

# THE EIGHTH AMENDMENT AND NUTRALOAF: A RECIPE FOR DISASTER

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*And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.<sup>1</sup>*

## I. OVERVIEW

In the Spring of 2012, in *Prude v. Clarke*, Judge Richard A. Posner ruled that an inmate's exclusive diet of "nutriloaf," (also spelled nutraloaf) a foul-tasting food given to prisoners as a form of punishment, violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>2</sup> The facts show that the inmate weighed 168 pounds prior to a ten-day stay awaiting trial.<sup>3</sup> However, over several different stays at a correctional facility this particular inmate lost 8.3 percent of his body weight after being subjected exclusively to nutraloaf meals (a.k.a. "prison meat loaf"), which is purposefully distributed to curb unwanted behavior of certain inmates, including for those found spitting, misusing utensils, throwing of projectiles and other bodily wastes at guards, and he was down to 154 pounds by the end of a ten-day period.<sup>4</sup> This particular inmate's symptoms included severe vomiting and bloody stools, and he also developed a painful anal fissure upon his return to state prison.<sup>5</sup> During one visit to the county jail infirmary, a nurse described his weight loss as "alarming."<sup>6</sup>

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1. *Dinsman v. Wilkes*, 53 U.S. 390, 404, 13 L. Ed. 1036 (1851) (noting, in dicta, the permissible bounds that a commanding officer must remain within while dealing with a subordinate and punishment). Although *Dinsman* did not include an Eighth Amendment assertion of cruel and unusual punishment, this statement represents an early Supreme Court ruling where justices were concerned with the subjective intent of an authority figure in charge.

2. *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012), *reh'g denied* (Apr. 19, 2012).

3. *Id.* at 733.

4. *Id.*

5. *Id.* at 734.

6. *Id.*

The primary goal of this note is to address the rationale behind arguments that serving nutraloaf to inmates throughout the United States constitutes cruel and unusual punishment. The second section of this note introduces the evolution of cruel and unusual punishment claims in the context of the Eighth Amendment, owing particular thanks to the scholarship of Michael B. Mushlin on the topic. In particular, section two focuses on three key Supreme Court decisions that sought to harmonize what the standard of analysis for cruel and unusual punishment claims would be. Next, section three examines the complex relationship between food and prisoners by touching on the various power struggles that exist between subordinate inmates and authority figures. Subsequently, the fourth section of this note provides a cross-section of judicial opinions on cruel and unusual punishment cases to better highlight the range of claims inmates typically raise while incarcerated. Part five of this note exclusively deals with inmate challenges that involve food. Similarly, part six of this note solely focuses on judicial decisions involving prisoners and nutraloaf, with the main emphasis on *Prude v. Clarke* and its critique. Finally, in conclusion, this note attempts to synthesize the lessons of past cruel and unusual punishment cases regarding serving nutraloaf to prisoners, and concluding that so long as prisoners are being served a nutritionally sufficient meal, an inmates' personal qualms with nutraloaf's taste or appeal is irrelevant. Conditions of confinement are not meant to be easy or tailored to individual preferences of inmates, and the best way to avoid an unpleasant or foul-tasting meal is the refrain from the kinds of food infractions that result in the distribution of nutraloaf in the first place.

## II. UNDERSTANDING CRUEL & UNUSUAL PUNISHMENT

### *A. Evolution of Eighth Amendment Protections*

The Eighth Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment, articulates subtle, yet necessary protections for current prisoners.<sup>7</sup> Among other things, the Eighth Amendment guarantees that no “cruel and unusual punishments [shall be] inflicted.”<sup>8</sup> Historically, the desire to prevent cruel and unusual punishment stemmed from concern over arbitrary and egregious judgments during James

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7. *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (citing *Robinson v. California*, 370 U.S. 660 (1962)).

8. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

II's reign in England.<sup>9</sup> The prohibition appeared initially in the Bill of Rights of 1689.<sup>10</sup>

Prior to 1976, the United States Supreme Court seldom addressed the scope of the Eighth Amendment's protections regarding inmates and prison conditions.<sup>11</sup> During that time, Eighth Amendment cases were granted certiorari only in situations where sentences were grossly disproportionate to crimes.<sup>12</sup> However, a shift occurred between 1976 and 1994, when the Supreme Court decided seven cases that dealt with prisoner rights and prison conditions rather than sentencing challenges.<sup>13</sup>

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9. *Harmelin*, 501 U.S. at 967-68 (“Most historians agree that the ‘cruel[] and unusual[] punishments’ provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II . . . . [R]ecently historians have argued, and the best historical evidence suggests, that it was not Jeffreys’ management of the Bloody Assizes that led to the Declaration of Rights provision, but rather the arbitrary sentencing power he had exercised in administering justice from the King’s Bench.”).

10. *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 54-55 (1910); see also MACAULAY, HISTORY OF ENGLAND 638-46 (noting the use of a pillory, a wooden device where a prisoner’s head and limbs were inserted and secured in place, so as to induce public humiliation from a passerby); but compare Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 851 (1969) (arguing that the American framers misinterpreted the intent of the English Bill of Rights drafters, and also suggesting, *inter alia*, that in 1641 a Puritan attorney, Rev. Nathaniel Ward of Ipswich, Massachusetts, drafted a document under the title *Body of Liberties*). With respect to Rev. Ward’s *Body of Liberties*, clause 46 said the following: “For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel.” *Id.* at 851.

11. Michael B. Mushlin, *Chapter 3: The Eighth Amendment: Solitary Confinement, Prevention of Violence, Protection Against Overcrowding, and Provisions of The Necessities of Life in RIGHTS OF PRISONERS* 69 (Thompson/West 4th ed., 2009).

12. *Id.*; see *Weems v. United States*, 217 U.S. 349, 368 (1910) (striking down minimum imprisonment of 12 years, one day in chains and lifetime surveillance for a crime of falsifying an official document); but see *In re Kemmler*, 136 U.S. 436, 447 (1890) (discussing the extent of constitutional limitations of cruel and unusual punishments by suggesting, “[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,-something more than the mere extinguishment of life.”).

13. Mushlin, *supra* note 11, at 69. See generally *Estelle v. Gamble*, 429 U.S. 97 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Whitley v. Albers*, 475 U.S. 312 (1986); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Helling v. McKinney*, 509 U.S. 25 (1993); *Farmer v. Brennan*, 509 U.S. 25 (1993).

In 1976, *Estelle v. Gamble* marked the first Supreme Court case specifically addressing the Eighth Amendment's protections from cruel and unusual punishment with respect to an inmate's health conditions.<sup>14</sup> In *Estelle*, a Texas state prisoner filed a *pro se* 42 U.S.C. § 1983 civil rights complaint<sup>15</sup> alleging, *inter alia*, that a medical director and two corrections officials subjected him to cruel and unusual punishment when they failed to provide adequate treatment for a back injury he allegedly sustained while engaged in a prison-work assignment.<sup>16</sup> The majority opinion in *Estelle* reinforced a rather common-sense notion that "infliction of such unnecessary suffering [upon inmates] is inconsistent with contemporary standards of decency."<sup>17</sup> However, *Estelle* ultimately stood for the proposition that in order for a prisoner to state a cognizable claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence *deliberate indifference* to serious medical needs."<sup>18</sup> While the *Estelle* decision first introduced the term "deliberate indifference" into the Eighth Amendment conversation, the Court did not make efforts to truly define the term's meaning.<sup>19</sup>

The next Supreme Court decision addressing Eighth Amendment protections regarding prison conditions occurred five years later, in *Rhodes v. Chapman*.<sup>20</sup> *Rhodes* involved a claim by two prisoners held at a maximum-security state prison in Lucasville, Ohio, who alleged the prison's

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14. *Estelle*, 429 U.S. at 103 ("An inmate must rely on prison authorities to treat his medical needs. . . . In the worst cases, such a failure may actually produce physical [torture or death. . . . In less serious cases, denial of medical care may result in pain and suffering which no one would suggest would serve any penological purpose.").

15. *Albright v. Oliver*, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

16. *Estelle*, 429 U.S. at 106-07 (finding that no "deliberate indifference" occurred when an inmate's medical treatment consisted of approximately seventeen visits with medical personnel over a three month span).

17. *Id.* at 103. *See also id.* at 103 n.8 (referencing more than twenty State codes dealing with the treatment of prisoners or rules for the operation correctional facilities. In addition, noting that "[m]any states have also adopted regulations which specify, in varying degrees of detail, the standards of medical care to be provided to prisoners."). *See also* *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926) (articulating the common-law view of prisoners that "the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.").

18. 429 U.S. at 106 (emphasis added).

19. *Mushlin*, *supra* note 11, at 70, 70 n.3 ("The term [deliberate indifference] had not been used by the Supreme Court prior to *Estelle*.").

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

policy of “double ceiling” constituted cruel and unusual punishment.<sup>21</sup> Writing for the majority, Justice Powell wrote that the “gravamen of their complaint was that double ceiling confined inmates too closely.”<sup>22</sup> But here, the *Rhodes* Court found that prison conditions, even those that some may consider harsh, are merely a consequence of the debt that criminal offenders pay for offenses against society.<sup>23</sup> Justice Powell also famously stated, “the Constitution does not mandate comfortable prisons,” and he noted that maximum-security prison conditions “cannot be free of discomfort.”<sup>24</sup> Ultimately, the *Rhodes* Court held that any double-ceiling was necessitated by an unforeseen surge in the prison population, and any effects on inmates were negligible at best and “did not lead to deprivations of essential food, medical care, or sanitation.”<sup>25</sup>

With respect to the evolution of Eighth Amendment analysis on cruel and unusual punishment, *Rhodes* had a significant impact insofar as the Court specifically declined to focus on the prison officials’ subjective states of mind, and instead looked to an objective inquiry into the prison conditions in question.<sup>26</sup> However, this alternate approach put *Rhodes* and *Estelle* slightly at odds, as a deliberate indifference standard articulated in *Estelle* “require[d] some inquiry into the defendant’s state of mind.”<sup>27</sup>

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21. *Id.* at 339-40 (explaining that double ceiling is a policy where two prisoners are put in cells typically designed for one due to overpopulation). *See also* Chapdelaine v. Keller, No. 95-CV-1126, 1998 WL 357350, at \*4-5 (N.D.N.Y. Apr. 16, 1998) (finding no Eighth Amendment violation for a double-ceiling policy despite inmates’ complaints about cell crowding, inadequate ventilation, no ladder access to the top bunk, and no private sanitary facilities).

22. *Rhodes*, 452 U.S. at 340-41 (“Each cell at SOCF measures approximately 63 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell. Cells housing two inmates have a two-tiered bunk bed.”).

23. *Id.* at 347.

24. *Id.* at 349.

25. *Id.* at 348 (“Although job and educational opportunities diminished marginally as a result of double ceiling, limited work hours and delay before receiving education do not inflict pain . . . [w]e would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution.”).

26. Mushlin, *supra* note 11, at 72 (citing *Rhodes v. Chapman*, 452 U.S. 337 (1981)).

27. *Id.* at 73. *But see* *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by objective factors to the maximum possible extent.”) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Five years later, in *Whitley v. Albers*, the Supreme Court addressed an action brought under 42 U.S.C. § 1983 by an inmate who was shot in the leg by a prison guard that was attempting to free another officer held hostage during a prison riot.<sup>28</sup> The *Whitley* Court rejected the inmate's claim that the shooting violated the Eighth Amendment right to be free from cruel and unusual punishments by focusing on the pressing exigent circumstances that the guards faced during the riot.<sup>29</sup> The Court concluded that, for an inmate to prevail, he or she must show that the shooting occurred "maliciously and sadistically for the very purpose of causing harm."<sup>30</sup> In other words, the *Whitley* Court focused on the subjective element of how force was applied—and whether or not the force was applied in a "good faith effort to maintain or restore discipline."<sup>31</sup>

At this point, the Court had articulated three distinct tests for Eighth Amendment challenges regarding cruel and unusual punishment, causing a lack of consensus.<sup>32</sup> Where *Estelle* initially articulated a deliberate indifference standard, and *Rhodes* highlighted the importance of objectivity, the *Whitley* decision represented a shift towards subjectivity.<sup>33</sup> The *Whitley* Court expressed concern that a deliberate indifference standard might not adequately "capture the importance" of competing factors such as the mental state of prison officials.<sup>34</sup> Until 1991, no definitive test was in place that one might look to in determining the constitutionality of cruel and unusual punishment claims.

#### B. Harmonizing *Estelle*, *Rhodes*, and *Whitley*

In 1991, the Court attempted to "rationalize and harmonize" its previous decisions in *Estelle*, *Rhodes*, and *Whitley* with respect to the Eighth Amendment and prison conditions in *Wilson v. Seiter*.<sup>35</sup> *Wilson* involved a 42 U.S.C. § 1983 lawsuit from an Ohio inmate who alleged that certain

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

29. Mushlin, *supra* note 11, at 73-74 (citing *Whitley v. Albers*, 475 U.S. 312 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.")).

30. *Whitley*, 475 U.S. at 313.

31. *Id.* at 320-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)).

32. Mushlin, *supra* note 11, at 74.

33. *Whitley*, 475 U.S. at 320-21.

34. *Id.* (noting that relevant factors should be considered in a subjective analysis of the action undertaken by prison officials, such as the *need* for any application of force as well as the relationship between the need and *amount* of force utilized).

35. Mushlin, *supra* note 11, at 76 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991)).

conditions of his incarceration amounted to cruel and unusual punishment, including, but not limited to, complaints about excessive noise, deficient locker space, unhygienic dining services and food preparation, and unclean restrooms.<sup>36</sup> Justice Scalia, writing for the majority, focused on the text of the Eighth Amendment which “bans only cruel and unusual *punishment*,” and reasoned that any punishment not formally enumerated through a judge’s sentence requires a *subjective* analysis into an inflicting officer’s state of mind.<sup>37</sup> On this specific point, Justice Scalia quoted the following observations made by Judge Posner in *Duckworth v. Franzen*:

The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner’s toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.<sup>38</sup>

However, the *Wilson* Court concluded that all Eighth Amendment prison claims must both be “supported by proof of an objective *and* a subjective component.”<sup>39</sup> In other words, plaintiffs must not only meet a burden of establishing that prison conditions are *objectively* cruel and unusual, but additionally satisfy that those conditions stem from subjective, “culpable acts by agents of the state.”<sup>40</sup>

### *C. The Objective and Subjective Test*

As set forth in *Trop v. Dulles*, the Eighth Amendment’s meaning is rooted in the “evolving standards of decency that mark the progress of a maturing society.”<sup>41</sup> Thus, what may have been recognized as permissible decades or

36. *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

37. *Id.* at 300-01.

38. *Id.* at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (rejecting allegations of cruel and unusual punishment stemming from a 1979 fire aboard a bus carrying handcuffed prisoners between Illinois prisons). The doors of the bus were sealed for security purposes and dense smoke filled the bus. Twenty one inmates were injured, and one inmate died. *Duckworth*, 780 F.2d at 648.

39. Mushlin, *supra*, note 11 at 76 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991)) (emphasis added).

40. *Id.* at 78 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

41. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

centuries earlier, may not necessarily be morally or legally tolerable in modern times.<sup>42</sup>

In a post-*Wilson* era, two tests were available for an inquiry regarding a prisoner's Eighth Amendment challenge—one subjective and one objective.<sup>43</sup> With respect to the objective prong, the question at issue became whether or not a condition was so serious that it might require protection or relief; whereas the subjective prong looked to whether or not prison administrators and officials had a culpable mindset in their decisions that punished or affected inmates.<sup>44</sup> Because these tests are independent of each other, a reviewing court could apply them in whatever order or preference desired.<sup>45</sup>

Frequently, objective standards of decency refer back to model standards proposed by organizations such as the American Bar Association, American Law Institute, and National Advisory Commission on Criminal Justice Standards and Goals.<sup>46</sup> While for the most part lower courts rely on these standards<sup>47</sup> in assessing standards of decency, the Supreme Court tends to view the wisdom of such groups or agencies as merely relevant, rather than as controlling.

It terms of the subjective prong, the Supreme Court set forth in *Wilson* that there must be an inquiry into the state of mind for the prison guard or administrator responsible for the conduct at issue in an Eighth Amendment prisoner claim.<sup>48</sup> To constitute cruel and unusual *punishment*, the practice in

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42. Roderick Oxford, *Eighth Amendment ETS Claims: A Matter of Human Dignity*, 18 OKLA. CITY U. L. REV. 505, 519 (1993) (citing *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring)); see also Mushlin, *supra*, note 11 at 92 n.7 (quoting Judge Posner's opinion, from *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988), where he wrote, "[t]he conditions in which prisoners are housed, like the poverty line, is a function of a society's standard of living. As that standard rises, the standard of minimum decency of prison conditions, like the poverty line, rises too.").

43. Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1815-16 (2012).

44. *Id.*

45. Oxford, *supra* note 42, at 529.

46. Mushlin, *supra* note 11, at 94 (discussing model standards proposed by various organizations).

47. See e.g., *Ramos v. Lamm*, 639 F.2d 559, 567 n.10 (10th Cir. 1980) (articulating the Supreme Court's view of minimum standards of decency by arguing "[w]hile . . . a variance from state standards or from standards promulgated by certain professional organizations does not establish a per se constitutional violation, it is a factor to be considered in determining whether contemporary standards of decency have been met.").

48. *Wilson v. Seiter*, 501 U.S. 294, 301 (1991).

question must necessarily be characterized as some form of punishment, otherwise there is no constitutional prohibition against it.<sup>49</sup> If a claim involves brutality by guards, “the inmate must prove that the defendants acted with malice,” if, however, “the claim concerns a prison condition, the right to safety and protection from inmate assaults, or prison medical care, the lesser standard of ‘deliberate indifference’ . . . applies.”<sup>50</sup> Overall, “no matter how objectively deplorable” a prison condition is, said condition might only be found unconstitutional if it “was imposed with the requisite scienter by prison officials.”<sup>51</sup>

### III. A BRIEF HISTORY OF PRISON FOOD

#### *A. Food in General*

The Eighth Amendment is a safeguard against subhuman conditions for incarcerated individuals.<sup>52</sup> Once the government imprisons someone, it assumes the responsibility of protecting his or her well-being during that period of incarceration.<sup>53</sup> As the only source for food for prisoners, the state must ensure that all prisoners are provided with “nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it.”<sup>54</sup>

Historically, food was tied closely to a system of rewards or punishments—mainly as a tool to foster obedience.<sup>55</sup> Throughout the nineteenth century, “incoming prisoners were provided typically with bread and water until they had earned the right for such luxuries as meat or cheese.”<sup>56</sup> However, in the twentieth century, during the rise of the medical

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49. Mushlin, *supra* note 11, at 98.

50. *Id.*

51. *Id.* at 98-99.

52. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“The also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care. . .”).

53. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“When a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.”).

54. *Ramos v. Lamm*, 639 F.2d 559, 571 (10th Cir. 1980).

55. MARY BOSWORTH, *THE U.S. FEDERAL PRISON SYSTEM* 73-77 (2002).

56. *Id.* at 73.

model of rehabilitation,<sup>57</sup> “individualized treatment” based on “the positivistic beliefs . . . in the potential of science” gained favor.<sup>58</sup> This medical-based model helped shift the focus away from obedience and towards “scientific notions of nutrition.”<sup>59</sup> Consequently, the mainstream belief was that “[h]ealthy prisoners . . . would be productive workers and, ultimately, reformed citizens.”<sup>60</sup>

In more modern times, prison standards have improved somewhat, yet, unsurprisingly, limited finances restrict most correctional facilities. In fact, some institutions manage with a total operational budget amounting to less than \$3.00 a day per inmate.<sup>61</sup> With such limited funds, it should come as no surprise that prisoners are often dissatisfied with the food provided.<sup>62</sup>

At a minimum, prisoners are allotted no less than fifteen minutes to eat their meals.<sup>63</sup> Most correctional standards also require that food be served in “congregate settings” except when security reasons override.<sup>64</sup> Former pleasantries from life outside of jail are not always provided or even constitutionally protected.<sup>65</sup> For example, there is no constitutional right to coffee.<sup>66</sup> However, with respect to inmates’ nutritional concerns, some institutions do make a point of offering healthier options of that day’s “main meal, and even go so far as to provide a salad bar.”<sup>67</sup>

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57. Dean J. Spader, *Megatrends in Criminal Justice Theory*, 13 AM. J. CRIM. L. 157, 180 (1986).

58. *Id.*

59. BOSWORTH, *supra* note 55, at 73 (“Prison diets were examined for the calorific content rather than used primarily as a means of control.”).

60. *Id.*

61. *Id.*

62. *Id.* at 74 (“As Seth M. Ferranti points out, ‘Whenever you have inmates making the food and they don’t care, the food will suck. . . . It all depends on the given situation.’”).

63. Mushlin, *supra* note 11, at 271.

64. *Id.*

65. *Lane v. Hutcheson*, 794 F. Supp. 877, 884 (E.D. Mont. 1992). The court noted that “discomfort alone” is not a constitutional violation. In *Lane*, the inmate complained, *inter alia*, about poor ventilation which resulted in hot prison conditions, lack of access to fresh fruits and vegetables, and no access to a glass mirror. *Id.*

66. *Id.* at 882-83 (“Unlike life outside of the jail, inmates are not allowed to “raid the refrigerator” thereby having unlimited access to food. This is simply one of life’s pleasures that confinement must restrict for safety and security reasons.”).

67. BOSWORTH, *supra* note 55, at 73-77 (“Most prisons these days also have a salad bar and offer a ‘hearty healthy’ version of the main meal. Fried chicken and baked chicken, or French fries and baked potatoes may be served at the same meal.”).

*B. Power Struggles & Inmate Defiance*

In correctional institutions, food generally symbolizes “the complexity of power relations between inmates and staff.”<sup>68</sup> Decisions about food are just one aspect of control that inmates lose upon incarceration. The stark contrast is that “in outside society dietary habits serve to establish and symbolize control over one’s body . . . [but] [i]n prison, that control is taken away as the prisoner and their [sic] body become the objects of external forces.”<sup>69</sup> Although each prisoner eventually adapts to the restrictions of incarceration, some inmates frequently challenge their subordinate roles by acting out in visibly defiant ways against the authority figures.<sup>70</sup> While some inmates show their defiance by refusing to return trays, others resort to more drastic means by hurling a mixture of food and human waste at guards.<sup>71</sup>

Aside from regularly scheduled meals, “[p]rison canteens can offer prisoners some avenues for accessing foods that they crave or associate with home or their cultural heritage.”<sup>72</sup> However, such choices are limited to those more powerful “inmates who possess the wealth—in whatever form of currency—to buy.”<sup>73</sup> Interestingly, these outside choices can present additional problems for correctional guards, since the food and its packaging can at times be used for contraband concealment.<sup>74</sup> For example, “Kit Kat chocolate bars . . . can be purchased at many prison canteens. But because the silver foil the Kit Kats are wrapped in can be used for taking drugs, the bars are stockpiled and traded at exorbitantly high rates.”<sup>75</sup> Similarly, “[f]ruit bought at the canteen or taken from the mess halls can be illegally

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68. Avi Brisman, *Fair Fare?: Food As Contested Terrain in U.S. Prisons and Jails*, 15 *GEO. J. ON POVERTY L. & POL’Y* 49, 54 (2008) (citing Gill Valentine & Beth Longstaff, *Doing Porridge: Food and Social Relations in a Male Prison*, 3 *J. MATERIAL CULTURE* 131, 132 (1998)).

69. Brisman, *supra* note 68 at, 54 (citing Catrin Smith, *Punishment and Pleasure: Women, Food and the Imprisoned Body*, 50 *A.M. SOC. REV.* 197, 202 (2002)).

70. Brisman, *supra* note 68, at 73 (citing Rebecca Godderis, *Dining In: The Symbolic Power of Food in Prison*, 43 *HOW. J. CRIM. JUST.* 255, 260 (2006)).

71. Brisman, *supra* note 68, at 74 (stating that typically, a mixture of urine and feces is thrown at the eyes and face of guards. “Humiliation is the name of the game and is one of the few ways prisoners have to degrade their keepers”)(quoting CARL SIFKIS, *THE ENCYCLOPEDIA OF AMERICAN PRISONS* 238 (2003)).

72. Brisman, *supra* note 68, at 76.

73. *Id.* at 77.

74. *Id.*

75. *Id.*

turned into alcohol, called ‘pruno,’ which can be traded, sold or consumed.”<sup>76</sup>

Hunger strikes are another common form of prisoner defiance.<sup>77</sup> According to the Code of Federal Regulations on Judicial Administration, a hunger strike is defined officially as a prisoner who “communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours.”<sup>78</sup> This self-starving behavior is usually done to effectuate change.<sup>79</sup> Most interesting is the dual-effect that hunger strikes may have by highlighting how well officials do (or do not) respond. On one hand, by permitting a hunger strike the State may appear to devalue prisoners’ lives.<sup>80</sup> However, the alternative would be to intervene by force-feeding, an effort the prisoner may challenge, which ultimately “turns an illegitimate activity—the hunger strike—into a legitimate one.”<sup>81</sup>

#### IV. A CROSS-SECTION OF CRUEL & UNUSUAL PUNISHMENT COMPLAINTS

##### A. *Shrader v. White*

Every cruel and unusual punishment claim is different in some manner, but most if not all, give a unique snapshot into life behind bars. For example, in *Shrader v. White*, inmates at Virginia State Penitentiary brought a class action suit against prison officials stating, *inter alia*, that “various conditions of their confinement violated the eighth amendment’s proscription against cruel and unusual punishment.”<sup>82</sup> Here, the *Shrader* court addressed inmate concerns about prison weapons, showers, inadequate heating and ventilation, the general disrepair of prisons, and oddly enough, a “pigeon” nest problem.<sup>83</sup> With respect to the pigeon nests, inmates expressed concern that the presence of birds might create a health risk, particularly from a sanitary point of view, because “pigeon feces and pigeons inside of the building increase the opportunity for the occurrence and transmission of certain mycotic diseases.”<sup>84</sup> On this point, no evidence

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76. *Id.* (citing Gill Valentine & Beth Longstaff, *Doing Porridge: Food and Social Relations in a Male Prison*, 3 J. MATERIAL CULTURE 131, 140 (1998)).

77. Brisman, *supra* note 68, at 79.

78. *Id.* at 80 (citing 28 C.F.R. § 549.61 (2005)).

79. Brisman, *supra* note 68, at 77.

80. *Id.* at 88 (citing Lionel Wee, *The Hunger Strike as a Communicative Act: Intention without Responsibility*, 17 J. LINGUISTIC ANTHROPOLOGY 61, 70 (2007)).

81. Brisman, *supra* note 68, at 88.

82. *Shrader v. White*, 761 F.2d 975, 977 (4th Cir. 1985).

83. *Id.* at 975-84.

84. *Id.* at 984.

was ever introduced that demonstrated if any inmate actually suffered from the presence of pigeons.<sup>85</sup> With respect to the sanitary conditions of showers, the court noted while there were rust stains and possible momentary loss of cold water as a result of toilets flushing, there was simply no evidence that inmates suffered injury as a result.<sup>86</sup>

On the more pertinent issue of food service in this note, the *Shrader* case reinforced the well-established principle that inmates must receive nutritionally adequate food, “prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it.”<sup>87</sup> Here, the parties involved stipulated that when food was properly prepared and stored, the menu met the requirements for nutritionally adequate meals.<sup>88</sup> However, the inmates’ main dispute in *Shrader* was that food was *not* in fact properly stored, prepared, or served.<sup>89</sup>

In its analysis of the food, the court compared the plaintiff-inmates claims against the veracity of defense witnesses.<sup>90</sup> The court stated, “if one were to believe the plaintiffs’ inmate witnesses, rarely a meal is served that does not consist of: (1) raw food; (2) rotten food; or (3) contaminated food.”<sup>91</sup> On the other hand, “[t]he defendants presented evidence of a Four-Star restaurant with excellent management procedures.”<sup>92</sup> In this case, the court’s primary focus was on making credibility determinations.<sup>93</sup> Accordingly, the court found that the record “reveals no evidence of outbreaks of food poisoning, diarrhea, or other diseases which are indicative of unhealthy conditions in the preparation or handling of food.”<sup>94</sup> Furthermore, “there is no evidence of either malnutrition or ‘sub-clinical manifestations’ of malnutrition, such as increased dental problems, loss of appetite, reduced capacity to work, ward off disease, cope with stress, etc.”<sup>95</sup>

Overall, the *Shrader* case serves as an important data point for cruel and unusual punishment claims, as the opinion arguably articulated the correct position that judicial assessment of prison conditions “spring[s] from constitutional requirements” rather than from a “court’s [particular] idea of

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85. *Id.*

86. *Id.*

87. *Id.* at 986 (citing *Ramos v. Lamm*, 639 F.2d 559, 571 (10th Cir. 1980)).

88. *Shrader v. White*, 761 F.2d 975, 986 (4th Cir. 1985).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Shrader v. White*, 761 F.2d 975, 986 (4th Cir. 1985).

95. *Id.*

how to best operate a detention facility.”<sup>96</sup> In other words, judges should not subjectively dictate or speculate on how prisons might best operate, or selectively impose standards.<sup>97</sup> Likewise, the *Shrader* court also emphasized the harsh reality first articulated in *Rhodes v. Chapman*, that “the Constitution does not mandate comfortable prisons, and prisons . . . cannot be free of discomfort.”<sup>98</sup> Ultimately, the *Shrader* court affirmed the district court’s findings that the prisoners’ claims lacked substance to prove Eighth Amendment violations on the part of prison officials.<sup>99</sup>

#### B. *Walker v. Johnson*

In *Walker v. Johnson*, a prisoner claimed that his constitutional rights were violated during an emergency lockdown of the prison for security reasons.<sup>100</sup> Among other grievances, the inmate claimed he was fed cold, nutritionally deficient meals, received insufficient medical attention, and had no access to fresh air or outdoor exercise.<sup>101</sup> Referencing an unpublished opinion on similar facts, the Court concluded that the restrictions imposed by the prison officials, though harsher than usual, remained constitutional, as they were implemented to further legitimate governmental interests in preserving order and safety.<sup>102</sup>

The decision in *Walker* represents an all too common response in cruel and unusual punishment cases where a prisoner merely asserts a litany of claims without offering the requisite support to establish any actual violation.<sup>103</sup> Here the court’s finding is representative of such a response. Where the allegation was that meals were inadequate and cold, the court found that inmates need only be provided with nutritionally adequate

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96. *Id.* at 986 (citing *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981)).

97. *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

98. *Shrader*, 761 F.2d at 987 (citing *Rhodes*, 452 U.S. at 349).

99. *Shrader*, 761 F. 2d at 981.

100. *Johnson v. Williams*, 768 F. Supp. 1161, 1163 (E.D. Va. 1991). According to Virginia Department of Corrections guidelines, an institutional lockup exists as a security measure when one or more inmates are temporarily confined during an investigation. *See* VA. DEPT. OF CORR. ADULT INSTITUTIONAL SERVICES GUIDELINE 411(III)(J) (Apr. 2, 1979).

101. *Johnson* 768 F. Supp. at 1163.

102. *Id.*

103. *Id.* at 1164 (reiterating that the plaintiff failed to present sufficient facts or at time even state a constitutional violation).

food.<sup>104</sup> The court reasoned that a cold bag lunch provided in lieu of a hot meal is not inherently less nutritious or unsanitary than a hot meal.<sup>105</sup> Similarly, with respect to the claim of inadequate medical attention, the court found that the inmate failed to establish any hard evidence of unnecessary and wanton infliction of pain.<sup>106</sup> Finally, the claims about excessive heat and cold failed because the inmate did not provide concrete evidence that the conditions resulted in serious medical or emotional deterioration.<sup>107</sup>

One of the more relevant issues raised in *Johnson* revolves around the question of inmate access to recreation and outdoor exercise.<sup>108</sup> As the court noted, the Fourth Circuit in *Sweet v. South Carolina Dept. of Corrections* previously held that a limitation, such as solitary confinement or restriction to exercise, that is ongoing for an extended period of time is harmful to prisoner health constitutes cruel and unusual punishment.<sup>109</sup> However, in *Johnson* the court ruled that based on security reasons for the lockdown, any restrictions on the opportunity to exercise outdoors did not violate constitutional protections.<sup>110</sup> More importantly, the record indicated that although opportunities were restricted, prisoners still had limited access outside of their cells and were still allowed to leave individual confinement approximate two hours every day, and allowed outdoor exercise twice a week, negating the prisoners Eighth Amendment claim of cruel and unusual punishment.<sup>111</sup> Overall, the Court determined that because the decisions made were penologically justified, no violation occurred.<sup>112</sup>

104. *Id.* at 1165 (quoting *Shrader v. White*, 761 F.2d 975, 986 (4th Cir. 1985)).

105. *Johnson v. Williams*, 768 F. Supp. 1161, 1165 (E.D. Va. 1991). *See also* *Burgin v. Nix*, 899 F.2d 733, 734 (8th Cir.1990) (holding sacked meals provide an adequate diet).

106. *Id.* at 1165 (“Indeed, plaintiff provides no specific facts regarding the alleged deprivation of medical treatment. By contrast, defendants state that the plaintiff requested medical attention on two occasions and that each request was addressed promptly.”).

107. *Id.* at 1166. The record indicated that maintenance workers continually made efforts to repair windows, but not all windows could be completed simultaneously. Moreover, there is no evidence that the conditions fell below minimal civilized measures of life’s necessities.

108. *Id.* at 1167.

109. *Id.* at 1167 (citing *Sweet v. South Carolina Dep’t of Corrections*, 529 F.2d 854, 865–66 (4th Cir.1975)).

110. *Id.* (“[C]onsidering the circumstances and the need for security, prison officials had not other alternative but to restrict prisoners to their cells in order to prevent another outbreak of violence.”).

111. *Johnson v. Williams*, 768 F. Supp. 1161, 1167 (E.D. Va. 1991).

112. *Id.*

## V. A CROSS-SECTION OF OPINIONS ABOUT FOOD

A. *Hamm v. DeKalb County*

In *Hamm v. DeKalb County*, a pretrial detainee complained that he was incarcerated in DeKalb County Jail from 1979 until 1982 during which time “food occasionally contained foreign objects.”<sup>113</sup> A district court entered judgment for defendants, and the Eleventh Circuit ruled that the district court correctly applied the standards with respect to food served to inmates.<sup>114</sup> Specifically, the Constitution mandates at a minimum that “reasonably adequate food” be provided in order for the cruel and unusual punishment standard to be passed.<sup>115</sup> Going further, “the fact the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation.”<sup>116</sup>

B. *Rodriguez v. Briley*

In *Rodriguez v. Briley*, an Illinois state prisoner appealed an earlier summary judgment ruling and claimed that prison officials had inflicted cruel and unusual punishment by “denying him showers and withholding meals.”<sup>117</sup> Inmate Rodriguez failed to comply with a prison rule that required him to store certain belongings in a particular box, which would promote safety, security, and facilitate swift cell searches for guards.<sup>118</sup> As a consequence for noncompliance, he was not permitted to leave his cell to go to the prison cafeteria. In addition, during an 18-month period, inmate Rodriguez “missed 75 showers and between 300 to 350 meals, with various consequences that included a rash, fatigue, and a loss of 90 pounds.”<sup>119</sup>

The Seventh Circuit ruled that Rodriguez “punished himself” and that as soon as “Rodriguez puts his belongings in the storage box, he can leave his

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113. *Hamm v. DeKalb County*, 774 F.2d 1567, 1569 (11th Cir. 1985).

114. *Id.* at 1569.

115. *Id.* at 1575.

116. *Id.* (citing *Hoitt v. Vitek*, 497 F.2d 598, 601 (1st Cir. 1974)).

117. *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005).

118. *Id.*

119. *Id.* (The court sarcastically noted, “[n]ot that [inmate Rodriguez] needed those 90 pounds, since, before he started skipping meals, he weighed between 250 and 300 pounds and he is only 5 feet 8 inches tall.”). *Id.*

cell and go to the cafeteria.”<sup>120</sup> In addressing *Rodriguez*, Judge Posner wrote the following:

Suppose [Rodriguez] announced that he would skip dinner every day unless he were served champagne and caviar at least one a month. He, not the prison, would be the author of his being denied dinner. A prisoner cannot force the prison to change its rules by going on a hunger strike and blaming the prison for his resulting loss of weight.<sup>121</sup>

Judge Posner wisely noted that only certain reasons would justify intervening in this case, including if a refusal to eat turned suicidal, or if such noncompliance were the product of insanity; however, neither condition was a factor here.<sup>122</sup>

### *C. Varricchio v. County of Nassau*

In *Varricchio v. County of Nassau*, an inmate claimed that he received tainted food that consisted of bodily waste, staples, metal pins, and soap, and that as a result of unbearable pains and bloody stools, he went on a hunger strike.<sup>123</sup> The court denied the defendant’s motion for summary judgment because the inmate’s complaint raised sufficient facts to plead a claim of cruel and unusual punishment.<sup>124</sup> The court was particularly influenced by allegations that sheriffs were placing bets on when the inmate would give up his hunger strike and begin eating meals again.<sup>125</sup> For the *Varricchio* court, the subjective prong might be satisfied if the sheriffs were aware of a serious harm, yet chose to do nothing about it.<sup>126</sup> The court also noted that the inmate claimed he was brought to the medical department and later to a hospital for x-rays, yet the inmate maintained he was never actually treated for his problems.<sup>127</sup>

Although the underlying merits of the cruel and unusual punishment claim were not adjudicated at this stage, the *Varricchio* example still raises some concern over inmate veracity and what might constitute sufficient proof of

120. *Id.* at 953 (“[H]e was not punished, and so we need not decide whether, or how many, skipped meals constitute a cruel and unusual punishment for violation of a valid prison regulation.”).

121. *Id.* (citing *Talib v. Gilley*, 138 F.3d 211 (5th Cir. 1998)).

122. *Id.*; see generally *Matos ex rel. Matos v. O’Sullivan*, 335 F.3d 553, 556 (7th Cir. 2003); *Sanville v. McCaughtry*, 266 F.3d 724, 729 (7th Cir. 2001).

123. *Varricchio v. County of Nassau*, 702 F. Supp. 2d 40, 47 (E.D.N.Y. 2010).

124. *Id.* at 56.

125. *Id.*

126. *Id.*

127. *Id.*

fact. In its analysis, the *Varricchio* court reinforces the common view that food served violates the Eighth Amendment if an inmate proves nutritional inadequacy or preparation, or the food somehow presents an immediate danger to his or her health and well-being.<sup>128</sup> However, in this instance, the prisoner merely alleged that his food contained staples, metal pins and soap without actually articulating anything more than his personal conclusion that food was contaminated.<sup>129</sup> Assuming *arguendo*, that even one meal was contaminated, the suspicion that subsequent meals would be contaminated amounts to a self-imposed hunger strike not based on fact, but rather on speculation. A more important question remains as to how an inmate, with limited resources and abilities, might even factually preserve evidence of deliberate food contamination, especially if it only occurred once. If the contamination was deliberate or a form of retaliation from guards, in all likelihood those very same guard or guards would be able to destroy that evidence. On some level, *Varricchio*, like *Shrader* above, reinforces the difficult burden that inmates face in preserving evidence, or actually supporting allegations in a sufficient manner.

#### *D. Greene v. Esgrow*

In *Greene v. Esgrow*, an inmate was placed on a pre-hearing restricted diet for seven days as a result of allegations that he spat at a staff member from his cell in October 2008.<sup>130</sup> After that inmate was found guilty of those charges, the inmate was subsequently sentenced to twelve months of confinement in the special housing unit, and twenty-one more days of a restricted diet.<sup>131</sup> The court found nothing in the record to indicate that the post-hearing restricted diet was cruel and unusual punishment or in violation of New York State regulations for restricted diets.<sup>132</sup> New York State regulations require, among other things, that medical staff check on the inmate's health within twenty-four hours of being on the restricted diet, and that any physician, nurse, or physician's assistant shall make a weekly

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128. *Id.* at 57 (citing *Chapdelaine v. Keller*, No. 95-CV-1126, 1998 WL 357350, at \*12 (N.D.N.Y. Apr. 16, 1998)).

129. *Varricchio v. County of Nassau*, 702 F. Supp. 2d 40, 56 (E.D.N.Y. 2010).

130. *Greene v. Esgrow*, 686 F. Supp. 2d 240, 241 (W.D.N.Y. 2010).

131. *Id.*

132. *Id.*; N.Y. COMP. CODES R. & REGS. tit. 7, § 304.2 (1999) (noting that a restricted diet must be comprised of sufficient quality of wholesome and nutritious food, and that a physician, nurse or physician's assistant, shall examine the inmate's health within 24 hours of the initiation of the restricted diet, and on a daily basis during the restriction period).

written report regarding the inmate's condition, or if there is a recommendation that the diet should stop.<sup>133</sup>

#### VI. AN ANALYSIS OF NUTRALOAF DECISIONS

The first issue withutraloaf is discerning exactly what the food is made from.<sup>134</sup> As Judge Posner wrote,utraloaf “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.”<sup>135</sup> Adding to the confusion, “utraloaf could meet requirements for calories and protein one day yet be poisonous the next if, for example, made from leftovers that had spoiled.”<sup>136</sup> According to prison officials,utraloaf is simply a tool “for behavior modification.”<sup>137</sup> While prison officials maintain thatutraloaf is a “complete meal,” inmates counter that it is “so awful they’d [sic] rather go hungry.”<sup>138</sup>

For shooting suspect Christopher Williams, theutraloaf he was served in 2008 is typical—it contained “a mixture of cubed whole wheat bread, nondairy cheese, raw carrots, spinach, seedless raisins, beans, vegetable oil, tomato paste, powdered milk and dehydrated potato flakes.”<sup>139</sup> According to Vermont Corrections Commissioner Rob Hofmann,utraloaf is a “mechanism that dissuades inmates from throwing feces, urine trays and silverware . . . [that] tends to have the desired outcome.”<sup>140</sup> Hoffman added, “[o]nce the offender relents, we stop with theutraloaf. That’s our goal, to protect our staff.”<sup>141</sup>

The real challenge is whether theutraloaf is, of itself, a form of cruel and unusual punishment. Furthermore, there is a question over whether that

133. N.Y. COMP. CODES R. & REGS. tit. 7, § 304.2.

134. *Prude v. Clarke*, 675 F.3d 732, 733 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012) (“Nutriloaf (also spelled ‘utraloaf’) is a bad-tasting food given to prisoners as a form of punishment (it is colloquially known as ‘prison loaf’ or ‘disciplinary loaf’”).

135. *Id.* at 734.

136. *Id.*

137. Wilson Ring, *Prison Calls It Food, Inmates Disagree*, HUFFINGTON POST (Mar. 23, 2008), [http://www.huffingtonpost.com/2008/03/23/prison-calls-it-food-inma\\_n\\_92953.html](http://www.huffingtonpost.com/2008/03/23/prison-calls-it-food-inma_n_92953.html).

138. *Id.*

139. *Id.* (Christopher Williams, who was 29 in 2008, was “charged in a 2006 school shooting that killed two people in Essex[, VT]” and was “givenutraloaf after he had assaulted guards and smeared excrement in his cell.”).

140. *Id.*

141. *Id.*

punishment is truly *harmful*, or alternatively, whether the food (if prepared properly) is a nutritious, albeit generally unappetizing, form of sustenance for inmates.

*A. Gilcrist v. Kautzky*

One of the earliest references to nutraloaf in a judicial opinion is the 1989 case of *Gilcrist v. Kautzky*.<sup>142</sup> In *Gilcrist*, an inmate alleged that prison staff used nutraloaf as a form of punishment in direct violation of Washington Administrative Code 137-28-110, which explicitly stated that “lowering the quantity or quality of food and deprivation of clothing, bedding, bed, or normal hygienic implements shall not be used as sanctions.”<sup>143</sup> Directing its attention to nutraloaf, the Court noted that nutraloaf is “alleged to be an *unhealthy* ground mass of food which looks like dog food.”<sup>144</sup> By raising a due process challenge instead of a cruel and unusual punishment claim, the inmate successfully argued that the state protections created an entitlement that food quality would not diminish as a form of punishment.<sup>145</sup> The Court agreed and explained that the wording of the administrative code left no room for doubt.<sup>146</sup>

*B. LeMaire v. Maass*

One of the most frequently cited cases on nutraloaf is the 1993 case of *LeMaire v. Maass*.<sup>147</sup> In *LeMaire*, an inmate sued the Superintendent of the Oregon prison, alleging that he suffered cruel and unusual punishment during his time in a disciplinary segregation unit.<sup>148</sup> LeMaire was first sent to disciplinary segregation after attacking a prison guard in February of 1986, and then just ten days after being transferred back into the general population, he savagely attacked and attempted to kill a fellow inmate with a

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142. *Gilcrist v. Kautzky*, No.88-3869, 876 F.2d 896, at \*3 (9th Cir. Jun 2, 1989).

143. *Id.* (citing WASHINGTON ADMIN. CODE 137-28-110 (1986), an implementing regulation of Washington law).

144. *Id.* Interestingly, the court did not look deeper into the allegations of whether or not nutraloaf was unhealthy, nor did it specifically seek information about what ingredients were used. *Id.*

145. *Id.* (noting that the inmate had a protected interest that was created by Washington State law).

146. *Id.* The lowering of the quality of food as a sanction is not an option under the Washington prison system. Thus, *Gilcrist* has a protected interest established by Washington law. *Id.*

147. *LeMaire v. Maass*, 12 F.3d 1444, 1447 (9th Cir. 1993).

148. *Id.*

ten to twelve inch sharpened, black rod.<sup>149</sup> Based on his record, Superintendent Maass concluded that “LeMaire represents a serious threat to the safety and well-being of others within the Oregon State Penitentiary.”<sup>150</sup> LeMaire had more than twenty-five violations at the time he complained that six practices of the disciplinary segregation unit constituted cruel and unusual punishment.<sup>151</sup> In particular, LeMaire challenged Oregon Administrative Rule 291-83-015(1), and the use of nutraloaf to combat food violations.<sup>152</sup>

In its analysis, the court applied the two part subjective and objective test from *Wilson*.<sup>153</sup> The court noted the security constraints that the Superintendent faced, and clearly articulated that there must be some level of wantonness established for the inmate to prevail.<sup>154</sup> With respect to the inmate’s placement on a controlled feeding of nutraloaf, the court overruled the district court’s determination that nutraloaf was unconstitutional largely because it found that the objective prong in *Wilson* was not satisfied.<sup>155</sup> Specifically, the court reiterated that the Eighth Amendment simply requires food that is adequate to maintain health, and that “it need not be tasty or aesthetically pleasing.”<sup>156</sup> However, the court distinguished the 1978 case of *Hutto v. Finney* by noting that in that case the food substance “grue” [sic] only provided 1000 calories a day, whereas in this case nutraloaf provides “an excess of nutritional requirements . . . and LeMaire, unlike the *Hutto* inmates who lost weight, has actually gained some sixty pounds in confinement.”<sup>157</sup> Whether or not weight gain is an indication of nutritional

149. *Id.* at 1448 (LeMaire admitted that he approached the victim “wanting to go for his spine.”).

150. *Id.* (citing numerous examples where LeMaire would ram his head into an officer’s chest, intentionally bang trays on bars in order to rile up other inmates, and instances where he would refuse to return his tray after morning meals. LeMaire also assaulted corrections officers with food, hot water, urine, and feces).

151. *Id.* at 1449.

152. *Id.*

153. *LeMaire v. Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993)(citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

154. *LeMaire*, 12 F.3d at 1452 (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)).

155. *LeMaire*, 12 F.3d at 1455-56 (citing *Wilson*, 501 U.S. at 298).

156. *LeMaire*, 12 F.3d at 1456 (citing *Cunningham v. Jones*, 567 F.2d 653, 659-60 (6th Cir. 1997)).

157. *LeMaire*, 12 F.3d at 1456 (citing *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978)). In *LeMaire*, the court noted that nutraloaf is made by blending a variety of foods from the standard meals served to inmates, that only fresh ingredients are used, and that recipes are nutritionally balanced. It continued to say that, “while not particularly appetizing,

quality is up for debate, nevertheless the court was convinced that LeMaire was not being starved.<sup>158</sup>

Most importantly, the Court articulated that the use of nutraloaf is not “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>159</sup> In particular, the court emphasized that any routine discomfort from nutraloaf does not amount to a denial of minimal civilized measures of life’s necessities, and so it falls short of an Eighth Amendment violation.<sup>160</sup> In dictum, the court went on to say that even if the serving of nutraloaf met the objective prong, LeMaire also failed to show that any prison officials had the sufficiently culpable state of mind required to satisfy the subjective prong.<sup>161</sup>

### *C. Prude v. Clarke*

In *Prude v. Clarke*, a Seventh Circuit case from 2012, a plaintiff brought a civil rights suit under 42 U.S.C. § 1983, against the staff of the Milwaukee County Jail based on several visits where he was exclusively fed nutraloaf.<sup>162</sup> As the court noted, “[o]n the second and third stays . . . the jail fed him only ‘nutriloaf,’ pursuant to a new policy the jail had adopted of making nutraloaf the exclusive diet of prisoners who had been in segregation in prison at the time of their transfer to the jail.” During his third stay, the plaintiff had been fed nutraloaf for two days and “began vomiting his meals and experiencing stomach pains and constipation.”<sup>163</sup> After deciding not to eat the nutraloaf provided, the plaintiff relied on meals of bread and water for the remaining eight days he was at the jail, although as the court notes,

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[nutraloaf] does exceed an inmate’s minimal daily requirements for calories, protein, and vitamins.” *Id.* at 1455.

158. *LeMaire*, 12 F.3d at 1456 (stating “LeMaire is not being starved. He is being fed, and he is being fed adequately.”).

159. *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). *See also* *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

160. *LeMaire*, 12 F.3d at 1456 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

161. *LeMaire*, 12 F.3d at 1456 (“There is not a scintilla of evidence in this record to indicate that the officials imposing Nutraloaf were either deliberately indifferent to LeMaire’s health or welfare”).

162. *Prude v. Clarke*, 675 F.3d 732, 733 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012) (“The plaintiff is serving time in a Wisconsin state prison, but was transferred to the county jail on several occasions to enable him to attend court proceedings relating to a post-conviction petition he had filed.”).

163. *Id.*

“it’s unclear how he obtained the bread.”<sup>164</sup> As a result, the plaintiff lost fourteen pounds after his second and third stays, a total of 8.3 percent of his weight.<sup>165</sup> To combat his vomiting, a guard sent the plaintiff to the infirmary where a nurse provided him with stool softener and antacids.<sup>166</sup> However, once the plaintiff transferred back to state prison “he continued experiencing painful defecation and bloody stools . . . and he was diagnosed with an anal fissure.”<sup>167</sup>

In their motion for summary judgment, the defendants submitted what Judge Posner referred to as a “preposterous affidavit” in which a sheriff’s officer matter-of-factly stated that “[n]utraloaf has been determined to be a nutritious substance for regular meals.”<sup>168</sup> In addition, Judge Posner determined that “[n]o evidence was presented concerning the recipe for or ingredients of theutraloaf that was served at the county jail during the plaintiff’s sojourns there.”<sup>169</sup> In fact, “the recipe was among the items of information that the plaintiff sought in discovery” and was never produced.<sup>170</sup> Judge Posner chastised the defendant prison officials for their failure to file a brief as well as their failure to respond to a court order to show cause regarding the failure.<sup>171</sup>

Ultimately, Judge Posner found that any “deliberate withholding of nutritious food or substitution of tainted or otherwise sickening food, with the effect of causing substantial weight loss, vomiting, stomach pains, and maybe an anal fissure . . . or other severe hardship would violate the Eighth Amendment.”<sup>172</sup> Judge Posner was careful to note that not allutraloaf is “unhealthful, though all is reputed to have an unpleasant taste.”<sup>173</sup> Instead, the key factor was that “other prisoners in the jail also vomited after eating theutraloaf, and this suggests that it was indeed inedible.”<sup>174</sup> Since the defendants submitted no evidence suggesting otherwise, Judge Posner found

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 734.

168. *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012) (exciting Judge Posner’s dismay, the sheriff had not been qualified as an expert witness, and “[a]s a lay witness, he was not authorized to offer hearsay evidence” that the food has been determined to be nutritious).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012).

that it was a possible inference that “jail officials were aware that the nutraloaf [was] being fed [to] the prisoners” and that the nutraloaf was making the plaintiff sick, but the officials did nothing about it.<sup>175</sup> For Judge Posner, the lack of response would amount to “deliberate indifference [to] a serious health problem and thus an Eighth Amendment claim.”<sup>176</sup>

#### D. Criticism of *Prude v. Clarke*

Aside from the obvious fact that Judge Posner was irritated with the prison officials for their failure to comply with the judicial process, there are still troubling aspects to the decision in *Prude v. Clarke*.<sup>177</sup> In keeping with the Supreme Court’s ruling in *Wilson v. Seiter*, Eighth Amendment claims have to be supported by proof of an objective and a subjective component.<sup>178</sup> Judge Posner, however, merely focused on deliberate indifference, specifically whether the agents of the state were somehow culpable in permitting nutraloaf to make the plaintiff sick without doing anything in response.<sup>179</sup> However, a closer examination of the existing record makes it clear that the jail officials did in fact *do something*.<sup>180</sup> Judge Posner acknowledges that the plaintiff “tried to solve the problem by speaking with a [correctional officer]” and that after his second complaint he was “taken to the clinical office to be seen by a nurse.”<sup>181</sup> By definition, doing nothing would amount to being non-responsive and indifferent to the inmate’s requests for help. Nevertheless, the nurse at the facility provided the plaintiff with antacids and stool softener, which by definition also amounts to providing the plaintiff with a reasonable remedy to his medical concerns.<sup>182</sup>

Moreover, Judge Posner relies on the questionable assumption that “[a]dult vomiting other than because of illness or drunkenness is rare—healthy, sober adults do not vomit a meal just because it doesn’t taste

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175. *Id.*

176. *Id.* at 735.

177. *But see* Bruce Vielmetti, *Sheriff blames counsel for 7th Circuit slapdown in nutraloaf case*, MILWAUKEE-WISCONSIN J. SENTINEL, (Apr. 3, 2012), <http://www.jsonline.com/blogs/news/145837015.html> (Sheriff David Clarke explained that it was the responsibility of counsel to defend the lawsuit, and his counsel failed to do that for him).

178. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991.); *see also* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

179. *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012).

180. *Id.*

181. *Id.*

182. *Id.*

good—and if the plaintiff is being truthful there was a veritable epidemic of vomiting during his stay.”<sup>183</sup> However, this line of thinking is problematic as it places too much weight on the credibility of prisoner’s testimony and biased recollection. There is simply no evidence, other than the plaintiff’s own testimony that the nurse he visited found his weight loss “alarming,” and that other inmates were similarly vomiting from the nutraloaf.<sup>184</sup> Moreover, without the actual recipe there is simply no evidence to suggest that the nutraloaf was not nutritious or was tainted. Likewise, there is no evidence to suggest that the plaintiff was not somehow idiosyncratic, perhaps allergic to some of the food product in the loaf, or suffering from some sort of ailment that would cause him to regurgitate his meals.<sup>185</sup>

The most problematic aspect of the decision is that both prongs of the analysis set forth by the *Wilson* Court were not met to determine whether feeding prisoners nutraloaf was in fact cruel and unusual punishment. First, there is nothing in the record that suggests the nutraloaf was actually a form of punishment, since it was distributed to all inmates regardless of their behavior and not as a deterrent.<sup>186</sup> Furthermore, as the prisoner in question was actually sent to the infirmary where he was seen by a nurse, there is nothing to suggest that the prison officials were nonresponsive or indifferent to his alleged claims, especially when efforts were clearly made by staff to remedy any health concerns.<sup>187</sup> More importantly, there is simply no objective prong analysis that shows exactly how or why the conditions of the nutraloaf served by the Milwaukee County Jail were objectively cruel and unusual.<sup>188</sup> Assuming that the food was nutritious in its total caloric value, there appears to be no evidence, including further lawsuits by similarly situated inmates, to corroborate this particular inmate’s story. If legitimate, there would have been systemic, massive illness throughout the Milwaukee County Jail, yet these claims are unsubstantiated. In the same breath that

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183. *Id.* at 734 (citing *Hall v. Bennett*, 379 F.3d 462, 464 (7th Cir. 2004) (“A risk can be so obvious that a jury may reasonably infer actual knowledge on the part of the defendants.”)).

184. *Id.* at 733.

185. See generally *Viral Gastroenteritis*, CENTER FOR DISEASE CONTROL, <http://www.cdc.gov/ncidod/dvrd/revb/gastro/faq.htm> (noting that viral gastroenteritis results in “watery diarrhea and vomiting. The affected person may also have headache, fever, and abdominal cramps . . . symptoms begin 1 to 2 days following infection with a virus that causes gastroenteritis and may last for 1 to 10 days.”) (last visited Dec. 23, 2013).

186. *Prude v. Clarke*, 675 F.3d 732, 733 (7th Cir. 2012), *reh’g denied* (Apr. 19, 2012).

187. *Id.*

188. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

Judge Posner criticizes the Sheriff's lack of expertise on the nutritional quality of nutraloaf and dismisses his opinions as hearsay, he assumes the role of pseudo-expert himself and relies on the plaintiff's own hearsay as irrefutable fact. Given the unusual circumstance that the defendants failed to respond in this case, the plaintiff's claims remained uncontested. Nevertheless, this failure to respond does not necessarily ensure the legitimacy of any claims or speak to the validity of the conditions at the time. It would appear that Judge Posner's distaste for the manner in which the defendant prison staff handled the inmate's lawsuit trumped what should have been his impartial objectivity. What would have resulted if the prison staff had complied with the process can therefore only be one of supposition.

#### VII. CONCLUSION

In *Rhodes*, discussed *supra* Section III Part A, Justice Brennan's concurrence wisely noted that judicial opinions about cruel and unusual punishment do not make for pleasant reading given their subject matter.<sup>189</sup> At the time *Rhodes* was decided "[t]here [were] over 8,000 pending cases filed by inmates challenging prison conditions."<sup>190</sup> Among other things, the *Rhodes* Court noted instances where approximately 200 men were required to share the use of one toilet, times when cells were infested with insects, and where food was "unappetizing and unwholesome."<sup>191</sup> While circumstances are often difficult to read, the relevant question for this Note is whether they constitute cruel and unusual treatment.

With respect to nutraloaf specifically, so long as the minimum amount of calories are provided to inmates, there should not be any constitutional violations. The objective prong set forth in *Wilson* cannot be met absent a showing that the nutraloaf is nutritionally deficient. While some genuine concern exists over the precise contents of nutraloaf, so long as prisons are clear on what ingredients are used in order to support nutritional claims, there should be no problem. The *LeMaire* court correctly reinforced the fact that meals need not be tasty or aesthetically pleasing so long as minimum nutritional standards are met.<sup>192</sup> If inmates want choice with respect to food, they are permitted to supplement their needs at the commissary with junk food. However, for those inmates that choose to threaten or assault prison guards or other inmates, there are consequences to pay. From a practical standpoint, most agree that nutraloaf is foul looking and unpleasant to eat,

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189. *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981)(Brennan, J., concurring).

190. *Id.* at 355 n.2.

191. *Id.* at 355 (citing *Pugh v. Locke*, 406 F. Supp. 318, 323-25 (M.D. Ala. 1976)).

192. *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (citing *Cunningham v. Jones*, 567 F.2d 653, 659-60 (6th Cir. 1997)).

but that does not necessarily make it inedible or cruel. If an inmate cannot eat nutraloaf because it is actually injuring him or her in some demonstrable way, then there are legitimate reasons that it should not be distributed. However, it is clear from most cases that prisoners are confusing *cannot physically eat* with *will not eat* when it comes to nutraloaf. Generally, if prisoners act in accordance with the rules of their confinement, then nutraloaf will not be served. The Eighth Amendment will, and should, protect those who are either being served less than the nutritional requirements when it comes to food or food that is physically harmful, but inmates cannot break the rules and subsequently cry foul solely based on unappealing and unappetizing food.