DEFINING “SUFFICIENTLY SERIOUS” IN CLAIMS OF CRUEL AND UNUSUAL PUNISHMENT

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ABSTRACT

When analyzing inmate claims brought under the Eighth Amendment’s ban on cruel and unusual punishment and that arise from conditions of confinement, courts employ a two-pronged approach, which asks (1) whether the injury was “objectively, sufficiently serious,” and (2) whether the prison official was “deliberately indifferent” to the inmate’s needs. Although there are wide-ranging examples of cases in which courts have examined whether deprivations of food, clothing, shelter, medical care, and safety satisfy the objectively, sufficiently serious standard, no consistent definition or articulated factors have been universally adopted in such cases. While a sodomy allegation meets the objectively, sufficiently serious standard, a denial of food due to an inmate’s failure to comply with prison policy may not. Where a particular inmate’s claim of deprivation falls on the resulting spectrum is any court’s guess. This Article reviews “evolving standards of decency” by studying state correctional standards in three areas: nutritional adequacy, hygiene, and exercise. Then, after ascertaining the “constitutional minimum,” three objective factors are examined from case law and jury verdicts: duration, severity, and loss of dignity. When applied to a deviation from the constitutional minimum, these factors will best assist courts, practitioners, and juries in determining whether a claim arising out of conditions of confinement is sufficiently serious.

TABLE OF CONTENTS

I. Introduction.................................................................................................................................3
II. Establishing the Floor in Three Examples: Statutes and Regulations as the Constitutional Minimum.................................................................8
   A. Nutritional Adequacy.............................................................................................................9
      1. State Statutes.....................................................................................................................9
      2. State Regulations..........................................................................................................10

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B. Minimum Hygiene .........................................................15
   1. State Statutes ..........................................................16
   2. State Regulations ......................................................17
      a. Bathing ..................................................................17
      b. Clothing and Linen ..................................................17
C. Access to Physical Exercise ...........................................19
   1. State Regulations ......................................................19

III. Applying Duration, Severity, and Dignity to Determine
     When Departures from Evolving Standards Constitute
     a Sufficiently Serious Deprivation ...................................20
     A. Duration ....................................................................21
     B. Severity .....................................................................23
     C. Dignity .....................................................................26
     D. Other Factors ............................................................29
        1. Fault on the Detainee’s Part .....................................29
        2. Feasible Alternatives Given Penological
           Considerations .......................................................30

IV. Jury Verdicts Support Application of the Factors of Duration,
    Severity, and Dignity ....................................................31
    A. Atkinson v. Taylor ......................................................32
    B. Chao v. Ballista ........................................................32
    C. Hubbard v. Zummer ...................................................32
    D. Norwood v. Vance ......................................................33
    E. West v. Hillsborough County Department of Corrections ....33

V. Analysis of Duration, Severity, and Dignity Will Best
   Ensure Decisions are Based on Objective Factors ................34
   A. Hypothetical Application of the Objective Factors to the
      Standards for Food, Hygiene, and Exercise ....................35
   B. An Example: Armendariz and the Shower Confinement ....36

VI. Conclusion .................................................................39
I. INTRODUCTION

“To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the ‘concepts of dignity, civilized standards, humanity, and decency’ that animate the Eighth Amendment.”

The U.S. Supreme Court’s jurisprudence on what constitutes cruel and unusual punishment under the Eighth Amendment is not a model of clarity. Prior to 1976, the Court had not explicitly applied the Eighth Amendment to claims regarding conditions of confinement, but only to claims arising out of specifically excessive sentencing. The Court first began openly applying the Eighth Amendment to conditions-of-confinement claims in 1976 in the groundbreaking case of Estelle v. Gamble. Since then, the Court has clarified that to establish a claim for cruel and unusual punishment arising out of conditions of confinement, detainees must satisfy both subjective and objective prongs.

This two-pronged approach asks (1) whether the injury was “objectively, sufficiently serious,” and (2) whether the prison official was “deliberately indifferent” to the inmate’s needs. Although one can find wide-ranging examples of deprivations of adequate food, clothing, shelter, medical care, and safety that either have or have not satisfied the objectively, sufficiently serious standard, no consistent definition or articulated factors have been universally adopted in such cases. For example, while an allegation of sodomy meets the sufficiently serious

4. While there are various terms applicable to individuals in detention, this Article uses “detainee.” The primary distinction in the status of one who is confined is whether they are pretrial or posttrial. Pretrial detainees’ claims arising out of conditions of confinement are founded in the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). However, the analysis is the same. Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998). Additionally, while the objective factors set forth herein are likely transferable to detention facilities involving minors, this Article focuses solely on adult correctional and detention facilities.
6. Id.
standard, denying food due to a detainee’s failure to comply with prison policy may not. Where a particular detainee’s claim of deprivation falls on the resulting spectrum is any court’s guess.

What amounts to a sufficiently serious deprivation has been interpreted in an ad hoc way, yet courts at least ostensibly attempt to standardize the analysis. As the Third Circuit has said, “Although our understanding of the Eighth Amendment changes as our society progresses, ‘the inquiry that courts must conduct in Eighth Amendment cases is not consequently less exacting.’”

Although it has generally failed to articulate helpful standards, the Supreme Court has stated that claims of cruel and unusual punishment should be decided “by objective factors to the maximum possible extent” in connection with “evolving standards of decency that mark the progress of a maturing society.” Yet, as the Eleventh Circuit noted, “[d]etermining when overall conditions of confinement are ‘sufficiently serious’... involves the application of vague ‘contemporary standards of decency’ to an amorphous collection of circumstances, and it is often a very difficult task for a court to perform.”

Professor Sharon Dolovich wrote a superb critique of the current approach, arguing that a modified form of strict liability should replace the current inquiry altogether. Professor Alexander A. Reinert has proposed strengthening the notion of “proportionality” in assessments of what constitutes cruel and unusual punishment. Under his approach, whether a certain condition of confinement amounts to a constitutional violation would turn on the nature and circumstances of the crime for which the inmate was convicted. Professor Reinert’s fascinating work, like Professor Dolovich’s, thoughtfully advocates for a departure from the current jurisprudence. This Article aims to articulate some objective factors that can be incorporated into the current two-pronged approach utilized by the

7. Calderón-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002).
15. *Id.* at 85.
Supreme Court.

Ideally, these objective standards will inform courts, juries, and practitioners in a manner that will result in more consistent determinations. Because the various types of deprivations arising out of conditions of confinement are many, the focus will be narrowed to three examples: adequacy of diet, maintenance of hygiene, and access to physical exercise. This focus will analyze the statutory and regulatory standards governing those three areas. A review of these standards will establish the floor that is the “evolving standard of decency”16 in these three areas.

While a few states codify their correctional standards, most adopt regulations that, in noteworthy ways, either copy or deviate from the standards promulgated by the American Correctional Association (ACA).17 When examining the few statutes and numerous regulatory standards promulgated to address the first of the three areas of focus, nutritional adequacy, the evolving standard of decency that results is (1) that detainees should receive three meals a day, (2) no two meals should be more than 14 hours apart, (3) at least one meal per day should be hot, and (4) the menu should be reviewed by a dietitian on a regular basis, at least annually.18 With regard to hygiene, a similar review demonstrates a standard requiring that (1) detainees have the opportunity to bathe at least every other day, (2) detainees’ clothing and linens be exchanged or laundered at least once or twice a week, and (3) detainee blankets be exchanged or laundered once every three months.19 Finally, with regard to exercise, the statutes and regulations reflect a growing consensus that a detainee be permitted five to seven hours of physical exercise each week, with a strong preference for the exercise to be outdoors when possible.20 Thus, in these three areas, a baseline is established for assessing the constitutional minimum in the context of conditions of confinement. This raises a question: How much of a deviation from that constitutional

17. For the American Correctional Association standards, see AM. CORR. ASS’N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003) [hereinafter ACA STANDARDS]; AM. CORR. ASS’N, 2012 STANDARDS SUPPLEMENT (2012) [hereinafter ACA STANDARDS SUPPLEMENT]. As an example of copying or deviating from the standards, compare ACA STANDARDS, supra, at 91, and 10A N.C. ADMIN. CODE 14J.0902 (2013) (mandating at least two hot meals per 24-hour period), with MINN. R. 2911.4700 (2013) (mandating that at least one meal per day be hot).
18. See infra Part II.A.
19. See infra Part II.B.
20. See infra Part II.C.
minimum is permitted before a deprivation is sufficiently serious enough to amount to cruel and unusual punishment?

Objective factors that can guide the assessment of sufficiently serious can be pulled from two areas: case law interpreting the Eighth Amendment and jury verdicts in cases involving claims for cruel and unusual punishment. Certainly, case law provides insight shaped by views from the bench, whereas jury verdicts best convey “the public attitude toward a given sanction.”21 The Supreme Court, in Gregg v. Georgia, emphasized that “[t]he jury… is a significant and reliable objective index of contemporary values because it is so directly involved.”22 Three objective factors appear from a study of court decisions and jury verdicts: duration, severity, and loss of dignity. Applying these three factors to the standards for food, hygiene, and exercise reveals a more objective and less ad hoc approach to determinations under the Eighth Amendment.23 The application of these factors can be charted accordingly:

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So, while a very brief deprivation of hygiene standards may not rise to

22. Id. at 181.
the level of a constitutional violation, a severe deprivation or one that involves a loss of dignity will. For example, while the duration of time of exposure to human waste may not be dispositive, “a shower of human excrement without protective clothing and equipment would be ‘inconsistent with any standard of decency’.” The severity and the assault on dignity support a finding of cruel and unusual punishment in violation of the Eighth Amendment.

These three factors—duration, severity, and dignity—and in particular, juries’ implicit endorsement of their application, better define sufficiently serious than the ad hoc approach so often resorted to by courts to date.25 And they are better measures of the fundamental aspect of decency that supports Eighth Amendment jurisprudence than other utilized factors, such as the fault of the inmate26 or the availability of administrative alternatives to the deprivation of basic needs.27 By applying duration, severity, and dignity to any condition-of-confinement claim, practitioners, courts, and juries can best assess what amounts to an “objectively, sufficiently serious” deprivation of basic human needs.

24. Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990) (quoting Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989)).

25. The ad hoc approach is inferior because it can lead to inconsistent results. Compare, e.g., Carrigan v. Davis, 70 F. Supp. 2d 448, 452–53 (D. Del. 1999) (“[A] matter of law . . . an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment.”) (footnote omitted), with, e.g., Chao v. Ballista, 772 F. Supp. 2d 337, 352 (D. Mass. 2011) (“A sexual relationship between an inmate and a guard may rise to the level of harm required for an Eighth Amendment claim. Sex and coercive relationships are complicated and the level of harm—or lack thereof—will depend on the facts of a given case.” (citing Boddie v. Schniede, 105 F.3d 857, 860–61 (2d Cir. 1997)).

26. See, e.g., Freeman v. Berge, 441 F.3d 543, 547 (7th Cir. 2006) (affirming judgment in the defendants’ favor because, “to an overwhelming degree[,] Freeman’s food deprivation was self-inflicted”); Rodriguez v. Briley, 403 F.3d 952, 953 (7th Cir. 2005) (“[Rodriguez] was not punished, and so we need not decide whether, or how many, skipped meals constitute a cruel and unusual punishment . . . . Rather, by failing to comply with a reasonable condition on being allowed to leave his cell, and as a result missing out on meals, Rodriguez punished himself.”).

27. See, e.g., Hawthorne v. Gray, 893 F. Supp. 2d 11, 12, 15 (D.D.C. 2012) (granting the defendants’ motion for summary judgment because the plaintiff, who alleged the prison’s unsanitary conditions gave him a severe staph infection, had not fully exhausted an informal grievance procedure before filing the lawsuit); Woodward v. Daugherity, 845 F. Supp. 2d 681, 682, 684–85 (W.D.N.C. 2012) (granting summary judgment against a plaintiff alleging the prison was “deliberately indifferent to [his] serious medical conditions,” because the plaintiff had not exhausted internal administrative remedies).
resulting in a violation of the Eighth Amendment ban on cruel and unusual punishment.\textsuperscript{28}

II. Establishing the Floor in Three Examples: Statutes and Regulations as the Constitutional Minimum

In determining whether a given condition of confinement gives rise to a claim for cruel and unusual punishment, courts and juries are to look to “the public attitude toward a given sanction.”\textsuperscript{29} “The touchstone is ‘what the general public would consider decent.’”\textsuperscript{30} The notion of evolving standards of decency has been applied by the Supreme Court in cases involving Eighth Amendment challenges to the death penalty. For example, in \textit{Atkins v. Virginia}, the Court examined whether subjecting individuals with mental retardation to the death penalty violated evolving standards of decency.\textsuperscript{31} In \textit{Atkins}, the Court looked to state legislatures to determine such standards.\textsuperscript{32}

A few state legislatures have codified standards for adult incarceration. More often, states have articulated standards by adopting regulations governing correctional facilities. Many of the standards parallel the standards promulgated by the ACA, the organization that has accredited approximately 1,300 jails and prisons in the United States.\textsuperscript{33} However, as the D.C. Circuit has noted, “It would . . . not be surprising if many aspects of current ‘industry standards’ fell below ‘what the general public would consider decent.’ In any case, it is clearly erroneous to assume that ‘average’ conditions will invariably pass constitutional muster.”\textsuperscript{34} Because the ACA standards are a widely used benchmark, individual state departures from them, whether setting forth more rigorous standards or providing more lenient regulatory mandates, are noteworthy in examining the floor of Eighth Amendment cruel and unusual punishment claims arising from conditions of confinement.

The standards prescribed by state officials cover a broad range of

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\item[30.] \textit{Doc v. District of Columbia}, 701 F.2d 948, 964 (D.C. Cir. 1983) (quoting Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)).
\item[32.] \textit{See id.} at 313–16.
\item[33.] E-mail from Brian Nielsen, Admin. Assistant, Am. Corr. Ass’n, to author (July 31, 2013) (on file with author).
\item[34.] \textit{Doc}, 701 F.2d at 964–65.
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conditions of confinement, from the permissible use of force to the adequacy of mental health care. A complete review of all standards is beyond the scope of this Article, but for assessing claims arising regarding conditions of confinement, a starting point is the standards ensuring the provision of services to satisfy “the minimal civilized measure of life’s necessities”—things like nutritional adequacy, hygiene, and exercise. This tracks the Supreme Court’s summation of basic human needs, such as “food, warmth[,] or exercise.”

A. Nutritional Adequacy

The most basic human need is food. As a starting point, the ACA requires that a corrections facility’s menu be reviewed at least annually by a qualified nutritionist or dietitian. The ACA further requires at least three meals be served at regular meal times within a 24-hour period, two of which must be hot meals, with no more than 14 hours between the evening meal and breakfast. It permits variation “based on weekend and holiday food service demands provided basic nutritional goals are met.”

1. State Statutes

Few states have codified standards addressing the provision of food. As might be expected, the state statutes that do codify corrections standards for food and diet range from general exhortations to specific nutritional requirements. Alabama, for example, requires only that “[t]he diet of convicts... shall be sound and wholesome.” Alaska’s standard cuts in another direction: “The commissioner may not... make per capita expenditures for food for prisoners in a state correctional facility operated by the state that exceed 90 percent of per capita expenditures for food that is available to enlisted personnel in the United States Army stationed in

37. ACA STANDARDS, supra note 17, at 88 (Standard No. 4-4316). The ACA promulgates both mandatory and nonmandatory standards, and for a facility to achieve ACA accreditation, it must adhere to 100 percent of the mandatory standards and 90 percent of the nonmandatory ones. Id. at xix.
38. Id. at 91 (Standard No. 4-4328).
39. Id.
40. ALA. CODE § 14-3-45 (LexisNexis 2011); see also OKLA. STAT. ANN. tit. 74, § 192(A)(4) (West Supp. 2013) (mandating that corrections standards for all city and county jails provide for “[i]nmates to be fed a wholesome and adequate diet”).
the state..." In contrast, Oregon’s statute specifically articulates the baseline for providing meals. Its statute parallels the standard adopted by the ACA and requires that “detainees and prisoners” be “fed daily at least three meals served at regular times, with no more than 14 hours between meals.” The statute further requires that the meals be “nutritionally adequate... in accordance with a plan reviewed by a registered dietitian or the Oregon Health Authority.”

As noted below in the discussion of the regulatory standards, the Oregon statute reflects the first tile in the constitutional floor for the provision of food to detainees: (1) that detainees be fed three times a day, (2) that there are no more than 14 hours between certain meals, and (3) that the menu be reviewed by a registered dietitian.

Most states do not codify their correctional standards regarding the provision of food but instead direct the state department overseeing corrections to adopt regulations. A review of these standards supports an argument that the ACA and Oregon standards set the constitutional floor for provision of the basic human need of food.

2. State Regulations

Among those states that promulgate regulations governing provision of food for adult detainees, there exists a clear trend tracking the ACA and Oregon standards. Some states have moved well beyond these standards, however, and specified the provision of nutrients necessary as a part of a detainee’s diet.

A review of regulations codified in state administrative codes demonstrates that many states have adopted the three-meals-a-day requirement. That said, a number of states depart from that requirement

41. ALASKA STAT. § 33.30.015(1) (2012).
43. Id. § 169.076(7)(b) (West Supp. 2013).
44. Id.; see ACA STANDARDS, supra note 17, at 88, 91 (Standard No. 4-4316 & 4-4328); see also 37 PA. CODE § 95.230(1) (2013) (“Regular and alternative menus shall be approved and signed by a registered dietitian or licensed physician, or both, and the prison administrator on an as needed basis, but no less than on an annual basis.”).
45. CAL. CODE REGS. tit. 15, § 1240 (2013); COLO. DEPT OF CORR., ADMINISTRATIVE REGULATIONS § 1550-02(D)(1) (2013); STATE OF CONN. DEPT OF CORR., ADMINISTRATIVE DIRECTIVES § 10.18(11) (2013); FLA. ADMIN. CODE ANN. r. 33-204.003(1) (2012); FLA. SHERIFFS ASS’N & FLA. ASS’N OF CTYS., FLORIDA MODEL JAIL STANDARDS § 6.04 (2013); ILL. ADMIN. CODE tit. 20, § 701.110(a)(3) (2013); 210
and permit provision of only two meals a day on certain days, but maintain the 14-hour limit contained in the ACA standard.⁴⁶ For example, Kentucky normally requires three meals a day for inmates, but makes exception for Saturdays, Sundays, and holidays, and permits detainees to receive only two meals on these days.⁴⁷ There is little doubt that these exceptions are labor driven; that is, the exceptions are made on days when jail and prison facilities prefer to give their employees their days off, and as a result wish to serve only two meals instead of three.⁴⁸

At least 19 states have adopted the three-meals-a-day requirement in their administrative codes as the general standard.⁴⁹ Of these, most also require that meals not be more than 14 hours apart, or that there be no more than 14 hours between breakfast and supper.⁵⁰ In addition, there at

⁴⁶ See, e.g., TENN. COMP. R. & REGS. 1400-1.10(2).
⁴⁷ 501 KY. ADMIN. REGS. 3:100(3)(a)–(b) (2013).
⁴⁸ See ACA STANDARDS, supra note 17, at 91 (Standard No. 4-4328) (“Variations may be allowed based on weekend and holiday food service demands . . . .”). This prompts the question, not addressed in this Article, of whether provisions of food service should be determined based on labor availability as opposed to a strictly nutritional basis. The ACA suggests nutrition must still be taken into account. Id. (permitting variation “provided basic nutritional goals are met”); see also 501 KY. ADMIN. REGS. 3:100(3)(b) (permitting two meals per day only if the two meals still meet a specific calorie threshold).
⁴⁹ See CAL. CODE REGS. tit. 15, § 1240; COLO. DEPT’ OF CORR., ADMINISTRATIVE REGULATIONS § 1550-02(D)(1); STATE OF CONN. DEPT’ OF CORR., ADMINISTRATIVE DIRECTIVES § 10.18(11); FLA. ADMIN. CODE r. 33-204.003(1); 210 IND. ADMIN. CODE 3-1-12(b); MD. CODE

least one-hot-meal requirement typically exists, although several states require two hot meals.\footnote{51} Almost all of the states that have promulgated standards for food and diet into their administrative codes have also included the requirement that a dietitian review the menu, although the standards vary with regard to how often such review should take place.\footnote{53}

Thus, the overall trend suggesting an evolving standard of decency that can provide the baseline against which claims regarding conditions of confinement with regard to food provision can be assessed is as follows: (1) detainees should receive three meals a day, (2) no meal should be more than 14 hours apart, (3) at least one meal should be a hot meal, and (4) the menu should be reviewed by a dietitian on a regular basis, at least annually.

The departures from these evolving standards prove the rule, and there are significant departures. California, for example, in addition to requiring the aforementioned baseline, sets forth specific nutritional and caloric requirements for meals.\footnote{54} California’s regulations go so far as to set

\footnotesize

REGS. 12.14.04.03(A)(2); 103 MASS. CODE REGS. 928.09(3); MINN. R. 2911.4100(1); N.J. ADMIN. CODE §10A:31-10.5(a); 10A N.C. ADMIN. CODE 14J.0902(a); OHIO ADMIN. CODE 5120:1-8-10(13); OKLA. ADMIN. CODE §310:670-3-1(13); TENN. COMP. R. & REGS. 1400-1-10(2); 37 TEX. ADMIN. CODE §281.1; 6 VA. ADMIN. CODE §15-40-590. Nebraska’s standards, while similar, require three meals and that no more than 15 hours transpire between breakfast and dinner. 81 Neb. ADMIN. CODE §11-002.

51. See, e.g., CAL. CODE REGS. tit. 15, § 1240; STATE OF CONN. DEPT OF CORR., ADMINISTRATIVE DIRECTIVES § 10.18(11); IOWA ADMIN. CODE r. 201–50.16(2); 81 Neb. ADMIN. CODE § 11-002; N.Y. COMP. CODES R. & REGS. tit. 9, § 7009.6(b).

52. See, e.g., COLO. DEPT OF CORR., ADMINISTRATIVE REGULATIONS § 1550-02(D)(1); FLA. ADMIN. CODE r. 33-204.003(1); 103 MASS. CODE REGS. 928.09(3); N.J. ADMIN. CODE §10A:31-10.5(a); 10A N.C. ADMIN. CODE 14J.0902(a); OKLA. ADMIN. CODE §310:670-3-1(13); TENN. COMP. R. & REGS. 1400-1-10(2); 6 VA. ADMIN. CODE §15-40-590.

53. CAL. CODE REGS. tit. 15, § 1242; COLO. DEPT OF CORR., ADMINISTRATIVE REGULATIONS § 1550-02(A)(3); STATE OF CONN. DEPT OF CORR., ADMINISTRATIVE DIRECTIVES § 10.18(06)(A); 210 INDIAN ADMIN. CODE 3-1-12(b)(2), (4) (every two years); MD. CODE REGS. 12.14.04.03(A)(1) (annually); MINN. R. 2911.4000 (annually); NEB. CORR. SERVS., ADMINISTRATIVE REGULATIONS no. 108.01. at 3, § II(A) (2013), available at http://www.corrections.state.ne.us/pdfs/ar/2010 01.pdf (annually); N.J. ADMIN. CODE §10A:31-10.3(a)–(b) (quarterly); 10A N.C. ADMIN. CODE 14J.0904(a); OHIO ADMIN. CODE 5120-1-8-10(C) (annually); OKLA. ADMIN. CODE §310:670-5-7(9); TENN. COMP. R. & REGS. 1400-1-10(1); 37 TEX. ADMIN. CODE §281.3 (annually); 6 VA. ADMIN. CODE §15-40-550(4) (every three years).

54. See CAL. CODE REGS. tit. 15, §§ 1240–1242.
forth the exact grams of each food group that must be served to the general population. It also requires a specific recipe for the “dietary loaf” served to detainees in disciplinary isolation. Minnesota’s regulations display a similar level of detail. On the other end of the spectrum, Wisconsin’s

55. *Id.* § 1241.
56. *Id.* § 1247. The regulation reads:

(a) A disciplinary isolation diet which is nutritionally balanced may be served to an inmate. No inmate receiving a prescribed medical diet is to be placed on a disciplinary isolation diet without review by the responsible physician or pursuant to a written plan approved by the physician. Such a diet shall be served twice in each 24 hour period and shall consist of one-half of the loaf (or a minimum of 19 oz. cooked loaf) described below or other equally nutritious diet, along with two slices of whole wheat bread and at least one quart of drinking water if the cell does not have a water supply. The use of disciplinary isolation diet shall constitute an exception to the three-meal-a-day standard. Should a facility administrator wish to provide an alternate disciplinary diet, such a diet shall be submitted to the Corrections Standards Authority for approval.

(b) The disciplinary diet loaf shall consist of the following:

2-1/2 oz. nonfat dry milk
4-1/2 oz. raw grated potato
3 oz. raw carrots, chopped or grated fine
1-1/2 oz. tomato juice or puree
4-1/2 oz. raw cabbage, chopped fine
7 oz. lean ground beef, turkey or rehydrated, canned, or frozen Textured Vegetable Protein (TVP)
2-1/2 fl. oz. oil
1-1/2 oz. whole wheat flour
1/4 tsp. salt
4 tsp. raw onion, chopped
1 egg
6 oz. dry red beans, pre-cooked before baking (or 16 oz. canned or cooked red kidney beans)
4 tsp. chili powder
Shape into a loaf and bake at 350-375 degrees for 50-70 minutes.

*Id.*

57. MINN. R. 2911.3900 provides definitions:

Subp. 2. Meat or protein. Two or more services per day of meat or protein shall be provided. A serving of meat or protein is defined as:
A. two to three ounces cooked (equivalent to three to four ounces raw) of any meat without bone, such as beef, pork, lamb, poultry, and variety meats such as liver, heart, and kidney;
B. two slices prepared luncheon meat;
C. two eggs;
D. two to three ounces of fresh or frozen cooked fish or shellfish, or one-half cup canned fish;
E. one-half cup cooked navy beans plus one ounce of animal protein; or
F. three ounces of natural or processed cheese or three-fourths cup of cottage cheese, not to exceed six ounces per week as a meat alternate.

Subp. 3. Milk. Two or more servings per day of milk shall be provided. A serving is defined as eight ounces (one cup) of milk. A portion of this amount may be served in cooked form, such as cream soups or desserts. The following substitutes may be used:
A. one ounce of American cheese for three-fourths cup milk;
B. one-half cup creamed cottage cheese for one-third cup milk; or
C. one-half cup ice cream for one-fourth cup milk.

Subp. 4. Vegetables. Two or more servings per day of vegetables shall be provided. One serving of a vitamin A source must be served four times per week. A serving is defined as one-half cup. Potatoes may be included once daily as a vegetable.

Vitamin A sources include: apricots, cantaloupe, carrots, mixed vegetables with carrots, winter or yellow squash, sweet potatoes or yams, spinach, greens (collard, kale, chard, mustard, beet or turnip), liver (counted under meat), or broccoli.

Subp. 5. Fruit. Two or more servings per day of fruit, one of which is citrus, for example, orange, grapefruit, or tomato, or other good source of vitamin C shall be provided. A serving of citrus fruit or tomato is defined as:
A. one medium orange or four ounces of orange juice;
B. one-half grapefruit or four ounces of grapefruit juice; or
C. one large tomato or eight ounces of tomato juice.

Subp. 6. Bread or cereal. Five or more servings per day of whole grain or enriched cereal and bread products shall be provided. A serving is defined as:
A. one slice of bread;
B. one-half cup cooked cereal;
C. three-fourths cup dry cereal; or
D. one-half cup macaroni, rice, noodles, and spaghetti.
regulations echo the Alabama statute, requiring only that “[m]enus shall satisfy generally accepted nutritional standards.”

Having established the floor, what remains to be determined is how far below the floor a jail or prison may fall before the deprivation constitutes a sufficiently serious one, giving rise to a claim for cruel and unusual punishment. That question involves a review of factors articulated by courts and culled from jury verdicts that can then be applied to the basic requirements of food provision. First, an analysis of the floor in two other areas assessing the “minimal civilized measure of life’s necessities” is in order.

B. Minimum Hygiene

After food, the most important general basic human need is keeping healthy with proper hygiene. This involves an assessment of the standards

Subp. 7. Dairy. Servings of butter, fortified margarine, cream, or salad oil in moderate amounts shall be used to make food palatable.

Subp. 8. Additional servings. Additional servings of the foods in subparts 2 to 7 may be used, or the following foods added, to meet caloric needs: soups; sweets, such as desserts, sugar, and jellies; or other fats, such as bacon, cream, and salad dressings.

In turn, Minn. R. 2911.4100 provides guidelines:

Subpart 1. Evening meal. There shall not be more than 14 hours between a substantial evening meal and breakfast. A substantial evening meal is classified as a serving of three or more menu items at one time to include a high quality protein such as meat, fish, eggs, or cheese. The meal shall represent no less than 20 percent of the daily total nutrition requirements. (Mandatory)

Subp. 2. Snack. If a nourishing snack is provided at bedtime, up to 16 hours may elapse between the substantial evening meal and breakfast. A nourishing snack is classified as a combination of two or more food items from two of the four food groups, such as cheese and crackers, or fresh fruit and cottage cheese.

Subp. 3. Three meals. Where inmates are not routinely absent from the facility for work or other purposes, at least three meals shall be made available at regular times during each 24-hour period. Variations may be allowed based on weekend and holiday food service demands provided basic nutritional goals are met. As an example, a facility may provide a brunch on Saturdays, Sundays, or holidays in lieu of separate breakfast and lunch meals.

set for bathing and change of clothing and bedding. The ACA requires that there be "sufficient bathing facilities... to permit inmates in the general population to shower at least three times per week."60 The ACA also requires that inmates "are provided the opportunity to have three complete sets of clean clothing per week," either by laundering or exchange.61 Linen (sheets and towels) exchange is to occur at least weekly and blanket exchange quarterly.62 As with the provision of food, most of the state standards set for hygiene are articulated in regulatory codes, not in statutes.

1. **State Statutes**

   Since most states defer to their administrative agencies to promulgate regulations addressing hygiene, only two examples of statutes setting forth some standards for hygiene can be found. Alabama requires that "[a]ll convicts must be clothed during the term of their imprisonment in a comfortable manner in coarse and cheap clothing."63 In contrast, Oregon articulates much more detailed statutory standards.64

   By statute, Oregon requires that detainees receive clean clothes twice per week.65 The Oregon standard with regard to bathing also reflects an approach found in several state regulatory standards. Rather than aiming the regulation at the detention facility's allowance of showers, the statute mandates that detainees bathe at least twice per week.66

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60. **ACA STANDARDS**, *supra* note 17, at 94 (Standard No. 4-4341).
61. **Id.** at 94 (Standard No. 4-4338).
62. **ACA STANDARDS SUPPLEMENT, supra** note 17, at 67 (Standard No. 4-4340).
63. **ALA. CODE** § 14-3-44 (LexisNexis 2011).
64. **OR. REV. STAT. ANN.** § 169.076(8)-(9) (West 2003 & Supp. 2013) ("Each local correctional facility shall:
   
   (8) Ensure that the facility be clean, and provide each confined detainee or prisoner:
   
   (a) Materials to maintain personal hygiene.
   
   (b) Clean clothing twice weekly.
   
   (c) Mattresses and blankets that are clean and fire-retardant.
   
   (9) Require each prisoner to shower at least twice weekly.").
65. **Id.** § 169.076(8)(b).
66. **Id.** § 169.076(9); see also, e.g., **ALASKA ADMIN. CODE** tit. 22, § 05.180(a) (2013) (stating "[s]hower and bathing facilities must be made available," but also requiring prisoners to maintain personal cleanliness and grooming); **FLA. ADMIN.**
Oregon thus sets forth some of the basic human needs with regard to
hygiene: (1) bathing at least twice per week, (2) clean bedding sheets, and
(3) clean clothing twice per week.67 That said, the trend in state
administrative codes is far more significant and reflects a higher standard
of hygiene care that is evolving nationally.

2. State Regulations

   a. Bathing. Many state regulations or administrative directives require
      that detainees be permitted to bathe at least every other day,68 while
      several require that daily showering be permitted.69 Again, the exceptions
      prove the rule, with two states—Virginia and Wisconsin—only requiring
      that detainees be permitted to bathe twice a week.70 At the very least, the
      evolving standard of decency that can be drawn out of the state regulations
      are that detainees be permitted to bathe at least every other day, if not
      more often.

   b. Clothing and linen. The evolving standard with regard to clothing is
      a little harder to ascertain because differing language is used. It is not
      always obvious whether the regulations governing issuance, exchange, and
      laundering of clothing are meant to include undergarments or just outer

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67. OR. REV. STAT. ANN. § 169.076(8)(b).
68. ALASKA ADMIN. CODE tit. 22, § 05.180 (“Shower and bathing facilities
must be made available at least three times weekly, unless ordered otherwise by facility
health care personnel.”); CAL. CODE REGS. tit. 15, § 1266 (2013) (“Inmates shall be
permitted to shower/bathe upon assignment to a housing unit and at least every other
day or more often if possible.”); COLO. DEPT. OF CORR., ADMINISTRATIVE
REGULATIONS § 850-11(IV)(B)(1) (requiring “sufficient shower facilities . . . to permit
all offenders to shower at least three times per week”); Ill. Admin. Code tit. 20,
§ 701.100 (b)(2) (2013) (“Bathing or showering shall be allowed three times weekly.”).
69. FLA. ADMIN. CODE ANN. r. 33-601.238(3) (2002) (“[I]nmates shall shower
at least once daily.”); FLA. SHERIFFS ASS’N & FLA. ASS’N OF CNTYS., FLORIDA MODEL
JAIL STANDARDS § 5.08(i) (“Each inmate in general population will be allowed to
shower daily.”); 501 KY. ADMIN. REGS. 3:080(13) (2013) (“Prisoners shall be permitted
to shower daily.”); N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.2 (2013).
70. 6 VA. ADMIN. CODE § 15-40-760 (2013) (“Each inmate shall be allowed to
bathe twice a week.”); WIS. ADMIN. CODE DOC § 309.24(2) (2013) (“Institutions
shall provide a minimum of 2 bathing periods per week for each inmate.”). Louisiana
has a slightly different rule; inmates must be permitted to shower daily if they wish, but
can choose to bathe less frequently. LA. ADMIN. CODE tit. 22, § 2907(A) (2013)
(“Inmates shall have access to a shower on a daily basis and shall be required to bathe
no less than twice a week.”).
apparel. That said, the overall trend in clothing for detainees requires that clothing be changed or laundered once or twice per week.\textsuperscript{71}

For linens, such as bed sheets, pillowcases, and towels, the evolving standards are fairly consistent; these are to be exchanged or laundered once per week.\textsuperscript{72} State regulatory hygiene requirements with regard to blankets vary, with most states that have regulations tracking the ACA requirement that they be exchanged or laundered every three months,\textsuperscript{73} while other states require that blankets be cleaned on a monthly basis.\textsuperscript{74}

Thus, the evolving standard for hygiene demands the following: (1) detainees should have the opportunity to bathe at least every other day, (2) detainees’ clothing and linens should be exchanged or laundered at least

\begin{itemize}
\item \textsuperscript{71} See, e.g., CAL. CODE REGS. tit. 15, § 1262.
\item There shall be written policies and procedures developed by the facility administrator for the scheduled exchange of clothing. Unless work, climatic conditions, illness, or California Retail Food Code necessitates more frequent exchange, outer garments, except footwear, shall be exchanged at least once each week. Undergarments and socks shall be exchanged twice each week.
\item Id.; FLA. SHERIFFS ASS’N & FLA. ASS’N OF CNTYS., FLORIDA MODEL JAIL STANDARDS § 8.05 (“Inmates shall be given the opportunity to have their clothing laundered or exchanged for clean clothing at least twice each week.”); Ill. Admin. Code tit. 20, § 701.100(a)(2) (“When clothing is provided by the jail, cleaning clothing shall be issued at least twice weekly.”); LA. ADMIN. CODE tit. 22, § 2905(C); MINN. R. 2911.3600(4) (2013); N.J. ADMIN. CODE § 10A:14-5.12(a) (2013).
\item Cal. Code Regs. tit. 15, § 1271; COLO. DEPT. OF CORR., ADMINISTRATIVE REGULATIONS § 850-05(I)(E)(2)(a); D.C. DEPT. OF CORR., Program Statement No. 2920.7(12)(c) (2013); FLA. SHERIFFS ASS’N & FLA. ASS’N OF CNTYS., FLORIDA MODEL JAIL STANDARDS §§ 8.02, 12.08; 210 IND. ADMIN. CODE 3-1-10(a) (2013); IOWA ADMIN. CODE r. 201-50.14(2)(d) (2013); 501 KY. ADMIN. REGS. 3:080(6)(a); LA. ADMIN. CODE tit. 22, § 2905; 03-201 ME. CODE R. ch. 1, § IIa(Q)(14)(b) (LexisNexis 2013); MD. CODE REGS. 12.14.03.05(H) (2013); 103 MASS. CODE REGS. 974.10(2) (2013); MINN. R. 2911.3650; N.J. ADMIN. CODE §§ 10A:14-5.12(b), 10A:31-12.3; N.Y. COMP. CODES R. & REGS. tit. 9, § 7005.9(b); 10A N.C. ADMIN. CODE 14J.0702 (2013); OHIO ADMIN. CODE 5120:1-10-05(F)(2) (2013); OKLA. ADMIN. CODE § 310:670-5-6(10) (2013); OR. ADMIN. R. 291-123-0015(6)(d) (2013); 37 PA. CODE § 95.229(5) (2013); MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES IN SOUTH CAROLINA § 2082(n) (2006); 37 TEX. ADMIN. CODE § 277.9 (2013); 6 VA. ADMIN. CODE § 15-40-740; 6 VA. ADMIN. CODE DOC § 350.08(3).
\item ACA STANDARDS SUPPLEMENT, supra note 17, at 67 (Standard No. 4-4340); see, e.g., 37 PA. CODE § 95.229(5) (“In-use blankets shall be laundered at least quarterly.”); 37 TEX. ADMIN. CODE § 277.9; WIS. ADMIN. CODE DOC § 350.08(2).
\item See, e.g., ILL. ADMIN. CODE tit. 20, § 701.120(d)(4); 210 IND. ADMIN. CODE 3-1-10(a); see also CAL. CODE REGS. tit. 15, § 1271 (requiring monthly blanket laundering if no top sheet is issued).
\end{itemize}
once or twice a week, and (3) detainee blankets should be exchanged or laundered once every three months.

C. Access to Physical Exercise

Among the three areas selected as examples in this Article, the area of access to physical exercise varies the most among the states, and thus tends to be the most difficult area in which to articulate a clearly evolving standard. Few states codify their standards regarding exercise, and the ACA requires that each inmate be offered one hour of access to an exercise area daily, preferably outside.75

1. State Regulations

Numerous states require that detainees be permitted at least an hour of exercise outside the cell daily.76 The general trend is toward requiring this exercise to be held outside when weather conditions permit.77 The required number of hours of exercise varies, from the highest standard in Pennsylvania requiring two hours a day,78 to the lowest standard in Iowa

75. ACA Standards, supra note 17, at 43 (Standard No. 4-4154). The comment to the standard adds that “[e]xercise/recreation spaces are not the same as dayrooms.” Id.
78. 37 Pa. Code § 95.238. The following are the minimum requirements applicable to recreation:

1. Jails shall provide all prisoners at least 2 hours daily, physical exercise in the open, weather permitting. If the weather is inclement, each inmate shall have 2 hours physical exercise daily indoors.

2. Written local policy shall describe the prison’s recreational programming for inmates.

3. Physical exercise schedules for males, females and juveniles shall be arranged to provide for segregation. Jail administrators may separate inmates further based on age, vulnerability and other appropriate security criteria.

4. Inmates under disciplinary status or segregation shall receive 1 hour of
requiring a minimum of two hours per week, with a number of states falling in between these two points.

At the very least, it is safe to articulate an evolving standard of decency that requires a detainee to be permitted five to seven hours of physical exercise per week, with a strong preference for the exercise to be permitted outdoors when possible.

Thus, a focused review in these three areas permits one to establish a floor that is a baseline pulled from evolving standards found in the states. That said, not every deviation from the baseline results in cruel and unusual punishment. Some identifiable, objective factors must be utilized to discern when a deprivation is sufficiently serious enough to result in an Eighth Amendment violation.

III. APPLYING DURATION, SEVERITY, AND DIGNITY TO DETERMINE WHEN DEPARTURES FROM EVOLVING STANDARDS CONSTITUTE A SUFFICIENTLY SERIOUS DEPRIVATION

Not until 1976 did the Supreme Court clearly hold that conditions of confinement, as opposed to inmate sentences, could give rise to an Eighth Amendment claim for cruel and unusual punishment. “In Estelle v. Gamble, [the Court] first acknowledged that the provision could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment.” Since then, the Court has clarified that to establish a claim for cruel and unusual punishment, a plaintiff must satisfy both a subjective and an objective prong. To prove the subjective prong, the plaintiff must show that detention officials were deliberately

outdoor activity 5 days a week.

79. IOWA ADMIN. CODE r. 201-50.18(1)(a) (2013).

80. See, e.g., TENN. COMP. R. & REGS. 1400-1-.12(2) (requiring “an average of one (1) hour . . . per day, with at least three (3) exercise periods per week”); TEX. ADMIN. CODE § 285.1 (2013) (requiring “one hour . . . at least three days per week”). For additional examples, see supra note 76. In some states, there is a separate standard that governs detainees in administrative or disciplinary segregation and thus, arguably a separate evolving standard in these circumstances. See, e.g., MINN. R. 2911.3100(7) (allowing inmates “on segregation status” to be denied access to the same recreational facilities as other inmates for security or safety reasons); N.Y. COMP. CODES. R. & REGS. tit. 9, § 7028.2(d).


indifferent to the alleged deprivations. To satisfy the objective prong, the deprivation of basic human need must be sufficiently serious. Precisely which claims amount to sufficiently serious deprivations of basic human needs has been difficult for courts to articulate. Now that the floor has been established—that is, the minimum needs required under evolving standards of decency—objective factors must be identified that can help courts, juries, and practitioners discern whether a detention facility has fallen so far below the floor that a claim is sufficiently serious. A review of appellate court decisions and jury verdicts points to three factors: duration, severity, and dignity.

A. Duration

Not long after Estelle v. Gamble, the Supreme Court recognized the common-sense notion that duration may serve as a determinant when analyzing the seriousness of claims arising from conditions of confinement. In Hutto v. Finney, the Court noted that “[a] filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.” The federal appellate courts review the duration of claimed deprivations of basic human needs as part of what the First Circuit has called the “Eighth Amendment calculus.”

In Surpremav. Rivas, the First Circuit concluded that a jury could easily have inferred that three weeks of “near-continuous confinement, denial of exercise time, water, and items of personal hygiene, exposure to bodily waste, and forced insertion of inmates’ unwashed fingers into their mouths up to five times per day posed an intolerable health and safety hazard,” and that the risk of harm was obvious.

83. See id.
84. Id.
85. See Brittany Glidden, Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual, 49 AM. CRIM. L. REV. 1815, 1823 (2012) (“[D]etermining what meets [the sufficiently serious] standard as a normative matter is complicated and uncertain . . . . Lower court decisions on what constitutes ‘sufficiently serious’ have been largely dictated by the sentiments of the judge and the quality of the advocacy.”).
87. Surpremav. Rivas, 424 F.3d 5, 20 (1st Cir. 2005) (“O’Mara also argues that however egregious the conditions of confinement may have been, their duration was so brief that no reasonable jury could find that they violated the Constitution. We agree that duration may affect the Eighth Amendment calculus.”).
88. Id. at 20–21. Before explaining the particular harms at issue in the case, the Court reviewed some general Eighth Amendment principles:
Similarly, the Seventh Circuit found that extended solitary segregation of detainees and denial of any out-of-cell exercise gave rise to conditions of confinement claims that were “significant and serious” as to both duration and severity.\textsuperscript{89}

Duration is a helpful but not necessarily dispositive factor. It is of course dispositive in such extreme cases as \textit{Spain v. Procunier}, in which the Ninth Circuit declared that it was cruel and unusual to deprive outdoor exercise to detainees held longer than four years.\textsuperscript{90} In contrast, in a case involving allegations of broken plumbing, the Tenth Circuit noted that “[t]he difference between enduring certain harsh conditions for seven weeks versus six months may be constitutionally significant.”\textsuperscript{91} In another case, the Tenth Circuit collected other cases featuring deprivations ranging from 24 hours to 11 days, and concluded that because the alleged cruel conditions of confinement in the case before it were similarly brief, the “allegations simply did not rise to the level of a constitutional violation.”\textsuperscript{92}

In the context of claims based on conditions of confinement, the Supreme Court has explained that “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” The conditions of confinement here were apparent to all and their risks were readily evident.

\textit{Id.} at 20 (quoting \textit{Farmer}, 511 U.S. at 842).

\textsuperscript{89} Delaney v. DeTella, 256 F.3d 679, 684 (7th Cir. 2001).

Here, both in duration and severity, the nature of Delaney’s alleged deprivation was significant and serious, and apparently no alternatives were made available to mitigate the effects of the deprivation. We recently noted that segregation is akin to solitary confinement and that such confinement, uninterrupted by opportunities for out-of-cell exercise “could reasonably be described as cruel and, by reference to the current norms of American prisons, unusual.”

\textit{Id.} (quoting Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001)).

\textsuperscript{90} Spain v. Procunier, 600 F.2d 189, 199–200 (9th Cir. 1979). \textit{But see} LeMaire v. Maass, 12 F.3d 1444, 1457–58 (9th Cir. 1993) (finding that although deprivation of outside exercise for most of a five-year period was objectively a “sufficiently serious deprivation under the Eighth Amendment,” the deprivation did not satisfy the subjective prong—and was therefore not a constitutional violation—because “LeMaire’s loss of outside exercise privileges [was] directly linked to his own misconduct”).

\textsuperscript{91} Craig v. Eberly, 164 F.3d 490, 496 (10th Cir. 1998). The court elaborated: “Furthermore, it is not clear from the record that all of plaintiff’s alleged deprivations lasted the entire period of incarceration. For example, plaintiff claims that his sink was frequently clogged, but stops short of saying that it was \textit{always} clogged.” \textit{Id.}

\textsuperscript{92} Barney v. Pulsipher, 143 F.3d 1299, 1311–12 (10th Cir. 1998).
The Tenth Circuit further noted that “[i]n general, the severity and duration of deprivations are inversely proportional, so that minor deprivations suffered for short periods would not rise to an Eighth Amendment violation, while ‘substantial deprivations of shelter, food, drinking water, and sanitation’ may meet the standard despite a shorter duration.”93 The Eleventh Circuit has similarly viewed duration and severity as two factors on an imperfect sliding scale.94 The necessary duration is shaped by the severity of the condition or the extent to which it violates human dignity.95 For example, the Eighth Circuit held that requiring inmates to work for even 10 minutes in a well where they faced “a shower of human excrement without protective clothing and equipment would be inconsistent with any standard of decency.”96

Therefore, a longer duration affects the serious nature of the deprivation. Lengthy persistence of what might be considered more minor deprivations could rise to the level of a sufficiently serious constitutional violation.97 Yet, the duration is intimately tied with the concept of the severity of the deprivation, as set forth below. A shorter duration of deprivation, but of a more serious kind, may also trigger a constitutional violation.98

B. Severity

An additional critical factor in the Eighth Amendment calculus is the severity of the deprivation.99 In this context, severity is not a synonym for

93. DeSpain v. Uphoff, 264 F.3d 965, 974 (10th Cir. 2001) (quoting Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000)); see also Whitmack v. Douglas Cnty., 16 F.3d 954, 958 (8th Cir. 1994) (“[T]he length of time required before a constitutional violation is made out decreases as the level of filthiness endured increases.”).
94. Chandler v. Crosby, 379 F.3d 1278, 1295 (11th Cir. 2004) (“Severity and duration do not necessarily form a perfect sliding scale, but our analysis should be informed by a consideration of both factors.”).
95. For the details of dignity analysis, see infra Part III.C.
96. Fruit v. Norris, 905 F.2d 1147, 1151 (8th Cir. 1990) (quoting Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989). For another condition of short duration but alarming severity, see Nami v. Fauver, 82 F.3d 63, 67 (3d Cir. 1996) (“Here, the allegations in the complaint raise another significant consideration; that plaintiffs were subject to sexual assaults . . .”).
97. See, e.g., Spain v. Procnunier, 600 F.2d 189, 200 (9th Cir. 1979) (finding that confinement without the ability “to go outside except for occasional court appearances, attorney interviews, and hospital appointments” was a constitutional violation when maintained “for more than four years”).
98. See DeSpain, 264 F.3d at 974.
sufficiently serious, but is a measure of how one can satisfy the need for “extreme deprivations” required by the Supreme Court.100 The Fourth Circuit has described severity as the extent to which the challenged condition may cause “a serious or significant physical or emotional injury.”101 Similarly, the Second Circuit defines it as the extent to which the condition creates a risk of death, degeneration, or extreme pain.102

Another approach to severity is assessing the effect of the totality of circumstances. This is best reflected in the Supreme Court’s most recent pronouncement on the Eighth Amendment, Brown v. Plata.103 In assessing whether injunctive relief is available to halt chronic unconstitutional overcrowding in California’s prisons, the Supreme Court noted that the “overcrowding [was] the ‘primary cause of the violation of a [f]ederal right,’ specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.”104 The Court continued:

Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to “substantial risk of serious harm” and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.105

Similarly, the Third Circuit found in Tillery v. Owens that double celling in the prison at issue was not itself unconstitutional, nor was double celling of inmates over a long duration sufficiently serious.106 However, a

100. See id.
102. Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996) (“Objectively, the alleged deprivation must be ‘sufficiently serious,’ in the sense that ‘a condition of urgency, one that may produce death, degeneration, or extreme pain’ exists.” (quoting Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994))).
105. Id. at 1925 n.3 (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994)) (emphasis added); see also Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994) (“Jordan contends that he was held in overcrowded, unsanitary local jails where the food was contaminated and fire hazards existed. These contentions implicate the deprivation ‘of a single human need,’ and if sufficiently severe, could constitute a deprivation of ‘the minimal civilized measure of life’s necessities.’” (quoting Wilson v. Seiter, 501 U.S. 294, 304-05 (1991))).
106. See Tillery v. Owens, 907 F.2d 418, 426 (3d Cir. 1990) (“[D]eficiencies and inadequacies in prison conditions do not necessarily violate the Eighth Amendment.”).
constitutional violation arose from the duration of the double celling coupled with the severe nature of the conditions, which included the amount of time prisoners were required to spend in their cells each day, sanitation, lighting, opportunities for activities outside the cells, and the repair and functioning of basic physical facilities such as plumbing, ventilation, and showers.107 Further, there existed a serious threat of abuse and sexual abuse.108 Thus, while overcrowding itself is not unconstitutional per se, when the totality or severity of conditions results in intolerable conditions, the result is a violation of the cruel and unusual punishment clause.109

To some extent, but not in all cases, severity overlaps with the notion of human dignity. Courts seem willing to find a deprivation severe, even obvious, when it runs afoul of basic notions of human dignity, in particular being free from exposure to human waste and sexual assault.110 But beyond obviously severe deprivations, severity is best viewed as a synonym of intensity.

Thus, the application of severity as a factor involves examining the extent to which an alleged deprivation that departs from evolving standards of decency—in Plata, the requisite level of adequate health care—imposes a risk of physical or emotional harm to detainees. There are situations in which the harm is immediate and obvious. Other situations may demand the combination of factors—for example, a duration or loss of dignity that, when coupled with severity, rises to

107. Id. at 423–24, 427–28.
108. Id. at 423.
109. Id. at 426–27 (reiterating that the totality-of-the-circumstances test applies to conditions of confinement claims and noting that “[c]ourts finding double-celling to be permissible have emphasized that the general prison conditions were otherwise adequate”).
110. See, e.g., id. at 423 (recounting the district court’s findings of frequent assaults and rapes in common areas, and of noxious urine sediment accumulating in toilet cracks); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (holding contact with “human waste is too debasing and degrading to be permitted”); Clark v. California, 739 F. Supp. 2d 1168, 1181 (N.D. Cal. 2010) (“When a prisoner demonstrates... that he has suffered physical or sexual assault at the hands of other prisoners, or that he lives with ‘substantial risk’ of such assault, he establishes [a] ‘sufficiently serious deprivation.’”).
112. See, e.g., Foster v. Runnels, 554 F.3d 807, 814–15 (9th Cir. 2009) (acknowledging the obvious harm “an inmate might suffer... as a result of the repeated denial of meals”).
sufficiently serious.\textsuperscript{113}

C. Dignity

In 2002, the Supreme Court decided \textit{Hope v. Pelzer}, a case involving a claim for cruel and unusual punishment arising out of an incident during which the detainee was shackled to a hitching post in the hot sun for seven hours.\textsuperscript{114} The Court held:

Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the “basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man.”\textsuperscript{115}

The question confronting the Supreme Court in \textit{Hope} was whether the officers were entitled to qualified immunity because there was no case directly on point holding such treatment violated clearly established Eighth Amendment law.\textsuperscript{116} The Court, while noting the violation in \textit{Hope} was obvious,\textsuperscript{117} emphasized the violation of dignity as a predominant factor in finding an Eighth Amendment violation.\textsuperscript{118} Although criticized for developing a new, unprecedented factor,\textsuperscript{119} \textit{Hope} stands as just another in a

\begin{itemize}
  \item \textsuperscript{113} \textit{See}, e.g., \textit{Dixon v. Godinez}, 114 F.3d 640, 644 (7th Cir. 1997) (including duration and severity among the factors courts should consider when “assessing claims based on low cell temperature”).
  \item \textsuperscript{114} \textit{Hope v. Pelzer}, 536 U.S. 730, 734–35 (2002).
  \item \textsuperscript{115} \textit{Id.} at 738 (alteration in original) (footnote omitted) (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958)).
  \item \textsuperscript{116} \textit{See id.} at 735–36.
  \item \textsuperscript{117} \textit{Id.} at 738.
  \item \textsuperscript{118} \textit{Id.} at 745.
  \item \textsuperscript{119} \textit{See id.} at 750 (Thomas, J., dissenting) (“[P]etitioner [n]ever claimed [a

The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

\textit{Id.}
well-established line of cases reinforcing the idea of fundamental human dignity as a factor to be used in assessing cruel and unusual punishment claims. For example, in *Trop v. Dulles*, the Supreme Court held that stripping someone of citizenship was cruel and unusual punishment, explaining that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”

In *Jackson v. Bishop*, then-Judge Harry Blackmun, when sitting on the Eighth Circuit Court of Appeals, discussed this notion of dignity as a factor in assessing prison claims. While acknowledging that the “limits of the Eighth Amendment’s proscription are not easily or exactly defined,” he added that “broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.” That said, some concepts of dignity are, of course, broader than others. For example, courts that have addressed exposure to human waste—while likely considering the health risks involved in such an incident—focus more significantly on the assault on dignity. The Tenth Circuit has noted that “exposure to human waste carries particular weight in the conditions calculus,” and the Eighth Circuit noted that “a shower of human excrement without protective clothing and equipment would be inconsistent with any standard of decency.” While other conditions may cause the same severity of risk of harm to a detainee, the exposure to human waste stands as a sufficiently serious violation of dignity in that, no matter how short the duration, a claim for cruel and unusual punishment arises.

Evidence of the independent factor of dignity can also be found in such cases as *Young v. Quinlan*. In *Young*, the detainee alleged that prison officials violated his Eighth Amendment rights by

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122. *Id.* at 579.
123. *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001).
not allowing [him] to leave his cell more than once to defecate or urinate over a period of several days, not providing [him] with a plastic urinal for 29 hours, not allowing [him] to empty his urinal more than twice, not allowing [him] to wash his hands before eating, not allowing [him] to bathe or shower, not providing [him] with toilet paper despite his diarrhea, [and] not providing [him] with water to drink, suggesting instead that he drink his urine.\(^{126}\)

Further, the detainee alleged that officials mocked him and threatened to chain him to a steel slab if he complained about his conditions.\(^{127}\) The Third Circuit held that the allegations “would[,] if proved[,] demonstrate a violation of the basic concepts of humanity and decency that are at the core of the protections afforded by the Eighth Amendment.”\(^{128}\)

In *Villegas v. Metropolitan Government of Nashville*, the issue of dignity arose when the detention center shackled a pregnant immigration detainee during the final stages of pregnancy and postpartum recovery.\(^{129}\) The detainee was shackled because she was designated a “medium-security inmate” by virtue of her immigration status.\(^{130}\) While the Sixth Circuit rejected a per se rule against shackling inmates during pregnancy, it held that, absent evidence in the record of a pregnant detainee being a flight risk, shackling her during labor offended “contemporary standards of human decency.”\(^{131}\)

Even in a relatively short durational period, dignity can be a significant factor in determining an Eighth Amendment violation. In *Garrett v. Schwartz*, the inmate was denied access to the bathroom during a three-hour class.\(^{132}\) Garrett was taking blood pressure medicine, and as a result, needed to make frequent trips to the restroom.\(^{133}\) Shortly after the class started, he asked the class instructor, and then the detention officer, permission to leave to use the restroom.\(^{134}\) The detention officer, following

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126. *Id.* at 365.
127. *Id.*
128. *Id.*
130. *Id.* at 574.
131. *Id.*
133. *Id.*
134. *Id.*
the policy of the prison, denied Garrett’s request. Garrett subsequently lost control of his bladder and bowels, and had to sit through the remainder of the class in his own feces. After class, he again requested permission to go to the restroom, and was instead ordered to continue on to the dining hall, where he was forced to eat lunch while sitting in his own excrement. While a relatively short period of time, the district court held that Garrett “sufficiently state[d] a claim that the denial of permission to use the restroom or clean himself after he defecated and urinated in his clothing deprived him of the ‘minimal civilized measure of life’s necessities’ as well as violated his basic human dignity.”

The factors of duration, severity, and dignity, while not perfectly objective in their application, will steer courts, practitioners, and juries toward a more consistent analysis. A look at alternative factors underscores their effectiveness.

D. Other Factors

While duration, severity, and the extent to which deprivation is inconsistent with human dignity are the primary factors courts should focus on in determining whether a claim is sufficiently serious, there are a few other factors that have been used by courts in assessing claims arising out of conditions of confinement.

1. Fault on the Detainee’s Part

Perhaps one of the most troubling notions is that the validity of a claim of cruel and unusual punishment may depend on the extent to which a detainee is responsible for the deprivation. Several courts of appeals have refused to find an Eighth Amendment violation when the detainee engaged in misconduct that resulted in the deprivation, either as punishment for the misconduct or as a practical necessity. But factoring

135. Id.
136. Id.
137. Id. at *2.
138. Id. at *4.
139. See, e.g., Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir. 2001) (holding four consecutive 90-day denials of out-of-cell exercise privileges for serious violations of prison disciplinary rules was not cruel and unusual punishment, because “allow[ing the detainee] to exercise in the yard would have given him additional opportunities to attack prison staff and set fires,” as he had done in the past); LeMaire v. Maass, 12 F.3d 1444, 1457–58 (9th Cir. 1993) (finding no Eighth Amendment violation when a prisoner was denied out-of-cell exercise for five years, because he posed a constant threat of
detainee misconduct into the equation injects a subjective component into what should be a purely objective analysis. And consideration of the detainee’s conduct interferes with the objective factors of severity or dignity.\textsuperscript{140} For example, in \textit{Armendariz v. Geo Group}, prison officials argued that locking inmates in a shower area was necessary because the inmates refused to return to their cells upon a lockdown order.\textsuperscript{141} Although the duration of the detention would still be a factor in the calculus, the detention in the shower area was, arguably, subjectively less severe or less indignant if one factors in the allegations that the inmates failed to return to their cells in a timely fashion.\textsuperscript{142}

At most, fault on the detainee’s part should remain a minor factor in the overall analysis of severity and dignity. For example, the prison officials in \textit{Hope v. Pelzer} alleged that the inmate refused to follow orders.\textsuperscript{143} But there can be little doubt that, even if true, the severe and indignant treatment of Hope was obviously cruel and unusual, regardless of any misconduct on his part.\textsuperscript{144}

2. \textit{Feasible Alternatives Given Penological Considerations}

Another questionable factor courts occasionally rely upon is whether a certain deprivation must be viewed in light of the absence of feasible alternatives, given larger penological considerations. For example, the Seventh Circuit has noted that “[o]bviously influencing whether prolonged segregation constitutes cruel and unusual punishment is the existence of feasible alternatives.”\textsuperscript{145} However, as with allegations of fault on the part of the detainee, courts that consider this factor must be cautious not to ignore

\textsuperscript{140} See \textit{Furman v. Georgia}, 408 U.S. 238, 273 (1971) (Brennan, J., concurring) (“[E]ven the vilest criminal remains a human being possessed of common human dignity.”).

\textsuperscript{141} See Order Granting Motion for Summary Judgment, \textit{Armendariz v. Geo Grp., Inc.}, No. CV 09-594 WPL/LAM, at 2 (D.N.M. June 17, 2010).

\textsuperscript{142} See \textit{id.}

\textsuperscript{143} See \textit{Hope v. Pelzer}, 536 U.S. 730, 734 (“[Hope] took a nap during the morning bus ride to the chain gang’s worksite, and when it arrived he was less than prompt in responding to an order to get off the bus.”).

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Meriwether v. Faulkner}, 821 F.2d 408, 417 (7th Cir. 1987); see also \textit{Mitchell v. Rice}, 954 F.2d 187, 191–92 (4th Cir. 1992) (applying a totality-of-the-circumstances analysis to restrictions on out-of-cell exercise and noting that “penological considerations may, in certain circumstances, justify restrictions”).
the objective nature of the Eighth Amendment analysis. There may be rare situations in which something that would typically constitute cruel and unusual punishment amounts to the only feasible penological option, such as prolonged isolation without exercise for an extremely dangerous detainee. Yet, this factor should be examined with the strictest scrutiny, and courts should permit such deprivations of basic human needs only when all other alternatives have been exhaustively considered by prison officials. A lower standard would permit officials an out based on a conclusory articulation of a lack of practical alternatives, which would be inconsistent with the established Eighth Amendment inquiry.

IV. JURY VERDICTS SUPPORT APPLICATION OF THE FACTORS OF DURATION, SEVERITY, AND DIGNITY

In addition to appellate court decisions, jury verdicts must also be considered when evaluating society’s evolving standards of decency. Though less than a dozen reported jury verdicts on successful claims for cruel and unusual punishment can be found, they support application of the factors articulated above: duration, severity, and dignity. The damages amounts themselves are of little value in articulating objective factors of deprivation because each situation is so factually distinct. However, the fact that a judgment was entered for the detainee as a result of the jury verdict bears some weight in identifying an objective calculus.

146. See Bass v. Perrin, 170 F.3d 1312, 1315–17 (11th Cir. 1999) (finding no Eighth Amendment violation for a complete denial of exercise privileges because the inmates’ misconduct while in prison—which included hijacking a dump truck and driving it through the perimeter fence in an escape attempt—made it “hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison”).

147. See Mitchell, 954 F.2d at 192 (permitting inmate behavior to justify a deprivation of exercise, but only after alternatives are examined and found infeasible).

148. See Meriwether, 821 F.2d at 417 (holding that dismissal of plaintiff’s claim without examining actual conditions of confinement and potentially feasible alternatives was “premature”).

A. Atkinson v. Taylor

In *Atkinson v. Taylor*, the detainee alleged that, during a seven-month incarceration, his cellmates were constantly smoking inside their shared cell.\(^{150}\) As a result, the detainee “suffered nausea, an inability to eat, headaches, chest pains, difficulty breathing, numbness in his limbs, teary eyes, itching, burning skin, dizziness, a sore throat, coughing and production of sputum.”\(^{151}\) The detainee also alleged various acts of retaliation in response to his complaints and requests to be moved away from the smoke.\(^{152}\) The jury awarded $85,000 in compensatory damages and $15,000 in punitive damages.\(^{153}\) It appears likely that the duration (seven months) and severity (health manifestations combined with physical assault) were factors considered by the jury in the judgment for the detainee.\(^{154}\)

B. Chao v. Ballista

In *Chao v. Ballista*, a female detainee complained of being coerced into sex with a detention officer.\(^{155}\) The officer admitted to having sex with the plaintiff dozens of times, but claimed it was consensual.\(^{156}\) The jury awarded her $67,500 in compensatory damages and $6,200 in punitive damages.\(^{157}\) All three of the articulated factors could support a judgment in this case: dozens (duration) of sexual assaults (severity and dignity) led to a jury verdict in her favor.

C. Hubbard v. Zummer

A detainee received $1 in compensatory damages and $76,000 in punitive damages on his claim for cruel and unusual punishment stemming from treatment of him as an individual with a disability.\(^{158}\) Hubbard had a

\(^{150}\) *Atkinson v. Taylor*, 316 F.3d 257, 259 (3d Cir. 2003).

\(^{151}\) *Id.* at 260.

\(^{152}\) *Id.*


\(^{154}\) *See Atkinson*, 316 F.3d at 260 (listing the harms the plaintiff alleged).


\(^{156}\) *See id.* at 341–42.


\(^{158}\) Verdict and Settlement Summary, *Hubbard v. Zummer*, No. 2:00-cv-71457, 2002 WL 32098707, at *1, (E.D. Mich. Apr. 17, 2002). Mr. Hubbard also received $30,400 on an Americans with Disabilities Act claim and $30,400 on a
congenital condition that left him with just one leg. Hubbard claimed that he was not accommodated in several ways, including inadequate access “to classes which were a great distance away, and [inadequate] shower and mail access.” Further, “[h]e slipped and fell from a folding chair while in the shower, injuring his back, and claimed that . . . prison guards made fun of his condition.” Although duration and severity of the harm may have been factors considered in deciding this case, the nominal and punitive damage awards indicate that the assault on Mr. Hubbard’s dignity supported a jury award.

D. Norwood v. Vance

In Norwood v. Vance, the plaintiff detainee was “locked down for 14 of the 22 months from Jan. 4, 2002 through Nov. 4, 2003,” and received no outdoor exercise during this period. “During the lockdown, all normal prison programs [were] canceled,” and he was confined to his cell every day of the week, except Sunday, with the exception of a five-minute shower every other day. The jury awarded Norwood $11 in nominal compensatory damages and $39,000 in punitive damages. Here, both duration (more than a full year on lockdown) and severity (the extremely limited nature of programs) unquestionably factor into the award of punitive damages.

E. West v. Hillsborough County Department of Corrections

In West v. Hillsborough County Department of Corrections, “[t]he plaintiffs alleged that while on free time, one of the defendant’s correction officers called a 10-33 (officer in distress call) which initiated a cell lockdown.” The plaintiffs “were identified by the corrections officer as inmates who attempted to take him hostage . . . [and] were removed to the

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Rehabilitation Act claim. Id. However, the punitive damages award was ultimately subject to a remittitur and was reduced to $500.00. Id. at *2.

159. Id.
160. Id.
161. Id.
162. See id. at *1.
164. Id.
165. Id.
‘hole,’ the jail’s equivalent of solitary confinement.”\textsuperscript{167} One of the plaintiffs alleged that while being transported there, “he was mistreated and assaulted by the officers, resulting in his sustaining a fractured wrist, severe abrasions to his ankles and wrists from the unnecessary tightening of the shackles, and abrasions to his face.”\textsuperscript{168} Another plaintiff “was allegedly treated similarly. His face was pushed several times by the defendants into the wall and he was subjected to an unnecessarily long strip search and taunted by the defendant’s officers.”\textsuperscript{169} The plaintiffs remained in the “hole” for two months.\textsuperscript{170} The jury found in favor of the detainees on due process and cruel and unusual punishment claims.\textsuperscript{171} The jury awarded the latter plaintiff $100,000 and the former $51,000.\textsuperscript{172} The jury award can be supported primarily by severity and a loss of dignity.

V. **Analysis of Duration, Severity, and Dignity Will Best Ensure Decisions Are Based on Objective Factors**

Proof of the effectiveness of these three factors can be found in their application to the three areas of standards discussed above. Using the floor articulated for the basic human needs of food, hygiene, and exercise, a court or practitioner can chart whether the deprivation violates the Eighth Amendment by assessing its duration, severity, and resulting loss of dignity. Before analyzing their application, it is worth emphasizing why these three factors best facilitate objective decisionmaking in the area of conditions of confinement.

In contrast to “the fault of the inmate” or “no feasible alternatives,” two of the alternative factors occasionally considered by courts and discussed above,\textsuperscript{173} the factors of duration, severity, and dignity stem from the underlying intent of the Eighth Amendment—that is, ensuring that detainees are treated with fundamental notions of dignity, as determined by the public.\textsuperscript{174} Injecting fault on the detainee’s part into the calculus undermines the assessment by forcing it into a more subjective realm. And measuring feasible alternatives to the deprivation of a basic human need runs the risk of undermining the core purpose of the Eighth

\textsuperscript{167} Id. at *1–2.
\textsuperscript{168} Id. at *2.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} See supra Part III.D.
Amendment. If a constitutional deprivation of a basic human need depends on the institutional alternatives, the dignity thread sewn in the fabric of the Eighth Amendment is torn out. Such an approach would justify potentially horrific deprivations solely because of a lack of accessible alternatives. Additionally, the concepts of duration, severity, and dignity have been reinforced by jury verdicts in favor of detainees—a demonstration that the public sees them as appropriate factors in the Eighth Amendment calculus.

A. Hypothetical Application of the Objective Factors to the Standards for Food, Hygiene, and Exercise

Clearly, receiving only two meals a day—15 hours apart for a single day—is not a deprivation of such duration or severity that results in a per se constitutional violation. Nor is it, by itself, a loss of dignity sufficient to give rise to such a claim. Yet receiving only two meals a day, 15 hours apart, for several days, or repeatedly over the course of several months, increases the likelihood that the deprivation is of such duration that it constitutes a violation. In the context of provision of food, it is unlikely that the dignity factor would apply, although an argument could be made that there could be means of presenting food that place the issue into the realm of a loss of dignity—for example, if prison officials insisted upon serving all meals after having them mixed in a giant blender that resulted in liquid meals only.

Deprivation of clothing or clean linen in a manner that departs from the evolving standards of decency could invoke all three factors. Again, running a day late on the weekly requirement that detainees receive clean sheets will probably not constitute a violation of the Eighth Amendment. However, six months without clean sheets is a considerable duration for even the less severe deprivation of clean linens, and should constitute a sufficiently serious violation. Additionally, one can imagine a scenario in which inmates are compelled to wear clothing that runs afoul of the

175. See id.
176. See supra Part IV.
177. See Hutto v. Finney, 437 U.S. 678, 687 (1978) (holding unpleasant conditions “might be tolerable for a few days”).
179. See Hutto, 437 U.S. at 686–87 (stating unpleasant conditions, though tolerable for a few days, are “intolerably cruel for weeks or months”).
fundamental notion of human dignity. Even if Sheriff Joe Arpaio’s required pink underwear\textsuperscript{180} did not fall short of the constitutional floor—and the Ninth Circuit did not decide whether it did\textsuperscript{181}—clothing with racially or sexually charged remarks would likely satisfy the loss of dignity standard in a sufficiently serious way.

Similarly, while denial of the opportunity to bathe every other day would not rise to the level of a constitutional violation after one missed opportunity, three weeks without bathing establishes a violation because of the duration \emph{and} the loss of human dignity that accompanies it. Deprivation of exercise that falls short of the one-hour-a-day evolving standard can be charted on the duration and severity line, or within the dignity circle in the alternative. The psychological effect of exercise-deprived isolation on an inmate reflects concerns that implicate fundamental notions of dignity. Depriving a person of any opportunity to exercise or to see the sun results in psychological effects on the detainee such that, in addition to duration and severity, dignity is implicated in a sufficiently serious manner.\textsuperscript{182}

Seeing how the factors apply in other contexts underscores the utility of the factors in making these determinations. The facts from a case arising in a prison in Northern New Mexico serve as a helpful example.

\textbf{B. An Example: Armendariz and the Shower Confinement}

On December 10, 2008, prison officials issued a lockdown order at the Northeast New Mexico Detention Facility (NENMDF) in Clayton, New Mexico.\textsuperscript{183} The court described the ensuing incident:

At 4:53 p.m. . . . [the] warden of NENMDF[] was advised of a disturbance in D-pod of Housing Unit Two. An inmate wielding a

\textsuperscript{180} See Wagner v. Cnty. of Maricopa, 706 F.3d 942, 948 (9th Cir. 2013), cert. denied, 133 S. Ct. 1504 (2013).

\textsuperscript{181} Id. (“Unexplained and undefended, the dress-out in pink appears to be punishment without legal justification. It appears to us that this . . . question is still open for exploration at trial on remand.”).

\textsuperscript{182} See Spain v. Procnier, 600 F.2d 189, 199 (9th Cir. 1979) (affirming the district court’s finding that preventing outdoor access made inmates “live in an atmosphere of fear and apprehension . . . under degrading conditions without affirmative programs of training or rehabilitation and without possible rewards or incentives from the state which will give them a semblance of hope” (quoting Spain v. Procnier, 408 F. Supp. 534, 545 (N.D. Cal. 1976))).

\textsuperscript{183} Order Granting Motion for Summary Judgment, Armendariz v. Geo Grp., Inc., No. CV 09-594 WPL/LAM, at 1 (D.N.M. June 17, 2010).
makeshift weapon had broken a security window and was refusing to submit to correctional officers. [The warden] ordered the entire facility into lockdown and ordered that a chemical agent be deployed in D-pod to force the inmate into submission. In an emergency, NENMDF policy requires all inmates to be locked down and inmates who are not near their housing units to be locked down at the nearest secure location.

... Several inmates... entered the shower room as they were being ordered to return to their cells. After [the warden] threatened to deploy chemical agents in E-pod, most inmates returned to their cells, but [some] refused to do so. [The warden] then ordered [them to be] secured in the shower room. [A female corrections officer] was ordered to videotape the non-compliance of E-pod inmates...

After all the inmates at NENMDF were locked down, correctional officers deployed a chemical agent in D-pod. Once the disruptive inmate was removed, an emergency response team was sent in to secure D-pod, corrections officers performed a preliminary evaluation to determine if any D-pod inmates needed medical attention due to exposure to the chemical agent, and then a medical response team performed more complete evaluations.... These activities took approximately two hours.184

Prison officials then conducted a “count of all inmates,” during which no inmate was permitted to move from his secured location.185 This did not mean the E-pod inmates were free to leave, however:

It took an additional hour and a half to perform an emergency head-count of all six hundred inmates in the facility. Upon completion of the emergency count, the lockdown was lifted and [a deputy warden] ordered [the E-pod inmates] released from the shower room. However, the key could not be located... [The inmates] asked if they could crawl out of the shower room through a hole in the cinderblock wall. [A corrections officer] told them that he could not order them to crawl out of the shower room but he would not discipline them for doing so. At 9:25 p.m. all of the [inmates in the shower] crawled out of the shower room.

According to [the E-pod inmates], initially they could not hear the lockdown orders but when they did, they began exiting the showers to

184. Id. at 1–2.
185. Id. at 2.
return to their cells. However, [prison officials] ordered them back to the showers.186

The inmates’ claims arose from the length of time they were locked in the showers and the treatment they received during that time.187 The inmates claimed that the female guard “taunted and mocked them as she videotaped them in the showers.”188 They also asserted that the shower room was cold and unsanitary, that they were refused access to a restroom, and, as a result, they were forced to urinate in the shower drains.189 When prison officials could not locate the key to the shower room, the inmates claimed they were ordered to crawl out of the showers through the cinderblock hole in the shower wall.190 Some of the inmates claimed they contracted skin and nail conditions as a result of being locked in the shower and due to scratches they received as they crawled through the dirty cinderblock hole.191 One of the inmates, an asthmatic, claimed that he suffered respiratory effects from exposure to the chemical agents used in D-pod and that prison officials ignored his requests for medical treatment of these problems both during the time he was locked in the shower, and in the ensuing days and weeks.192

The inmates brought suit alleging that prison officials “deprived them of their Eighth Amendment right to be free from cruel and unusual punishment.”193 The district court granted summary judgment for the prison officials, holding that the “conditions arising out of [the inmates’] four-and-a-half hour confinement to the shower room at NENMDF during a prison disturbance on...are not sufficiently serious to constitute constitutional violations under the Eighth Amendment.”194

In the Armendariz shower confinement case, the district court primarily examined duration and severity in granting summary judgment to the prison officials.195 Under a sliding scale employing just those two

186. Id. at 2–3.
187. Id. at 4.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id. at 6.
193. Id. at 4.
194. Id. at 26 (emphasis added).
195. See id. at 18–21.
factors, the court’s decision is a sound and straightforward analysis.\textsuperscript{196} However, had dignity been examined more significantly as a factor, the facts alleged by the plaintiffs should have permitted the matter to proceed to trial by jury. Standing naked, or nearly so, for hours in a cold, dirty shower room without access to toilet facilities—in part because the key to the shower room was lost—while being videotaped and then having to crawl out of a filthy cinderblock hole runs afoul of basic notions of human dignity protected by the Eighth Amendment.

VI. CONCLUSION

Application of the factors of duration, severity, and loss of dignity will not enable every court to render a purely objective decision with regard to every claim regarding a condition of confinement. However, these factors, unlike fault of the inmate or feasible institutional alternatives, place the focus objectively on the inmate, and will result in more consistent decisionmaking than the ad hoc approach demonstrated by courts to date.

What remains is identifying the public consensus—the evolving standard—on a host of other correctional areas, ranging from provision of mental health care to the use of solitary confinement. Further review of state standards and civil jury verdicts in these areas will illuminate the necessary floor. After establishing the constitutional minimum in each context, courts can then determine claims brought by detainees by assessing the duration, severity, and loss of dignity involved in any deprivation of a “minimal civilized measure of life’s necessities.”\textsuperscript{197}

\textsuperscript{196} See id. at 19 (“Four-and-a-half hours is a very short period of time.”); id. at 20 (“Plaintiffs claim that they were ‘cold’ but provide no specific evidence as to how cold it was. Even with little or no clothing, being ‘cold’ for four-and-a-half hours is not sufficiently serious.”).