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## Sane, Manipulative Self-Harm: When Hostage and Hostage Taker Become One

John R. FitzGerald

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# SANE, MANIPULATIVE SELF-HARM: WHEN HOSTAGE AND HOSTAGE TAKER BECOME ONE

*John R. FitzGerald\**

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\* AB University of Wisconsin-Milwaukee; JD Notre Dame Law School. I would like to thank Judge William C. Griesbach for introducing me to this topic, Professor Jennifer Mason McAward guiding me at the outset of this project, and Professor Alexander Tsesis for providing valuable feedback, and the members of the *West Virginia Law Review* for improving this Article with their editing. I would also like to thank Tom Dwyer and Jake Crammer, who offered important perspective and suggestions. Finally, I would like to give a special thanks to Brooke McDermid for her tireless encouragement and support.

*[T]he prison staff was unable to rescue the hostage. Because the threatened hostage was the same person as the threatening perpetrator, they could not be separated. It was impossible to deny the perpetrator access to his hostage. The defendants were left with the almost impossible task of trying to protect a man from himself twenty-four hours a day and seven days a week . . . . Indeed, it is the prison staff's very concern for [their inmate's] physical safety that, in [their inmate's] mind, gave him so much power over them.*

—Judge William C. Griesbach<sup>1</sup>

## I. INTRODUCTION

The deliberate indifference doctrine requires prisons and prison staff to protect inmates from harm; the exact nature of the requirement is constantly challenged, but it is especially tricky when the harm involved is self-imposed by the inmate himself. Compare two prisoners. First, Matt Sanville.<sup>2</sup> He has been diagnosed with “major depressive disorder, aggressive conduct disorder, bipolar disorder, dysthymic disorder, adjustment disorder, mixed personality disorder, and manic depression” by various doctors throughout his life.<sup>3</sup> Sanville died by suicide in prison.<sup>4</sup> Here’s what led to his death: All of Sanville’s doctors unanimously agreed that he needed medication.<sup>5</sup> In 1997, after Sanville decided to stop taking medication, police arrested him for assaulting his mother.<sup>6</sup> Although his mother and prosecutor agreed that Sanville was unthreatening when medicated and should therefore not be incarcerated, the judge sent him to prison.<sup>7</sup> During his incarceration, Sanville persuaded the prison doctor to discontinue medication due to nausea and vomiting.<sup>8</sup> Bizarre behavior followed, and Sanville sent a letter home contemplating his imminent death.<sup>9</sup> The prison staff reacted by placing Sanville in solitary confinement; the State did nothing more, even

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<sup>1</sup> Bowers v. Pollard, 602 F. Supp. 2d 977, 933 (E.D. Wis. 2009).

<sup>2</sup> Sanville v. McCaughtry, 266 F.3d 724, 728 (7th Cir. 2001).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 728–29. The prosecutor stated at Sanville’s sentencing: “I do not believe that sending a person to the Wisconsin State Prison system is the best place to deal with a person’s mental illness.” *Id.* at 729.

<sup>8</sup> *Id.* at 729.

<sup>9</sup> *Id.* at 729–30 (describing Sanville’s bizarre behavior, including writing threats on his sheets, flushing clothes down the toilet, assaulting an inmate, and refusing food).

when Sanville stopped eating.<sup>10</sup> It did not take long before he died by suicide in his cell.<sup>11</sup>

Now meet David Bowers.<sup>12</sup> Bowers is currently incarcerated.<sup>13</sup> Bowers's doctors are less certain about his mental health than Sanville's doctors were—while his record contains diagnoses such as intermittent explosive disorder, some evaluators say he is “not an individual who is mentally ill or intellectually incompetent.”<sup>14</sup> In 2005, Bowers was transferred from one prison to another to complete a sentence for a drug crime.<sup>15</sup> State healthcare providers have treated Bowers's potential mental illness throughout his incarceration, but, despite the treatment, Bowers has repeatedly engaged in self-harm.<sup>16</sup> On multiple occasions, he has threatened to engage in self-harm unless guards acquiesce to his demands.<sup>17</sup> Over time, state officials have concluded that the self-harm is “manipulative and not psychotic.”<sup>18</sup> Put differently, Bowers can control his self-harm.

Sanville and Bowers have much in common. Primarily, both prisoners have suffered self-inflicted injuries that the State failed to prevent, opening the door for prisoner civil-rights claims.<sup>19</sup> Central to this Article, however, is the glaring difference between the two inmates: the cause of their self-harm. On the one hand, Sanville committed suicide because of his mental illness. On the other hand, Bowers repeatedly engages in self-harm as a strategic and often successful way to negotiate with prison staff. It would seem that Bowers should fail if he brings a claim against the State under 42 U.S.C. § 1983 because otherwise he will be able to use the law to exploit the State. Yet, under the current law in some circuits, Bowers's and Sanville's claims would likely be treated the same. Using the Seventh Circuit as a case study, this Article argues that the two claims should be treated differently under the deliberate indifference framework. Furthermore, it argues that treating the claims the same makes the deliberate indifference

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 731.

<sup>12</sup> *Bowers v. Pollard*, 602 F. Supp. 2d 977, 978 (E.D. Wis. 2009).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 979 (citing a report prepared by a psychologist that analyzed Bowers in 1993).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 980, 989 (noting the various demands Bowers made to prison officials, such as that they give him certain property or medication, or that they transfer him to a different facility). Bowers even admitted his motivation. *Id.* at 989 (“[T]he threat that prompted the May 22 extraction—he protested that it was not a real threat but just an effort to get transferred. ‘I’m not suicidal,’ he said, ‘I’m chillin’ ‘cause I want to go to [a different institution].’” (quoting a statement made by Bowers)).

<sup>18</sup> *Id.* at 980 (quoting Bowers's prison admissions coordinator and supervisor Jeffrey Heise).

<sup>19</sup> John R. FitzGerald, Note, *Non-Merit-Based Tests Have No Merit: Restoring District Court Discretion Under § 1915(E)(1)*, 93 NOTRE DAME L. REV. 2169, 2169 (2018).

framework vulnerable to exploitation and therefore flawed. This Article argues that the flaw will be avoided if judges faithfully apply the current legal framework for deliberate indifference.

To offer background, this Article begins in Part II by describing prisoner civil rights cases; Part II then goes on to explain what a prisoner who brings a claim based on self-inflicted harm must prove in order to prevail in a civil suit against the State. Next, using the Seventh Circuit as a case study, Part III analyzes the strongest argument for why a sane prisoner who engages in manipulative self-harm (“MSH”) could prevail against the State: analogizing MSH with hunger striking. Part III then describes why it is problematic for claimants to prevail in sane MSH cases. Part IV shows that claimants like Bowers, who engage in MSH, are not in fact analogous to hunger strikers, which means the evolution of the doctrine in the Seventh Circuit is misguided. Part IV then demonstrates why claimants like Bowers should in fact lose on the merits when applying the deliberate indifference framework. Additionally, Part IV shows how Congress, or the Supreme Court, could clarify the law to ensure that MSH claimants cannot exploit the § 1983<sup>20</sup> loophole described in this Article. Generally, this Article offers a valuable guide for judges and states’ attorneys confronted with a prisoner civil rights claim of deliberate indifference brought by a prisoner who is attempting to exploit § 1983 by engaging in MSH to manipulate prison staff.

## II. BACKGROUND

### A. Prisoner Civil Rights Cases

“Prisoners in the United States can sue their jailors.”<sup>21</sup> Prisoners, under 42 U.S.C. § 1983, can sue state actors who violate their constitutional rights while incarcerated.<sup>22</sup> The list of state actors includes wardens, guards, nurses, doctors, and others.<sup>23</sup> Prisoners can file civil rights claims, but they face obstacles that a traditional plaintiff does not confront in a civil lawsuit.

For one thing, a prisoner must prove that the State violated the Constitution, a much greater challenge than proving a tort. A typical person who sees a doctor and suffers harm will recover if he can prove that the doctor acted negligently.<sup>24</sup> In contrast, an inmate who sees the prison doctor will not recover under § 1983 if he can only prove negligence; rather, the prisoner must be able

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<sup>20</sup> 42 U.S.C.A. § 1983 (West 2020).

<sup>21</sup> FitzGerald, *supra* note 19.

<sup>22</sup> § 1983.

<sup>23</sup> *Id.*

<sup>24</sup> *What Is Medical Malpractice?*, AM. BD. PRO. LIAB. ATT’YS, <https://www.abpla.org/what-is-malpractice> (last visited Oct. 10, 2020).

to show “deliberate indifference to [a] serious medical need”<sup>25</sup>—a violation of the Eighth Amendment prohibition against cruel and unusual punishment.<sup>26</sup>

Another unique obstacle faced by prisoners is the doctrine of qualified immunity.<sup>27</sup> A full discussion of the doctrine, which has recently come under scrutiny in both academia and the courts,<sup>28</sup> is not central to the argument of this Article.<sup>29</sup> It suffices to say that qualified immunity protects government actors and halts a prisoner’s § 1983 claim when the prison official does not violate “clearly established law.”<sup>30</sup> In other words, when there is uncertainty, the benefit of the doubt goes to the State rather than the prisoner.

Additionally, prisoners face a series of obstacles enacted by Congress in the Prison Litigation Reform Act (“PLRA”).<sup>31</sup> The PLRA requires prisoners to pay filing fees, pay court costs, and exhaust all grievance procedures before filing a claim.<sup>32</sup> Moreover, it requires judges to screen prisoner civil rights cases before allowing them to proceed,<sup>33</sup> and allows judges to hold telephonic hearings.<sup>34</sup> For the defendant, the PLRA relinquishes the obligation to respond<sup>35</sup> and limits potential damages.<sup>36</sup> These are only some of the obstacles set forth in the PLRA<sup>37</sup> that are unique to prisoners.

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<sup>25</sup> *Rivera v. Kettle Moraine Corr. Inst.*, No. 14-C-6, 2014 WL 2875897, at \*1 (E.D. Wis. June 24, 2014).

<sup>26</sup> U.S. CONST. amend. XIII.

<sup>27</sup> *See, e.g.,* *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

<sup>28</sup> *See* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Zadeh v. Robinson*, 902 F.3d 483, 498–500 (5th Cir. 2018) (Willett, J., concurring dubitante); Symposium, *Federal Courts, Practice & Procedure: The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018).

<sup>29</sup> For a full discussion of the doctrine, see *Federal Courts, Practice & Procedure: The Future of Qualified Immunity*, *supra* note 28.

<sup>30</sup> Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793, 1793 (2018) (“This defense, which protects officers from liability for damages unless they violate clearly established law, has attracted many critics.”). For the purposes of qualified immunity, “clearly established law” is where “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018) (discussing some of the problems caused by the “clearly established” requirement).

<sup>31</sup> 42 U.S.C.A. § 1997e (West 2020).

<sup>32</sup> 28 U.S.C.A. § 1915(a)–(b) (West 2020); *FitzGerald, supra* note 19, at 2174.

<sup>33</sup> 28 U.S.C.A. § 1915A(a); *FitzGerald, supra* note 19, at 2174.

<sup>34</sup> 42 U.S.C.A. § 1997e(f)(1); *FitzGerald, supra* note 19, at 2174.

<sup>35</sup> 42 U.S.C.A. § 1997e(g)(1); *FitzGerald, supra* note 19, at 2174.

<sup>36</sup> 42 U.S.C.A. § 1997e(e); *FitzGerald, supra* note 19, at 2174 (footnotes omitted).

<sup>37</sup> For a more complete discussion of the PLRA, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

Finally, because prisoner civil rights cases are civil lawsuits, the prisoner enjoys no constitutional right to an attorney.<sup>38</sup> Yet few prisoners can afford representation.<sup>39</sup> Some prisoners find a pro bono lawyer, either independently or by asking the court to appoint counsel discretionally based on indigency status.<sup>40</sup> The remaining indigent prisoners are left to secure counsel in the same way as any other plaintiff, by entering a contingency fee agreement.<sup>41</sup> Finding a lawyer willing to enter such an agreement is especially difficult for prisoners. Merit and substance aside,<sup>42</sup> taking on a prisoner as a client may not be attractive to an attorney—it requires traveling to the prison for every meeting and accommodating the time-consuming and sometimes invasive visitor protocol.<sup>43</sup> What is more, some attorneys have moral apprehensions about representing prisoners or prejudices about the “nature of the client,”<sup>44</sup> which may lead them to decline to represent an inmate.<sup>45</sup> These and similar conditions make securing counsel particularly challenging for a prisoner.

The purpose of this Section is to show that prisoner civil rights claims are not easy to win. To put some numbers to it, between 1988 and 2011, prisoner civil rights cases were disposed of pretrial in favor of the defendant almost 85% of the time.<sup>46</sup> In comparison, prisoner civil rights claims were decided pretrial in

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<sup>38</sup> FitzGerald, *supra* note 19, at 2169.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (reviewing 28 U.S.C.A. § 1915(E)(1), the statute that allows district courts to request private counsel to represent the plaintiff-prisoner in a prisoner civil rights case and considering what factors a judge should be able to consider when making that determination).

<sup>41</sup> *Id.* at 2185–86.

<sup>42</sup> Merit here refers to the strength of the prisoner’s claim; substance here refers to what is at stake in the litigation, as the remedy (and if damages, the amount of money) a plaintiff may be awarded. *Id.* at 2170.

<sup>43</sup> *Id.* at 2182–83 (“Appointed attorneys are expected to advance money to cover costs of discovery, travel, and other litigation expenses. . . . [S]ince prisons tend to be isolated in rural locations, lawyers may have to travel far distances without reimbursement. Once they arrive at the prison, lawyers are at the mercy of the institution with regard to whether, and if so, how promptly, they can meet with their client.” (internal citations omitted)); see also Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL’Y J. 149 (2013); Raven Rakia, “A Living Nightmare”: *Women Visiting Loved Ones Jailed at Rikers Describe a Pattern of Invasive Searches by Guards*, INTERCEPT (Jan. 10, 2017, 4:08 AM), <https://theintercept.com/2017/01/10/rikers-island-strip-search-new-york-city-jails-visitors/>.

<sup>44</sup> FitzGerald, *supra* note 19, at 2183 (quoting Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. UNIV. L.J. 417, 484 (1993)).

<sup>45</sup> Professional Rule of Responsibility 1.16 addresses declining representation. MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS’N 1980). Declining to represent an inmate for the reasons discussed above would not appear to run afoul of Rule 1.16 because it allows an attorney to “withdraw if it can be accomplished without material adverse effect on the client’s interests.” *Id.*

<sup>46</sup> Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 165 fig.4 (2015).

favor of the plaintiff less than 1% of the time.<sup>47</sup> Only 13% of prisoner civil rights cases went to trial, and of those, about 11% were decided in the plaintiff's favor.<sup>48</sup> It is important to keep this principle in mind—that these are hard-to-win cases where the deck is stacked heavily against prisoners—before discussing prisoner civil rights claims.

### B. Eighth Amendment Prisoner Civil Rights Claims

One common prisoner civil rights claim is deliberate indifference to serious medical needs. A prisoner who engages in self-harm and then files a lawsuit against prison staff for failing to prevent the harm will rely on a deliberate indifference theory. Such claims are predicated on the following principle, which the Supreme Court articulated in *Estelle v. Gamble*: “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death.’”<sup>49</sup> Because the inmate is entirely dependent on the prison to meet his medical needs, deliberate indifference to those needs constitutes an “unnecessary and wanton infliction of pain.”<sup>50</sup> And unnecessary and wanton infliction of physical pain is, under the United States Constitution, cruel and unusual punishment in violation of the Eighth Amendment.<sup>51</sup>

A plaintiff must satisfy two prongs to successfully prove deliberate indifference: that the prison official was (1) deliberately indifferent to (2) a serious medical need.<sup>52</sup> The first prong is subjective and the second is objective.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman, *Congress, Courts and Corrections: An Empirical Perspective on the Prisoner Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1537 fig.2 (2003); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. L. REP., Feb.–Mar. 2017, at 69, 84 fig.3; Rachel Poser, *Why It's Nearly Impossible for Prisoners To Sue Prisons*, NEW YORKER, (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons>.

<sup>49</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

<sup>50</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977) (quoting *Estelle*, 429 U.S. at 103).

<sup>51</sup> U.S. CONST. amend. VIII.

<sup>52</sup> Haley Loutfy, Note, *Health Care Behind Bars: Constructing a Uniform Deliberate Indifference Standard To Prevent the Use of the Eighth Amendment as Broad Prison Reform*, 45 LINCOLN L. REV. 77, 80 (2018).



A prisoner's claim thus fails if prison officials are unaware that the prisoner is injured or at risk of injury,<sup>53</sup> or when the harm or potential harm is trivial.<sup>54</sup>

The first prong tests whether the prison official (or officials) possessed the requisite mens rea.<sup>55</sup> The clearest and most recent Supreme Court guidance on this prong is *Farmer v. Brennan*.<sup>56</sup> There, the Supreme Court rejected an objective test for the mens rea prong, under which a prisoner would satisfy the prong if he proved that the risk posed to him "was known or should have been known by a reasonable prison official."<sup>57</sup> Instead, the *Farmer* Court opted for a subjective test, which is satisfied when prison officials are "consciously aware of a serious medical need or substantial risk of harm and disregard that need or risk."<sup>58</sup>

The latter prong tests the objective severity of the medical need. The Supreme Court has not provided any guidance on how to delineate what harm is serious enough to come within the purview of the Constitution. It is thus incumbent on district courts to assess severity and establish manageable standards.<sup>59</sup>

Even with the instruction of *Farmer*, the circuits have split on how to apply the subjective mens rea test. The circuit courts are also divided on how to assess what constitutes a serious medical need, which is not surprising given the absence of Supreme Court guidance on the matter. As a result, the two-pronged deliberate indifference test is applied differently in the various United States courts of appeals.

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<sup>53</sup> For an example of an injury that prison officials would have a difficult time anticipating, and therefore be unable to establish the requisite subjective intent, consider an inmate whose appendix bursts without warning. *E.g.*, FitzGerlad, *supra* note 19 (discussing *Rivera v. Kettle Moraine Corr. Inst.*, No. 14-C-6, 2014 WL 2875897, \*1 (E.D. Wis. June 24, 2014), where an inmate sued his prison for failing to properly anticipate that his appendix would rupture, to which an expert explained that "appendicitis is often either missed or misdiagnosed" when explaining that the medical care provided wouldn't even reach the level of medical malpractice, not to mention a constitutional violation).

<sup>54</sup> For an example of a trivial medical need, see *Dickson v. Colman*, 569 F.2d 1310, 1311 (5th Cir. 1978), where an inmate complained of shoulder pain from a three-year-old accident, but the examining doctor concluded that no treatment was necessary.

<sup>55</sup> Loutfy, *supra* note 52, at 81.

<sup>56</sup> 511 U.S. 825 (1994).

<sup>57</sup> Loutfy, *supra* note 52, at 80.

<sup>58</sup> *Id.* at 81 (citing *Farmer*, 511 U.S. at 844).

<sup>59</sup> *Id.*; Jason L. Stern, *Prison (In)Justice: An Examination of the Deliberate Indifference Standard in 42 U.S.C. § 1983 Jail-Suicide Claims*, 10 SETON HALL CIR. REV. 173, 186 (2013).

## 1. A Review of the Varying Deliberate Indifference Standards

### *i. Deliberate Indifference: The Subjective Element*

Deliberate indifference analyses can be divided into two predominate camps. The first camp follows the “grossly inadequate care” standard,<sup>60</sup> whereby—as the name suggests—deliberate indifference is established by showing that care is grossly inadequate, or, more specifically, that the “need for treatment is obvious, but medical care is so cursory as to amount to no treatment at all.”<sup>61</sup> That a reasonable doctor could have considered his actions lawful is persuasive evidence that care is not grossly inadequate.<sup>62</sup> Deliberate indifference may exist under this definition when, *inter alia*, (1) relief is available and an inmate needlessly suffers due to dilatory prison staff,<sup>63</sup> (2) necessary medical treatment is delayed for nonmedical reasons,<sup>64</sup> (3) prison officials opt for easier or less efficient courses of treatment,<sup>65</sup> or (4) nonmedical prison officials know that an inmate is in extreme pain but delay access to medical personnel.<sup>66</sup>

The second camp ascribes to the “medically unacceptable” test,<sup>67</sup> whereby prison officials are deliberately indifferent when their care is “so far afield of accepted professional standards as to raise the inference that it was not actually based on medical judgment . . . [and] that no minimally competent professional would have so responded under [the same] circumstances.”<sup>68</sup> Deliberate indifference may exist under this standard when, *inter alia*, (1) harm to a prisoner becomes worse because of a delay in care,<sup>69</sup> (2) prison staff fails to provide medication or treatment despite professional advice to do so,<sup>70</sup> or (3)

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<sup>60</sup> Loutfy, *supra* note 52, at 82 (attributing the standard to the First, Third, Sixth, Tenth and Eleventh Circuits).

<sup>61</sup> *Id.* at 85. The Eleventh Circuit described its standard in *Waldrop v. Evans*: “[Care that is] so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.” 871 F.2d 1030, 1033 (11th Cir. 1980).

<sup>62</sup> Loutfy, *supra* note 52, at 85. (quoting *Terrance v. Northville Reg’l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002)).

<sup>63</sup> *Id.* (citing *Brown v. Hughes*, 894 F.2d 1533 (11th Cir. 1990)).

<sup>64</sup> *Id.* (citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)).

<sup>65</sup> *Id.* (citing *McElligott*, 182 F.3d at 1257).

<sup>66</sup> *Id.* (citing *Rosseter v. Annetts*, No. 9:10-CV-1097, 2012 U.S. Dist. LEXIS 139265, at \*47 (N.D.N.Y. June 29, 2012)).

<sup>67</sup> *Id.* at 86 (attributing this test to the Seventh and Ninth circuits). The Third Circuit applies essentially the same test, finding deliberate indifference when “some level of care had been provided, but the care was not based on sound medical judgment.” *Id.* at 87 (citing *Scott v. Corr. Med. Servs.*, No. 06-5552, 2008 U.S. Dist. LEXIS 55553, at \*14 (D.N.J. July 21, 2008)).

<sup>68</sup> *Id.* at 86 (quoting *Arnett v. Webster*, 658 F.3d 742, 750 (7th Cir. 2011)).

<sup>69</sup> *Id.* at 87 (citing *Arnett*, 658 F.3d at 753).

<sup>70</sup> *Id.*

prison officials opt for an easier or less effective treatment without approval from a specialist.<sup>71</sup>

ii. *Serious Medical Need: The Objective Element*

Like the subjective element, the objective element can be divided into two divergent camps.<sup>72</sup> The first camp, consisting of the First, Third, Sixth, Tenth, and Eleventh Circuits, defines a serious medical need as one “(1) that has been diagnosed by a physician as requiring treatment; (2) that is so obvious that a lay person would recognize the necessity for a doctor’s attention; or (3) for which the delay of or inadequacy of treatment would result in a substantial risk of serious harm.”<sup>73</sup> This definition is the more rigid of the two camps. Prisoners have satisfied this test with heart-attack-like chest pain,<sup>74</sup> severe and lasting mental anguish,<sup>75</sup> and severe dental issues,<sup>76</sup> to name a few.

The Second and Ninth Circuits apply a broader test, under which a serious medical need is “a ‘condition’ of urgency, one that may produce death, degeneration, or extreme pain.”<sup>77</sup> Courts consider the following factors when applying this test: “(1) the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; (2) the presence of a medical condition that significantly affects an individual’s daily activities; or (3) the existence of chronic or substantial pain.”<sup>78</sup> This test is broad and “fairly easy to satisfy.”<sup>79</sup>

2. Tracing the Expansion of the Deliberate Indifference Doctrine:  
From *Estelle* to Self-Harm

*Estelle*, the seminal deliberate indifference case, addressed indifference to an inmate’s *physical* harm—specifically, the pain suffered when prison staff allows an inmate’s injury or physical illness to go untreated.<sup>80</sup> Untreated physical

<sup>71</sup> *Id.* (citing *Arnett*, 658 F.3d at 754).

<sup>72</sup> *Id.* at 82.

<sup>73</sup> *Id.*

<sup>74</sup> *Mata v. Saiz*, 427 F.3d 745, 754 (10th Cir. 2005).

<sup>75</sup> *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 180 (D. Mass. 2002).

<sup>76</sup> *Farrow v. West*, 320 F.3d 1235, 1243–44 (11th Cir. 2003).

<sup>77</sup> *Loutfy*, *supra* note 52, at 83 (citing *Rosseter v. Annetts*, No. 9:10-CV-1097, 2012 U.S. Dist. LEXIS 139265, at \*28 (N.D.N.Y. June 29, 2012)).

<sup>78</sup> *Id.* at 83 (citing *Colwell v. Bannister*, 763 F.3d 1060, 1074 (9th Cir. 2014); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

<sup>79</sup> *Loutfy*, *supra* note 52, at 84.

<sup>80</sup> *See Estelle v. Gamble*, 429 U.S. 97 (1976) (involving an inmate who injured his back when a cotton bale fell on him; the prison did not treat his injury despite the inmate’s continued complaints of back pain).

pain is the most obvious and basic basis for a deliberate indifference claim. Over time, the principles from *Estelle* have been applied beyond physical pain. Namely, courts have expanded deliberate indifference principles to apply to mental health.<sup>81</sup> For instance, the State may be held accountable if an inmate dies by suicide and the prison failed to train its staff on how to care for suicidal inmates.<sup>82</sup> The doctrine has also been applied to nonmedical cases; for instance, cases where prison staff fails to protect inmates from hurting one another.<sup>83</sup> One core principle drives each incremental expansions of the doctrine: Because of his being incarcerated, the prisoner cannot protect himself from harm, and thus depends on the State to protect him. If the prison fails to protect him, he will go unprotected.<sup>84</sup>

Given the expansion of the doctrine and its driving principle, some inmates who engage in self-harm may have a deliberate indifference claim against the State. Here is the quintessential example:

Prisoner *A* is a diagnosed schizophrenic. He is arrested, and the prison staff knows he is schizophrenic. Furthermore, the prison staff knows *A* is likely to engage in self-harm as a symptom of his schizophrenia if he is not properly treated. Instead of providing *A* with the proper medication and professional treatment, the prison staff keeps *A* in solitary confinement. While there, *A* harms himself.<sup>85</sup>

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<sup>81</sup> See, e.g., *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986) (applying the analysis from *Estelle* to a detainee suicide case); see also *Taylor v. Wausau Underwriters Ins. Co.*, 423 F. Supp. 2d 882, 887 (E.D. Wis. 2006) (noting this expansion of the doctrine from physical needs to mental health needs).

<sup>82</sup> See *Partridge*, 791 F.2d 1182.

<sup>83</sup> *Taylor*, 423 F. Supp. 2d at 887 (“The principle has also been applied outside the medical context to require prison guards and jailers to take reasonable steps to protect inmates from physical assaults by known violent inmates.” (citing *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)).

<sup>84</sup> *Id.*

<sup>85</sup> This hypothetical example is based on the facts of real prisoners’ experiences that have led to lawsuits. See, e.g., Jeff Coen & Stacy St. Clair, *How Solitary Confinement Drove a Young Illinois Prison Inmate to the Brink of Insanity*, HERALD & REV. (Jan. 7, 2019), [https://herald-review.com/news/state-and-regional/crime-and-courts/how-solitary-confinement-drove-a-young-illinois-prison-inmate-to/article\\_09cca483-419a-57b5-aff1-b1b351d8e195.html](https://herald-review.com/news/state-and-regional/crime-and-courts/how-solitary-confinement-drove-a-young-illinois-prison-inmate-to/article_09cca483-419a-57b5-aff1-b1b351d8e195.html) (describing Anthony Gay’s experience in an Illinois prison, where he was kept in solitary confinement for twenty-two years causing his mental health to decline and causing him to frequently engage in self-mutilation); Sam T. Levin, *US Prisoner Gouged Out Eyes After Jail Denied Mental Health Care, Lawsuit Says*, GUARDIAN (Dec. 8, 2017), <https://www.theguardian.com/us-news/2017/dec/08/prisoner-gouges-out-eyes-colorado-boulder-mental-health-lawsuit> (describing Ryan Partridge’s experience in a Colorado prison, where prison guards tased, beat, and punished him instead of treating his schizophrenia, leading him to self-mutilation). For a case demonstrating the straightforward successful claim, see *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996). In that case, the prisoner was prescribed psychotropic medication at a prior prison. *Id.* He was then transferred to the defendant institution. *Id.* Upon transfer, the prisoner saw a doctor who met with him for less than a minute and decided to discontinue the medication. *Id.* The doctor made the decision without reviewing any of the plaintiff’s records. *Id.* After hearing the decision, the

A trickier case, or at least what this Article argues *should be* a trickier case, is one where the prisoner engages in self-harm for reasons other than mental illness or a loss of his faculties, which is what this Article means by the term “sane.” Recall David Bowers, for instance. Bowers, so it seems, does not engage in self-harm or threaten to commit suicide because he suffers from an untreated mental illness. He does not seem to lack control of his faculties; rather, Bowers uses self-harm to manipulate prison staff and get what he wants, such as a transfer to a different institution.<sup>86</sup>

Finally, how we approach prisoner civil-rights cases, it bears noting, has significant practical importance. It is difficult to find accurate statistics, but this much is clear: prisoner civil-rights claims—and deliberate indifference claims specifically—comprise a large portion the federal docket.<sup>87</sup> Innumerable prisoners are directly impacted on a personal level by how we define and understand deliberate indifference for purposes of the Eighth Amendment because, as plaintiffs bringing these claims, it dictates what they must prove and whether they can succeed. At the same time, because the law imposes such liability, how we define deliberate indifference directly affects prisons and states on an institutional level. Prisons must establish and inculcate procedures for preventing deliberate indifference, which imposes tremendous costs on the State.<sup>88</sup> Also costly to the states are litigation fees—fees spent defending guards and health-care staff in federal court—when prisoners bring such a claim.<sup>89</sup> In other words, how we define deliberate indifference dictates how prisons operate, and thus indirectly impacts the prison population as a whole.

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prisoner’s former institution wrote to the new prison warning the new prison officials that the prisoner was at risk for suicide if he continued to go unmedicated. *Id.* Nevertheless, the prisoner went on without medication and the prisoner suffered insomnia, anxiety, and bodily pains. *Id.* at 1267–68. Had the prisoner committed suicide, the case would make an even more straightforward and apropos example.

<sup>86</sup> See *supra* note 17 and accompanying text.

<sup>87</sup> See FitzGerald, *supra* note 19, at 2169.

<sup>88</sup> To illustrate some of the prisons’ options and why they are costly, consider the following: When the prison has reason to believe an inmate may hurt himself, it typically requires a whole team of guards to suit up in protective gear, enter a cell, remove an inmate, and search him for items he could hurt himself with. *Cf.* ROBERT D. HANSER, INTRODUCTION TO CORRECTIONS 78 (3d ed. 2020). In some instances, when an inmate is on suicide watch, prisons require constant observation by a guard. *Cf.* Williams v. Eckstein, No. 18-C-1426, 2019 WL 4261105 (E.D. Wis. Sept. 9, 2019). And in some instances, prisons must put inmates in restraint chairs to prevent self-harm, which may cause the inmate to sue on the theory that the restraint chair constitutes cruel and unusual punishment. *See, e.g.,* Brown v. Washington Dept. of Corr., No. C13-5367 RBL-JRC 2015 WL 4039322 (W.D. Wash. May 13, 2015).

<sup>89</sup> The cost is especially high when the court recruits counsel for the inmate. *See generally* FitzGerald, *supra* note 19.

### III. DELIBERATE INDIFFERENCE TO MANIPULATIVE SELF-HARM IN THE SEVENTH CIRCUIT

As a preliminary matter, it is important to distinguish two different harms that an inmate like Bowers may face and seek treatment for while incarcerated. First, the physical harm that occurs once self-harm is inflicted, such as the gash in his flesh once he cuts himself or the foreign object in his body once he inserts it. This kind of harm is not contemplated by this Article and is uncontroversial. Prison authorities undeniably have a constitutional obligation to treat these injuries, self-imposed or not.<sup>90</sup> Second, the kind of harm contemplated here is the threat of harm that a prisoner who is predisposed to self-harm faces. Does the prison have an obligation to intervene and prevent such harm once it has notice that the prisoner plans to inflict it? That is the question considered here. In other words, the question is not whether the prison must stitch the self-inflicted gash, but whether it must prevent the prisoner from self-inflicting the gash in the first place; or perhaps more to the point, whether the State is liable when prison staff fails to prevent the self-inflicted harm.<sup>91</sup>

The question remains unanswered by the Supreme Court. To narrow the focus here, this Article considers only how the Seventh Circuit has approached state liability in cases where the State has failed to prevent a sane prisoner from self-harm, using the Seventh Circuit as a case study. To that end, this Part begins by discussing *Freeman v. Berge*,<sup>92</sup> where the Seventh Circuit ruled that prisons must intervene on non-mentally ill hunger strikers. Dicta in *Freeman*, which will be discussed below, suggested that prisons have a duty to intervene on sane, manipulative self-harm. This Part then traces how the *Freeman* Court's dicta later became law in *Miranda v. City of Lake*,<sup>93</sup> where the Seventh Circuit seemingly held that prisons will be liable if they fail to prevent competent inmates from harming themselves. Last, this Part calls into question the legal underpinnings and the policy implications of *Freeman* and *Miranda*.

According to the Code of Federal Regulations, U.S. prison officials may force feed a hunger-striking inmate once a physician determines that the inmate's life or health is at risk.<sup>94</sup> In *Freeman v. Berge*, Judge Posner of the Seventh

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<sup>90</sup> See U.S. CONST. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (holding that deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment).

<sup>91</sup> It also bears noting at the outset that the alternative to imposing liability on guards, medical staff, and the State, is not to allow guards to do nothing in the face of prisoners engaging in MSH. State prisons can impose a duty on staff to prevent such conduct. That way, those responsible and able to prevent the harm will be compelled to act, however the inmate or his estate will not have a claim for money damages. See *Taylor v. Wausau Underwriters Ins. Co.*, 423 F. Supp. 2d 882, 889–90 (E.D. Wis. 2006).

<sup>92</sup> 441 F.3d 543 (7th Cir. 2006).

<sup>93</sup> 900 F.3d 335, 349 (7th Cir. 2018).

<sup>94</sup> See Sara Cloon, *Competent Hunger Strikers: Applying the Lessons from Northern Ireland to the Force-Feeding in Guantanamo*, 31 NOTRE DAME J.L., ETHICS & PUB. POL'Y 383, 389–90

Circuit pointed out that force feeding arises in two distinguishable circumstances. In the first circumstance, a mentally ill prisoner is force fed when his mental illness causes him to refuse food.<sup>95</sup> In this circumstance, the prison is constitutionally required to treat the inmate's mental illness by force feeding if necessary.<sup>96</sup> After all, we assume (or at least hope) that an unincarcerated citizen suffering from the same mental illness would find similar treatment. Because of the inmate's incarceration, he cannot seek treatment himself, and the prison staff must step in and provide it.

The second circumstance in which force feeding arises is when a prisoner chooses to refuse food in order to produce a certain outcome or simply make a political statement.<sup>97</sup> And there are logical reasons he might do so; hunger striking is a traditional method prisoners use to protest the conditions of their incarceration.<sup>98</sup> This is the circumstance the Seventh Circuit faced in *Freeman* when considering whether prisons are constitutionally required to intervene on a non-mentally ill hunger strike. In *Freeman*, petitioner Barrell Freeman's maximum security prison required prisoners to eat alone in their cells.<sup>99</sup> Inmates had to stand in the middle of their cells with pants on to receive each meal.<sup>100</sup> A prisoner who failed to follow the rules would be refused food.<sup>101</sup> Freeman did not want to wear pants, so on multiple days during a two-and-a-half year span he refused to wear pants and, per the institution's rule, was not served meals.<sup>102</sup> As

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(2017) ("The physician must first determine that the inmate's life or health is at risk. [The Code of Federal Regulations] then encourages the staff to convince the inmate to 'voluntarily accept treatment,' but after such 'reasonable efforts' the medical staff is justified in force-feeding." (internal citations omitted)).

<sup>95</sup> See *Freeman*, 441 F.3d at 546.

<sup>96</sup> See *id.* (first citing *Sanville v. McCaughtry*, 266 F.3d 724, 733–34 (7th Cir. 2001); and then citing *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001)). The hypothetical inmate described here is analogous to Prisoner A described above. See *supra* note 85 and accompanying text.

<sup>97</sup> *Freeman*, 441 F.3d at 546.

<sup>98</sup> See Rusty Reeves, Anthony C. Tamburello, Jennifer Platt, Drew Tepper & Kerri Edelman, *Characteristics of Inmates Who Initiate Hunger Strikes*, 45 J. AM. ACAD. PSYCHIATRY & L. 302, 302 (2017) ("A hunger strike is a common . . . event within a correctional institution."). Prisoners have very little leverage—hunger strikes, work strikes, and self-mutilation being the primary options—to produce a desired outcome. Sometimes these methods are successful. See Christie Thompson, *Do Prison Strikes Work?*, MARSHALL PROJECT (Sept. 21, 2016, 2:31 PM), <https://www.themarshallproject.org/2016/09/21/do-prison-strikes-work>; see also *Bowers v. Pollard*, 602 F. Supp. 2d 977, 980 (2009) ("Bowers . . . engaged in [self-harm] at [his previous institution] in order to get to [a new institution] (which he did) . . .").

<sup>99</sup> *Freeman*, 441 F.3d at 544.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

a result, Freeman lost significant weight<sup>103</sup> and experienced blurred vision.<sup>104</sup> Freeman sued the State, arguing that refusing to provide him food for failing to follow feeding protocol constituted cruel and unusual punishment.<sup>105</sup>

Judge Posner wrote for the three-judge panel, stating in dicta that “a prison [cannot] allow a prisoner to starve himself to death, or even starve himself to the point at which he seriously impairs his health.”<sup>106</sup> Although non-mentally ill people have a liberty interest in refusing life-saving treatment, Judge Posner reasoned, prisoners either “don’t have such an interest, or it is easily overridden.”<sup>107</sup> The reasons, according to Judge Posner, are practical ones.<sup>108</sup> Allowing prisoners to commit suicide would mean allowing them to “cheat[] the gallows.”<sup>109</sup> It would impede the prison’s ability to maintain discipline because inmate suicide agitates the surviving prison population.<sup>110</sup> Finally, allowing starvation could expose prisons to lawsuits and liability.<sup>111</sup>

The Seventh Circuit ultimately ruled against Freeman for three reasons.<sup>112</sup> First, prison policy required that any prisoner who skipped all meals for three days in a row be inspected by health personnel.<sup>113</sup> Second, Freeman’s food deprivation was self-inflicted.<sup>114</sup> Third, Freeman did not experience any “real suffering, extreme discomfort, or any lasting detrimental health consequences.”<sup>115</sup>

The “sane” prisoner in Judge Posner’s hypothetical, who refuses food to produce a desired outcome, is like Bowers. He is engaging in a type of self-harm not attributable to mental illness but instead attributable to manipulative intent—MSH. *Freeman*’s dicta suggests that deliberate indifference principles have “evolved into the rule that guards must now protect an inmate from the inmate’s

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<sup>103</sup> *Id.* Freeman lost 45 pounds during his hunger strike. *Id.*

<sup>104</sup> *Id.* at 547.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 546.

<sup>107</sup> *Id.* (first citing *In re Grand Jury Subpoena John Doe*, 150 F.3d 170, 172 (2d Cir. 1998) (per curiam); then citing *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992); then citing *Laurie v. Senecal*, 666 A.2d 806, 809 (R.I. 1995); then citing *In re Caulk*, 480 A.2d 93, 96–97 (N.H. 1984); then citing *State ex rel. White v. Narick*, 292 S.E.2d 54, 58 (W. Va. 1982); then citing *McNabb v. Dep’t of Corr.*, 112 P.3d 592, 594–95 (Wash. Ct. App. 2005); and then citing *People ex rel. Dep’t of Corr. v. Fort*, 815 N.E.2d 1246, 1250–51 (Ill. App. Ct. 2004)).

<sup>108</sup> *Id.* at 547.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*



own efforts to injure himself, even in the absence of evidence of a severe mental illness that has robbed the inmate of his faculties.”<sup>116</sup> Indeed, if a non-mentally ill prisoner must be force fed in order to curtail the harm of a hunger strike, how can a court justify nonintervention to other forms of MSH (e.g., Bowers) where prisoners self-mutilate and threaten suicide as a manipulation tactic? The approach to hunger strikes described in *Freeman* buttresses an argument that prisons that fail to stop self-harm (regardless of its cause) must be held accountable for deliberate indifference.

But Posner leaves a major issue in *Freeman* unaddressed. When prison officials are deliberately indifferent to a physical illness, mental illness, or threat from a fellow inmate, “the rationale underlying such claims would seem to require a threat to the inmate’s safety from which, as a result of his incarceration, he is unable to protect himself.”<sup>117</sup> A claimant like Bowers, or a sane hunger striker, whose self-harm is not attributable to “mental illness or some other condition that deprived [him] of his rational faculties,”<sup>118</sup> marks a departure from the doctrine’s underlying rationale. A prisoner engaging in self-harm for a calculated purpose makes a deliberate decision—he is *able* to protect himself; he merely *chooses* not to.

Twelve years after *Freeman*, in *Miranda v. City of Lake*,<sup>119</sup> the Seventh Circuit made explicit what Posner had suggested in *Freeman*. Lake County Jail inmate Lyvita Gomes was placed on suicide watch and hunger strike protocol because she was refusing food, water, and all medical treatment.<sup>120</sup> In the course of ten days, Gomes’s weight dropped from 146 pounds to 128 pounds,<sup>121</sup> which prompted a psychiatric examination by Dr. Hargurmukh Singh.<sup>122</sup> Dr. Singh diagnosed Gomes with “psychotic disorder not otherwise specified,” but prescribed no medication.<sup>123</sup> Dr. Singh concluded that Gomes’s mental health condition “rendered her unable to understand the risks of not eating and unable to participate in her treatment plan.”<sup>124</sup> Gomes’s condition only worsened.<sup>125</sup> Ultimately, Lake County Jail medical staff sent Gomes to a hospital 15 days after she arrived at the jail, and she died 5 days after that.<sup>126</sup>

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<sup>116</sup> Goodvine v. VandeWalle, No. 16-C-890, 2018 WL 460121, at \*8 (E.D. Wis. Jan. 17, 2018).

<sup>117</sup> Taylor v. Wausau Underwriters Ins. Co., 423 F. Supp. 2d 882, 887 (E.D. Wis. 2006).

<sup>118</sup> *Id.*

<sup>119</sup> 900 F.3d 335 (7th Cir. 2018).

<sup>120</sup> *Id.* at 342.

<sup>121</sup> *Id.* at 341.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 342.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

Gomes's Estate filed several claims, naming several defendants, including Lake County Jail medical staff members.<sup>127</sup> Only the claims against the medical staff members went to trial.<sup>128</sup> At trial, Gomes's family members testified that Gomes was a devout Catholic with no history of mental illness and that she would not have committed suicide.<sup>129</sup> Based in large part on that testimony, the district court decided to "bar all reference to the theory that the medical defendants violated the Due Process Clause by failing to protect Gomes from harming herself."<sup>130</sup> Gomes's Estate challenged the decision on appeal, among other things.

In its brief on appeal, the defendants urged the Seventh Circuit to affirm the district court's decision to reject the failure-to-protect theory, arguing in part that prison medical staff cannot be liable for failing to prevent a competent inmate from committing self-harm.<sup>131</sup> The Seventh Circuit rejected the argument, holding that the district court would have to allow the plaintiff to pursue a failure-to-protect theory at the retrial.<sup>132</sup> The Seventh Circuit reasoned as follows: While competent persons have a due-process right to refuse lifesaving hydration and nutrition, the right does not extend to incarcerated persons.<sup>133</sup> Citing *Freeman*, the Seventh Circuit implicitly held that all inmates are incompetent, and that, jails therefore have a duty to prevent all prisoners from giving way to the unusual psychological strain caused by incarceration.<sup>134</sup>

The *Miranda* Court did not squarely address the departure from the underlying deliberate indifference policy—i.e., that a sane prisoner engaging in self-harm is *able* to protect himself and merely *chooses* not to. But the *Miranda* Court addressed this departure by making the sweeping declaration that *all* inmates are incompetent. To use the parlance of this Article, the *Miranda* Court declared, in essence, that there is no such thing as a sane prisoner.

But it cannot be true that there is no such thing as a sane prisoner. Yes, incarceration doubtless imposes mental strain on inmates, but that strain leads to behavior of many stripes—violence against guards or other inmates, stealing, smuggling prohibited items and substances into prison, etc.—and inmates are held responsible for such behavior. As they should be. After all, while many inmates have been diagnosed with a mental illness of one kind or another, prisoners are ultimately serving sentences for crimes because they have been

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 349.

<sup>130</sup> *Id.* at 348–49.

<sup>131</sup> Brief of Defendants–Appellees at 17, *Miranda v. City of Lake*, 900 F.3d 335 (7th Cir. 2018) (No. 17-1603), 2017 WL 4572369, at \*17.

<sup>132</sup> *Miranda*, 900 F.3d at 349.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing *Freeman v. Berge*, 441 F.3d 543, 546 (7th Cir. 2006)).

found criminally responsible for their behavior. Any prisoner who develops a severe mental illness after commencing a sentence should be transferred to such a mental health facility.

On a similar note, one could make the converse argument, that “no suicide is truly intentional[] because it is not an exercise of free will.”<sup>135</sup> Put differently, instead of taking the approach of the *Miranda* Court and arguing that there is no sane prisoner, one could argue that there is no sane suicide. While that proposition may or may not be empirically true, just as it may or may not be empirically true that all prisoners are incompetent due to mental strain, U.S. law currently disavows this understanding of human behavior.<sup>136</sup> “The law assumes that, absent serious mental illness or other form of incapacity, a person has free will and is therefore responsible for his own intentional acts.”<sup>137</sup> This understanding of human behavior is deeply rooted in U.S. law.<sup>138</sup>

A prisoner who is not suffering from a mental illness or any other condition robbing him of his faculties faces no threat of self-harm from which he cannot protect himself. Moreover, he faces no threat of self-harm from which he would protect himself but for his incarceration and from which he relies on prison officials, as a nature of his incarceration, to provide protection. In other words, MSH does not logically fit within the deliberate indifference doctrine. The core principle driving the doctrine does not apply. To sweepingly decide instead that all prisoners, or all suicides, must as a matter of law be the result of incompetence would be to depart from that core principle.

Including MSH in the doctrine is not just illogical, it is also unwise. Policy considerations urge against allowing the manipulative self-harming prisoner to recover under § 1983. It would allow prisoners to engineer a constitutional claim, creating perverse incentives for prisoners to self-harm or threaten suicide.<sup>139</sup> If the idea of the deliberate indifference doctrine—or the

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<sup>135</sup> *Joseph v. State*, 26 P.3d 459, 471 (Alaska 2001); see also LINDSAY M. HAYES, NATIONAL INSTITUTE OF CORRECTIONS, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 6 (1995) (“[A]ny inmate who would go to the extreme of threatening suicide or engaging in self-injurious behavior is suffering from at least an emotional imbalance that requires special attention.”); Allen C. Schlinsog, Jr., *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased*, 24 J. MARSHALL L. REV. 463, 477–79 (1991).

<sup>136</sup> *Taylor v. Wausau Underwriters Ins. Co.*, 423 F. Supp. 2d 882, 888 (E.D. Wis. 2006).

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) (noting that the U.S. legal system assumes the “belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil”); see also *Taylor*, 423 F. Supp. 2d at 888 n.5 (explaining contradiction between the theory that no self-harm or suicide can be the product of free will and the position advanced by anyone who advocates for legal physician assisted suicide).

<sup>139</sup> *Taylor*, 423 F. Supp. 2d at 890 (“To hold [that a manipulative self-harming prisoner can recover under the Eighth Amendment] would . . . seem to be permitting a prisoner ‘to engineer an

Eighth Amendment generally—is to keep prisoners safe and healthy, then MSH necessarily ought not be legally incentivized.

Two perverse incentives are created by allowing inmates engaging in MSH to recover: negotiating power and money. If a prisoner can succeed on a claim of self-harm without showing that he was robbed of his faculties and could not prevent the harm himself, then prisoners are left with a macabre cost-benefit analysis: Is the self-imposed pain worth a possible increase in negotiating power? Better yet (for the prisoner) is threatening suicide—which involves no physical pain—worth a possible increase in negotiating power? If it is, and there are many reasons why it might be,<sup>140</sup> then the prisoner will go forth with the threat of actual self-harm—there is a chance prison staff will intervene and acquiesce to the prisoner’s demand in order to avoid a constitutional claim.

Another perverse incentive is the potential financial award. Money has great value in prison, as in all parts of society, and prisoners lack many ways to acquire it.<sup>141</sup> A prisoner who wants money, whether to use in prison or send to someone outside of the prison, and who is not satisfied with the paltry wages available within the institution, may have no option but to lodge a prisoner-civil rights lawsuit. Unless that prisoner’s constitutional rights are already being violated, he would have to find a way to “engineer” a claim. As courts have recognized, it is bad policy to allow a prisoner the ability to engineer a

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Eight Amendment violation . . . .”) (quoting *Rodriguez v. Briley*, 403 F.3d 952, 953 (7th Cir. 2005)).

<sup>140</sup> Consider, for example, a prisoner with a high tolerance for pain who wants to be transferred to a different institution to be closer to his family and friends. A brief period of physical pain would—if his negotiation is successful—allow him to get something he couldn’t otherwise get by a standard request. If he knows it might work and is willing to withstand the pain, why not give it a try?

<sup>141</sup> Telephone Interview with Robert Holleman, Wabash Valley Correctional Facility inmate, (Oct. 12, 2018) (describing his multiple successful § 1983 claims against Wabash Valley Correctional Facility, and explaining that the money, dollar-for-dollar, has more value in prison than out of prison, and explaining that he has no shortage of things he can use his money for, including sharing it with unincarcerated loved ones). To read about Holleman’s successes against correction facilities, see, for example, Rebecca R. Bibbs, *More than 30 Pendleton Inmates, Families Sue Corizon Health over Death, Injuries*, IND. ECON. DIG. (Oct. 11, 2015), <https://indianaeconomicdigest.com/main.asp?SectionID=31&SubSectionID=64&ArticleID=81482>; Stuart Hirsch, *DOC Inmate Wins Settlement; Federal Judge Rebukes Officials*, HERALD BULL. (Oct. 16, 2017), [https://www.heraldbulletin.com/news/local\\_news/doc-inmate-wins-settlement-federal-judge-rebukes-officials/article\\_20caa376-b2d7-11e7-a92a-c32da61758b2.html](https://www.heraldbulletin.com/news/local_news/doc-inmate-wins-settlement-federal-judge-rebukes-officials/article_20caa376-b2d7-11e7-a92a-c32da61758b2.html); Marilyn Odendahl, *Same Court, New Experience*, IND. LAW. (Aug. 28, 2012), <https://www.theindianalawyer.com/articles/29541-same-court-new-experience>; *Ruling for Doctor Reversed in Inmate’s Gluten-Free Diet Suit*, IND. LAW. (May 17, 2017), <https://www.theindianalawyer.com/articles/43742-ruling-for-doctor-reversed-in-inmates-gluten-free-diet-suit>. According to Holleman, money has higher value because inmates can only work a limited number of jobs, paying two dollars per day at most. Aside from that, gifts and lawsuits are the only two ways to make money. *Id.*

constitutional claim against his jailor.<sup>142</sup> (If he can, then that fact marks a loophole in the law well worth fixing.)

This Section has demonstrated two things. First, precedent suggests that a court confronted with the issue and the appropriate facts may rule in favor of an inmate in an MSH case. Second, such a holding would be problematic because it would mark an unjustifiable diversion from the core principle underlying the deliberate indifference doctrine: that “the prisoner, by virtue of his incarceration, is deprived of his normal opportunities for protecting himself.”<sup>143</sup> The holding would also create perverse incentives: it would give prisoners the ability to engineer Eighth Amendment claims by self-harming or threatening to self-harm, which would give manipulative, self-harming prisoners negotiating power. Prisoners could force prison officials to decide between acquiescing to inmate demands or facing § 1983 litigation. It could also cause prisoners to self-harm for a chance at a big financial award.<sup>144</sup>

#### IV. HOW TO FIX OR AVOID THE DELIBERATE INDIFFERENCE LOOPHOLE

This Part proposes a solution on how to fix or avoid the deliberate indifference loophole in three Sections. Section IV.A distinguishes MSH from the sane hunger striker described in *Freeman* and *Miranda* to show that the precedential weight of the two cases should be limited to cases of hunger striking.<sup>145</sup> Section IV.B considers how to properly analyze MSH under the two-

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<sup>142</sup> See, e.g., *Rodriguez*, 403 F.3d at 953; *Taylor*, 423 F. Supp. 2d at 889 (citing *Rodriguez*, 403 F.3d at 953). The *Rodriguez* court explained:

Rodriguez punished himself . . . Suppose he'd announced that he would skip dinner every day unless he were served champagne and caviar at least once a month. He, not the prison, would be the author of his being denied dinner. A prisoner cannot force the prison to change its rules by going on a hunger strike and blaming the prison for his resulting loss of weight. He cannot, in short, be permitted to engineer an Eight Amendment Violation. The analogy is to civil contempt. A person who is imprisoned for refusing to sign a deed that he is legally obligated to sign, but who can get out of prison just by signing it, cannot complain that he is being punished.

*Rodriguez*, 403 F.3d at 953 (internal citations omitted). For an example of a prisoner who, arguably, used self-harm to engineer a constitutional claim against his jailor, see *Bowers v. Pollard*, 602 F. Supp. 2d 977 (E.D. Wis. 2009).

<sup>143</sup> *Taylor*, 423 F. Supp. 2d at 887.

<sup>144</sup> See, for example, Hirsch, *supra* note 141 for an indication of the damages at stake in prisoner civil rights cases.

<sup>145</sup> Of course, by its facts, *Miranda* is not a case of a sane hunger striker. Gomes was engaging in self-harm because of a diagnosed mental illness. Nevertheless, for the purposes of this Article, *Miranda* is treated as a sane-hunger-striking case because of the defendant's argument. The defendant argued that the evidence showed that Gomes was not mentally ill. The Court rejected the argument, not just by deciding that the record included significant evidence to the contrary, but also by deciding that the defendant's argument would fail *even if* Gomes were not mentally ill. See *Miranda v. City of Lake*, 900 F.3d 335 (7th Cir. 2018).

prong deliberate indifference analysis and concludes that such plaintiffs should typically fail under one or both prongs. Section IV.C explains how Congress, or the Supreme Court, could clarify the law in a way that eliminates the MSH issue altogether.

*A. Considering the Precedent: Distinguishing Starvation and Self-Mutilation*

Under *Miranda*, the state is obligated to prevent harm even when the prisoner could protect himself from it—a departure from the core deliberate indifference principle that a prisoner must not be able to defend himself against the harm posed in order to rise to the level of a constitutional violation. MSH is, however, sufficiently distinguishable from sane hunger striking that courts should not rely on *Miranda* to further extend the departure from this core principle. In other words, there is a difference between MSH and hunger striking, and, by sweepingly declaring that the state is liable in all cases of MSH regardless of mental health, the Seventh Circuit acted imprudently.

The hunger striking in *Freeman* and *Miranda*, which is sane self-harm via starvation, is distinguishable from the sorts of self-harm contemplated here, most commonly self-mutilation or similar self-harm. Starvation is a unique kind of self-harm. It's gradual, noticeable, and easily interrupted.<sup>146</sup> Once a prisoner stops eating, the state can easily notice it, monitor the inmate's health, and when it becomes apparent that the prisoner is in a serious risk of medical harm, the prison can rest assured that its intervention techniques will likely (although not always)<sup>147</sup> be effective and constitutional.<sup>148</sup> In contrast, self-mutilation or suicide (threatened or real) is typically acute and difficult to prevent without either accepting an inmate's demands, placing the inmate in a solitary cell,<sup>149</sup> or restraining the inmate to make him immobile and unable to harm himself.<sup>150</sup> Unlike starvation, the state cannot confidently know what will prevent MSH—

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<sup>146</sup> It takes a person 21 to 70 days to die of starvation, and there are many developed ways to force feed prisoners who refuse food. See Catie Edmondson, *Prison Inmates on Hunger Strike Being Force-Fed*, MILWAUKEE J. SENTINEL (June 24, 2016), <https://www.jsonline.com/story/news/politics/2016/06/24/prison-inmates-on-hunger-strike-being-forcefed/86372116/> (describing some methods of force feeding); Thomas C. Weiss, *What Happens When We Starve? Phases of Starvation*, DISABLED WORLD (Oct. 29, 2018), <https://www.disabled-world.com/fitness/starving.php> (regarding how long a person can survive without food).

<sup>147</sup> See, e.g., *Miranda*, 900 F.3d at 349.

<sup>148</sup> See Cloon, *supra* note 94.

<sup>149</sup> Sometimes this technique works and prevents self-harm. SUICIDE PREVENTION RES. CTR., *WHAT CORRECTIONS PROFESSIONALS CAN DO TO PREVENT SUICIDE* (2007). Sometimes, however, it exacerbates the problem. *Id.* It is impossible to know which will be the case, making this method less than ideal. *Id.*

<sup>150</sup> This technique can lead to its own § 1983 claims, making this course of action also less than ideal. See *Johnson v. McVea*, No. 15-1586, 2016 WL 1223067 (E.D. La. Mar. 7, 2016).

in fact, the state cannot even know whether the inmate will engage in MSH until the inmate actually does. And to add to the complexity, any reaction by the state could induce further MSH.<sup>151</sup> So, while the sane hunger striker is conceptually similar to the sane manipulative self-harmer, the state's menu of reactive options is quite different, and the state's calculus when deciding whether to intervene and how is exceptionally more complex.

Not only is the harm notably different, the reasons for overriding the prisoner's right to starve himself do not equally apply to MSH. Whereas Posner is right that a prisoner allowed to starve himself to death is able to cheat the gallows—at least insofar as opting for death over prison ends incarceration—the same logic does not justify holding the state liable for failing to prevent MSH. Only death, not injury, ends one's punishment. It is true that the state's nonaction may, in some instances, lead to an inmate committing suicide if the state miscalculates about the necessary response to the threatened harm.<sup>152</sup> Unlike a starving inmate, though, the prison officials need to make challenging decisions about whether an inmate is in fact likely to engage in MSH; how serious the potential MSH might be; how soon it will be inflicted, if at all; and whether responding to the threat of self-harm will benefit the prisoner's well-being, or induce more frequent and severe harm in the future. Allowing prison officials and medical professionals some latitude in making these calculations, rather than forcing them to err on the side of acquiescence to inmate demands (even if it is a course of action that will produce further and more widespread self-harm in the future), does not mean prisoners are permitted to cheat the gallows. Quite the opposite, a system that promotes self-harm as an effective negotiating strategy allows prisoners to game the penal system by giving inmates control over the conditions of their punishment.

The second reason Posner gave for overriding prisoners' right to suicide, that permitting suicide impedes the prison's ability to maintain discipline, is turned on its head in the MSH context. Sure, allowing prisoners to starve themselves to death will agitate the inmate population and complicate the operation of the institution. But allowing prisoners to use MSH as a negotiation tactic impedes the prison's ability to maintain discipline in an even more direct and significant way. If prisoner *A* cuts himself one day and threatens to do it again the next unless he is transferred to a different institution, and to prevent further harm the state transfers *A*, it stands to reason that every prisoner who wants a transfer enough to withstand the pain is going to cut himself. And then what? Should they all be transferred? What if the demands are more outlandish: choosing cellmates, getting a cellphone, picking the lunch menu? As described

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<sup>151</sup> See, e.g., *Goodvine v. VandeWalle*, No. 16-C-890, 2018 WL 460121, at \*9 (E.D. Wis. Jan. 17, 2018).

<sup>152</sup> Of course, the State would work to prevent prisoner suicide. The argument here is not, "Let the inmates commit suicide, just don't give them what they demand." The argument is, "Sometimes no action might be the appropriate reaction to self-harm or threatened self-harm."

above, the prison can take courses of action other than acquiescence,<sup>153</sup> but none are ideal, and nonaction may justifiably be the safest and most optimal route. Eliminating nonaction from the state's menu of reactive options is what will most impede the prison's ability to maintain discipline.

The third and final reason Posner gave is that allowing inmate suicide would expose prisons to lawsuits brought by decedent prisoners' estates.<sup>154</sup> Posner is right, but the reasoning is unconvincing because it is irrelevant, a red herring. Whether or not recognizing a right will produce litigation does not address the real issue: the existence of the right in the first place. Overriding a right because its existence would expose violators of that right to lawsuits follows the same logic as decriminalizing murder because it exposes murderers to criminal punishment—of course it would, all crimes expose offenders to criminal punishment, that is the point. All rights expose others to potential lawsuits because a legal right is a prerequisite for a case.<sup>155</sup> What is more: If a right can be justifiably overridden because it will produce lawsuits, what does that mean for rights writ large?

The two propositions—that sane hunger strike and MSH are distinct types of self-harm, and that the reasons to override a prisoner's right to engage in the former do not apply to the latter—taken together, show that the dicta in *Freeman* should have little if any bearing on the issue of MSH. Therefore, even if sane hunger strikes constitute a permissible departure from the core deliberate indifference principle (that the prisoner faces a harm from which he cannot protect himself), MSH does not.

### B. Applying the Deliberate Indifference Test to MSH

It may seem intuitively wrong that an inmate engaging in MSH could recover under § 1983. It should because, as mentioned above, it marks a departure from the underlying principle of deliberate indifference. Such a claimant is not facing a threat to his safety from which, because of his incarceration, he cannot protect himself.<sup>156</sup> But that principle—even though it drives the doctrine—is not itself a part of the test for deliberate indifference.<sup>157</sup> The only two factors are (1) that the prison was deliberately indifferent to (2) a serious medical need.<sup>158</sup>

Even though it is not part of the doctrine, the driving principle matters. The underlying principle drives what the test seeks to determine. If a plaintiff

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<sup>153</sup> Most notably, the prison can put the inmate in solitary confinement or restrain the inmate—but both courses of action are not ideal.

<sup>154</sup> *Freeman v. Berge*, 441 F.3d 543, 546–47 (7th Cir. 2006).

<sup>155</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>156</sup> *Taylor v. Wausau Underwriters Ins. Co.*, 423 F. Supp. 2d 882, 887 (E.D. Wis. 2006).

<sup>157</sup> Loutfy, *supra* note 52, at 80.

<sup>158</sup> See *supra* note 49 and accompanying text.



satisfies both prongs of the deliberate indifference test, but he is not facing a threat to his safety from which he cannot, due to his incarceration, protect himself, then the test is either insufficient or it is being incorrectly applied. This Article argues that allowing MSH petitioners to prevail constitutes the latter, an incorrect application of the test.<sup>159</sup>

### 1. Applying the Deliberate Indifference (Subjective) Element

Both definitions of deliberate indifference described above—the grossly-inadequate-care definition and the medically-unacceptable-care definition—support the conclusion that at least some instances of MSH do not satisfy the subjective element. The two definitions are discussed in turn.

Prison staff members are not deliberately indifferent under the grossly-inadequate-care standard when the need for care is nonobvious or when the care provided is not grossly inadequate.<sup>160</sup> In a case of MSH, whenever the likelihood of self-infliction is uncertain, for instance, if prison staff confront a prisoner who frequently threatens but never inflicts self-harm, the need for care is nonobvious. In such circumstances it is unknown whether the prisoner needs care. What is more, whenever a medical professional concludes that no intervention is the best reaction to a prisoner's MSH, and advises prison staff accordingly, it reasonably follows that nonaction is not grossly inadequate.<sup>161</sup> If nonaction is what the medical professional advises as the best course of action, it is not only adequate, it is optimal. In comparison, intervention, especially acquiescence to the prisoner's demands, may be grossly inadequate because it may ultimately encourage self-harm if he or his fellow inmates come to see MSH as an effective negotiation tactic.

In other jurisdictions, prison staff is deliberately indifferent under the medically-unacceptable-care standard when care “raise[s] the inference that it was not actually based on medical judgment” such that “no minimally competent professional would have so responded under [the same] circumstances.”<sup>162</sup> Under this definition, a prison must be able to show that a health professional evaluated the inmate and concluded that no intervention was appropriate, and furthermore, that the conclusion was medically reasonable. Similar to the grossly-inadequate-care standard, the MSH prisoner should not be able to satisfy the deliberate indifference prong as long as the course of action taken is defensible as a matter

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<sup>159</sup> As a procedural matter, if an inmate's sanity were at issue in a case, the court would hold an evidentiary hearing. Both plaintiff and defense would likely call expert witnesses—doctors specializing in psychiatry, psychology, or the like—to testify to competing theories on the inmate's sanity, and ultimately the factfinder would make the decision.

<sup>160</sup> Loutfy, *supra* note 52, at 85.

<sup>161</sup> This proposition only holds true, of course, if the medical professional's advice is not, itself, grossly inadequate.

<sup>162</sup> Loutfy, *supra* note 52, at 86.

of medical judgment.<sup>163</sup> Under both tests, it is crucial that the prison staff seek professional medical advice when deciding how to react to the threat of harm. When it is not borne out of professional medical judgment, opting for nonaction will be tough, if not impossible, to defend. But when nonaction is the product of medical judgment, it should rarely, if ever, give rise to a successful prisoner civil rights claim.

## 2. Applying the Serious Injury (Objective) Element

The objective element is easier for a prisoner to satisfy than the subjective element, but some instances of MSH will not satisfy this element. Under the more rigid definition of serious injury, the mandated treatment and obviousness definition,<sup>164</sup> serious harm is (1) a diagnosis requiring treatment, (2) so obvious that a lay person would recognize the need for medical attention, or (3) a harm so serious that delayed or inadequate treatment would put the prisoner in a substantial risk of harm.<sup>165</sup> The three parts of the definition are discussed in turn.

As for the first part, a diagnosis requiring treatment, MSH will not always satisfy the standard because in some cases the risk of self-harm will not be diagnosed by a physician as a “condition” requiring treatment. After all, when there is no indication that the risk of injury is symptomatic of an untreated mental illness, what would the “condition” be? And what would the treatment be? In such instances, the physician would likely find no “condition” to diagnose, and, even if she did consider the propensity for self-harm a “condition,” she may determine that nonaction is the best reaction to avoid incentivizing future self-harm, as opposed to any formal “treatment.”

As for the second part of the definition, that the injury is so obvious a lay person would recognize the need for medical attention, the proverbial “lay person” in this situation may not consider it obvious that the “condition” requires a doctor’s attention. If the lay person shares the same understanding of human behavior as our legal system—“that, absent serious mental illness or other form of incapacity, a person has free will and is therefore responsible for his own

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<sup>163</sup> See *Davis v. Harding*, No. 12-CV-559-wmc, 2014 WL 5454216, at \*2 (W.D. Wis. Oct. 24, 2014) (“[Davis’s doctor] knew Davis used threats of self-harm to manipulate staff and that he had not acted on a threat of self-harm in over three years. Under these circumstances, [the doctor] exercised professional judgment in deciding how to prioritize Davis’s demands on her time . . . . Davis has offered *no* evidence that [the doctor’s] decision to make another patient’s needs a priority was an act of deliberate indifference, rather than one of many ordinary acts of discretion doctors are called on to exercise multiple times a day”).

<sup>164</sup> Loutfy, *supra* note 52, at 82.

<sup>165</sup> See *supra* note 73 and accompanying text.

intentional acts”<sup>166</sup>—then he may reason that a doctor’s attention is unnecessary to prevent an act of free will.

Finally, regarding the third part of the definition, the delay or inadequacy of treatment does not result in a substantial risk of serious harm when treatment is deemed an ineffective course of action. If nonaction is the best reaction, there is no *treatment* to delay.<sup>167</sup>

Even under the broader definition, some instances of MSH may not satisfy the serious-injury element. The broad definition “relax[es] the serious injury element making it fairly easy to satisfy the first prong of the deliberate indifference test.”<sup>168</sup> The argument against liability is weaker under this definition, but it is still worth making. It will be the rare case that the potential for self-inflicted harm is not “worthy of comment.” In the event that a prisoner regularly threatens self-harm, however, and never follows through, allowing the prison system to confidently “call the inmate’s bluff,” the threat of harm may indeed not be worthy of comment. Indeed, such confidence by the prison staff may be rare. That being said, because this broad definition of the objective element dilutes the objective element to the point that it almost serves no purpose, a court would be justified in setting a higher bar for the subjective element when applying the not-worthy-of-comment test for the objective element.

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Looming in the background of this discussion is the fact that a prisoner has almost no ability to control his situation and every incentive to sue his jailor. Doubtless, Congress could dwarf the prevalence of MSH in prisons by engendering better avenues for inmates to bargain with their jailors and effect change. For this reason—and innumerable other reasons beyond the purview of this Article<sup>169</sup>—Congress should re-implement a sentencing scheme whereunder prisoners may be eligible for early release on parole for good behavior.

This is not an Article about sentencing, so a deep dive into American criminal sentencing is inapt, but a few words are in order. The federal criminal system once abided by a flexible sentencing scheme: “Indeterminate sentences were imposed, which meant that the judge” exercised discretion—at the outset when imposing the sentence—in deciding when during the course of an offender’s sentence he would become eligible for parole.<sup>170</sup> Once an inmate

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<sup>166</sup> Taylor v. Wausau Underwriters Ins. Co., 423 F. Supp. 2d 882, 888 (E.D. Wis. 2006).

<sup>167</sup> In the event that a plaintiff calls into question the medical staff’s determination that nonaction is the best reaction—presumably with expert testimony—a question of fact would arise for the jury to determine.

<sup>168</sup> Loutfy, *supra* note 52, at 84.

<sup>169</sup> See, e.g., Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL’Y 1 (2013).

<sup>170</sup> Gerald Bard Tjoflat, *The Evolution of the Federal Criminal Sentencing System*, 13 AM. U. INT’L L. REV. 1077, 1078 (1998).

became eligible for parole, the Parole Commission exercised discretion to determine whether to grant parole.<sup>171</sup> The system had its basis in a rehabilitation theory of punishment.<sup>172</sup> The idea being that the Parole Commission would decide whether an inmate was sufficiently rehabilitated to successfully return to society.<sup>173</sup> Starting in the mid-1970s, the criminal justice system gradually moved away from the flexible sentencing model and toward a determinate sentencing model.<sup>174</sup> Under a determinate sentencing model, an offender's sentence generally cannot be shortened based on an inmate's behavior.<sup>175</sup> The determinate sentencing model is essentially what federal prisoners encounter today.<sup>176</sup>

A lot has changed since the 1970's. For instance, we have more information: we now know determinate sentencing causes a deluge in prisoner litigation.<sup>177</sup> We also have better technology: for instance, we now have reliable and affordable GPS tracking devices and drug testing technology.<sup>178</sup> It is time to return to a more flexible sentencing model. Such a model would remove—or at least relax—many of the perverse incentives alive in the current system that influence prisoners to bring frequent lawsuits and induce poor behavior, just one example of which is MSH.

## V. CONCLUSION

This Article identifies a loophole in the current deliberate indifference doctrine that prisoners can and are exploiting.<sup>179</sup> Specifically, prisoners can engineer a § 1983 claim with MSH. The loophole is problematic because it incentivizes self-harm and, if allowed to persist, gives dangerous negotiating power to prisoners. Not only is this loophole problematic from a public policy

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<sup>171</sup> *Id.*

<sup>172</sup> Jonathan J. Wroblewski, *History and Future of the Sentencing Commission*, 13 AM. U. INT'L L. REV. 1072, 1073 (1998).

<sup>173</sup> Tjoflat, *supra* note 170, at 1079.

<sup>174</sup> *See id.* at 1079–80.

<sup>175</sup> Under the current federal sentencing scheme, an inmate can only earn a maximum of 54 days off of his sentence per year for good behavior. In other words, regardless of behavior, an inmate must serve 85% of his sentence. *Glossary of Federal Sentencing-Related Terms*, U.S. SENTENCING COMM'N, <https://www.ussc.gov/education/glossary> (last visited Oct. 10, 2020).

<sup>176</sup> *Id.*; Michael Santos, *How To Understand Sentencing Systems*, PRISON PROFESSORS (Aug. 26, 2017), <https://prisonprofessors.com/how-to-understand-sentencing-systems>. In contrast to the federal criminal system, several states follow the indeterminate sentencing model. BUREAU OF JUST. ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING.

<sup>177</sup> *See Schlanger, supra* note 37, at 1584 Fig. I.A.

<sup>178</sup> *See, e.g.,* Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017) (discussing GPS tracking); David Evans, 1 Drug Testing Law Tech. & Prac. §5:1 (2020 West) (discussing drug testing).

<sup>179</sup> *E.g., Goodvine v. VandeWalle*, No. 16-C-890, 2018 WL 460121 (E.D. Wis. Jan. 17, 2018).

standpoint, it also represents an untenable departure from the deliberate indifference doctrine. The principle underlying the doctrine—that “the prisoner, by virtue of his incarceration, is deprived of his normal opportunities for protecting himself”<sup>180</sup>—does not apply to MSH.

In reaction to the problematic and doctrinally precarious loophole, this Article makes multiple suggestions that, if followed, will alleviate the possible consequences. On the conservative end, this Article shows how courts should treat MSH cases under the current deliberate indifference frameworks. MSH claims should at least fail one of the two deliberate indifference prongs and may fail both. Attorneys representing the state, as well as courts hearing these cases, should draw from the reasoning here to avoid exacerbating a jurisprudential loophole and overstressing the deliberate indifference doctrine.

On the more quixotic end, this Article shows that Congress or the Supreme Court could clarify the deliberate indifference framework. Specifically, the framework would require that the prisoner to prove: (1) deliberate indifference (2) to a serious medical need (3) that was not self-inflicted by a prisoner who acted on his own free will.

Prisoner self-harm presents a unique and challenging problem. It is uncomfortable to talk about and easy to ignore. But it is a serious and sad reality that ought to be handled with care.<sup>181</sup> The reason for closing the current loophole is not to eliminate one of the few aspects of an inmate’s life that he controls and to make inmates even more vulnerable to the state’s will. On the contrary, the goal is to reveal how the loophole puts prisoners in danger and to offer some ways to prevent it. If the law protects the sane manipulative self-harmer and gives him damages in court, then there will inevitably be situations where the reasonable prisoner will correctly calculate that self-harm is his best option, which should never be true.

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<sup>180</sup> Taylor v. Wausau Underwriters Ins. Co., 423 F. Supp. 2d 882, 887 (E.D. Wis. 2006).

<sup>181</sup> E.g., Seena Fazel, Taanvi Ramesh, & Keith Hawton, *Suicide in Prisons: An International Study of Prevalence and Contributory Factors*, 4 LANCET PSYCHIATRY 946 (2017).