not merely exist in perceptions and society’s subconscious.

A study performed by Myers, Godwin, Latter, and Winstanley highlighted the impact of dehumanizing language in a courtroom setting.<sup>31</sup> The researchers found that by using humanizing language to describe victims in victim impact statements, the humanness of the victim was emphasized to the jury while simultaneously stressing the “subhumanness” of the defendant.<sup>32</sup> This language emphasizes to a jury that the defendant is “therefore not worthy of compassion.”<sup>33</sup> Further, the researchers found that where mock jurors read a victim impact statement containing dehumanizing language about a defendant, they were more likely to opt for the death penalty.<sup>34</sup>

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<sup>27</sup> Vasiljevic & Viki, *supra* note 15, at 133. This denial results in “certain people or social groups being perceived as animallike.” *Id.* at 131.

<sup>28</sup> See generally Scott A. Bonn, *How the Police Can Create “Monsters”*, PSYCH. TODAY (May 29, 2017), <https://www.psychologytoday.com/us/blog/wicked-deeds/201705/how-the-police-can-create-monsters> [<https://perma.cc/V23H-EGVH>]; Eduardo A. Vasquez et al., *The Animal in You: Animalistic Descriptions of a Violent Crime Increases Punishment of Perpetrator*, 40 AGGRESSIVE BEHAV. 337 (2014).

<sup>29</sup> See *Words Matter: Using Humanizing Language*, THE FORTUNE SOC’Y, <https://fortunesociety.org/wordsmatter/> [<https://perma.cc/V4BC-ZN55>].

<sup>30</sup> Vasiljevic & Viki, *supra* note 15, at 133.

<sup>31</sup> *Id.* at 133-34 (The study “tested whether dehumanizing language in victim impact statements influences the decisions of mock jurors regarding the death penalty.”).

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.* at 135-36 (“Although results did not reach statistical significance, a larger number of participants who read a dehumanizing victim impact statement opted for the death penalty (75.6%) when compared to respondents who read a neutral or humanizing statement (59%).”). See also Brock Bastian et al., *The Roles of Dehumanization and Moral Outrage in Retributive Justice*, 8 PLOS ONE 1, 1 (2013) (“Theoretically, viewing others as lacking core human capacities and likening them to animals or objects may make them seem less sensitive to pain, more dangerous and uncontrollable, and thus more needful of severe and coercive forms of punishment.” (footnote omitted)).



Outside of the theoretical world of studies, institutions like the New York City Council attempted to curb dehumanizing language and its adverse effects by ordering correction officers to refrain from referring to incarcerated persons as “packages” or “bodies.”<sup>35</sup> There even was a push to stop using socially acceptable dehumanizing words like “inmate” and “prisoner” when referring to incarcerated persons.<sup>36</sup>

The dehumanization of incarcerated individuals by prison staff is an interesting consideration, as the prison staff is responsible for shaping the environment within a particular prison. As discussed *infra*, the current Eighth Amendment inquiry considers the subjective mindset of a defendant when assessing a conditions of confinement claim.<sup>37</sup> If a correctional officer or official is not deliberately indifferent to the risk a particular condition of confinement poses to the health of an incarcerated individual, there can be no cruel and unusual punishment. Without a showing of deliberate indifference, no Eighth Amendment violation exists.<sup>38</sup> And so an important question emerges—does dehumanization subconsciously affect the Eighth Amendment subjective inquiry?

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<sup>35</sup> Stephen Rex Brown & John Annese, *Prisoners Are People, NYC Says — Correction Officers Ordered to Stop Calling Them ‘Packages’ and ‘Bodies’*, N.Y. DAILY NEWS (Oct. 10, 2019, 8:30 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-city-correction-officers-can-no-longer-refer-to-inmates-as-bodies-20191011-yc6rx37rwbcgjf4mo3aitrayle-story.html> [<https://perma.cc/4BN8-GH4C>].

<sup>36</sup> See Emily Hamer, *Wis. Jail to Stop Calling Incarcerated People ‘Inmates’*, WIS. STATE J. (Aug. 17, 2021), <https://www.corrections1.com/jail-management/articles/wis-jail-to-stop-calling-incarcerated-people-inmates-shUoTjMo8c98D3IH/> [<https://perma.cc/B6KH-AUCC>] (discussing Sheriff Calvin Barrett’s decision to begin “refer[ring] to those in jail as . . . ‘residents’ or ‘those within our care’” as a way to humanize incarcerated individuals). See also Bill Keller, *Inmate. Parolee. Felon. Discuss.*, MARSHALL PROJECT (Apr. 1, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/04/01/inmate-parolee-felon-discuss> [<https://perma.cc/AM56-PQU8>] (“Eric Waters of the Osborne Association . . . said his organization has made an effort to eliminate from its vocabulary ‘the oftentimes dehumanizing language of the criminal justice system, that is, defining people by the crime they were convicted of or their ‘status’ in the criminal justice system . . .”). This Article attempts to similarly eliminate dehumanizing language by referring to those incarcerated as incarcerated persons or incarcerated individuals when possible.

<sup>37</sup> See discussion *infra* Part III.B.

<sup>38</sup> See generally *Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994).

## 2. Dehumanization Over the Course of Imprisonment

Naturally, dehumanization negatively affects incarcerated individuals throughout their sentence. The researchers Deska, Almaraz, and Hugenberg studied how this dehumanization may change over the course of imprisonment.<sup>39</sup> They offered a first hypothesis—that societal dehumanization would increase as one progressed towards their release back into society, either through a perceived psychological threat or through a view that prison itself served to dehumanize the individuals incarcerated inside.<sup>40</sup> Conversely, a second hypothesis proposed there may be a reduction in societal dehumanization as incarcerated individuals serve their time.<sup>41</sup> To test these hypotheses, the researchers showed participants the faces of male incarcerated individuals who either had four years or four weeks left on a four-year sentence; the participants then judged their agentic and experimental mental capacities.<sup>42</sup>

The researchers first discovered that slightly more agentic mental sophistication was ascribed to incarcerated persons about to reenter society.<sup>43</sup> Essentially, the soon-to-be-released incarcerated persons were viewed as having higher levels of self-regulation and morality.<sup>44</sup> A second study, which used the Mind Attribution Scale<sup>45</sup> rather than the previously employed agentic and experimental scale, offered similar results, as “[p]articipants ascribed greater emotional, intentional, and cognitive faculties to

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<sup>39</sup> Deska et al., *supra* note 14, at 1615.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The researchers noted that rehumanization could arguably result from any of the four functions of incarceration—rehabilitation, retribution, deterrence, or incapacitation. *Id.* at 1619.

<sup>42</sup> *Id.* at 1616. Their agentic and experimental mental capacities were measured using the mind ascription measure, which “assesses both humanlike agentic faculties (e.g., self-regulation and morality), as well as more basic experiential faculties shared by most animals (e.g., the ability to feel fear, hunger, and pain).” *Id.*

<sup>43</sup> *Id.* at 1618.

<sup>44</sup> *Id.* However, the ability of the incarcerated individuals to feel basic fundamental abilities, like fear and hunger, remained unchanged regardless of the perceived time left to serve. *Id.*

<sup>45</sup> *Id.* This scale was created to “measure differences among humans, rather than between humans and non-humans, and thus focuses on human faculties that are commonly seen to vary between people, including sophisticated *emotional* capacities (e.g., complex feelings), *intentional* capacities (e.g., self-regulation), and *cognitive* capacities (e.g., engaging in extensive thought).” *Id.*

[incarcerated individuals]” nearing their reentry to society.<sup>46</sup> Participants also showed a greater perception of rehabilitation for incarcerated persons nearing the end of their sentence.<sup>47</sup>

Further, when the researchers assessed the participant’s view of retributive justice, those with less time remaining on their sentence were believed to have “received greater punishment for their crimes than those with more time to serve.”<sup>48</sup> While people may believe if one has not paid their societal cost through imprisonment they are “less-than-fully human,” the researchers noted this view is not rooted in reality, since punishment likely does not cause incarcerated persons to gain mental sophistication.<sup>49</sup>

Studies like this may be helpful in understanding why society at large is apathetic towards conditions of confinement. If society does not view incarcerated individuals as possessing humanlike mental sophistication until just before their release, it is easy to disregard the inhumane conditions of confinement that they endure throughout a years-long sentence.

There are also unanswered questions about society’s shifting perception uncovered by this study and the potential rehumanization of those serving a life sentence. Can society still ascribe some amount of rehabilitation and mental sophistication if there isn’t an end date to incarceration, or are those offenders forever dehumanized?

### 3. Dehumanization and the Inability to be Rehabilitated

Researchers Viki, Fullerton, Raggett, Tait, and Wiltshire conducted a study to examine how dehumanization and moral exclusion affect public penal attitudes.<sup>50</sup> The study focused on public attitudes towards sex offenders due to the mass dehumanization by the media towards this particular group of

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<sup>46</sup> *Id.* at 1618-19.

<sup>47</sup> *Id.* at 1620 (“Soon-to-be-released [offenders] seem more rehabilitated than [offenders] with more time to serve and consequently are ascribed more humanlike mental sophistication.”).

<sup>48</sup> *Id.* at 1621.

<sup>49</sup> *Id.* In fact, it has been shown that prison is more likely to have negative effects on one’s physical and mental well-being. *Id.*

<sup>50</sup> Vasiljevic & Viki, *supra* note 15, at 135 (“[W]e tested the conjectured relationship between dehumanization and moral exclusion as predictors of penal attitudes toward sex offenders.”).

offenders.<sup>51</sup> The researchers discovered “that the more participants’ dehumanized sex offenders, the less they supported offender rehabilitation.”<sup>52</sup> In a second study, the researchers found that dehumanization resulted in support of “the social exclusion of offenders.”<sup>53</sup>

The results of this study matched other research, which found that when sex offenders are likened to animals through animalistic dehumanization, there is a positive correlation “with [the] endorsement of harsher punishment, reduced support for rehabilitation, exclusion from society, and support for violent treatment.”<sup>54</sup> With offenders generally, Bastian, Denson, and Haslam found that where members of the public are morally outraged by an offender’s crime, there is “a perception that the offender is unsuitable for rehabilitation.”<sup>55</sup>

The public perception of sex offenders is especially interesting when compared to studies on sex offenders themselves. A study done by Waldram showed that while offenders are cognizant of the fact that they’ve committed immoral acts, they reject the label of “evil,” instead believing they are capable of rehabilitation, which, of course, is directly in opposition to society’s perception.<sup>56</sup>

#### 4. From Dehumanization to Demonization

Society’s view of sex offenders is indicative of a larger issue; society wants incarcerated individuals to *remain* incarcerated. In essence, this is how imprisonment has devolved into banishment.

Researchers Giner-Sorolla, Leidner, and Castano have explored the theory of demonization, which “goes beyond simple denial of humanity,” and how it affects incarcerated individuals in

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The researchers also discovered that when participants dehumanized the offenders more, this resulted in the recommendation of higher sentences. *Id.*

<sup>53</sup> *Id.* at 135.

<sup>54</sup> Bastian et al., *supra* note 34, at 1.

<sup>55</sup> *Id.* at 9.

<sup>56</sup> Vasiljevic & Viki, *supra* note 15, at 134-35 (“The study showed that although public discourse labels offenders as ‘evil’ in essentialist terms, and thereby beyond rehabilitation, the view of the offenders themselves is that they have done bad acts, but they reject the label of ‘evil’ in essentialist terms and also believe they can be rehabilitated.”).

the United States.<sup>57</sup> As “[d]emonization is a special kind of moral mandate that identifies an out[]group as evil, and justifies any measure taken against them . . . [o]vercrowding, violence, social isolation and rape in prison are tolerated, even celebrated, as part of [one’s] punishment.”<sup>58</sup>

Further, demonization is a collective ideology, resulting in non-violent offenders and the most extreme offenders being categorized together.<sup>59</sup> This demonization may help explain why society not only favors but justifies harsh prison conditions, even when the majority of offenders are incarcerated for non-violent offenses.<sup>60</sup>

## II. THE ROOT OF IT ALL: MEDIA, POLITICS, AND PUBLIC PERCEPTION

While it is clear that dehumanization affects incarcerated persons from sentencing, to release, and beyond—what’s less clear is what causes society to develop these subconscious attitudes. It likely cannot be pinned to a single source; rather, it is an amalgam of news media sensationalizing crime, politicians taking a “tough on crime” stance, and a general lack of knowledge about actual crime statistics and what policies *do* works to deter crime and promote public safety.<sup>61</sup>

### A. Public Attitudes Towards Crime Generally

A desire to promote public safety is what drives society. In other words, a society cannot be effective if a fear for one’s safety

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<sup>57</sup> Roger Giner-Sorolla et al., *Dehumanization, Demonization, and Morality Shifting: Paths to Moral Certainty in Extremist Violence*, in EXTREMISM AND THE PSYCHOLOGY OF UNCERTAINTY 165, 169-70 (Michael A. Hogg & Danielle L. Blaylock eds., 2011).

<sup>58</sup> *Id.* at 170.

<sup>59</sup> *Id.* at 171 (“Another aspect of demonization that goes beyond retribution is its collective nature, applying to a group. This allows the most extreme acts, not the most typical, to stand as a representative of the whole, justifying vicarious retribution against individual group members.”)

<sup>60</sup> *Id.* (“Thus, harsh prison conditions are justified by raising the specter of ‘coddling’ murderers and rapists, ignoring the majority of nonviolent offenders in prison.”).

<sup>61</sup> See BARKOW, *supra* note 6, at 5 (“The unfortunate result of a process fueled by ignorance of data and analysis is an excessive reliance on incarceration that is counterproductive instead of employing better strategies for reducing crime and protecting the public.”).

lingers within the general atmosphere.<sup>62</sup> Because of this, society favors any policy that promises security.<sup>63</sup> This attitude can be traced back to the rise in crime that occurred throughout the 1960s and the resulting societal shift from rehabilitation to retribution in the 1970s.<sup>64</sup> This penal philosophy served several purposes—it was “the tool by which society expressed its displeasure with someone,” while at the same time “deter[ri]ng future crime[],” and “incapacitat[ing] the person so that he or she could not commit additional crimes . . . while incarcerated.”<sup>65</sup> While this ideology made logical sense in times of rampant criminal victimization, crime in the United States has rapidly declined for decades.<sup>66</sup> However, society’s thirst for retribution has not subsided; if anything, society has only become more ravenous for punishment.

### 1. How Outside Attitudes Affect Inside Conditions

Society’s desire for safety goes hand in hand with dehumanization. When a society that emphasizes safety is conditioned to consistently fear victimization, those who are criminally convicted are seen as a grave threat to the public. As a result, the criminal justice system has turned into a “zero-sum game’ in which any policy choice that [is] good for offenders [is] bad for victims of crime.”<sup>67</sup>

Because of this, society implicitly demands that conditions in prisons be harsh. Studies show that individuals generally “perceive prison life to be too easy and comfortable for [incarcerated

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<sup>62</sup> *Id.* at 106 (“People fear first and foremost for their safety, and crime threatens their sense of security.”).

<sup>63</sup> *Id.* (“[T]he instinctual reaction among the public with respect to crime policy tends to be ‘do what it takes to keep us safe.’”).

<sup>64</sup> See Lauren-Brooke Eisen & Oliver Roeder, *America’s Faulty Perception of Crime Rates*, BRENNAN CTR. FOR JUST. (Mar. 16, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates> [https://perma.cc/AG5A-2XHD] (“[T]he violent crime rate increased by 126 percent between 1960 and 1970. . .”). BARKOW, *supra* note 6, at 56 (“The demise of parole was part of a broader shift, beginning in the 1970s, ‘away from rehabilitation as a dominant philosophy and toward retribution or ‘just deserts.’”).

<sup>65</sup> BARKOW, *supra* note 6, at 56.

<sup>66</sup> Eisen & Roeder, *supra* note 64.

<sup>67</sup> Kevin H. Wozniak, *American Public Opinion About Prisons*, 39 CRIM. JUST. REV. 305, 305 (2014).

persons],” resulting in public resentment towards the amenities that prisons supply to the incarcerated.<sup>68</sup>

This belief may help explain why prison livestock living areas have the luxury of climate-control in states like Texas, while the living spaces of incarcerated individuals reach sweltering levels.<sup>69</sup> Indeed, in 2013, the Texas Department of Criminal Justice (“TDCJ”) spent \$750,000 to create climate-controlled barns for its pig farming program.<sup>70</sup> The TDCJ made this decision despite the fact that at least fourteen incarcerated persons in Texas prisons suffered heat-related deaths in prior years.<sup>71</sup> In fact, one year earlier, in 2012, Rodney Adams died “after he was detained for driving under the influence”—his body temperature was nearly 110 degrees when he was discovered.<sup>72</sup>

The TDCJ made the active decision to bring pig farming barns up to industry standards<sup>73</sup> while keeping prison living conditions so gravely inhumane that even the U.N. Committee Against Torture “expressed particular concern about deaths from extreme heat exposure . . . in Texas.”<sup>74</sup> In other words, livestock was deemed

<sup>68</sup> *Id.* at 305-06. More specifically, TVs and exercise equipment are the prison amenities that the American public tends to resent. *Id.* at 306. *But cf.* Steve Kilar & Balt. Sun, *Clear Televisions Help Occupy Md. Prisoners, Keep Out Contraband*, BALT. SUN (Aug. 11, 2011, 8:22 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-clear-televisions-20110811-story.html> [https://perma.cc/Q4LG-KW6L] (“Televisions . . . have become an important tool for wardens. Giving prisoners something to occupy their minds while in the cells, and connecting them to the outside world, can reduce tension among inmates and decrease the chance of guards being caught in the middle of a fight.”). That is not to say that some studies do not come to a different result regarding the perception of prison conditions. In a study done by Kathlyn Taylor Gaubatz, the majority of the participants viewed prison life as uncomfortable and stressful. Wozniak, *supra* note 67, at 307.

<sup>69</sup> John Ericson, *Texas Prison Pigs Better Off Than Inmates: 14 Inmates Dead From Heat While \$750,000 Spent On Barn AC System*, MED. DAILY (Aug. 18, 2013, 2:53 PM), <https://www.medicaldaily.com/texas-prison-pigs-better-inmates-14-inmates-dead-heat-while-750000-spent-barn-ac-system-252267> [https://perma.cc/P6PU-PMU3].

<sup>70</sup> *Texas Prison System Pays \$750K to Cool Down Pig Barns*, CBS NEWS DFW (Aug. 17, 2013, 8:29 PM), [https://www.cbsnews.com/dfw/news/texas-prison-system-pays-750k-to-cool-down-pig-barns/#:~:text=AUSTIN%20\(AP\)%20%2D%20The%20Texas,and%20guards%20about%20extreme%20heat](https://www.cbsnews.com/dfw/news/texas-prison-system-pays-750k-to-cool-down-pig-barns/#:~:text=AUSTIN%20(AP)%20%2D%20The%20Texas,and%20guards%20about%20extreme%20heat) [https://perma.cc/W6TN-TTL6].

<sup>71</sup> Ericson, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Ed Mazza, *John Oliver Reveals Where Americans Are Literally Treated Worse Than Pigs*, HUFFINGTON POST (June 14, 2021, 4:58 AM),

worthy of a certain level of comfort while incarcerated individuals were not.<sup>75</sup> As some argue that air conditioning is a human right, it is likely that public perceptions and dehumanization are responsible for this right not extending into America's prisons.<sup>76</sup>

### B. News Media's Role in the Perception of Crime

Although society in the United States emphasizes public safety, humans, naturally, are drawn toward sensationalism. As a result, the media churns out stories of crime on a regular basis.<sup>77</sup> Importantly, the stories of crime that receive the most coverage, on both a local and national level, are those of violent crime, especially murder.<sup>78</sup> This obsession with violent crime coverage becomes worrisome when a link between punitive attitudes and media exposure reveals itself. According to a 2017 study, the "most punitive voters are those who 'are White, live in politically conservative areas, and view more hours of local television news programs.'"<sup>79</sup>

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[https://www.huffpost.com/entry/john-oliver-prison-air-conditioning\\_n\\_60c7051de4b0c1abbe6a3589](https://www.huffpost.com/entry/john-oliver-prison-air-conditioning_n_60c7051de4b0c1abbe6a3589) [<https://perma.cc/7T56-QL3U>].

<sup>75</sup> The fight surrounding air conditioning in Texas prisons is an ongoing battle that suffered a tremendous setback in the summer of 2021. See Matt Zdun, *Texas Lawmakers Decline to Expand Air Conditioning in State Prisons*, KWTX (June 23, 2021, 6:21 PM), <https://www.kwtx.com/2021/06/23/texas-lawmakers-decline-expand-air-conditioning-state-prisons/> [<https://perma.cc/QL75-MCXY>] (describing how House Bill 1971, which would have funded air conditioning in all Texas prisons, died in the Senate after passing through the House "with strong bipartisan support").

<sup>76</sup> See Jeff Edwards & Scott Medlock, *Air Conditioning Is a Human Right*, TIME (July 21, 2016, 9:07 AM), <https://time.com/4405338/air-conditioning-human-right/> [<https://perma.cc/8AG8-ZR9R>] ("[W]hile free citizens should be able to set their thermostat to whatever level they feel comfortable at (the Department of Energy conservatively recommends 78), imprisoning people in buildings where there is no thermostat to keep the temperature below 90 isn't just uncomfortable, nor is it just dangerous—it's a violation of a human right.").

<sup>77</sup> BARKOW, *supra* note 6, at 106 ("The lead story on local news outlets is either a crime story or an accident story 77% of the time, and 32% of all local television news stories are about crime."). See also Michael O'Hear, *Violent Crime and Media Coverage in One City: A Statistical Snapshot*, 103 MARQ. L. REV. 1007, 1009-10 (2020) (discussing a study done on local TV news in Orlando, Florida over a three-week period in 1998, where although only eighteen percent of crime in Orlando was violent, over two-thirds of the crime stories on the news were of violent crimes).

<sup>78</sup> BARKOW, *supra* note 6, at 107 ("Murder stories dominate the news whether overall homicide rates are up or down.").

<sup>79</sup> *Id.* at 108.



The bombardment of violent crime stories in the news leads to punitive views and skewed perceptions of crime by the public. Essentially, the media fosters public fear through its disproportionate crime coverage.<sup>80</sup> A 1992 study showed that up to ninety-five percent of Americans used the media as their “primary source of information about crime.”<sup>81</sup> And since crime coverage dominates the news cycle, the public responds with increased fear of victimization and a belief that crime rates are rising.<sup>82</sup> Further, these crime stories are often delivered to the public without contextual information, leaving readers and viewers without helpful background information.<sup>83</sup>

### 1. Media’s Encouragement of Dehumanization

The news media’s skewed reflection of crime results in mass societal dehumanization—and to a certain point, is also responsible for the demonization of incarcerated persons that has emerged in the United States. Consider a news story that reports that there is a rise in “sex offenders.”<sup>84</sup> A viewer likely imagines the worst types

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<sup>80</sup> Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 UNIV. FLA. J.L. & PUB. POL’Y 37, 48 (1997) (“Moral panics and everyday overreporting of violent crime have significant consequences. They are an effective way to raise profits in the news, to start organizations for particular causes, to justify increases in social control, and to boost political campaigns. However, they may also have the unwarranted side effect of elevating fear levels in the general population.” (footnotes omitted)).

<sup>81</sup> Stephen Mann, *Crime and the Media in America*, OUPBLOG (Apr. 5, 2018), <https://blog.oup.com/2018/04/crime-news-media-america/> [https://perma.cc/8KLC-8XAQ].

<sup>82</sup> *Id.*; BARKOW, *supra* note 6, at 107-08 (“Indeed, despite the fact that crime rates have been falling consistently since the 1990s, Gallop polls for more than a decade have found that a majority of Americans believe that crime rates are up.”).

<sup>83</sup> O’Hear, *supra* note 77, at 1010 (“Also notable are studies finding that crime reporting tends to disregard contextual information that might help readers/viewers to better understand the background of the offenders and the underlying causes of the offenses.”).

<sup>84</sup> See *Registered Sex Offenders on Rise*, GAINSVILLE SUN (Dec. 31, 2018, 4:54 PM) <https://www.gainesville.com/story/news/crime/2018/12/31/report-number-of-sex-offenders-in-florida-on-rise/6414416007/> [https://perma.cc/V4MD-K5KJ] (describing that “[t]he number of sex offenders and predators living in Florida has been rising steadily for more than a decade,” without providing any further explanation or breakdown of the levels of these offenders). Florida classifies sexual offenders through three levels, the first level consists of those “who have committed lower-level crimes,” for example, “streaking on campus;” however *all* offenders must register for life, except in rare circumstances. Don Pumphrey, Jr., *What You Need to Know About Florida’s Sex Offender Classification Levels*, PUMPHREY L. FIRM (July 21, 2021),

of sex crimes.<sup>85</sup> However, this rise may stem from an increase in citations for public urination, streaking, or something similarly non-threatening to the public at large, due to how stringent the sex offender registry has become.<sup>86</sup> Of course, this distinction does not get publicized. Therefore, the viewer is left with a feeling of demonization for “sex offenders” as a whole. By delivering news stories that are “simplistic, dramatic, and less nuanced,” media encourages emotional reactions from viewers, and in turn, reactive and emotion-based policies from our law makers.<sup>87</sup>

### C. *The Politicization of Crime and Prison Conditions*

Criminal policy in the United States differs from policy and regulation in other areas. It “is set largely based on emotions and the gut reactions of laypeople” rather than through the work and studies of specialized experts and policymakers.<sup>88</sup> Politicians, like the general public, are at the mercy of the media-fear machine.<sup>89</sup> Because the media delivers skewed stories of crime, politicians must deliver equally skewed promises to the electorate. Thus emerged the “tough-on-crime” rhetoric that both Republicans and Democrats utilize.<sup>90</sup>

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<https://www.pumphreylawfirm.com/blog/what-you-need-to-know-about-floridas-sex-offender-classification-levels/> [<https://perma.cc/R6RH-N5HH>].

<sup>85</sup> See BARKOW, *supra* note 6, at 20 (“A prime [example] comes from . . . ‘sex offenders,’ a category one might think is populated only by the worst kind of offender who deserves the most severe punishment. . . . But when you hear that term, what kind of offender comes to mind? It is almost guaranteed that you are thinking of rapists and child molesters.”).

<sup>86</sup> *Id.* at 21-22 (discussing how children playing doctor, teens having consensual sex, and men visiting prostitutes are “lumped” in with child molesters and rapists within the definition of “sex offender”).

<sup>87</sup> O’Hear, *supra* note 77, at 1015 (“More simplistic, dramatic, and less nuanced crime coverage yield[s] a preference for more reactive and less preventive crime control policies.”).

<sup>88</sup> BARKOW, *supra* note 6, at 1.

<sup>89</sup> Eschholz, *supra* note 80, at 48 (“Political feeding frenzies may occur around election time, or when there is a lull in sensational news stories.”).

<sup>90</sup> BARKOW, *supra* note 6, at 110-11 (“[G]et-tough’ rhetoric allows politicians to create the appearance that they have an immediate, tangible solution to social unrest.”). See Eschholz, *supra* note 77, at 49 (discussing how both Republicans and Democrats rallied around the War on Drugs). See also Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATL. (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/> [<https://perma.cc/HP4N-JJAP>] (“Democrats’

Consider the 400% increase in violent crime and juvenile violence coverage by the media in 1993.<sup>91</sup> This led to a forty percent jump in “Americans ranking crime as the most important problem in the United States.”<sup>92</sup> As a result, punitive measures like The Violent Crime Control and Law Enforcement Act of 1994 were passed into law.<sup>93</sup> Essentially, the politicization of crime is the result of media-induced moral panics.<sup>94</sup>

With a society that fears victimization, it is essentially political suicide to even remotely appear to be soft on crime.<sup>95</sup> As a result, politicians must capitalize on public emotions by promising tougher criminal justice policies even though these policies have little to no effect on crime in practice, instead only serving to increase incarceration rates.<sup>96</sup>

### 1. The Resulting Dehumanizing Laws

The reaction-demand relationship that exists between the public and politicians is also apparent when examining prison conditions and the laws that keep them inhumane. Perhaps unsurprisingly, the media, and thus politicians, promoted the belief

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fear of being labelled soft on crime was the impetus behind the 1986 law that introduced mandatory minimum sentences for drug offenses.”).

<sup>91</sup> Eschholz, *supra* note 80, at 49.

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

<sup>93</sup> *Id.* (“[I]creasingly punitive measures for juvenile criminals were passed into law in many states. The Violent Crime Control and Law Enforcement Act of 1994 proffered a variety of ‘get tough’ measures, ranging from longer prison sentences to an expanded use of the death penalty.”).

<sup>94</sup> *Id.* at 48.

<sup>95</sup> *See id.* at 50 (describing how Massachusetts Governor Dukakis’ presidential ambitions were destroyed after “media coverage of the Willie Horton case” resulted in campaign commercials portraying him “as being lenient on violent criminals”). *See also* BARKOW, *supra* note 6, at 111 (“As legal scholar Al Alschuler puts it, ‘Politicians fear endorsing any position that an opponent can characterize as ‘soft on crime’ in a 30-second television commercial.”).

<sup>96</sup> BARKOW, *supra* note 6, at 2. *See* Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, SENTENCING PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/> [<https://perma.cc/KP47-RAEU>] (“At best, some studies conclude that the rise of incarceration may have produced about a quarter of the decline in crime that has occurred since the early 1990s. Other studies have found this effect to be as low as five percent. Even if one concludes that one quarter of the decline is the most defensible finding, that means that three quarters of the decline in crime was *not* due to increased incarceration.” (footnotes omitted)).

“that the public angrily resented conditions in prisons that they perceived to be like a resort or country club.”<sup>97</sup> As a result, Congress repeatedly attempted to pass bills like the “No Frills Prison Act” in part to demonstrate their “tough-on-crime” stance to the public.<sup>98</sup>

This belief could also help explain the reasoning behind the Senate passing the Prison Litigation Reform Act (“PLRA”). Passed in 1995 as a way to cut back on “frivolous” claims by incarcerated individuals, it contains numerous requirements, including the requirement that administrative remedies must be exhausted before filing a lawsuit.<sup>99</sup> More broadly, the PLRA has served to restrict incarcerated individuals’ meaningful access to the court system and thus, the opportunity to assert their legal rights.<sup>100</sup> This is especially troubling as incarcerated persons cannot contribute to the political system through voting, making the judicial system the only avenue available to those who wish to fight for their rights and interests.<sup>101</sup>

Further, the PLRA limits what one may recover if successful. It does not entitle a plaintiff to the most effective remedy; rather, it only entitles them to a remedy that eliminates the constitutional injury.<sup>102</sup> While in theory this sounds reasonable, in practice, this

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<sup>97</sup> Wozniak, *supra* note 67, at 306. See generally Sander Jacobowitz, *Rattling Chains and Smashing Rocks: Testing the Boundaries of the Eighth Amendment*, 28 RUTGERS L. J. 519 (1997) (discussing American public opinion that prison life is too easy and as a result, the rise in support for chain gangs in prisons in the 1990s).

<sup>98</sup> Wozniak, *supra* note 67, at 305-06. While the bill never became law, it was introduced seven separate times from 1995 to 2003, before finally dying. See No Frills Prison Act, H.R. 663, 104th Cong. (1995); No Frills Prison Act, H.R. 169, 105th Cong. (1997); Federal No Frills Prisons Act of 1997, H.R. 816, 105th Cong. (1997); No Frills Prison Act, H.R. 370, 106th Cong. (1999); No Frills Prison Act of 2001, H.R. 458, 107th Cong. (2001); Federal No Frills Prison Act of 2001, H.R. 1031, 107th Cong. (2001); Federal No Frills Prisons Act of 2003, H.R. 2296, 108th Cong. (2003).

<sup>99</sup> Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL’Y INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html) [<https://perma.cc/J6N7-9JX2>]. For an example demonstrating how detrimental the requirement to exhaust administrative remedies can be for overheating claims, see *Osbaldo v. Harrington*, No. 15-cv-1317-NJR-DGW, 2017 WL 9532840, at \*1 (S.D. Ill. May 12, 2017) (explaining that a grievance submitted by an inmate in which he complained his fan in his cell overheated and melted was determined not to be an emergency, precluding relief for months).

<sup>100</sup> Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 467 (2011).

<sup>101</sup> *Id.* at 469-70.

<sup>102</sup> *Ball v. LeBlanc*, 792 F.3d 584, 599 (5th Cir. 2015).

requirement drags out litigation, restricts a claimant's ability to access *any* remedy, and ties up judicial resources as courts go back and forth attempting to determine what exact injunctive remedy is acceptable under the PLRA.

As demonstrated by the judicial history of *Ball v. LeBlanc*, even where a claimant is successful, it can take years to flesh out appropriate injunctive relief under the PLRA.<sup>103</sup> In *Ball*, three seriously-ill death row claimants at the Louisiana State Penitentiary alleged the Department of Public Safety and Corrections, the warden of the penitentiary, and other penitentiary staff had violated their rights under the Eighth Amendment by subjecting them to extreme heat.<sup>104</sup>

The district court collected heat index data for the death row tiers at the penitentiary; the data showed that the heat index exceeded 104 degrees in each tier during the collection period.<sup>105</sup> As a result, the district court found this degree of heat to be in violation of the Eighth Amendment and essentially ordered the defendants to install air conditioners by way of issuing a permanent injunction requiring the defendants to keep the heat index of the death row tiers at or below eighty-eight degrees at all times.<sup>106</sup>

On appeal, the Fifth Circuit found that while an Eighth Amendment violation did exist, the injunction issued by the district court violated the PLRA.<sup>107</sup> Not only did the district court grant the plaintiffs too effective of a remedy, but the district court also granted the plaintiffs a remedy for the entire facility, two solutions—while humane—not permitted under the PLRA.<sup>108</sup> The

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<sup>103</sup> See *Ball v. LeBlanc*, 988 F. Supp. 2d 639 (M.D. La. 2013), *aff'd in part, vacated in part, and remanded by* 792 F.3d 584 (5th Cir. 2015); *Ball v. LeBlanc*, 223 F. Supp. 3d 529 (M.D. La. 2016), *rev'd and remanded by* 881 F.3d 346 (5th Cir. 2018), *cert. dismissed*, 139 S. Ct. 499 (2018).

<sup>104</sup> *Ball*, 988 F. Supp. 2d at 643.

<sup>105</sup> *Id.* at 652-53.

<sup>106</sup> *Id.* at 689; *Ball*, 792 F.3d at 598.

<sup>107</sup> *Ball*, 792 F.3d at 596, 598-99 (“[A]ir conditioning . . . is unnecessary to correct the Eighth Amendment violation. Under the PLRA, plaintiffs are not entitled to the most effective available remedy . . . . Some risk is permissible and perhaps unavoidable.”).

<sup>108</sup> *Id.* at 599 (“The PLRA limits relief to the particular plaintiffs before the court.”). *But see* 42 U.S.C. § 1997g (“It is the intent of Congress that deplorable conditions in institutions covered by this [Act] amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected . . . . It is the further intention of Congress that where Federal funds are available for use in improving such institutions,

court then enjoined the defendants to relocate the three plaintiffs to a specific tier of death row, curtained off from other incarcerated persons, where they alone would be provided an IcyBreeze unit—an ice chest that emits cool air with a fan.<sup>109</sup>

The penitentiary appealed this second injunction, where the Fifth Circuit once again reversed and remanded.<sup>110</sup> The plaintiffs filed a petition for a writ of certiorari;<sup>111</sup> however, the Supreme Court subsequently dismissed it.<sup>112</sup> In all, the litigation spanned over five years, with the state spending over \$1,000,000 fighting the lawsuit when air conditioning the unit would have cost an estimated \$225,000.<sup>113</sup> State prisons are willing to spend more to fight against implementing humane conditions, especially when society views air conditioning as a luxury in prisons.<sup>114</sup>

### III. THE JUDICIARY'S POSITION TOWARDS CONDITION OF CONFINEMENT CLAIMS

The nine justices that comprise the United States Supreme Court are, of course, members of American society. That is, they do not live, exist, or form their judicial opinions inside of a bubble. While society at large views these justices as the purveyors of truth and impartiality, they are nevertheless susceptible to subconscious influences.

Consider the concern for the future of abortion rights that spread following the appointment of Justice Amy Coney Barrett in October 2020.<sup>115</sup> Senate members peppered Barrett with questions surrounding the potential influence that her faith might have on

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priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist.”).

<sup>109</sup> Ball v. LeBlanc, 223 F. Supp. 3d 529, 538, 547 (M.D. La. 2016).

<sup>110</sup> Ball v. LeBlanc, 881 F.3d 346, 348 (5th Cir. 2018).

<sup>111</sup> Ball, 881 F.3d 346, petition for cert. filed, 2018 WL 3740585 (U.S. Aug. 6, 2018) (No. 18-162).

<sup>112</sup> Ball v. LeBlanc, 139 S. Ct. 499 (2018).

<sup>113</sup> Matt Clarke & Christopher Zoukis, *Litigation Heats Up Over Extreme Temperatures in Prisons, Jails*, PRISON LEGAL NEWS (June 29, 2018), <https://www.prisonlegalnews.org/news/2018/jun/29/litigation-heats-over-extreme-temperatures-prisons-jails/> [<https://perma.cc/KF63-N37E>].

<sup>114</sup> *Id.* But see Edwards & Medlock, *supra* note 76.

<sup>115</sup> Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, VOX (Oct. 26, 2020, 8:17 PM), <https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion> [<https://perma.cc/MM2R-S5A4>].

her judicial decision-making at her 2017 confirmation hearing to the Court of Appeals.<sup>116</sup> After being nominated to serve on the Supreme Court, “[t]he possible impact of Barret’s Catholicism on her jurisprudence . . . continued to be a subject of speculation . . . .”<sup>117</sup> While it is easy to point the finger at something clearly discernable, like one’s religious or political affiliation, it is much more difficult to parse through the delicate intricacies of social norms and subconscious attitudes.

A. *42 U.S.C. § 1983 Claims and the Eighth Amendment*

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. While historically, the Supreme Court has assessed the cruelty of a punishment through the criminal sanction imposed, the Eighth Amendment also limits how a state may administer a criminal sentence.<sup>118</sup> Because of this, the majority of claims made by incarcerated individuals contesting their conditions of confinement are brought under 42 U.S.C. § 1983, which allows claimants to assert a civil claim against a state actor who deprived them of a right “secured by the Constitution.”<sup>119</sup>

Of note, in all but two states and the District of Columbia, incarcerated individuals lose their voting rights during their incarceration.<sup>120</sup> As a result, oftentimes the only way an incarcerated person can assert their voice is by filing a § 1983 claim. As discussed more fully *infra*, one of the critical flaws in

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<sup>116</sup> Jessica Gresko, *Five Things to Know About Court Nominee Amy Coney Barrett*, ASSOCIATED PRESS (Oct. 10, 2020), <https://apnews.com/article/donald-trump-religion-ruth-bader-ginsburg-confirmation-hearings-amy-coney-barrett-5bfc898d36072c4b9bf63646e1c91fa6> [<https://perma.cc/A7FM-6QT5>].

<sup>117</sup> Tom Gjelten, *Amy Coney Barrett’s Catholicism Is Controversial but May Not Be Confirmation Issue*, NPR (Sept. 29, 2020, 5:42 PM), <https://www.npr.org/2020/09/29/917943045/amy-coney-barretts-catholicism-is-controversial-but-may-not-be-confirmation-issu> [<https://perma.cc/M4K8-YUSK>].

<sup>118</sup> *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 8, at 884.

<sup>119</sup> 42 U.S.C. § 1983.

<sup>120</sup> *Restoration of Voting Rights for Felons*, NAT’L CONF. OF STATE LEGISLATORS (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/N9ZL-36UH>]. More specifically, in twenty-one states, the voting rights of incarcerated individuals are automatically restored upon release. *Id.* However, in sixteen states, voting rights are not restored until the completion of parole or probation. *Id.* Additionally, these states may not reinstate voting rights until certain fines, fees, or restitution is paid. *Id.* Finally, in eleven states, voting rights are lost “indefinitely for some crimes, or require a governor’s pardon . . . to be restored.” *Id.*

encompassing conditions of confinement claims within the Eighth Amendment is that claimants are then required to prove both an objective and subjective component in order to be entitled to relief.<sup>121</sup> Because many plaintiffs cannot meet both components, they are essentially shut out of both the judicial and political process, resulting in their living conditions being controlled by a society that has dehumanized and demonized them.

*B. A Brief History of Condition of Confinement Claims*

A string of Supreme Court decisions, beginning in 1976 with *Estelle v. Gamble*,<sup>122</sup> established the types of prison condition claims that incarcerated individuals could bring, as well as a standard for recovery under the Eighth Amendment. In *Estelle*, the Supreme Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”<sup>123</sup> What this holding did for micro-level personal mistreatment claims, *Rhodes v. Chapman*<sup>124</sup> did for macro-level condition claims,<sup>125</sup> as the Court emphasized that “[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.”<sup>126</sup> *Estelle* and *Rhodes* directed courts to inquire about the conditions themselves to determine if an Eighth Amendment violation had occurred, which fit in line with the Eighth Amendment’s moral commitments and the constitutional rights of the incarcerated.<sup>127</sup>

However, the Court shifted its position in the 1990s, instead focusing on “what defendants did or did not know about the risk of

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<sup>121</sup> See *infra* Part III.B.

<sup>122</sup> 429 U.S. 97 (1976).

<sup>123</sup> *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

<sup>124</sup> 452 U.S. 337 (1981).

<sup>125</sup> *Evading the Eighth Amendment*, *supra* note 1, at 136 (“Together, this pair of cases addressed the two types of conditions claims prisoners might bring: micro-level assertions of personal mistreatment by individual officers, and macro-level challenges to system-wide failures of care.”).

<sup>126</sup> *Rhodes*, 452 U.S. at 347.

<sup>127</sup> *Evading the Eighth Amendment*, *supra* note 1, at 136.



harm to prisoners.”<sup>128</sup> In *Wilson v. Seiter*,<sup>129</sup> the Court determined that in order to have a viable Eighth Amendment claim in regards to their conditions of confinement, incarcerated individuals were required to show deliberate indifference by the prison officials themselves.<sup>130</sup> While the challenged conditions were still to be considered by courts in the inquiry, they were to be considered “only within the narrowest possible frame.”<sup>131</sup>

The most devastating blow to conditions of confinement claims came three years later in *Farmer v. Brennan*,<sup>132</sup> in which the Court finally defined “deliberate indifference” nearly twenty years after setting it as a standard.<sup>133</sup> The Court held that “a prison official cannot be found liable under the Eighth Amendment for denying an [incarcerated person] humane conditions of confinement unless the official knows of and disregards an excessive risk to [their] health or safety.”<sup>134</sup>

Today, in order for an incarcerated individual to succeed on an Eighth Amendment conditions of confinement claim, they must prove both an objective and subjective component. The objective component requires that there be “a serious risk to health or safety”; the subjective risk requires that “prison officials [be] deliberately indifferent to that risk.”<sup>135</sup> Following *Farmer*, prison officials can easily escape liability by simply ignoring inhumane conditions around them. In other words, prison officials are incentivized not to notice dangers and risks in their prisons, likely resulting in even more suffering.<sup>136</sup> As a result, even if objectively

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<sup>128</sup> *Id.*

<sup>129</sup> 501 U.S. 294 (1991).

<sup>130</sup> *Id.* at 303.

<sup>131</sup> *Evading the Eighth Amendment*, *supra* note 1, at 137.

<sup>132</sup> 511 U.S. 825 (1994).

<sup>133</sup> *Evading the Eighth Amendment*, *supra* note 1, at 147, 149 (“When *Rhodes* was decided, the Court had not yet defined ‘deliberate indifference’ with any precision[.]” but “[i]n the 1994 case of *Farmer v. Brennan*, the Court defined deliberate indifference as the equivalent of criminal recklessness, on which defendants are liable only if they actually realized the risk of harm.”).

<sup>134</sup> *Farmer*, 511 U.S. at 837.

<sup>135</sup> Mary E. Adair, *Beat the Heat: Texas’s Need to Reduce Summer Temperatures in Offender Housing*, 51 ST. MARY’S L.J. 707, 717-18 (2020).

<sup>136</sup> *Cruelty, Prison Conditions, and the Eighth Amendment*, *supra* note 8, at 882 (“This, at its core, is the problem with *Farmer*’s recklessness standard: It holds officers liable only for those risks they happen to notice—and thereby creates incentives for

a condition violates the Eighth Amendment, prison officials can evade liability—and therefore avoid remedying the condition—if the subjective component is not also met.

Not only does the current test lack a theoretical base,<sup>137</sup> it also strips incarcerated individuals of their voice and personal experience in their incarceration. A harmful condition is a harmful condition; what prison officials may or may not notice should not have any bearing on whether or not one experiences inhumane confinement. Unfortunately, the subjective component tends to be the determining factor in Eighth Amendment conditions of confinement cases, rendering the claimant's personal experience essentially unimportant.<sup>138</sup>

### C. *Judicial Dehumanization*

If the inquiry established by *Estelle* and *Rhodes* aligned with the Eighth Amendment's morality commitments, why did the Court shift in *Wilson* and *Farmer* to an inquiry that essentially dismisses those commitments altogether? The answer is not in the inherent differences between punishment and confinement as the Court suggests; it results from judicial dehumanization and the internalization of public attitudes.

#### 1. How the Human Moral Circle Impacts the Eighth Amendment Inquiry

As discussed *supra*, incarcerated individuals are generally viewed as subhuman by society.<sup>139</sup> In crafting the conditions of

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officers *not* to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse.”).

<sup>137</sup> See Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1816 (2012) (“[T]he Eighth Amendment conditions of confinement test . . . ultimately lacks a sound theoretical basis, which prevents it from serving its intended purpose.”).

<sup>138</sup> See, e.g., *Baptist v. Hinsley*, 107 F. App'x 7, 7 (7th Cir. 2004). In *Baptist*, an incarcerated individual was left either nude or merely in his underwear in a “strip cell.” *Id.* Further, the blankets and sheets were removed from his mattress. *Id.* The court found that the individual had “raised a genuine issue of material fact regarding the cold conditions in his cell,” but “could not show that the defendants knew his cell was cold” and therefore, “he could not prove they were deliberately indifferent to his exposure to the cold.” *Id.* at 8.

<sup>139</sup> See *supra* Part I.A.

confinement inquiry around the subjective mindset of the defendant, the Court has internalized this subhuman attitude. The experience of an incarcerated individual does not matter due to their subhuman status, unless it has been acknowledged and disregarded by a member of the ingroup. Essentially, the Court has solidified this societal positioning with an inquiry that emphasizes that the incarcerated are lesser than ingroup members of society. In other words, if a correctional officer—who is part of the ingroup—doesn't believe that a condition of confinement poses a risk to an incarcerated individual—a member of the outgroup—the inquiry ends.

This is essentially the human moral circle argument playing out in the judicial realm. The human moral circle has cast out the claimant for the crime that led to their incarceration. Due to this position in the outgroup, the subjective experience of the claimant is entirely unimportant for their conditions of confinement claim, however unconstitutional it may be. The defendants in these cases, however, are still members of the human moral circle. They are part of the ingroup, and therefore, their subjective opinion matters more to the other members of the moral circle in the equation—the judges.

The human moral circle theory is especially important when considering the line that was drawn by the Court between cruel and unusual punishments and cruel and unusual conditions in *Farmer*. While in the past, the Court had stated that “the Constitution does not mandate comfortable prisons,”<sup>140</sup> in *Farmer*, the Court essentially opened the floodgates for inhumane conditions with its holding, by giving prison officials a route to evade any liability.

The Supreme Court, through its jurisprudence, placed an additional hurdle in the way of claimants asserting an Eighth Amendment claim through the subjective component. This additional hurdle can best be understood as the Supreme Court embracing the social exclusion of the incarcerated, and in a way, encouraging ill-treatment and harsh punishment by way of poor conditions of confinement.

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<sup>140</sup> Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

## 2. Internalizing Dehumanization Through the Subjective Component of the Eighth Amendment Inquiry

As discussed above, the current Eighth Amendment framework for conditions of confinement claims pits ingroup members of society vs. outgroup members of society. Because of this, the outgroup—incarcerated persons—are at an immediate disadvantage. This is due to the human moral circle ideology as well as the dehumanization that accompanies it.

Consider the influence of animalistic dehumanization discussed *supra*.<sup>141</sup> When prison officials engage in animalistic dehumanization of incarcerated individuals, they subconsciously assert that they are subhuman. Because of this mindset, it may be easier for prison officials to subjectively believe that there is no risk to the health of an incarcerated person when an inhumane condition arises. If an incarcerated individual is viewed as subhuman, it's logical to conclude that what's inhumane to a regular human does not apply to them. In other words, the bar for inhumane conditions is subconsciously determined to be much, much lower.

Additionally, the inquiry allows for dehumanization to guide the subjective component depending on how far along in their sentence a claimant is. For example, if a claimant has only served four years of a twenty-year sentence, prison officials may subconsciously believe they have not yet “paid” their societal costs. Thus, since they lack sufficient human mental sophistication, they are only worthy of subhuman conditions of confinement.

With how the Supreme Court has sculpted the subjective component of its conditions of confinement inquiry, this may preclude a finding of deliberate indifference, simply because the prison official thinks of the incarcerated individual as being subhuman. Because the subjective component of the Eighth Amendment inquiry does not consider the implications of subconscious dehumanization, this result can only be described as judicial dehumanization.

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<sup>141</sup> See *supra* Part I.A.1.

### 3. The Combined Effect of Judicial, Legislative, and Societal Dehumanization

Although the Supreme Court's judicial dehumanization precludes humane conditions of confinement, it is not the sole vehicle responsible for inhumane conditions in prisons, nor did it reach the point of judicial dehumanization on its own accord. The root cause boils down to news media and its ability to subconsciously influence societal views. With its obsession of violent crime coverage, media has influenced society to be increasingly punitive and dehumanizing towards the incarcerated. America's elected officials then feed off this media-induced moral panic by quickly passing punitive and dehumanizing policies and laws. In response, the Supreme Court crafted an Eighth Amendment conditions of confinement inquiry that reflected these societal and legislative attitudes. As a result of these powerful dehumanizing forces, American prisons serve to harshly punish those inside its walls to an extent far greater than their sentence intended. In essence, this is how inhumane conditions of confinement have been allowed to exist for so long.

#### IV. OVERCOMING SOCIETY'S SUBCONSCIOUS

Currently, the United States is stuck in a cycle of subconscious dehumanizing influence. This cycle has been allowed to continue, unchanged, for decades because the part of the population it affects is silenced and cast out from society. It is nearly impossible for claimants to effect change while incarcerated due to the legislative and judicial hoops that have been constructed. And as briefly mentioned *supra*, the vast majority of the incarcerated population will not regain their voting rights until after completing their sentence or sometime thereafter.<sup>142</sup> This, in turn, restricts their ability to use their votes as a voice to help enact change regarding state prison conditions. Therefore, "ingroup" action must be taken to finally make prison conditions humane without the taint of subconscious attitudes blocking the way.

What follows in this section are possible options that could be implemented to improve state prison conditions. This is not a one-

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<sup>142</sup> See *supra* note 119.

size-fits-all fix, nor are any of these options alone likely sufficient to remedy the deep-rooted problems in America's social psyche. However, combined, they may help initiate the transformation from inhumane to humane within prison walls.

#### A. *Extend the Bureau of Prisons*

The Bureau of Prisons ("BOP") maintains the federal prison system in the United States. On their website, the BOP highlights their safe and humane facilities, as well as their thirty-four percent recidivism rate.<sup>143</sup> When comparing the BOP's recidivism rate to that of state prisons, which is nearly forty-five percent within one year of release and eighty-nine percent within nine years of release, it becomes apparent that the BOP is doing something better than state prisons.<sup>144</sup> Further, almost all prisons in the BOP system are air-conditioned, which is significant when compared to states like Texas, where only twenty-five percent of the prisons and jails are air-conditioned.<sup>145</sup>

While the BOP oversees federal prison conditions, there is currently no agency or standard in place to maintain minimum prison conditions on the state level. Instead, state authorities manage state prisons, resulting in inconsistencies in prison conditions throughout the country.<sup>146</sup> Considering there are 1,833

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<sup>143</sup> *About Our Agency*, BUREAU OF PRISONS, <https://www.bop.gov/about/agency/> [<https://perma.cc/DKQ6-FPRE>] (last visited Dec. 15, 2021).

<sup>144</sup> *Compare* Matthew Clarke, *Long-Term Recidivism Studies Show High Arrest Rates*, PRISON LEGAL NEWS (May 3, 2019), <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/> [<https://perma.cc/JX6B-RM2Q>] (The data from the cited study shows a thirty-nine and eight-tenths percent recidivism rate for the BOP for non-violent crimes and a sixty-four percent recidivism rate for violent crimes over an eight-year period.), *with About Our Agency*, *supra* note 143 (The thirty-four percent recidivism rate published on the BOP's website only reflects a three-year period.) However, the BOP's recidivism rate is still lower than that of state prisons at both three- and eight-years post-release). *Id.*

<sup>145</sup> Edwards & Medlock, *supra* note 76; Jolie McCullough, *Heat is Part of Life at Texas Prisons, But Federal Judge Orders One to Cool It*, TEX. TRIB. (July 20, 2017, 12:00 AM), <https://www.texastribune.org/2017/07/20/texas-prison-heat-air-conditioning-lawsuit/> [<https://perma.cc/6UZD-FMR6>].

<sup>146</sup> *Compare* *Death Row Air Conditioning Rare in South*, WDSU (Aug. 24, 2013, 12:56 PM), <https://www.wdsu.com/article/death-row-air-conditioning-rare-in-south/3365239#> [<https://perma.cc/FS32-9DJM>] (describing Arkansas's prisons being air conditioned, with "Arkansas prison policy call[ing] for summertime cell temperatures ranging from 74 to

state prisons as opposed to 110 federal prisons, with state prisons and local jails housing nearly ninety percent of offenders, this glaring absence of regulation is deeply alarming.<sup>147</sup>

With this lack of regulation comes the ability for subconscious social influence and internalized dehumanization to direct state prison operations. A possible way to mitigate this risk is to expand the BOP to cover state prison facilities. This would extend government oversight to the state prison system, resulting in a baseline standard of operations for all state prisons.

That is not to say that the BOP is a perfect operating system. Federal prisons are chronically overpopulated,<sup>148</sup> and many federal prisons have similarly inhumane conditions of confinement.<sup>149</sup> But having a government hand in the operation of state prisons systems may be what is necessary to get the ball rolling towards the larger discussion of prison conditions as a whole.

### B. The OSHA Option

A more aggressive option is for Congress to create an entirely new agency to oversee and maintain state prison conditions. The Occupational Safety and Health Administration (“OSHA”) was established following public outcry concerning dangerous conditions in the workplace, a situation not unlike the current outcry from social justice advocates arguing for improved prison

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78 degrees”), with Alexi Jones, *Cruel and Unusual Punishment: When States Don’t Provide Air Conditioning in Prison*, PRISON POL’Y INITIATIVE (June 18, 2019), <https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning/> [https://perma.cc/6HVT-R8DT] (listing Southern states that refuse to air condition their prisons).

<sup>147</sup> Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2354 (2000).

<sup>148</sup> See *Policy Shifts Reduce Federal Prison Population*, U.S. CTS., <https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population> [https://perma.cc/EN88-F2TL]. Poor conditions of confinement may help explain why “there is a 10-year differential between the overall health of Bureau of Prisons inmates and that of the general population.” Justin Brooks, *The Politics of Prisons*, 77 MICH. BAR J. 154, 154 (1998).

<sup>149</sup> See DeAnna R. Hoskins & Vivian D. Nixon, *Freezing Temps, Contaminated Water Are Inhumane; People in Prison Deserve Better*, USA TODAY (Feb. 21, 2019, 5:40 PM), <https://www.usatoday.com/story/opinion/policing/2019/02/21/congress-must-exercise-oversight-end-inhumane-conditions-inmates/2909122002/> [https://perma.cc/N4NB-PFQH] (discussing the Federal Bureau of Prisons being sued for freezing temperatures in a Brooklyn facility and drinking water containing arsenic in an Atlanta facility).

conditions. OSHA's rulemaking process and standards could serve as a much-needed template for the new administration.

OSHA was one of the three permanent agencies established with the signing of The Occupational Health and Safety Act of 1970, and it was created to "set and enforce workplace safety and health standards."<sup>150</sup> OSHA then set the "federal standards and voluntary consensus standards" for 6.9 million workplaces in the United States.<sup>151</sup> OSHA established these standards in two ways: either by adopting existing standards that had already been recognized and accepted, or through notice and comment rulemaking.<sup>152</sup>

Now, most of OSHA's federal regulations are developed and issued through notice and comment rulemaking.<sup>153</sup> This standard-making process is extraordinarily public. OSHA publishes its intent to create a standard in the *Federal Register*, which allows for public comment, OSHA's advisory committee meetings are open to the public, and OSHA's expert conferences are open to the public.<sup>154</sup> Public hearings may also occur, as OSHA's standards affect 130 million workers nationwide, and stakeholders are encouraged to participate in the rulemaking process.<sup>155</sup>

While OSHA's standard-making process typically begins with information gathering performed by the National Institute for Occupational Safety and Health, which then provides comments for

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<sup>150</sup> *OSHA at 30: Three Decades of Progress in Occupational Safety and Health*, U.S. DEP'T. OF LAB., <https://www.osha.gov/aboutosha/30-years> [<https://perma.cc/9HZR-64X8>] [hereinafter *OSHA at 30*]. The Act also established the National Institute for Occupational Safety and Health, which researches workplace safety and health, and the Occupational Safety and Health Review Commission, "an independent agency to adjudicate enforcement actions challenged by employers." *Id.* Agencies like these could also be instrumental in reducing dehumanization in prison by bringing scientific standards into the prison condition conversation while also having a commission that reviews the policies put into practice.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ("Congress gave OSHA 2 years to put an initial base of standards in place by adopting these widely recognized and accepted standards. Other standards were to be issued through notice and comment rulemaking.")

<sup>153</sup> THOMAS H. WILSON, *OSHA GUIDE FOR HEALTH CARE FACILITIES* § 140 (Supp. Apr. 2013).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* ("For an agency such as OSHA, whose standards can have significant, broad impact on organizations and individuals, stakeholder input is an integral part of the rulemaking process"); *Commonly Used Statistics*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/data/commonstats> [<https://perma.cc/AH5Z-PTM8>] (last visited Dec. 15, 2021).



recommended changes, new standards, or alerts of potential new hazards, organizations or unions may also request new or updated standards.<sup>156</sup> Further, OSHA may choose “to revise a proposed rule based on comments by individuals, employers and associations.”<sup>157</sup> OSHA also addresses comments when publishing a final rule, which aids employers in interpreting OSHA’s intent with a particular standard.<sup>158</sup>

While some of OSHA’s original standards are still in place today, many “have been updated or expanded through public rulemaking, dropped as unnecessary or overly specific, or amended to clarify their intent.”<sup>159</sup> In other words, OSHA’s standards are flexible and elastic enough to change with the times and needs of society.

OSHA’s policy of adopting existing standards may appeal to prison officials, as they can argue for certain procedures and conditions to remain unchanged. Further, OSHA’s standards cover “most private sector employers and their workers in all 50 states,” demonstrating that its structure could easily apply to state prisons nationwide.<sup>160</sup> However, an open rulemaking process like that of OSHA will require more public support for humane prison conditions to be truly effective. Without widespread support for improved conditions of confinement, prisons can lobby to keep conditions as they are currently. A possible way to mitigate this risk is to give the incarcerated a voice in the rulemaking process, thus allowing the agency to balance the potentially oppositional requests of incarcerated individuals and the prisons. This also leaves room for the standards to develop as public support for improved conditions increases.

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<sup>156</sup> THOMAS H. WILSON, OSHA GUIDE FOR HEALTH CARE FACILITIES § 140 (Supp. Apr. 2013).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *OSHA at 30, supra note 150.*

<sup>160</sup> *Help for Employers*, OSHA, <https://www.osha.gov/employers> [<https://perma.cc/FFA9-UJC6>].

*C. The European Prison Rules' Standard for Humane Conditions*

Perhaps the best way for the United States to face and overcome its societal dehumanization of incarcerated individuals is to shift the penal philosophy entirely. The European Prison Rules (“EPR”), adopted from the United Nations Standard Minimum Rules for the Treatment of Prisoners, reflect the European penal philosophy.<sup>161</sup> The EPR set forth three ideals:

- (a) that conditions of confinement should not be punitive because deprivation of liberty is punishment enough; (b) that treatment must be the principle aim of punishment; and (c) that the administration of prisons must show respect for the fundamental rights of individuals, and at all times uphold the values that nourish human dignity.<sup>162</sup>

Under the EPR, regular inspections of institutions occur “to ensure compliance with the objective and requirements of the rules.”<sup>163</sup> A regional court also reviews potential human rights violations.<sup>164</sup>

Most recently revised in 2020, the EPR gives detailed instructions for humane conditions of confinement.<sup>165</sup> Part II of the EPR outlines the conditions of imprisonment. Rule 18.1 states that “[t]he accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity . . . due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.”<sup>166</sup>

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<sup>161</sup> Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. CRIM. & CIV. CONFINEMENT 61, 94 (2007).

<sup>162</sup> *Id.* at 94-95.

<sup>163</sup> *Id.* at 95. The EPR were designed specifically to represent the “floor” for prison conditions as opposed to the “ceiling,” so that member States could further develop prison condition standards through domestic legislation. See Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMP. L. 1, 28 (1998).

<sup>164</sup> Rodriguez, *supra* note 161, at 95.

<sup>165</sup> *Recommendation Rec(2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules*, COUNCIL OF EUR., [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016809ee581](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581) [<https://perma.cc/G8Z6-UP37>].

<sup>166</sup> *Id.*

Further, Rule 18.2a requires the “entrance of fresh air except where there is an adequate air conditioning system.”<sup>167</sup>

While not legally binding,<sup>168</sup> these rules instruct European prison staff on how to treat incarcerated individuals. This gives staff an understanding of what is and is not humane in a prison setting. Because of these guidelines, there cannot be an argument that a correctional officer or administrator subjectively did not know a particular condition posed a risk to a claimant; there is a clear outline of what is to be expected. Essentially, adoption of some form of the EPR can effectively replace the subjective component of the Eighth Amendment inquiry.

#### CONCLUSION

Currently, in the United States, there is a system in which news media and political theater largely influence the social perception of incarcerated persons. As a result, dehumanization has seeped into the social subconscious, silently directing the arms of the legislature and judiciary for decades. To combat this, large-scale changes need to be made. Expanding the BOP, creating administrative agencies, and adopting some form of the EPR can help shift the societal tides, thus allowing criminal justice policy to be rooted in science rather than emotion. From here, humane conditions of confinement can finally emerge in the United States.

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<sup>167</sup> *Id.*

<sup>168</sup> However, “multiple European nations have used them as binding law as the basis for complaints against inadequate prison services.” Amanda Dick, *The Immature State of Our Union: Lack of Legal Entitlement to Prison Programming in the United States as Compared to European Countries*, 35 ARIZ. J. INT’L & COMP. L. 287, 309 (2018).

