DOCTORING AN INMATE'S BASIC RIGHTS: INMATE HEALTHCARE AND *FOURTE V. FAULKNER COUNTY*

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I. INTRODUCTION

The adult correctional population in the United States totals nearly seven million people.[1] Inmates are ostensibly guaranteed certain rights[2]—significant among these is the right to be free from "cruel and unusual punishment" while incarcerated.[3] Beyond the implication that inmates cannot be tortured,[4] the Eighth Amendment affords inmates protection against the "deliberate indifference to serious medical needs."[5] However, when officials violate the prohibition against cruel and unusual punishment, they may be "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known,'" meaning that the officials could successfully assert the qualified-immunity privilege in a

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1. *See* LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS BULL. NO. NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1 (2014) ("An estimated 6,899,000 persons were under the supervision of adult correctional systems at yearend 2013 . . . .").

2. *See generally* Peter R. Shults, Note, *Calling the Supreme Court: Prisoners' Constitutional Right to Telephone Use*, 92 B.U. L. REV. 369, 373–80 (2012) (providing an example of how inmates partially retain some constitutional rights).

3. U.S. CONST. amend. VIII.

4. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion) ("'[I]t is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden' by the Eighth Amendment." (second alteration in original) (quoting Wilkerson v. State of Utah, 99 U.S. 130, 136 (1879))).

5. Estelle v. Gamble, 429 U.S. 97, 104 (1967) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

civil action.[6] In *Mitchell v. Forsyth*,[7] the Court noted that "[t]he entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[8] If correctly invoked, qualified immunity protects government officials from suit when they have violated an individual's constitutional rights.[9] Although this defense is often necessary to protect officials who are acting in their official capacity, courts have accepted qualified immunity as a defense in some seemingly unsavory situations—as in *Fourte v. Faulkner County*.[10] The court in *Fourte* held that an inmate, whose untreated high blood pressure eventually led to blindness, failed to prove that qualified immunity should not apply to the prison officials and the county jail that allegedly deprived him of his right to be free from cruel and unusual punishment.[11]

This Case Comment first explores how the Eighth Amendment, 42 U.S.C. § 1983, and qualified immunity work together during litigation. It then analyzes qualified immunity's historical and social impact on medical treatment under the Eighth Amendment. Next it explains and critiques the *Fourte* decision. And finally, it concludes with a pragmatic call for Congress to reexamine inmates' rights to adequate medical care in light of recent healthcare reform in the United States.

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6. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242." *Id.* For purposes of this Case Comment and the subsequent analysis of *Fourte v. Faulkner County*, the focus will be on claims brought under 42 U.S.C. § 1983.

7. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

8. *Id.* (second alteration in original). However, qualified immunity is often referred to as a defense. *See, e.g.*, Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 501 (2008).

9. *See Forsyth*, 472 U.S. at 526.

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed these acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.

Id.

10. *See* Fourte v. Faulkner County, 746 F.3d 384, 387, 390 (8th Cir. 2014) (citing Keil v. Triveline, 661 F.3d 981, 985 (8th Cir. 2011); Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

11. *See id.* at 390.

II. HISTORICAL AND SOCIAL PERSPECTIVE OF THE EIGHTH AMENDMENT

A. Titus Oates's and Humanism's Influence on the Eighth Amendment

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[12] This Amendment's history is rooted in seventeenth-century English jurisprudence.[13] As a result of the extreme sentence passed on a man named Titus Oates for perjury, public reaction began to shape what would eventually become a cornerstone of the United States Constitution.[14] Regardless of Titus Oates's crimes,[15] English society was unable to accept the severity of his sentence, which was "too much if innocent, and . . . without a precedent."[16] In 1689, the English Parliament enacted a law to prohibit such punishment due to its concern that extreme punishments would deviate from established common law standards.[17] Although Titus Oates's punishment was excessive, Parliament seemed

12. U.S. CONST. amend. VIII.

13. *See* Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 420 (1995).

14. WAYNE C. BARTEE & ALICE FLEETWOOD BARTEE, LITIGATING MORALITY: AMERICAN LEGAL THOUGHT AND ITS ENGLISH ROOTS 114–15 (1992).

15. *See id.* at 114. Titus Oates gave false testimony, which led to the unjust conviction and execution of multiple people. *Id.* at 115. His sentence for perjury was unusual:

> [H]e was condemned to have his priestly habit taken from him, to be a prisoner for life, to be set on the pillory in all the public places of the city, and ever after that to be set on the pillory four times a year, and to be whipt by the common hangman from Aldgate to Newgate one day, and the next from Newgate to Tyburn; which was executed with so much rigour, that his back seemed to be all over flead. This was thought too little if he was guilty, and too much if innocent, and was illegal in all the parts of it: for as the secular court could not order ecclesiastical habit to be taken from him, so to condemn a man to a perpetual imprisonment was not in the power of the court: and the extream rigour of such whipping was without a precedent.

Trial of Titus Oates, 10 Howell's State Trials 1079, 1079 n.* (1685). Pillory was "[a] punishment instrument consisting of a wooden framework with holes through which an offender's head and hands were placed and secured." *Pillory*, BLACK'S LAW DICTIONARY (10th ed. 2010).

16. *See* BARTEE & BARTEE, *supra* note 14, at 114.

17. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 121 (2004) (citing Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (per curiam)).

focused not on the actual physical abuse, but rather considered the court's deviation from traditional common law punishments "cruel and unusual."[18] Titus Oates's condemnation, therefore, indirectly influenced the drafters of the United States Bill of Rights to ultimately place the Eighth Amendment within American jurisprudence.[19] So arguably, including the Amendment was an attempt to preserve democratic and societal values.[20] The Eighth Amendment has a storied history in American jurisprudence, and the Amendment has been subjected to various interpretations, especially when it applies to inmate rights.[21]

As with many constitutional topics, it is seemingly impossible that the Founders could have been aware of the future growth and expansion of their ideas when they drafted the Eighth Amendment.[22] But one likely reason Congress established the Eighth Amendment was to prevent future Congresses "from inventing the most cruel and un-heard-of punishments, and annexing them to crimes . . . ."[23] To that end, the Eighth Amendment

18. *Id.* at 121–22 (emphasis omitted).

19. *See id.*; BARTEE & BARTEE, *supra* note 14, at 115; U.S. CONST. amend. VIII.

20. *Cf.* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained . . . : 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (second alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion))). 'Bloody Assizes' refers to the innocent blood shed because of Titus Oates's perjury. BARTEE & BARTEE, *supra* note 14, at 114–15. *But see* Claus, *supra* note 17, at 143 ("Some scholars have mistakenly suggested that the cruel-and-unusual-punishments clause responded to brutal methods of punishment employed by Sir George Jeffreys when sentencing perpetrators of a rebellion against King James in 1685. . . . It was *against* Oates's sentence that [the clause responded] . . . ." (footnote omitted)).

21. *Cf.* Claus, *supra* note 17, at 119–24 (citing Ewing v. California, 538 U.S. 11 (2003) and *Atkins*, 536 U.S. 304) ("Members of the Supreme Court in two recent cases offered alternative visions of the Amendment's function.").

22. *See* Bukowski, *supra* note 13, at 421–22.

23. Abraham Holmes, Speech at the Massachusetts Ratifying Convention (Jan. 9, 1788), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., Philadelphia: J.B. Lippincott Co. 2d ed. 1836); *cf.* Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (upholding a punishment because it was not "invented" and concluding that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history"); Furman v. Georgia, 408 U.S. 238, 276–77 & n.20 (1972) (Brennan, J. concurring) (discussing the relationship between "arbitrary," "cruel," and "unusual punishments"); Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality

was intended to prohibit punishments that are inhumane.[24] Arguably, empathy and sympathy for humanity were the building blocks that explain the public's reaction to Titus Oates's punishment.[25] And to an extent, the same is true today. For instance, in 1993, the Supreme Court extended the theory behind the Eighth Amendment to ensure prisoners are not involuntarily and excessively exposed to dangerous amounts of second-hand smoke.[26] This expansion of the Eighth Amendment appears to indicate the present culture's awareness of a need for progressive medical standards;[27] accordingly, the breadth of prisoners' rights is expanding in conjunction with society's progression.[28]

opinion) (discussing cases interpreting the Eighth Amendment and concluding that "[t]hese cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual'"); CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1704–05 (Kate M. Manuel et al. eds., Centennial ed. 2015) (cases decided through July 29, 2015) (recounting the history of the debates over and adoption of the "Cruel and Unusual Punishments Clause").

24. *See Furman*, 408 U.S. at 277 (Brennan, J., concurring) ("A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity."); Weems v. United States, 217 U.S. 349, 368 (1910) ("It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like.").

25. *Cf.* BARTEE & BARTEE, *supra* note 14, at 114 (describing the public "[r]eaction to the barbaric and excessive penalties"). *But see* Claus, *supra* note 17, at 141–42 (describing the primary concern as the departure from tradition).

26. Helling v. McKinney, 509 U.S. 25, 28–31, 35 (1993); *see also* Jacqueline M. Kane, Note, *You've Come a Long Way, Felon:* Helling v. McKinney *Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment*, 72 N.C. L. REV. 1399, 1400–01 (1994); *cf.* McKinney v. Anderson, 924 F.2d 1500, 1505–07 (9th Cir.) ("In sum the Surgeon General concluded, '[i]nvoluntary smoking is a cause of disease, including cancer, in healthy nonsmokers.'" (quoting U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL 7 (1986))), *vacated and remanded sub nom*. Helling v. McKinney, 502 U.S. 903 (1991), *reinstated and remanded*, McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992), *aff'd and remanded sub nom.*, Helling v. McKinney, 509 U.S. 25.

27. *See, e.g.*, *US Health System Ranks Last Among Eleven Countries on Measures of Access, Equity, Quality, Efficiency, and Healthy Lives*, COMMONWEALTH FUND, http://www.commonwealthfund.org/publications/press-releases/2014/jun/us-health-system-ranks-last [https://perma.cc/9NJN-YDXY].

28. *See* Kane, *supra* note 26, at 1407.

B. Qualified Immunity's Evolving Standard

The doctrine of qualified immunity arose to ensure no undue liability was placed on government officials because limitless liability might prohibit officials from properly performing their jobs.[29] In *Wood v. Strickland*,[30] the Supreme Court created a qualified-immunity test, holding that it "need only be established that the defendants did not, in the light of all the circumstances, act in good faith" for immunity to fall away.[31] This standard was "based not only on [an official's] permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."[32] The Court stated that an official is

> not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . .[33]

Hence, under the *Wood* standard, an official was not immune to suit if the official "knew or reasonably should have known" her actions were unjust or the official wrongfully intended to deprive another individual of her constitutional rights.[34]

However, in *Harlow v. Fitzgerald*,[35] the preceding analysis for qualified-immunity suits shifted when the Court altered the analysis to strengthen officials' rights.[36] Qualified immunity evolved away from the malicious-intent requirement[37] because the Court felt that "bare allegations" were no longer an adequate reason to subject officials to the

29. *See* 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 3:6 & nn.4–5 (3d ed.), Westlaw (database updated Dec. 2015) (discussing cases elaborating on this theme).

30. Wood v. Strickland, 420 U.S. 308, 314 (1975), *overruled by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

31. *Id.* (quoting Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973), *vacated sub nom. Wood*, 420 U.S. 308).

32. *Id.* at 322.

33. *Id.*

34. *Id.*

35. *Harlow*, 457 U.S. 800.

36. *Id.* at 817–18.

37. *Id.*

plight and expense of litigation.[38] These shifts in the doctrine reflect competing public policy goals.

C. Public Policy Supports Qualified Immunity

The purposes supporting qualified immunity are twofold. First, qualified immunity is a defense to lawsuits brought under 42 U.S.C. § 1983 (2012), which provides a federal cause of action for individuals whose constitutional rights allegedly have been violated by a state actor.[39] Second, qualified immunity protects officials' rights by ensuring that they are not prosecuted for their actions without proper notice that they had been violating an individual's constitutional rights.[40] Qualified immunity exists, in part, to ensure that when an official performing her duty violates a constitutional right, the official is only subjected to suit upon sufficient notice that her actions were prohibited.[41] Qualified immunity is, in effect, a safeguard—protecting officials' procedural due process rights to adequate notice.[42] Notably, Judge Learned Hand, a jurist of great repute,[43] wrote the following on the policy considerations underlying the analogous doctrine of absolute immunity for United States attorneys:

> [A]n official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected

38. *Id.* ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

39. 42 U.S.C. § 1983 (2012). *See generally* Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Mitchum v. Foster, 407 U.S. 225, 238–42 (1972) (analyzing the history of § 1983 and describing it as a "uniquely federal remedy against" the power of state law enacted for various public policy reasons); Monroe v. Pape, 365 U.S. 167, 172–87 (1961) (discussing the extensive history behind § 1983), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

40. Hope v. Pelzer, 536 U.S. 730, 739–40 (2002); *see also id.* at 739 ("[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))).

41. *Id.* at 739–40.

42. *See id.* at 739; *see also* SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS 207 (Jeffery S. Gutman ed., 2d ed. 2004).

43. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 263 (expanded ed. 1988).

> with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[44]

Finally, qualified-immunity protection is necessary for officials because the expenditure of assets in litigation against officials is "wide-ranging, time-consuming, and not without considerable cost to the officials involved. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."[45] If officials were not afforded protection from liability for performing their official duties, then they might be deterred from assuming crucial roles within society.[46]

III. MAKING SENSE OF QUALIFIED IMMUNITY, THE EIGHTH AMENDMENT, AND SERIOUS MEDICAL NEEDS

A. Qualified Immunity and an Official's Duty to Supply Medical Treatment

Section 1983[47] is a catchall provision that establishes an individual's right to bring a civil action when her rights have been violated.[48] However, there is a counter: qualified immunity.[49] Again, qualified immunity is an affirmative defense available to government officials that protects them from a § 1983 suit.[50] As a result, when an official violates an individual's constitutional rights that official may not be liable for the violation.[51] But

44. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

45. Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in part by an equally divided court*, 452 U.S. 713 (1981) (per curiam).

46. *See id.*

47. 42 U.S.C. § 1983 (2012).

48. *Id.*

49. *Id.*; *see also* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

50. *Gomez*, 446 U.S. at 640.

51. *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

qualified immunity will not apply when an official should have known her actions violated "*clearly established* statutory or constitutional rights of which a reasonable person would have known."[52] The plaintiff shoulders the burden to prove this with sufficient clarity.[53] So when an official is deemed to have been on notice that her act or omission violated a constitutional right of another, she will not be shielded from liability by qualified immunity.[54]

To establish whether an official has violated an individual's constitutional right, courts look to see whether the "constitutional right . . . [was] clearly established," which requires that "its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"[55] For example, in *Reece v. Groose*,[56] the Eighth Circuit held that the district court correctly denied prison officials' motion for summary judgment where a prisoner had been assaulted and burned and did not receive prompt medical treatment because there were questions of fact regarding whether the risk of serious harm to the prisoner was obvious and "whether reasonable officers would have done more to protect [the prisoner] after placing him in administrative segregation."[57] The court also affirmed the denial of summary judgment because the prisoner "produced testimony from an acquaintance who saw [the burns]," so, when viewed in the light most favorable to the prisoner, a jury could conclude that the prison guard consciously disregarded the prisoner's serious medical condition—conduct that could constitute an Eighth Amendment violation.[58]

Conversely, in *Good v. Olk-Long*,[59] the circuit court held that officials who did not give prisoners protective coveralls during waste cleanup fell within the shield of qualified immunity because the officials did supply

52. *Id.* (emphasis added).

53. *See, e.g.*, Findlay v. Lendermon, 722 F.3d 895, 899 (7th Cir. 2013); Bazzi v. City of Dearborn, 658 F.3d 598, 607 (6th Cir. 2011); Hynson *ex rel.* Hynson v. City of Chester, 827 F.2d 932, 935 (3d Cir. 1987) ("Although the officials claiming qualified immunity have the burden of pleading and proof, a plaintiff who seeks damages for violation of constitutional rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." (citations omitted)).

54. *Hope*, 536 U.S. at 739.

55. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

56. Reece v. Groose, 60 F.3d 487 (8th Cir. 1995).

57. *Id.* at 490.

58. *Id.* at 492.

59. Good v. Olk-Long, 71 F.3d 314 (8th Cir. 1995).

some protective gear for the inmates.[60] Although this case was decided under the *Wood* subjective-good-faith standard,[61] it still suggests that courts, when adjudicating claims where an official invokes qualified immunity, can weigh the totality of the circumstances on a factual, case-by-case basis.[62] Courts have applied this type of approach to find a right "clearly established" even "in novel factual circumstances."[63]

Given these cases surrounding officials' treatment of prisoners, it is not surprising that the deprivation of medical treatment has become a recognized violation of the Eighth Amendment.[64] Additionally, local governments may also be found to have official-capacity liability when their officials cause a victim's deprivation of rights due to a "government[al] policy or custom."[65] When the officials' acts or omissions following these customs lead to deliberate indifference, no qualified-immunity protection is available to the government.[66] To summarize, an official's deliberate indifference toward an individual's constitutional rights may expose the local government to liability when the government official was acting according to an official policy and should have known what she was doing violated the individual's constitutional rights.[67]

B. Deliberate Indifference to Medical Needs

In the context of the Eighth Amendment's protection from cruel and

60. *Id.* at 316.

61. Wood v. Strickland, 420 U.S. 308, 321–22 (1975), *overruled by* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

62. *Good*, 71 F.3d at 316.

> The prison employees testified they did not deem it necessary to wear coveralls themselves because they had already cleaned the area . . . . This does not, under the totality of circumstances, demonstrate bad faith on the part of the employees. Obviously, employees may not enjoy the privilege of qualified immunity if the totality of the circumstances would demonstrate their belief was unreasonable.

Id.

63. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.").

64. *E.g.*, Langford v. Norris, 614 F.3d 445, 453 (8th Cir. 2010).

65. Grayson v. Ross, 454 F.3d 802, 810–11 (8th Cir. 2006) ("Rather, official-capacity liability must be based on deliberate indifference or tacit authorization." (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978))); *see also Monell*, 436 U.S. at 690–95.

66. *Grayson*, 454 F.3d at 811 & n.2.

67. *See generally Monell*, 436 U.S. at 690–95.

unusual punishment, deliberate indifference occurs when there is either interference with necessary care or "infliction of . . . unnecessary suffering."[68] Deliberate indifference is shown via a two-step inquiry that gives consideration to an inmate's "objective" ailment as well as the official's "subjective" knowledge of the problem.[69] To meet the objective prong in a medical context, a plaintiff must prove that she had an objectively serious medical need that officials subjectively knew of and deliberately disregarded.[70] Courts have clarified what constitutes an *objectively serious medical need*: it is either obvious to the average nonmedical professional or diagnosed by a physician.[71]

Because the need is *deliberately* disregarded, it is not synonymous with medical negligence; however, medical care can at times drift so far from what is acceptable that it crosses into the realm of indifference.[72] For example, in *Gordon ex rel. Gordon v. Frank*,[73] where officials knew of an inmate's medical difficulties and knew that the inmate had been complaining of related symptoms but the officials failed to act, the Eighth Circuit held that the officials were to be denied qualified immunity based on their deliberately indifferent behavior.[74] But in *Fourte v. Faulkner County*, a case with similar facts (and even authored by the same judge), the court declined to extend *Gordon*'s conclusion because Fourte's injuries were deemed less obvious.[75]

68. Estelle v. Gamble, 429 U.S. 97, 101, 103–04 (1976).

69. Nelson v. Corr. Med. Servs., 583 F.3d 522, 529 (8th Cir. 2009) (citing Farmer v. Brennan, 511 U.S. 825, 838–39, 842 (1994)).

70. *Estelle*, 429 U.S. at 106 ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment."); *see also* Hudson v. McMillian, 503 U.S. 1, 5 (1992); Wilson v. Seiter, 501 U.S. 294, 297 (1991); *cf.* Helling v. McKinney, 509 U.S. 25, 35 (1993) (discussing "subjective and objective elements necessary to prove an Eighth Amendment violation"). *See generally Farmer*, 511 U.S. at 834 (1994) (discussing an analogous standard applied in prison-condition cases).

71. Aswegan v. Henry, 49 F.3d 461, 464 (8th Cir. 1995).

72. Moore v. Duffy, 255 F.3d 543, 545 (8th Cir. 2001) ("Although medical negligence does not violate the eighth amendment, [the medical professional did] not dispute that it was 'clearly established' when he treated [the inmate] that medical treatment may so deviate from the applicable standard of care as to evidence a physician's deliberate indifference." (citation omitted)).

73. Gordon *ex rel.* Gordon v. Frank, 454 F.3d 858 (8th Cir. 2006)

74. *See Gordon*, 454 F.3d at 862–66.

75. Fourte v. Faulkner County, 746 F.3d 384, 388 (8th Cir. 2014).

IV. *FOURTE V. FAULKNER COUNTY*

A. Facts

Broderick L. Fourte, Sr., the plaintiff in this case, was an inmate who had been diagnosed with high blood pressure prior to his incarceration in an Arkansas penitentiary.[76] Fourte had a prescription for blood pressure medicine before he was convicted.[77] Upon his arrival at the prison, Fourte asked the prison officials to contact his family to retrieve his prescription; however, the family was not contacted.[78]

Due to his lack of required medicine, Fourte made an appointment with the prison physician, Dr. Garry L. Stewart, complaining of high blood pressure.[79] The prison nurse, Tamara R. Lumpkin, recorded Fourte's vitals, and the prison guards were given orders to monitor Fourte's blood pressure daily.[80] Additionally, on a day when Fourte's blood pressure was exceptionally high, 180/121, "Lumpkin gave [Fourte] a blood-pressure pill."[81] Although the blood pressure pill Lumpkin administered was on hand at the prison, it was not the medication that was eventually prescribed to Fourte.[82] The record further reflects that the prison workers failed to monitor Fourte's blood pressure daily as required, possibly because Fourte had become physically unable to remove himself from his cell bed.[83] The day after Fourte finally received a blood pressure pill, he wrote to the medical staff: "Thanks for the blood pressure pill but I need it every day and I am losing my eye. I don't see that good. It's getting bad. I need help please I need help bad."[84] Six days after his note, Fourte was able to visit

76. *Id.* at 386.

77. *See Fourte*, 746 F.3d at 386 (discussing Fourte's request that his family bring his prescription to the correctional facility, which implied he had previously been seen by a doctor).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 387. *See generally Blood Pressure Chart: What Your Reading Means*, MAYO CLINIC (Feb. 21, 2015), http://www.mayoclinic.org/diseases-conditions/high-blood-pressure/in-depth/blood-pressure/art-20050982 [http://perma.cc/48P7-K55Q] (indicating that the highest blood pressure category is Stage 2 hypertension: a reading over 160/100).

82. *Fourte*, 746 F.3d at 387.

83. Fourte v. Faulkner County, No. 4:11CV00726 BRW–BD, 2013 WL 2099661, at *3 & n.3 (E.D. Ark. Apr. 24, 2013) (magistrate judge recommendation), *adopted in full by* No. 4:11CV00726 BRW–BD, 2013 WL 2099703 (E.D. Ark. May 14, 2013), *rev'd*, 746 F.3d 384 (8th Cir. 2014).

84. *Fourte*, 746 F.3d at 387.

Dr. Stewart, who measured Fourte's blood pressure.[85] Dr. Stewart wrote a prescription for the necessary medicine but did not take any other immediate action or continue treating Fourte with the medicine in the prison stores.[86]

Eleven days passed. Fourte still did not receive his medication.[87] During the eleven-day period, Dr. Stewart had to reissue the prescription request for Fourte's medicine from the contracted company that provided the prison with medication.[88] After a total of "approximately thirty-four days without [his prescription]," Fourte finally received his medicine.[89] But it was too late; within a year of arriving at the jail, "Fourte was diagnosed as legally blind."[90] In bringing this action, Fourte "presented evidence linking his blindness to lack of blood-pressure medicine while incarcerated."[91]

B. Procedural History

Fourte brought suit against Faulkner County, Dr. Stewart, Lumpkin, and a handful of other officials under § 1983.[92] Fourte argued that these officials violated his Eighth Amendment right to be free from cruel and unusual punishment.[93] In addition to his claims for individual liability, Fourte brought a claim for official-capacity liability against Faulkner County for its policies and customs that the individual defendants followed.[94]

Specifically, Fourte argued the following: (1) the lack of medical screening at the time Fourte entered the detention center constituted deliberate indifference of his right to adequate medical treatment; (2) not prescribing medicine sooner was deliberate indifference; and (3) delay in receiving medication was deliberate indifference.[95]

85. *Id.* at 387; *see also* Statement of Indisputable Material Facts in Support of Motion for Summary Judgment at 4, *Fourte*, 2013 WL 2099661.

86. *See Fourte*, 746 F.3d at 387 (stating that the medication Dr. Stewart prescribed had to be ordered).

87. *Id.*

88. *See id.* at 390 (referring to the "County's prescription delivery system").

89. *Fourte*, 2013 WL 2099661, at *5.

90. *Fourte*, 746 F.3d at 387.

91. *Id.*

92. *See generally id.* at 386–88; *see also Fourte*, 2013 WL 2099661, at *2.

93. *Fourte*, 746 F.3d at 386.

94. *See Fourte*, 2013 WL 2099661, at *2; *Fourte*, 746 F.3d at 389.

95. *Fourte*, 746 F.3d at 387–88.

The magistrate judge recommended granting summary judgment for most of the officials who were sued in their individual capacities.[96] However, the magistrate judge did not recommend granting summary judgment for Faulkner County in its official capacity over its employees, nor for Lumpkin and Dr. Stewart in their individual capacities as medical practitioners.[97]

As for the official-capacity liability, Fourte contended that the prison exhibited a custom of unconstitutionally ignoring objectively serious medical conditions; specifically, Fourte claimed that his initial blood pressure was disregarded, even though his tests indicated it was "dangerously high."[98] Faulkner County disputed this statement and argued that safe medical procedures were in place; however, the County failed to provide any evidence regarding these procedures.[99] The magistrate judge found that summary judgment was not appropriate without a complete record of the prison's medical procedures and customs.[100] Consequently, the district court found that, when the evidence was viewed in the light most favorable to the nonmovant, a reasonable juror could conclude that deliberate indifference toward Fourte's medical needs had occurred; thus, the court denied Faulkner County's motion for summary judgment and the officials' motions for summary judgment in their official capacities.[101]

On Lumpkin's and Dr. Stewart's individual capacities, the magistrate judge found that, although Fourte received some medical treatment while detained, factual questions remained as to "why Mr. Fourte was not provided a medical screening when he was initially booked into the Detention Center; why Mr. Fourte went approximately thirty-four days without blood pressure medication; and why Mr. Fourte was not administered the blood pressure medication prescribed by Dr. Stewart for nearly two weeks."[102] Because these questions, when viewed most favorably to Fourte, might show deliberate indifference by Lumpkin and Dr. Stewart, the magistrate judge recommended that summary judgment was not appropriate.[103] The district court adopted the magistrate judge's

96. *See Fourte*, 2013 WL 2099661, at *1, *6.
97. *Id.* at *1, *5–6.
98. *Id.* at *2 (quoting Plaintiff's Brief in Support of His Response to Defendant's Motion for Summary Judgment at 14).
99. *Id.* (quoting Brief in Support of Motion for Summary Judgment at 4).
100. *Id.*
101. *See id.* at *1–3, *5–6.
102. *Id.* at *5.
103. *Id.*

findings in their entirety,[104] and the defendants filed an interlocutory appeal.[105]

C. Explanation of the Opinion

Judge Duane Benton, sitting on a panel with Judges Raymond W. Gruender and Jane Kelly, wrote the opinion for the Eighth Circuit Court of Appeals.[106] Because this was an interlocutory appeal from a denial of summary judgment, the court gave the lower court's findings no deference, and the court addressed the plaintiff's claim:

> (1) whether the facts alleged, construed in the light most favorable . . . [to the plaintiff], establish a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the alleged violation, such that a reasonable official would have known that her actions were unlawful.[107]

On a motion for summary judgment, a court decides a case by applying the law to the undisputed facts.[108] Because of this procedural posture, deference to the lower court would prove futile; there is nothing more for the appellate court to do than ensure that the law was correctly applied to the undisputed facts.[109] Where the facts are not disputed, there is no need for the case to proceed if it may be disposed of earlier.[110] However, where a reasonable person could apprehend alternate outcomes from the undisputed facts, summary judgment should never be granted.[111] The court

104. *See* Fourte v. Faulkner County, No. 4:11CV00726 BRW–BD, 2013 WL 2099703 (E.D. Ark. May 14, 2013), *rev'd*, 746 F.3d 384 (8th Cir. 2014).

105. *Fourte*, 746 F.3d at 386.

106. *Id.*

107. *Id.* (second alteration in original) (quoting Keil v. Triveline, 661 F.3d 981, 985 (8th Cir. 2011)).

108. FED. R. CIV. P. 56(a).

109. *See id.*; *see also* Elbe v. Yankton Indep. Sch. Dist. No. 1, 714 F.2d 848, 850 (8th Cir. 1983) ("Appellate review of a grant of summary judgment under Rule 56 is governed by the same standard as that applied by the district court."); *cf.* Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 737–38 (2006) (reasoning that because summary judgment applies only to questions of law, and appellate courts are better structured than district courts "to conduct deep analysis of legal questions," de novo review of a grant or denial of summary judgment is logical and proper).

110. *See* Javetz v. Bd. of Control, 903 F. Supp. 1181, 1186 (W.D. Mich. 1995).

111. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

rejected Fourte's claims on these procedural grounds and concluded that there were no materially disputed facts from which a reasonable person could arrive at varying conclusions with regard to Dr. Stewart and Lumpkin as to "whether they should have responded sooner to the missing medication," and remanded the case for further proceedings regarding the "County's prescription-delivery system."[112] The court believed that, given the circumstances and the applicable law, there was only a single verdict at which this case could arrive.[113] Accordingly, the Eighth Circuit "affirm[ed] in part, reverse[d] in part, and remand[ed]" the case.[114]

The court held that Fourte did not have a constitutional right to a "general medical screening when admitted to a detention center," and he did not show an objectively serious medical need that the officials deliberately disregarded.[115] The court arrived at this conclusion because it felt Fourte's symptoms were neither as serious nor as obvious as symptoms in similar cases.[116] And Fourte could only have shown deliberate indifference if he proved: "(1) that [he] suffered [from] objectively serious medical needs and (2) that the prison officials actually knew of but deliberately disregarded those needs."[117] Additionally, the court concluded that, because there were no governmental policies in place that Lumpkin and Dr. Stewart acted under that resulted in a denial of rights, official-capacity liability did not apply and they were entitled to qualified immunity.[118] So the court of appeals remanded the case with instructions for the district court to enter summary judgment on that claim.[119]

The court also concluded that Lumpkin and Dr. Stewart were entitled to summary judgment based on qualified immunity.[120] The court found

112. Fourte v. Faulkner County, 746 F.3d 384, 390 (8th Cir. 2014). The court concluded that "Fourte [did] not show[] that 'the known facts would inform a reasonable actor that his actions violate an established legal standard.'" *Id.* (quoting Pool v. Sebastian County, 418 F.3d 934, 944 (8th Cir. 2005)). As a result, the defendants were "entitled to qualified immunity" and accordingly, summary judgment. *Id.*

113. *See id.*

114. *Id.* at 386, 390.

115. *Id.* at 388.

116. *Id.*

117. *See id.* at 387 (alteration in original) (quoting Jolly v. Knudsen, 205 F.3d 1094, 1096 (8th Cir. 2000)).

118. *See id.* at 389.

119. *See id.* at 386, 389–90.

120. *See id.* at 388–89.

that, at most, Lumpkin and Dr. Stewart committed medical malpractice.[121] The court explained that "[d]eliberate indifference is 'more than negligence, more even than gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation.'"[122] Because Fourte did not show that Lumpkin and Dr. Stewart should have known they were violating a clearly established legal standard, the court reversed the district court's denial of summary judgment.[123] Additionally, the court affirmed the summary judgment for the other "non-medical jail officials," whom Fourte had sued in their individual capacities.[124]

V. ANALYSIS

A. The Effect on Existing Law: Procedural Shortcomings and the Expansion of Officials' Rights

Before beginning a macro analysis of *Fourte*, it is important to consider the bare bones of this decision. In deciding this case, the appellate court narrowly interpreted prisoner rights, and as a result, expanded the doctrine's overall purpose of protecting officials from liability.[125] If the Eighth Circuit had taken a more liberal and flexible approach with Fourte's complaints, it is possible that this case might have been decided differently.[126] Consequently, *Fourte* was decided incorrectly from both procedural and substantive perspectives.

121. *Id.* at 389.

122. *Id.* at 387 (quoting *Jolly*, 205 F.3d at 1096).

123. *See id.* at 388, 390.

124. *Id.* at 386 n.1.

125. *See generally id.* at 387–90. The court cited *Coleman v. Rahija* accurately but limited the two interpretations of a "serious medical need"—"diagnosed by a physician . . . , or . . . so obvious that even a layperson would easily recognize the necessity for a doctor's attention"—to just the second interpretation and disregarded the first in application. *Id.* at 388 (quoting Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997)). The court also applied *Whitley v. Albers* to hold that conflicting expert witness testimony cannot establish deliberate indifference even when construed most favorably to Fourte instead of using *Smith v. Jenkins*, which clearly states that a gross deviation from the standard of care can amount to deliberate indifference. *Id.* at 387, 389 (first citing Whitley v. Albers, 475 U.S. 312, 322–23 (1985); and then citing Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990)).

126. *See* Hope v. Pelzer, 536 U.S. 730, 736–39, 741–42 (2002) (reversing the Eleventh Circuit's finding of qualified immunity for prison officials who handcuffed a man outside for eight hours without water or protection from the sun). The Supreme Court criticized the Eleventh Circuit's "rigid gloss on the qualified immunity standard." *Id.* at 739; *see also*

Procedurally, this case was incorrectly decided because the adjudicated issues, when viewed in the light most favorable to Fourte,[127] could have resulted in an alternative conclusion.[128] Here, when the court looked at the evidence, it arguably could have found two reasonable alternatives. First, Lumpkin's and Dr. Stewart's malpractice potentially rose to the level of deliberate indifference because they were aware of Fourte's need and, as medical professionals, should have taken further treatment steps.[129] A showing that Lumpkin and Dr. Stewart simply prescribed medicine to Fourte[130] does not necessarily show that they satisfied their duty of care as medical professionals[131] because given

Smith, 919 F.2d at 91–94 (taking a less "rigid" approach and reversing a finding of qualified immunity for a prison doctor on a claim of deliberate indifference to an objectively serious medical need). *But see* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–58 (2013) (discussing the "murky" and confusing status of the Supreme Court's qualified-immunity doctrine). While *Hope* has not been overruled, it "is largely ignored or distinguished by both the Supreme Court and lower courts." *Id.* at 657. It is apparent that in spite of the confusion surrounding this doctrine, the Roberts Court "is strongly pro-immunity." *Id.* Whether Justice Scalia's death will change how the Court approaches qualified immunity remains to be seen. *See* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1981 (2016) ("After Justice Scalia's death, it seems everything is up for grabs . . . . In every major area where the late Justice provided a crucial fifth vote, a new Justice may shift the Supreme Court majority and, in turn, the law for decades to come.").

127. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986) (discussing the "doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment").

128. *Compare Fourte*, 746 F.3d at 388–90 (reviewing the facts and concluding that "Fourte has not shown that 'the known facts would inform a reasonable actor that his actions violate[d] an established legal standard'" (quoting Pool v. Sebastian County, 418 F.3d 934, 944 (8th Cir. 2005))), *with* Fourte v. Faulkner County, No. 4:11CV00726 BRW–BD, 2013 WL 2099661, at *1–3 (E.D. Ark. Apr. 24, 2013) (magistrate judge recommendation) (discussing the material issues of fact that preclude summary judgment), *adopted in full by* No. 4:11CV00726 BRW–BD, 2013 WL 2099703 (E.D. Ark. May 14, 2013), *rev'd*, 746 F.3d 384.

129. *See Fourte*, 746 F.3d at 389 (finding that the defendants "should have known they were committing malpractice—but medical malpractice is not deliberate indifference"); *Smith*, 919 F.2d at 93 ("Grossly incompetent or inadequate care can constitute deliberate indifference as can a doctor's decision to take an easier and less efficacious course of treatment." (citing Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986))); *id.* ("Medical care so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care violates the eighth amendment." (citing Green v. Carlson, 581 F.2d 669, 675 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980))).

130. *See Fourte*, 746 F.3d at 387, 390.

131. *See generally* 70 C.J.S. *Physicians and Surgeons* § 83, Westlaw (database updated

Fourte's condition and their knowledge as medical professionals, more treatment should have been administered.[132] Second, Fourte's request for his prescription from his family shows that a physician had diagnosed Fourte prior to his arrival at the detention center.[133] This means that Fourte's medical condition was objectively serious, regardless of how obvious it might have been to a layperson per the standard that an objectively serious medical need is one either "diagnosed by a physician *or*" readily recognizable by a layperson.[134] Taking any of these points in the light most favorable to Fourte, as summary judgment requires, it is clear that reasonable minds could have arrived at a different conclusion than the court; a jury could have arrived at the same conclusion as the magistrate judge and district court.[135] As a result, the Eighth Circuit erred when it remanded for summary judgment to be granted in favor of Lumpkin and Dr. Stewart.

A denial of summary judgment is particularly important because it serves as a nexus for whether the case ends or proceeds to a jury trial; the concepts of summary judgment and jury trials are intertwined.[136] The significance of jury trials has been recognized for years, so much so that the right to a jury trial was enshrined within the United States

2016) (discussing a physician's duty of care).

132. *See generally Hypertensive Crisis*, AM. HEART ASS'N (Oct. 22, 2015), http://www.heart.org/HEARTORG/Conditions/HighBloodPressure/AboutHighBloodPressure/Hypertensive-Crisis_UCM_301782_Article.jsp#.V56wh_krKCg [https://perma.cc/UM93-BVH8] (stating that a "[h]ypertentive emergenc[y] generally occur[s] at blood pressure levels exceeding 180 systolic OR 120 diastolic . . ." and can cause "[s]troke," "[h]eart attack," and, most relevant to Fourte, "[d]amage to the eyes and kidneys").

133. *See Fourte*, 746 F.3d at 386.

134. *See Fourte*, 746 F.3d at 388 ("A serious medical need is 'one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention.'" (quoting Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997)).

135. *See* Fourte v. Faulkner County, No. 4:11CV00726 BRW-BD, 2013 WL 2099661, at *1–2, *5 (E.D. Ark. Apr. 24, 2013) (magistrate judge recommendation) (discussing the material issues of fact that precluded summary judgment), *adopted in full by* No. 4:11CV00726 BRW–BD, 2013 WL 2099703 (E.D. Ark. May 14, 2013), *rev'd*, 746 F.3d 384.

136. *See* David H. Simmons et al., *The Celotex Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial*, 1 FLA. A & M U. L. REV. 1, 2 (2006) ("[T]he decrease in . . . trials is 'consistent with a documented increase in the prevalence of summary judgment.'" (quoting Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 483 (2004))).

Constitution.[137] Because of the centrality of jury trials to the court system, improperly granting summary judgment against Fourte would unfairly deny him the core principles guaranteed within the American system of law.[138]

The court of appeals explained that, at most, Lumpkin and Dr. Stewart committed medical malpractice, and the court rationalized that Fourte "has only shown . . . that another physician in the same circumstance might have ordered different tests and treatment."[139] Deliberate indifference is "more than negligence [or] . . . gross negligence";[140] however, deliberate indifference may fall into the realm of medical malpractice and "[g]rossly incompetent or inadequate care can constitute deliberate indifference."[141] The treatment must be "so inappropriate as to evidence intentional maltreatment."[142] However, there are inconsistent approaches in the case law.[143] The same court in *Smith v. Jenkins*[144] held that medical malpractice can deviate from the standard of care so greatly that it shows deliberate

137. *See id.* at 3–4; U.S. CONST. amend. VII; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 633 (Boston, Hillard, Gray & Co. 1833) ("[The Seventh Amendment] is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.").

138. *See* Simmons et al., *supra* note 136, at 11 (stating that courts that erroneously grant summary judgment "deny litigants the ability to reach trial and thereby obstruct litigants from their Seventh Amendment right to a jury trial"); U.S. CONST. amend. VII.

139. *Fourte*, 746 F.3d at 389 (quoting Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (per curiam)).

140. Estate of Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995).

141. Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990).

142. *Id.*

143. *Compare Fourte*, 746 F.3d at 389 (using Whitley v. Albers, 475 U.S. 312, 322–23 (1986), arguably out of context, to hold that conflicting expert witnesses, even when construed most favorably to Fourte, would not show deliberate indifference), *with Moore*, 255 F.3d at 545 ("Often whether such a significant departure from professional standards occurred is a factual question requiring expert opinion to resolve." (citation omitted)), *and* Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997) (holding that the serious medical need required to establish deliberate indifference can be met by a need "that has been diagnosed by a physician as requiring treatment" (quoting Camberos v. Branstand, 73 F.3d 174, 176 (8th Cir. 1995))), *and Smith*, 919 F.2d at 92–93 (stating that a "decision to take an easier and less efficacious course of treatment," and "medical care so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care" can all establish deliberate indifference, which violates the Eighth Amendment).

144. *Smith*, 919 F.2d 90.

indifference.[145] In comparing *Fourte* to *Whitley v. Albers*,[146] which suggested the defendants merely erred in judgment, rather than to *Smith*, with its more fact-conscious approach, the court in *Fourte* did not maintain a perspective favorable to the nonmoving party as summary judgment requires.[147]

Lumpkin's and Dr. Stewart's negligence may or may not have risen to the level of deliberate indifference, but that is a factual inquiry that a jury should have decided.[148] It is not necessarily material that the negligence was not on par with similar cases as the court asserted.[149] What does matter is that, taking into account the totality of the circumstances, a reasonable juror might very well have concluded that their medical malpractice so deviated from the standard of care that it manifested deliberate indifference.[150] Thus, summary judgment was not appropriate for this issue.[151]

Next, the court's conclusion that Dr. Stewart's first prescription for Fourte eliminated the possibility that Lumpkin and Dr. Stewart were deliberately indifferent confuses the application of the deliberate indifference standard.[152] Admittedly, the argument does appear sound on its face, as providing some treatment is better than none.[153] After all, it seems impossible to be indifferent to an inmate's health when practitioners have provided treatment to the individual.[154] The treatment itself shows

145. *See id.* at 93.

146. *Whitley*, 475 U.S. 312.

147. *See Fourte*, 746 F.3d at 389.

148. *Cf.* Bloomgarden v. Coyer, 479 F.2d 201, 206 (D.C. Cir. 1973) ("In reviewing the propriety of a summary judgment, it is our responsibility to determine whether there was any issue of fact pertinent to the ruling and, if not, whether the substantive law was correctly applied. The summary judgment procedure is properly and wholesomely invoked when it eliminates a useless trial but, of course, not when it would cut a litigant off from his right to have a jury resolve a factual issue bearing significantly on the outcome of the litigation.").

149. *See Fourte*, 746 F.3d at 388 (comparing Lumpkin's and Dr. Stewart's negligence to that in other cases).

150. *See Smith*, 919 F.2d at 93; *Bloomgarden*, 479 F.2d at 206–07.

151. *See Bloomgarden*, 479 F.2d at 206–07.

152. *Fourte*, 746 F.3d at 390.

153. *See Smith*, 919 F.2d at 93 (noting "courts hesitate to find an eighth amendment violation when a prison inmate has received medical care"); *see also* Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985) (affirming the district court's rejection of a prison inmate's claimed constitutional violation because he "received significant medical care while at the jail").

154. *See Fourte*, 746 F.3d at 386–87 (describing Lumpkin's and Dr. Stewart's treatment

response to, as well as interest in, the inmate's wellbeing.[155] However, when Fourte's medicine did not arrive in a timely manner, it took a protracted amount of time for Dr. Stewart to reissue the medicine.[156] It also seems that at least some medicine was available given that Lumpkin had previously treated Fourte when his blood pressure was extraordinarily high.[157] While it is possible that reasonable minds[158] could have concluded that Lumpkin and Dr. Stewart provided sufficient treatment, it is also possible that reasonable minds could have differed, finding instead that merely prescribing a drug, without more treatment, constitutes deliberate indifference, especially since Fourte could have begun treatment without delay if the medical staff had continued to give him the emergency medication.[159] Severely elevated blood pressure can potentially damage organs and should be treated immediately.[160] As medical professionals, Lumpkin and Dr. Stewart were "required to possess and exercise the degree of skill and learning possessed and exercised, under similar circumstances, by the members of [their] profession."[161] Taking that into account, it is possible to arrive at a conclusion opposite the court's opinion: that the medical staff had the means to treat Fourte with less delay, and in knowing the risks of severely high blood pressure and withholding the available medication, they acted with deliberate indifference toward Fourte's objectively serious medical condition. Consequently, the Eighth Circuit should not have reversed the lower court's denial of summary judgment.[162]

Finally, the court explained that Fourte failed to present an objectively serious medical need, as deliberate indifference requires.[163] Fourte's symptoms[164] were not as serious as the court felt was necessary to put

measures).

155. *See id.*

156. *See id.* at 390.

157. *Id.* at 387.

158. Wallace v. Broyles, 961 S.W.2d 712, 722 (Ark. 1998) (discussing the standard that if "'reasonable minds' could differ as to the factual conclusion to be reached" then even if there are no disputes over the facts, summary judgment should be denied).

159. *Fourte*, 746 F.3d at 387.

160. *See Hypertensive Crisis*, *supra* note 132.

161. *Physicians and Surgeons*, *supra* note 131.

162. *Fourte*, 746 F.3d at 386.

163. *See id.* at 388.

164. *Id.* (listing Fourte's visible symptoms as "a 'lazy eye,' 'sweating,' and difficulty 'getting around'").

officials on notice.[165] In *Long v. Nix*,[166] the Eighth Circuit granted officials qualified immunity where an inmate alleged that prison officials were deliberately indifferent to medical needs associated with the inmate's gender-identity disorder.[167] In that case, the court agreed with the district court that this inmate's particular medical issues, requests to be allowed to "cross dress[]," were not serious medical needs that officials disregarded.[168] However, in *McRaven v. Sanders*,[169] the Eighth Circuit affirmed the denial of qualified immunity for the officials because the inmate's symptoms were sufficiently obvious that even a layperson would have comprehended that a serious medical need was present.[170] There, the officials knew that the inmate had ingested prescription pills and had observed his slurred speech, flushed face, and low blood pressure.[171] When he eventually suffered brain damage, prison officials were denied the protections of qualified immunity because the facts presented an objectively serious medical need that the officials disregarded.[172] In the present case, Fourte was known to require blood pressure medication.[173] He was unable to move from his cell to have his vitals taken.[174] He was "sweating" and had a "lazy eye,"[175] yet when he went blind as a result of untreated high blood pressure, prison officials were granted qualified immunity and protected from personal liability.[176] Similar to the facts in *McRaven*, reasonable minds could have found that Fourte's symptoms were obvious signs that he was faced with a "substantial [medical] risk."[177]

Beyond the obviousness of Fourte's physical condition, he had been

165. *Id.*
166. Long v. Nix, 86 F.3d 761 (8th Cir. 1996).
167. *Id.* at 762–63.
168. *Id.* at 766 (quoting Long v. Nix, 877 F. Supp. 1358, 1366 (S.D. Iowa 1995), *aff'd*, 86 F.3d 761).
169. McRaven v. Sanders, 577 F.3d 974 (8th Cir. 2009).
170. *Id.* at 978, 981.
171. *Id.* at 978.
172. *Id.* at 979.
173. *See* Fourte v. Faulkner County, 746 F.3d 384, 386 (8th Cir. 2014).
174. *See* Fourte v. Faulkner County, No. 4:11CV00726 BRW–BD, 2013 WL 2099661, at *3 & n.3 (E.D. Ark. Apr. 24, 2013) (magistrate judge recommendation) (stating that "there appears to be a dispute of fact" over whether Fourte could get out of bed), *adopted in full by* No. 4:11CV00726 BRW–BD, 2013 WL 2099703 (E.D. Ark. May 14, 2013), *rev'd*, 746 F.3d 384.
175. *Fourte*, 746 F.3d at 388.
176. *Id.* at 388–90.
177. *See* Farmer v. Brennan, 511 U.S. 825, 842 (1994) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that it was obvious.").

diagnosed by a physician prior to his detainment,[178] and Fourte produced at least some evidence that prison officials were aware of his previous diagnosis.[179] As a result, the court should have ruled that knowledge of the previous diagnosis lent itself to an inference that prison officials were aware of Fourte's serious ailment.[180] Moreover, the correlation of Fourte's previous prescription and Dr. Stewart's eventual prescription legitimizes Fourte's health concerns as objectively serious.[181] Dr. Stewart would not have prescribed medication without a legitimate need.[182] Because of this, reasonable minds could have found that Fourte's medical need was objectively serious.[183] This possible alternative outcome, contrary to the court's finding, should have precluded summary judgment.[184]

The uproar surrounding Titus Oates's shocking punishment in the seventeenth century has ebbed away as regulation and public administration have gained ground.[185] Likewise, the law is losing sight of the intent behind the Eighth Amendment.[186] Qualified immunity exists, in part, to preserve officials' rights and ensure that someone wants to perform their admittedly crucial job.[187] No one would want to work in a position that could expose them to too much liability.[188] However, when the public they serve has its rights eclipsed in an effort to protect officials, the officials' role becomes almost ironic.[189] It would seem paradoxical to have

178. *See Fourte*, 746 F.3d at 386.

179. *Id.*

180. *Cf.* Webb v. Mercy Hosp., 102 F.3d 958, 960 (8th Cir. 1996). In *Webb*, an employee claimed wrongful termination linked to her diagnosis of depression. The court stated, however, that because her superiors were not aware of the diagnosis, it could not be inferred that the employers had any knowledge of the employee's depression. *Id.*

181. *Fourte*, 746 F.3d at 388 (quoting Coleman v. Rahija, 114 F.3d 778, 784 (8th Cir. 1997)).

182. *See generally* Madelyn Pollock et al., *Appropriate Prescribing of Medications: An Eight-Step Approach*, 75 AM. FAMILY PHYSICIAN 231, 231–36 (2007) (describing appropriate methods for determining when medicine should be prescribed).

183. *See* Quick v. Donaldson Co., 90 F.3d 1372, 1377 (8th Cir. 1996) ("'If reasonable minds could differ as to the import of the evidence,' summary judgment is inappropriate." (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986))).

184. *Id.*; *Fourte*, 746 F.3d at 386.

185. BARTEE & BARTEE, *supra* note 14, at 114; *see also supra* note 15 (discussing Titus Oates's punishment).

186. *See* Claus, *supra* note 17, at 121.

187. *See* RICH, *supra* note 29, § 3:6.

188. *See id.*

189. *Cf.* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 78 YALE L.J. 447, 459–62 (1978) ("Constitutional standards, designed to limit governmental authority over citizens, serve a

officials administer and regulate the ways that citizens live, when those officials' rights diminish the rights of the public they serve.[190] After all, the individual citizen's constitutional interests are arguably the basis for all things the government exists to serve.[191] Without the public, there is no need for government officials. It unfortunately appears the country has lost sight of that in this instance.[192]

B. The Effect on Future Law: Stifling the Growth of Inmate Medical Care

Despite being incorrect, the *Fourte* decision is indicative of the attitude surrounding inmate healthcare in the nation.[193] The United States

more important function. If imposition of personal liability upon the wrongdoer is thought to have consequences adverse to the proper discharge of his public functions, society can either reimburse the wrongdoer or shift liability to his employer, rather than deny a remedy to the victim. His constitutional rights are just as impaired and the injury he suffers just as serious regardless of the good faith of the wrongdoer."); Kit Kinports, Iqbal *and Supervisory Immunity*, 114 PENN ST. L. REV. 1291, 1305 (2010) (discussing the supervisory-liability standard for qualified immunity and concluding that "it gives high-ranking public officials yet another bite at an apple that in many cases is already pretty well masticated"). Examples of officers' rights eclipsing the public's rights include: Anderson v. Creighton, 483 U.S. 635, 640–41 (1987) (expanding the "objectively legally reasonable" qualified-immunity standard to immunize officials for constitutional violations), *Fourte*, 746 F.3d at 388–89 (granting medical personnel qualified immunity), and Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 467–68 (5th Cir. 1994) (en banc) (Garwood, J., dissenting) (arguing a high school principal should have received qualified immunity for having "consensual sexual relations" with a minor student).

190. *See* Thomas E. O'Brien, Note, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 769–70, 776 (2004) (describing the aspirational "attempt to balance the need to redress and deter civil rights violations with the need to preserve government stability and promote government service" and how "a court can severely upset this balance by mechanically applying the objective legal reasonableness test . . . [and] failing to engage in the balancing of competing interests that underlie the qualified immunity doctrine"); Newman, *supra* note 189, at 460; *Fourte*, 746 F.3d at 386 (providing an example where an inmate relies on medical prison officials for care and, when it is not given, the officials later claim qualified immunity).

191. *See* Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH. L. REV. 1143, 1144–45 (2007); *see also* Note, *The Greatest Interest of Mankind on Earth*, 7 AM. JUD. SOC'Y 164, 164 (1923).

192. *See* Cloud, *supra* note 191, at 1169; s*ee also Fourte*, 746 F.3d at 388–89.

193. *Cf.* Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 671 (2009) ("Providing inmates with health care is politically unpopular. Indeed, former Surgeon General Richard H. Carmona stated that the Bush administration had blocked the release of the Surgeon General's

is in the midst of a medical renaissance with the passage of the Affordable Care Act.[194] This large healthcare-system overhaul is both notable within the nation as a whole and belated in comparison with our neighbors globally.[195] The Affordable Care Act's policy reform acknowledges the fact that greater access to medical care would be beneficial to society as a whole.[196] The decision in *Fourte* illustrates the importance that should be placed on inmate wellness, preventative care, and medical treatment in the United States in two ways.[197] First, the court's accurate statement that inmates have no established right to a medical screening exposes an imprudent flaw in the prison system and general healthcare structure in the United States.[198] Second, it seems incongruous that after such a large and important piece of legislation as the Affordable Care Act inmate healthcare should still be lacking to the extent seen in *Fourte*.[199]

Regarding the first issue, requiring medical screenings prior to admittance is not an issue for a court to address.[200] The court was correct

Report, *Call to Action on Corrections in Community Health*, for fear that the report would increase government spending on inmates.").

194. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.). *See generally* Katherine Hayes, *Overview of Policy, Procedure, and Legislative History of the Affordable Care Act*, 7 NAELA J. 1 (2011) (demonstrating enough support to enact a national healthcare act and thus an increased concern for healthcare nationally).

195. *See* William J. Brisk, *Introduction to Health Care Reform*, 7 NAELA J., vii, viii (2011) (noting the evolution of healthcare reform in Europe, Massachusetts, and eventually the entire United States).

196. *Cf. id.* (pointing out that the Affordable Care Act is far from the "single-payor plan which reformists had anticipated" but that it is "nevertheless ambitious[, seeking] to enroll at least 30 of the 40 million Americans who . . . have no health insurance . . . and rescue millions of Americans from disastrous medical bills"); Douglas A. Bass, Annotation, *Validity of the Minimum Essential Medical Insurance Coverage, or "Individual Mandate," Provision of § 1501 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119*, 60 A.L.R. Fed. 2d Art. 1, 1, § 8.2 (2011 & Supp. 2013) ("The proponents of this Act identified its purposes as reforming America's health-care system to achieve universal medical insurance coverage for all Americans and lowering the costs of health care nationally.").

197. *See generally Fourte*, 746 F.3d 384.

198. *Id.* at 388.

199. *Compare* Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, 126 PUB. HEALTH REPORTS 130, 130 (2011) (describing the breadth of the Affordable Care Act and its goals), *and* Bass, *supra* note 196, at 1, § 8.2 (noting the purpose of healthcare reform was to "promote public health"), *with* Wilper et al., *supra* note 193, at 671 (discussing the poor state of inmate healthcare in the United States).

200. *Cf.* Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the*

in stating that no such right existed, and it arguably would have overstepped its constitutional authority to order such screenings.[201] That aside, by not requiring medical screenings, Congress has allowed the prison system to maintain a position of willful blindness regarding inmate health.[202] Although the court did not accept Fourte's argument, Congress should consider it. Not addressing serious medical needs in this way is tantamount to undermining prisoners' rights.[203] Without the appropriate screening—or an inmate checkup at minimum—any latent, nonobvious conditions will remain untreated.[204] Serious and preventable health concerns are overlooked due to this omission.[205] If that is not convincing to Congress, consider that allowing latent illnesses into the correctional system exposes the prison population to contagious diseases.[206] Indeed, it is arguably deliberately indifferent to house so many inmates without taking this precaution.[207]

Congress should also take into account the evolution of jurisprudence

Supreme Court in Dialogue, 77 OR. L. REV. 1229, 1249 & n.96 (1998) ("[T]he Court talked ever more insistently about the level of deference federal judges should afford prison officials in deciding how prisoners' rights should [be] 'accommodate[d].'" (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984))). *But see Block*, 468 U.S. at 593–94 (Blackmun, J., concurring in judgment) ("When a constitutional challenge to prison conditions necessarily places the good faith of prison administrators at issue, I regard it as improper to make the plaintiff prove his case twice by requiring a court to defer to administrators' putative professional judgment. Instead, I think it sufficient to rest on [a] substantive due process standard . . . . I therefore am mystified by the Court's insistence on invoking principles of judicial deference, since those principles are not only inappropriate but entirely unnecessary to the result in this case.").

201. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 13–19 (1998) (discussing judicial policy making in the prison reform cases and the "serious legitimacy problem" that is created stemming from its seeming violation of the principles of federalism, separation of powers, and stare decisis).

202. *See, e.g.*, Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 642–43, 645 (2010).

203. *See* Langford v. Norris, 614 F.3d 445, 449–53, 460–62 (8th Cir. 2010) (affirming the district court's denial of qualified immunity because reasonable inferences supported the plaintiff's claims that their serious medical needs were deliberately ignored).

204. *See, e.g.*, Fourte v. Faulkner County, 746 F.3d 384, 388 (8th Cir. 2014); *see also* Thompson, *supra* note 202, at 643.

205. *See Fourte*, 746 F.3d at 388; *see also* Thompson, *supra* note 202, at 643.

206. *See* Claire Fortin, Comment, *A Breeding Ground for Communicable Disease: What to Do About Public Health Hazards in New York Prisons*, 29 BUFF. PUB. INT. L.J. 153, 154 (2010).

207. *See generally id.*; *see also* Thompson, *supra* note 202, at 652–53.

that leans in favor of higher medical standards for inmates. Consider that *Estelle v. Gamble*[208] established that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[209] That decision was expanded even further in *Helling v. McKinney*[210] when the Court held that deliberate indifference to an inmate's exposure to secondhand smoke supported a legitimate Eighth Amendment claim.[211] Continuing this pattern, *Board v. Farnham*[212] held that a detainee had a "constitutional right to toothpaste."[213] This systematic expansion of what constitutes adequate medical standards exemplifies what the American concept of "cruel and unusual punishment" has become.[214] In light of this, Congress should recognize this growth and implement laws that reflect these developments.

Second, the Affordable Care Act has brought the importance of healthcare law to the forefront of the national conversation.[215] The United States' contemporary and "evolving standards of decency" requires an ever-improving standard of medical care for its incarcerated population.[216] While inmates have a right to receive healthcare, the objective reality of Fourte's situation shows that access to adequate care is seriously lacking.[217] This does not further the Affordable Care Act's purpose.[218] Rather, the prison system is in many ways a black spot on the face of American's healthcare reforms.[219] As seen in *Fourte*, prison care is

208. Estelle v. Gamble, 429 U.S. 97 (1976).

209. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.)).

210. Helling v. McKinney, 509 U.S. 25 (1993).

211. *Id.* at 35.

212. Board v. Farnham, 394 F.3d 469 (7th Cir. 2005).

213. *Id.* at 481 (holding that it violated a detainee's right to medical treatment to deny him toothpaste for three weeks).

214. U.S. CONST. amend. VIII.

215. *See* Joan H. Krause & Richard S. Saver, *Health Care Decisions in the New Era of Health Care Reform: An Overview*, 92 N.C. L. REV. 1445, 1450 (2014).

216. Estelle v. Gamble, 429 U.S. 97, 102–04 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); *Trop*, 356 U.S. at 101 (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

217. *See supra* notes 202–07 and accompanying text.

218. *See supra* notes 196, 199 and accompanying text.

219. *See generally* Thompson, *supra* note 202; Wilper et al., *supra* note 193.

embarrassingly inadequate.[220] In a "maturing society,"[221] even convicted criminals should have their rights protected, including rights to improving standards of medical care.[222] Beyond the health of United States prisoners while incarcerated, the reality is that without adequate medical attention, prisoners who are integrated back into society may be forced to continue to rely on government assistance for the ailments acquired or worsened while imprisoned.[223] It is irresponsible to allow inadequate prisoner care—like that which Fourte claims he faced—to continue.[224] Considering these policy concerns, it would be prudent for Congress to act on behalf of inmates like Fourte.

VI. CONCLUSION

Although this case was likely decided incorrectly on a procedural basis, the laws surrounding inmate care remain an issue, regardless of procedural posture. The courts' discretion seems to have grown too large. Especially in the age of the Affordable Care Act, when America's health is the subject of much discussion, it is imperative that government officials' rights do not eclipse inmates' medical rights. The fact that inmates are wards of the state does not lessen their right to adequate medical attention.

220. *See* Fourte v. Faulkner County, 746 F.3d 384, 386–87 (8th Cir. 2014); *see also* sources cited *supra* notes 202–07.

221. *Trop*, 356 U.S. at 101 (plurality opinion).

222. *See* Thompson, *supra* note 202, at 652–54; *see also supra* note 216 and accompanying text.

223. *See* Thompson, *supra* note 202, at 646–47.

224. *See Fourte*, 746 F.3d at 387–88.