NOTE

The Antidotes to the Double Standard: Protecting the Healthcare Rights of Mentally Ill Inmates by Blurring the Line Between *Estelle* and *Youngberg*

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Abstract:

This Note is an examination of mentally ill inmates' constitutional right to treatment. It has significant doctrinal and practical implications. In terms of doctrine, the Supreme Court has created distinct standards for the minimum levels of care for inmates (*Estelle*) and the civilly committed mentally ill (*Youngberg*). Under this framework mentally ill inmates are constitutionally equivalent to inmates generally, but are entitled to less care than the civilly committed even if they suffer the same illness. This Note explores this gap through the lens of equal protection and argues that mentally ill inmates are similarly situated to the civilly committed. It further contends that inmates constitute a "discrete and insular minority" and thus the standard establishing their right to care should be subject to strict scrutiny. This Note finds that Estelle fails this test.

Practically, this Note brings visibility to a consequential area of the law neglected by scholarship. Over half of inmates are mentally ill and yet treatment in prisons is inadequate. The literature at the intersection of health, criminal justice, and constitutional rights has not constructively considered how doctrine should be changed to protect the wellbeing of this vulnerable population. Scholars have also provided little oversight of the judicial administration of justice in this field; there are few reviews of how judges actually apply treatment rights standards. This Note lessens this blind spot by exposing how courts fail to properly distinguish between different standards.

This Note proposes that the most promising antidote to the *Estelle*-

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Youngberg double standard, counterintuitively, is not the creation of a uniform standard. A standard that puts mentally ill inmates on equal footing with the civilly committed would solve the doctrinal puzzle, but would be subject to *Youngberg*'s inherent flaws and the judicial malpractice in this area. Recognizing the deficiencies of a purely judicial remedy, this Note recommends a solution relying both on courts and Congress. It concludes by highlighting the importance of targeting the primary causes of society's neglect of mentally ill inmates—the stigmatization of mental illness and incarceration—as a necessary step in spurring these institutions to action. Vindication of mentally ill inmates' right to treatment requires that society first overcome its prejudice against this vulnerable population.

TABLE OF CONTENTS

INTRODUCTION **114**

I. BACKGROUND: THE CRISIS IN INMATE MENTAL HEALTHCARE **117**

II. THE DOUBLE STANDARD: *ESTELLE*'S INFERIORITY TO *YOUNGBERG* **119**

A. GAMBLE'S *ESTELLE* 119

B. ATTACKING *ESTELLE* 120

1. IMPERMISSIBLY VAGUE 120

2. ELUSIVE INTENT 121

3. LIMITED PRACTICAL BITE 123

C. ADVOCATING FOR ROMEO'S *YOUNGBERG* 124

III. BLURRING THE LINE: THE IMPLICATIONS OF EQUAL PROTECTION **125**

A. SIMILARLY ILL AND CONFINED 126

B. FUNDAMENTAL RIGHT TO HEALTHCARE 128

C. INMATES AS DISCRETE AND INSULAR 129

D. FATAL IN FACT 132

IV: JUDICIAL MALPRACTICE: ROMEO'S INCARCERATION **133**

A. *YOUNGBERG* BEHIND BARS 134

B. CONFLATING ROMEO AND GAMBLE 134

V. *YOUNGBERG*'S DEMISE: THE WRONG PRESCRIPTION **135**

VI. RESUSCITATING GAMBLE: THE DOUBLE-DOSE REMEDY **137**

A. LEGISLATING EQUALITY 137

B. A UNIFORM STANDARD AS ONE PIECE OF THE PUZZLE 139

C. RESISTANCE TO REFORM 140

1. FAIRNESS 140

2. PRACTICABILITY 141

3. EFFECTIVENESS 142

4. ADVERSE OUTCOMES 143

CONCLUSION: THE ANTIDOTES **144**

INTRODUCTION

A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

–U.S. Supreme Court Justice Anthony Kennedy[1]

A few decades ago, two individuals under state custody turned to the justice system to substantiate their rights to healthcare. Their respective claims climbed all the way to the Supreme Court of the United States, where each story prompted judicial recognition of a constitutional right to treatment. In many respects, these individuals' cases were mirror images. Both individuals had been involuntarily committed to state custody because of socially undesirable behavior. While in custody, each was at the mercy of the state for healthcare and their claims were based on the state's failure to provide basic care. While confined, each suffered illness and injury. Instead of providing treatment, the state moved these two ailing individuals into isolation.

Both repeatedly sought redress within their institutions of confinement before seeking justice in the court system. They turned to the courts asserting rights to additional and alternative forms of treatment, grounding their claims in the Eighth Amendment's prohibition against cruel and unusual punishment. The Court implicitly recognized a dimension of equality between these two individuals' constitutional rights by using the same concept to define their right to treatment—adequacy.[2] It based this finding on the fact that confinement had put both individuals at the institutions' mercy for basic care.[3]

Despite the parallelism between the two individuals' claims and the Court's recognition of an element of equality, the Court ultimately fixated on what it considered to be an essential difference: One individual's confinement was based on criminal conviction; the other was civilly committed. Gamble, the criminal,

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1 Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

2 Youngberg v. Romeo, 457 U.S. 307, 322 (1982) ("[R]espondent is entitled to minimally *adequate* training.") (emphasis added); Estelle v. Gamble, 429 U.S. 97, 105 (1976) ("[A] claim by a prisoner that he has not received *adequate* medical treatment [can] state[] a violation of the Eighth Amendment.") (emphasis added).

3 *See Youngberg*, 457 U.S. at 320 n.27 ("[T]he purpose of respondent's commitment was to provide reasonable care and safety, conditions not available to him outside of an institution."); *Estelle*, 429 U.S. at 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.") (citation omitted).

sought care for a back injury he suffered while working on a prison plantation.[4] He received pain medication without a full assessment or treatment, and was placed in solitary confinement.[5] He asked the Court to protect his right to basic care. Romeo, the civilly committed individual, was thirty-three but purportedly had the capacity of an eighteen-month-old child. His mother's claim on his behalf demanded habilitation and freedom from shackling.[6]

The Court held that the different purposes of Gamble and Romeo's confinements dictate unequal treatment standards, with inmates entitled to less care than the civilly committed because the purpose of their confinement is punishment.[7] This finding resulted in the two constitutional standards that courts use today. Inmates' rights are assessed under the minimalist *Estelle* standard developed in Gamble's case and the civilly committed are protected by the more robust *Youngberg* standard from Romeo's case.

In building this constitutional divide, the Court in effect shaped healthcare into a penal weapon; its limitation is a valid form of punishment.[8] This Note rejects this premise, arguing that "denial of medical care is surely not part of the punishment which civilized nations may impose for crime."[9] It focuses on this double standard's implications of for mentally ill inmates. Under the current constitutional regime, mentally ill inmates are entitled to less care[10] than the civilly committed even if they suffer the same symptomology. To illustrate the practical ramifications of this gap, Part I of this Note provides an overview of the current crisis in inmate mental health. Part II examines the legal framework underlying this discrepancy by analyzing the *Estelle* and *Youngberg* standards in juxtaposition.

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4 This Note uses the term "prison" as shorthand for all institutions of criminal confinement, including jails.

5 *Estelle*, 429 U.S. at 109 ("Gamble was placed in solitary confinement for prolonged periods as punishment for refusing to perform assigned work which he was physically unable to perform.").

6 *Youngberg*, 457 U.S. at 309.

7 *Id.* at 321-22 ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

8 *See Estelle*, 429 U.S. at 105-06 ("[I]nadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'").

9 *Id.* at 116 n.13 (Stevens, J., dissenting).

10 The two constitutional standards under discussion in this Note apply to mental and physical healthcare. *See Youngberg*, 457 U.S. at 321-22 (noting that the civilly committed are entitled to at least as much care as inmates, which under *Estelle* includes physical and mental health treatment); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (finding that under *Estelle* there is "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart").

Part III is the crux of this Note. It undertakes an equal protection review of *Estelle* relative to *Youngberg* and finds that *Estelle* fails this test. Parts IV and V take this Note's equal protection review conclusion in a counterintuitive direction by arguing against a uniform standard on par with *Youngberg*. Specifically, Part IV raises doubts about the potential of a judicial solution by discussing trends of judicial malpractice in the application of *Youngberg*. Part V reveals further serious weaknesses in the *Youngberg* standard, in theory and in application, that counsel against its use for inmates. In Part VI, this Note responds to the deficiencies of a purely judicial remedy by proposing a solution that relies on both the courts and Congress.

This project's scope is limited in two notable ways. First, this Note does not discuss the implications of the Prison Litigation Reform Act (PLRA) on inmates' ability to bring suits related to mental health. The PLRA bars lawsuits by inmates for monetary damages for mental injury unless physical harm is present.[11] This impediment to litigation is outside this Note's focus on judicial doctrine and extra-judicial remedy. Second, this Note does not investigate the weight that costs might have in the constitutional balance. Scholars have debated what effect, if any, prison resource limitations should have on application of *Estelle* without reaching a consensus; this Note only touches on this debate tangentially.[12] Full engagement in this strain of controversy would lead this Note astray from its equality inquiry because prisons[13] and civil institutions[14] are both

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11 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-72 (1996) (codified as amended at 42 U.S.C. § 1997e(e) (2012) (prior to 2013 amendment)).

12 *Compare* Marc J. Posner, *The* Estelle *Medical Professional Judgment Standard: The Right of Those in State Custody To Receive High-Cost Medical Treatments*, 18 AM. J.L. & MED. 347, 353 (1992) ("[C]ost concerns cannot be considered in determining prisoners' medical care rights."), *with* Carrie S. Frank, *Must Inmates Be Provided Free Organ Transplants?: Revisiting the Deliberate Indifference Standard*, 15 GEO. MASON U. C.R. L.J. 341, 356 (2005) ("[T]here appears to remain a fair amount of confusion as to whether cost can ever be a legitimate consideration that precludes a finding of deliberate indifference."), *and* Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483, 497 (2004) ("Constitutional standards that incorporate a subjective state-of-mind analysis [including *Estelle*] allow budgetary limitations to enter the analysis.").

13 *See, e.g.*, NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 10 (2014) (explaining that the federal prison system is struggling with "the increasing cost" of its operations).

14 Nicole Fisher, *Mental Health Loses Funding As Government Continues Shutdown*, FORBES (Oct. 10, 2013, 12:06 PM), http://www.forbes.com/sites/theapothecary/2013/10/10/mental-health-loses-funding-as-government-continues-shutdown ("[A]s federal and state governments look to cut budgets at every turn, mental and behavioral health services are often on the chopping block first.

cash-strapped and these severe resource limitations call for an inquiry all its own.

I. BACKGROUND: THE CRISIS IN INMATE MENTAL HEALTHCARE

In the decades since the Court drew a constitutional line between healthcare in prisons and civil institutions, the Gambles of the world have started to look even more like Romeos. Not only are both dependent on the state for care; the care they need is nearly equivalent. The deinstitutionalization movement in the 1970s resulted in widespread closure of civil commitment institutions and an influx of mentally ill individuals into the criminal justice system.[15] Today, prisons are de facto mental hospitals.[16] They confine an estimated 1,264,300 mentally ill individuals,[17] 356,268 of whom suffer from severe mental illness.[18] This is ten times more than hospitals house.[19]

Mentally ill inmates now out-number their non-ill counterparts—over half of inmates are mentally ill.[20] Evidence suggests they suffer primarily from one of two illnesses: major depression and anxiety disorder.[21] Inmates are also reported to have high rates of bipolar disorder (36.3%), severe depression (22.5%), and psychosis or schizophrenia (18.6%).[22]

Despite these serious conditions, mentally ill inmates are routinely deprived of care.[23] At least forty percent of this population receives no form of treatment

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Financial cuts . . . mean that those who need services most are often those left without proper care.").

15 Danielle Drissel, *Massachusetts Prison Mental Health Services: History, Policy and Recommendations*, 87 MASS. L. REV 106, 106 (2003).

16 *E.g.*, Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 657 (2003) ("[J]ails and prisons have become the new mental hospitals.").

17 Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T JUSTICE 1 (2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf.

18 *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOCACY CTR. & NAT'L SHERIFFS' ASS'N 6 (2014) [hereinafter TREATMENT ADVOCACY CTR., *State Survey*], http://tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

19 *Id.*

20 James & Glaze, *supra* note 17, at 3.

21 *The Health Status of Soon-To-Be-Released Inmates: A Report to Congress*, NAT'L COMM'N ON CORR. HEALTH CARE 24 tbl.3-3 (2002), https://www.ncjrs.gov/pdffiles1/nij/grants/189735.pdf.

22 Eladio D. Castillo & Leanne F. Alarid, *Factors Associated with Recidivism Among Offenders with Mental Illness*, 55 INT'L L.J. OFFENDER THERAPY & COMP. CRIMINOLOGY 98, 105 (2011).

23 *See, e.g.*, Ramos v. Lamm, 485 F. Supp. 122, 144 (D. Colo. 1979), *aff'd in part, set aside in part*, 639 F.2d 559 (10th Cir. 1980) ("Mental health needs are shunned and ignored as if they were an ugly stepchild of corrections.") (citation omitted).

to address their mental health needs while incarcerated.[24] This lack of treatment often leads to decompensation,[25] one consequence of which is increasing difficulty complying with prison rules. This, in turn, contributes to mentally ill inmates' high placement rates in solitary confinement, which further bleakens their prognosis.[26] Multiple interrelated failings in the prison system set the stage for this human tragedy, including severe understaffing of mental health professionals, limited efforts to identify and monitor the mentally ill, and overreliance on medication to temporarily dull symptoms.[27]

Scholars have spoken out against this injustice. Some have provided nuanced critiques of *Estelle*[28] and a lesser number have looked beyond the bench, emphasizing the importance of the politics that surround application of *Estelle*.[29] One work on *Estelle* turns to *Youngberg* as a potential remedy in recognition of the similarities between Gamble and Romeo, but does not underpin its proposal with legal argument.[30] It also does not focus on mental health. The literature on *Youngberg* leaves the prison context virtually untouched, perhaps because in

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24 Paula M. Ditton, Bureau of Justice Statistics, *Mental Health and Treatment of Inmates and Probationers*, U.S. DEP'T JUST. 9 (1999), http://www.bjs.gov/content/pub/pdf/mhtip.pdf.

25 TREATMENT ADVOCACY CTR. *State Survey, supra* note 18, at 15. Decompensation is defined as "loss of physiological compensation or psychological balance." *Decompensation*, MERRIAM-WEBSTER (2015), http://www.merriam-webster.com/medlineplus/decompensation.

26 *Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Hearing Before the Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary*, 111th Cong. 1 (2009) [hereinafter *Human Rights at Home*] (statement of Sen. Dick Durbin, Chairman).

27 *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUM. RTS. WATCH 4 (2003) [hereinafter *Ill-Equipped*], http://www.hrw.org/sites/default/files/reports/usa1003.pdf.

28 *See, e.g.*, Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 946 (1992) (arguing that *Estelle* is "an inappropriate measure of the constitutionality of prison health care provision" in part because of its subjective intent requirement); Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of* Estelle v. Gamble, 21 VT. L. REV. 379, 380-81 (1996) (claiming that the use of a subjective standard is misguided because asking courts to consider only prisons' intent creates a safe harbor when the impact of unintentional actions is egregious).

29 *See, e.g.*, Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 169 (2013) (explaining that the article "lighten[s] scholarly emphasis on judges in favor of closer examination of the multi-player politics"); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1999 (1999) (faulting an *Estelle* article for its exclusive concern with "the judiciary, and even more narrowly, the judicial activity of doctrine creation"); *see also* Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 465 (2004) ("Ultimately, overall community sentiment and penal philosophy will dictate the larger picture and litigation will, in effect, keep the place clean.").

30 Posner, *supra* note 12, at 355.

crafting *Youngberg* the Court barred its application to inmates.[31] This Note fills this gap in the literature by directly analyzing the disparity between Gamble and Romeo's legal rights.

II. THE DOUBLE STANDARD: *ESTELLE*'S INFERIORITY TO *YOUNGBERG*

A. *Gamble's* Estelle

The Court's adjudication of Gamble's case in *Estelle v. Gamble* established inmates' constitutional right to healthcare.[32] It defined this right indirectly, by interdicting "*deliberate indifference* to serious medical needs . . . that can offend 'evolving standards of decency' in violation of the Eighth Amendment."[33] Post-*Estelle* courts have added texture by dividing the standard into objective and subjective elements.[34] The objective prong requires that "the deprivation [is] sufficiently *serious*,"[35] limiting the type of harm that qualifies.[36] One court, for instance, found that the interruption of HIV medication was not "serious" because the delay did not result in injury.[37] Courts agree that mental illness is a serious condition that warrants constitutional protection.[38]

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31 Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

32 Helling v. McKinney, 509 U.S. 25, 40 (1993) ("[I]t was not until 1976, in *Estelle v. Gamble* . . . that this Court first [applied the Eighth Amendment to prison deprivations].") (Thomas, J., dissenting).

33 Estelle v. Gamble, 429 U.S. 97, 106 (1976) (emphasis added).

34 *See, e.g.*, Wilson v. Seiter, 501 U.S. 296, 298 (1991); Gill v. Mooney, 824 F.2d 192, 174 (2d Cir. 1987); Toombs v. Bell, 798 F.2d 297, 298 (8th Cir. 1986); Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977).

35 *Wilson*, 501 U.S. at 299 (emphasis added).

36 Smith v. Carpenter, 316 F.3d 178, 184 (2d Cir. 2003) ("[N]ot every lapse in prison medical care will rise to the level of a constitutional violation.") (citations omitted); Capps v. Atiyeh, 559 F. Supp. 894, 901 (D. Or. 1982) ("To the extent prison conditions are restrictive and even harsh, they are part of the penalty criminals must pay for their offenses against society.") (citations omitted).

37 *Smith*, 316 F.3d at 188 ("Although [the inmate] suffered from an admittedly serious underlying condition, he presented no evidence that the two alleged episodes of missed medication resulted in permanent or on-going harm to his health."); *see* Board v. Farnham, 394 F.3d 469, 481 (7th Cir. 2005) ("[W]e hold [that the inmate] had an established constitutional right to toothpaste . . . .").

38 *See, e.g.*, Steele v. Shah, 87 F.3d 1266, 1269 (11th Cir. 1996) ("[P]sychiatric needs can constitute serious medical needs."); Seifullah v. Toombs, 940 F.2d 662, 662 (6th Cir. 1991) ("The eighth amendment requirement of adequate medical care for a prisoner applies equally to psychiatric care."); Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) ("This circuit has recognized that deliberate indifference to an inmate's serious mental health needs violates the eighth amendment."); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983)

The subjective component shifts the inquiry to mens rea. The *Estelle* Court specifies that mere "accident[al]"[39] behavior does not qualify and subsequent courts have maintained the ineligibility of unintentional harm.[40] They situate blameworthiness "somewhere between the poles of negligence at one end and purpose or knowledge at the other."[41] In effect, they equate it with recklessness.[42]

B. Attacking Estelle

1. Impermissibly Vague

Courts have directed strong salvos at *Estelle*'s basis in the Eighth Amendment's prohibition against "cruel and unusual punishment." Judges have accused the *Estelle* Court of inadequately explaining, and perhaps considering, why the Eighth Amendment should apply to inmates' health rights; the relevance of punishment to healthcare is not self-evident.[43] This lack of rationale, in conjunction with the vagueness of the Eighth Amendment itself, have left courts feeling unmoored in their implementations of *Estelle*.[44]

("Treatment of the mental disorders of mentally disturbed inmates is a 'serious medical need.'") (citation omitted); Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982) ("[Deliberate indifference] requirements apply to . . . mental health."); Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980) ("[The Constitution requires] treatment for inmates' . . . psychological or psychiatric [needs]."); Inmates of Allegheny Cty. Jail v. Peirce, 612 F.2d 754, 763 (3d Cir. 1979) ("[T]he 'deliberate indifference' standard of *Estelle v. Gamble* is applicable in evaluating the constitutional adequacy of psychological or psychiatric care provided at a jail or prison."); *Bowring*, 551 F.2d at 47-48.

39 Estelle v. Gamble, 429 U.S. 97, 105 (1976) ("An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.").

40 *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."); Whitley v. Albers, 475 U.S. 312, 319 (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.").

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

42 *See, e.g.*, *id.* at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."); LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993) ("To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs so that knowledge can be inferred.").

43 *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 40 (1993) ("In essence, however, this extension of the Eighth Amendment to prison conditions rested on little more than an *ipse dixit*.").

44 *See, e.g.*, Wells v. Franzen, 777 F.2d 1258, 1264 (7th Cir. 1985) ("Because the eighth amendment draws its meaning from the evolving standards of decency in a maturing society, there is no fixed standard to determine whether conditions are cruel and unusual.") (citations

The objective prong aggravates *Estelle*'s vagueness.[45] Post-*Estelle* courts have specified that a serious need "is one that has been *diagnosed by a physician* as mandating treatment or one that is so obvious that even a *lay person would easily recognize* the necessity for a doctor's attention,"[46] but this elaboration is of little avail. Inmates have limited access to physicians—the Iowa prison system, for instance, houses 2000 mentally ill inmates and has three psychiatrists.[47] The deference to lay persons is also problematic. Prison staff receive little to no mental health training and are ill-equipped to recognize what warrants treatment.[48] Arguably, only exceedingly severe conditions will be detected and covered by *Estelle*.[49] This leaves a lot of suffering unprotected.

In struggling to define the objective prong in the context of the grim realities of prison healthcare, some courts have turned it into a balancing test.[50] They weigh cost against medical severity. In contrast, some scholars argue that medical need is dispositive; situational factors, however relevant to treatment feasibility, do not belong in the constitutional inquiry.[51] The divergence between these approaches, with courts and scholars on both sides,[52] is further evidence of the *Estelle* standard's inadequacy. In permitting such disparate interpretations, *Estelle* creates room for inconsistent outcomes.[53]

2. Elusive Intent

Estelle's subjective component creates an unreasonably high evidentiary

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omitted); Langley v. Coughlin, 715 F. Supp. 522, 535 (S.D.N.Y. 1989) ("[T]his standard is not one that can be applied with geometric precision."); *see also* Frank, *supra* note 12, at 346. ("[T]he *Estelle* opinion offers only limited guidance as to what types of conduct constitute deliberate indifference.").

45 Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see also* Frank, *supra* note 12, at 347 ("In *Estelle*, the Supreme Court provided little guidance to define what constitutes a serious medical need.").

46 Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980) (citations omitted) (emphases added).

47 *Ill-Equipped*, *supra* note 27, at 95.

48 TREATMENT ADVOCACY CTR., *State Survey*, *supra* note 18, at 11.

49 Susan W. Brenner & David M. Galanti, *Prisoners' Rights to Psychiatric Care*, 21 IDAHO L. REV. 1, 29 (1985) ("In the psychological context . . . only those prisoners who demonstrate blatant, abnormal behavior will be entitled to treatment.").

50 Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. Unit A June 1981) ("[T]he court should consider the availability and expense of providing psychiatric treatment.").

51 *See, e.g.*, Posner, *supra* note 12, at 353 ("[C]ost concerns cannot be considered in determining prisoners' medical care rights.").

52 Frank, *supra* note 12, at 356 ("[T]here appears to remain a fair amount of confusion as to whether cost can ever be a legitimate consideration that precludes a finding of deliberate indifference.").

53 *Id.* at 348 ("[A] rule without reason simply will not do.").

burden.[54] Proving the mens rea of recklessness requires strong evidence that speaks to prison administrators' internal state of mind.[55] Courts' deference to prison administration and inmates' limited resources hamper inmates' ability to meet this standard.[56] Indeed, many *Estelle* cases are lost for failure to satisfy the subjective prong,[57] and these denials include legitimate claimants.[58] Mentally ill inmates are particularly disadvantaged because awareness of nuanced mental disorders is especially hard to prove.[59]

Some courts have attempted to remedy this flaw by shifting towards a negligence-based standard.[60] These efforts are unlikely to save *Estelle* because they are vulnerable to the charge that they constitutionalize medical

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54 *E.g.*, Drissel, *supra* note 15, at 108 ("[T]he threshold for stating a constitutional claim for violation of the right to mental health treatment under the Eighth Amendment is very high.").

55 *See, e.g.*, Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) ("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.") (emphasis added), *overruled by* Farmer v. Brennan, 511 U.S. 825, 843 (1994).

56 *See, e.g.*, DesRosiers v. Moran, 949 F.2d 15, 18 (1st Cir. 1991) ("Medical evidence about the cause of the infection was inconclusive. Documentary proof was scant; in point of fact, the evidence was scattershot as to whether, and if so, to what extent, the prison's medical staff was required to document the delivery of routine services.").

57 *See, e.g.*, *Farmer*, 511 U.S. at 847 ("[W]e reject petitioner's arguments and hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement *only if he knows* that inmates face a substantial risk of serious harm.") (emphasis added); Inmates of Allegheny Cty. Jail v. Peirce, 612 F.2d 754, 760 (3d Cir. 1979) ("On this record, we perceive no 'deliberate indifference' to the inmates' serious medical needs in disregard of the standard enunciated in [*Estelle*].").

58 *See, e.g.*, Brenner & Galanti, *supra* note 49, at 29 ("In the psychological context, [*Estelle*'s subjective intent requirement] means that only those prisoners who demonstrate blatant, abnormal behavior will be entitled to treatment."); Friedman, *supra* note 28, at 946 (arguing that *Estelle* is "an inappropriate measure of the constitutionality of prison health care provision" because of its subjective intent requirement); Genty, *supra* note 28, at 380-81 (claiming that the use of a subjective standard is misguided).

59 Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 490 (2004) ("Given the complexities of mental illness and prison guards' general lack of awareness of mental health needs, the mentally ill face a tougher burden in proving actual knowledge than their physically ill counterparts.")

60 *See, e.g.*, Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d 134, 143 (2d Cir. 1981) ("[G]ross negligent conduct creates a strong presumption of deliberate indifference."); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) ("[R]epeated examples of such treatment bespeak a deliberate indifference by prison authorities."); Langley v. Coughlin, 715 F. Supp. 522, 536 (S.D.N.Y. 1989) ("[T]he inference of such indifference may be based upon proof of a series of individual failures by the prison to provide adequate medical care even if each such failure—viewed in isolation—might amount only to simple negligence.").

malpractice.[61] Others object to the relevance of the prison's "state of mind" altogether, arguing that the severity of the harm should determine culpability.[62] Justice Stevens raised this very point in his *Estelle* dissent:

> I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment.[63]

This more radical rejection of *Estelle* is persuasive. *Estelle*'s motivating purpose is to protect inmates from harmful conditions, and thus it makes sense that the standard should focus on the nature of the injury, not prisons' intent.

3. Limited Practical Bite

Even when inmates' claims successfully navigate the uncertainty of *Estelle*'s objective and subjective prongs, judicial findings of culpability can have little practical effect. An infamous California case initiated in 1990 and decided as *Brown v. Plata*[64] in 2011 illustrates this phenomenon. Although the Court strongly condemned the treatment of mentally ill inmates as violative of *Estelle*,[65] this decades-long saga is still not resolved. Victory in court under *Estelle* has done little to ameliorate the horrendous conditions mentally ill inmates in California face.[66] The California correctional system was largely unmoved by the Court's poignant but lofty constitutional pronouncements, and it does not stand alone in this recalcitrance. This shows that the *Estelle* standard requires drastic

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61 *Langley*, 715 F. Supp. at 536 ("[T]he Eighth Amendment does not constitutionalize the law of medical malpractice."); *see also* Fred Cohen, *Captives' Legal Right to Mental Health Care*, 17 L. & PSYCHOL. REV. 1, 22 (1993) ("[A] complaint that a physician has been *negligent* in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.") (emphasis added).

62 *See, e.g.*, Genty, *supra* note 28, at 380-81 (1996) (claiming that the use of a subjective standard is misguided because asking courts to consider prisons' intent creates a safe harbor when the impact of unintentional actions is egregious).

63 Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

64 131 S. Ct. 1910 (2011).

65 *Id.* at 1923 ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result.").

66 *Id.* at 1924 ("Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets.").

modification, if not wholesale substitution, to fulfill the purpose with which the Court originally conceived it.[67]

C. Advocating for Romeo's Youngberg

In *Youngberg*, the Court found *Estelle* inadequate for the civilly committed.[68] It rejected the component of Romeo's claim based on the Eighth Amendment, ruling that unlike an inmate's claim, Romeo's was properly assessed under the Fourteenth Amendment.[69] It grounded this bifurcation in an assertion that the involuntarily committed are "entitled to more considerate treatment . . . than criminals"[70] because the purpose of their confinement is treatment, not punishment. To provide more robust protection, the *Youngberg* Court created a new standard—"professional judgment"—that instructs courts to defer to professionals in determining whether treatment is constitutionally adequate.[71]

In sharp contrast to *Estelle*, *Youngberg* imposes affirmative obligations. To satisfy *Youngberg*, the state must provide "training" that preserves individuals' ability to care for themselves when not confined;[72] *Estelle* completely rejects rehabilitative rights.[73] Moreover, in directly asserting a protective right to care, *Youngberg* sidesteps *Estelle*'s hypocrisy. *Youngberg*, unlike *Estelle*, does not attempt to reconcile its positive purpose and a negative "*no* deliberate indifference" framework. For this reason, *Youngberg* is a better judicial lodestar. It rightly focuses on the central issue of treatment instead of the secondary question of intent.[74]

Youngberg also trumps *Estelle* because it more adequately guards against judicial interference with medical expertise. Under *Youngberg*, a treatment decision is presumptively valid unless it "is such a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible

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67 Helling v. McKinney, 509 U.S. 25, 42 (1993) ("Were the issue squarely presented, therefore, I might vote to overrule *Estelle* . . . . I seriously doubt that *Estelle* was correctly decided . . . .") (Thomas, J., dissenting).

68 Although the claim in *Youngberg* was brought by an institutionalized mentally disabled individual, the Court's holding is broadly applicable to committed individuals, including the mentally ill. Youngberg v. Romeo, 457 U.S. 307, 319 n.25 (1982).

69 *Id.* at 324.

70 *Id.* at 322.

71 *Id.* at 323.

72 *Id.* at 327.

73 *See, e.g.*, Grubbs v. Bradley, 552 F. Supp. 1054, 1124 (M.D. Tenn. 1982) (finding that a lack of rehabilitative programs does not violate the Eighth Amendment).

74 Brenner & Galanti, *supra* note 49, at 31 ("A better approach would be to begin with the presumption that all prisoners have a constitutional right to psychiatric care.").

actually did not base the decision on such a judgment."[75] *Youngberg* further retreats from the realm of medicine by emphasizing that a court's inquiry does not properly involve a comparative assessment of the potentially numerous treatment options available in a given case.[76] It leaves this to the medical professionals. *Estelle*, in contrast, instructs courts to conjecture about what qualifies as a medically "unnecessary and wanton infliction of pain."[77]

III. BLURRING THE LINE: THE IMPLICATIONS OF EQUAL PROTECTION

Estelle and *Youngberg*'s inequality is by design. Indeed, the *Youngberg* Court's discriminatory intent is made plain through its explicit positioning of inmates' rights below the rights of the committed.[78] Although this straightforward reading of *Youngberg* invites equal protection review of the *Estelle-Youngberg* double standard, this constitutional territory is uncharted. Most of the inmate equal protection literature and cases compares inmates to inmates.[79] The few that view inmates' rights in juxtaposition to non-inmates'[80] do not examine the treatment rights double standard.[81] This Part of the Note

75 *Youngberg*, 457 U.S. at 323.

76 *Id.* at 321 ("[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.").

77 Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

78 *Youngberg*, 457 U.S. at 321-22 ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals . . . .").

79 *See, e.g.*, Rachel C. Grunberger, Johnson v. California*: Setting a Constitutional Trap for Prison Officials*, 65 MD. L. REV. 271, 294 (2006) (discussing the appropriate level of equal protection review for racial segregation of inmates); James F. Horner, Jr., *Constitutional Issues Surrounding the Mass Testing and Segregation of HIV-Infected Inmates*, 23 MEM. ST. U. L. REV. 369 (1993) (claiming that courts will likely never find compelled HIV testing of inmates and status-based segregation violative of equal protection); Michelle Masotto, *"Death Is Different": Limiting Health Care for Death Row Inmates*, 24 HEALTH MATRIX 317 (2014) (arguing that death row inmates are not entitled to the same healthcare as other inmates under equal protection); Joanna E. Saul, *This Game Is Rigged: The Unequal Protection of Our Mentally-Ill Incarcerated Women*, 5 MOD. AM. 42 (asserting that male and female inmates are similarly situated with respect to mental health treatment due to equal dependence on the state for care).

80 *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107, 110 (1966) (finding that equal protection entitles inmates to the same civil commitment procedures as non-inmates); *see also* Sharona Hoffman, *Beneficial and Unusual Punishment: An Argument in Support of Prisoner Participation in Clinical Trials*, 33 IND. L. REV. 475 (2000) (arguing that laws barring inmates from clinical trials violate equal protection).

81 Part I of this Note mentions the one article that is an exception and explains that its limitations, namely, its lack of legal analysis and distance from mental health, leave this Note to occupy this field. Posner, *supra* note 12, at 347.

responds to this invitation to subject *Estelle* to a new form of equal protection review. And it finds that in relegating individuals like Gamble to second-class health, the double standard violates equal protection.

A. Similarly Ill and Confined

Inmates and the civilly committed are similarly situated with respect to their reliance on the state for treatment. Generally, to qualify as similarly situated under the Constitution, groups only need to share characteristics that relate to the claimed service.[82] In this context, the claimed service is mental healthcare and an inmate suffering from the same illness as a committed individual has a need that warrants similar treatment. Because of the high prevalence of mental illness in prisons, this line of reasoning applies to inmates on a wide scale.

Some courts have employed a less claimant-friendly definition of "similarly situated" to inmates. In *Klinger v. Department of Corrections*, for instance, the Eighth Circuit considered a range of factors, including security level and inmate numerosity, in comparing inmates across genders.[83] It denied the gender-based equal protection claim because of differences in these other traits between genders.[84] If this same analysis were applied to mentally ill inmates, they might not look so similar to the civilly committed. These groups vary in several dimensions, including security and numerosity.[85] Yet the wide-ranging *Klinger* analysis is on shaky ground. It includes factors that are irrelevant to the equal protection inquiry, which should focus exclusively on traits related to the challenged state action.[86] In the context of the *Estelle-Youngberg* double standard, the challenged action is differentiated treatment rights, so only

82 *See, e.g.*, Betts v. McCaughtry, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993), *aff'd*, 19 F.3d 21 (7th Cir. 1994) ("To be 'similarly situated,' groups need not be identical in makeup, they need only share commonalities that merit similar treatment."); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 422 (Conn. 2008) ("[T]he question is 'not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged.'") (citation omitted).

83 31 F.3d 727, 731-32 (8th Cir. 1994).

84 *Id.* at 727.

85 TREATMENT ADVOCACY CTR., *State Survey*, *supra* note 18, at 15 (finding that there are ten times more seriously mentally ill individuals in prisons than in civil institutions).

86 *See, e.g.*, Angie Baker, *Leapfrogging over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Prison Facilities for Males and Females in* Klinger v. Department of Corrections, *31 F.3d 727 (8th Cir. 1994)*, 76 NEB. L. REV. 371, 386 (1997) ("In determining that women inmates were not 'similarly situated' to male inmates, the appeals court considered variables that, even taken together, failed to sustain its findings."); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 275 (2003) ("Although these propositions are true, the analysis tends toward circular logic because [they are used to avoid comparing the trait that is actually relevant to the challenged action].").

treatment factors should enter the fray.

Indeed, a number of courts have specifically rebuked *Klinger*'s logic in the context of inmates' mental health rights.[87] In *Baxstrom v. Herold*, for instance, the Court found that equal protection entitles inmates to the same civil commitment procedures as everyone else.[88] It reasoned that the use of different standards for inmates and non-inmates is "arbitrary,"[89] rejecting the claim that criminality warrants differentiation.[90] In explanation, the Court asserted that equal protection requires that "a distinction made have some relevance to the purpose for which the classification is made"[91] and criminality is not germane to mental illness. This logic applies neatly to the *Estelle-Youngberg* controversy. The purpose of the classifications in this context is to determine treatment rights—both *Estelle* and *Youngberg* were crafted for this reason. Under *Baxstrom*, criminality is an unwelcome trespasser in this health-focused area of government action.

Baxstrom's relevance could be challenged on the ground that it involved an inmate "nearing the expiration point of a prison term"[92]—in other words, an individual bordering on being a non-inmate. In this light, *Baxstrom*'s rejection of the relevance of criminality could be viewed as a result of the fact that it was essentially comparing non-inmates to non-inmates. Yet this overlooks the fact that today's Gambles also sit at the border between inmates and non-inmates. Mentally ill inmates tend to rapidly cycle in and out of prison[93] so for significant portions of their stays, they could be characterized as near the end of their terms. Moreover, this objection ignores the *Baxstrom* Court's broad, unequivocal

87 *See, e.g.*, Souder v. McGuire, 516 F.2d 820, 821-22 (3d Cir. 1975) (finding that a mental health law that allows officials to use less rigorous commitment procedures for inmates than non-inmates raises "serious equal protection" issues); U.S. *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969) ("[W]e believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings."); Evans v. Paderick, 443 F. Supp. 583, 585 (E.D. Va. 1977) (refusing to construe a civil commitment statute to exempt inmates from protection because of their criminal status).

88 383 U.S. 107, 110 (1966) ("We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed.").

89 *Id.* at 111.

90 *Id.* ("The director contends that the State has created a reasonable classification differentiating the civilly insane from the 'criminally insane.'").

91 *Id.* (citing Walters v. City of St. Louis, 347 U.S. 231, 237 (1954)).

92 *Id.* at 114.

93 TREATMENT ADVOCACY CTR., *State Survey*, *supra* note 18, at 9 ("In the Los Angeles County Jail, 90 percent of mentally ill inmates are repeat offenders, with 31 percent having been incarcerated ten or more times.").

language disclaiming the relevance of criminality to mental health treatment.

Alternatively, one could argue that *Baxstrom*, a case about the right not to be civilly committed, is inapposite because it involves the right to *avoid* treatment. According to this line of attack, *Baxstrom* disclaims the relevance of criminality because it has no bearing on the right to refuse treatment—even inmates retain this right.[94] A proponent of this argument could claim that the double standard, in contrast, properly accounts for criminality because it is relevant to positive treatment rights. Society's obligation to care for inmates is related to criminality because crime is the basis of their confinement and reliance on the state. This objection fails because it overlooks the fact that *Estelle* and *Youngberg*, like *Baxstrom*, also protect the right to refuse treatment. Overtreatment can constitute deliberate indifference[95] or departure from professional judgment.[96] Thus, *Baxstrom* is not distinguishable on this point. It requires that courts drop criminality from their *Estelle* analysis, and find Gamble and Romeo similarly situated.[97]

B. Fundamental Right to Healthcare

That mentally ill inmates and the committed mentally ill are similarly situated does not end the equal protection inquiry. Similarly situated groups can be treated differently if there is a valid reason, which depends on the nature of the right and level of constitutional scrutiny.[98] Mentally ill inmates' claims are entitled to the most demanding level of review, strict scrutiny, because they seek protection of a fundamental right.[99]

Estelle established treatment as a fundamental right for inmates when it found this entitlement in the Eighth Amendment to the U.S. Constitution.[100] It

94 *See, e.g.*, Washington v. Harper, 494 U.S. 210 (1990).

95 *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1336 (S.D. Tex. 1980), *aff'd in part*, 688 F.2d 266 (5th Cir. 1982).

96 Youngberg v. Romeo, 457 U.S. 307, 310 (1982).

97 For a discussion of why inmates are similarly situated to non-inmates with respect to healthcare rights of another sort, see Sharona Hoffman, *Beneficial and Unusual Punishment: An Argument in Support of Prisoner Participation in Clinical Trials*, 33 IND. L. REV. 475, 505 (2000) (arguing that laws barring inmates from clinical trials violates their right to equal protection with non-inmates).

98 *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 543 (1961) ("[A] reasonable and sensitive judgment must [recognize] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.").

99 *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 601 (2000) ("[T]he Court has extended strict scrutiny to classifications that implicate so-called 'fundamental interests.'").

100 *See* Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, HEALTH LAWYER, Aug. 2008, at 1, 5 ("This historic

explained its holding in terms strongly reminiscent of fundamental rights generally, which are "deeply rooted in this Nation's history and tradition."[101] The *Estelle* Court pointed to America's long tradition of prohibiting cruel and unusual punishment as consistent with the constitutional drafters' intentions.[102] It specified that these historical beliefs not only proscribe outright torture, but also the suffering that can result from the denial of medical care. This conclusion, according to the *Estelle* Court, is based on "elementary principles"[103] with deep roots in common law.[104] In other words, the right to healthcare is fundamental.

Although there are few grounds for convincingly arguing against this interpretation of *Estelle* since its holding is explicitly rooted in the Eighth Amendment's fundamental protections, one could object that relying on *Estelle* while attacking it is unsound. Yet this Note does not argue against *Estelle* in its entirety. It supports *Estelle*'s assertion of a fundamental right to healthcare but views *Estelle*'s implementation of this premise as self-defeating.

C. Inmates as Discrete and Insular

Mentally ill inmates' claims for care are also entitled to strict scrutiny, which subjects prisons' actions to the most stringent form of review, on the basis that inmates constitute a discrete and insular minority. Courts have tended to place inmates at the bottom of the constitutional classificatory totem pole, only entitling their claims to rational basis review, which almost always upholds the challenged government conduct.[105] Yet a growing contingent of courts is bucking

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decision [*Estelle*] marked the first time in history that the Supreme Court had recognized a *fundamental* right to healthcare for any group of Americans.") (emphasis added).

101 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

102 Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment.").

103 *Id.* at 103.

104 *Id.* at 103-04 ("The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that '(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'") (citation omitted).

105 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) ("[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it.") (citation omitted); Bell v. Wolfish, 441 U.S. 520, 561 (1979) ("[T]he determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose."); Boivin v. Black, 225 F.3d 36, 42 (1st Cir. 2000); Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997); Carson v. Johnson, 112 F.3d 818, 821-22 (5th Cir. 1997); Roller v. Gunn, 107 F.3d 227, 233 (4th Cir. 1997); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997); United States v. King, 62 F.3d 891, 895 (7th Cir. 1995).

this trend[106] and prominent scholars are supportive. They assert that inmates are entitled to strict scrutiny because they fit squarely within *United States v. Carolene Products*[107] footnote four's definition of a discrete and insular minority.[108]

In its famous footnote four, the *Carolene Products* Court called for a "more searching judicial inquiry" when discrimination is alleged against "discrete and insular minorities."[109] In the same breath, it mentioned racial, religious, and ethnic minorities, but with no hint of exclusivity. Mentally ill inmates also qualify as discrete and insular because societal prejudice against them likewise "tends seriously to curtail the operation of those political processes ordinarily to be relied upon."[110] Widespread voting right bans,[111] poverty,[112] and stigma[113] limit their ability to influence politics and legislation. This is precisely the type of disempowerment *Carolene Products*' footnote four identifies as cause for courts

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106 *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 716-17 (2005) ("To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard."); Johnson v. California, 543 U.S. 499 (2005) (finding that strict scrutiny should apply to the prison case at hand since it involved racial discrimination); *see also* Hudson v. Palmer, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting) ("Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared . . . *prisoners are surely a 'discrete and insular minority.'*") (emphasis added).

107 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (establishing, in a landmark case, that courts' standards of review should vary according to the nature of the given constitutional claim).

108 *See, e.g.*, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 449-60 (1999) ("[Inmates] are [a] classic example[] of [a] discrete and insular minorit[y], who have little political power."); Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N. DAK. L. REV. 173, 176 (1995) ("Prison inmates may be the least sympathetic group of "outsiders" in our constitutional jurisprudence."); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 157 (2000) ("*Carolene Products* supports classifying inmates [as a discrete and insular minority] because modern prisoners are, in many relevant ways, similar to *Carolene*-era blacks.").

109 *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

110 *Id.*

111 George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999).

112 James E. Robertson, *The Jurisprudence of the PLRA: Inmates As "Outsiders" and the Countermajoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 209 n.85 (2002) ("About one-half of inmates free for a year or more before their arrest reported incomes under $10,000; nineteen percent reported incomes less than $3,000.").

113 Jason Schnittker, *The Psychological Dimensions and the Social Consequences of Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 122 (2014) (discussing "the stigma of a criminal record").

to heighten their protection through strengthened review of government conduct.

Post-*Carolene* courts have offered little additional guidance as to what constitutes a "discrete and insular minority."[114] The appellation was first applied to racial minorities but the cases did not elaborate the constitutional characteristic.[115] Aliens were next and were even called a "prime example," but again, with little by way of explanation.[116] Courts' findings about who does *not* belong are more instructive. For instance, old people were denied this classification under the rationale that everyone (life circumstances permitting) becomes old.[117] Inmates survive this test. Unlike old age, incarceration is not inevitable.

Scholars have helped fill the definitional void left by courts. An elucidation proposed by Bruce Ackerman,[118] characterized as the "most widely accepted,"[119] explains that a "discrete" minority's "members are marked out in ways that make it relatively easy for others to identify them."[120] As an example, he notes that African American women qualify as "discrete" because they cannot plausibly hide their traits.[121] Arguably, inmates are even more "discrete" under Ackerman's definition. African American women could, no doubt with a lot of trouble, hide or minimize their race and gender traits through aesthetic choices. Inmates, on the other hand, can do nothing to minimize their confinement; by definition it marks their status against their will.

Ackerman's refinement of the term "insular" is also supportive. He defines insularity as "the tendency of group members to interact with great frequency in

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114 *See* Harvie Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 981 (1975) ("A court's act of designating groups as 'discrete and insular' has so far been more a matter of feel on the part of the court than of any rationally justifiable process. The label is more emotive than analytical.").

115 *See, e.g.*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 290 (1978) (casting doubt on the importance of "discreteness and insularity" in determining the standard of review).

116 Graham v. Richardson, 403 U.S. 365, 372 (1971).

117 Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) ("[O]ld age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span.").

118 Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985). Although Ackerman's central thesis is that footnote four is flawed, his critique does not lessen the doctrine's applicability to inmates. Ackerman contends that discreteness and insularity may in fact be indicative of political power, and not disenfranchisement. As this Note discusses, inmates have essentially no political power.

119 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 149 (2011).

120 Ackerman, *supra* note 118, at 729.

121 *Id.*

a variety of social contexts."[122] Inmates interact with one another in *every* social context; their confinement limits them to each other's company. Moreover, their interactions are frequent before and after incarceration. Inmates predominantly belong to certain socioeconomic groups,[123] and these groups tend to cohere outside prison walls as well.[124]

D. Fatal in Fact

The application of strict scrutiny to the double standard is bound to be fatal, regardless of whether this standard of review is triggered by the fundamental nature of inmates' right to treatment[125] or their status as a discrete and insular minority.[126] Strict scrutiny instructs courts to determine whether the challenged action serves a "compelling interest" and is "narrowly tailored" to further this interest.[127] Since the state usually fails at least one of these tests, strict scrutiny is considered a death knell for challenged government actions.[128]

In the prison context, the government interest most often raised as compelling is safety.[129] Although courts usually defer to prisons on safety matters,[130] strict scrutiny demands a more searching inquiry.[131] By instructing

122 *Id.* at 726.

123 Robertson, *supra* note 112, at 209 n.85 ("About one-half of inmates free for a year or more before their arrest reported incomes under $10,000; nineteen percent reported incomes less than $3,000.").

124 Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74 (2009) ("During the last third of the twentieth century, the United States moved toward a new regime of residential segregation characterized by moderating racial-ethnic segregation and rising class segregation.").

125 Reno v. Flores, 507 U.S. 292, 302 (1993) ("[The government cannot] infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

126 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

127 Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[S]uch classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

128 *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to strict scrutiny review as "the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact").

129 *See, e.g.*, Johnson v. California, 543 U.S. 499, 512 (2005) (finding that prison safety is "a compelling government interest"); Lee v. Washington, 390 U.S. 333, 334 (1968) (entertaining "the necessities of prison security and discipline" as compelling interests).

130 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 79 (1987) (finding a prison rule "entitled to deference on the basis of the significant impact of prison correspondence on the liberty and safety of other prisoners and prison personnel").

courts to assess whether the government action is "narrowly tailored" to achieve the compelling interest, this level of review requires courts to abandon any presumption of relevancy. Indeed, how the double standard contributes to safety is far from clear. Evidence suggests that instead of improving safety, the double standard undermines it. Without *Youngberg*'s more robust treatment rights, mentally ill inmates are more likely to be victims of prison violence,[132] to inflict harm,[133] and to drain management resources that could otherwise be expended on safety measures.[134] *Estelle* therefore falls flat under equal protection review.

IV: JUDICIAL MALPRACTICE: ROMEO'S INCARCERATION

Although no court has explicitly recognized the equal protection implications of the double standard, a number have applied *Youngberg* in prisons.[135] This could be evidence of an appreciation of the strength of mentally ill inmates' equal protection claims. Yet the confused nature of some of these applications[136] suggests that many judges are struggling to administer *Estelle* and

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131 *Grutter*, 539 U.S. at 308 ("[S]trict scrutiny is designed to provide a framework for *carefully examining the importance and the sincerity* of the government's reasons for using [a given trait] in a particular context.") (emphasis added).

132 *See Ill-Equipped, supra* note 27, at 101 ("Compared to other prisoners, moreover, prisoners with mental illness also are more likely to be exploited and victimized by other inmates.").

133 *See* Brandi Grissom, *A Tie to Mental Illness in Violence Behind Bars*, N.Y. TIMES (Sept. 21, 2013), http://www.nytimes.com/2013/09/22/health/a-tie-to-mental-illness-in-the-violence-behind-bars.html ("It is not surprising that prisons with a greater proportion of mentally ill inmates would have more violence than others.").

134 TREATMENT ADVOCACY CTR., *State Survey, supra* note 18, at 10 ("Because of their impaired thinking, many inmates with serious mental illnesses are major management problems.").

135 Langley v. Coughlin, 715 F. Supp. 522, 538 (S.D.N.Y. 1989) ("[S]ince *Youngberg* was decided, a number of courts have invoked its standards to adjudicate claims of denial of medical care by convicted prisoners."); *see also* Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 717 (1992) ("As the professional judgment standard has been expanded beyond the mental health system, claims such as those against prisons and jails for not providing adequate treatment or screening for suicidal or mentally disabled prisoners and pretrial detainees also fall into this category.").

136 This Note does not aim to provide a comprehensive presentation of the myriad ways that courts cross-apply and confuse *Estelle* and *Youngberg*. Rather, it illustrates courts' tendencies with select cases. For additional examples of judges applying *Youngberg* in prisons in health-related contexts, see *Davidson v. Cannon*, 474 U.S. 344 (1986); *Santana v. Collazo*, 793 F.2d 41 (1st Cir. 1986); *Wells v. Franzen*, 777 F.2d 1258 (7th Cir. 1985); *Harding v. Kuhlmann*, 588 F. Supp. 1315 (S.D.N.Y. 1984), *aff'd mem.*, 762 F.2d 990 (2d Cir.1985); and *Newby v. Serviss*, 590 F. Supp. 591 (W.D. Mich. 1984).

Youngberg properly, blurring the standards in an unprincipled way. It follows, then, that replacing *Estelle* with *Youngberg* is no panacea since the contours of the standards tend to fall apart in application.

A. Youngberg *Behind Bars*

Some courts that apply *Youngberg* in prisons provide forthright explanations. Their reasoning tends to focus on one critical point—inmates and the civilly committed are *equally* dependent on the state because of their confinement. *Langley v. Coughlin*, a case brought in the Southern District of New York challenging a prison's failure to address the mental health needs of inmates in solitary confinement, is a prime example.[137] In applying *Youngberg*, the *Langley* court explained that inmates and committed individuals' right to care "rests in significant measure upon the same rationale."[138] Namely, that the state has limited each individual's "freedom to act on his own behalf."[139] The district court concludes that this "unitary theory" requires equivalent standards, regardless of the purpose of confinement.[140]

The logic in cases like *Langley*[141] supports the substance of this Note's equal protection argument even though it does not raise equal protection explicitly. Like this Note, these courts consider the similarity between inmates and committed individuals' needs to be dispositive, and they reject the relevance of the purpose of confinement. This line of precedent also suggests that this Note's initial proposal that *Youngberg* supplant *Estelle* is not beyond the realm of possibility—that some judges have already made this change reflects receptiveness.

B. Conflating Romeo and Gamble

Other larger[142] pockets of *Estelle-Youngberg* case law, with more limited expositions of the reasons behind application of a given standard, provide less cause for optimism. They reveal that a significant cohort of judges confuse *Estelle* and *Youngberg* such that the standard they purport to apply does not in fact determine the outcomes of their cases. Collectively, these misapplications

137 *Langley*, 715 F. Supp. at 531.

138 *Id.* at 535 (emphasis added).

139 *Id.* at 539.

140 *Id.*

141 For another illustrative example, see *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990), in which the court held, "Just as it does for mental patients, the State must provide . . . treatment for inmates."

142 *See* Stefan, *supra* note 135, at 705 ("[C]ourts rarely undertake to explain the logic behind their extension of the professional judgment standard to this very different scenario.").

suggest that judicial malpractice in this arena is widespread, and relying solely on judicial reform would therefore be unwise.

Some courts recognize *Estelle*'s relevance but the standard they apply reads nothing like *Estelle*. One court, for instance, purports to apply *Estelle* but the language it lays out closely approximates *Youngberg*: "The [E]ighth [A]mendment protects inmates from an environment in which *degeneration* is probable and *self improvement* unlikely."[143] In fact, it is *Youngberg* that protects specifically against "deteriorati[on]" [144] and supports self-improvement by requiring "training."[145] *Estelle*, in contrast, does not protect rehabilitation.[146] The court only mentions *Youngberg* to disclaim its applicability,[147] which suggests that it is unaware that the standard it is applying is, in effect, *Youngberg*.

One could argue that judges who opine in this manner[148] are not confused; they are sneaky. They agree with the judges who openly proclaim *Youngberg*'s applicability but choose not to name *Youngberg* to guard their opinions against being overturned for applying the "wrong" standard. This Note does not pretend to discern judges' unstated intentions, but it still finds this explanation unpersuasive. The case law this Note reviewed contained no evidence of such sleight of hand and there are indications that judges are prone to such malpractice in other contexts.[149]

V. *YOUNGBERG*'S DEMISE: THE WRONG PRESCRIPTION

Youngberg's desirability as a substitute for *Estelle* is questionable on more than as applied grounds. *Youngberg* has flaws that counsel against its use

143 Capps v. Atiyeh, 559 F. Supp. 894, 901 (D. Or. 1982) (emphases added).

144 Youngberg v. Romeo, 457 U.S. 307, 327 (1982).

145 *Id.* at 322 ("[R]espondent is entitled to minimally adequate *training*.") (emphasis added).

146 *See, e.g.*, Grubbs v. Bradley, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982) (finding that a lack of rehabilitative programs does not violate the Eighth Amendment).

147 *Capps*, 559 F. Supp. at 917 (D. Or. 1982) (referring to *Youngberg* as a standard applicable in "another context").

148 For other examples, see *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989); *Zwalesky v. Manistee County*, 749 F. Supp. 815 (W.D. Mich. 1990); *McCloud v. Delaney*, 677 F. Supp. 230 (S.D.N.Y. 1988); and *Willis v. Barksdale*, 625 F. Supp. 411 (W.D. Tenn. 1985). For examples of how the malpractice runs in both directions—courts also bungle *Youngberg* in ways that resemble *Estelle* in controversies implicating civil institutions—see *Strutton v. Meade*, 668 F.3d 549 (8th Cir. 2012); *Sain v. Wood*, 512 F.3d 886 (7th Cir. 2008); *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006); and *Moore* ex rel. *Moore v. Briggs*, 381 F.3d 771 (8th Cir. 2004).

149 Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 233 (2009) (finding based on an empirical review that judicial standards "are often abused in practice").

irrespective of judicial malpractice. Appellate courts could conceivably make *Youngberg* more manageable by issuing clarifying opinions, but this would only strengthen the influence of *Youngberg*'s inherent inadequacies.[150] It suffers from at least three serious defects.

First, the *Youngberg* standard is vulnerable to the charge that it demands judicial abandonment of a core right.[151] It instructs courts to apply a strong presumption of constitutionality to actions undertaken according to professional judgment, and at the same time provides no strict limit to what qualifies as professional judgment.[152] As a result, *Youngberg* protects a range of harms. Professional judgment is not necessarily consistent with inmates' rights. A physician might well be exercising some professional judgment in withholding painkillers from an inmate in extreme pain because she fears inciting a substance abuse problem. Yet the inmate's right to adequate treatment could still be compromised.

Second, by deemphasizing claimants' rights, *Youngberg* can be read as expressively bankrupt.[153] Its deep deference to professionals emphasizes the importance of their right to practice freely, according to their own standards. *Youngberg*'s silence about the rights of the confined could be interpreted as suggesting that any benefit they might receive under the standard is secondary to the protection of professionals' right to follow their judgment.

Finally, *Youngberg* is only as robust as the resources available to professionals.[154] And prisons, and by implication their professional staff, are increasingly resource-starved.[155] This doctrinal flimsiness is so prejudicial to

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150 *See, e.g.*, *Capps*, 559 F. Supp. at 917 ("This state of the psychiatric art makes it all the more difficult for me to distinguish between cases that show inmates receiving, on the one hand, constitutionally inadequate treatment, and, on the other hand, treatment about which mental health professionals could reasonably differ.").

151 *E.g.*, Stefan, *supra* note 135, at 642 (arguing that "the court's crucial role in our constitutional system" is lost under the *Youngberg* standard).

152 Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (specifying that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

153 Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 760 (1998) ("The expressive dimension of governmental action plays a central, but underappreciated, role in constitutional law.").

154 *See, e.g.*, West v. Atkins, 487 U.S. 42, 56 n.15 (1988) (noting that professional judgment is shaped by the government's limited resources).

155 NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2014)

committed individuals that the *Youngberg* Court felt called upon to apologize: "[The] presumption [of professionalism] is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function."[156] This creates the paradox that institutions inflicting the most egregious harm[157] might be least likely to be found liable. Indeed, the conditions in many civil institutions under *Youngberg*'s purview have long been described as abysmal.[158] The Court's creation of *Youngberg* has done little to change this terrible reality.

VI. RESUSCITATING GAMBLE: THE DOUBLE-DOSE REMEDY

Recognizing the deficiencies of a purely judicial fix, this Part turns to Congress to investigate the possibilities of a multi-branch remedy. In so doing, it helps alleviate the tunnel vision that afflicts scholarship on mentally ill inmates. Most articles consider what *single* solution is the most promising.[159] The interwoven doctrinal and political issues underlying the plight of mentally ill inmates, however, demand this Note's inclusive approach.[160] The dilemma is essentially "a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web."[161]

A. Legislating Equality

Backdoor approaches, like statutory reform, could address *Estelle*'s doctrinal flaws without changing the standard itself. Prisons' de facto mental hospital

(explaining that the federal prison system is struggling with "the increasing cost" of its operations).

156 *Youngberg*, 457 U.S. at 324.

157 Stefan, *supra* note 134, at 691 ("The patient's treatment may not represent the result of a decision or judgment at all, but simply a default in the absence of alternatives.").

158 *See, e.g.*, Alex Hecht, *Civil Rights of Institutionalized People*, MD. B.J., Jan.-Feb. 2003, at 32, 32 (describing the "dire, often life-threatening, conditions" in which some mentally ill civilly committed individuals live).

159 *See, e.g.*, Posner, *supra* note 12, at 363 (proposing changes in the standard for inmates' right to treatment but not looking to Congress).

160 This approach is not intended to be *all*-inclusive. Its scope is restricted to government actors, and it does not include a few government solutions—such as increased federal intervention through more aggressive enforcement of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997a(a) (2012))—because their interaction with the *Estelle* standard is relatively remote. It also leaves potential private sector solutions—like social impact bond programs that increase prison resources—to works that focus on and can thus fully examine the implications of private sector involvement.

161 Brown v. Plata, 131 S. Ct. 1910, 1936 (2011) (citations omitted).

status[162] points to hospital laws as a potentially apt analogue and framework for reform. The Emergency Medical Treatment and Active Labor Act (EMTALA) requires hospitals, within their capability, to provide appropriate health screening to everyone who presents at emergency rooms.[163] *Estelle*'s central failing—its restriction of liability to conditions prisons are aware of—could be mitigated by a requirement like EMTALA's.[164] By putting prisons on notice, screening would create strong grounds for arguing that a failure to treat violates *Estelle* because prisons could no longer hide behind lack of awareness. Under an EMTALA-like rubric, the dispositive inquiry would be whether prisons' judgment about how to respond to detected mental illnesses is deliberately indifferent to medical standards. This shift to scrutiny of prison professionals' actions, away from consideration of their awareness of illness, would bring *Estelle* closer to *Youngberg*.[165]

This leap between the prison and hospital realms is not pie in the sky. A small number of courts have already tried to save *Estelle* by interpreting it as requiring screening.[166] Some have found a duty to conduct mental health screenings in particular.[167] Yet, however attractive a screening requirement might be as a solution to the doctrinal puzzle, it is less appealing in terms of feasibility.

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162 *See, e.g.*, Christina Canales, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1725 (2012) (arguing that "prisons have become the new mental health system"); Slovenko, *supra* note 16 ("[J]ails and prisons have become the new mental hospitals.").

163 42 U.S.C. § 1395dd(a) (2012).

164 Currently, federal correctional institutions are not bound by a statutory duty to screen inmates' health. Bureau of Prisons guidance, which is at the Bureau's discretion, is the only national requirement. U.S. DEP'T OF JUSTICE, FY 2014 PERFORMANCE BUDGET—CONGRESSIONAL SUBMISSION: FEDERAL PRISON SYSTEM, SALARIES AND EXPENSES 28 (2014), http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/08/bop-se-justification.pdf ("[Bureau of Prisons (("BOP)] policy requires that every inmate admitted to a BOP facility be given an initial psychological screening."). Evidence suggests that prisons do not adhere to these discretionary guidelines. *See Ill-Equipped*, *supra* note 27, at 101 ("[I]n many prison systems screening and tracking of mentally ill prisoners is problematic. Prisoners with mental illness are not identified upon entry into prison and are left untreated.").

165 Despite *Youngberg*'s flaws, this shift is still desirable. *See* Rosalie Berger Levinson, *Wherefore Art Thou* Romeo*: Revitalizing* Youngberg*'s Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 559 (2013) ("Despite its drawbacks, however, the *Youngberg* standard has become the best shield for plaintiffs against arbitrary government decision making.").

166 *See, e.g.*, Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (holding that a failure to screen for infectious diseases is unconstitutional); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 867 (D.D.C. 1989) (holding that a lack of syphilis and tuberculosis screening constitutes deliberate indifference).

167 *See, e.g.*, Inmates of Allegheny Cty. Jail v. Peirce, 487 F. Supp. 638, 642 (W.D. Pa. 1980) (finding an Eighth Amendment violation in the lack of a "screening system for new admittees to identify those with mental health problems").

It would encounter serious roadblocks, starting with the problem that mentally ill inmates are not a politically sympathetic group.[168] The difficulty would be aggravated by the fact that despite recent expansions in access to healthcare,[169] access to mental healthcare remains acutely inadequate.[170] Strengthening this right for inmates would likely not be popular when non-offenders are wanting. Moreover, even when Congress does summon the will to enact laws to improve care for mentally ill inmates, the promised opening of the purse strings does not necessarily follow.[171]

B. A Uniform Standard as One Piece of the Puzzle

The barriers to a legislative fix are not insurmountable,[172] but their existence suggests that the most promising remedy will likely involve both legislative and judicial change. The lack of public and congressional solicitude for mentally ill inmates is susceptible to judicial influence. There is evidence that Supreme Court

168 *See, e.g.*, Drissel, *supra* note 15 ("People who commit criminal offenses are often marginalized. The general population has expressed little interest in ensuring or financing their welfare . . . . Similarly, our society stigmatizes individuals with mental illness."); *see also* Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 671 (2009) ("Providing inmates with health care is politically unpopular.").

169 Katherine L. Record, *Litigating the ACA: Securing the Right to Health Within a Framework of Negative Rights*, 38 AM. J.L. & MED. 537, 543 (2012) ("[T]he new law extends access to care to an unprecedented number of Americans.").

170 *See, e.g.*, Abby Goodnough, *Expansion of Mental Health Care Hits Obstacles*, N.Y. TIMES (Aug. 28, 2014), http://www.nytimes.com/2014/08/28/us/expansion-of-mental-health-care-hits-obstacles.html ("The need [for mental health treatment] is widely viewed as great: Nearly one in five Americans has a diagnosable mental illness . . . but most get no treatment.").

171 *Human Rights at Home*, *supra* note 26, at 281 (statement of Michael P. Randle, Dir., Ill. Dep't of Corrections) ("Congress enacted the Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA) in 2004 . . . . While the Act authorized $50 million to be granted toward these efforts, only $21.5 million has been appropriated between fiscal years 2006-2009. Due in part to this lack of funding, coupled with record deficits, States and counties have found themselves in dire circumstances with respect to treatment and management of the mentally ill.").

172 Congress recently reauthorized a statute that funds programs that link local criminal justice and mental health systems. Screening programs are eligible for MIOTCRA funding. Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008, Pub. L. No. 110-416, § 4, 122 Stat. 4352, 4353-54 (codified at 42 U.S.C. § 3797aa(h) (2012)). Congress also recently demonstrated growing solicitude for mentally ill inmates by convening a hearing focused on their plight. *See Human Rights at Home*, *supra* note 26, at 2-3.

positions affect public sentiment,[173] and Congress, in turn, is influenced by constituents' opinions.[174] Thus, even if the uniform application of *Youngberg* to the civilly committed and inmates would not result in meaningful change in courts because of *Youngberg*'s doctrinal flaws and judges' maladroitness, it could help unlock legislative change.

What is more, this symbiosis truly runs in both directions. Each mode of reform has the power to counteract the other's flaws—legislation could save *Estelle* (or its replacement), and a Court decision that explicitly recognizes mentally ill inmates' right to equal treatment could make legislation more likely. Although this remedy requires two government institutions to act instead of one, the formidability of this task is not cause for criticism. On the contrary, the challenges of implementation are a reflection of the intractability of mentally ill inmates' plight. This realism is a prerequisite for success.

C. Resistance to Reform

Thus far, this Note has presumed the desirability of improving care for mentally ill inmates, even in acknowledging doctrinal and legislative challenges. This Part engages with counterarguments that do not take this premise for granted, as well as some objections to this Note's proposal that do. This discussion is broken into four Sections addressing potential grounds for objection: (1) fairness; (2) practicability; (3) effectiveness; and (4) adverse outcomes. In responding to these charges, it finds that they do not, individually or collectively, undermine the desirability of improving treatment.

1. Fairness

Objections to improving care for mentally ill inmates could be raised on fairness grounds. Under this logic, helping individuals who have harmed society

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173 This Note is arguing that insofar as public sentiment is influenced by the Court's positions, judicial standards thereby influence publicly elected Members of Congress. Large bodies of scholarship analyze the interactions between public sentiment, Supreme Court jurisprudence, and Congress, and this Note leaves this ongoing debate to these devoted works. For an example of one of the many pieces that support this Note's premise that the Court influences the public, see James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RESEARCH Q. 419 (2006).

174 Similarly, this Note is not taking a position on the controversial issue of how responsive, exactly, Congress is to constituents. For an example of one of the many works that dive deeply into this issue, see Lisa O. Monaco, *Give the People What They Want: The Failure of "Responsive" Lawmaking*, 3 U. CHI. L. SCH. ROUNDTABLE 735, 737 (1996) (arguing "that the national legislature is increasingly responsive to individual manifestations, such as phone calls, letters, e-mails, and faxes, of constituent preferences").

should not be the first step in solving a problem that affects law-abiding citizens.[175] This argument makes two mistakes. First, it draws a rigid line between "criminals" and "citizens" that does not exist. Mentally ill inmates cycle in and out of prison so often that they are known as "frequent flyers."[176] Improving their care also benefits the public because these inmates spend large chunks of time as free citizens too. In addition, mentally ill inmates' offenses are often nonviolent[177] and stem from their illnesses,[178] which could mitigate their culpability. In this light, mentally ill inmates are not bona fide "criminals" and are no less entitled to care than non-offenders.

Second, this counterargument overlooks the fact that improving treatment for mentally ill inmates and caring for the public are not mutually exclusive. There is no direct link between healthcare spending in and outside of prisons; reductions in expenditures on prisoners do not necessarily accrue to the benefit of the non-incarcerated ill.[179] Indeed, if there are manifest benefits to improving care in prisons, this could motivate investment on the outside. Prisons could function as laboratories of democracy.

2. Practicability

Detractors could also argue that there are practical barriers to improving treatment for inmates. The most obvious contention is that improving care is prohibitively costly, but this straightforward attack does not hold up.

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175 *See, e.g.*, Kate Douglas, *Prison Inmates Are Constitutionally Entitled to Organ Transplants—So Now What?*, 49 ST. LOUIS U. L.J. 539, 544 (2005) ("[T]axpayers . . . dislike the idea that tax dollars go to provide inmates with a medical procedure that many law-abiding citizens are unable to afford."); Posner, *supra* note 12, at 363 ("[B]ased on notions of fairness—it is not right that society spends a lot of money giving prisoners better medical care than poor citizens who have not committed crimes.").

176 *More Mentally Ill Persons Are in Jails and Prisons than Hospitals,* TREATMENT ADVOCACY CTR. & NAT'L SHERIFFS' ASS'N 10 (2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf ("In the Los Angeles County Jail, 90 percent of mentally ill inmates are repeat offenders, with 31 percent having been incarcerated ten or more times.").

177 Christine M. Sarteschi, *Mentally Ill Offenders Involved with the U.S. Criminal Justice System,* SAGE OPEN, July-Sept. 2013, at 1, 9 (2013), http://sgo.sagepub.com/content/3/3/2158244013497029 ("Forty-eight percent of the federal mentally ill inmates have been charged with drug trafficking crimes.").

178 *Ill-Equipped, supra* note 27, at 24 ("Thousands of mentally ill are left untreated and unhelped until they have deteriorated so greatly that they wind up arrested and prosecuted for crimes they might never have committed had they been able to access therapy, medication, and assisted living facilities in the community.").

179 Posner, *supra* note 12, at 363 ("[T]here is no reason to believe that reducing the amount that states spend on medical services for prisoners will result in better services for the poor.").

Incarcerating the mentally ill *without* providing adequate treatment, as is done today, is in fact the costlier proposition. Inmates whose illnesses go untreated cost the prison system more because they have longer stays and drain non-medical management resources because of disciplinary issues.[180]

Other practical concerns, in contrast, are more justifiably characterized as intractable. Prison medical staffs are of notoriously poor quality because of low pay and the discomfort of working in prisons.[181] This barrier is not absolute, however. The growing sensitivity to inmates' plight[182] could attract higher quality professionals.

Yet even if prisons addressed staffing problems, one could argue that improving services would incentivize malingering. Mental illness has no surefire test,[183] and a colorable argument could be made that everyone in prison is mentally ill in some sense. Part of the punishment of confinement is its psychological harm.[184] Non-mentally-ill inmates might present for care to receive comforting services they do not need. Although this concern has some legitimacy, in today's prison healthcare context it is not a relevant line of analysis. The risk of over-inclusive and wasteful care pales in comparison to the likelihood inadequate treatment.[185]

3. Effectiveness

From a mental health professional's perspective, improving care in prisons might be for naught. With mentally ill inmates cycling in and out, and with few treatment options on the outside, improved prison care could be undone by a lack

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180 TREATMENT ADVOCACY CTR., *State Survey*, *supra* note 18, at 10.

181 Brown v. Plata, 131 S. Ct. 1910, 1927 (2011) ("Prisons were unable to retain sufficient numbers of competent medical staff, and would hire any doctor who had a license, a pulse and a pair of shoes.") (citations omitted).

182 *See, e.g.*, Mary Clare Reim, *The Surprising Ingredient for Bipartisan Reform: Hit Show 'Orange Is the New Black,'* DAILY SIGNAL (June 12, 2014), http://dailysignal.com/2014/06/12/surprising-ingredient-bipartisan-reform-hit-show-orange-new-black ("For many viewers, the show provides a spooky wake up call to the all-too-disturbing reality of mass incarceration. . . . It's not just 'Orange is the New Black' viewers who are beginning to feel uneasy and morally troubled about the current U.S. prison system.").

183 Jacob Sullum, *Finding a Place for the Mentally Ill*, CATO UNBOUND (Aug. 20, 2012), http://www.cato-unbound.org/2012/08/20/jacob-sullum/finding-place-mentally-ill (noting that "there is no objective biological or psychological test" for mental illnesses).

184 Andrew Cohen, *Supermax: The Faces of a Prison's Mentally Ill*, ATLANTIC (June 19, 2012), http://www.theatlantic.com/national/archive/2012/06/supermax-the-faces-of-a-prisons-mentally-ill/258429 ("[T]he inhumane treatment of the men has made them mad, or at least exacerbated their preexisting mental health problems.").

185 Ditton, *supra* note 24, at 9 (finding that at least forty percent of mentally ill inmates receives no form of treatment).

of continuity.[186] This concern is well-founded, but instead of counseling against improving care in prisons, it points to the related importance of post-release support. Congress has recognized this need by allotting funding to programs that provide recently released inmates with care.[187] Moreover, quality care in prison could identify mental illness in some individuals for the first time. Although accessing care on the outside is challenging, individuals might be more receptive to and able to benefit from treatment if they are aware that they need it.

4. Adverse Outcomes

Opponents could point to possible unintended negative consequences. Without concurrent improvement in care on the outside, the mentally ill might be incentivized to commit crimes to access care in prison.[188] In addition, improving treatment could weaken prison safety if resources are shifted from security management.[189] Both of these arguments are one-sided. The first does not consider the fact that the downsides to incarceration—removal from family, friends, and jobs, for instance—likely outweigh the allure of treatment for many. The second does not account for the fact that resources allocated to care accrue to safety as well. Better symptom management can improve ill inmates' ability to navigate their incarceration with minimal risk to themselves and others.[190]

There is another sense in which the cure could be viewed as worse than the disease—bolstering treatment rights could result in overmedication. Evidence suggests that some prison mental health staff protect against liability by erring in this direction.[191] Arguably, a more robust right could aggravate this propensity.

186 *Position Statement of AACP on Persons with Mental Illness Behind Bars*, AM. ASS'N COMMUNITY PSYCHIATRISTS (Mar. 15, 2001), http://www.communitypsychiatry.org/pages.aspx?PageName=Position_Statement_of_AACP_on_Persons_With_Mental_Illness_Behind_Bars ("Upon release their decompensated mental state, combined with unavailability of . . . community mental health and dual diagnosis treatment, puts these individuals at risk for . . . psychiatric hospitalization, and re-incarceration.").

187 *See, e.g.*, Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008, Pub. L. No. 110-416, § 4, 122 Stat. 4352, 4353-54 (codified at 42 U.S.C. § 3797aa(h) (2012)).

188 Chris Halsne, *Expensive Trend: People Committing Crimes To Get Free Jail Health Care*, FOX NEWS (July 7, 2014), http://kdvr.com/2014/07/07/expensive-trend-people-committing-crimes-to-get-free-jail-health-care.

189 Turner v. Safley, 482 U.S. 78, 90 (1987) (holding that inmates' rights must be balanced against prison safety needs and safety interests should supersede inmates' individual rights).

190 *Ill-Equipped*, *supra* note 27, at 60 ("[M]entally ill prisoners in state and federal prisons as well as local jails are more likely than others to have been involved in a fight and also more likely to have been charged with breaking prison rules.").

191 *See* Don Thompson, *California Spends Big on Anti-Psychotics*, ASSOCIATED PRESS

Yet *Estelle*, even in its current weak form, has been interpreted as guarding against overtreatment[192] and *Youngberg*'s "professional" basis guards against care that does not serve therapeutic purposes. Crucially, under-treatment looms far larger[193] so a skewed solution is warranted.

Perhaps the most formidable argument against improving care is that this solution is a temporary fix. Under this reasoning, the mentally ill do not belong in prison regardless of the quality of care because the setting is inherently harmful to their health and does not deter crime. "Better" care would mask confinement's harm, and the resulting diminution in visible distress would obscure the need to remove the mentally ill from prison. This argument is less compelling, however, when the suffering of mentally ill inmates that is already public is taken into account. No reforms came about even when it was revealed that one inmate died every six to seven days in one prison system because of "constitutional deficiencies" in healthcare.[194] There is little reason to believe that more severe tragedies, whatever they might be, would incite action when this one has not. Therefore, obstruction of the visibility of harm is not likely to significantly derail reform efforts, and improvements in care should not be avoided for this reason.

CONCLUSION: THE ANTIDOTES

It has been decades since Gamble and Romeo sought protection of their healthcare rights from the Supreme Court. Although the Court overlooked their fundamental similarity then, in the intervening years this resemblance has only grown. Today, there are more Romeos in prison than in civil facilities. Yet the *Estelle-Youngberg* double standard that grew out of Gamble and Romeo's cases still relegates mentally ill inmates to second-class healthcare. This Note exposes the doctrinal deficiency at the heart of this injustice—the double standard violates mentally ill inmates' right to equal protection.

In response, this Note proposes that the antidote to the unconstitutional *Estelle-Youngberg* double standard is not a uniform standard. A standard that puts mentally ill inmates on equal footing with the civilly committed would solve the doctrinal puzzle, but because of *Youngberg*'s flaws and judicial malpractice in this area of the law, in reality this reform would do little to help mentally ill inmates. Therefore, the solution must necessarily look beyond courts, and, as this

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(May 1, 2013), http://bigstory.ap.org/article/ap-exclusive-calif-spends-big-anti-psychotics ("California's inmate mental health professionals appear to overmedicate their patients. Even a former top prison mental health administrator acknowledged that fear of lawsuits often drove the decisions about inmates' treatment.").

192 Ruiz v. Estelle, 503 F. Supp. 1265, 1339 (S.D. Tex., 1980), *aff'd in part*, 688 F.2d 266 (5th Cir. 1982).

193 Ditton, *supra* note 24, at 9.

194 Brown v. Plata, 131 S. Ct. 1910, 1927 (2011).

Note suggests, also to Congress.

The doctrinal and political issues underlying mentally ill inmates' plight demand such a multifaceted approach. Each mode of reform has the power to counteract the other's limitations—legislation could save *Estelle*, and a holding that explicitly recognizes inmates' equal right to care could make legislation more likely. Thus, there is a long and winding road ahead to save Gamble from a fate that is "little short of barbarous."[195] The first step likely lies outside of courts and Congress, as within the general public's power. The pervasive antipathy for the incarcerated and the mentally ill suggests that neither courts nor Congress are likely to disrupt the status quo without an underlying shift in public awareness, for fear of a backlash. To awaken courts to the similarity between Romeo and Gamble and to spur Congress to hold prisons to account, society must first shed its stigma against this vulnerable population.

195 Boring v. Kozakiewicz, 833 F.2d 468, 472 (3d Cir. 1987) ("To apply the Eighth Amendment standard to mentally retarded persons would be little short of barbarous.").