Note

Gruel and Unusual: Prison Punishment Diets and the Eighth Amendment

Jackie Cuellar[*]

INTRODUCTION

In 2016, Terrill Thomas was held in solitary confinement in Milwaukee County Jail.[1] During his time in isolation, Thomas was suffering a severe mental health crisis, manifesting in extremely agitated behaviors.[2] At one point, Thomas had attempted to stuff his shirt and pieces of his mattress into his toilet, causing it to overflow and flood his cell.[3] Rather than providing him with the urgent medical and mental health care he desperately needed, callous jail officials punished Thomas for his disorder. They cut off all water to his cell, removed his mattress and bedding, and deprived him of access to a shower and

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1. Merrit Kennedy, *$6.75 Million Settlement Paid to Family of Milwaukee Inmate Who Died of Dehydration*, NPR (May 29, 2019), https://www.npr.org/2019/05/29/728023455/-6-75-million-settlement-paid-to-family-of-milwaukee-inmate-who-died-from-dehydr [https://perma.cc/U8TT-CqFJ] (explaining that Thomas had been arrested for firing a weapon during what family members believed was a psychotic episode resulting from bipolar disorder).

2. *Id.*; Isiah Holmes & Dan Boville, *The Chase Key: How a Black Man Died of Dehydration in a US Jail*, ALJAZEERA (July 9, 2020), https://www.aljazeera.com/features/2020/7/9/the-chase-key-how-a-black-man-died-of-dehydration-in-a-us-jail [https://perma.cc/P9T3-LD8U] (noting that in addition to flooding his cell, Thomas reportedly spent several days repeatedly slamming his hands or shoes against his cell's walls, talking to himself, or pacing around his cell).

3. Kennedy, *supra* note 1.

any relief from the twenty-four-hour lockdown.[4] They also placed him on a diet consisting exclusively of blended bread, potatoes, non-dairy cheese, beans, fruits, and vegetables baked into a loaf—a repulsive concoction commonly known as "nutraloaf."[5] The nutraloaf was effectively inedible, leaving Thomas incapable of benefitting from what little hydration it may have provided. For six days, Thomas's unconscionable suffering persisted.[6] On day seven, Thomas, who had lost thirty-four pounds and had no access to any water or edible food, was found unresponsive on the floor of his cell.[7] Unsuccessful in their efforts to resuscitate him, medical examiners later concluded that Thomas had died from severe dehydration.[8]

Issues surrounding prison conditions and the purpose of confinement continue to foster robust discussion on reform measures such as abolishing long-term solitary confinement,[9] providing educational programming,[10] and alternatives to imprisonment.[11] However, this discourse often overlooks the quality of the food provided in prisons. More specifically, prison food

4. Amended Complaint at para. 1, Thomas v. Milwaukee County, (No. 17-CV-355) 2018 WL 3472527 (E.D. Wis. Apr. 18, 2018).

5. *Id.* at paras. 59–60.

6. *Id.* at para. 69.

7. *Id.* at paras. 98, 112.

8. *Id.* at para. 113.

9. *See* David H. Cloud, Ernest Drucker, Angela Browne & Jim Parsons, *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 24 (2015) (criticizing the widespread reliance on solitary confinement within the U.S. prison system and contending that it "undermines our nation's public health and safety and is a particularly traumatic element of mass incarceration.").

10. *See* ELLEN CONDLIFFE LAGEMANN, LIBERATING MINDS: THE CASE FOR COLLEGE IN PRISON 2–3 (2016) (presenting educational programming in prisons as a recidivism reduction tactic, alongside other economic and societal benefits).

11. *See, e.g.*, *Alternatives to Incarceration in a Nutshell*, FAMS. AGAINST MANDATORY MINIMUMS (July 8, 2011), https://famm.org/wp-content/uploads/FS-Alternatives-in-a-Nutshell.pdf [https://perma.cc/XXX3-Z4X7] (suggesting the use of alternatives to prison, such as treatment programs, restitution, house arrest, and community service); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/NU47-YF4M] ("Instead of asking whether anyone should be locked up or go free, why don't we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?") (quoting Ruth Wilson Gilmore, prison abolitionist).

that is used as punishment raises grave constitutional concerns.[12] The most common form of food as a mechanism of prisoner control is nutraloaf, sometimes called prison loaf, disciplinary loaf, alternative meal plan, or simply "the loaf."[13] Nutraloaf is usually given to prisoners as punishment for misbehavior related to dining, such as throwing food or fighting with prison guards in the dining hall.[14] Additionally, nutraloaf is commonly the only item on the menu for prisoners held in solitary confinement.[15] While the exact ingredients and preparation methods vary by state, nutraloaf is commonly made by blending together bread, potatoes, non-dairy cheese, beans, fruits, and vegetables, and then shaping it into a loaf and baking it.[16] Nutraloaf is typically served as a prisoner's exclusive meal three times per day for days or weeks on end.[17] While nutraloaf may technically meet the minimum dietary requirements for prison food,[18] it is over-

12. This Note will analyze prison punishment foods under the Eighth Amendment, specifically. *See infra* Part II.A.

13. Eliza Barclay, *Food as Punishment: Giving U.S. Inmates "The Loaf" Persists*, NPR (Jan. 2, 2014), https://www.npr.org/sections/thesalt/2014/01/02/256605441/punishing-inmates-with-the-loaf-persists-in-the-u-s [https://perma.cc/2QLK-5G4V].

14. Jesse McKinley, *New York Prisons Take an Unsavory Punishment Off the Table*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/nyregion/new-york-prisons-take-an-unsavory-punishment-off-the-table.html [https://perma.cc/W9G7-4HNU].

15. *Id.*

16. Arin Greenwood, *It's What's for Dinner*, 96 AM. BAR ASS'N J., July 2010, at 6, 10.

17. Barclay, *supra* note 13 ("[P]risoners who misbehave don't just get [nutraloaf] once. They have to eat it at every meal, for days or weeks at a time."); Erin Fuchs, *Nutraloaf: This Revolting Food Is Used as Punishment in Prison*, BUS. INSIDER (June 25, 2013), https://www.businessinsider.com/what-do-people-eat-in-solitary-confinement-2013-6 [https://perma.cc/VHA5-JDNW]; *see also* Jeff Ruby, *Dining Critic Tries Nutraloaf, the Prison Food for Misbehaving Inmates,* CHI. MAG. (Aug. 26, 2010), https://www.chicagomag.com/Chicago-Magazine/September-2010/Dining-Critic-Tries-Nutraloaf-the-Prison-Food-for-Misbehaving-Inmates [https:// perma.cc/V6NY-BAL5] (describing nutraloaf as "roughly the size of a calzone and with the appearance of a neglected fruitcake.").

18. *See generally* Alysia Santo & Lisa Iaboni, *What's in a Prison Meal?*, MARSHALL PROJECT (July 7, 2014), https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal [https://perma.cc/3A5Y-4ANC] ("Nutritional standards at state and local facilities are governed by a patchwork of state laws, local policies, and court decisions . . . . Some jails and prisons require low-fat or low-sodium diets, while others mandate inmates receive a certain number of calories.").

whelmingly detested by prisoners[19] and, for many, it is simply too revolting to eat at all.[20]

Several lawsuits across the United States have challenged the use of nutraloaf, many claiming that nutraloaf caused vomiting, diarrhea, gastrointestinal bleeding and distress, significant weight loss, and other adverse health outcomes.[21] Although the exact mechanism through which nutraloaf causes individuals to become ill is not entirely clear, there is speculation that it may be from the use of spoiled food,[22] its high fiber content which can cause abdominal discomfort,[23] or nutraloaf's nauseating taste and texture may make it impossible to eat altogether.[24] Further, nutraloaf was also the meal provided to Terrill Thomas, described above, as well as another individual who tragically died of dehydration in North Carolina.[25]

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19. McKinley, *supra* note 14.

20. Leslie Sobel, Kathryn Stroud & Marika Weinstein, *Eating Behind Bars: Ending the Hidden Punishment of Food in Prison* IMPACT JUST. 103 (2020), https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars.pdf [https://perma.cc/CYR3-ANTF].

21. *See, e.g.*, Prude v. Clark, 675 F.3d 732 (7th Cir. 2012) (alleging that plaintiff was given nutraloaf for all meals over a ten-day period and lost over eight percent of his bodyweight and experienced severe vomiting and bloody stools); Myers v. Milbert, 281 F. Supp. 2d 859, 865–66 (N.D.W. Va. 2003) (claiming that nutraloaf caused vomiting, frequent bowel movements, and burning in his chest and throat); Gates v. Huibregtse, 69 F. App'x 326, 326–27 (7th Cir. 2003) (alleging that "plaintiff repeatedly regurgitated [nutraloaf], culminating in his vomiting of blood"); Hazel v. McElvogue, No. 8:10-CV-524-RMG, 2011 WL 1559227, at *2 (D.S.C. Apr. 25, 2011) (claiming that nutraloaf caused plaintiff severe stomach pains, gas, and diarrhea).

22. *E.g.*, *Prude*, 675 F.3d at 734 ("[N]utriloaf could meet requirements for calories and protein one day yet be poisonous the next if, for example, made from leftovers that had spoiled.").

23. *See Vermont Supreme Court: "Nutraloaf" Diet Is Punishment that Requires Hearing*, PRISON LEGAL NEWS (Aug. 15, 2009), https://www.prisonlegalnews.org/news/2009/aug/15/vermont-supreme-court-nutraloaf-diet-is-punishment-that-requires-hearing [https://perma.cc/L8VQ-YMQ7] ("Nutraloaf is high in fiber and requires the prisoner to drink a lot of water to avoid constipation.").

24. *See* cases cited *supra* note 21 and accompanying text.

25. While being held in solitary confinement and suffering from an untreated psychological disorder, Michael Anthony Kerr was placed on a nutraloaf diet. Although he had originally been served milk alongside the nutraloaf, it was discontinued after Kerr had attempted to use the cartons to clog the toilet in his cell. Kerr had running water available through a sink in his cell, but his limited physical capacity, as well as the fact that he was handcuffed, tragically resulted in his death due to dehydration. *See $2.5 Million Settlement in North Carolina Prisoner's Dehydration Death*, PRISON LEGAL NEWS (Apr. 1, 2016),

Nutraloaf goes far beyond the usual harshness[26] of prison conditions and crosses into cruel and unusual punishment in violation of the Eighth Amendment. The fact that the American Correctional Association discourages,[27] and prison systems in at least fourteen states have banned,[28] the use of nutraloaf is evidence of its outdated and barbarous nature. In addition, several national and international detention standards[29] require that

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https://www.prisonlegalnews.org/news/2016/apr/1/25-million-settlement-north-carolina-prisoners-dehydration-death [https://perma.cc/MJ7A-NWY4].

26. For example, incarcerated individuals have little to no control over their diet and courts have found there is no constitutional right to order from a menu or to be offered specific items such as coffee. MICHAEL B. MUSHLIN, 1 RIGHTS OF PRISONERS 247 (5th ed. 2017) (citing Chandler v. Moore, 2 F.3d 847, 848 (8th Cir. 1993); Rogers v. Holt, 49 F. App'x 231 (10th Cir. 2002); Bijeol v. Nelson, 579 F.2d 423 (7th Cir. 1978)). Prison mealtime restrictions may also be imposed without violating the Eighth Amendment. *Id.* at 248 (citing Robbins v. South, 595 F. Supp. 785, 790 (D. Mont. 1984) (upholding an inmate mealtime of less than fifteen minutes as constitutional)). Beyond food and diet specifically, the practice of placing two incarcerated individuals in a single cell, also known as "double-celling," was deemed constitutional in *Rhodes v. Chapman*. 452 U.S. 337, 347 (1981). Further, the use of solitary confinement, or other restrictive housing units, has often been found constitutional. MUSHLIN, *supra*, at 106, 138–39 (citing Ashley v. Seamon, 32 F. App'x 747 (7th Cir. 2002); LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993); Bruscino v. Carlson, 854 F.2d 162, 164 (7th Cir. 1988); Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980) ("[I]nactivity, lack of companionship, and a low level of intellectual stimulation do not constitute cruel and unusual punishment.")).

27. ERIKA CAMPLIN, PRISON FOOD IN AMERICA 65 (Ken Albala & Suzanne Staszak-Silva eds., 2017) ("[T]he American Correctional Association, which accredits prisons and sets best practices for the industry, discourages using food as a disciplinary measure.") (internal quotation marks omitted).

28. A recent study found that while numerous states still serve nutraloaf, fourteen states do not. Sobel et al., *supra* note 20, at 102.

29. G.A. Res. 70/106, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), U.N. Doc. A/C.3/70/L.3, at 13 (Sept. 29, 2015) [hereinafter The Mandela Rules] ("Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served."); *see also International Human Rights Standards Governing the Treatment of Prisoners*, HUM. RTS. WATCH PRISON PROJECT (Sept. 27, 2021), https://www.hrw.org/legacy/advocacy/prisons/stndrds.htm [https://perma.cc/CJ9X-YXSY] (noting that the Standard Minimum Rules are not a treaty but rather an authoritative guide to binding treaty standards); G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988) (providing that "[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" where "cruel" punishment is defined "so

food given to prisoners be of "wholesome quality" and expressly prohibit the use of food as punishment.[30]

This Note intends to demonstrate that our evolving standards of decency, which are taken into consideration in the Eighth Amendment analysis,[31] demand that the Supreme Court hold nutraloaf as an unconstitutional punishment and put an end to such weaponization of food. Part I of this Note provides a brief history and summary of how the Eighth Amendment evolved through the twentieth century, concluding with the legal standard as applied today. Part II discusses historical uses of food as punishment in prisons and the most prominent form of disciplinary food currently used, the nutraloaf. Part III analyzes the use of nutraloaf under the current legal standard for Eighth Amendment claims, concluding that nutraloaf constitutes cruel and unusual punishment. Finally, Part IV provides guidance on helpful evidence to gather when bringing an Eighth Amendment challenge against the use of nutraloaf, or any future iteration of it, that is potentially capable of surviving judicial scrutiny.

I. CRUEL AND UNUSUAL PUNISHMENT: THE EVOLUTION AND APPLICATION OF THE EIGHTH AMENDMENT TO PRISON CONDITIONS

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[32] The current framework for analyzing Eighth Amendment claims arising from confinement conditions utilizes a two-part test[33] in which the plaintiff is required to show that: (1) conditions were objectively cruel and unusual; and (2) the corrections staff acted with the requisite subjective intent of deliberate indifference to serious harm or injury.[34] The

as to extend the widest possible protection against abuses, whether physical or mental").

30. *Performance-Based National Detention Standards 2011*, U.S. IMMIGR. & CUSTOMS ENF'T 216 (Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/BVS2-UCAQ] ("Staff may not impose or allow imposition of . . . deprivation of food services, to include use of Nutraloaf.").

31. *See infra* Part I.C; Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

32. U.S. CONST. amend. VIII.

33. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

34. *Id.*; George Bach, *Defining "Sufficiently Serious" in Claims of Cruel and Unusual Punishment*, 61 DRAKE L. REV. 1, 3 (2013).

conditions and mental intent required to meet each component have developed through a series of landmark cases[35] that revolutionized the Eighth Amendment framework.

Part I of this Note provides a brief history of the Eighth Amendment's proscription of cruel and unusual punishment and its early development and eventual application to both sentencing and prison conditions. Next, Part I will summarize landmark cases that revolutionized the Eighth Amendment as applied to prison conditions. Finally, Part I will explain the current legal standard for evaluating allegations that prison conditions violate the Eighth Amendment.

A. HISTORICAL APPLICATIONS OF THE EIGHTH AMENDMENT TO CONDITIONS OF CONFINEMENT

In colonial America, the Eighth Amendment's proscription of cruel and unusual punishment was intended to prevent torture and other severe mistreatment of prisoners.[36] Throughout the nineteenth century, the use of barbaric punishments[37] that the Eighth Amendment had originally intended to proscribe had dramatically declined, making the provision virtually obsolete.[38] However, in 1910, the Supreme Court revolutionized the Eighth Amendment by holding that the Amendment's protections were not tied to a particular theory or point in time, but rather our contemporary notions of cruel and unusual punishment "may ac-

35. *See* Estelle v. Gamble, 429 U.S. 97, 106–07 (1976) (holding that a plaintiff alleging Eighth Amendment violations for failure to provide medical needs must allege sufficiently harmful conduct to evidence deliberate indifference); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (reasoning that some prison conditions, even those considered harsh, may merely be due to the nature of confinement and the social debt that incarcerated individuals pay for offenses against society); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (attempting to harmonize *Estelle* and *Rhodes*, the Court concludes that punishment requires a culpable state of mind; thus, such claims must be supported by showing that prison conditions are objectively cruel and unusual and also that the prison officials acted with the requisite mental intent, or in other words, proof of an objective and a subjective component).

36. Alvin J. Bronstein, *Prisoners' Rights: A History*, *in* 14 LEGAL RIGHTS OF PRISONERS 19, 26 (Geoffrey P. Alpert ed., 1980).

37. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (proposing that the Eighth Amendment prohibits "[t]he barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like" (citation omitted)).

38. *See id.*

quire meaning as public opinion becomes enlightened by humane justice."[39] During the 1960s, courts began to assume significant supervisory control over practices beyond corporal punishment, focusing their attention on sanitation, safety, and other prison conditions.[40]

Nevertheless, between 1910 and 1976, Eighth Amendment challenges mainly concerned sentencing procedures or the duration of a sentence being disproportionate to the crime committed.[41]

B. EVOLVING APPLICATIONS OF THE EIGHTH AMENDMENT FRAMEWORK: LANDMARK SUPREME COURT DECISIONS ON PRISON CONDITIONS

Throughout the 1970s and 1980s, the Supreme Court began ruling on several cases that specifically considered the applicability of the Eighth Amendment to prison conditions.[42] In addressing these issues, the Court developed several different tests for determining Eighth Amendment violations depending on whether the claim challenged specific incidents,[43] overall prison

39. Weems v. United States, 217 U.S. 349, 373 (1910). In *Weems v. United States*, Paul Weems was convicted of falsifying documents for purposes of defrauding the government and sentenced to fifteen years in prison with harsh conditions, including being chained from wrist to ankle and compelled to engage in hard labor. *Id.* at 362–64. The Court ruled this punishment impermissibly severe relative to the crime committed and held the penalty to be in violation of the Eighth Amendment. *Id.* at 373; *see also* MUSHLIN, *supra* note 26, at 85 n.6 ("[T]he Supreme Court has clearly ruled that the Eighth Amendment is not frozen so as to forbid only punishments seen as barbaric in 1789.").

40. CHRISTOPHER E. SMITH, THE SUPREME COURT AND THE DEVELOPMENT OF LAW: THROUGH THE PRISM OF PRISONERS' RIGHTS 159 (2016) (citing MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)).

41. *See, e.g.*, Badders v. United States, 240 U.S. 391, 393 (1916) (holding constitutional a mail fraud statute which treated each mailed letter in furtherance of a scheme to defraud as a separate offense); Graham v. West Virginia, 224 U.S. 616, 631 (1912) (holding that being charged before the court of another county after conviction does not inflict cruel and unusual punishment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law which imprisons a person for their status as a narcotics user inflicts a cruel and unusual punishment); *see also* Alexander J. Spanos, *The Eighth Amendment and Nutraloaf: A Recipe for Disaster*, 30 J. CONTEMP. HEALTH L. & POL'Y 222, 224 (2013) ("Prior to 1976 . . . Eighth Amendment cases were granted certiorari only in situations where sentences were grossly disproportionate to crimes.") (citing Weems v. United States, 217 U.S. 349, 368 (1910)).

42. MUSHLIN, *supra* note 26, at 64.

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

conditions,[44] or the actions of prison officials during a prison riot.[45] Two tests remain today to assess whether the Eighth Amendment has been violated in cases regarding prison conditions[46] or whether prison officials have acted unconstitutionally during an emergency.[47] While both require that a prisoner show that the treatment they received was objectively cruel and unusual, the two tests differ as to whether the prison official inflicting such punishment must be shown to have acted with deliberate indifference, as in the case of prison conditions, or with malice, during an emergency.

1. *Estelle v. Gamble*: Introducing Deliberate Indifference into the Eighth Amendment Analysis

In 1976, the Supreme Court ruled on the landmark prisoners' rights case *Estelle v. Gamble*, which held that prison officials' failure to provide medical treatment for a prisoner who suffered a work-related injury violated the Eighth Amendment.[48] The Court reasoned that cruel and unusual punishment in the context of the Eighth Amendment applies to both a prisoner's sentence and to the conditions of their confinement.[49] Further, the *Estelle* decision marked the introduction of a new standard under the Eighth Amendment by holding that "deliberate indifference to a prisoner's serious illness or injury" would constitute cruel and unusual punishment.[50] Although the Court provided no specific definition for the key new term "deliberate indifference," the Court did suggest that indifference may manifest through prison doctors in their response to a prisoner's needs or where prison guards intentionally deny or delay access to medical care or interfere with a prescribed treatment.[51]

The *Estelle* holding was a catalyst for prisoner's rights and for cases challenging prison conditions as violating the Eighth Amendment.[52] The decision also introduced the term "deliberate indifference" as a governing standard, providing a precursor to

44. *See* Rhodes v. Chapman, 452 U.S. 337 (1981).

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

46. *See* Wilson v. Seiter, 501 U.S. 294 (1991); *infra* Part I.C.

47. *See* Whitley v. Albers, 475 U.S. 312 (1986); *infra* Part I.B.3.

48. Estelle v. Gamble, 429 U.S. 97, 102–04 (1976).

49. *See id.* at 103–04.

50. *Id.* at 104–05.

51. *Id.*; *see also* MUSHLIN, *supra* note 26, at 65 (noting that the Court had evidently never used the term "deliberate indifference" prior to *Estelle*).

52. MUSHLIN, *supra* note 26, at 64.

the "subjective test" that courts use to this day.[53] However, this term, and the Eighth Amendment framework in general, was expanded upon through a series of cases following the *Estelle* decision.

2. *Rhodes v. Chapman*: An Entirely Objective Approach to Eighth Amendment Challenges

In 1981, the Court contemplated the issue of general prison conditions and the Eighth Amendment for the first time in *Rhodes v. Chapman*.[54] The Court considered whether an Ohio prison's practice of placing two individuals in a single cell, otherwise known as "double-celling," violated the Eighth Amendment.[55] The Court, finding no violation, concluded that "the Constitution does not mandate comfortable prisons."[56] However, the Court acknowledged that where the conditions of confinement wantonly or unnecessarily inflict pain or are grossly disproportionate such that they deprive a prisoner of "the minimal civilized measure of life's necessities,"[57] they may violate the Eighth Amendment.[58] In setting forth this new standard, the Court again provided no specific guidelines for determining whether a prison condition is simply "part of the penalty that criminal offenders pay for their offenses against society"[59] or rises to the level of violating the Constitution.[60] However, the Court noted that because the practice of double-celling did not lead to deprivations of essential goods, medical care, or sanitation, the assertion that double-celling constitutes cruel and unusual punishment is unsupported.[61] This suggests that such deprivations unconstitutionally transgress inmates' Eighth Amendment rights.[62]

Importantly, the *Rhodes* decision took an entirely objective approach, never considering whether prison officials acted with "deliberate indifference" as the Court had announced just five

53. *Id.* at 65; *see infra* Part I.C.2.

54. MUSHLIN, *supra* note 26, at 65 (citing Rhodes v. Chapman, 452 U.S. 337, 344 (1981)).

55. *Id.*

56. *Id.* at 66 (citing *Rhodes*, 452 U.S. at 339).

57. *Id.* (citing *Rhodes*, 452 U.S. at 337).

58. *Id.*

59. *Id.* (citing *Rhodes*, 452 U.S. at 347).

60. *Id.*

61. *Rhodes*, 452 U.S. at 348.

62. *See id.*

years earlier in *Estelle v. Gamble*.[63] Thus, the *Rhodes* and *Estelle* decisions generated distinct standards that the Court would eventually need to resolve.[64]

3. *Whitley v. Albers*: Establishing Requisite Mental Intent for Emergencies in Prisons

After *Estelle* and *Rhodes*, the Court again considered deliberate indifference, the subjective component of the Eighth Amendment analysis, in *Whitley v. Albers*.[65] There, the Court considered a prison riot case where Albers, a prisoner, was shot by a prison official executing a plan to free a guard who had been taken hostage by other prisoners.[66] Albers claims that he was not involved in the hostage situation, but he was outside of his cell despite warnings.[67] Prison officials were directed to shoot low at any prisoners in their path to the hostage situation.[68] After firing a warning shot, Albers was struck in the leg while walking up the stairs—which he claimed was to return to his cell and not to interfere with the release of the hostage.[69]

The Court held that the shooting did not violate the Eighth Amendment because the prison official had not acted wantonly to inflict pain but rather had responded to an urgent situation.[70] Thus, the Court set forth the standard that where a prison official is responding to an emergency, a prisoner can only assert an Eighth Amendment violation if the prison official acted "maliciously and sadistically for the very purpose of causing harm."[71] The Court held that a deliberate indifference standard was inadequate to accommodate the rapid decision-making and imme-

63. MUSHLIN, *supra* note 26, at 67.

64. *Id.*

65. *Id.*

66. *Id.* (citing Whitley v. Albers, 475 U.S. 312 (1986)).

67. *Whitley*, 475 U.S. at 314, 316.

68. *Id.*

69. *Id.* at 316, 325.

70. *See* Richard D. Nobleman, Wilson v. Seiter*: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 284 (1992) (citing *Whitley*, 475 U.S. at 319, 324).

71. MUSHLIN, *supra* note 26, at 68 ("If this showing could not be made, the Court held, an Eighth Amendment violation did not occur because the force was applied in a good faith effort to maintain or restore discipline.") (internal quotation marks omitted).

diate action that prison officials must take in emergency situations, emphasizing the need to extend significant deference to prison officials during a riot.[72]

Taken together, *Estelle*, *Rhodes*, and *Whitley* suggested that three different standards existed under the Eighth Amendment and the applicability of each depended on the circumstances of the alleged violation. Claims challenging prison officials' actions in isolated incidents needed to demonstrate that the defendant had acted with subjective "deliberate indifference" under the standard set forth in *Estelle*. Alternatively, general conditions of confinement were analyzed under the objective test applied in *Rhodes*. Finally, the heightened standard of subjective maliciousness described in *Whitley* was applied to actions of prison officials during a riot. The Court then turned to *Wilson v. Seiter* and attempted to resolve these conflicting decisions[73] and clarify the applicable standard for Eighth Amendment claims involving prison conditions.

C. *WILSON V. SEITER*: SYNTHESIZING THE SUPREME COURT'S EIGHTH AMENDMENT DECISIONS

The Court attempted to harmonize its prior Eighth Amendment decisions in *Wilson v. Seiter*.[74] In *Wilson*, a state prisoner alleged that several conditions of his confinement, such as overcrowding and unsanitary dining facilities,[75] violated the Eighth Amendment.[76] Writing for the majority, Justice Scalia held that plaintiffs alleging Eighth Amendment violations must show that

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72. *See* John Simon, Case Comment, *Reviewing the Excessive Force Standard*, U. CIN. L. REV. (Nov. 17, 2018), https://uclawreview.org/2018/11/17/reviewing-the-excessive-force-standard [https://perma.cc/WHE9-Q4AS] ("Circuits acknowledge that the prison official maintain significant deference because of the daily threats existing in a prison").

73. *See* Wilson v. Seiter, 501 U.S. 294 (1991); *see also* Arthur B. Berger, Wilson v. Seiter*: An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 584–86 (1992).

74. MUSHLIN, *supra* note 26, at 69 (citing Wilson v. Seiter, 501 U.S. 294 (1991)).

75. *Id.*

76. *See* Brenna Helppie-Schmieder, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?*, 110 NW. U. L. REV. 647, 656 n.63 (2016) (noting that Wilson also complained of other intolerable conditions of the prison environment, such as excessive noise and mentally and physically ill inmates) (citing *Wilson*, 501 U.S. at 296).

the conditions are objectively cruel and unusual, as well as the result of subjectively culpable acts by agents of the state.[77] Refusing to acknowledge that the subjective component would make it exceedingly difficult for prison condition case plaintiffs to prevail, the Court nevertheless held that such claims required a showing of "deliberate indifference" by prison officials.[78] However, unlike *Estelle*, the Court did clarify that deliberate indifference fell somewhere between "mere negligence" and acting "maliciously and sadistically for the very purpose of causing harm."[79] Nevertheless, showing deliberate indifference to satisfy the subjective component complicates a prisoner's Eighth Amendment claim to this day,[80] due to the twin challenges of establishing the requisite mental intent, and limited judicial elaboration on the exact definition of "deliberate indifference."[81]

1. The Objective Prong: Defining Cruel and Unusual

After *Wilson*, prisoners are required to satisfy the two-pronged test set forth in *Wilson* in order to assert a claim that prison conditions violated the Eighth Amendment.[82] Regardless of the specific factual context from which the claim arises—whether it developed due to lack of medical care, inedible food, or other alleged conditions—the plaintiff first needs to show that, objectively, those conditions were cruel and unusual.[83] Thus, the plaintiff is required to demonstrate a risk of "serious harm" that is "sufficiently substantial."[84]

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77. *See id.* at 656–57 (citing *Wilson*, 501 U.S. at 303–05).

78. MUSHLIN, *supra* note 26, at 71.

79. Helppie-Schmieder, *supra* note 76, at 657 (quoting *Wilson*, 501 U.S. at 305).

80. For example, a plaintiff alleging that he was denied dental care for five months which led to pain, tooth decay, and oral bleeding nevertheless failed to assert an Eighth Amendment claim because he did not allege sufficient facts to prove that the defendants were deliberately indifferent to any serious medical need. Coleman v. Stevenson, C/A No. 0:09-872-HMH-PJG, 2010 WL 2990737, at *5 (D.S.C. June 22, 2010), *aff'd*, 407 F. App'x 709 (4th Cir. 2011); *see also* Arnett v. Snyder, 769 N.E.2d 943, 950 (Ill. App. Ct. 2001) ("[P]laintiffs did not present any evidence to indicate the prison officials were deliberately indifferent to plaintiffs' health or welfare.").

81. MUSHLIN, *supra* note 26, at 93.

82. *Id.* at 71.

83. *See* Helppie-Schmieder, *supra* note 76, at 655.

84. *Id.*

The Court further elaborated on the objective prong through a series of cases, including *Hudson v. McMillian*.[85] There, the Court held that since discomfort is encapsulated in the "penalty that inmates pay for their offenses against society," a prisoner must establish that the conditions cause "extreme deprivations."[86] Then, in *Helling v. McKinney*, the Court also made clear that a deprivation is sufficiently serious if it denies a basic human need or minimal civilized necessities for life, such as nutritious food, adequate shelter, and opportunities to engage in exercise or maintain personal hygiene.[87]

Today, the Eighth Amendment generally protects against cruel and unusual punishment by ensuring that "it is not inconsistent with societal standards, that is, neither shocking per se to the contemporary conscience nor grossly disproportionate to the wrong committed."[88] What constitutes cruel and unusual punishment is not fixed, but rather reflects the "notions of the

85. *See* 503 U.S. 1 (1992).

86. MUSHLIN, *supra* note 26, at 73–74 (citing Hudson v. McMillian, 503 U.S. 1 (1992)); *see also* Johnson v. Williams, 768 F. Supp. 1161, 1167 (E.D. Va. 1991) (concluding that restrictions imposed by prison officials that are harsher than usual are still constitutional, so long as they were implemented to further a legitimate governmental interest, such as maintaining order).

87. 509 U.S. 25, 32 (1993) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses . . . the Eighth Amendment."); *see also* Bach, *supra* note 34, at 9 (noting that prisons must provide the "minimal civilized measure of life's necessities") (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Wilson v. Seiter, 501 U.S. 294, 301 (1991) (rejecting the United States' argument that prison officials, acting in good faith, cannot be responsible for failure to "eliminat[e] . . . inhumane conditions"); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 949, n.264 (2009) ("Following *Rhodes*, courts have since extended the Eighth Amendment to prisoners' claims for, among other things, clean water, clean air, sufficient clothing and bedding, protection from extreme temperatures and excessive noise, adequate food, adequate sanitation, and opportunities for maintaining personal hygiene.") (citations omitted). Courts have previously found that the inability to access a shower due to limited physical capacity constituted deprivation of a basic need. *See* Montalvo v. Koehler, No. 90 CIV. 5218, 1992 WL 396220, at *5 (S.D.N.Y. Dec. 21, 1992). Courts have also found that failure to have established medical protocols for handling common chronic illnesses such as hypertension and diabetes deprived inmates of basic needs. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1210 (N.D. Cal. 1995).

88. HUBERT M. CLEMENTS, W.S. MCANICH & E.D. WEDLOCK, JR., S.C. DEP'T CORR., THE EMERGING RIGHTS OF THE CONFINED 12 (1972).

society at a given point in time of what is fair, just, and civilized."[89] Courts acknowledge that these notions "will continue to evolve and change with the progression of society in general."[90] Thus, the definition of cruel and unusual draws its meaning from "the evolving standards of decency that mark the progress of a maturing society."[91]

However, uncertainty regarding what conditions fall below such civilized minimums can make it challenging to know when *Wilson*'s objective prong is satisfied. The Eleventh Circuit noted that "[d]etermining when overall conditions of confinement are 'sufficiently serious' . . . involves the application of vague 'contemporary standards of decency' to an amorphous collection of circumstances, and it is often a very difficult task for a court to perform."[92] For guidance, courts will often refer to model standards proposed by organizations such as the American Bar Association (ABA), standards set forth by the United Nations (UN), or, most commonly, the American Correctional Association Manual of Correctional Standards (ACA Manual).[93] While not controlling,[94] these standards and guidelines can be particularly useful to courts in shaping the scope of what conduct falls outside our objective standards of decency.

With regard to the use of disciplinary diets such as nutraloaf, the UN and ACA Manual take the view that food should not be used as punishment.[95] Further, although the ABA allows

89. *Id.* at 103–04.

90. *Id.* at 104.

91. Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (describing the fundamental principle of the Eighth Amendment as "the dignity of man").

92. Bach, *supra* note 34, at 4 (quoting Jordan v. Doe, 38 F.3d 1559, 1567 (11th Cir. 1994)).

93. MUSHLIN, *supra* note 26, at 86–87; *see, e.g.*, Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974) (looking to ACA Manual and UN Standards); Cunningham v. Jones, 567 F.2d 653 (6th Cir. 1977) (consulting ACA Manual); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975) (considering Guidelines for Jail Operations of the National Sheriffs' Association, ACA Manual, and the Corrections Manual of the National Advisory Commission on Criminal Justice Standards and Goals); Lareau v. Manson, 651 F.2d 96, 106 (2d Cir. 1981) (citing ACA standards "to inform [the Court] of contemporary standards" on permissible square footage allotments).

94. Amanda Chan & Anna Nathanson, *"Not for Human Consumption": Prison Food's Absent Regulatory Regime*, 29 WM. & MARY BILL RTS. J. 1009, 1039 (2021) (noting that, while "instructive," these materials merely "establish goals"; "they simply do not establish the constitutional minima") (quoting Bell v. Wolfish, 441 U.S. 520, 543–44 n.27 (1979)).

95. *See* The Mandela Rules, *supra* note 29, at 13 (requiring "nutritional"

for the use of alternative meals for inmates in segregated housing, the food must nevertheless be healthful and palatable, suggesting that its quality may not be lowered for the purposes of punishment.[96] Although these standards do not condemn the use of nutraloaf explicitly, they are nevertheless helpful guidance for courts when attempting to ascertain society's values and expectations for the treatment of prisoners.

2. The Subjective Prong: Requisite Mental Intent

In addition to satisfying the objective prong, the *Wilson* test also requires the plaintiff to satisfy the subjective prong by showing that prison officials had the requisite mental intent of "deliberate indifference."[97] The Court elaborated in *Farmer v. Brennan* that deliberate indifference can be shown by prison officials who know, or should know, that conditions objectively fall below civilized standards.[98] Thus, where a condition is obviously harmful and serves no deterring or reformatory purpose, the requisite state of mind can be inferred.[99]

The subjective prong creates an enormous hurdle for prisoners alleging Eighth Amendment violations. For example, in *Blair v. Raemisch*, plaintiff Jerry Blair alleged that he was unable to eat a restricted diet because it made him sick, causing him to suffer from stomach cramps, vomiting, and gastrointestinal pain.[100]

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and "wholesome" food); *Standards for Adult Local Detention Facilities*, 2 AM. CORR. ASS'N, 62 (1981), https://www.ojp.gov/pdffiles1/Digitization/83419NCJRS.pdf [https://perma.cc/UG9L-4LF6] (urging prisons to adopt "[w]ritten polic[ies] preclude[ing] the use of food as a disciplinary measure").

96. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 81 (3d ed. 2011).

97. Wilson v. Seiter, 501 U.S. 294, 297 (1991).

98. MUSHLIN, *supra* note 26, at 91–94 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

99. *Id.* at 92–93. For instance, in *Wellman v. Faulkner,* non-English speaking inmates were repeatedly denied medical care, resulting in a worsening of illnesses and even death. 715 F.2d 269, 273–74 (7th Cir. 1983). Finding deliberate indifference through prison officials' repeated failures to act, the Court held that "given the gross deficiencies in staffing, the shocking delays in treatment and the ongoing severe problems in stocking needed supplies," prisoners' Eighth Amendment rights had been violated. *Id.* Thus, *Wellman* illustrates how plaintiffs must establish a thorough record of harmful treatment resulting in unnecessary suffering in order for courts to find deliberate indifference.

100. 804 F. App'x 909, 918 (10th Cir. 2020). It is also not uncommon for prisoners with food allergies to face significant challenges in obtaining a special diet of foods that are safe for them to eat. *See* Jamie Longazel & Rachel Archer, *The*

Blair, like most Eighth Amendment claimants, sought injunctive relief and damages.[101] However, the district court concluded that Blair had not alleged that prison officials had knowledge of Blair's digestion issues, nor that the restricted diet was exacerbating them.[102] Thus, failing on the subjective prong of the Eighth Amendment analysis, the case was dismissed.[103]

Blair v. Raemisch, and many similar cases, demonstrate how *Wilson* dramatically increased a plaintiff's burden in bringing an Eighth Amendment violation claim.[104] The subjective prong is exceedingly difficult to meet due to the inherent difficulty of establishing a prison official's mental state through conduct and circumstances,[105] causing many claims to fail on this step of the *Wilson* test. As Justice White aptly noted in his *Wilson* concurrence, prison conditions are often "the result of cumulative actions and inactions by numerous officials inside and outside a prison," and thus "it is far from clear whose intent should be examined."[106] Thus, the test has been sharply criticized for

Inadequacy of Prison Food Allergy Policies, PRISON LEGAL NEWS (Apr. 15, 2014), https://www.prisonlegalnews.org/news/2014/apr/15/the-inadequacy-of-prison-food-allergy-policies [https://perma.cc/X2ZH-DXGZ] (noting that "[m]any states require that an allergy be verifiable and documented, and that written medical proof be provided," in order for prisoners to get special dietary foods) (internal quotation marks omitted)).

101. *Blair*, 804 F. App'x at 909. Importantly, when a prisoner challenges harsh treatment "that has occurred in the past, whether that treatment is caused by an individual corrections official or by a set of prison policies, customs, or practices, the prisoner may obtain only monetary damages." Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1584 (2012).

102. *Blair*, 804 F. App'x at 920.

103. *Id.*

104. *Cf.* David Heffernan, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 501 (1996) (arguing that *Farmer*'s "deliberate indifference" standard impedes prisoners' ability to redress Eighth Amendment violations).

105. *See, e.g.*, Gardner v. Beale, 780 F. Supp. 1073, 1076 (E.D. Va. 1991) ("There is no evidence in the record to support a finding of deliberate indifference . . . Plaintiff's complaint and affidavits do not create an issue of material fact to warrant a trial on an [E]ighth [A]mendment claim.") (holding that providing prisoners with two meals per day, rather than three, is constitutional), *aff'd*, 998 F.2d 1008 (4th Cir. 1993).

106. Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of* Estelle v. Gamble, 21 VT. L. REV. 379, 392–93 (1996) (citing Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring)).

effectively removing "any realistic opportunity to prevent or redress violations of [prisoners'] Eighth Amendment rights."[107]

In sum, the *Wilson* two-part test has developed to require that plaintiffs alleging Eighth Amendment violations must first show that they suffered a deprivation that is sufficiently serious, satisfying the objective prong.[108] Then, the plaintiff must also demonstrate that the official responsible for imposing that deprivation acted with a sufficiently culpable state of mind of deliberate indifference, satisfying the subjective prong. Part II will explore the *Wilson* test through cases specifically involving disciplinary diets, and demonstrate how courts have applied the Eighth Amendment analysis to cases involving nutraloaf.

II. FOOD AS PUNISHMENT

When a state decides to imprison an individual, it assumes responsibility for their wellbeing, as incarceration in many ways deprives prisoners of the opportunity to meet their own basic needs.[109] Correctional facilities must therefore ensure that certain minimum necessities are fulfilled, including "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and wellbeing of the inmates who consume it."[110]

However, for as long as prisons have existed, food has been used as a mechanism of control through reward and punishment.[111] Although past diets administered as a means of punish-

107. Heffernan, *supra* note 104, at 502 (quoting *The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 231, 240 (1994)).

108. Dolovich, *supra* note 87, at 889–90 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

109. MUSHLIN, *supra* note 26, at 243.

110. *Id.* (citing Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)).

111. *See* Spanos, *supra* note 41, at 230 ("Historically, [prison] food was . . . a tool to foster obedience.") (citing MARY BOSWORTH, THE U.S. FEDERAL PRISON SYSTEM 73–77 (2002)); *see also* Christopher Zoukis, *Use of Nutraloaf on the Decline in U.S. Prisons*, PRISON LEGAL NEWS (Apr. 2016), https://www.prisonlegalnews.org/news/2016/mar/31/use-nutraloaf-decline-us-prisons [https://perma.cc/SEJ6-9TKF] ("Using food as punishment has been a practice in American prisons since the nineteenth century, when bread and water diets were a common tool for making prisoners behave.").

ment, including the bread and water diet[112] and grue,[113] have since been ruled unconstitutional, one punishment diet persists in many jurisdictions today: nutraloaf.[114]

Part II discusses constitutional issues surrounding food in prison. First, Part II describes prison food as a basic right of confined individuals. Next, this Part highlights historical uses of food as punishment, constitutional challenges to such disciplinary measures, and the punishment diets that have been deemed unconstitutional. Finally, Part II explains the nutraloaf diet and summarizes prominent cases arguing that nutraloaf constitutes cruel and unusual punishment.

A. FOOD IN PRISONS AND THE EIGHTH AMENDMENT

Prisons are notorious for serving prisoners highly processed, low-quality meals[115] with some spending on average less than a dollar per meal.[116] While plenty of prisoners have brought legal challenges regarding the quality of food in prisons,[117] the vast majority are unsuccessful,[118] leaving correctional facilities with few incentives to improve prison food service.[119]

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112. Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971) ("[T]he bread and water diet is inconsistent with current minimum standards of respect for human dignity. The Court has no difficulty in determining that it is a violation of the [E]ighth [A]mendment.").

113. "Grue" is a potato-based substance produced by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste. The Supreme Court held that grue could constitute cruel and unusual punishment if continued for extended periods of time in *Hutto v. Finney*. 437 U.S. 678, 686–87 (1978). The use of grue in prisons was thereafter discontinued. Zoukis, *supra* note 111.

114. Nutraloaf is typically made by blending and baking an assortment of ingredients including bread, potatoes, non-dairy cheese, beans, fruits, and vegetables. Greenwood, *supra* note 16.

115. *See generally Correcting Food Policy in Washington Prisons*, PRISON VOICE WASH. (Oct. 26, 2016), https://washingtoncorrectionswatch.files.wordpress.com/2020/11/final_correcting-food-policy-in-wa-prisons_prison-voice-wa.pdf [https://perma.cc/Q4L7-2W88].

116. *See, e.g.*, Brianna Bailey, *Oklahoma Spends Less Than a Dollar a Meal Feeding Prisoners*, FRONTIER (Oct. 20, 2020), https://www.readfrontier.org/stories/oklahoma-spends-less-than-a-dollar-a-meal-feeding-prisoners [https://perma.cc/2AZB-H4LT].

117. *See, e.g.*, Paul Nelson, *Lawsuit Says Jail Skimps on Food*, TIMES UNION (July 30, 2014), https://www.timesunion.com/local/article/Lawsuit-says-jail-skimps-on-food-5658245.php [https://perma.cc/XLF4-4V3X].

118. *See* Chan & Nathanson, *supra* note 94, at 1019 (describing the challenges prisoners face in asserting constitutional rights to adequate food, and noting that "[o]ften, courts throw prisoners' cases out").

119. *See generally* Nadra Nittle, *As COVID-19 Ups the Stakes, Advocates Say*

1. Prison Food Generally

Prisons essentially function as out-of-sight food deserts—areas with limited access to affordable, nutritious, and wholesome foods.[120] Although community development projects across the country have sought to bring fresh,[121] affordable foods to areas with limited access, nutrition in prisons is generally overlooked. Prisons perpetuate patterns of poor health outcomes among populations that already experience profound health disparities.[122] With a skyrocketing number of people in prisons to feed, from half a million in 1980 to over 2.3 million today, the quality of prison food nationwide is poor and has long been declining.[123] Meals in prisons are frequently high in salt, sugar, and refined carbohydrates and low in essential nutrients, the exact opposite of what governmental health agencies recommend.[124] For example, a typical breakfast may consist of "a carton containing dry cereal, sliced white bread, a bran bar, and a muffin . . . jelly packets . . . powdered milk and a packet of peanut butter,"[125] and lunch may include deli meat, bread, mayo or mustard, tortilla chips, and a cookie.[126] Just one month of unhealthy meals can result in long-term rises in cholesterol and body fat, increasing the risk of diet-related diseases.[127]

Prison Food Needs an Overhaul, CIV. EATS (Jan. 21, 2021), https://civileats.com/2021/01/21/as-covid-19-ups-the-stakes-advocates-say-prison-food-needs-an-overhaul [https://perma.cc/V6RU-YERA] (noting that prisons are under pressure to cut costs, leading to smaller portions and poorer meal quality).

120. *See, e.g.*, Kristian Larsen & Jason Gilliland, *A Farmers' Market in a Food Desert: Evaluating Impacts on the Price and Availability of Healthy Food*, 15 HEALTH & PLACE 1158, 1158 (2009) (defining food desert as "socially distressed neighborhoods with poor access to healthy food").

121. *E.g.*, *Healthy Neighborhood Market Network*, L.A. FOOD POL'Y COUNCIL, https://www.goodfoodla.org/healthyneighborhoodmarketnetwork [https://perma.cc/4ZCY-D3AM] (describing a program helping to bring affordable, whole foods to small markets and corner stores in low-income communities).

122. *See* CAMPLIN, *supra* note 27, at 42 ("Many of the young people that end up in prison grew up hungry or in food deserts."); Soble et al., *supra* note 20, at 37 (citing a recent report from the Bureau of Justice Statistics which found that "incarcerated people suffer from higher rates of diabetes and heart disease . . . than the general public. Whether people enter prison with these health issues or develop them while incarcerated, the typical prison diet exacerbates those conditions.") (citations omitted).

123. Sobel et al., *supra* note 20, at 16.

124. *Id.*

125. *Id.* at 30.

126. *Id.* at 31.

127. *Id.* at 16 (citing Åsa Ernersson, Fredrik H. Nystrom & Torbjörn

Further, outside of prisons, large-scale kitchens across the country are obligated to meet strict health and safety standards.[128] They are also are subject to inspections and must remedy violations or risk being shut down by the health department.[129] However, food in prison is not subject to the same rigorous oversight.[130] Rather, the rules of prison nutrition are a muddled assortment of state and local policies combined with the jurisdiction's applicable court decisions.[131] For example, in Texas, a law requires that county jails provide incarcerated individuals with three meals a day, but the law does not cover state prisons.[132] Thus, correctional institution foodservice programs vary, and not simply by state or by county, rather *every facility* has different guidelines that they follow to create menus with nutritionally and calorically sufficient meals that fit within budget constraints.[133] Additionally, food in prison is generally self-regulated by correctional facilities that compare their own practices against "industry standards."[134]

Lindström, *Long-Term Increase of Fat Mass After a Four Week Intervention with Fast Food Based Hyper-Alimentation and Limitation of Physical Activity*, 68 NUTRITION & METABOLISM 1,7 (2010)).

128. *Id.* at 93.

129. *Id.*

130. *Id.*

131. *See, e.g.*, 37 TEX. ADMIN. CODE § 281.1 (2022) ("Food shall be served three times in any twenty-four-hour period. No more than 14 hours shall pass between meals without supplemental food being served."); *see also Cruel and Usual: A National Prisoner Survey of Prison Food and Health Care Quality*, INCARCERATED WORKERS ORG. COMM. & RSCH. ACTION COOP. 1,7 (Apr. 2018), https://incarceratedworkers.org/sites/default/files/resource_file/iwoc_report_04-18_final.pdf [https://perma.cc/8QK4-KJ67] ("[T]he rules of prison nutrition come from a hodgepodge of state and local policies combined with layers of court decisions.").

132. 37 TEX. ADMIN. CODE § 281.1 (2022).

133. CAMPLIN, *supra* note 27, at 42. The trend towards industrialization and privatization of prisons is also associated with worsening prison food quality. *See* Wendy Sawyer, *Food for Thought: Prison Food is a Public Health Problem*, PRISON POL'Y INITIATIVE (Mar. 3, 2017), https://www.prisonpolicy.org/blog/2017/03/03/prison-food [https://perma.cc/9HKZ-3TFS]. *See generally* Roland Zullo, *Food Service Privatization in Michigan's Prisons: Observations of Corrections Officers*, PRISON LEGAL NEWS (2016), https://www.prisonlegalnews.org/media/publications/Food%20Service%20Privatization%20in%20Michigans%20Prisons%20-%20Observations%20of%20Corrections%20Officers%2C%20Zullo%2C%202016.pdf [https://perma.cc/LC56-WFCK] (associating prison privatization with a decline in food quality, quantity, and sanitation as well as decreased safety and control).

134. CAMPLIN, *supra* note 27, at 50.

Although there are no national prison nutrition requirements, correctional facilities may opt to obtain certification with bodies such as the American Correctional Association (ACA) which has developed specific guidelines for the quality of food, kitchen sanitation, food service employee training, and other food safety procedures.[135]

In order to obtain ACA accreditation, a facility needs to meet one hundred percent of the applicable ACA mandatory standards, and at least ninety percent of the non-mandatory standards, although the ACA may waive certain standards under some circumstances.[136] Mandatory standards related to food include having dietary allowances reviewed at least annually by a qualified healthcare professional to ensure that they meet nationally recommended allowances for basic nutrition, and having all food service staff comply with all sanitation and health codes enacted by state or local authorities.[137] Non-mandatory food-related standards include providing adequate space for food preparation and service, as well as an eating area with seating for diners.[138]

Notably, these standards are not overseen by any government entity, and the ACA itself does not provide ongoing oversight or monitoring, but instead utilizes merely a "paper review" to verify whether a facility is in compliance.[139] The ACA asserts that accreditation may provide correctional facilities "a stronger defense against litigation through documentation and the demonstration of a 'good faith' effort to improve conditions of confinement."[140] Correctional facilities may therefore seek ACA accreditation because courts frequently consider these guidelines as indicators of society's "evolving standards of decency."[141]

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135. *Id.* For more information on ACA accreditation, see generally COMM'N ON ACCREDITATION FOR CORR., AM. CORR. ASS'N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003).

136. Alex Friedmann, *How the Courts View ACA Accreditation*, PRISON LEGAL NEWS (Oct. 10, 2014), https://www.prisonlegalnews.org/news/2014/oct/10/how-courts-view-aca-accreditation [https://perma.cc/AHV5-FXRE].

137. *See 2016 Standards Supplement*, COMM'N ON ACCREDITATION FOR CORRS., AM. CORR. ASS'N 12–13 (2016), https://www.aca.org/common/Uploaded%20files/2016%20Standards%20Supplement.pdf [https://perma.cc/SP9H-6EQH].

138. *Id.* at 13.

139. Friedmann, *supra* note 136.

140. *Id.*

141. *See supra* Part I.C.1. *But see* Gates v. Cook, 376 F.3d 323, 337 (5th Cir. 2004) (noting that it is "absurd to suggest that the federal courts should subvert

Thus, courts may be more willing to hold prison conditions in compliance with ACA standards as constitutional.

Significantly, although the ACA "discourages using food as a disciplinary measure,"[142] the rule is voluntary and an institution may still maintain its accreditation even if their prisoners are subject to a restricted diet as punishment, such as nutraloaf.[143]

2. Legal Challenges of Prison Food

As noted previously, prison kitchens are largely self-regulated, making it exceptionally difficult for inmates to challenge the quality, safety, or adequacy of the food provided.[144] This leaves prisoners with limited pathways to file complaints other than through litigation alleging constitutional violations,[145] most commonly, Eighth Amendment violations.[146]

Filing a lawsuit in and of itself can be a lengthy and expensive process. Even if a prisoner is able to afford and properly self-file a lawsuit regarding prison conditions,[147] there is little guar-

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their judgment as to alleged Eighth Amendment violations to the ACA whenever it has relevant standards"); Grenning v. Miller-Stout, 739 F.3d 1235, 1241 (9th Cir. 2014) (holding that ACA accreditation does not entitle defendants to summary judgment on a prisoner's Eighth Amendment claim); Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979) (stating that ACA standards "may be instructive in certain cases, they simply do not establish the constitutional minima"). Additionally, most insurance companies reduce liability rates for accredited facilities, providing another financial incentive to seek ACA accreditation. *See* Friedmann, *supra* note 136.

142. CAMPLIN, *supra* note 27, at 65 (internal quotation marks omitted).

143. Matthew Purdy, *What's Worse Than Solitary Confinement? Just Taste This*, N.Y. TIMES: OUR TOWNS (Aug. 4, 2002), https://www.nytimes.com/2002/08/04/nyregion/our-towns-what-s-worse-than-solitary-confinement-just-taste-this.html [https://perma.cc/FQQ2-XLBV] (describing the nutraloaf diet as "[t]he ultimate discipline," and "a last resort," used when "there's nothing left to take away").

144. CAMPLIN, *supra* note 27, at 58.

145. SALVADOR JIMENEZ MURUGÍA, FOOD AS A MECHANISM OF CONTROL AND RESISTANCE IN JAILS AND PRISONS: DIETS OF DISREPUTE 11 (2018).

146. *Id.*

147. Common Eighth Amendment challenges of prison conditions include inadequate healthcare, use of excessive force, sexual abuse, solitary confinement, and poor-quality food. *E.g.*, Brown v. Plata, 563 U.S. 493, 502–06 (2011) (prison overcrowding and inadequate healthcare); Gamez v. Ryan, No. CV-12-0760-PHX-RCB, 2013 WL 3335211, at *2 (D. Ariz. July 2, 2013) (excessive force by prison officials); Crawford v. Cuomo, 796 F.3d 252, 254 (2d Cir. 2015) (sexual abuse of inmates by prison officials); Foster v. Runnels, 554 F.3d 807, 811 (9th Cir. 2009) (denial of food); Porter v. Clarke, 923 F.3d 348, 353 (4th Cir. 2019)

antee these grievances will be rectified.[148] The success rate of these legal complaints filed by inmates is by some estimates as low as six percent.[149]

The Eighth Amendment standard for cruel and unusual punishment is a notoriously high bar, resulting in most prison food cases being unsuccessful.[150] This may be explained in part by the fact that prisoner civil rights cases are time-consuming and costly, making it difficult for prisoners to retain legal counsel and instead forcing them to represent themselves pro se.[151] Courts are often unwilling to hear, if not overtly hostile towards, pro se prisoner plaintiffs and reject their claims with significant frequency.[152] Across several cases, the deprivation of food as punishment has been upheld, even where a prisoner was refused almost fifty meals over a five-month period[153] or experienced the loss of over forty-five pounds as a result of missed meals.[154]

In sum, the self-regulating nature of prisons, the challenge of trying to regulate prison facilities "from the bottom up" by using lawsuits,[155] and courts being generally unreceptive to prison

(solitary confinement); Williams v. Hull, No. CA 08-135, 2009 WL 1586832, at *2 (W.D. Pa. June 4, 2009) (poor-quality food).

148. CAMPLIN, *supra* note 27, at 58 ("And these lawsuits, usually self-filed, rarely go anywhere.").

149. *Id.* (citing Cyrus Naim, Prison Food Law (Spring 2005) (Master's Thesis, Harvard University)), http://nrs.harvard.edu/urn-3:HUL.InstRepos:8848245 [https://perma.cc/BN2Q-B8PX].

150. *See supra* Part I.C.

151. Eighth Amendment complaints are overwhelmingly made pro se. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 165–67 (2015) ("Prisoner plaintiffs . . . lose more often than other plaintiffs.").

152. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 37 (2002) (noting that pro se litigants "typically receive a hostile reception from overworked court staff who feel put-upon by having to educate them about the system and from agitated judges, frustrated by the lack of counsel").

153. MUSHLIN, *supra* note 26, at 250 (citing Talib v. Gilley, 921 F.2d 191 (8th Cir. 1990)).

154. CAMPLIN, *supra* note 27, at 59–60 (citing Freeman v. Berge, 441 F.3d 543 (7th Cir. 2006)).

155. *Id.* at 58; *see also* White v. Gregory, 1 F.3d 267, 269 (4th Cir. 1993) (holding that plaintiff's allegation that he was receiving two, rather than three, meals per day was not forbidden by the Eighth Amendment); Gardner v. Beale, 780 F. Supp. 1073, 1075 (E.D. Va. 1991) (holding that providing only two meals per day, even where in violation of the prison's meal service manual, does not constitute cruel and unusual punishment), *aff'd*, 998 F.2d 1008 (4th Cir. 1993).

food challenges results in these claims remaining largely unheard, and leaves prisoners without options for relief.

B. PUNISHMENT DIETS DEEMED UNCONSTITUTIONAL

Prisoners alleging that the food they are served violates the Eighth Amendment face tremendous burdens and are unlikely to be successful. However, there are a few notable cases where courts have found food as punishment to be unconstitutional.

1. *Landman v. Royster*: The Bread and Water Diet

In *Landman v. Royster*, plaintiffs alleged that prison officials had violated the Eighth Amendment by subjecting them to a diet consisting only of bread and water which provided a daily caloric intake of just seven hundred calories.[156] Although this decision preceded the *Wilson* holding and thus did not consider plaintiff's Eighth Amendment claim under the *Wilson* two-part test, the court nevertheless engaged in an analysis similar to the objective prong.[157]

The court noted that the bread and water diet resulted in physical harm, made evident by the substantial weight lost by those subjected to the diet.[158] Importantly, the court also noted that the deprivation of adequate food, a fundamental necessity, served no purpose of ensuring safety and security, but rather amounted to unnecessary infliction of pain.[159]

Additionally, the court cited the ACA's Manual of Correctional Standards, which "strongly disapproves any disciplinary diet which impairs health," as evidence of its obsolescence.[160] The *Royster* court went on to conclude that the bread and water diet is inconsistent with the "current minimum standards of respect for human dignity."[161] Thus, the court had "no difficulty in determining that it is a violation of the Eighth Amendment."[162]

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156. Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971) ("Bread and water provides a daily intake of only seven hundred calories, whereas sedentary men on the average need 2000 calories or more to maintain continued health"), *supplemented*, 354 F. Supp. 1302 (E.D. Va. 1973).

157. Recall that the objective component considers whether the alleged deprivation was sufficiently serious to constitute cruel and unusual punishment. Wilson v. Seiter, 501 U.S. 294, 298 (1991).

158. *Royster*, 333 F. Supp. at 647.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

2. *Hutto* v. *Finney*: Grue

The Supreme Court addressed food deprivation as punishment in *Hutto v. Finney*.[163] There, the plaintiffs alleged that their diet of "grue"—a mixture of meat, potatoes, margarine, syrup, vegetables, eggs, and seasonings blended into a paste and baked into 4-inch squares—was unconstitutional.[164]

The *Hutto* case was decided before the *Wilson* two-prong test became the standard of analysis for such claims, but the Court nevertheless evaluated the allegations under the objective test set forth in *Estelle v. Gamble*.[165] Citing *Estelle*, the Court noted that the Eighth Amendment proscribes more than merely "physically barbarous punishments" but also punishments that "transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[166] The Court, making clear its disapproval of the use of grue, suggested that it may be "tolerable for a few days and intolerably cruel for weeks or months," upholding the Eighth Circuit's requirement that the grue diet be discontinued.[167]

3. Food Deprivation as Corporal Punishment

Although courts have frequently upheld deprivations of food as punishment as constitutional,[168] the Fifth Circuit recently considered a case where food was withheld as punishment for a prisoner's failure to comply with a particular prison rule. In *Cooper v. Sheriff, Lubbock County*, the prison required that inmates in solitary confinement be fully clothed to receive a meal, citing no penological purpose beyond general control over a prisoner's behavior. The plaintiff alleged that he had been deprived of food for thirteen days, twelve consecutively, because he had

163. 437 U.S. 678 (1978).

164. *Id.* at 683.

165. 429 U.S. 97 (1976).

166. Hutto v. Finney, 437 U.S. 678, 685 (1978) (internal quotation marks omitted).

167. *Id.* at 686–87; *see also* Finney v. Ark. Bd. Corr., 505 F.2d 194, 207–08 (8th Cir. 1974) ("There exists a fundamental difference between depriving a prisoner of privileges he may enjoy and depriving him of the basic necessities of human existence. We think this is the minimal line separating cruel and unusual punishment from conduct that is not. On remand, the district court's decree should be amended to ensure that prisoners . . . are not deprived of basic necessities including . . . a proper diet.") (citations omitted).

168. *See supra* Part II.A.2.

refused to be fully dressed before meals.[169] The court, disagreeing with this prison rule, explained that "depriving a prisoner of adequate food is a form of corporal punishment" and that the Eighth Amendment forbids withholding food for significant periods of time.[170]

The *Cooper* decision is a notable distinction from another Fifth Circuit decision in *Talib v. Gilley*, where the plaintiff's alleged Eighth Amendment claim for missing fifty meals over a five-month period was rejected.[171] There, the plaintiff had refused to follow a prison rule that required inmates confined for disciplinary reasons to kneel with their hands behind their back to receive their meal.[172] Contrary to prisoners having to be fully clothed or forgo a meal altogether, the court in *Talib* found that this prison rule served a rational purpose of preserving safety and security, which outweighed the deprivation.[173] Therefore, the *Cooper* holding provides an important illustration of how courts approach the use of food as punishment, and balance the level of deprivation it imposes against its rationale, such as safety.[174]

C. NUTRALOAF

Punitive diets such as nutraloaf can be described as "legally right on the line," with courts frequently holding that such diets are not violative of the Eighth Amendment, but are still often considered offensive to civilized norms.[175]

1. Perceptions of Nutraloaf Among Prisoners and the Public

Prisons have a long history of using food as a tool for punishment, but the use of nutraloaf is a more recent and certainly

169. MUSHLIN, *supra* note 26, at 250 (citing Cooper v. Sheriff, Lubbock Cty., Tex., 929 F.2d 1078, 1084 (5th Cir. 1991)).

170. *Cooper*, 929 F.2d at 1083.

171. 138 F.3d 211, 213 (5th Cir. 1998).

172. MUSHLIN, *supra* note 26, at 250 (citing Talib v. Gilley, 138 F.3d 211, 214 (5th Cir. 1998)).

173. Talib, 138 F.3d at 213 (5th Cir. 1998).

174. *See also* Rodriguez v. Briley, 403 F.3d 952, 952 (7th Cir. 2005) (holding that food deprivation for failure to comply with a rule requiring that prisoners keep their personal belongings in a provided box that intended to "facilitate searches of the cell, and in other ways as well promote safety and security" was constitutional despite plaintiff missing over three hundred meals over eighteen months and losing ninety pounds).

175. *See* Zoukis, *supra* note 111 (quoting David C. Fathi, Director, ACLU National Prison Project).

controversial phenomenon.[176] Grue, as described in *Hutto v. Finney*,[177] is seemingly a precursor to the nutraloaf served in prisons today. Nutraloaf is an unappetizing combination of ingredients that is blended and baked into a brick-like loaf that, unlike grue, meets minimum nutritional requirements.[178]

Although there is no exact recipe,[179] nutraloaf commonly contains conflicting flavors and mixtures of off-putting textures[180] that are so unappealing to prisoners that they would "rather go hungry."[181] Prisoners' characterization of nutraloaf being tasteless and deeply unpleasant[182] has been corroborated by food critics[183] and other amateur taste testers on popular media plat-

176. *See, e.g.*, JIMENEZ MURGUÍA, *supra* note 145, at 35 (describing the use of food as a component of punishment in prisons as early as 1863).

177. Hutto v. Finney, 437 U.S. 678, 683 (describing grue as a blend of meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning); *see also* Part II.B.2.

178. JIMENEZ MURGUÍA, *supra* note 145, at 35.

179. Prude v. Clarke, 675 F.3d 732, 734 (7th Cir. 2012) ("'Nutriloaf' isn't a proprietary food like Hostess Twinkies but, like 'meatloaf' or 'beef stew,' a term for a composite food the recipe of which can vary from institution to institution, or even from day to day within an institution.").

180. *See, e.g.*, JIMENEZ MURGÍA, *supra* note 145, at 35 (explaining that most nutraloafs contain bread, vegetables, and sometimes fruits, and other "traditionally unrelated ingredients" such as garlic, raisins, non-dairy cheese, beans, and powdered milk).

181. Spanos, *supra* note 41, at 240 (quoting Wilson Ring, *Prison Calls It Food, Inmates Disagree*, HUFFINGTON POST (Mar. 23, 2008), http://www.huffingtonpost.com/2008/03/23/prison-calls-it-foodinman92953.html [https://perma.cc/T6GF-8M23].

182. Barclay, *supra* note 13 (recounting prisoner descriptions of nutraloaf as "bland, like cardboard" and that they "would have to be on the point of dizziness" in order to eat it).

183. *See, e.g.*, Arin Greenwood, *Taste-Testing Nutraloaf*, SLATE (June 24, 2008), https://slate.com/news-and-politics/2008/06/can-prison-food-be-unconstitutionally-bad.html [https://perma.cc/2NG7-3APT] ("It was dense and dry and tasted like falafel gone wrong."); Adam Cohen, *Can Food Be Cruel and Unusual Punishment?*, TIME (Apr. 2, 2012), https://ideas.time.com/2012/04/02/can-food-be-cruel-and-unusual-punishment [https://perma.cc/JWX8-LSLR] (stating that nutraloaf is "somewhere on the spectrum from unpleasant to vomit inducing").

forms such as YouTube[184] and BuzzFeed.[185] One food critic colorfully described nutraloaf as "a thick orange lump of spite with the density and taste of a dumbbell"[186] and a lawyer who sampled the nutraloaf recipe used in Illinois prisons recounted that "even the smallest test slice . . . gave [her] a stomachache."[187]

Nutraloaf is commonly imposed upon prisoners that have misused food or misbehaved in the dining hall,[188] but may also be served to inmates held in solitary confinement or for other disciplinary purposes.[189] It is generally served without utensils, forcing prisoners to eat it with their hands.[190]

Alongside the unpalatable nature and dehumanizing experience of eating nutraloaf, it has also been alleged to cause significant harm to the health of its recipients. Prisoners have recounted numerous ailments resulting from the punishing loaf, ranging from vomiting and diarrhea to gastrointestinal bleeding and substantial weight loss, among other adverse health outcomes.[191] Whether the cause of these ill-effects is the use of spoiled food,[192] its high fiber content,[193] or simply the unappetiz-

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184. *See, e.g.*, emmymade, *NUTRALOAF - Disciplinary Loaf - Prison Punishment Food - Recipe #1: Illinois*, YOUTUBE (Mar. 9, 2019), https://www.youtube.com/watch?v=pXus8Zeou7I (describing nutraloaf as "very bland"); emmymade, *NUTRALOAF Disciplinary Loaf - Prison Punishment Food - Recipe #2: Ohio*, YOUTUBE (June 3, 2019), https://www.youtube.com/watch?v=SwB0TbFhrCM (describing Nutraloaf as "not good at all" and its texture as "not pleasant" and "a lot like Playdoh"); BuzzFeedVideo, *Is This Prison Food Cruel and Unusual?*, YOUTUBE (June 12, 2015), https://www.youtube.com/watch?v=1bei7vlf56w ("It was like old, leathery meat with glue.").

185. BuzzFeedVideo, *supra* note 184 (depicting several young adults trying nutraloaf and immediately spitting it out).

186. Ruby, *supra* note 17.

187. Greenwood, *supra* note 183.

188. MUSHLIN, *supra* note 26, at 251 (citing LeMaire v. Maass, 745 F. Supp. 623, 633–35 (D. Or. 1990), *vacated on other grounds*, 12 F.3d 1444 (9th Cir. 1993).

189. CAMPLIN, *supra* note 27, at 64.

190. *Vermont Supreme Court: "Nutraloaf" Diet Is Punishment that Requires Hearing*, PRISON LEGAL NEWS (Aug. 15, 2009), https://www.prisonlegalnews.org/news/2009/aug/15/vermont-supreme-court-nutraloaf-diet-is-punishment-that-requires-hearing [https://perma.cc/L8VQ-YMQ7]; Greenwood, *supra* note 183.

191. *See supra* note 21 and accompanying text.

192. Prude v. Clarke 675 F.3d 732, 734 (7th Cir. 2012) ("[N]utriloaf could meet requirements for calories and protein one day yet be poisonous the next if, for example, made from leftovers that had spoiled.").

193. PRISON LEGAL NEWS, *supra* note 23 ("Nutraloaf is high in fiber and requires the prisoner to drink a lot of water to avoid constipation.").

ing character of nutraloaf is not entirely clear, but these negative impacts on prisoner health are nevertheless well-documented.[194]

2. Nutraloaf Cruel and Unusual Punishment Claims

Nutraloaf is no stranger to Eighth Amendment challenges. While dozens of cases involve claims that its use constitutes cruel and unusual punishment, the vast majority have been unsuccessful.[195] However, two notable decisions have shaped the legal landscape for similar claims and may provide a path towards the judiciary eliminating nutraloaf use entirely.

a. LeMaire v. Maass

One of the most notable and often cited cases challenging the use of nutraloaf is *LeMaire v. Maass*.[196] Samuel LeMaire was convicted of murder and sent to Oregon State Prison, where he had repeatedly and violently attacked prison guards and other inmates.[197] Later diagnosed with antisocial personality disorder and other mental health issues, LeMaire's erratic and aggressive behavior caused him to accumulate twenty-five rule violations within a two-year period.[198] Prison officials imposed multiple sanctions in an effort to reform LeMaire's behavior, including the use of nutraloaf "as part of a controlled feeding status designed to control inmates who throw or misuse food or human waste, or who fail to return meal trays or eating utensils."[199]

LeMaire contended that restricting his diet to only nutraloaf was a violation of the Eighth Amendment.[200] The court, reversing the determination of the district court, analyzed LeMaire's claim under the *Wilson* test and reasoned that "[n]utraloaf does not rise to the threshold level of a deprivation that satisfies" the objective prong.[201] Citing earlier decisions regarding prison food, the court stated that the Eighth Amendment requires that prisoners need only "receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing."[202] The court also distinguished nutraloaf from the use of grue which

194. *See supra* note 21 and accompanying text.
195. Barclay, *supra* note 13.
196. LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993).
197. *Id.* at 1147–49.
198. *Id.* at 1449.
199. *Id.* at 1449–50 (citations omitted).
200. *Id.* at 1455.
201. *Id.* at 1456.
202. *Id.* (citing Cunningham v. Jones, 567 F.2d 653, 659–60 (6th Cir. 1977)).

was deemed unconstitutional in *Hutto v. Finney*, noting that grue provided less than one thousand calories per day whereas nutraloaf exceeded nutritional requirements.[203] Further, unlike the plaintiffs in *Hutto*, LeMaire had gained, rather than lost, weight during his time in confinement, which the court considered further evidence of nutraloaf's nutritional adequacy.[204] However, whether weight gain actually indicates health or adequate nutrition is debated.[205]

Even though the court did not find the objective prong satisfied, it nevertheless considered the subjective prong as well. The court concluded that LeMaire "failed to show [prison officials] had a sufficiently culpable state of mind[.]"[206] The court went on to explain that LeMaire provided no evidence to support the notion that "the officials imposing [n]utraloaf were . . . deliberately indifferent to LeMaire's health or welfare[.]"[207] However, the court did not address whether the subjective prong would be satisfied if LeMaire had demonstrated that nutraloaf was causing him adverse health impacts of which prison officials were aware. Regardless, the court ultimately concluded that a temporary diet of nutraloaf "does not deny the minimal civilized measures of life's necessities,"[208] nor is it "incompatible with the evolving standards of decency that mark the progress of a maturing society."[209] Therefore, it does not form the basis for an Eighth Amendment claim.

The *LeMaire* decision captures a period of indifference, if not outright hostility,[210] towards plaintiffs alleging that nutraloaf,

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203. *Id.* (citing Hutto v. Finney, 437 U.S. 678, 686–87 (1978)).

204. *Id.*

205. Spanos, *supra* note 41, at 242–43 ("Whether or not weight gain is an indication of nutritional quality is up for debate, nevertheless the court was convinced that LeMaire was not being starved.").

206. *LeMaire*, 12 F.3d at 1456.

207. *Id.*

208. *LeMaire*, 12 F.3d at 1456 (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992)) (internal quotation marks omitted).

209. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

210. *See, e.g.*, United States v. Michigan, 680 F. Supp. 270, 275 (W.D. Mich. 1988) (holding that the use of nutraloaf is not per se unconstitutional, but declining to hold that all use of nutraloaf is constitutionally permissible); Smith v. Or. State Dep't of Corr., 792 P.2d 109, 110 (1990) (holding that nutraloaf did not constitute cruel and unusual punishment); *see also* BARRY M. LEVENSON, HABEAS CODFISH 203 (2001) ("Prisoner lawsuits over food are usually viewed with suspicion and scorn . . . . [M]ost of these are quickly and summarily dismissed by the courts."). *But see* Gilcrist v. Kautzky 1989 WL 61761, at *3 (9th Cir. 1989)

or prison food in general,[211] constitutes cruel and unusual punishment. However, two decades later, the Seventh Circuit would again consider nutraloaf through a seemingly more receptive lens.

b. Prude v. Clark

In 2012, Terrance Prude brought a claim in the Seventh Circuit alleging that nutraloaf establishes an Eighth Amendment violation.[212] Although Prude was serving time in a Wisconsin state prison, he had been transferred on several occasions to a county jail where he was provided only with nutraloaf for each meal.[213]

In contrast to *LeMaire*, Prude alleged a litany of appalling health issues he suffered after being placed on the nutraloaf diet, including stomach pains, constipation, severe vomiting, bloody stools, a painful anal fissure, and the loss of over eight percent of his bodyweight.[214] The *Prude* court reasoned that the symptoms experienced by Prude, as well as the fact that others in the jail served nutraloaf had also vomited after eating it, was evidence of "[d]eliberate withholding of nutritious food or substitution of tainted or otherwise sickening food," in violation of the Eighth Amendment.[215] However, the court stopped short of suggesting that all nutraloaf is unconstitutional, but rather only where there is actual injury.[216]

The court's decision in *Prude* is significant, not only because it spurred dozens of other cases challenging nutraloaf in 2012 alone,[217] but also because it reaffirms that when food is provided to prisoners and causes adverse health effects, and where prison officials acted with deliberate indifference to those effects, it

(acknowledging that nutraloaf constitutes "lowering of the quality of prison food as punishment").

211. *See, e.g.*, Hamm v. DeKalb Cnty., 774 F.2d 1567, 1575 (11th Cir. 1985) ("The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation.").

212. Prude v. Clark, 675 F.3d 732 (7th Cir. 2012).

213. *Id.* at 733.

214. *Id.* at 733–34.

215. *Id.* at 734 ("Deliberate withholding of nutritious food or substitution of tainted or otherwise sickening food, with the effect of causing substantial weight loss, vomiting, stomach pains . . . or other severe hardship, would violate the Eighth Amendment.").

216. *Id.*

217. *See* Barclay, *supra* note 13.

gives rise to an Eighth Amendment claim.[218] Further, the court did not explicitly consider whether nutraloaf satisfies the objective component of the *Wilson* Eighth Amendment analysis, suggesting the court tacitly acknowledged that nutraloaf is in fact punishment, as other courts have previously recognized.[219]

Prisons have a long, sordid history of using of food as a disciplinary measure.[220] While specific punishment diets have since been deemed to fall below our civilized minimums,[221] nutraloaf has almost entirely escaped this same fate. However, the *Prude* decision, alongside society's shifting perspectives on the purposes of punishment, pave the way towards eliminating nutraloaf and the practice of using food as a mechanism of controlling prisoners entirely. Next, Part III will discuss why nutraloaf cases have generally been unsuccessful, and how courts should evaluate future nutraloaf cases, given the thorough record of the harms that nutraloaf causes and our evolving standards on the treatment of prisoners.

III. NUTRALOAF ANALYZED UNDER THE *WILSON* TEST

Part III analyzes the use of nutraloaf under the current standard for Eighth Amendment claims regarding prison conditions. First, this Part reviews the reasoning of cases finding that nutraloaf does not constitute cruel and unusual punishment and explains why the courts in these cases are misguided. Next, this Part analyzes the use of nutraloaf under the two-part test established in *Wilson v. Seiter*. Finally, Part III concludes that nutraloaf is a punishment that satisfies both prongs of the *Wilson* test and is therefore unconstitutional under the Eighth Amendment's cruel and unusual punishment clause.

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218. MUSHLIN, *supra* note 26, at 252 (citing *Prude*, 675 F.3d at 734.

219. *See, e.g.*, Adams v. Kincheloe, 743 F. Supp. 1385, 1390–91 (E.D. Wash. 1990) (concluding that there is no doubt that the use of nutraloaf is intended as punishment for misconduct); Borden v. Hofmann, 974 A.2d 1249, 1254 (Vt. 2009) (reasoning that nutraloaf is a "classic punitive deterrence" and concluding that nutraloaf is a form of punishment).

220. Barclay, *supra* note 13 ("Tasteless food as punishment is nothing new: Back in the 19th Century, prisoners were given bread and water until they'd earned with good behavior the right to eat meat and cheese.").

221. Hutto v. Finney, 437 U.S. 678, 686–87 (1978) (holding that the use of "grue" as punishment violates the Eighth Amendment); Moss v. Ward, 450 F. Supp. 591, 596–97 (W.D.N.Y. 1978) (holding that denying a prisoner food for four consecutive days was "grossly disproportionate" to the prisoner's offense and thus violated the Eighth Amendment).

In retrospect, previous cases that upheld the use of food as punishment as constitutional are evidence that the courts are often slow to recognize rights of prisoners consistent with societal standards.[222] Further, the considerable and growing record of nutraloaf's serious and harmful physical effects[223] weakens previous court decisions distinguishing the unconstitutional use of grue from the constitutional use of nutraloaf. Finally, mounting evidence from social psychologists and corrections experts firmly demonstrates that nutraloaf is an ineffective punitive measure that does not promote safety in prisons.[224]

In addition, recent case law such as the *Prude* decision, as well as correctional standards[225] and a more general shift towards restorative rather than retributive justice,[226] suggests that society no longer condones callous prison disciplinary methods such as nutraloaf. For instance, a recent study found that "[v]oters across the political spectrum strongly support criminal justice reform" and alternatives to incarceration.[227] These shifts in law, policy, and public perceptions of the purpose of punishment call past nutraloaf decisions into question.[228]

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222. *See infra* Part III.A.1.

223. *See supra* note 21 and accompanying text.

224. *See infra* Part III.B.3.

225. *See infra* Part III.B.1.

226. *See, e.g.*, Lenore Anderson & Robert Rooks, *No, Crime Survivors Don't Want More Prisons. They Want a New Safety Movement*, WASH. POST (Mar. 16, 2021), https://www.washingtonpost.com/opinions/2021/03/16/prisons-public-safety-trauma [https://perma.cc/XZ4M-K4XQhttps]; Patricia Leigh Brown, *What Would a World Without Prisons Look Like?*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/06/arts/design/prison-architecture.html [https://perma.cc/G97W-F6FK]; Natalie Delgadillo, *D.C.'s Restorative Justice Program Focuses on Conflict Resolution. Is It Working?*, NPR (May 11, 2020), https://www.npr.org/local/305/2020/05/11/853912376/d-c-s-restorative-justice-program-focuses-on-conflict-resolution-is-it-working [https://perma.cc/AH5H-47HEhttps].

227. *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TR. 1 (Mar. 21 2017), https://www.pewtrusts.org/-/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf [https://perma.cc/68EE-RV7F]; *see also Voters Want Big Changes in Federal Sentencing, Prison System*, PEW CHARITABLE TR. (Feb. 12, 2016), https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system [https://perma.cc/GD6F-F2LR]; John F. Gorczyk & John G. Perry, *What the Public Wants*, 59 CORR. TODAY 78, 83 (1997) ("The people want justice that is restorative rather than retributive.").

228. MUSHLIN, *supra* note 26, at 251.

A. DEFICIENCIES IN NUTRALOAF CASES THAT FAILED TO FIND A CONSTITUTIONAL VIOLATION

Although most courts continue to uphold the use of nutraloaf as constitutional, these holdings are increasingly misguided. These courts failed to thoughtfully consider that nutraloaf is so unpalatable that it is effectively inedible, and the penological purpose is undercut by overwhelming evidence that food is not an effective disciplinary measure. Thus, cases holding that nutraloaf meets society's minimum standards of decency are unjustified.

1. Courts Consistently Lag Behind Public Perceptions of Minimum Standards of Decency

Literature on public perceptions of prison conditions well before[229] and at the time the bread and water diet was ruled unconstitutional critiqued its outdated nature, with one author writing: "[I]t is difficult to understand these bread and water diet cases which generally seem to be a throwback to an earlier time."[230] This evidence suggests that courts are generally quite slow to adopt standards of decency held by the public.

Likewise, human rights organizations[231] and the general public have spoken similarly about the use of nutraloaf being "a disgusting, torturous form of punishment that should have been banned a century ago"[232] and that the loaf "has a connotation of

229. *See, e.g.*, *Bread and Water Diet of Attorneys Amuses Navy Men*, WASH. POST, Sept. 29, 1926, at 2 [hereinafter *Bread and Water Diet*] (noting that a judge who sentenced two bootleggers to a bread-and-water diet was "swamped by criticism" more than forty years before it was formally deemed unconstitutional).

230. William S. McAninch, *Penal Incarceration and Cruel and Unusual Punishment*, 25 S. C. L. REV. 579, 590 (1973); *see also Bread and Water Diet*, *supra* note 229; *Navy's Traditional Penalty—Bread and Water—Ruled Out*, WASH. POST, May 7, 1953, at 1, https://www.proquest.com/docview/152543864/4CD9DF465379430CPQ/90?accountid=14586 [https://perma.cc/Z92Y-VMFE] (demonstrating that nearly twenty years before it was ruled unconstitutional, the bread and water diet was called "cruel and barbaric and a relic of earlier days") (internal quotation marks omitted).

231. *See, e.g.*, Barclay, *supra* note 13 (noting that human rights advocates have called for an end to the unethical use of food as a means of punishment); Purdy, *supra* note 143 (describing nutraloaf as "a very restrictive, punitive and pointless policy that's not a sign of an enlightened system" (quoting Jennifer Wynn, Researcher, Correctional Association of New York)).

232. McKinley, *supra* note 14 (quoting Karen Murtagh, Director of Prisoners' Legal Services of New York) (internal quotation marks omitted).

the Middle Ages" and "conjured up long-ago images [of] [m]edieval, dungeons, shackles, bread and water."[233] Thus, although many past cases challenging nutraloaf failed to find it objectively cruel and unusual, these decisions fail to reflect the public's views on minimum standards of decency.

2. Caloric Density: An Unpersuasive Distinction between Nutraloaf and Grue

In *LeMaire v. Maass*, the court distinguished nutraloaf from the similar substance, known as grue, that was ruled unconstitutional in *Hutto v. Finney*.[234] The court reasoned that grue was nutritionally inadequate, providing less than one thousand calories per day, whereas nutraloaf provides calories and nutrients in excess of minimum nutritional requirements.[235]

However, the court in *Hutto* cited the significant weight loss that inmates experienced when subjected to grue as evidence that it transgressed broadly held ideals of "dignity, civilized standards, humanity, and decency."[236] Significantly, some inmates had reportedly lost weight, not only due to the lack of calories, but also due to their refusal to eat it altogether.[237] Earlier, the court in *Landman v. Royster* held that the bread-and-water diet was unconstitutional, also citing weight loss as evidence of the imposed diet's particularly barbarous and unconstitutional nature.[238] The court also added that the pain of hunger constituted a "prolonged sort of corporal punishment."[239] These cases suggest that courts can and should look critically at the use of food as punishment, and must seriously consider the adverse health effects and psychological impacts that disciplinary diets have on prisoners.

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233. Purdy, *supra* note 143 (quoting John Alves, state prison system doctor).

234. LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993).

235. *Id.*

236. Hutto v. Finney, 437 U.S. 678, 685 (1978) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

237. Mayukh Sen, *Pennsylvania Just Banned This Prison Food,* FOOD 52 (Dec. 1, 2016), https://food52.com/blog/18572-pennsylvania-just-banned-this-prison-food [https://perma.cc/3B97-FQ8C] ("Inmates had lost weight when being fed grue, some becoming more gaunt because they refused to eat it out of principle.").

238. 333 F. Supp. 621, 647 (E.D. Va. 1971), *supplemented*, 354 F. Supp. 1302 (E.D. Va. 1973).

239. *Id.*

While nutraloaf may technically provide the caloric density necessary to avert weight loss, courts[240]—or, at the very least, prisoners—have recognized that nutraloaf is remarkably unpleasant and essentially inedible.[241] This is corroborated by the many detailed accounts of inmates losing weight while placed on the nutraloaf diet.[242] As one judge put it: "If the meal loaf was inedible, then the fact that it contains the minimal nutritional and caloric requirements is irrelevant because the inmates are unable to eat the meal loaf."[243]

Prisoners have repeatedly and fervently asserted that nutraloaf is inedible, therefore it is effectively as nutritionally inadequate as the bread-and-water diet or grue.[244] This makes the alleged distinction between grue and nutraloaf by the *LeMaire* court entirely unconvincing. Thus, nutraloaf is as objectively cruel and unusual as its now unconstitutional predecessor, grue.

3. Nutraloaf as an Ineffective Mechanism of Control

Courts frequently accept prison restrictions, even those that are harsher than usual, as constitutional so long as they further a legitimate governmental interest, such as promoting safety and maintaining order.[245] With regard to nutraloaf specifically, even where courts have recognized its harshness, they have nevertheless been receptive to its use due to the supposed safety and security it provides.[246] Officials may point to the fact that inmates are not given utensils that can be used to cause harm, as

240. Blair v. Raemisch, 804 F. App'x 909, 916 (10th Cir. 2020) (allowing plaintiff to argue that the alleged nutraloaf he was served was inedible and sickening and therefore in violation of his rights).

241. *See, e.g.*, LEVENSON, *supra* note 210, at 201 (recounting an inmate describing going days without food because they were unable to eat nutraloaf); Barclay, *supra* note 13.

242. *See supra* note 21 and accompanying text.

243. Arnett v. Snyder, 769 N.E.2d 943, 953 (Ill. Ct. App. 2001) (Myerscough, J., dissenting in part).

244. *See generally* Zoukis, *supra* note 111 ("When you create a food item that is so unpalatable that prisoners just can't eat it . . . then, in effect, you are denying people food.") (quoting Alex Friedmann, Managing Editor, Prison Legal News).

245. *See e.g.,* Johnson v. Williams, 768 F. Supp. 1161, 1167 (E.D. Va. 1991).

246. *See, e.g.*, LeMaire v. Maass, 12 F.3d 1444, 1453, 1455–56 (9th Cir. 1993) ("Where a prison security measure is undertaken to resolve a disturbance . . . whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline. . . .").

well as its purported general effectiveness at maintaining control and order, as legitimate interests furthered by nutraloaf.[247] Others, such as former Maricopa County sheriff Joe Arpaio, contend that nutraloaf gets results.[248] At a time when plenty of jails and prisons were "trying to find less controversial ways of dealing with behavioral problems" that felt less "medieval," then-sheriff Arpaio was certain that "[h]e d[id]n't plan on phasing out the loaf any time soon."[249]

However, evidence of the contrary—poor-quality food eliciting the opposite of its intended purpose of order and safety—is well-documented. Food is a central component of a prisoner's identity and dignity,[250] and to weaponize food as a means of power and control creates, rather than alleviates, management and behavioral issues.[251] For example, when former governor Andrew Cuomo prohibited the use of nutraloaf in New York correctional facilities in late 2015, he cited expert opinions stating that "no change may have a more immediate impact on prisoners' moods, and on those of the officers assigned to keep them behind bars, than the end of the so-called disciplinary-sanctioned restricted [nutraloaf] diet."[252] In addition, nutraloaf is far from the only nutritionally complete meal that does not require

247. *Cf.* Talib v. Gilley, 138 F.3d 211, 212 (5th Cir. 1998) (requiring inmates to kneel with their hands behind their backs to receive a meal).

248. Kaleigh Rogers, *When Prison Food Is a Punishment*, VICE (Sept. 23, 2015), https://www.vice.com/en/article/539n3d/when-prison-food-is-a-punishment [https://perma.cc/X67F-D334] ("Arpaio is known for being a huge proponent of nutraloaf . . . .").

249. *Id.*

250. Chan & Nathanson, *supra* note 94, at 1021 ("Prison food is not just a matter of unsatisfied prisoners. Food is also a means for the carceral state and its actors to further control and exert power over the minutiae of prisoner life and identity."); Maria Chiara Locchi, *Food as Punishment, Food as Dignity: The Legal Treatment of Food in Prison*, *in* THE LANGUAGE OF LAW AND FOOD 127, 133 (Salvatore Mancuso ed., 2021) ("The dimension of food as a fundamental right closely connected to the dignity of prisoners is multifaceted."); CAMPLIN, *supra* note 27, at 68 (describing a 2009 prison riot in Kentucky that allegedly started over the poor-quality food, and ended with the entire prison being engulfed in flames, injuring sixteen).

251. McKinley, *supra* note 14 ("Food is very important to prisoners in a deprived and harsh environment; it is one of the very few things they have to look forward to . . . And when you mess with prisoners' food, that leads to unhappy prisoners, which lead to management problems.") (quoting David C. Fathi, Director, ACLU National Prison Project) (internal quotation marks omitted).

252. *Id.*

utensils.[253] For example, a meal replacement shake or other no-utensil foods such as sandwiches, wraps, pizza, tacos, and raw fruits and vegetables can be combined to create a meal that preserves safety and can be prepared as easily and inexpensively as nutraloaf.[254] For example, the communications director for the Minnesota Department of Corrections, which does not use nutraloaf, said that their officials had "found the service of regular and bag meals to be quite manageable for [their] segregation/observation units . . . with exceptions made for security risks, such as hot soup, hot beverages, hot cereal, bones and whole fresh fruits."[255]

Since using food as punishment has been shown to make prison conditions even more unsafe, and there are feasible alternative meals that can be served without utensils, the fundamental justification for using nutraloaf is unsupported. This undermines previous court holdings that nutraloaf, even if harsh, remains constitutional because it serves a rational purpose.

B. THE OBJECTIVE PRONG: NUTRALOAF AS CRUEL AND UNUSUAL PUNISHMENT

As described previously, the *Wilson* analysis of Eighth Amendment claims requires the plaintiff to show that the alleged deprivation is objectively cruel and unusual, falling below society's "evolving standards of decency" and civilized minimums.[256] Due to the amorphous character of these standards, courts will often turn to model guidelines published by professional organizations such as the ABA, the UN, or the ACA Manual to ascertain these minimums.[257] In addition, state policies and trends in common practices among prison systems can also act as indicators of shifts in societal standards.

253. Telephone Interview with Katie Berns, Registered Dietician (Mar. 6, 2022) [hereinafter Berns Interview].

254. *Id.*

255. Donna Rogers, *Views on the Use of Food Loaf*, INSIDER: MAG. ACFSA, ASS'N CORR. FOOD SERV. AFFILIATES 9–10 (2009) (quoting Shari Burt, Director, Communications & Media Relations, Minnesota Department of Corrections), https://www.acfsa.org/Insider/insider2009Spring.pdf [https://perma.cc/ZH6V-7YCM].

256. *See supra* Part I.C.1.

257. *See supra* note 93.

1. Evolving Standards of Food in Prison

Given the difficulty that courts face in determining civilized minimums, national and international standards provide valuable guidance as markers of society's expectations for the treatment of prisoners and prisons conditions.[258]

a. National Guidelines

Several organizations that develop guidelines for detention facilities have discouraged the use of food as punishment. For decades, the ACA Manual has included in the Food Service section the standard that an accredited correctional facility's "[w]ritten policy precludes the use of food as a disciplinary measure."[259] The comments to the standard further elaborate that "[a]ll inmates and staff . . . should eat the same meals. Food should not be withheld, nor the standard menu varied, as a disciplinary sanction for an individual inmate."[260] Although a prison may fail to comply with this standard while still maintaining its accreditation, it is nevertheless indicative of the ACA's general discouragement of the use of food as punishment.[261]

In addition, United States Immigration and Customs Enforcement (ICE) detention standards prohibit "deprivation of food service" and explicitly proscribe the use of nutraloaf.[262] Although ICE detention centers are not technically prisons, they are still state facilities responsible for providing basic necessities to those in their confines, and are therefore still illustrative of society's expectations for the treatment of detainees. Moreover, the American Bar Association Criminal Justice Standards for the Treatment of Prisoners provides that alternative foods may be imposed for a limited period where a "prisoner in segregated

258. *See supra* note 92.

259. *Standards for Adult Local Detention Facilities*, AM. CORR. ASS'N 62 (Apr. 1981) https://www.ojp.gov/pdffiles1/Digitization/83419NCJRS.pdf [https://perma.cc/HF3W-KRKM].

260. AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS 147 (5th ed. 2021).

261. *Cf. supra* note 136 ("To achieve accreditation a facility must comply with one hundred percent of applicable mandatory standards and at least ninety percent of applicable non-mandatory standards. Under some circumstances, the ACA may waive certain accreditation standards.").

262. *Performance-Based National Detention Standards 2011*, U.S. IMMIGR. & CUSTOMS ENF'T 216 (Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/A95Q-RPTL].

housing . . . has used food or food service equipment in a manner that is hazardous to the prisoner or others, provided that the food supplied is healthful, palatable, and meets basic nutritional requirements."[263]

Nutraloaf implicitly fails to comply with the ACA Manual because it is a food used as punishment,[264] and explicitly violates the standards provided by ICE. Further, the numerous prisoner narratives of nutraloaf being wholly unpalatable substantiate a finding that nutraloaf violates the ABA standards as well.[265] Since courts frequently consult standards produced by these organizations when considering whether a particular punishment is objectively cruel and unusual, nutraloaf's failure to meet any of the provided standards emphatically supports a finding that the objective prong is satisfied.

b. International Standards

Courts often also consider international standards when defining minimum standards of decency, though with less frequency than consulting the ACA Manual or ABA standards.[266] Nevertheless, the UN has consistently stipulated that food provided to prisoners should be of nutritionally adequate and "of wholesome quality and well prepared and served."[267] Again, prisoner accounts of nutraloaf being off-putting and inedible establish that these UN standards are not met.[268]

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263. *ABA Standards for Criminal Justice: Treatment of Prisoners*, AM. BAR ASS'N 81 (2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/treatment_of_prisoners.pdf [https://perma.cc/R766-SEXJ].

264. Adams v. Kincheloe, 743 F. Supp. 1385, 1390–91 (E.D. Wash. 1990) (concluding that nutraloaf is unequivocally intended as punishment).

265. *See* LEVENSON, *supra* note 210, at 200–03.

266. *See supra* note 93.

267. The Mandela Rules, *supra* note 29, at 13. Additionally, several other countries do not officially use food as part of a prison's system of rewards and punishment. For example, in Norway, guidelines regarding prison food require that the food be culturally relevant, tasty, nourishing, and sufficient to promote feelings of fullness. *See* Thomas Ugelvik, *The Hidden Food: Mealtime Resistance and Identity Work in a Norwegian Prison*, 13 PUNISHMENT & SOC'Y 47, 49–50 (2011); *see also* M. Heather Tomlinson, *"Not an Instrument of Punishment": Prison Diet in the Mid-Nineteenth Century*, 2 J. CONSUMER STUD. & HOME ECON. 15, 17–18 (1978) (noting that British dietary codes in as early as 1842 stressed that food "was not to be made an instrument of punishment"). In New Zealand, diets are only modified for various religious, cultural, or medical purposes. *See* Corrections Act 2004, pt 2 s 72 (N.Z.).

268. *See* LEVENSON, *supra* note 210, at 200–03.

Additionally, the UN also prohibits "inhuman or degrading treatment or punishment."[269] Prisoners are forced to eat nutraloaf in an undignified and demeaning manner, as they are not provided utensils and must eat the dry, crumbly loaf with their bare hands.[270] Thus, both national and international standards support finding that nutraloaf is objectively cruel and unusual.

c. Declining Use of Nutraloaf

Trends in state prison systems are also a marker of evolving societal standards of decency.[271] For example, prisons across the United States have recently moved to reduce their use of solitary confinement, in part due to anticipated lawsuits and new public scrutiny over the mental health effects of persistent isolation.[272] Similarly, even in the absence of a court decision or state policy prohibiting food as a means of discipline, the use of nutraloaf has continued to diminish.[273] A recent study found that while numerous states still serve nutraloaf, fourteen states do not.[274] Notably, several of these states have eliminated the use of nutraloaf in recent years, demonstrating a trend in prisons shifting away from using food as punishment.[275]

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269. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

270. Greenwood, *supra* note 183.

271. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 316 (2002) (noting a trend in prisons no longer invoking the death penalty for individuals with limited mental capacity, consistent with a "national consensus" that had developed against such executions).

272. *See, e.g.,* Priyanka Boghani, *Reducing Solitary Confinement, One Cell at a Time*, FRONTLINE (Apr. 18, 2017), https://www.pbs.org/wgbh/frontline/article/reducing-solitary-confinement-one-cell-at-a-time [https://perma.cc/W2DA-AWD3].

273. *See* Zoukis, *supra* note 111; *see also* Randall Chase, *"Baked Slop": Delaware Sticks to Prison Loaf; Others End Use*, AP NEWS (Jan. 31, 2017), https://apnews.com/article/d6e6b18bff4a483384f2eef356f92847 [https://perma.cc/7C5Y-Q34J].

274. Sobel et al., *supra* note 20.

275. For example, New York prisons discontinued the use of nutraloaf in 2015. McKinley, *supra* note 14. Pennsylvania and Maryland eliminated nutraloaf in 2016. Michael Tanenbaum, *Pennsylvania Does Away With 'Food Loaf' Prison Punishment*, PHILLYVOICE (Nov. 27, 2016), https://www.phillyvoice.com/pennsylvania-does-away-food-loaf-prison-punishment [https://perma.cc/DZ95-PAZA]; Emily Nonko, *Abolitionist Organization Takes On Maryland's Prison Food System*, NEXT CITY (Sept. 22, 2021), https://nextcity.org/urbanist-news/abolitionist-organization-takes-on-marylands-prison-food-system [https://perma.cc/E4EH-N6XB].

Additionally, a recent informal survey found that about forty percent of correctional facilities said their use of nutraloaf was declining and thirty percent said they did not use nutraloaf at all.[276] The exact reasons for nutraloaf falling out of favor are unclear, although anecdotal evidence suggests that prison administrators are wary of litigation or have found more effective methods of maintaining safety and security than converting basic human necessities into punishment.[277] For example, educational programs[278] and drug treatment programs have been shown to reduce inmate misconduct and provide an effective management tool for correctional administrators.[279] Additionally, the Deputy Commissioner for Public Information with the New York City Department of Corrections, which does not use nutraloaf, said that their facilities "don't mix nutrition with discipline" and instead utilize alternative disciplinary methods such as "separation and an internal quasi-judicial process charging [inmates] with infraction of the rules."[280]

These trends in prison policies across the country, alongside the discouragement and explicit proscription of nutraloaf by national and international organizations, compel the conclusion that the use of nutraloaf falls below society's minimum standards of decency and is objectively cruel and unusual, satisfying the first prong of the *Wilson* test.[281]

C. THE SUBJECTIVE PRONG: NUTRALOAF, SUBSTANTIAL HARM, AND DELIBERATE INDIFFERENCE

Recalling the previous discussion of the subjective prong,[282] a plaintiff claiming an Eighth Amendment violation must, in addition to satisfying the objective prong, satisfy the subjective prong by showing that prison officials had the requisite mental

276. Barclay, *supra* note 13.

277. *See id.*

278. *See generally* Karen F. Lahm, *Educational Participation and Inmate Misconduct*, 48 J. OFFENDER REHAB. 37, 37 (2009) (examining the correlation between educational programs (i.e., GED, high school, vocational, and college) and reduced inmate misconduct).

279. *See* Neal P. Langan & Bernadette M.M. Pelissier, *The Effect of Drug Treatment on Inmate Misconduct in Federal Prisons*, 34 J. OFFENDER REHAB. 21, 27 (2001) (analyzing data suggesting that substance abuse treatment programs reduce prisoner misconduct).

280. Rogers, *supra* note 255, at 10 (quoting Stephen Morello, Deputy Commissioner for Public Information, New York City Department of Corrections).

281. Barclay, *supra* note 13.

282. *See supra* Part I.C.2.

intent of "deliberate indifference."[283] The subjective prong of the *Wilson* test is often the greatest obstacle for plaintiffs alleging that nutraloaf constitutes cruel and unusual punishment.[284] In many cases, demonstrating that prison officials acted with deliberate indifference is a substantial burden for plaintiffs because it is difficult to obtain sufficient evidence of the requisite scienter.[285] However, as the court in *Farmer v. Brennan* explained, deliberate indifference can be inferred where prison officials knew or should have known that conditions objectively fell below civilized standards.[286]

As detailed earlier, the fact that the ACA Manual has, for decades, discouraged the use of food as a disciplinary measure, as well as the other national and international standards also discouraging or prohibiting such punishment, compels the conclusion that nutraloaf objectively falls below civilized standards.[287] Further, numerous lawsuits have included descriptions of nutraloaf recipients suffering hunger pains, weight loss, gastrointestinal distress and bleeding, vomiting, diarrhea,[288] and, indirectly, death.[289] At this point, the adverse health effects of nutraloaf are well-documented, and the evidence clearly demonstrates that nutraloaf poses a serious risk to the well-being of its recipients.

Indeed, the vast majority of previous nutraloaf cases have failed, often due to the lack of evidence that prison officials imposing the nutraloaf diet upon prisoners acted with deliberate indifference.[290] However, these cases have established a thorough record of harms caused by nutraloaf, cutting against the

283. Wilson v. Seiter, 501 U.S. 294, 297 (1991).

284. Heffernan, *supra* note 104, at 501.

285. MUSHLIN, *supra* note 26, at 90–91 (summarizing the main objections to the subjective test, including that prison conditions that "objectively fall below civilized standards" may continue so long as defendants cannot be shown to have acted "with deliberate indifference in causing them," and that the standard is "unworkable" given the "diffused, bureaucratic setting of a prison"). For additional discussion on types of evidence that a plaintiff likely needs to satisfy the subjective prong, see *infra* Part IV.B.

286. MUSHLIN, *supra* note 26, at 91–94 (citing Farmer v. Brennan, 511 U.S. 825 (1994)); *see also supra* Part I.C.2 (discussing *Blair v. Raemisch* and court inferences of deliberate indifference by repeatedly denying basic medical care to prisoners).

287. *See supra* Part III.B.

288. *See supra* note 21 and accompanying text.

289. PRISON LEGAL NEWS, *supra* note 25; Kennedy, *supra* note 1.

290. *See, e.g.*, Barclay, *supra* note 13; *supra* note 105 and accompanying text.

assumption that prison officials distributing nutraloaf are acting in good faith. The evidence of society's evolving standards of decency alongside the consistent negative impacts resulting from nutraloaf makes it abundantly clear that prison officials know, or should know, the threat that nutraloaf poses to health and thus they could only proceed with purposeful disregard for that risk. This necessitates a finding that nutraloaf satisfies the subjective prong as well.

Together, nutraloaf is objectively cruel and unusual, falling far below our minimum standards of decency, and any prison officials inflicting such punishment upon a prisoner must do so with a sufficiently culpable state of mind of deliberate indifference, satisfying both prongs of the *Wilson* test and establishing that nutraloaf violates the Eighth Amendment. Part IV will explore a hypothetical case and the possible evidentiary avenues to demonstrate that nutraloaf constitutes cruel and unusual punishment.

IV. PRACTICAL GUIDANCE ON NUTRALOAF CASES

Bringing a successful nutraloaf Eighth Amendment challenge is a tremendous feat and requires persuasive counterarguments against the cacophony of case precedent across several courts that have held nutraloaf to be constitutional.[291] As Eighth Amendment challenges are highly fact-specific, courts may be hesitant to hold that nutraloaf is per se unconstitutional, and instead choose to address its use on a case-by-case basis. Part IV seeks to provide guidance and specify evidence necessary to establish a robust record of objective harm and deliberate indifference capable of satisfying both prongs of the Eighth Amendment standard. This guidance also can be generalized to apply to future iterations of nutraloaf and other food used as punishment in prisons.

A. LEGAL REPRESENTATION FOR THE INCARCERATED

Access to legal assistance can be critical to ameliorating harmful prison conditions.[292] People in prisons often have limited access to legal information and rely on a narrow set of

291. *See supra* Part II.C.

292. *See generally* Anne Grunseit, Suzie Furell & Emily McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners*, LAW & JUST. FOUND. OF NEW S. WALES 93–108 (2008), http://www.lawfoundation.net.au/ljf/site/articleIDs/4DC35D5A0C06F1C4CA25748D00131D8C/$file/TakingJusticeIntoCustody.pdf [https://perma.cc/572R-3ZYR] (describing the barriers incarcerated

sources, typically either the prison library or their legal advisors.[293] Prisoners may be able to find legal representation by contacting their local bar association or organizations providing civil legal services to prisoners on matters related to the conditions of their confinement, or, once the case is moving forward, requesting that the court appoint an attorney to represent them.[294] A prisoner may be able to obtain a lawyer who will provide their services pro bono or on a contingency fee, especially if there is a chance of the court awarding damages or where the defendant pays for the attorney's fees if the case is successful.[295]

Without a lawyer, pro se prisoners often struggle to navigate the complex legal system, and frequently lose their cases on procedural grounds rather than on the merits.[296] However, although securing legal representation is a significant advantage, it is not absolutely necessary that a prisoner obtain the legal services of an attorney in order to bring a successful claim. For example, the plaintiff in *Prude v. Clarke*, who successfully brought suit alleging that the prison's use of nutraloaf constituted cruel and unusual punishment, was a pro se litigant.[297]

Pro se litigants may also consider starting a suit for themselves or a small group of prisoners before seeking a lawyer or requesting a court appointed attorney. The lawyer may then amend the complaint to modify the suit into a class action which provides the advantage of having more prisoner experiences

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individuals face in accessing legal services and opportunities to improve legal representation available to prisoners).

293. *Id.* at 95.

294. Rachel Meeropol & Ian Head, *The Jailhouse Lawyer's Handbook*, CTR. FOR CONST. RTS. & NAT'L LAWS. GUILD 4 (2010), https://ccrjustice.org/files/Report_JailHouseLawyersHandbook.pdf [https://perma.cc/JK56-YRYD]. Importantly, this is left up to the judge's discretion.

295. *Id.* at 4. For example, in a Section 1983 or *Bivens* lawsuit, the plaintiff may be awarded money damages and/or an injunction. *Id.* at 69.

296. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 271 (2010). Lawyers should also be motivated to take on these types of claims, not only for potential compensation or to fulfil the professional responsibility to provide legal services to those unable to pay. As Taeva Shefler, co-founder of the Prison Advocacy Network, has stated, although these kinds of claims are not easily won, the work is "essential to building a more just society." Mallika Kaur & Melissa Barbee, *Negotiating the Trauma of Working with Prisoners, Pro Bono and After Hours*, AM. BAR ASS'N J. (June 2, 2021), https://www.abajournal.com/web/article/negotiating-the-trauma-of-working-with-prisoners-pro-bono-and-after-hours [https://perma.cc/77J3-YTJG].

297. *See* Prude v. Clarke, 675 F.3d 732, 733 (7th Cir. 2012).

with nutraloaf that would be helpful in satisfying the objective and subjective prongs of an Eighth Amendment claim.[298]

B. ESTABLISHING NUTRALOAF AS OBJECTIVELY CRUEL AND UNUSUAL PUNISHMENT

In order to bring a successful claim alleging that nutraloaf violates the Eighth Amendment, an attorney must first demonstrate that nutraloaf is objectively cruel and unusual, falling below civilized standards.[299]

1. Review Prison Policies and Secure Expert Testimony

First, it is helpful to gather the standards on prison conditions, such as those discussed previously from the ACA Manual, UN, and ABA.[300] Policies from prisons across the state should also be compiled in order to demonstrate more general trends in the use of food as punishment in the relevant locale.[301] Further, policies specific to the prison detaining the plaintiff should also be obtained in order to identify whether the nutraloaf diet that the plaintiff was subjected to complied with those policies.[302] For instance, it is important to determine whether prison officials violated their own written policies on the use of nutraloaf by, for example, exceeding the maximum number of days prescribed by the policy.[303] An attorney may also wish to retain expert testimony on whether nutraloaf is a sound correctional practice that serves a valid penological objective or purpose.[304]

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298. *See, e.g.,* Meeropol & Head, *supra* note 294, at 41. In *Palmer v. Johnson*, the court held that conditions that may not be unconstitutional on their own may add up to create an overall effect that is unconstitutional. *Id.* (citing Palmer v. Johnson, 193 F.3d 346 (5th Cir. 1999)). The requirements for a class action are provided by Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 74; FED. R. CIV. P. 23.

299. *See supra* Part III.B.

300. *See supra* Part III.B.1.

301. Telephone Interview with Brian Spahn, Attorney, Godfrey & Khan (Feb. 23, 2022) [hereinafter Spahn Interview] (describing evidence gathered when representing plaintiff Deron Love in the 2015 case *Love v. Brown*, which alleged in part the unconstitutional use of nutraloaf).

302. *Id.*

303. *See id. See generally* Declaration of Steve J. Martin at 8, Prude v. Clarke, 675 F.3d 732 (7th Cir. 2012) (No. 10-CV-167-JPA) [hereinafter Martin Declaration] (noting that the prison's written policy on nutraloaf was violated).

304. *See* Martin Declaration, *supra* note 303, at 10. Expert witnesses that may provide this testimony include former correctional officers, corrections consultant, correctional sociologists, and other prison procedure experts such as

2. Obtain the Nutraloaf Recipe

Second, because the recipe of nutraloaf varies from prison to prison,[305] obtaining the recipe used by the specific prison is also helpful.[306] This recipe should also be analyzed by an expert witness, such as a registered dietician or food scientist, to elaborate on the potential and expected health outcomes of repeated and continuous consumption of the prescribed nutraloaf.[307] Though challenging, attorneys should also seek evidence of whether or not the recipe was actually followed when making the nutraloaf served to the plaintiff.[308]

3. Document the Use of Nutraloaf

Next, the specific conditions of the use of nutraloaf should be documented. For example, the number of days and times per day that the plaintiff was served nutraloaf,[309] whether they were exclusively fed nutraloaf, and whether they also received a beverage such as milk or water. Further, an attorney should also seek to identify the penological purpose of the nutraloaf diet in order to ascertain whether any rational argument can be made to suggest the purpose of the punishment justified the deprivation.[310] Importantly, the plaintiff's negative reactions to the diet should also be well-documented and may include weight loss, gastrointestinal distress, stomach cramps, dehydration, vomiting, diarrhea, heartburn, anal fissures, and other adverse effects on physical wellbeing specific to the individual and the recipe

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former prison wardens. *See, e.g.*, *Expert Witnesses for Plaintiffs in Prison Conditions Cases*, UCLA, https://law.ucla.edu/sites/default/files/PDFs/Prison_Law_and_Policy/Expert_Witnesses_for_Plaintiffs_in_Prison_Conditions_Cases_May_2021.pdf [https://perma.cc/RS9J-RJGD].

305. *Prude*, 675 F.3d at 734 (7th Cir. 2012) (noting there is no exact recipe for nutraloaf, thus, it may vary by correctional facility).

306. *See* Spahn Interview, *supra* note 301.

307. Berns Interview, *supra* note 253.

308. Spahn Interview, *supra* note 301.

309. Jayne v. Bosenko, No. 2:08-CV-02767-MSB, 2014 WL 2801198, at *6 (E.D. Cal. June 19, 2014) ("Although withholding nutritionally adequate food is not a per se constitutional violation, the 'amount and duration of the deprivation' is relevant to determining whether there has been a violation.") (citing Reed v. McBride, 178 F.3d 849, 853 (7th Cir.1999)). *But see* Trammell v. Keane, 338 F.3d 155, 158 (2d Cir. 2003) (finding no constitutional violation despite being on nutraloaf diet for approximately ninety-five days).

310. *See, e.g.*, Cooper v. Sheriff, Lubbock Cnty., 929 F.2d 1078, 1083 (5th Cir. 1991) (finding an Eighth Amendment violation where the purpose of the punishment did not outweigh the deprivation).

used. Attorneys should also determine whether existing medical conditions are exacerbated by nutraloaf. For example, in *Rodriguez v. McGinnis*, the plaintiff complained that his restricted diet interfered with his ability to take his epilepsy medication because he also suffered from chronic gastritis and was regurgitating the meal and thus was unable to keep down his medications, causing his condition to worsen.[311] Evidence of such harms is highly useful in establishing that nutraloaf is objectively cruel and unusual punishment.

4. Consult Other Prisoners Subjected to Nutraloaf

Finally, an attorney should seek to record anecdotal descriptions from other inmates who have been subjected to nutraloaf in order to establish a pattern of harm caused and potential risks to health, as well as evaluate the potential for a class action lawsuit.[312] These accounts of nutraloaf may help establish how unpleasant and effectively inedible nutraloaf is, which courts may consider as tantamount to deprivation of food. For example, in *Smego v. Aramark Food Services Corporation*, the court noted that "[f]ood that is so unpalatable as to be inedible, or food that repeatedly causes diarrhea or nausea, presents a substantial risk to a resident's present and future health and well-being. If the meal cannot be eaten as a practical matter, then the meal cannot as a practical matter provide adequate nutrition."[313] Thus, a clear record that numerous prisoners subjected to nutraloaf have experienced similar harms is valuable evidence that nutraloaf falls far below our minimum standards of decency.

C. DEMONSTRATING DELIBERATE INDIFFERENCE

In addition to establishing that nutraloaf is objectively cruel and unusual, an attorney must also satisfy the subjective prong by demonstrating that prison officials acted with deliberate indifference to a serious harm.[314] In other words, there must be sufficient evidence to show that prison officials knew or should have known that conditions fell below civilized standards.[315] As

311. No. 98-CV-6031CJS, 2004 WL 1145911, at *9 (W.D.N.Y. May 18, 2004).

312. *See* Prude v. Clarke, 675 F.3d 732, 734 (7th Cir. 2012) ("The uncontradicted evidence is that other prisoners in the jail also vomited after eating the nutriloaf, and this suggests that it was indeed inedible.").

313. No. 10-3334, 2013 WL 1987262, at *5 (C.D. Ill. May 13, 2013).

314. *See supra* Part I.C.2.

315. *See* Farmer v. Brennan, 511 U.S. 825, 835 (1994).

discussed previously, the intent requirement is exceedingly difficult to prove.[316] However, attorneys should take every possible avenue to develop a record showing that prison officials were aware of the harm that nutraloaf was causing the plaintiff and continued the diet anyway. Attorneys should advise that their client take advantage of the grievance process within the prison and exhaust all internal remedies before filing court action. Further, attorneys should directly make the prison officials aware of the harms through written notice. Combined, this documented evidence of harm and awareness among prison officials will help establish the record necessary to show the requisite mental intent of deliberate indifference.

1. Utilize the Prisoner Grievance Process

Prisons and jails across the country have systems for prisoners to contest their conditions of confinement in order to exhaust internal remedies before formally filing for relief through the court system.[317] These inmate grievance procedures are a critical tool for establishing a record necessary to show deliberate indifference and actual knowledge.[318] For example, in *Rodriguez v. McGinnis*, plaintiff Rodriguez was able to show that prison official McGinnis had received several letters from the plaintiff detailing his inability to consume the restricted diet.[319] Further, McGinnis had directly reviewed and affirmed denials of plaintiff's grievances regarding the restricted diet which had alleged he was "starving," "had lost approximately twenty pounds while on the restricted diets," "was vomiting blood," and that the restricted diet was exacerbating existing conditions including chronic gastritis and "interfering with his ability to take

316. *See supra* Part.I.C; *see also* Russel W. Gray, Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1342 (1992) ("It is no longer enough that overall prison conditions are harsh . . . the Supreme Court has made it more difficult for inmates to challenge successfully poor prison conditions on Eighth Amendment grounds.").

317. *See generally* Valerie Jenness & Kitty Calavita, *Prisoner Grievances, Rights, and the Culture of Control*, 15 OHIO ST. J. CRIM. L. 211 (2017).

318. Telephone Interview with Stephen Hurley, Attorney, Hurley Burish (Mar. 3, 2022) [hereinafter Hurley Interview] (describing previous work on a consent decree for a Supermax Correctional Institution in Boscobel, Wisconsin which agreed to eliminate the use of nutraloaf).

319. No. 98-CV-6031CJS, 2004 WL 1145911, at *20 (W.D.N.Y. May 18, 2004).

his medications."[320] Further, McGinnis had even suspended the restricted diet on thirty-one occasions due to Rodriguez's weight loss and chose when the restricted diet would resume.[321] On this set of allegations, the court found that there was "at least a triable issue of fact as to whether or not McGinnis was deliberately indifferent" to Rodriguez's needs.[322] In a nutraloaf case, prisoners must be diligent and consistent in submitting grievance complaints when placed on nutraloaf to document the timeline of its use and the resulting direct and indirect adverse health outcomes.

2. Put Prison Officials on Notice

In addition to establishing a record through the prisoner grievance process, attorneys should also directly issue a formal, written notice to the prison officials.[323] For example, an attorney with a client that is being fed nutraloaf should document the duration of the diet and the harms that the client suffered. These details should then be compiled into a letter and sent to the prison officials in order to create evidence of actual knowledge of harm.[324] Thus, if the client continues to be served nutraloaf and continues to experience adverse health effects, a lawyer will have evidence to substantiate the assertion that prison officials knew of the harm that the nutraloaf was causing but continued the diet anyway, thus, prison officials acted with deliberate indifference sufficient to satisfy the subjective prong.[325]

A robust record of both the objective harms caused by the nutraloaf diet and the deliberate indifference with which prison officials inflicted the punishment diet is critical evidence that courts need in order to find both the objective and subjective prongs of the *Wilson* test satisfied and hold that nutraloaf violates the Eighth Amendment. Attorneys seeking to bring a successful claim that nutraloaf is unconstitutional should gather as much evidence as possible to demonstrate that nutraloaf falls below our civilized minimums and that prison officials knew or should have known that nutraloaf does not rise to society's minimum standards of decency.

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320. *Id.*
321. *Id.*
322. *Id.*
323. Hurley Interview, *supra* note 318.
324. *Id.*
325. *Id.*

D. FUTURE APPLICATIONS OF THE NUTRALOAF EIGHTH AMENDMENT FRAMEWORK

After the court in *Hutto v. Finney* ruled grue[326] unconstitutional, prisons modified their recipes to create what is now known as nutraloaf.[327] Thus, even if nutraloaf is ruled unconstitutional in the future, it may nevertheless be destined for the same fate—prison administrators may make changes to the recipe and argue it is distinct from nutraloaf or they may even concoct an entirely new punishment food to inflict upon prisoners.

However, the types of supporting evidence necessary to satisfy the objective and subjective prongs for a court to rule that nutraloaf violates the Eighth Amendment can also apply to any of its future iterations. Model codes, trends in prison policies, a nutritional expert's evaluation of the recipe, and documented accounts of harms caused by the diet may all be used to demonstrate that the punishment food falls below society's minimum standards of decency, satisfying the objective prong. Further, evidence of the requisite mental intent can be established through the prisoner grievance process as well as formal notice to prison officials from an attorney. Attorneys or pro se litigants should also evaluate the feasibility and efficacy of a class action lawsuit. Therefore, regardless of its exact ingredients, the framework provided here can be applied to any punishment diet to demonstrate that is unconstitutionally cruel and unusual.

CONCLUSION

Nutraloaf is a barbarous, reprehensible, and ineffective form of punishment that should have been abolished many years ago. As custodians of the individuals who are incarcerated in their facilities, prison officials are responsible for providing the basic necessities of human existence, including palatable and nutritionally adequate meals. Nutraloaf does not rise to meet this minimum. Further, our evolving standards of decency and conceptions of the purpose of prison, as well as the abundance of evidence that nutraloaf can cause its recipients significant harm, reveals that courts not only should, but must, find the *Wilson* objective and subjective prongs satisfied, and hold that the use

326. Recall that "grue" is the predecessor of nutraloaf and followed a similar recipe but with smaller portions, resulting in insufficient calories. *See supra* note 113.

327. *See supra* Part II.C.

of nutraloaf amounts to cruel and unusual punishment in violation of the Eighth Amendment.