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A DELIBERATE DIFFERENCE?: THE RIGHTS OF INCARCERATED INDIVIDUALS UNDER THE NEW MEXICO STATE CONSTITUTION

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Historically, to bring claims against government officials for unconstitutional prison conditions, individuals incarcerated in New Mexico had one vehicle for redress: Section 1983 claims based on the protections of the Federal Constitution. If an individual seeks relief via Section 1983 for prison conditions that are in violation of the Eighth Amendments protections against cruel and unusual punishment, courts apply a "deliberate indifference" standard to determine the liability of prison officials. This defendant-friendly standard requires that incarcerated plaintiffs suffer an objective harm and—crucially—that the relevant officials have a culpable state-of-mind of deliberate indifference. In 2021, the New Mexico Legislature passed the New Mexico Civil Rights Act ("NMCRA") to provide a vehicle for constitutional redress under the state constitution, essentially, a state-level Section 1983 counterpart. As a result, practitioners in New Mexico now have a unique opportunity to help define the state constitutional rights afforded to incarcerated individuals and how such rights deviate from federal constitutional law. This Comment argues that New Mexico courts can—and should—reject the federal "deliberate indifference" standard used to assess unconstitutional prison conditions violations. Instead, when interpreting the state's Eighth Amendment analogue, New Mexico courts should adopt a standard that better protects the rights of incarcerated individuals.

INTRODUCTION

Like all forms of social hardship, the COVID-19 pandemic has had different effects across the many intersections of society. To name just a few, the impacts of the virus vary widely across different geographies, races, classes, and professions. In the era of self-quarantine and social distancing, there are few settings less amenable

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to these directives than the contemporary prison. Indeed, as one might expect, individuals who are incarcerated have been disproportionately affected by COVID-19, as they have found themselves unable to socially distance or access adequate medical care.[1] In 2020, the rate of infections in prisons was more than four times that of the public and the mortality rate of incarcerated individuals was double that of the general population.[2] A number of factors contributed to this disparity, including "over-crowded [facilities] with rapid population turnover, often in old and poorly ventilated structures . . . and a health care system that is siloed from community public health."[3] While some states made efforts to decrease prison populations by commuting sentences via executive orders and permitting early release by court order and state legislation,[4] these initiatives often fell short and thousands of individuals incarcerated across the country consequently died of COVID-19.[5] Additionally, the virus-induced devastation in prisons disproportionately affected people of color due to the well-documented racial and ethnic disparities in the correctional setting.[6]

Although the pandemic has—in some grim sense—shed new light on the many shortcomings of the American penal system, the larger issues that gave rise to such indignities are longstanding and deeply rooted. Shortcomings include (but are not limited to) the overuse of solitary confinement,[7] the utilization of private, for-profit prisons,[8] and the prevalence of overcrowding in American correctional facilities.[9] Furthermore, the United States, with only 5% of the global population, incarcerates a remarkable 25% of the global prison population—more individuals than any other nation.[10] In short, while the pandemic has (perhaps) offered a new

1. *See, e.g.*, Kevin T. Schnepel, *COVID-19 in U.S. State and Federal Prisons*, COUNCIL ON CRIM. JUST. 5 (Dec. 6, 2020), https://counciloncj.org/impact-report-covid-19-testing-in-state-prisons-2/.

2. *Id.* at 3.

3. NAT'L ACADS. OF SCIS., ENG'G, AND MED., DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 2 (2020) [*hereinafter* DECARCERATING CORRECTIONAL FACILITIES].

4. *The most significant criminal justice policy changes from the COVID-19 pandemic*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/virus/virusresponse.html (last updated Apr. 1, 2022).

5. Emily Widra, *State prisons and local jails appear indifferent to COVID outbreaks, refuse to depopulate dangerous facilities*, PRISON POL'Y INITIATIVE (Feb. 10, 2022), https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/.

6. *See* DECARCERATING CORRECTIONAL FACILITIES, *supra* note 3, at 1.

7. Under the "Nelson Mandela Rules" put forth by the United Nations, "prolonged solitary confinement" is defined as "a time period in excess of 15 consecutive days." G.A. Res. 70/175, Nelson Mandela Rules, Rule 43 (Dec. 17, 2015). In contrast, the United States often keeps people in solitary confinement for months and even decades. *See* Alison Shames, Jessa Wilcox & Ram Subramanian, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, VERA INST. OF JUST. 15–16 (May 2015), https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf.

8. *See generally* Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, THE SENT'G PROJECT (Aug. 2, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/ (considering criticisms of for-profit, private prisons).

9. *See generally Overcrowding and Overuse of Imprisonment in the United States*, ACLU (May 2015), https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf (reporting on the causes of and issues with overcrowding in United States prisons).

10. *Id.* at 1.

perspective on the manifold forms of misery that plague our correctional institutions, the underlying injustices run far deeper.

In the face of these injustices, prison reform activism manifests itself in various ways. In the legal context, however, one tool looms large: constitutional litigation. For example, in the prison setting, lack of access to adequate medical care may constitute a violation of the United States Constitution's Eighth Amendment protection against "cruel and unusual punishments."[11] However, though the Federal Constitution can provide protections to incarcerated individuals in theory, those seeking constitutional redress face many practical obstacles. Perhaps the greatest impediment is the legal standard necessary to show a violation of the Eighth Amendment: the so-called "deliberate indifference" standard.[12] According to this judicially created standard, to prove claims of unconstitutional prison conditions, incarcerated plaintiffs are required to show both that the conditions they are living in constitute an objective harm *and* that the culpable prison official possesses a state of mind that shows deliberate indifference to that harm.[13] This test is an extremely difficult hurdle for plaintiffs who are incarcerated.[14] Until recently, in New Mexico, those who sought to bring constitutional claims against prison officials were restricted to arguments based on this federal standard. These claims were almost invariably litigated in federal court, with plaintiffs seeking relief under 42 U.S.C. Section 1983, the federal statute that creates a cause of action against persons who abridge rights created by the Constitution and laws of the United States.[15] For New Mexico's entire history, incarcerated individuals could not seek alternative redress in state court based on constitutional grounds.

However, New Mexico—like all states—has its own constitution, and in theory, incarcerated individuals could seek relief under the state's own unique civil rights protections. Nevertheless, until recently, bringing claims under the New Mexico Constitution was only possible in very limited circumstances.[16] This difficulty was due to the lack of any state law counterpart to Section 1983. The state bill of rights, like its federal analogue, lacks any internal enforcement mechanism. That is, it lacks an internal cause of action to enforce its protections, and until this year, no Section 1983-esque state statute existed to fill the void. As a result, the civil protections of the state bill of rights remained largely unlitigated.

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11. U.S. CONST. amend. VIII. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (holding that deliberate indifference by prison personnel to an incarcerated individual's serious illness or injury is cruel and unusual punishment that violates the Eighth Amendment).

12. *See infra* Part II.A.

13. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994).

14. *See, e.g.*, Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487 (2004) (noting the near impossibility of satisfying the deliberate indifference standard); Chad Flanders, *COVID-19, Courts, and the "Realities of Prison Administration" Part II: The Realities of Litigation*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 495 (2021) (same); Brad Taylor, *Professional Judgment or Deliberate Indifference? Suicide Under the Eighth Amendment*, 2020 U. ILL. L. REV. ONLINE 60 (2020) (same).

15. *See* 42 U.S.C. § 1983.

16. *See generally* Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302, 306 (2018) (discussing the history of constitutional civil rights litigation in New Mexico).

Evidently aware of this dilemma, in 2021, the state legislature passed the New Mexico Civil Rights Act ("NMCRA").[17] The NMCRA provides a cause of action against government actors for civil rights violations under the state constitution's bill of rights. With the passage of this Act, the New Mexico legal community has an opportunity to create and define state constitutional jurisprudence that aligns more closely with New Mexico's unique constitutional tradition and values, such as protecting the rights of discrete classes of politically powerless people.[18] This legislation allows for, among other things, the formulation of a state constitutional standard for prison conditions violations that better protects the rights of individuals who are incarcerated. In this spirit, this Comment explores the reasons to stray from federal precedent under the state constitution and encourages practitioners to be creative in their approach to prison conditions litigation under the NMCRA.

Part I of this Comment provides a brief history of prison conditions litigation in the United States and examines Supreme Court cases that established the "deliberate indifference" test. Part I also discusses the procedural realities of bringing claims for unconstitutional prison conditions under Section 1983. Following this discussion, Part II considers three reasons that compel state courts to stray from federal precedent under New Mexico's current mode of state constitutional law interpretation when presented with the novel possibilities provided by the NMCRA. Finally, Part III of this Comment offers potential alternatives to the "deliberate indifference" standard that would better protect the rights of incarcerated individuals under the New Mexico Constitution and align more closely with New Mexican values and protections.

I. BACKGROUND

A. Federal Prison Conditions Case Law

Although this Comment ultimately focuses on the unique civil rights afforded under the New Mexico Constitution, due to the methodology of state constitutional interpretation (as well as the structure of federalism and the Supremacy Clause[19]), discussion of relevant federal precedent serves as a necessary foundation. When analyzing claims of prison conditions violations under the state constitution, it is important to examine the federal precedent already in place, as federal constitutional analysis can guide state courts in their own constitutional

17. 2021 N.M. Laws ch. 119, § 1 (codified at N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

18. *See, e.g.*, Rodriguez v. Brandwest Dairy, 2016-NMSC-029, ¶ 27, 378 P.3d 13 (establishing a "constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests" in the context of social and economic legislation) (internal citations omitted); State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351 (showing a willingness to expand Eighth Amendment rights under the New Mexico Constitution).

19. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

rulings.[20] This is especially true where states have limited local precedent on state constitutional issues, as is the case in New Mexico. Consideration of existing federal constitutional standards not only provides a legal "floor" of basic rights protected by the federal government,[21] it also provides the potential reasoning for which state constitutional law might depart from federal analysis.[22]

The Eighth Amendment of the United States Constitution protects citizens against government infliction of "cruel and unusual punishments."[23] Although there is debate as to the original meaning of this phrase,[24] modern Supreme Court jurisprudence has acknowledged that the interpretation of this Amendment is dynamic, "not static."[25] According to this jurisprudence, the Eighth Amendment is historically contingent and "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[26] While it is seemingly plausible that these "evolving standards" are grounded in the "moral sense" of individual judges and attitudes around the world about contemporary standards of decency,[27] the Supreme Court has not explicitly stated how courts should evaluate these standards.[28] Nonetheless, the "evolving standards of decency" of the Eight Amendment continue to provide the basic analytical framework for federal constitutional claims of prison conditions violations.

Historically speaking, until the second half of the twentieth century, both federal and state courts took a "hands-off" approach to allegations of unlawful prison conditions, generally deferring to the judgment of prison officials to determine the adequacy of their institutions.[29] For most of American legal history, the Eighth

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20. *See generally* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027 (1985).

21. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

22. As will be discussed in Part I.C below, in New Mexico, courts have held that state constitutional interpretation can depart from its federal analogue if the federal precedent is "flawed."

23. U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Eighth Amendment was applied to the states via the Fourteenth Amendment in *Robinson v. California*. 370 U.S. 660 (1962).

24. *See, e.g.*, Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J. L. & PUB. POL'Y 91, 121 (2019) (Originalist Supreme Court Justice Antonin Scalia was of the belief that "the Eighth Amendment, properly understood, is defined by the 'common-law background' and does not invite an inquiry into evolving standards of decency."). For example, when considering the constitutionality of the death penalty, Justice Scalia asked how the Court could "hold unconstitutional that which the Constitution explicitly *contemplates*." Glossip v. Gross, 576 U.S. 863, 894 (2015) (Scalia, J., concurring). He reasoned that "[h]istorically, the Eighth Amendment was understood to bar only those punishments that added 'terror, pain, or disgrace' to an otherwise permissible capital sentence." *Id.*

25. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

26. *Id.* at 101 (emphasis added).

27. *See* Lerner, *supra* note 24, at 105.

28. *See generally* SpearIt, *Evolving Standards of Domination: Abandoning a Flawed Legal Standard and Approaching a New Era in Penal Reform*, 90 CHI.-KENT L. REV. 495 (2015).

29. James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QLR 407, 415–16

Amendment was understood to only apply to sentencing; beyond that, incarcerated individuals essentially had "no enforceable rights."[30] It was not until the 1960s that state and federal courts began hearing cases involving prison conditions.[31] In part, courts were "motivated by the state of terror and violence that characterized certain prisons" at the time.[32] It was not until the 1970s, however, that the Supreme Court began the work of developing a test to assess when prison conditions rise to the level of a constitutional violation.[33]

Three Supreme Court cases from this era developed the current federal standard for Eighth Amendment constitutional violations in prisons.[34] The test—known as the "deliberate indifference" standard—was first introduced in the 1976 decision *Estelle v. Gamble*.[35] In *Estelle*, the Court considered an Eighth Amendment claim brought by J.W. Gamble, an individual incarcerated in Texas.[36] Gamble claimed that he had received delayed and inadequate medical care from the Department of Corrections after his back was injured while undertaking a prison labor assignment.[37] Asserting that the grossly inadequate medical care he received constituted "cruel and unusual punishment," Gamble brought a claim against the director of the Department of Corrections, the warden of the prison, and the medical director under Section 1983.[38] In its first explicit pronouncement of the parameters of the Eighth Amendment as they relate to prison conditions, the Court held that "*deliberate indifference* to a prisoner's serious illness or injury states a cause of action under [Section] 1983" for violating the prohibition on cruel and unusual punishment.[39] Nevertheless, the Court found that the defendants' actions in Gamble's case did not rise to this level.[40] Although the meaning of "deliberate indifference" remained somewhat elusive in the opinion, the Court did provide some preliminary clues.

(2001); *see also* Mikel-Meredith Weidman*, The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1509 (2004) (discussing judicial deference to prison officials for claims of unconstitutional prison conditions prior to prison reform movements of the 1960s and 70s).

30. Park, *supra* note 29, at 416.

31. *Id.*

32. *Id.* For example, Arkansas' entire prison system was found to be unconstitutional while other prisons were essentially run by incarcerated individuals. *Id.* at 416 n.34.

33. In 1980, unconstitutional prison conditions were addressed in New Mexico via a consent decree enforced by the Department of Justice. In a complaint filed against the Governor of the State of New Mexico (then Jerry Apodaca), individuals incarcerated at the State Penitentiary of New Mexico reported "overcrowding and other conditions" that "[fell] beneath standards of human decency, inflict[ing] needless suffering on prisoners and create an environment with threatens prisoners' mental and physical well-being." First Amended Complaint at 196a, Duran v. Apodaca, No. Civ 77-721P (D.N.M. July 6, 1978). In the settlement agreement, the Department of Corrections was implored to address specific issues like acceptable living conditions and adequate medical care in New Mexico correctional facilities. Settlement Agreement, Duran v. Apodaca, Civ. No. 77-721-C (D.N.M. July 14, 1980).

34. *See* Estelle v. Gamble, 429 U.S. 97 (1976); Farmer v. Brennan, 511 U.S. 825 (1994); Wilson v. Seiter, 501 U.S. 294.

35. *Estelle*, 429 U.S. 97.

36. *Id.* at 98.

37. *Id.*

38. *Id.*

39. *Id.* at 105 (emphasis added).

40. *Id.* at 107.

Namely, the Court referenced various lower court cases that would meet the "deliberate indifference" standard articulated by the Court.[41] One such case involved a prison doctor throwing away a patient's ear that had been torn off in an attack and stitching up the stump instead of exercising "professional judgment" in his treatment.[42] In another example, a prison nurse injected an incarcerated man with penicillin, despite knowing he was allergic.[43] When the individual suffered an allergic reaction, a doctor in the prison concluded that the individual did not require any further treatment.[44] These examples, the Court suggested, would rise to a level of "deliberate indifference" that would implicate the protections of the Eighth Amendment.[45] However, the Court in *Estelle* cautioned that failing to provide adequate medical treatment did not "become a constitutional violation merely because the victim is a prisoner."[46] Instead, the actions of the prison official had to "constitute 'an unnecessary and wanton infliction of pain'" or be "repugnant to the conscience of mankind."[47] In Gamble's case, because the failure to treat his back was not a "wanton infliction of pain," the *Estelle* Court held that he did not have a cognizable constitutional claim under the Eighth Amendment.[48]

While the notion of a "deliberate indifference" standard was initially articulated for cases of medical care in *Estelle v. Gamble*, it was not until nearly two decades later that the standard was applied more broadly to prison conditions. In *Wilson v. Seiter*, the Court heard a claim brought by Pearly Wilson, an individual incarcerated in Ohio.[49] Wilson complained of various inadequate conditions at the prison, including "improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."[50] Individuals incarcerated in the prison suffered "heat-related rashes" and respiratory issues from lack of ventilation in the summer[51] and were forced to "put blankets over their head" to stay warm in the winter.[52] With Justice Scalia writing for the majority, the Court held that to show a violation of the Eighth Amendment for prison conditions violations, there must be a sufficiently culpable state of mind: deliberate indifference.[53] The Court reasoned that "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer."[54] Justice Scalia used textualism to support his opinion, arguing that "[a]n intent requirement

41. *Id.* at 104 n.10.
42. Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974).
43. *See* Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974).
44. *Id.*
45. *Estelle*, 429 U.S. at 104.
46. *Id.* at 106.
47. *Id.* at 105–06.
48. *Id.* at 107–08.
49. Wilson v. Seiter, 501 U.S. 294, 296 (1991).
50. *Id.*
51. Brief of Petitioner at 3, Wilson v. Seiter, 501 U.S. 294 (1991) (No. 89-7376).
52. Transcript of Oral Argument at 7, Wilson v. Seiter, 501 U.S. 294 (1991) (No. 89-7376).
53. *See Wilson*, 501 U.S. at 303.
54. *Id.* at 300.

is either implicit in the word 'punishment' or is not."[55] Finding that "punishment" necessarily requires a subjective component, the Court applied the "deliberate indifference" standard from *Estelle* to constitutional claims for prison conditions violations and remanded Wilson's case to the lower court to be considered under this standard.[56]

However, even after *Wilson,* the "deliberate indifference" standard still lacked a formal definition. Three years later, in 1994, the Supreme Court finally attempted to offer a more concrete definition of the standard in *Farmer v. Brennan*.[57] In *Farmer*, the Court considered a claim from Dee Farmer, a transgender woman housed in a male-designated detention facility.[58] After being placed in general population and suffering a brutal attack within two weeks, Farmer brought an Eighth Amendment claim under Section 1983 against the prison officials who had placed her in general population knowing the danger it posed to her as a transgender woman.[59] In its analysis, the Court outlined two prongs that must be satisfied to show deliberate indifference: (1) the harm must be "sufficiently serious . . . [to] pos[e] a substantial risk" to the individual, and (2) the prison official must have a "sufficiently culpable state of mind."[60] The *Farmer* Court clarified that deliberate indifference is a higher standard than negligence, more akin to criminal recklessness.[61] Essentially, deliberate indifference is "the equivalent of recklessly disregarding [the] risk."[62] Therefore, "the 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."[63] Ultimately, Farmer's case was remanded for the lower court to apply the newly defined test.[64] Since its decision in *Farmer* nearly 30 years ago, the Supreme Court has not reconsidered the appropriateness of the deliberate indifference standard.

This brief historical survey provides a basic foundation of federal law as it relates to claims of unconstitutional prison conditions. A more detailed critical analysis of the deliberate indifference standard and its impracticability is undertaken below in Part II to demonstrate why it should not apply in New Mexico. However, to provide further foundation for discussion of the NMCRA, this Comment now turns its focus to the unique procedural characteristics of Section 1983—the statute

55. *Id.* at 301.

56. *Id.* at 303–05.

57. *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994).

58. *Id.* at 829.

59. *Id.* at 829–30.

60. *Id.* at 834.

61. *Id.* at 835–36. Criminal recklessness involves "consciously disregard[ing] a substantial and unjustifiable risk. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 2020).

62. *Farmer*, 511 U.S. at 836.

63. *Id.* at 837.

64. *Id.* at 851. On remand, the district court found that the defendants "had no reason to believe that plaintiff would be subjected to a substantial risk of harm" and granted the defendants' motion for summary judgment. Farmer v. Brennan, 81 F.3d 1444, 1448 (7th Cir. 1996). On appeal to the Seventh Circuit, Farmer's case was remanded on procedural grounds. *Id.* at 1453.

that provides a cause of action to litigants seeking damages on the basis of violations of the Federal Constitution.

B. Section 1983 of the Civil Rights Act

Despite the protections provided by the federal and state constitutions in the United States, the rights afforded by these documents are generally not self-enforcing. As such, legislation must be enacted to provide a legal cause of action to enforce constitutional rights. As it relates to the federal system, the primary way to bring constitutional claims against government officials is via Section 1983 of the Civil Rights Act.[65] Section 1983 allows claims to be brought against government officials whose actions caused a deprivation of the individual's rights protected under the Constitution or laws of the United States.[66] Because the NMCRA functions in a similar manner to Section 1983, for the purposes of this Comment and to compare the two causes of action, it is important to note several key features of Section 1983.

Section 1983 was enacted in 1871 in the wake of the Civil War under the Ku Klux Klan Act.[67] The text of the statute states, in relevant part:

> Every *person* who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[68]

These words fundamentally altered the federal government's relationship to the states, allowing federal courts to intervene between State actors and their citizens "as guardians of the people's federal rights."[69] Despite this apparently radical reorganization of American federalism, the statute went largely unused for nearly a century, in large part due to an understanding that the statute's "under color of law" language "reached only misconduct either officially authorized or so widely tolerated as to amount to 'custom or usage.'"[70]

In the landmark case of *Monroe v. Pape*, the traditional understanding that Section 1983 claims only applied to officially authorized conduct was rejected by

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65. 42 U.S.C § 1983.

66. *Id.* After the adoption of the post-Civil War amendments, violence against Black Americans pervaded the South. ERWIN CHEMERINKSY, FEDERAL JURISDICTION 530, 530 (8th ed. 2021). The Senate conducted investigations into the violence, "especially focusing on the role of the Ku Klux Klan." *Id.* In response, Congress enacted the Civil Rights Act of 1871—the Ku Klux Klan Act—what is now known as Section 1983. *Id.* The purpose of the Act was to "give a broad remedy for violations of federally protected civil rights." *Id.*

67. CHEMERINSKY, *supra* note 66, at 529.

68. 42 U.S.C § 1983 (emphasis added).

69. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

70. PETER W. LOW & JOHN C. JEFFERIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 917 (4th ed. 1998).

the Supreme Court.[71] In *Monroe*, the Court considered a Fourth Amendment claim brought under Section 1983 against thirteen Chicago police officers who broke into a family home without a warrant and forced the home's occupants to stand naked in the living room while the officers ransacked their belongings.[72] When presented with the question of whether these individual government officials could be held liable under Section 1983, the Court held—for the first time—that actions taken in an individual's official capacity are "under color of law" for the purposes of Section 1983, regardless of whether the actions had been authorized by a government actor.[73] Consequently, officials could be held liable even if not acting pursuant to their position, but simply with the power conferred on them by their title.[74] In *Monroe*, the Court clarified that these causes of action were to be brought against *individual officials* rather than government entities[75]—a detail that is important to emphasize for our discussion of the NMCRA below.[76]

In subsequent cases, the Court further extended the group of possible defendants that could be subject to Section 1983 suits. In another landmark case, *Monell v. Department of Social Services of the City of New York*, the Supreme Court considered a constitutional claim brought by pregnant city employees who were being compelled—as a matter of official policy—to take unpaid leaves of absence before it was medically necessary.[77] In *Monell*, the Court held that cities, counties, and other local government entities could be held liable for constitutional violations under Section 1983.[78] In essence, these entities were to be considered "persons" for the purposes of Section 1983's language. The Court, however, limited this particular kind of "municipal liability" substantially to instances in which "execution of a government's *policy or custom* . . . inflicts the injury."[79] Therefore, under the *Monell* doctrine, municipalities cannot be held vicariously liable for the acts of their individual employees.[80] Instead, there must be a policy or custom put in place by the municipality or local government that deprives individuals of their constitutional rights.

Further, *Monell* claims contain a unique kind of pseudo-scienter requirement akin to the deliberate indifference standard. To hold a municipality liable under this theory, plaintiffs must show that "through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."[81] Essentially, the

71. Monroe v. Pape, 365 U.S. 167, 169 (1961).

72. *Id.*

73. *Id.*

74. *Id.* at 184–87.

75. *Id.* at 187–92.

76. *See infra* Part II.B.

77. Monell v. Dep't of Soc. Serv., 436 U.S. 658, 660–61 (1978).

78. *Id.* at 694.

79. *Id.* (emphasis added).

80. *Id.* at 691. Instead, there are five distinct ways to establish Section 1983 liability under the *Monell* doctrine: (1) legislation made by municipal legislative bodies; (2) "actions by municipal agencies or boards that exercise authority delegated by the municipal legislative body"; (3) actions by individuals with final decision-making authority; (4) "government policy of inadequate training or supervision"; and (5) the existence of a custom. *See* CHEMERINSKY, *supra* note 66, at 557.

81. Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original).

plaintiff "must show that the municipal action was taken with the requisite degree of culpability."[82] Therefore, under the *Monell* doctrine, municipalities act as persons and can also possess states of mind. As such—and importantly for the ensuing discussion—the entity's subjective culpability becomes an integral part of the analysis. Because *Monell* claims can be brought under any Amendment of the Federal Constitution, this state-of-mind analysis factors into *Monell* claims brought under the Eighth Amendment.[83]

However, due to the limitations of the Eleventh Amendment, which prohibits suits against states for money damages, [84] this same explicit state-of-mind requirement has never been applied to state agencies—only municipalities and other *local* government agencies. One of the core tenets of American federalism is the doctrine of sovereign immunity and the protections that states are afforded from suit by private citizens.[85] As a result, the Supreme Court has held firm in its understanding that state governments are not "people" for the purposes of Section 1983, using the protections of the Eleventh Amendment to support this conclusion.[86] Importantly, no exceptions (like those provided to municipalities by the *Monell* doctrine) have been created by the Court for *state* governmental entities.

From the perspective of litigants seeking to bring constitutional claims on the part of individuals who are incarcerated, the inability to sue state governments under Section 1983 is one of the statute's major limitations. That is, while individuals, municipalities, and local governments can be named in Section 1983 lawsuits, states—and state agencies—maintain their sovereign immunity. This is true even if the state government entity itself is culpable and should be held liable for constitutional violations by being named as a defendant.

A brief hypothetical is instructive to highlight this disparity. In New Mexico, for example, an individual incarcerated at a county-run jail (like the Metropolitan Detention Center in Bernalillo County) would be able to name any culpable official, *as well as* Bernalillo County in their prison conditions lawsuit brought under Section 1983. However, an analogous individual incarcerated at a state-run prison (like the Penitentiary of New Mexico) would only be able to name the individual prison officials and *not* the Corrections Department—despite the fact that the harm suffered might have resulted from a departmental action or inaction. Especially in the case of facility-wide failures, the inability to name the New Mexico Corrections Department in a lawsuit profoundly limits the ability of litigants to hold

82. *Id.*

83. It is difficult for plaintiffs to establish unconstitutional policies or customs that violate the Eighth Amendment, but it is not impossible. *See, e.g.* Haywood v. Wexford Health Sources, No. 16-CV-3566, 2017 WL 3168996 (N.D. Ill. July 26, 2017) (Plaintiff successfully alleged a *Monell* claim by showing repeated indifference to the health of incarcerated individuals through policy and custom).

84. *See* U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

85. The doctrine of sovereign immunity protects both the federal and state governments and their actors from suit by private citizens. The rationale behind the doctrine is to "limit the general costs of subjecting officials to the risks of trial—namely, distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." 77 AM. JUR. 2D *United States* § 60 (2022).

86. Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989).

these institutions accountable for their unconstitutional shortcomings. And here lies the reason that the New Mexico Civil Rights Act is a useful and desirable piece of legislation: the NMCRA provides individuals in state-run facilities the option to hold the public body accountable.

C. New Mexico Civil Rights Act (NMCRA) and State Constitutional Law Interpretation

1. New Mexico Civil Rights Act History and Purpose

As noted, until 2021 the only possibility for New Mexicans seeking redress against state government officials who violated their Eighth Amendment rights was under Section 1983. For example, incarcerated individuals in state-run facilities suffering from inhumane prison conditions throughout the COVID-19 pandemic could only bring their Eighth Amendment claims under this federal statute, and only against individual officers. However, this has changed with the introduction of the New Mexico Civil Rights Act.

Because of the limitations of Section 1983, many states have passed civil rights acts for circumstances in which the federal law—constitutional or otherwise—does not provide adequate relief.[87] Many of these civil rights acts mirror the protections and procedures of Section 1983 by allowing for constitutional claims to be brought against government officials in their individual capacities.[88] These Acts have been motivated by a number of factors, including the option to expand liability of government actors under the state constitution, as well as creating a vehicle for compensatory damages. State-level civil rights acts are made possible by the principle that state constitutions may provide greater protections than those afforded by the Federal Constitution,[89] as nothing in the latter document prevents states from expanding liability for government actors or from waiving their own sovereign immunity.[90]

In New Mexico, prior to the enactment of the NMCRA, claims under the state constitution were limited to injunctive relief, declaratory judgment, and certain criminal procedure defenses.[91] None of these remedies, however, provided adequate redress for incarcerated individuals who suffered serious harm. While the New Mexico Supreme Court had significantly expanded protections for criminal

87. *See* Steven H. Steinglass, *The Importance of State Law*, *in* SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS § 5:4 (2021).

88. *See, e.g.*, ARK. CODE ANN. § 16-123-101 (holding "every person" liable under color of law for deprivation of rights and explicitly not waiving sovereign immunity); CAL. CIV. CODE § 52.1 (claims brought against "a person or persons"); COLO. REV. STAT. ANN. § 13-21-131 (claims brought against "a peace officer" for deprivation of rights under the Colorado Bill of Rights); MASS. GEN. LAWS ch. 12, § 11I (claims brought against "a person or persons"); NEB. REV. STAT. § 20-148 (claims brought against "[a]ny person or company" and "company" is defined as "any corporation, partnership, limited liability company, joint-stock company, joint venture, or association"); N.J. REV. STAT. § 10:6-2 (claims brought against "a person, whether or not acting under color of law"); ME. STAT. ANN. tit. 5, § 4682 (claims brought against "any person").

89. *See* Steinglass, *supra* note 87.

90. *Id.*

91. Vanzi, Schultz & Stambaugh, *supra* note 16, at 306.

defendants under the state constitution,[92] it "[had] never interpreted the New Mexico Constitution as an equal source of individual *civil* rights."[93] The call from practitioners for a mechanism to enforce state constitutional rights was answered in the form of the NMCRA. The legislation allows for plaintiffs to bring civil claims against the government to recover for compensatory damages as well as attorney's fees.

Some brief legislative history illuminates the NMCRA's purpose and relationship to Section 1983. During the 2020 Special Session, in the wake of the murder of George Floyd and the public outcry for an end to the defense of qualified immunity, the New Mexico Legislature created the Civil Rights Commission ("the Commission") to develop legislation for holding public officials who engage in misconduct accountable under the state constitution.[94] By its own account, the Commission was motivated by the fact that the New Mexico Legislature "[had] not yet passed a law like Section 1983 to enforce the fundamental rights" guaranteed to New Mexicans by the state constitution.[95] In its report released in November of 2020, the Commission advocated for a state analogue of Section 1983. The NMCRA was formally introduced to lawmakers during the 2021 Legislative Session.

In its original draft, the NMCRA bill provided a cause of action "against a public body or person acting on behalf of or under the authority of a public body for a violation of the individual's rights, privileges or immunities arising pursuant to the Constitution of New Mexico," and the bill provided no damages cap.[96] After navigating various committees in both chambers of the state legislature, the final version of the bill had altered language to only bring claims under the state bill of rights[97] with a damages cap of two million dollars.[98] Additionally—and crucially for the analysis of this Comment—the bill's language was changed to specify that "[c]laims brought pursuant to the New Mexico Civil Rights Act shall be brought *exclusively against a public body*."[99] Public bodies are to be "held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body."[100] For the purpose of the statute, "public bodies" are defined as "a state or local government, an advisory board, a commission, an

92. *See e.g.,* State v. Bomboy, 2008-NMSC-029, ¶ 17, 144 N.M. 151, 184 P.3d 1045 (holding that absent exigent circumstances or some other exception to the warrant requirement, an officer cannot search an automobile without a warrant); Montoya v. Ulibarri, 2007-NMSC-035, ¶ 23, 142 N.M. 89, 163 P.3d 476 (holding that habeas petitioners must be allowed to assert claims of actual innocence under the due process clause); State v. Granville, 2006-NMCA-098, ¶ 19, 140 N.M. 345, 142 P.3d 933 (recognizing a right to privacy under Section 10 of the New Mexico Constitution).

93. Vanzi, Schultz & Stambaugh, *supra* note 16, at 305 (emphasis added).

94. N.M. CIVIL RIGHTS COMM'N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, at 1 (2020).

95. *Id.*

96. H.B. 4, 55th Leg., 1st Reg. Sess. (N.M. 2021).

97. *See* N.M. CONST. art. II, §§ 1–24.

98. N.M. STAT. ANN. §§ 41-4A-3 to -6 (2021).

99. N.M. STAT. ANN. §§ 41-4A-3(C) (2021) (emphasis added).

100. *Id.*

agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding."[101]

The NMCRA provides a novel opportunity for New Mexico courts to interpret this language chosen by the legislature. No other state-level civil rights act has held state government entities liable in a manner akin to the NMCRA.[102] As a result, New Mexico can be an example of the power that this type of legislation can wield. However, on a fundamental level, although the NMCRA provides litigants with a cause of action to enforce the protections of the state bill of rights, the actual content of these protections can only be articulated according to the rules of constitutional interpretation employed by the New Mexico judiciary. As such, before exploring the possible rights afforded to incarcerated individuals under the state constitution, this Comment will first discuss the method by which state court judges can analyze the provisions of the state constitution.

2. Modes of State Constitutional Law Interpretation

As previously noted, a basic tenet of federalism and state constitutional law is the concept that, while the federal constitution provides a "floor" for individual rights, state constitutions can go "above and beyond" these baseline protections.[103] Essentially, states cannot provide fewer rights than the Federal Constitution, but they can provide more—thus serving as "laboratories" that experiment with providing greater rights to their citizens.[104] As such, while New Mexico courts must provide the basic rights guaranteed by the Federal Constitution, they are allowed to expand those rights under the state constitution. The introduction of the NMCRA as a vehicle to bring claims under the New Mexico Bill of Rights provides courts with the opportunity to experiment in the constitutional laboratory. How those rights will differ from their federal counterparts, however, depends crucially on the mode of interpretation used by the courts.

To date, New Mexico courts have recognized three methods of state constitutional interpretation.[105] The first, the "lock-step" approach, looks exclusively to federal precedent to guide the formation of state law.[106] In short, if there exists a federal constitutional analogue to a given state constitutional provision, the state constitutional analysis mirrors the precedent set forth by federal courts as closely as possible.[107] The second mode is the "primacy" approach, or the "self-reliant

101. N.M. STAT. ANN. §§ 41-4A-2 (2021). Importantly, the NMCRA also bars the use of the defense of qualified immunity and provides for attorney's fees in these causes of action. N.M. STAT. ANN. §§ 41-4A-4 (2021).

102. Other state civil rights acts hold individual officials responsible, rather than public bodies. *See, e.g.*, CAL. CIV. CODE § 52.1 (claims brought against "a person or persons").

103. Brennan, *supra* note 21, at 550.

104. *Id.* at 549–50.

105. State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1. When a state constitutional right has not been interpreted differently than the federal analog, a party "must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision." *Id.* at ¶ 23, 932 P.2d at 8.

106. *Id.* ¶ 16, 932 P.2d at 6.

107. *Id.*

approach."[108] Primacy "focuses on the state constitution as an independent source of rights and relies on it as the fundamental law."[109] Under this approach, "federal law and analysis are not presumptively correct" and the court is encouraged to "look first to the state provision and to state history, doctrine, and structure."[110] The final mode of interpretation—somewhere in the middle of the previous two—is the "interstitial" approach.[111] Under the interstitial approach, the state court looks first to federal precedent and if the right is protected under the federal constitution, the court will follow that analysis.[112] The state court will only diverge from federal precedent if there is "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[113] In 1997, New Mexico courts adopted the interstitial method of constitutional interpretation.[114]

Since then, New Mexico courts have used the interstitial approach to depart from federal precedent in various circumstances. Under the first reason to depart—"flawed federal analysis"—the Supreme Court of New Mexico has provided greater rights for criminal defendants under Article II, Section 10, of the New Mexico Constitution (the state analogue of the Fourth Amendment of the Federal Constitution).[115] For example, in *Campos v. State*, the court rejected federal precedent that found warrantless arrests to be constitutionally permissible.[116] The court "decline[d] to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places."[117] Instead, each case involving a warrantless arrest of a felon would be "reviewed in light of its own facts and circumstances."[118] Under the interstitial approach, the court held that there would not be an assumption of constitutional permissibility, thereby departing from established federal precedent.[119] The court reasoned that New Mexico had shown a "willingness to accord defendants more protection under [its] search and seizure provision than the federal courts accord under the Fourth Amendment."[120]

The second potential reason to depart from federal precedent— "distinctive state characteristics"—has been described in various ways by New Mexico courts.[121]

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108. Utter, *supra* note 20, at 1027.

109. *Id.* at 1028.

110. *Id.*

111. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7.

112. *Id.*

113. *Id.*

114. *Id.* ¶ 21, 932 P.2d at 7.

115. *See* Campos v. State, 1994-NMSC-012, 117 N.M. 155, 870 P.2d 117; State v. Gutierrez, 1993-NMSC-062, 116 N.M. 431, 863 P.2d 1052.

116. *Campos*, 1994-NMSC-012, ¶ 10, 870 P.2d at 120.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* State v. Cordova, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30; *see also* State v. Granville, 2006-NMCA-098, 140 N.M. 345, 142 P.3d 933 (holding that New Mexico's expansion of the Fourth Amendment and its distinct interest in privacy protections prohibited warrantless searches of garbage); State v. Sutton, 1991-NMCA-073, ¶ 24, 112 N.M. 449, 816 P.2d 518 (noting that land plot sizes in rural New Mexico are often large and that "interpretation and application of the state constitution must take

For example, in *State v. Cordova*, the Supreme Court of New Mexico again considered a constitutional claim under Article II, Section 10 of the state constitution.[122] The federal courts had adopted a "totality of the circumstances" test in lieu of a two-prong test for obtaining search warrants, finding that the two-prong test was "[applied] in too rigid and technical a fashion by some courts."[123] The Supreme Court of New Mexico rejected this approach, noting the distinctive characteristic of successfully applying the two-prong test in state courts, despite its rigidity.[124] Therefore, the New Mexico court rejected the federal precedent and continued to apply the two-prong test in place of the "totality of circumstances" standard.[125]

New Mexico courts have used the third and final reason to depart from federal precedent under the interstitial approach—"structural differences between federal and state government"—sparingly.[126] When adopting the interstitial approach in *State v. Gomez*, the New Mexico Supreme Court cited scholarship that defines this ground for divergence as "general institutional differences between the state government and its federal counterpart, suggesting that constraints on the federal doctrine might be less relevant at the state level."[127] This is how the Supreme Court of New Mexico applied "structural differences" in *Montoya v. Ulibarri*.[128] There, the court held that plaintiffs could seek habeas relief under the state constitution on a freestanding claim of innocence, contrary to established federal precedent.[129] The *Montoya* court reasoned that the governing federal precedent "was informed by concerns of federalism and an unwillingness to overturn convictions of petitioners who have been afforded fair trials in state courts."[130] In contrast, those principles of federalism did not constrain the state courts.[131] As such, the court found that this "structural difference" between the state and federal government was sufficient reason to depart from federal precedent.[132]

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into account the possibility that such differences in custom and terrain gave rise to particular expectations of privacy when the state constitution was adopted.").

122. *Cordova*, 1989-NMSC-083, 784 P.2d 30. Article II, Section 10 of the New Mexico Constitution states: "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation." N.M. CONST. art. II, § 10.

123. *Cordova*, 1989-NMSC-083, ¶ 17, 784 P.2d at 36.

124. *Id.* ¶ 15, 784 P.2d at 35 (The court reasoned that the two-prong federal test "[had] not proved to be a problem in [its] state courts' application of the standard.") It is worth noting that the court in *Cordova* never mentions the phrase "distinctive state characteristics" in its analysis. *Id.* However, in *Gomez*, the Supreme Court cited *Cordova* when discussing "distinctive state characteristics" as a rationale for departing from federal precedent. State v. Gomez, 1997-NMSC-006, ¶ 20, 122 N.M. 777, 932 P.2d 1.

125. *Cordova*, 1989-NMSC-083, ¶ 17, 784 P.2d at 36.

126. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7.

127. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1359 (1982).

128. Montoya v. Ulibarri, 2007-NMSC-035, ¶¶ 20–21, 142 N.M. 89, 163 P.3d 476.

129. *Id.* ¶ 1, 163 P.3d at 478.

130. *Id.* ¶ 20, 163 P.3d at 483.

131. *Id.* ¶ 21, 163 P.3d at 483.

132. *Id.*

Since the New Mexico Supreme Court's decision in *Gomez*, the interstitial approach has been used to interpret various provisions of the state constitution.[133] In some cases—mostly for criminal defendants—rights under the New Mexico Constitution have been expanded. The enactment of the NMCRA provides many more opportunities for courts to interpret the New Mexico Bill of Rights, giving additional force to state constitutional rights.

II. ADOPTING A DIFFERENT STANDARD FOR PRISON CONDITIONS ANALYSIS UNDER THE STATE CONSTITUTION

The NMCRA went into effect on July 1, 2021. As practitioners begin to use the Act to bring constitutional claims in the coming years, it is important to keep in mind the NMCRA's unique potential to help craft a distinctive state constitutional civil rights jurisprudence. As it relates to prison conditions litigation, this Comment argues that practitioners should carefully consider the ways in which incarcerated individuals might be better protected under the state constitution than under the Federal Eighth Amendment.

Again, under New Mexico's current mode of constitutional interpretation—the interstitial approach—when considering a novel constitutional question, a reviewing state court will consider first whether there is a federal analogue to the relevant state constitutional provision. In the case of the prohibition against cruel and unusual punishment, Section 13 of the New Mexico Constitution practically mirrors the language of the Eighth Amendment of the U.S. Constitution.[134] The text of Section 13 is longer, as it provides for greater rights with regard to bail, but the "cruel and unusual punishment" language is almost indistinguishable from the Federal Constitution (except that the word "punishment" in Section 13 is singular instead of plural).[135] Article II, Section 13 reads, in relevant part, "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted*."[136]

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133. *See, e.g.*, *id.* (interpreting Article II, Section 18, which ensures due process, and Article II, Section 13, prohibiting cruel and unusual punishment); State v. Granville, 2006-NMCA-098, 140 N.M. 345, 142 P.3d 933 (interpreting Article II, Section 10 of the New Mexico Constitution); State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (interpreting Article II, Section 15, protections against double jeopardy).

134. N.M. CONST. art. II, § 13.

135. *Id.*

136. *Id.* (emphasis added). Section 13 reads, in full: "All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters. A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner." *Id.*

Indeed, in 1999 the New Mexico Court of Appeals noted in dicta that the Eighth Amendment and Section 13 "are nearly identical in their wording."[137] However, despite the similarity in wording of the two provisions, in a later case, the Supreme Court of New Mexico found that Section 13 has "been interpreted as providing greater protection than [its] federal counterpart[]"—at least as it pertains to the principle of proportional punishment.[138] Although the Eighth Amendment concept of proportionality is analytically distinct from the Eighth Amendment protections surrounding conditions of confinement, this acknowledgement by the Supreme Court shows a willingness to expand Eighth Amendment rights under Section 13, despite the nearly identical "cruel and unusual punishment" language. In short, the Supreme Court's affirmation of "greater protection"—as well as various other factors discussed in detail below—call for reconsideration of the federal standard when interpreting Section 13 of the New Mexico Constitution.

With the interstitial mode of constitutional interpretation in mind, the following Sections will analyze three compelling reasons to depart from federal precedent and adopt a new standard under the state constitution: (1) the current federal analysis for Eighth Amendment claims is flawed; (2) the New Mexico legislature purposefully distinguished language in the NMCRA from its federal equivalent: Section 1983; and (3) the State of New Mexico has distinctive characteristics that suggest a changing attitude towards individuals who are incarcerated.

A. Flawed Federal Analysis

As was noted above,[139] the federal standard for prison conditions litigation—deliberate indifference—contains both an objective and a subjective prong. Not only must plaintiffs prove that a substantial risk of serious harm is present in the prison setting, but they must also show that the culpable prison official acted with the requisite state of mind. The following Section will explore two distinct reasons that explain why the subjective element of the deliberate indifference test falls short of adequately protecting incarcerated individuals under the Eighth Amendment—thus rendering it "flawed." First, the analysis considers legal scholarship that points out the flaws in a standard that incentivizes the ignorance of prison officials and makes it nearly impossible for incarcerated individuals to succeed on their claims. Second, this Section reflects on arguments against the deliberate indifference standard from members of the United States Supreme Court.

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137. State v. Rueda, 1999-NMCA-033, ¶ 8, 126 N.M. 738, 975 P.2d at 353.

138. *Montoya*, 2007-NMSC-035, ¶ 22, 163 P.3d at 484. Here, the Supreme Court of New Mexico refers to the decision in *State v. Rueda*. *Id.* In *Rueda*, the Court of Appeals considered whether the proportionality review of punishment should apply to noncapital cases in New Mexico. *Rueda*, 1999-NMCA-033, ¶ 12, 975 P.2d at 354. The court in *Rueda* looked to a plurality opinion from the United States Supreme Court in which "the prevailing majority was unable to agree concerning the appropriateness of conducting proportionality review in noncapital cases." *Id*. (discussing Harmelin v. Michigan, 501 U.S. 957 (1991)). The *Rueda* court explicitly rejected the "assertion that a defendant may not invoke a proportionality review." *Id.* ¶ 13, 975 P.2d at 354. While the Court of Appeals did not expressly reject federal precedent, it showed a willingness to expand Eighth Amendment rights under the New Mexico constitution.

139. *See supra* Part I.A.

First, the current federal standard inherently encourages indifference to the needs of incarcerated individuals.[140] The federal standard only holds prison officials liable when they have actual knowledge of the harm and subsequently disregard that knowledge. This actual knowledge component is problematic, as it "suggests that prison officials' obligations to prisoners are merely episodic, arising only when they happen to notice possible threats to prisoners' well-being."[141] Under this standard, prison officials are not held liable when they "fail to notice risks that any reasonably attentive prison official . . . would have noticed and addressed."[142] Therefore, deliberate indifference "promotes failures of care at both the micro and macro levels," whether the constitutional violation results from an individual officer inflicting harm or a prison-wide failure to protect.[143] In short, the current federal standard incentivizes not noticing risks, as prison officials cannot be held liable if they do not possess actual knowledge of the harm.

The flaws inherent in the deliberate indifference standard are also evidenced by the lack of concrete definition for the level of culpability that must be proven when challenging unconstitutional prison conditions. As Professor Brittany Glidden notes, the difficulty in defining the subjective prong of the deliberate indifference standard makes the test "almost prohibitively ambiguous."[144] Even if an objective risk is established by a plaintiff who is incarcerated, "many commentators have questioned the ability of prisoners to present satisfactory evidence of mindset."[145] The closest the Supreme Court came to defining the level of culpability necessary to show deliberate indifference was in *Farmer v. Brennan*. There, the Court defined the subjective prong as "subjective recklessness" as it is used in the criminal law context.[146] If this is the case, the subjective prong is an undeniably high threshold of culpability to meet, as there must be actual knowledge. Proving a poorly defined but seemingly difficult culpable mindset is an inherent flaw in the deliberate indifference test.

Apart from academic critique, Supreme Court justices have raised concerns about the appropriateness of the deliberate indifference standard since the test was first established. In his dissent in *Estelle v. Gamble*, Justice Stevens suggested that the deliberate indifference test was a flawed standard for prison conditions analysis.[147] Stevens questioned the implementation of a state-of-mind requirement and suggested that the "Court improperly attache[d] significance to the subjective

140. *See generally*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment,* 84 N.Y.U. L. REV. 881, 945 (2009); Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1858 (2012); *See also* Park, *supra* note 29, at 450 (noting that "even if a defendant knows of the underlying facts of a specific risk, he can avoid liability by arguing that he did not subjectively appreciate the magnitude of the danger.").

141. Dolovich, *supra* note 140, at 945.

142. *Id.*

143. *Id.* at 946.

144. Glidden, *supra* note 140, at 1858. *See also* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 153 (2020) (defining the subjective prong as "hopelessly unclear").

145. Glidden, *supra* note 140, at 1858.

146. Farmer v. Brennan, 511 U.S. 825, 839–40 (1994).

147. Estelle v. Gamble, 429 U.S. 97, 116 (Stevens, J., dissenting).

motivation of the defendant."[148] Justice Stevens reasoned that an individual's subjective motivation may be useful in determining what remedy is appropriate, but stated that "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it."[149] In a footnote, Justice Stevens acknowledged that "[i]f a State elects to impose imprisonment as a punishment for crime," the government "has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy."[150] He recognized that "the State and its agents have an affirmative duty to provide reasonable access to medical care[,] . . . [f]or denial of medical care is surely not part of the punishment which civilized nations may impose for crime."[151] Justice Stevens pointed out the flaws with the intent element of the deliberate indifference test that would ultimately hold true in its application.[152]

Later, in *Wilson v. Seiter*, Justice White argued in his concurrence that the subjective prong of the deliberate indifference test would likely "prove impossible to apply in many cases" when challenging inhumane prison conditions.[153] This is because "[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."[154] Justice White noted that the majority in *Wilson* gave "no real guidance" as to whose intent should be examined and argued that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."[155] The Justice expressed concern that "serious deprivations of basic human needs" in prisons would ultimately "go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.'"[156]

Finally, in his concurrence in *Farmer v. Brennan*, Justice Blackmun would agree with Justices Stevens and White "that inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind."[157] Blackmun also noted that prison officials have an "affirmative duty under the Constitution to provide for the safety of inmates" and that this duty is "not to be taken lightly."[158]

In short, the flaws inherent in the federal deliberate indifference analysis have been noted since its establishment—both by academic commentary, as well as by sitting Justices on the Court. In large part for the reasons articulated by these

148. *Id.*

149. *Id.*

150. *Id.* at 117 n.13.

151. *Id.*

152. Justice Stevens would later affirm his belief that a subjective component is improper in his *Farmer* concurrence. 511 U.S. at 858 (Stevens, J., concurring).

153. Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring).

154. *Id.*

155. *Id.*

156. *Id.* at 311.

157. *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring).

158. *Id.* at 852.

sources, the federal analysis in this area is "flawed" and compels New Mexico courts to reconsider its application under the state constitution.[159]

B. Language of the NMCRA is Purposefully Distinct from Section 1983

Apart from the federal standard's inherent flaws, the distinctive language of the NMCRA compels reconsideration of the deliberate indifference standard under the state constitution. As noted above,[160] under the NMCRA, plaintiffs bring claims of constitutional violations exclusively against "public bodies." For the purpose of the statute, "public bodies" are defined as "a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding."[161]

Remarkably, across all fifty states, the NMCRA is the only state-level civil rights act that exclusively holds the public body accountable and abrogates sovereign immunity by including the state government under the definition of public body. Every other state civil rights act mirrors the language of Section 1983 by holding *individual* government officials responsible for constitutional wrongdoing.[162] The unique language of the NMCRA bringing claims "exclusively against public bodies" is therefore a distinctive state characteristic in the most obvious sense: it is a feature that is entirely distinctive to New Mexico state law. Under the interstitial mode of interpretation, "distinctive state characteristics" require special consideration of the federal standards to analyze claims of constitutional violations under the state constitution.

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159. The fraught history of prison litigation in the United States would be incomplete without mention of the Prison Litigation Reform Act ("PLRA"): 42 U.S.C. § 1997e (2018). Passed one year after the *Farmer v. Brennan* decision, the PLRA prevents any action from being brought under Section 1983 unless all available administrative remedies are exhausted. *Id.* This hurdle prevents many cases from ever being filed or reaching the courts. *See, e.g.*, CHEMERINSKY, *supra* note 66, at 526–28 ("The number of prisoner suits filed in federal court fell from 41,215 in fiscal year 1996 to 28,635 for fiscal year 1997 . . . [I]t is clear that the Prison Litigation Reform Act is a substantial limit on the ability of prisoners to file [Section] 1983 suits in federal court.").

160. *See supra* Part I.C.

161. N.M. STAT. ANN. § 41-4A-2 (2021). The full text reads: "As used in the New Mexico Civil Rights Act, 'public body' means a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education, but not including an acequia or community ditch, a soil and water conservation district, a land grant-merced, a mutual domestic water consumers association or other association organized pursuant to the Sanitary Projects Act or a water users' association.'" *Id.*

162. *See, e.g.*, ARK. CODE ANN. § 16-123-101 (West 1993) (holding "every person" liable under color of law for deprivation of rights and explicitly not waiving sovereign immunity); CAL. CIV. CODE § 52.1 (West 2021) (claims brought against "a person or persons"); COLO. REV. STAT. ANN. § 13-21-131 (West 2021) (claims brought against "a peace officer" for deprivation of rights under the Colorado Bill of Rights); MASS. GEN. LAWS ch. 12, § 11I (West 1979) (claims brought against "a person or persons"); NEB. REV. STAT. ANN. §20-148 (West 1977) (claims brought against "[a]ny person or company" and "company" is defined as "any corporation, partnership, limited liability company, joint-stock company, joint venture, or association"); N.J. REV. STAT. § 10:6-2 (West 2004) (claims brought against "a person, whether or not acting under color of law"); ME. STAT. tit. 5, § 4682 (West 2001) (claims brought against "any person").

But this distinctiveness, of course, begs the question of its implication: i.e., what does this textual uniqueness signal about the *use* of the NMCRA? To begin with, it is important to note that the NMCRA, on its face, asks practitioners to do something that cannot be done under Section 1983: sue state agencies directly. As such, the interpretation of the NMCRA cannot simply mirror the federal law that has developed around Section 1983. To determine the procedural dynamics of this type of lawsuit, New Mexico courts—without any guidance from federal law—will have to determine *how* to analyze state constitutional claims against *state governmental bodies*. This task will involve the crucial determination of the precise way in which these bodies can be sued, and—perhaps most importantly—how these bodies can have "subjective" intent to act in particular ways. Simply put: if the federal standard for a certain constitutional claim involves subjective intent, how might that intent be imputed to a non-human entity like a state agency?

Of course, the notion of non-human "personhood" is not a novel concept in the law. Nevertheless, few non-human entities have been given legal personhood under constitutional law and the exceptions for government entities are narrow. As the United States Supreme Court has noted, this is in part because the attachment of subjectivity to non-human entities—as opposed to government officials—brings with it "considerable conceptual difficulty."[163] The idea that courts can readily determine the subjective motivation of a group of prison officials in the same manner as an individual "grossly misrepresents government-imposed punishment."[164] Invariably, such punishment involves "a complex set of practices that involve a wide array of actors and institutions"—a matrix of policies and motivations profoundly dissimilar to the internal dynamics of individual human decision-making.[165] In the Eighth Amendment context, "[r]arely can a single coherent intent be attributed to the entire institutional apparatus that imposes punishment."[166] While individual officers' states of mind may be relevant to the inquiry, they are not dispositive indications of "whether the system is imposing punishment."[167]

This conceptual difficulty becomes even more apparent when considering an entity (e.g., a New Mexico state agency) that has enjoyed sovereign immunity from civil rights claims for the entirety of its existence. States and their agencies cannot be held liable for claims of constitutional violations under Section 1983.[168] With these challenges in mind, how should New Mexico courts approach constitutional claims against state-level non-human governmental entities that have never before been subject to such claims?

One answer is to look to Supreme Court decisions that address the liability of other kinds of non-human government entities. *Monell v. Department of Social Services*, discussed above,[169] is one such doctrine. The *Monell* doctrine applies specifically to local governments and municipalities, giving those entities a form of

163. *Farmer*, 511 U.S. at 841.

164. Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1399–400 (2008).

165. *Id.* at 1399.

166. *Id.*

167. *Id.*

168. Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 376 (1990).

169. *See supra* Part I.B.

"legal personhood" under Section 1983.[170] However, the Court's holding in *Monell* was narrow—the liability of these public bodies would be limited to *unconstitutional policies or customs only*.[171]

In theory, the *Monell* doctrine could be applied by courts to state agencies under the NMCRA as it is applied to municipalities and local government bodies under Section 1983. However, the requirement of proving that a policy or custom violated an individual's constitutional rights is a difficult standard to meet. In fact, the *Monell* doctrine itself could be considered "flawed federal analysis."[172] In a post-*Monell* dissenting opinion, Justice Breyer noted that "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."[173] In an empirical study of policies governing police misconduct, surveyed attorneys noted "that the current doctrine makes it difficult for a plaintiff to prove a case against the city, resulting in fewer victorious claims for plaintiffs."[174] An attorney commented that these cases are "always dismissed under *Monell*."[175]

Due in large part to these shortcomings, when assessing the liability of state agencies under the NMCRA, New Mexico courts should not turn to the *Monell* doctrine. The limiting of liability to unconstitutional policies and longstanding customs under the NMCRA would go against the legislative intent of the Act, which plainly sought to *expand* the possibilities for holding government officials accountable. Additionally, the NMCRA limits plaintiffs to suing the public body and there is no option to sue individual government officials. Therefore, unless an individual can show that a policy or custom is the moving force behind a constitutional violation, there is no government liability. It is likely that simply adopting the *Monell* doctrine or a *Monell*-like standard would essentially render the NMCRA useless for claims of unconstitutional prison conditions.

However, if New Mexico courts reject a *Monell*-like standard for assessing prison conditions claims, the question still remains as to how the courts should assess claims of unconstitutional prison conditions under the state constitution. While suggestions are offered below,[176] for the purposes of this Section, it is important to recognize that the doctrine already put forth by the United States Supreme Court will not suffice. Not only is the *Monell* doctrine flawed for the reasons discussed above, but the language of the NMCRA is distinct from Section 1983. Attempting to make *Monell* "fit" under the NMCRA simply would not work. This unique aspect of the NMCRA—this "distinctive state characteristic"—and its purposeful departure from the language of Section 1983 suggests that New Mexico courts should reconsider federal precedent under the state constitution.

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170. Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978).

171. *Id.* at 694.

172. *See* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 667 (1999) (describing *Monell* as a "doctrinal mess").

173. Bd. of Cty. Comm'rs of Bryan Cty v. Brown, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting).

174. Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK UNIV. L. REV. 831, 849 (2005).

175. *Id.*

176. Part III.

C. Initiatives and Legislation Providing Incarcerated Individuals in New Mexico With Greater Rights

Apart from the flawed federal analysis for prison conditions outlined above and the unique procedural aspects of the NMCRA, a different sort of distinctive state characteristic in New Mexico likewise suggests straying from federal precedent. For one, as previously mentioned, the Supreme Court of New Mexico has shown a willingness to expand rights under the state's Eighth Amendment analogue.[177] But, more broadly, the state's changing attitude towards incarcerated and recently incarcerated individuals is a distinctive characteristic that should compel New Mexico courts to devise a standard for evaluating constitutional violations of prison conditions that is more responsive to the rights of this vulnerable population. To quote the United States Supreme Court, the state's "evolving standards of decency" and changing attitude towards people who are incarcerated necessitates reconsideration of the analysis used to evaluate the conditions in which they live.

The New Mexico legislature has responded to the needs of people who are incarcerated by passing various laws in recent years protecting and expanding the rights of those individuals. Additionally, recent state-funded initiatives are indicative of New Mexico's desire to protect the rights of incarcerated people. The following Section considers legislation passed since 2019 that suggests a growing interest in prison reform by the state legislature: (1) the Restricted Housing Act; (2) significant amendments to the Criminal Offender Employment Act; and (3) the Criminal Expungement Act. Finally, to conclude, this Section considers a state-funded initiative, Project ECHO, that likewise suggests a changing attitude towards incarcerated individuals by bodies that receive state funding.

New Mexico has shown interest in protecting and expanding rights of individuals who are incarcerated or recently incarcerated in its most recent legislative sessions. First, in 2019, the New Mexico Legislature introduced the "Restricted Housing Act."[178] This Act protects certain individuals from the harms of solitary confinement or "restricted housing."[179] Under the Act, restricted housing is explicitly banned for individuals who are "younger than eighteen years of age" and those who are "known to be pregnant."[180] Additionally, the legislation creates procedural hurdles for prison officials when placing individuals with serious mental disabilities[181] in restricted housing, with the objective of preventing them from experiencing predictable health issues in that environment.[182] Finally, the Act requires that every correctional facility in the state create a report every three months documenting how many individuals were placed in restricted housing and the

177. *See supra* Part II.A.

178. H.B. 364, 54th Leg., 1st Reg. Sess. (N.M. 2019) (codified at N.M. STAT. ANN. §§ 33-16-1 to -7 (2021)).

179. N.M. STAT. ANN. §§ 33-16-3 to -4 (2021).

180. N.M. STAT. ANN. § 33-16-3 (2021).

181. "Serious mental disabilities" are defined by the Act as "(1) a serious mental illness, including schizophrenia, psychosis, major depression and bipolar disorder; or (2) having a significant functional impairment along with a brain injury, organic brain syndrome or intellectual disability." N.M. STAT. ANN. § 33-16-2(D) (2021).

182. N.M. STAT. ANN. § 33-16-4 (2019).

reasons for the placement.[183] This information is to be made available to the public in order to hold correctional facilities accountable for their use of this form of punishment.[184] This additional oversight and interest in limiting the use of restricted housing is evidence of New Mexico's evolving standards of decency.

Second, New Mexico's "Criminal Offender Employment Act" was amended in 2021 to reflect an evolving attitude towards rehabilitation and reentry of incarcerated individuals.[185] Originally enacted in 1974, the legislation was inspired by the belief that the public is better protected when individuals who are released from prison "are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible."[186] In its original form, the legislation prohibited "records of arrest not followed by a valid conviction" and "misdemeanor convictions not involving moral turpitude" from being distributed with public employment applications.[187] In 2021, the Act was amended to include all "convictions that have been sealed, dismissed, expunged, or pardoned," as well as "juvenile adjudications" and "convictions for a crime that is not job-related for the position in question."[188] The Criminal Offender Employment Act was amended as part of a nationwide, decade-long effort to introduce "ban-the-box" and "fair chance hiring" legislation in the United States.[189] The Act showed an effort on the part of the New Mexico Legislature to provide opportunities for recently released individuals to aid in the process of their reentry.

Additionally, New Mexico has shown its desire to protect incarcerated individuals' rights through the "Criminal Expungement Act" passed by the legislature in 2019.[190] This legislation allows certain individuals to have their criminal records expunged.[191] Importantly, two sections were added in the 2021 Special Session that further expand those rights. First, the legislature added a section outlining the procedure for expunging marijuana convictions retroactively[192] in light of the legalization of recreational marijuana in New Mexico in 2021.[193] The added section states that all public records referencing a cannabis charge will automatically be expunged two years after the date of the person's arrest or conviction "[i]f a person was charged with an offense involving cannabis that is no longer a crime on the

183. N.M. STAT. ANN. § 33-16-5 (2019).

184. *Id.*

185. 1974 N.M. Laws 218.

186. *Id.*

187. *Id.*

188. N.M. STAT. ANN. § 28-2-3 (2021).

189. These ordinances "prevent employers from asking about arrest or conviction information until later in the hiring process." *See generally* Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 367 (2016).

190. 2019 N.M. Laws ch. 203, § 1 (codified as N.M. STAT. ANN. §§ 29-3A-4 to -9 (2021)).

191. N.M. STAT. ANN. §§ 29-3A-4 to -5 (2021).

192. 2021 N.M. Laws ch 3., § 5 (codified at N.M. STAT. ANN. § 29-3A-8 (2021)).

193. *See* N.M. STAT. ANN. §§ 26-2C-1 (2021).

effective date of the Cannabis Regulation Act."[194] The second section applied the statute to individuals who are incarcerated.[195] The state was given one year to review marijuana-related charges and determine whether the person's sentence could be dismissed and their record expunged.[196] This retroactive application of expungement for certain marijuana-related charges is further evidence of New Mexico's commitment to recognizing the rights of individuals affected by the criminal justice system.

Finally, there has been a push in the legislature to move away from the use of private prisons in New Mexico. Private prisons are problematic on their face, as these profit-driven institutions "contain a built-in incentive for the contractor to economize" by cutting the cost of labor and reducing the amount spent on the needs of individuals who are incarcerated.[197] Therefore, "[a]bsent effective checks, efforts on the part of private prison administrators to cut operational costs could thus lead to decisions that deprive inmates of basic human needs, a hallmark of inhumane punishment."[198] The "Private Detention Facility Moratorium Act" was presented to the New Mexico legislature during the 2021 Regular Session.[199] The bill would have made it "unlawful for any person, corporation, business, or nonprofit entity to operate a private detention facility."[200] The legislation also would have prohibited public funding of privately run facilities and removed the state's authorization to enter into contracts with independent contractors.[201] Although the bill did not pass, the purpose of the Act has been put in motion as the state attempts to move away from the private prison industry. In 2019, nearly 50% of New Mexican prisons were privately run.[202] In June of 2022, private prisons made up two of the twelve facilities.[203]

Apart from these pieces of legislation, New Mexico has invested in initiatives that aim to benefit currently incarcerated individuals and those individuals who have recently been released. For example, New Mexico has shown an interest in improving medical care for incarcerated individuals through state-funded initiatives like Project Extension for Community Health Outcomes ("Project ECHO").[204] A subdivision of Project ECHO—the Hepatitis C Elimination Project—was created in response to the epidemic of Hepatitis C ("HCV") in New Mexico

194. N.M. STAT. ANN. § 29-3A-8 (2021). The Cannabis Regulation Act also shows the state's interest in decriminalizing drug use and the benefits of not choosing to incarcerate people for minor drug offenses. This seems to consider the larger issue of decarceration and departing from incarceration as punishment in general.

195. N.M. STAT. ANN. § 29-3A-9 (2021).

196. *Id.*

197. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 437, 471–80 (2005).

198. *Id.* at 480.

199. H.B. 40, 55th Leg., 1st Reg. Sess. (N.M. 2021).

200. *Id.*

201. *Id.*

202. Press Release, Eric Harrison, Public Information Officer, New Mexico Corr. Dep't, NMCD to Convert Additional Private Prison (July 16, 2021), https://cd.nm.gov/wp-content/uploads/2021/07/NMCD-to-convert-additional-private-prison-facility.pdf.

203. *NMCD Prison Facilities*, N.M. CORR. DEP'T., https://www.cd.nm.gov/divisions/adult-prison/nmcd-prison-facilities/.

204. *See* Karla Thornton et al., *The New Mexico Peer Education Project: Filling a Critical Gap in HCV Prison Education*, 29 J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 1544, 1545–46 (2018).

prisons.[205] The project aims to "provide[] high-quality, low-cost health education that addresses HCV risk behaviors and exposure to a large number of incarcerated people."[206] This model uses technology to disseminate information about HCV by facilitating a weekly teleconference between specialists and medical providers in New Mexico prisons.[207]

Additionally, Project ECHO has two programs that directly engage with incarcerated and recently released individuals around New Mexico.[208] First, the New Mexico Peer Education Project ("NMPEP") empowers incarcerated individuals to act as educators themselves in addressing HCV in the prisons.[209] Second, Project ECHO recently founded the Community Peer Education Program ("CPEP"), which targets recidivism and works with individuals who have left the prison setting and reentered their communities.[210] CPEP is fully funded by the New Mexico Corrections Department and allows individuals who have been through the probation and parole system to guide others as they are released from New Mexico prisons.[211] NMPEP and CPEP are examples of initiatives supported by and/or funded in-part by the state government. This investment in better health and reentry outcomes for incarcerated individuals is a distinctive characteristic of New Mexico's changing attitude towards protections against cruel and unusual punishment.

These distinctive state characteristics, in conjunction with the flawed federal analysis currently in place and the unique language of the NMCRA, compel reconsideration of the federal prison conditions standard under the interstitial approach.

III. ALTERNATIVES TO THE DELIBERATE INDIFFERENCE STANDARD

While the previous Section of this Comment discussed the rationales for a New Mexico constitutional departure from federal Eighth Amendment jurisprudence as it relates to prison conditions protections, this Section approaches the logical follow-up question: what is a more appropriate standard? The standards put forth in this Section could be implemented in New Mexico should it choose to depart from federal precedent under the interstitial approach and adopt a new standard for prison conditions under Section 13 of the state constitution. This Section considers two workable possibilities that present a move towards greater protections: 1) an

205. *See id.* at 1544. ("Hepatitis C virus is prevalent in epidemic proportions in U.S prisons. Estimated HCV prevalence ranges from 9.6% to 41.1% compared with 1% in the general population.").

206. *Id.* at 1545.

207. *Id.*

208. *Id.* at 1545–46.

209. *Id.* at 1546 ("Since 2009, Project ECHO has trained 482 (10.8% female) incarcerated people to become NMPEP peer educators in seven prisons. As of October 2016, 482 peer educators have trained 3,797 general population prisoners in 10-hour peer-led workshops and 5,066 prisoners have participated in the three-hour educational session.").

210. Matthew Reisen, *Peer Education Initiative for Prisoners Goes Mainstream*, ALBUQUERQUE J. (Sept. 14, 2021, 12:02 AM), https://www.abqjournal.com/2428894/peer-education-initiative-for-prisoners-goes-mainstream.html.

211. *Id.*

objective approach; and 2) a standard more akin to tort liability for prison conditions violations.

The standards considered here are rooted in the idea that the state owes an affirmative duty to protect individuals it chooses to incarcerate. This idea, however, is not novel. In 1926, the Supreme Court of North Carolina noted that the public should be "required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself."[212] This affirmative duty imposed on the state was fleshed out more recently by Professor Sharon Dolovich, who calls this responsibility the state's "carceral burden."[213] This burden is the "price society pays" for using incarceration as its main method of punishment.[214] The idea is that this carceral burden "allows society to remove certain individuals from the shared public space, but only on the condition that the state assumes an ongoing affirmative obligation to meet the basic human needs of the people exiled."[215] If the state does not wish to incur this burden, it can choose to invest in other forms of seeking justice. Additionally, because prison sentences have the potential to last for extended periods of time, prison officials must be "proactive" in their approach to prison conditions—"[t]hey must pay attention to existing conditions, notice possible dangers, investigate them, and take appropriate steps to prevent unnecessary suffering."[216]

A. Objective Unreasonableness

Any test used to analyze prison conditions violations should correspond with this affirmative duty incurred by the state. Judges and scholars alike have considered an objective test, essentially eliminating the subjective prong of the deliberate indifference test.[217] As discussed above,[218] in their respective dissent and concurrence, Justices Stevens and Blackmun both advocated for an objective approach to the issue of unconstitutional prison conditions. In effect, an objective test would consider "whether plaintiffs were subjected to a substantial risk of serious harm of which a reasonably attentive prison official would have known."[219]

An objective standard of this sort might look like the analysis articulated in *Kingsley v. Hendrickson* for pretrial detainees bringing claims of excessive force under the Fourteenth Amendment.[220] In *Kingsley*, the Supreme Court considered a claim from an individual who was detained pretrial at a county jail in Wisconsin for a drug charge.[221] After refusing to remove a piece of paper from the light above his bed, Kingsley was forcibly removed from his cell.[222] Once removed, his head was

212. Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926).

213. Dolovich, *supra* note 140, at 892.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See e.g.*, *id.*; Park, *supra* note 29; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 425 (2018).

218. *See supra* Part II.A.

219. Dolovich, *supra* note 140, at 948.

220. Kingsley v. Hendrickson, 576 U.S. 389 (2015).

221. *Id.* at 392.

222. *Id.*

slammed against a concrete bunk and he was tased in the back.[223] Kingsley brought a Section 1983 claim against the prison officials for excessive use of force under the Fourteenth Amendment.[224] The Court held that, for claims of excessive force that violate an individual's right to due process under the Fourteenth Amendment, the "relevant standard is objective not subjective" and "the defendant's state of mind is not a matter that plaintiff is required to prove."[225] Instead, "a pretrial detainee must show only that the force purposely or knowingly used against him was *objectively unreasonable*."[226] However, the Court noted that this standard could not be applied "mechanically" and instead would have to be fact determinative, considered on a case-by-case basis.[227] Further, in applying this objective standard, the court only considers "the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."[228] As such, despite its objective nature, this standard is still deferential to the decisions of prison officials.

Because of its deferential quality, simply ridding the current "deliberate indifference" standard of the subjective prong to create an objective standard would present its own challenges. As noted in the *Kingsley* decision, the current "objective unreasonableness" standard outlined by the Supreme Court is considered from the perspective of "a reasonable officer on the scene."[229] The American legal system has historically been extremely deferential to law enforcement officials, especially in the context of corrections.[230] This deferential attitude is evidenced by the Court's refusal to intervene in issues of prison conditions until the 1960s.[231] Because of this history, an objective approach might "incline judges and juries—who are already prone to sympathize with uniformed peace officers—to find officers' conduct reasonable and not to impose liability."[232]

Additionally, the history of societal indifference to incarcerated individuals in the United States necessitates careful implementation of an "objective" standard. Importantly, there is a "tendency to regard as less than human the people we incarcerate" in this country's penal system.[233] This can be attributed to various factors, including a lack of transparency about the reality of American prisons and

223. *Id.* at 392–93.

224. *Id.* at 393.

225. *Id.* at 395.

226. *Id.* at 396–97 (emphasis added).

227. *Id.* at 397.

228. *Id.*

229. *Id.*

230. *See e.g.*, Rhodes v. Chapman, 452 U.S. 337, 350 n.14 (1981) (noting that security in correctional facilities is "a matter normally left to the discretion of prison administrators"); Barney v. Pulsipher, 143 F.3d 1299, 1313 (10th Cir. 1998) ("We hesitate to interfere with prison officials' decisions concerning the day-to-day administration of prisons, to which we must accord deference."); Jeffers v. Gomez, 267 F.3d 895, 917 (9th Cir. 2001) (holding that the court would not "micro-manage" a prison's emergency plans). *See also* Nicole B. Godfrey, *Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals*, 74 ARK. L. REV. 365, 421 (2021).

231. *See supra* Part I.A. *See generally* Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004).

232. Dolovich, *supra* note 140, at 955–56.

233. *Id.* at 960.

"a culture of fear that permeates American imagination" and results in a belief that incarcerated individuals "are bad guys, just getting what they deserve."[234] The lack of transparency surrounding carceral systems in the United States shields the tragedies of those systems from the public eye.[235] This prevents society at large from making critical assessments about the humanity of these institutions. Additionally, the culture of fear surrounding incarcerated individuals is largely misleading, employing fearmongering rhetoric to maintain the status quo.[236] Many of the issues presented in this Comment concerning the deliberate indifference standard are "allowed to perpetuate because of an overarching societal indifference to the harms suffered by people behind bars."[237]

However, while an objective standard in Eighth Amendment jurisprudence may risk the adoption of this judicial and societal deference, it is important to note the inherent value in an objective approach. Unlike a tort claim, which requires a showing of actual harm, a deliberate indifference test without the subjective prong would require only a showing of a "risk" of serious harm. At least analytically, a standard of this sort would resolve some of the current obstacles presented by the deliberate indifference standard by allowing courts to avoid determining whether officials acted with deliberate malice, and instead focusing on whether the official acted reasonably. As a result, this objective standard should be—at the very least—considered by courts and litigants making arguments about a New Mexico constitutional departure from the deliberate indifference standard for prison conditions violations.

B. Negligence Standards

Legal scholars have also presented tort liability standards for prison officials to better protect the constitutional rights of incarcerated individuals as an alternative to the deliberate indifference standard. This tort liability could look like a landowner-invitee relationship[238] or something closer to strict liability.[239] Both standards would impose an affirmative duty on prison officials to protect the individuals they choose to incarcerate. In tort law, under landowner-invitee liability, an owner of a premises "who directly or impliedly invites others to enter" their land owes "a duty to use ordinary or reasonable care to have his or her premises in a reasonably safe condition."[240] Additionally, "if the owner is aware of a dangerous condition," they have "a duty to warn the invitee of such condition."[241] In the prison setting, incarcerated individuals are not "invitees" in the traditional sense. However, if the court were to apply this framework and recognize that correctional departments owe the same duty that landowners owe to invitees by choosing to incarcerate those individuals, prison officials would "be liable for objectively serious harms suffered

234. Godfrey, *supra* note 230, at 417.
235. *Id.*
236. *See id.* at 420.
237. *Id.* at 421.
238. Park, *supra* note 29, at 409.
239. Dolovich, *supra* note 140, at 964–72.
240. 62 Am. Jur. 2d *Premises Liability* § 158 (2021).
241. *Id.*

by a prisoner caused by the prison official's failure to take reasonable precautions to protect the prisoner from risks of serious harm that are discoverable with reasonable care."[242] This analysis would impose an affirmative duty on prison officials not only to use reasonable care to keep the prison safe, but to uncover harms that are reasonably discoverable.

Finally, a strict liability standard might help better protect the rights of incarcerated individuals. If the state were to adopt a strict liability standard, "plaintiffs who suffered sufficiently serious harm at the hands of the state would recover notwithstanding a finding of good intentions on the part of individual officers."[243] As Professor Dolovich points out, the affirmative duty incurred by the state "operates against the backdrop of a heightened official obligation to take care as regards the health and safety of prisoners."[244] Therefore, "when state officials subject prisoners to substantial risks of serious harm, they have manifested a gross deviation from the standard of care that the state owes its prisoners."[245] Unless there was a showing of good intention by the prison officials, the state would be held responsible for harms suffered by individuals who are incarcerated. This standard, in theory, would provide the greatest protections for the incarcerated population.

However, in some basic unavoidable sense, proposals that suggest any form of affirmative duty ultimately require an objective standard to determine what is unreasonable in the prison context. In order to show that there is an objectively unreasonable condition, or that strict liability has been met, there must be some uniform standard of decency. But how—and who—should be the arbiter of such a standard?

One approach would be the creation of a state-level prison condition oversight committee. Because of the stigma regarding incarcerated individuals and the tendency to believe that those who have been convicted of a crime are deserving of lesser living conditions, a diverse oversight committee would be best positioned to approach this question in a democratic and collaborative manner. In theory, such a body could consist of lawmakers, prisoners' rights advocates, victim rights advocates, victims themselves, individuals who are incarcerated and other community members who can collaborate to create a standard set of conditions that must be met in the correctional setting. This group could look beyond the United States to other models of incarceration around the world,[246] as well as the latest scholarship on punishment and cognitive science. These inquiries would include considering the role that correctional officers play in prison conditions violations and assessing the power dynamics that influence determinations of "objectively unreasonable" conduct on the part of such officials.[247] While promoting humane prison conditions in the United States likely goes beyond the creation of a uniform

242. Park, *supra* note 29, at 409.

243. Dolovich, *supra* note 140, at 965.

244. *Id.*

245. *Id.*

246. *See generally* Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT'L L. REV. 329 (2017); Are Høidal, *Normality Behind the Walls: Examples from Halden Prison*, 31 FED. SENT'G REP. 58 (2018).

247. *See generally* Sami Abdel-salam, *Enhancing the Role of Correctional Officers in American Prisons: Lessons Learned from Norway*, 31 FED. SENT'G REP. 67 (2018).

standard of decency, a statewide consensus on what is objectively unreasonable would be an important first step in creating a less cruel system.

Ultimately, the New Mexico Civil Rights Act approach—holding "public bodies" accountable—all but necessitates some version of an objective standard for assessing violations of Section 13. By holding government entities responsible instead of individuals, the language of the Act suggests a desire to correct *systemwide* failure. An objective standard (in some form) meets this challenge and would "ensure both appropriate judicial condemnation of cruel prison conditions and the creation of pressure for institutional reform."[248] If incarcerated individuals repeatedly name a certain state agency in civil rights lawsuits, greater change could occur as a result of mounting pressure.

In short, the NMCRA allows the possibility that an institution and its practices will be held responsible for the injustices perpetuated in our prisons—not simply a "bad apple" individual officer. While the objective and tort liability standards discussed above are valuable jumping off points, this Comment encourages practitioners in New Mexico to be creative in their approach to establishing prison conditions standards under the state constitution.

CONCLUSION

The basic purpose of this Comment is to demonstrate how and why New Mexico constitutional jurisprudence should depart from the Eighth Amendment standard of deliberate indifference as it relates to the constitutionality of prison conditions. To make this argument, this Comment discussed the current nature of the federal standard, compared and contrasted Section 1983 and the NMCRA, and gave several reasons why interpretation of Section 13 can depart from federal law under the interstitial approach. Finally, this Comment has gestured towards the possibility of new approaches to prison conditions that could be adopted under Section 13 that would better protect the constitutional rights of individuals incarcerated in New Mexico. As noted above, the NMCRA offers the possibility of a unique set of state constitutional protections that are defined and articulated by the state's legal community.

However, while the New Mexico Civil Rights Act and the possibility of greater protections for incarcerated individuals under Section 13 is an important step in the right direction, the issue of inhumane prison conditions goes beyond providing greater rights for those already incarcerated. Ultimately, the current state of American correctional facilities calls for an overhaul of the carceral system and a reconsideration of the use of incarceration as punishment. In a society that purports to be an emblem of democracy, the treatment of incarcerated individuals in the United States is a stark example of the ways in which our practices fall short of the lofty and noble ideals to which we aspire. Additionally, the carceral system fails on its face as it disproportionately impacts people of color and low-income individuals, a further downfall that calls for significant action far beyond the scope of prison conditions litigation. Larger, institutionalized, historical issues in American society are at play here.

248. Dolovich, *supra* note 140, at 965.

Ultimately, as long as the United States stigmatizes incarcerated individuals and fails to address the root causes of crime, prison conditions will remain inhumane. Broadly speaking, in addition to trying to make the carceral system currently in place more humane, the United States should be working as a community to make living on the outside more equitable. Time, energy, and resources should be funneled into healing initiatives like reformative justice programs, and movements to decrease wealth inequality and improve access to education and health care. Until the United States reckons with its history and the purpose of its choice to incarcerate, change in the carceral system will continue to be limited and incremental. Nevertheless, incremental change can still matter in a very material sense. The state constitutional approach suggested by this Comment may be a modest step in this direction, but it cannot be the only one.