

COMMENTS

WEIGHING THE EIGHTH AMENDMENT: FINDING THE BALANCE BETWEEN TREATING AND MISTREATING SUICIDAL PRISONERS

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INTRODUCTION

The drastic increase in incarceration in conjunction with the serious decrease in institutionalization of mental health patients has led

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to a significantly higher proportion of incarcerated individuals with serious mental health problems.¹ As a result, the rates of suicide are on the rise in local jails and remain steady in state prisons.² Deaths by suicide as a percentage of total deaths, however, is generally on the rise in both prisons and jails³ since the death rate has otherwise been in decline.⁴ Judge Richard Posner has described the suicide rates in prison as “frighteningly high.”⁵ Suicide is the second leading cause of death in jail and the third leading cause of death in prison.⁶ Prisons and jails are severely constrained in the breadth and depth of their mental health services, thus impeding what would otherwise be ideal methods for reducing prisoner suicide.⁷

As the issues plaguing our systems of incarceration come under increasing scrutiny, the pervasiveness of mental illness and suicide in prisons ought to put the treatment of mentally ill and suicidal prisoners toward the forefront of institutional evaluation and reform. The recent Supreme Court decision in *Brown v. Plata* addressed the mistreatment of mentally ill prisoners in the context of prison overcrowding.⁸ The issue, however, extends beyond concerns of overcrowding. The “harsh and isolated conditions” and “limited mental health services” criticized by the Supreme Court are not unique to overcrowded prisons.⁹ Courts, including the Supreme Court, recog-

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- 1 Ildiko Suto & Genevieve L.Y. Arnaut, *Suicide in Prison: A Qualitative Study*, 90 THE PRISON J. 288, 289 (2010) (“[D]einstitutionalizing mental health patients . . . [has] led to a greater proportion of incarcerated individuals with mental health problems, including those at risk for suicide.”).
 - 2 MARGARET E. NOONAN & SCOTT GINDER, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, NCJ 242186, MORALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2001 - STATISTICAL TABLES, Tables 2–15 (2013), available at <http://www.bjs.gov/content/pub/pdf/mljsp0011.pdf>.
 - 3 Lindsay M. Hayes, *Prison Suicide: An Overview and a Guide to Prevention*, 75 THE PRISON J. 431, 431 (1995) (“Although the rate of suicide in prisons is far lower than it is in jails, it remains disproportionately higher than that for the general population.”).
 - 4 NOONAN & GINDER, *supra* note 2, at Tables 1, 14.
 - 5 *Belbachir v. Cnty. of McHenry*, 726 F.3d 975, 980 (7th Cir. 2013).
 - 6 *Id.* at 980–81; See Anasseril E. Daniel, *Preventing Suicide in Prison: A Collaborative Responsibility of Administrative, Custodial, and Clinical Staff*, 34 J. AM. ACAD. PSYCHIATRY L. 165, 165 (2006) (“Suicide is the third leading cause of death in U.S. prisons and the second in jails.”).
 - 7 OR. DEP’T OF CORRECTIONS, INMATE SUICIDE PREVENTION STUDY 16–17 (2009), available at http://www.oregon.gov/DOC/RESRCH/docs/Inmate_Suicide_Prevention_Study_Report.pdf.
 - 8 *Brown v. Plata*, 131 S. Ct. 1910, 1924–25 (2011) (recognizing that overcrowding and harsh and isolated conditions have contributed to an inmate suicide rate approaching one per week).
 - 9 *Id.* at 1924; see also *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987) (remanding case to ascertain “the actual conditions of plaintiff’s confinement and the existence of any feasible alternatives”).

nize that the Eighth Amendment prohibition on cruel and unusual punishment extends to protect inmates “from an environment where degeneration is probable and self-improvement unlikely.”¹⁰

Beyond the moral compunctions, the treatment of suicidal prisoners is of particular concern given the rise in lawsuits against prison officials¹¹ for failing to prevent inmate suicide.¹² In order to preemptively avoid many of these cases, officials have taken measures to make prisoner suicide nearly impossible. These measures are too often aimed not at providing mental health services, but rather at “preventing the attempt from succeeding.”¹³ The purpose of tort law, as Professor George Keating aptly recognizes, is to incentivize individuals to take precautions that are cost-justified,¹⁴ not to prevent injury at any cost.¹⁵ Tort law is intended to strike a balance, but precautions that exceed justification defy the logic of tort and encroach on our

¹⁰ *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1977) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976)).

¹¹ Suit may be brought against state and local officials under 42 U.S.C. § 1983 or federal officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The same legal standards apply to both Section 1983 and *Bivens* suits and are therefore evaluated jointly throughout this Comment. *Corr. Servs. Corp. v. Malesko*, 524 U.S. 61, 81–82 (2001) (Stevens, J., dissenting) (highlighting the Court’s recognition of “sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors ‘would be incongruous and confusing’” (quoting *Butz v. Economou*, 438 U.S. 478, 499 (1978))).

¹² *See, e.g.*, *Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 529–30 (7th Cir. 2000) (outlining both an “objectively serious” risk of “substantial harm” and “deliberate indifference” on behalf of the prison official towards the prison inmate as necessary for an Eighth Amendment claim); *Estate of Cole v. Fromm*, 94 F.3d 254, 259 (7th Cir. 1996) (“[D]efendants may be liable for [an inmate’s] suicide if they were deliberately indifferent . . .”).

¹³ *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 990–91 (7th Cir. 1998); *see also Vega v. Davis*, No. 13-1268, 2014 WL 3585714 (10th Cir. July 22, 2014) (exemplifying cases in which restraints are unsuccessfully used in lieu of mental health services); *Easley v. Judd*, 1:14-CV-100, 2014 WL 897166, at *9 (S.D. Ohio Mar. 6, 2014) *report and recommendation adopted*, 1:14CV100, 2014 WL 1660690 (S.D. Ohio Apr. 25, 2014) (“[P]laintiff essentially complains about his long-term placement in isolation as a substitute for treatment for his mental health issues, which involve depression and suicidal thoughts that have worsened over the course of the over-two-year period he has been in isolation.”).

¹⁴ *See generally* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing a widely adopted algebraic formula for calculating the proper level of precaution); *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 872 (1986) (adopting and applying a formula to determine that the cost to the public that would result cannot justify holding manufacturer liable). This cost-benefit analysis has been applied to many areas of tort law, including constitutional tort law, as recognized by the Seventh Circuit. *Belbachir v. Cnty. of McHenry*, 726 F.3d 975, 981–82 (7th Cir. 2013) (describing “the famous Hand formula” (citing *Carroll Towing*, 159 F.2d at 173)).

¹⁵ *George C. Keating, Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 658, 661 (2003) (arguing that fairness warrants extending precaution beyond cost-justification, but not further).

liberty.¹⁶ This dichotomy was recently recognized by the Eastern District of Louisiana when a prisoner alleged an Eighth Amendment violation as a result of being placed on suicide watch. The Court recognized that the measures taken were reasonable and that “if [the Warden] had ignored plaintiff’s actions and he then committed suicide, she might well have been liable for failing to take preventative measures.”¹⁷

The risk of suit from inmate suicide and the cost of defending against such suits, needless to mention the potential cost of an unfavorable judgment, have led officials to take extraordinary measures in physically restraining inmates.¹⁸ Rather than resulting in a burgeoning of cases challenging these severe restraints, though, suits have continued to charge officials with deliberate indifference *despite* their use of extreme restraints, thus encouraging officials to go even further in attempting to prevent suicide.¹⁹ Yet just as Professor Keating recognized the liberty limit necessary in general tort law,²⁰ there likewise needs to be some limit in *constitutional* tort law, at least insofar as the Eighth Amendment is concerned.²¹ While suicide prevention measures are intended to prevent self-harm, whether all physically

¹⁶ *Id.* at 661 (recognizing that there must be a limit to prevent “inflicting harms to our liberty greater than the harms . . . on our security”).

¹⁷ *Stewart v. Warner*, No. 13-4759-DEK, 2014 WL 3498165, at *4 (E.D. La. July 15, 2014).

¹⁸ *See, e.g., Wells v. Franzen*, 777 F.2d 1258, 1260–61 (7th Cir. 1985) (recounting plaintiff’s nine-day period restrained in only underwear to a bed by all four limbs leaving abrasions, bruises, and restricting blood flow while also leaving plaintiff with an unemptied urinal pitcher provided only at convenience of guards); *Bassey v. Wideman*, No. DKC-08-3262, 2009 WL 2151340, at *5 (D. Md. July 10, 2009) (approving the use of five-point restraints on prisoner for four hour intervals and, on some occasions, without clothing).

¹⁹ *See, e.g., Beyer ex rel. Estate of Beyer v. Johnson City*, No. 2:01-CV-45, 2003 WL 23737298, at *1, *4, (E.D. Tenn. 2003) (alleging deliberate indifference to suicide committed in “restraint chair” with three body belts, two wrist straps, and two ankle straps).

²⁰ Keating, *supra* note 15, at 658, 661.

²¹ The Supreme Court has already explicitly established the need for balancing costs and benefits in similar, related contexts. For example, in determining whether to extend absolute immunity to an official, an analysis that in many cases occurs as a predicate to deciding the issue of Section 1983 liability, the court must launch a “discerning inquiry into whether the contributions of immunity to effective government . . . outweigh the perhaps recurring harm to individual citizens.” *Doe v. McMillan*, 412 U.S. 306, 320 (1973); *see also Westfall v. Erwin*, 484 U.S. 292, 298 (1988) (recognizing the need to balance potential costs and benefits under the particular circumstances). This approach has been further expanded to apply in all inquiries regarding official immunity. *Forrester v. White*, 484 U.S. 219, 224 (1988). Even when immunity is unavailable, as is often rightly the case, tort liability in itself likewise requires a balancing act. *See Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (“[W]hether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.”); *see also Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (applying balancing tests for First, Fourth, and Fifth Amendment challenges).

possible measures should be taken to prevent self-harm at any cost is an issue that has yet to be resolved.²²

This Comment seeks to identify and discuss an issue in our prison system partially created by 42 U.S.C. § 1983 (hereinafter “Section 1983”) and likewise proposes how Section 1983 may be used to strike the proper balance between protection and torment of suicidal prisoners. Part I of this Comment examines the liability faced by prison officials for suicides committed by those who are incarcerated²³ and the effect of such liability on the behavior of prison officials. Part II explains how the heightened risks associated with suicide liability identified in Part I lead to suicide prevention measures that are aimed at avoiding liability rather than protecting and providing mental health treatment for prisoners. Part III briefly explains the framework for bringing an Eighth Amendment suit under Section 1983 before further analyzing and explaining the dearth of such suits in regards to the aggressive suicide prevention measures addressed in

22 *Cf. Campbell v. Sikes*, 169 F.3d 1353, 1359–60 (11th Cir. 1999) (upholding the use of an “L” restraint with knees bent and calves perpendicular to back, upper body immobilized with straightjacket, ankles cuffed, hands cuffed, and anklecuffs and handcuffs strapped together for nearly three days straight because it only caused “physical discomfort and emotional pain” without physical injury).

23 Immunity doctrines often prevent Section 1983 claims from proceeding to the true substance of the constitutional claim itself; however, this Comment focuses on Section 1983 tort liability once immunity claims have been rejected, and the case has proceeded on the merits. The low standard for extending official immunity—the type of immunity most likely to arise in the prison context—means prison officials are often shielded from defending against the constitutional tort claim itself. *See* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3573.3 (3d ed. 2008) (“[Q]ualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” (quoting *Malley v. Briggs*, 475 U.S. 335, 349 (1986))); *see also* *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (applying identical qualified immunity analyses to Section 1983 and *Bivens*). This can create gaps in case law because the Supreme Court no longer requires courts to first decide the merits of the constitutional claim. In a recent Supreme Court decision, the Court made discretionary the formerly mandatory two-step analysis of *Saucier v. Katz*, 533 U.S. 194 (2001), which required courts to first decide the merits of the constitutional claim before hearing and deciding a claim of immunity. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (finding the *Saucier* framework no longer mandatory, but rather subject to the discretion of lower federal court judges). As a result, federal courts are now permitted to first resolve an official’s claim of immunity and therefore potentially avoid deciding the merits of a plaintiff’s constitutional claim. *Pearson*, 555 U.S. at 236; *see also* *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (recognizing that the *Pearson* approach “comports with [the Court’s] usual reluctance to decide constitutional questions unnecessarily”). Despite the plethora of issues raised by the problems of immunity, since the doctrine does not specifically affect the courts’ execution of the standards for finding tort liability upon reaching the merits of the constitutional tort claim, it has no effect on the lack of balancing at issue here.

Part II.²⁴ Finally, Part IV discusses implications of the current state of our case law on mental health treatment services in prisons and possible resolutions.

I. SUICIDE LIABILITY UNDER SECTION 1983

Inmate suicide is a serious issue in incarceration facilities throughout the United States. When a prisoner commits suicide while incarcerated, the estate will often bring a Section 1983 action against the prison officials or, in the case of jails, perhaps even against the city itself.²⁵ Federal district courts and circuit courts of appeal do not resolve Section 1983 suits brought by the estates of deceased prisoners against prison officials uniformly. Looking at a cross-section of these cases provides a basis for understanding the challenges and risk of liability faced by prison officials. The risk to prison officials posed by suicide liability suits has led to a serious escalation in the level of suicide precaution exercised in prisons.²⁶

A. *Establishing Liability for Prisoner Suicide*

To succeed in a survivorship action against prison officials alleging a failure to protect, the plaintiff's estate must meet both the objective and subjective components of the test for deliberate indifference as laid out in *Farmer v. Brennan*.²⁷ The objective component requires the

²⁴ Actions against federal, state, and local officials are analyzed uniformly throughout this Comment because the same substantive legal standard applies to each action. While a more rigorous standard applies to a *Bivens* action in certain new contexts, which likely reduces the number and success of suits against federal officials under federal law, because this only applies to limit suits permitted to go forward and not the standard for liability applied, it will have no effect in the ultimate finding of liability relevant here. See *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (delineating situations where a *Bivens* action may be defeated); *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (refusing to apply a *Bivens* remedy for alleged Eighth Amendment violation).

²⁵ Suits brought against a municipality are more challenging to prove, and therefore less frequent, as Section 1983 suits brought against municipalities require showing that the municipality has an official policy or custom that caused the deprivation of rights. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690–91 (1978). Even in particularly egregious cases where the liability of the municipality is clear, the prohibition on punitive damages for municipal liability further limits the ultimate success of municipal liability claims. See *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981) (“[W]e hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.”).

²⁶ In addition to the well-known risk of defending against a lawsuit, there is also the risk of adverse publicity. See *Hayes*, *supra* note 3, at 431–32 (1995) (documenting resulting publicity following prison suicides).

²⁷ 511 U.S. 825, 834 (1994) (relying on precedent to establish requirements for proof of objective seriousness and subjective culpability).

plaintiff to prove that the alleged deprivation is objectively “sufficiently serious.”²⁸ The subjective component enforces the principle established in *Wilson v. Seiter* that “only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.”²⁹ The defendant-prison official must have a requisite mental state beyond mere negligence – the defendant must be “deliberately indifferent” to the health or safety of the inmate.³⁰ The Court reads the Eighth Amendment as requiring this subjective component because the Amendment does not prohibit “cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”³¹

1. *The Objective Prong*

In suits alleging a failure to protect an inmate from suicide, the objective component involves a straightforward inquiry as to whether there was a sufficiently serious risk of suicide.³² The objective component hinges on whether there is a medical need so obvious that a layperson would recognize the need for medical attention.³³ If the prisoner succeeds in committing suicide, however, this prong is necessarily met.³⁴ In many circuits, deliberate indifference to an inmate’s psychological needs violates the inmate’s constitutional rights just as much as disregard to physical needs.³⁵ For such an allegation to rise to the level of “sufficiently serious” there must be “neglect of ‘serious’ medical needs,” because there is no expectation in society that prisoners will have unqualified health care access.³⁶ It is recognized that suicidal tendencies constitute a serious medical need.³⁷ In addition to demonstrating neglect of the inmate’s serious medical needs, objec-

28 *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

29 *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297).

30 *Farmer*, 511 U.S. at 836–37 (“[T]he official knows of and disregards an excessive risk to inmate health or safety.”).

31 *Id.* at 837.

32 *See Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990) (“[D]eliberate indifference has become the barometer by which suicide cases . . . are tested.”).

33 *Blackmon v. Sutton*, 734 F.3d 1237, 1244 (10th Cir. 2013) (citing *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)).

34 *See, e.g., Gaston v. Ploeger*, 297 F. App’x 738, 742 (10th Cir. 2008) (finding that the objective component is “[o]bviously” satisfied by suicide); *Collins v. Seeman*, 462 F.3d 757, 760 (7th Cir. 2006) (reaffirming prior cases establishing that “the objective element is met by virtue of the suicide itself”).

35 *Blackmon*, 734 F.3d at 1245 (citing *Ramos*, 639 F.2d at 574–75).

36 *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976)).

37 *Schultz v. Sillman*, 148 F. App’x 396, 400 (6th Cir. 2005) (“[S]uicidal tendencies constitute a serious medical need.”).

tively there must be deliberate indifference on the part of the defendant.

2. *The Subjective Prong*

The subjective prong of the *Farmer* test is far more difficult to prove and is often fatal to the claim. The prison official must actually know of the inhumane nature of the plaintiff's confinement, yet deny or delay medical care.³⁸ Because deliberate indifference is not established by mere negligence, the subjective prong imposes a more stringent standard than most tort law. Rather, the Supreme Court has established a standard akin to criminal recklessness where a defendant is liable for consciously disregarding a substantial risk of serious harm.³⁹ The standard is more stringent than mere negligence, but does not go so far as to require an actual intent to harm.⁴⁰ In *Mitchell*, the defendant-officer explicitly ordered Mr. Mitchell stripped naked in a concrete cell without heat, bedding, glasses, exercise, writing utensils, adequate ventilation, hot water, and limited toilet paper.⁴¹ The alleged deprivations caused by the officer's orders were sufficient for a reasonable jury to find deliberate indifference.⁴² In many cases, however, there is far more limited information available to infer deliberate indifference.⁴³ But the court will often investigate whether the inmate showed a strong likelihood that he would attempt suicide to an extent that the officer must have strongly suspected the risk.⁴⁴ As a result, an officer may be liable even without having explicit knowledge of the risk of suicide.⁴⁵

³⁸ *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (citing *Estelle*, 429 U.S. at 104–06).

³⁹ *Mata*, 427 F.3d at 752.

⁴⁰ *Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996) (“Deliberate indifference does not require a finding of express intent to harm.” (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986))).

⁴¹ *Mitchell*, 80 F.3d at 1442.

⁴² *Id.*

⁴³ *Cf. Rellergert v. Cape Girardeau Cnty.*, 924 F.2d 794, 796 (8th Cir. 1991) (requiring evidentiary proof of deliberate indifference outside suicide itself). The difficulties of proof both for prisoners and prison officials may subside in the near future as video recording technology becomes increasingly accessible and affordable. *See, e.g.*, *Jacoby v. Mack*, No. 12-0366-CG-C, 2014 WL 2435655, at *15 (S.D. Ala. May 30, 2014) (“Subsequent to . . . Plaintiff’s alleged May 23, 2012 assault, another guard and extra cameras were placed in the unit.”); *O’Connor v. Kelley*, No. 3:10CV360/LAC/EMT, 2014 WL 1133522, at *2 (N.D. Fla. Mar. 21, 2014) (noting that a prison official “arrived at the location and began operating a portable video/audio recording camera”); *Bassey v. Wideman*, No. DKC-08-3262, 2009 WL 2151340, at *2 (D. Md. July 10, 2009) (“[R]estraint cells are monitored by cameras[.]”).

⁴⁴ *Schultz v. Sillman*, 148 F. App’x 396, 401 (6th Cir. 2005); *see also* *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996) (“It is enough for Haley to show that the defendants actually

B. Additional Risks in Suits Alleging Liability for Prisoner Suicide

There are three serious concerns that make suicide liability suits particularly risky for prison officials. These risks arise as a result of fewer concerns at trial in suicide liability cases. The first concern is the cost of discovery, and of potentially defending, that arises based on the difficulty of proving a subjective state of mind without extensive inquiry. Since these claims often require probing factual investigation, summary judgment is less likely to occur early in the litigation, and perhaps may not occur at all. Secondly, prison officials are often accorded high levels of deference in prison administration challenges, but since suicides often occur outside the usual context of maintaining order in the prison, there is less deference and therefore a higher chance of liability. While deference usually imposes another obstacle in Eighth Amendment claims, that obstacle is removed, or at least reduced, in the context of prisoner suicide. Finally, the Prison Litigation Reform Act was specifically enacted to reduce the number of suits brought by prisoners against officials. While the Act specifically creates heightened requirements for suit, the PLRA is inapplicable when the prisoner has committed suicide and is thus no longer incarcerated. These three concerns in combination make suicide liability cases more likely to proceed further into litigation and therefore incentivize prison officials to go above and beyond in avoiding such claims.

1. Cost of Defending Beyond Summary Judgment

Even when prison officials perfectly execute all reasonable prevention measures, prisoners determined to commit suicide may still succeed.⁴⁶ Oftentimes, such suicides then become the basis of suits against prison officials. The cost of defending against such suits, even when they do not proceed past the summary judgment stage, deters prison officials who would otherwise refrain from taking suicide precautions that crossed over the bounds of reasonableness.⁴⁷ Since the

knew of a substantial risk that Wilborn would seriously harm him.” (emphasis omitted)); *Price v. Sasser*, 65 F.3d 342, 345–46 (4th Cir. 1995) (“[T]he inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”).

⁴⁵ See *Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir. 2005) (recognizing objective indications of suicide, although generally difficult to predict).

⁴⁶ See, e.g., *Beyer ex rel. Estate of Beyer v. Johnson City*, No. 2:01-CV-45, 2003 WL 23737298, at *4, (E.D. Tenn. Feb. 24, 2003) (alleging deliberate indifference to suicide committed in “restraint chair” with three body belts, two wrist straps, and two ankle straps).

⁴⁷ Before the Supreme Court’s decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the costs of discovery, particularly in civil rights

subjective prong is inordinately fact-specific due to the inherent difficulty in ascertaining an official's state of mind, deliberate indifference claims necessarily require particularly invasive discovery.⁴⁸ Furthermore, since fee shifting is not symmetrical under 42 U.S.C. § 1988(b), defendants are unlikely⁴⁹ to recoup the cost of the suit even if it fails.⁵⁰

suits, were widely examined and discussed. See, e.g., Eric Harbrook Cottrell, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes A Look at Heightened Pleading Standards in* *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 N.C. L. REV. 1085, 1100–01 (1994) (“A § 1983 plaintiff sometimes must engage in a great deal of costly and disruptive discovery to substantiate a claim.”); Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 269, 284 (2002) (“Consistent with its exercise of judicial restraint, the *Crawford-El* Court declined the invitation to revise established rules and employ a blunt instrument that inflicts a high cost on plaintiffs with bona fide constitutional claims.”). Since the advent of the heightened pleading standard and its application to civil rights claims in 2009, this discussion has largely abated, but the issue remains. *Iqbal*, 556 U.S. at 678. See, e.g., Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1266 (2010) (“In 2009, the Supreme Court’s *Ashcroft v. Iqbal* opinion confirmed that *Twombly* articulated a general standard of pleading that applied outside of the antitrust context.”); Morgan Smith, *On Notice: The Supreme Court’s Recent Decisions Regarding Heightened Pleading Requirements Leave Much to Be Desired*, 10 APPALACHIAN J.L. 47, 56 n.98 (2010) (“Even though the Supreme Court originally endorsed notice pleading in *Conley v. Gibson*, courts have since embraced heightened pleadings in many contexts.”).

48 See *Kellergert v. Cape Girardeau Cnty.*, 924 F.2d 794, 795–98 (8th Cir. 1991) (recognizing that “the concept behind the controlling law is simple, [but] application . . . necessarily depends on the facts of a given case”); see also *Freedman v. City of Allentown*, 853 F.2d 1111, 1114–15 (3d Cir. 1988) (permitting discovery that allows plaintiff the opportunity to prove case).

49 While unlikely, it is not impossible for defendants to recover costs, since Rule 11 may also provide for fees in cases involving sanctionable conduct. FED. R. CIV. P. 11. A defendant may also receive post-offer costs, but not fees, through Federal Rule of Civil Procedure 68 (hereinafter “Rule 68”). FED. R. CIV. P. 68; see *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986) (“[P]laintiff who refuses an offer of judgment, and later fails to obtain a more favorable judgment, must pay the defendant’s post-offer costs.”); see also *Pouillon v. Little*, 326 F.3d 713, 718–19 (6th Cir. 2003) (“Rule 68 . . . requires that an offer made pursuant to the rule be compared to the judgment ‘finally obtained.’”); *Tunison v. Cont’l Airlines Corp.*, 162 F.3d 1187, 1193–94 (D.C. Cir. 1998) (“[I]nterpreting Rule 68 to require payment of a defendant’s costs where the judgment obtained by the plaintiff is less favorable than an earlier offer . . . is entirely consistent with Rule 68’s purpose”); *O’Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989) (“We hold that a plaintiff who refuses an offer of judgment under Rule 68 and later fails to receive a more favorable judgment must pay the defendant’s post-offer costs.”); *Liberty Mutual Ins. Co. v. Equal Emp’t Opportunity Comm’n*, 691 F.2d 438, 442 (9th Cir. 1982) (“[W]here a Rule 68 offer is made and the judgment finally obtained by the plaintiff is not more favorable than the offer, he *must* pay the costs incurred after the asking of the offer.”).

50 42 U.S.C.A. § 1988 (West 2000).

Finally, the unpredictable nature of judge and jury determinations as to deliberate indifference⁵¹ adds further cost to litigation by reducing clarity in deciding when to settle. Unpredictability in assessing the outcome of cases may lead officials to unnecessarily decide to settle or litigate.⁵² Unpredictability in assessing outcomes in the form of monetary verdicts may also hinder the ability of officials to effectively use Federal Rule of Civil Procedure 68 (hereinafter “Rule 68”) when making settlement offers,⁵³ since Rule 68 only allows defendants to escape paying a prevailing plaintiffs’ attorneys fees and costs when the offer made was higher than the judgment ultimately collected by the plaintiff.⁵⁴

2. Deference to Prison Officials

The second issue arises from the lower level of deference afforded in a majority of suicide cases. Unlike in cases in which officers must use force to restore order in emergency situations and thus act out of urgent necessity, which earns the officers a great deal of deference from the courts,⁵⁵ suicide liability cases are often not made in the context of split-second decisions that require extensive discretion.⁵⁶ Prison officials outside the context of emergency situations do not receive the reduced standard of “good faith effort,” and therefore

51 See Christy P. Johnson, *Mental Health Care Policies in Jail Systems: Suicide and the Eighth Amendment*, 35 U.C. DAVIS L. REV. 1227, 1243–47 (2002) (comparing *Estate of Cills v. Kaf-tan*, 105 F. Supp. 2d 391 (D.N.J. 2000), with *Estate of Novack v. Cnty. of Wood*, 226 F.3d 525 (7th Cir. 2000), as demonstrative of this inconsistency).

52 See generally Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 916 (2007) (“[I]nstead of litigants ‘evaluat[ing] the risk and costs of litigation’ as intended by the rule, litigants end up evaluating the risks and costs of Rule 68.”); Lesley S. Bonney et. al, *Rule 68: Awakening A Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 379 (1997) (“Litigants and counsel find it extraordinarily difficult to make informed decisions on the merits of making or accepting an offer of judgment under Rule 68.”).

53 See Harold S. Lewis, Jr. & Thomas A. Eaton, *Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723, 733–34 (2006) (detailing multiple reasons for the underutilization of Rule 68).

54 FED R. CIV. P. 68; see, e.g., *Marek v. Chesny*, 473 U.S. 1, 11–12 (1985) (finding petitioners not obligated to pay costs, including attorney fees, incurred after settlement offer).

55 See, e.g., *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (distinguishing cases where prison security measures are undertaken to resolve a disturbance (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (1973))).

56 See *Whitley*, 475 U.S. at 321–22 (finding that prison security, which is ordinarily left to the discretion of prison officials, is afforded even more deference in the face of actual conflict or unrest) citing *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981); *Bell v. Wolfish* 441 U.S. 520, 547 (1979)).

liability is more likely to result in cases involving the suicide of an inmate.⁵⁷

This is not to suggest, however, that deference is lacking.⁵⁸ In fact, the Supreme Court jurisprudence is highly deferential to prison administrators.⁵⁹ It remains unclear whether this level of deference is appropriate when prisoners challenge conditions of confinement under the Eighth Amendment.⁶⁰ As a result, the level of deference varies with the jurisdiction and the particular court's standard of deference.⁶¹ An unclear standard of deference adds to the uncertainty of Eighth Amendment cases and likely leads prison officials to err on the side of caution in terms of reducing liability, thus providing further reason for officials to employ extensive suicide precautions.⁶²

3. *The Prison Litigation Reform Act of 1996*

Finally, the Prison Litigation Reform Act,⁶³ which is aimed at reducing claims asserted by prisoners,⁶⁴ does not apply to causes of ac-

57 See *Johnson*, 481 F.2d at 1033 (setting a standard for correctional officers applying force in good faith, rather than maliciously and sadistically to cause harm).

58 See, e.g., *Procnier v. Martinez*, 416 U.S. 396, 404–05 (1974) (creating a laundry list of reasons for exceptional deference to prison authorities).

59 *Bell*, 441 U.S. at 547–48 (“Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”).

60 See Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1522–23 (2004) (“[S]ome federal courts play an active role in extending the Court’s deferential policies.”). The inconsistency in deference may be seen by comparing *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991) (en banc), cert. denied, 502 U.S. 1074 (1992) and *Roland v. Johnson*, 856 F.2d 764, 769 (6th Cir. 1988) with *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1124–25 (W.D. Wis. 2001), which recognizes that defendants are afforded deference, but finds for prisoners nonetheless.

61 See Weidman, *supra* note 60, at 1521–23 (delineating the circuit split in applying *Turner* deference).

62 See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 101 (2000) (“*Turner*’s broad language left uncertainty as to whether the Court intended the rational basis standard to apply to Eighth Amendment claims of cruel and unusual punishment.”).

63 See 42 U.S.C.A. § 1997e (West 2013) (outlining the conditions under which prisoners may bring suit and the limitations on such suits).

64 *Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006) (“The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons The PLRA also was intended to ‘reduce the quantity and improve the quality of prisoner suits.’” (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002))).

tion brought by a deceased prisoner's estate.⁶⁵ Ordinarily, under the PLRA, prisoners must exhaust all administrative remedies that are available regardless of whether they provide the relief demanded.⁶⁶ An estate bringing suit does not encounter this barrier since the PLRA only applies to currently incarcerated prisoners, nor must it comply with the filing fee and physical injury requirements.⁶⁷ Complaints against prison officials alleging liability for suicide are therefore much more likely than ordinary Eighth Amendment cases to require extensive litigation.⁶⁸

The probing discovery, reduced likelihood of summary judgment, difficulties in assessing settlement, an unclear standard of deference, and the lack of PLRA protection likely influence prison officials to take such extensive measures in an attempt to prevent prisoner suicide. Even though these cases are not necessarily more likely to succeed, the risk inherent in proceeding through discovery and litigation is enough to lead prison officials to take extraordinary measures. Part II will evaluate these measures, their efficacy in preventing suicide, and their effects on the mental state of suicidal prisoners. Then Part III will discuss how the Eighth Amendment, through Section 1983 suits, should deter prison officials from such precautions that reach too far.

65 The scope of the PLRA applies only to prisoners and the Act defines "prisoner" in such a manner as to not extend to the estate of deceased prisoners. John Boston, *The Prison Litigation Reform Act*, THE LEGAL AID SOCIETY PRISONER'S RIGHTS PROJECT PRO BONO TRAINING, Feb. 27, 2006, at 1-5, available at http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf (analyzing case law to establish the definition of "prisoner" under the PLRA, which generally is limited to only currently confined persons); 18 U.S.C.A. § 3626(g)(3) (West 1997) (defining "prisoner" as "any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law").

66 See *Booth v. Churner*, 532 U.S. 731, 733 (2001) (holding that prisoners must exhaust the prison administrative process if it "could provide some sort of relief on the complaint stated").

67 28 U.S.C.A. §§ 1915(b)(1), (g) (West 1996) (requiring filing fees to be paid in full with a limited exception and imposing a three strikes limit to reduced filing fees); 42 U.S.C.A. § 1997e(e) (West 2013) (eliminating suits for mental and emotional injury unless accompanied by physical injury).

68 The PLRA provides barriers to nearly all civil suits brought by prisoners against prison officials in accordance with the intent of Congress to discourage and reduce prison litigation; removing such a limitation therefore significantly opens opportunity for litigation. See *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (applying the PLRA to "all inmate suits about prison life").

II. SUICIDE PREVENTION MEASURES

Many national, state, and local entities are taking measures to combat the high suicide rate plaguing our jails and prisons.⁶⁹ Officials have not been left alone in the endeavor, and various task forces and researchers have taken up the issue of predicting and preventing suicide.⁷⁰ There is no doubt that our treatment of mentally ill prisoners has improved over the course of time; however, as the mentally ill prison population continues to increase, the methods for handling suicidal prisoners becomes of increasing import.⁷¹

Many of the most important suicide prevention standards have been developed and implemented in an effort to avoid liability.⁷² Prisons generally respond to suicidal prisoners by imposing restrictions that make it nearly impossible for the prisoner to commit suicide.⁷³ Such measures range from placing the inmate in administrative segregation with heightened supervision to prisoners being stripped naked and restrained to a chair. Prison officials, who tend

⁶⁹ See, e.g., NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 1–8 (2004 ed.), available at <https://s3.amazonaws.com/static.nicic.gov/Library/018604.pdf> (examining “in detail correctional health care programs and suggest[ing] guidelines that contain mechanisms for program implementation”); OR. DEP'T. OF CORRECTIONS, *supra* note 7, at 16–17 (summarizing statistics on the occurrence of inmate suicides in prisons); Judith F. Cox & Pamela C. Morschauer, *A Solution to the Problem of Jail Suicide*, 18 CRISIS 178, 178–184 (1997). The single largest contributor to the study and treatment of suicidal prisoners for the last three decades has been Lindsay Hayes at the National Center for Institutions and Alternatives. See Ronald L. Bonner, *Correctional Suicide Prevention in the Year 2000 and Beyond*, 30 SUICIDE AND LIFE-THREATENING BEHAVIOR 370, 370–71 (2000) (providing an overview of Hayes' contributions).

⁷⁰ Nobert Konrad et. al, *Preventing Suicide in Prisons, Part I: Recommendations from the International Association for Suicide Prevention Task Force on Suicide in Prisons*, 28 CRISIS 113–121 (2007).

⁷¹ Jacques Baillargeon et. al, *Psychiatric Disorders and Suicide in the Nation's Largest State Prison System*, 37 J. AM. ACAD. PSYCHIATRY & L. 188, 188 (2009) (recognizing suicide as one of leading causes of death due to half of the prison population being mentally ill and then subjected to “psychological stressors” in the correctional setting).

⁷² See Bonner, *supra* note 69, at 371 (2000) (“Based on . . . increasing litigation involving jail and prison suicides, several major suicide prevention standards have been developed.”); Anasseril E. Daniel, *Preventing Suicide in Prison: A Collaborative Responsibility of Administrative, Custodial, and Clinical Staff*, 34 J. AM. ACAD. PSYCHIATRY L. 165, 173 (2006), available at <http://www.jaapl.org/content/34/2/165.full.pdf+html> (“The program described is . . . to avoid any malpractice or deliberate-indifference claims”).

⁷³ Precautions that strive for impossibility tend to be employed as default measures to abate suicide risk, but are unlikely to be effective or productive. See Jay S. Albanese, *Preventing Inmate Suicides*, 47 FED. PROBATION 65, 68 (1983) (advancing the claim that locking an inmate in a room with all dangerous instruments removed is not supported by research); Hayes, *supra* note 3, at 431, 434 (citing a thirteen-year period where 79% of suicides in Kentucky prisons occurred in special housing units).

to select suicide prevention methods most convenient to the staff rather than require extensive observation and treatment, will often physically isolate or even restrain the individual.⁷⁴ The literature, however, recognizes that inmates should only be stripped naked and physically restrained as an absolute last resort.⁷⁵ Furthermore, isolation and deprivation of human contact are also disfavored; housing assignments are more effective in protecting inmates when based on interaction and observation of the inmate.⁷⁶ The scientifically supported policies to ensure proper care and prevention include “(1) suicide assessment, observation, and intervention; (2) psychotropic medication use; (3) involuntary/forced medication and involuntary medical treatment; and (4) inpatient hospitalization of the mentally ill.”⁷⁷ Despite research and common-sense counseling against extreme isolation,⁷⁸ sensory deprivation, and the extensive use of restraints, most suicide precautions employed in jail and prison settings utilize such methods.⁷⁹

Perhaps one of the most commonly used (or abused)⁸⁰ measures is administrative segregation, wherein the inmate is removed from the

74 LINDSAY M. HAYES, NAT’L CTR. ON INSTITUTIONS AND ALTERNATIVES, SUICIDE PREVENTION IN CUSTODY: GUIDE TO DEVELOPING AND REVISING SUICIDE PREVENTION PROTOCOLS WITHIN JAILS AND PRISONS (2011), available at <http://www.ncianet.org/services/suicide-prevention-in-custody/publications/guide-to-developing-and-revising-suicide-prevention-protocols-within-jails-and-prisons>.

75 *Id.*

76 *See Id.* at n.11 (2011) (explaining that precautions that appear punitive create reluctance in inmates who are suicidal to seek mental health services or admit to suicidal thoughts). This is further bolstered by evidence demonstrating that sixty percent of inmates may “communicate their intent to kill themselves either verbally or nonverbally,” thus creating a very real reason not to dissuade such communication. Daniel, *supra* note 72, at 171.

77 Daniel, *supra* note 72, at 169.

78 *See generally* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116 (2008) (“[C]onditions of prolonged solitary have long been known to cause serious mental harm.”).

79 A cross section of recent cases from multiple jurisdictions demonstrate the prevalence of restraints and isolation in prisons and jails across the country. *See, e.g.*, Vega v. Davis, No. 13-1268, 2014 WL 3585714 (10th Cir. July 22, 2014) (discussing the use of restraints); Belbachir v. Cnty. of McHenry, 726 F.3d 975, 980 (7th Cir. 2013) (discussing the use of isolation); McCreary v. Governor of Virginia, No. 3:12CV484-HEH, 2014 WL 4162202, at n.12 (E.D. Va. Aug. 19, 2014) (asserting the authority for the use of restraints); Easley v. Judd, 1:14-CV-100, 2014 WL 897166 (S.D. Ohio Mar. 6, 2014) *report and recommendation adopted*, 1:14CV100, 2014 WL 1660690 (S.D. Ohio Apr. 25, 2014) (discussing the use of isolation); Gay v. Chandra, 652 F. Supp. 2d 959, 967 (S.D. Ill. 2009) (discussing the use of restraints); Bassey v. Wideman, No. DKC-08-3262, 2009 WL 2151340 (D. Md. July 10, 2009) (discussing the use of restraints).

80 *See* Bonner, *supra* note 69, at 374 (“Perhaps no factor has been more tragically associated with jail and prison suicides than the consistent finding of isolated/segregated housing of the jail or prison environment.” (citing Ronald L. Bonner, *Isolation, Seclusion, and Psycho-*

general population and placed in an isolated cell. A prisoner in North Carolina brought suit to challenge the conditions of his confinement; he was kept in a small, concrete cell, was provided extremely minimal contact with others, and could not participate in activities or go outdoors for several years.⁸¹ During that time, and despite those restrictions, Mr. Williams was still occasionally placed in restraints while in a concrete cell alone for four-hour periods.⁸² The Fourth Circuit, however, upheld dismissal of the claim arguing that to the extent the isolation and behavioral restrictions aggravated plaintiff's mental illness, it was merely "an unfortunate but inevitable result of his incarceration."⁸³ The court concluded that, based on the responsibility of prison officials to limit self-harm, there was not a sufficient deprivation.⁸⁴

There are certainly cases in which courts, even within the same jurisdiction, reach the opposite result. A prisoner in Virginia, Mr. Milton McCray, was confined in a "mental observation" cell where he was stripped naked and confined to a room without a blanket, a mattress, a sink, running water, or hygienic tools.⁸⁵ Despite an initial dismissal by the district court,⁸⁶ the circuit court found that the conditions absolutely presented an issue triable by a jury.⁸⁷ The Fourth Circuit held that, even if such conditions were to be permissible, the failure of the official "to devise and employ means to protect McCray from injury to himself other than continued isolation with deprivation of clothing and elements of personal hygiene," was not permissible.⁸⁸ While this is the intuitive result, when contrasted with the Fourth Circuit decision in *Williams*, such results are anything but predictable.⁸⁹

Although courts have routinely upheld the use of segregation and isolation,⁹⁰ the field of psychology recognizes that "such archaic prac-

social Vulnerability as Risk Factors for Suicide Behind Bars, in *ASSESSMENT AND PREDICTION OF SUICIDE*, 398–419 (Ronald W. Maris et. al eds., 1992)).

81 *Williams v. Branker*, 462 F. App'x 348, 350–51 (4th Cir. 2012).

82 *Id.*

83 *Id.* at 354.

84 *Id.*

85 *McCray v. Burrell*, 516 F.2d 357, 369 (4th Cir. 1975) (describing conditions of confinement in the mental observation cell).

86 *Id.* at 360 ("[The district court] found that no constitutional violations had occurred in the incidents alleged.").

87 *Id.* at 369 ("[We] cannot conceive that decent society would tolerate it even for a suspected mental patient who had been convicted of a crime.").

88 *Id.*

89 *Williams v. Branker*, 462 F. App'x 348, 354 (4th Cir. 2012).

90 While a majority of courts do not consider indefinite administrative segregation to violate the Eighth Amendment, there have been notable exceptions where inmates were left in segregation without any mental health care. *Blackmon v. Sutton*, 734 F.3d 1237, 1245

tices” must be reevaluated in order for our society make serious progress in preventing prisoner suicide.⁹¹ Alternatives exist. Cells can be designed to significantly reduce the risk of hanging by using air vents with holes too small to thread a sheet through, break-away shower heads, and concrete slab-secured mattresses.⁹² Such designs are particularly effective when paired with human supervision.⁹³

Notably missing from the literature on effective and productive suicide prevention measures is the use of restraints.⁹⁴ Juries have held prison officials liable even when they took all reasonable precautions,⁹⁵ thus encouraging officials to take extreme measures such as full restraints.⁹⁶ But of graver concern is the result of using restraints.

Mr. Wells, a prisoner in an Illinois correctional center thought to be suicidal, exemplifies the concerns inherent in the restraint practices.⁹⁷ Mr. Wells was placed in a four-point shackle wherein each limb was shackled to one corner of the bed.⁹⁸ Mr. Wells remained shackled to the bed for *nine days*.⁹⁹ The shackles were not gentle; there were abrasion and bruises resulting from restricted blood

(10th Cir. 2013) (recognizing concerns stemming from use of restraints without providing mental health treatment); *see e.g.*, *Casey v. Lewis*, 834 F. Supp. 1477, 1553 (D. Ariz. 1993) (restricting the use of segregation as an alternative to mental health care).

91 *Bonner*, *supra* note 69, at 370–71 (arguing that serious mental health care and suicide prevention advancements require alternatives to archaic isolation practices).

92 *See Daniel*, *supra* note 72, at 170 (explaining methods of planning cell design to reduce suicide risk).

93 *Id.* at 170–71 (concluding that cell design methods are imperfect, but when paired with human supervision provide a deterrent to suicide).

94 *See Hayes*, *supra* note 3, at 431, 446 (detailing effective suicide prevention policies as those with six critical components: “staff training, intake screening/assessment, housing, levels of supervision, intervention, and administrative review”).

95 *See e.g.*, *Rellergert v. Cape Girardeau Cnty.*, 924 F.2d 794, 796–97 (8th Cir. 1991) (overturning jury verdict for prisoner whose estate argued he should have been fully restrained because “the question is not whether the jailers did all they could have, but whether they did all the Constitution requires”).

96 *See Vega v. Davis*, No. 13-1268, 2014 WL 3585714 (10th Cir. July 22, 2014) (recognizing the cruelty of placing an emaciated, largely incoherent prisoner in a cell utterly alone without mental health care and chained hand and foot); *Bassey v. Wideman*, No. DKC-08-3262, 2009 WL 2151340, at *5 (D. Md. July 10, 2009) (granting summary judgment in favor of defendants where prisoner, on multiple occasions, was stripped of clothing, placed in a “suicide smock,” and restrained using a five point system at his wrists, ankles, and torso, because he was monitored in fifteen minute intervals); *Ferola v. Moran*, 622 F. Supp. 814, 820 (D.R.I. 1985) (granting prisoner relief after being shackled in a “spread eagle” position for twenty hours with no toilet access for fourteen of those hours, thus forcing him to lay in his urine and causing permanent nerve damage to his arm).

97 *Wells v. Franzen*, 777 F.2d 1258 (7th Cir. 1985).

98 *Id.* at 1260–61 (detailing the conditions under which plaintiff was kept).

99 *Id.* at 1260 (“After four days, plaintiff was interviewed briefly by a psychiatrist and, although he denied ever expressing suicidal intentions, remained tied down for another five days.”).

flow.¹⁰⁰ Mr. Wells had limited access to water, limited access to a urinal pitcher that required help of the guards and was rarely emptied, was itchy, ill, covered in a rash, and was not permitted to shower for the entire nine day period.¹⁰¹ The district court dismissed Mr. Wells' claims on a motion for summary judgment,¹⁰² deciding that there was no genuine dispute as to any material fact and that the officials were entitled to a judgment as a matter of law without ever reaching a jury.¹⁰³ The disturbing aspects of Mr. Wells' confinement demonstrates how the use of restraints may disturb common notions of decency and the Seventh Circuit recognized the potentially "unconscionable conditions of restraints"¹⁰⁴ before reversing and remanding to the lower court.¹⁰⁵

While Mr. Wells being shackled for nine days is an extraordinary case, the district court was still unwilling to protect Mr. Wells' rights.¹⁰⁶ This unreasonable level of deference further exemplifies the barriers faced by suits challenging allegedly unconstitutional use of restraints. And, as in isolation cases, the likelihood of success is equally uncertain. In a 1974 opinion that continues to stand as good law today, the Fifth Circuit chastised Alabama prisons for, along with a host of serious defects in their mental health programs, *not* putting inmates in lockup cells equipped with restraints.¹⁰⁷ Such conflicting views espoused by courts add to a lack of clarity already pervasive in this area of law.

III. SUICIDE PREVENTION MEASURES AND SECTION 1983

There are three methods by which a prisoner may challenge actions taken by prison officials under the Eighth Amendment, but each challenge must meet the aforementioned objective and subjec-

¹⁰⁰ *Id.* at 1261 (noting that "restraints were carelessly applied, causing abrasions and bruises and restricting blood flow to his limbs").

¹⁰¹ *Id.*

¹⁰² *Id.* at 1260.

¹⁰³ FED. R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

¹⁰⁴ *Wells*, 777 F.2d at 1264 (citing *McCray v. Burrell*, 516 F.2d 357, 369 (4th Cir. 1975)).

¹⁰⁵ *Wells*, 777 F.2d at 1264-65 ("In light of the eighth amendment precedents . . . conditions of his restraint are sufficient to warrant further examination.").

¹⁰⁶ *Id.* at 1265.

¹⁰⁷ *Newman v. Alabama*, 503 F.2d 1320, 1324 (5th Cir. 1974), *cert. denied* 421 U.S. 948 (1975) (criticizing the practice of housing mentally unwell prisoners with general population and, if eventually removed, put in "lockup cells not equipped with restraints").

tive prongs of the *Farmer* test to succeed.¹⁰⁸ The three challenges are those contesting: conditions of confinement, excessive use of force, and deliberate indifference to the serious medical needs of the prisoner.¹⁰⁹

Even though both prongs of the *Farmer* test must be met in each case, the applicable standards vary. To challenge the conditions of confinement, the prisoner must show that there are “extreme deprivations” since mere discomfort is considered part of the punishment itself.¹¹⁰ Extreme deprivations are only those so grave as to deny “the minimal civilized measure of life’s necessities”¹¹¹ and are proven by showing that an official was “deliberately indifferent to a risk of serious harm to the plaintiff inmate.”¹¹² An excessive-force claim requires the defendant to prove that the force was applied “maliciously and sadistically for the very purpose of causing harm,” rather than applied in a good faith effort to diffuse an emergency.¹¹³

Lastly, in addition to an objectively serious medical need, cases alleging inadequate medical attention require the prison to prove that the official’s state of mind must reach the level of “deliberate indifference.”¹¹⁴ The psychological needs of suicidal inmates constitute a serious medical need for which liability may attach.¹¹⁵ Such liability, however, is limited to circumstances in which prison officials *know* of the need for more mental health care, but are nonetheless *deliberately indifferent* to the medical needs of the prisoners.¹¹⁶ Ultimately, since conditions-of-confinement and deprivation of medical care challenges are the claims available to a suicidal inmate,¹¹⁷ the success of such suits will necessarily depend on establishing deliberate indifference.

108 See *supra* Part I.A.

109 *Thomas v. Bryant*, 614 F.3d 1288, 1303–04 (11th Cir. 2010).

110 *Hudson v. McMillian*, 503 U.S. 1, 8–9 (1992) (“[E]xtreme deprivations are required to make out a conditions-of-confinement claim.” (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))).

111 *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes*, 452 U.S. at 347).

112 *Thomas*, 614 F.3d at 1312 (citing *Farmer v. Brennan*, 511 U.S. 825, 828 (1994)).

113 *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1972), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)).

114 See *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (“[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 172–73 (1976))).

115 *Estelle*, 429 U.S. at 104–06 (“[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”).

116 See *Townsend v. City of Morehead*, 208 F.3d 215 (6th Cir. 2000) (establishing knowledge as essential to a finding of deliberate indifference).

117 Excessive force is excluded from the analysis since the suicide prevention methods employed are highly unlikely to be used “maliciously and sadistically” as is required by such a standard. See *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (noting that the intent of the

Although there is limited research evaluating the effect of severe suicide prevention measures, many observers continue to research and argue that we are not doing enough to combat inmate suicide.¹¹⁸ The American Correctional Association first began promulgating accreditation standards that recommend policies and procedures for addressing suicidal detainees in 1981.¹¹⁹ The National Commission on Correctional Health Care has supplemented these recommendations with practical guidelines intended to improve suicide prevention programs and reduce the “risk of adverse legal judgments.”¹²⁰ Nonetheless, even as recently as 2005, the majority of facilities had yet to adopt and enact successful suicide prevention programs, and researchers argued that it would take many more years of lawsuits for proper guidelines to be finally implemented.¹²¹

I do not disagree. It seems that while many facilities have not gone far enough to *properly* treat suicidal prisoners, many others have gone too far to *improperly* isolate, restrain, and neglect suicidal prisoners. Hence, Part IV argues for a balance. We do need tort law to impose suicide liability to properly incentivize prison officials to aid the mentally ill and take precautions to prevent suicide. But we also need tort law to impose liability for indefinitely segregating and extensively restraining prisoners for a mental condition often outside their control. This is not outside the realm of possibility. Tort law is designed to achieve socially optimal behavior by imposing civil liability for unreasonable conduct.¹²² Section 1983 can lead officials to that balance.

Section 1983 suits seeking to enjoin the use of allegedly unconstitutional isolation, and restraint procedures are more difficult to bring than suits brought by an estate after an inmate has committed suicide. There are two readily identifiable reasons for this difference.

Eighth Amendment is to prohibit barbarous punishment and torture); *see, e.g.*, *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650 (7th Cir. 2012) (dismissing an excessive force claim brought after an inmate was restrained to a chair for an eighteen-hour period).

118 *See e.g.*, Schnavia Smith Hatcher, *Deliberate Indifference in Jail Suicide Litigation: A Fatal Judicial Loophole*, 24 SOC. WORK IN PUB. HEALTH 401, 406–08 (2009) (claiming that ambiguous standards and procedures “result[] in an array of minimally compliant suicide prevention standards overall”).

119 *Id.* at 407.

120 *Id.*

121 *Id.* at 408 (“Court proceedings had not provided any impetus to the jails to develop or augment their policies . . . [I]t would take many more years of ‘legalese.’”).

122 *See Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (establishing that punishments incompatible with the “evolving standards of decency that mark the progress of a maturing society” are violative of the Eighth Amendment).

First, there will likely be more difficult issues with proof. Part I.B.1 addressed the risks posed to officials by suicide liability suits and cited the difficulties in proving deliberate indifference as a barrier to summary judgment, which heightens the risk of being required to provide full discovery and fully litigate the suit. The risk is heightened compared to Section 1983 actions brought under other constitutional provisions, which do not require proof of subjective intent. The degree of proof required for suicide liability suits compared to that required for actions brought by currently incarcerated persons challenging conditions of confinement or deprivation of medical care, is significantly reduced. As discussed in Part I.A.1, in suicide liability cases the plaintiff need not prove that an objectively serious harm occurred since the suicide itself is evidence of such harm. Conversely, a currently incarcerated person filing a complaint regarding his or her treatment must plead and prove the objective prong of *Farmer* in addition to the subjective prong. Since suicide precludes contestation of the first prong, such suits are by their nature less demanding. This is further compounded by the fact that the evidence in suits challenging current treatment is often provided by the mistreated prisoner him or herself, thereby raising evidentiary and credibility concerns not present as extensively in suicide liability suits.

Second, the Prison Litigation Reform Act, which does not apply to suits brought by a deceased inmate's estate, is likely to apply in full force here.¹²³ The PLRA acts as a deterrent to suit. It is going to limit the representation available to the inmate, since the collection of fees and costs is limited. Plus, the scope of relief and damages is also limited, thus further reducing the incentive for attorneys to litigate such cases. This is in stark contrast to suits brought under Section 1983 that are not subject to the PLRA, in which there is asymmetrical fee shifting that favors plaintiff attorneys. As a result, suits challenging isolation and restraints as methods of preventing suicide are less likely to proceed than suits challenging inadequate precautions after an inmate suicide.

Ultimately, suicides are expensive for prison officials. Officials cannot contest the objective prong of the *Farmer* test; officials can expect a relatively substantial award of damages for death; there is no fee-capping statute for the plaintiff's lawyers; and a jury is likely to be sympathetic to the deceased. By contrast, suits challenging excessive precautions such as restraints and isolation are subject to PLRA fee caps, PLRA limitations on physical damages, and limitations on

123 See *supra* Part III.

proof, and will likely experience juries unsympathetic to the plight of a restrained or isolated prisoner. This uneven playing field makes it more difficult to strike a balance through tort law since the risks, and the magnitude of the risks, do not incentivize finding a middle ground.

IV. IMPLICATIONS AND RESOLUTIONS

Tort law, including constitutional tort law, is critical to the proper functioning of our society. It incentivizes individuals and entities to internalize externalities and act in a manner that addresses the rights of others. Tort law also deters individuals and entities from acting in ways that create liability, thus deterring behavior society finds to be offensive or repulsive. The goals of tort law are only realized when the risk and magnitude of liability are representative of the behavior society wishes to deter or incentivize and to the extent society intends to do so.¹²⁴ But here, tort law has failed.¹²⁵

The consequences of the imperfections in our tort law are apparent. The cost of defending against suits asserting a failure to take adequate precautions to prevent inmate suicide and the likelihood and magnitude of liability have led prison officials to ignore the science and, instead, employ archaic precautions. Although liability for the inhumane conditions of confinement and a failure to provide medical care for serious mental conditions theoretically should be able to provide a backstop to such measures, they are not doing so successfully at this point in time. In order to see the proper balance being achieved, we need an even playing field.

The state of our current law suggests that inmate suicide should be prevented at *any* cost. In addition to the perverse incentives this creates in the treatment of suicidal prisoners, it also has implications on one's right to the control of one's own body. While the Supreme Court has been reluctant to establish a broad sweeping "right to die," there is no legal prohibition on suicide.¹²⁶ In fact, we as a society sen-

¹²⁴ See Keating, *supra* note 15, at 684–86 (discussing various level of risk reduction).

¹²⁵ Reasonable minds differ in regards to cost-justification and constitutional torts. For an argument that Eighth Amendment claims should not be defeated by notions of cost, see Elizabeth Alexander, *Prison Health Care, Political Choice, and the Accidental Death Penalty*, 11 U. PA. J. CONST. L. 1 (2008). Ms. Alexander addresses traditional notions of cost, rather than the type of cost presented here—namely, the cost to the health and welfare of the prisoner imposed by the use of isolation and restraints. The costs at issue here are arguably more understandable and less controversial than the fiscal considerations most oppose.

¹²⁶ See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (denying constitutional due process right to assisted suicide for not constituting a fundamental liberty interest).

tence convicted felons in our prisons to death and force their lives to be taken.¹²⁷ In light of this, it seems contradictory to so rigorously prohibit determined prisoners from taking the identical action themselves.

Several courts have addressed cases where prisoners sentenced to death refuse to appeal or contest their impending execution.¹²⁸ These courts have held that a failure to contest execution indicates that the inmate is not competent to be executed—we are fully prepared to execute prisoners only up until the point that they consent to the execution and then the punishment is prohibited. But it seems quite absurd to maintain that suicidal tendencies by a convicted prisoner preparing to face his own execution are indicia of incompetence.

I make no suggestion that suicide ought to be permitted in our prison system. I raise the aforementioned arguments in an attempt to suggest that even though tort balancing will likely see instances of suicide that would otherwise be prevented through extreme isolation and restraint, it is still preferable to the inhumane suicide prevention measures currently in effect.¹²⁹

The critical question that remains is how the outcome of suits alleging suicide liability and unconstitutional treatment can properly reflect the type of precautions that are truly cost-justified. The most organic way for such a change to occur is through the use of Section 1983 suits themselves. Suits alleging unconstitutional conditions of confinement for the use of solitary confinement and those for deprivation of medical care for serious medical needs can be brought by prisoners who are severely restrained without mental health care. Imposing liability for actions that cross the line from treating to mistreating suicidal prisoners will incentivize officials to step back from extreme measures in order to avoid such liability. The difficulties inherent in these suits as addressed in Part III, however, make this organic resolution largely aspirational.

Since Section 1983 suits brought by currently incarcerated persons are so difficult to mount, there may be a need for external intervention. There are two potential options for striking a balance that are particularly viable: one requiring a long-sought decision by the

127 See, e.g., *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1250 (9th Cir. 2000) (granting a motion to stay execution pending competency after a death row inmate became “a volunteer”).

128 See generally Kristen M. Dama, *Redefining A Final Act: The Fourteenth Amendment and States’ Obligation to Prevent Death Row Inmates from Volunteering to Be Put to Death*, 9 U. PA. J. CONST. L. 1083 (2007).

129 While such a proposition admittedly seems to undermine the value of human life, it is the same sacrifice we see pervasive in all areas of tort law free of strict liability.

Supreme Court and the other involving the administrative capabilities of the Federal Bureau of Prisons as a subset of the Department of Justice.

First, the Supreme Court could grant certiorari to correct the misapplication¹³⁰ of Section 1983 liability for prisoner suicide. The current Eighth Amendment standards of liability are entirely set by Supreme Court precedent. The Court has not specifically considered the Eighth Amendment in the context of suicidal prisoners,¹³¹ despite the strong urging of many parties¹³² and the inordinately high suicide rate in our prisons and jails.¹³³ The Supreme Court has established deliberate indifference as the standard for liability¹³⁴ and has interpreted that standard to mean that the official was subjectively aware of the risk of serious harm, yet failed to take proper precautions to protect against it.¹³⁵ The application of the deliberate indifference standard to the treatment of suicidal prisoners, however, remains an open question.¹³⁶ The Court has recognized that depriving a physically ill prisoner of lifesaving treatment is sufficient to at least plead a claim of deliberate indifference.¹³⁷ But this has not been uniformly expanded to encompass lifesaving mental health treatment for psychologically ill prisoners.

As a result, rather than providing *treatment* for mentally ill prisoners, officials are instituting severe practices of restraint and isola-

¹³⁰ In this context, I define “misapplication” as the heightened level of liability imposed in suicide cases and the lower levels of liability in restraint and isolation cases.

¹³¹ Reply Brief of Petitioner for Petition for Writ of Certiorari at 1, *Troyanos v. Coats*, 132 S. Ct. 1560 (2012) (No. 11-742), 2012 WL 259400, at *1 (urging the Court to grant certiorari because a Section 1983 suicide case has never been considered despite the high number of suicide cases in the circuits).

¹³² See, e.g., Petition for Writ of Certiorari and Appendix Volume I, *Arocho v. Cnty. of Lehigh*, 555 U.S. 815 (2008) (No. 07-1361), 2008 WL 1892739; Petition for Writ of Certiorari, *Bradley v. Simpson*, 547 U.S. 1018 (2005) (No. 05-754), 2005 WL 3392967; Petition for Writ of Certiorari, *Smith v. Blue*, 537 U.S. 1003 (2002) (No. 02-385), 2002 WL 32134417; Petition for Writ of Certiorari, *McCrary v. Comstock*, 537 U.S. 817 (2002) (No. 01-1698), 2002 WL 32134047.

¹³³ NOONAN & GINDER, *supra* note 2, at Tables 2, 15.

¹³⁴ *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

¹³⁵ See *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (“[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”).

¹³⁶ Reply Brief of Petitioner for Petition for Writ of Certiorari, *supra* note 131, at *1 (urging the Court to grant certiorari because a Section 1983 suicide case has never been considered despite the high number of suicide cases in the circuits).

¹³⁷ See *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (per curiam) (finding “[it] was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory” when the prisoner was removed from a hepatitis C treatment program).

tion.¹³⁸ Whether such behavior—depriving the mentally ill of mental health treatment—qualifies as deliberate indifference is an application of the *Farmer* standard the Court has not considered. The Court need not decide whether prisoners are entitled to mental health care in order to ensure balance in the implementation of suicide precautions. The Court could either grant certiorari where the lower court decided whether an official was liable for the suicide of a prisoner *or* the Court could grant certiorari where the lower court decided whether an official was liable for excessively restraining a suicidal prisoner without providing mental health care. The former would provide the Court an opportunity to make clear that imposing liability for suicide requires that the official fail to take *proper* precautions, not that the prison official fail to take *all* physically possible precautions. The latter would afford the Court an opportunity to limit the extent to which the use of restraints can be constitutional. It is impractical to expect, and would be even more impractical to issue, a perfectly clear opinion balancing those precautions which must be taken to prevent suicide and those precautions that are cruel and unusual. But simply recognizing that *some* balance between the two is necessary would be an excellent first step toward recalibrating suicide prevention policies to provide protection and treatment rather than solely restraint and isolation.

Second, the Bureau of Prisons as an administrative agency could promulgate regulations to govern the standards of treatment for suicidal prisoners in federal prisons. While such a regulation would not be binding on state prisons and local jails, tort law often relies on industry standards. By providing a well-balanced policy for federal prisons, the Bureau of Prisons could set an industry standard for all to follow. In a similar vein, the National Commission on Correctional Health Care (NCCHC) and¹³⁹ the American Correctional Association (ACA) could update their standards to reflect modern understandings of mental illness and suicide.¹⁴⁰ While NCCHC and ACA stand-

¹³⁸ See e.g., *Arocho v. Cnty. of Lehigh*, 922 A.2d 1010, 1011–14 (Pa. Commw. Ct. 2007), *cert. denied*, 555 U.S. 815 (2008) (explaining each level of suicide precaution, none of which provide treatment for the suicidal prisoner despite requiring “medical restraints”).

¹³⁹ Since the ACA standards are applied solely to jails, either both entities would need to promulgate similar standards or only the NCCHC.

¹⁴⁰ These standards currently require suicide prevention policies to provide for special housing, increased observation, and medical restraint. The standards do not indicate to what extent restraints are appropriate and there is no recognition that, at a certain point, such restraints may be more harmful than helpful. Furthermore, the standards do not provide any type of mental health or other medical services for those classified as suicidal. AM. CORR. ASS'N, *CORE JAIL STANDARDS* (2010), available at http://www.aca.org/ACA_PROD_

ards are not binding and likewise cannot absolve officials of liability, these standards provide easy-to-adopt guidelines that prisons and jails can use to reform current policies.

Unlike a Supreme Court decision, which would likely create a generally applicable rule for deliberate indifference in cases involving suicidal prisoners, standard-setting entities could be more careful in constructing suicide prevention measures. In this respect, specific standards may have more of an effect on the extent and utility of reforming suicide precautions. Furthermore, the comparative ease with which such precautions can be amended as we develop a better understanding of mental illness and the treatment it requires is appealing. Ultimately, without a decision from the Supreme Court or an Act of Congress, these standards will not be binding on correctional institutions or its officials. The standards will, however, set an industry standard by which the conduct of officials and institutions can be evaluated. As a result, either a Supreme Court decision or an adept industry standard could have a great impact on finally striking the balance between treating and mistreating suicidal prisoners.

CONCLUSION

The pervasiveness of mental illness and the rates of suicide in our prison system are staggering. But the treatment of these mentally ill and suicidal prisoners is even more alarming. Physically restraining prisoners in painful positions for extended periods of time is effective in physically preventing suicide and therefore Eighth Amendment suicide liability. The Eighth Amendment, however, also prohibits cruel and unusual punishment. As a result, there must be a balance between the duty prison officials have to protect inmates from committing suicide and the extent to which officials can employ any method possible to prevent potential suicides.

Tort law itself is intended to incentivize taking those precautions that are cost-justified. The use of uncomfortable restraints for prolonged periods of time has its costs. It costs suicidal and mentally ill prisoners more of their mental health and welfare. It imposes costs that are not always justified by the results, in contravention of the guiding principle to tort liability. While protecting prisoners from suicide is an important task, protecting prisoners from painful and stressful restraints is also vital.

The unique success suicide liability suits have experienced has created an imbalance in the level of incentive provided by the risk of Section 1983 liability. But by deterring the unjustified use of suicide prevention measures such as solitary confinement and severe restraints through Section 1983 liability, the Eighth Amendment can regain its balance.