EVADING THE EIGHTH AMENDMENT: PRISON CONDITIONS AND THE COURTS

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The Eighth Amendment prohibition on "cruel and unusual punishment" places moral limits on what the state may do to people convicted of crimes.[2] But because constitutional norms "are too vague to serve as rules of law," courts need doctrinal standards to guide their analysis in concrete cases.[3] In the American constitutional scheme, it falls to the Supreme Court to craft these standards. Translating constitutional values into workable rules will inevitably entail some cost to the full enforcement of those values, which makes the Court a site of ongoing struggle over the scope of constitutional protections.[4] On paper, this struggle plays out in legal abstractions. Yet when the claimants are prisoners seeking to challenge the conditions of their confinement, the human stakes could not be higher. The greater the "slippage" between Eighth Amendment norms and their enforcement,[5] the broader the judicial permission conferred on correctional officers to treat the incarcerated with cruelty—an effect that will cash out, every day, in increased physical suffering and psychological trauma for the real live flesh-and-blood people living in American prisons.[6]

This chapter traces the evolution of the governing standards for Eighth Amendment prison conditions claims. It argues that the Supreme Court's early efforts to shape those standards looked set to enable judicial determinations consistent with fundamental Eighth Amendment moral imperatives, but that, in later cases, the Court betrayed that early promise by, among other things,

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[2] *See* Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting) ("The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.").

[3] Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997).

[4] *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006). Some commentators have endorsed what has come to be called the "pragmatic" view, on which the Constitution encompasses only those protections provided by the governing judicial doctrine, and no more. *See, e.g.*, Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173 (2006); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Others take a more aspirational view, on which the limited constitutional protections typically afforded by courts do not represent the whole of constitutional meaning, but instead indicate a gap between constitutional doctrine and normative constitutional entitlements. *See, e.g.*, Fallon, *supra*, at 1317; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978). As should be clear, I subscribe to the latter, aspirational view, which forms the backdrop to this Chapter.

[5] *See* Sager, *supra* note 4, at 1213.

[6] *See* Robert Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 818 (1986) ("The Constitution's connection to violence is not confined to our Revolutionary origins. . . . [J]udges also deal in pain and death. . . . Even the violence of weak judges is utterly real. . . . Take a short trip to your local prison and see.").

conditioning findings of unconstitutional conditions on defendants' subjective awareness of the risk of harm. Though seemingly simple, this move in fact entailed a radical shift away from meaningful enforcement, allowing courts to dismiss prisoners' claims without ever squarely confronting either the character of the challenged conditions or their consistency with core Eighth Amendment values. The effect was to leave the people we incarcerate—fellow human beings—wholly dependent for their survival on state officials with no constitutional obligation even to notice obvious dangers to prisoners' health and safety. This arrangement all but guarantees needless pain and suffering for people in prison, a result directly at odds with the Court's repeated assertion that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain."[7] And recent signs from the new Roberts Court suggest that, if anything, people in prison may soon face an Eighth Amendment regime even less protective than the already morally diminished standards that currently govern.

THE FEDERAL COURTS OPEN THE DOORS

Today, it is taken for granted that prison conditions are open to Eighth Amendment challenge. But it was not always so. For much of the twentieth century, the federal courts largely took a "hands-off" posture toward prisoners' constitutional claims. However brutal prison conditions were during this period—and they were brutal indeed[8]—the federal courts almost uniformly subscribed to the view that "it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries."[9] As a consequence, even people whose conditions of confinement plainly transgressed constitutional values had no forum in which to bring their claims.

Despite the evident unwillingness of the judiciary to entertain prisoner suits, federal judges had long received complaints from people incarcerated in state prisons.[10] By the 1960s, motivated at least in part by the "soul-chilling" conditions described in those missives,[11] a number of federal

[7] *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 319 (1986); Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

[8] *See e.g.,* Atterbury v. Ragen, 237 F.2d 953, 954 (7th Cir. 1956); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2009); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010); Matthew L. Myers, *The Alabama Case: 12 Years after James v. Wallace*, 13 NAT'L PRISON PROJECT J. 8 (1987), *reprinted in* LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 472 (9th ed. 2013)); WRIT WRITER (New Day Films 2009).

[9] *Atterbury*, 257 F.2d at 955 (internal quotations omitted).

[10] *See* MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 34–35 (1998) ("It is somewhat curious, given the evident hostility of most federal courts to prisoner complaints, that these prisoner complaints kept coming [to the courts]."); *see also Atterbury*, 237 F.2d at 955 (expressing concern "at the ever-increasing number of [prisoner complaints] which are filed in this Circuit" alleging "brutal treatment by prison officials or other complaints with reference to the regulations pertaining to prison discipline" and emphasizing that "for the most part, such . . . suits are futile").

[11] *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring) (quoting Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (Mass. 1973)).

courts had started to soften their hands-off posture.[12] And once they began to look behind the walls, what they saw led at least some judges to abandon that posture completely. This dramatic shift occurred first in Arkansas, where litigation begun in 1965 revealed "the savage and quasi-feral character of the Arkansas prisons."[13] By 1970, Judge J. Smith Henley of the Eastern District of Arkansas had held the state's prison system "in its entirety [to be] in violation of the Eighth Amendment," and had "placed the system under a comprehensive court order that was tantamount to federal receivership."[14] In the ensuing decades, prison officials in Alabama, Georgia, Louisiana, Mississippi and countless other states found themselves in the same situation as their Arkansas counterparts.[15]

It was not until 1962, in *Robinson v. California*, that the Supreme Court incorporated the Eighth Amendment against the states via the Fourteenth Amendment.[16] With *Robinson* being so new, governing Eighth Amendment precedent in the 1960s was thin, leaving those courts newly open to hearing conditions claims to mine past decisions for whatever principles seemed most appropriate to this new context. When it came time to apply those principles, the reasoning was mostly conclusory. The focus was instead on the facts, with judges largely taking a totality of the circumstances/totality of the conditions approach. Given the barbarism of the conditions courts were confronting—"dangerously overcrowded,"[17] "a dark and evil world,"[18] "unfit for human habitation"[19]—the tendency to cut analytical corners should not have been surprising. But at some point, "[o]nce the very worst practices were successfully attacked" and the follow-on cases began to emerge, some more formal legal analysis would be required.[20] At that point, judges would need

[12] FEELEY & RUBIN, supra note 10, at 37.
[13] *Id*. at 39.
[14] *See id*. at 39; *see also id*. at 51–79 (discussing the Arkansas prison litigation in detail).
[15] *See* Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (Louisiana); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Guthrie v. Evans, No. 73-3068 (S.D. Ga. 1973); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); *see also* FEELEY & RUBIN, *supra* note 10, at 39–92 (discussing the spread of judicial prison reform). That these prisons were almost exclusively Southern reflects the deep connection between incarceration and slavery in the region. As the mechanism for controlling black bodies shifted from slavery to criminal punishment, brutality against the enslaved readily turned into brutality against prisoners, the vast majority of whom were black. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997); Taja-Nia Henderson, *Property, Penality and (Racial) Profiling*, 12 STAN. J. OF C.R. & C.L. 177 (2016) (describing the role local jails played in supporting enslavers and the institution of chattel slavery in the antebellum South); John Bardes, *The Problem of Incarceration in the Age of Slavery* 5, 43–47 (draft copy on file with the author) (describing a network of carceral institutions forming a "statewide penal system for enslaved convicts" in Louisiana, Mississippi, Tennessee, and elsewhere in the antebellum South; and describing the brutal methods of torture employed to humiliate and "discipline" the enslaved people held in those facilities).
[16] *See* Robinson v. California, 370 U.S. 660 (1962).
[17] Costello v. Wainwright, 397 F. Supp. 20, 34 (1975).
[18] Hutto v. Finney, 437 U.S. 678, 681 (1970) (quoting Holt v. Sarver, 309 F. Supp. 362, 382 (E.D. Ark. 1970)) (opinion of Judge Henley).
[19] *Pugh*, 406 F. Supp. at 323–24; *Gates*, 349 F. Supp. at 894; *see also* Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980).
[20] Malcom M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, *in* COURTS, CORRECTIONS, AND THE CONSTITUTION 12, 28 (John J. Dilulio, Jr. ed., 1990).

workable standards against which to assess challenged conditions, to allow them to determine whether, given their nature and impact, those conditions violated Eighth Amendment limits on state punishment.

This last point bears emphasizing: to enable courts hearing Eighth Amendment prison conditions claims to reach valid judgments of constitutionality, the applicable doctrine would need to (1) direct courts to examine the impact of the conditions at issue, and (2) provide evaluative standards that, in their application, would operationalize the Eighth Amendment's governing moral imperatives. Otherwise, even if dispositive on the matter of constitutional liability, a judicial finding for defendants would have no bearing on what is, after all, the essential question when evaluating the constitutionality of carceral punishment: whether the challenged conditions are consistent with prison officials' Eighth Amendment obligations to prisoners.[21]

Given the broad and novel authority being claimed by the federal courts to regulate state prisons during this period, it was only a matter of time before the Supreme Court weighed in. The Court's earliest efforts came in 1976 and 1981 with *Estelle v. Gamble*[22] and *Rhodes v. Chapman*.[23] Together, this pair of cases addressed the two types of conditions claims prisoners might bring: micro-level assertions of personal mistreatment by individual officers, and macro-level challenges to system-wide failures of care. Although the defendants prevailed in both cases, *Gamble* and *Rhodes* nonetheless laid a foundation for doctrinal standards that would have allowed courts to effectively operationalize the Eighth Amendment's animating moral commitments and thus to meaningfully enforce prisoners' constitutional rights.

Then, with a second pair of cases in the early 1990s—*Wilson v. Seiter*[24] and *Farmer v. Brennan*[25]—the Court shifted the inquiry, directing courts away from the conditions themselves and toward what defendants did or did not know about the risk of harm to prisoners. This is where the law currently stands. To the extent that, in the wake of *Wilson* and *Farmer*, courts are to still to consider the conditions themselves, it is only within the narrowest possible frame, from a perspective that inevitably leaves unaddressed or even unacknowledged conditions that deeply compromise the overall safety and well-being of those inside. This shift substantially narrowed prison officials' constitutional obligations and has left prisoners' constitutional rights correspondingly underenforced—with the price to be paid by the incarcerated in increased physical pain and psychological trauma.

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[21] *See* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff, eds., 2017); *see also supra* note 4 (acknowledging the overtly aspirational approach to constitutional interpretation this Chapter embraces).
[22] Estelle v. Gamble, 429 U.S. 97 (1976).
[23] Rhodes v. Chapman, 452 U.S. 337 (1981).
[24] Wilson v. Seiter, 501 U.S. 294 (1991).
[25] Farmer v. Brennan, 511 U.S. 825 (1994).

The sections that follow trace this doctrinal evolution from early promise to eventual contraction and also consider what the Court's 2019 decision in *Bucklew v. Precythe* portends for the future of Eighth Amendment prison conditions claims.[26] But first, it is necessary to briefly consider the normative limits the Eighth Amendment places on the treatment of prisoners. If we had a system of Eighth Amendment enforcement that sought to reflect this provision's animating values, what obligations would the state be held to owe the people we have collectively chosen to incarcerate?[27] Only once we have answered this question will we be equipped to recognize which standards would best enable judicial enforcement of Eighth Amendment imperatives in the conditions context and why the current regime falls so far short of the mark.

THE EIGHTH AMENDMENT ROOTS OF THE STATE'S CARCERAL BURDEN

What limits does the Eighth Amendment place on the conditions of prisoners' confinement? In our constitutional system, it is widely agreed that the state may not, in the name of criminal punishment, inflict torture or "other barbarous methods of punishment."[28] Nor may accepted forms of punishment be applied in ways that cause gratuitous pain and suffering. As the Supreme Court has recognized, such treatment would at worst amount to torture, and at best constitute the "unnecessary and wanton infliction of pain," serving no legitimate penal purpose.[29] Either way, it would represent an abuse of the state's penal power.

The prohibition on gratuitously harmful prison conditions is thus a fundamental Eighth Amendment principle. The Supreme Court has explicitly acknowledged as much, holding that, under the Eighth Amendment, the state is obliged to provide people in custody with "the minimal civilized measure of life's necessities"[30] and to protect them from "substantial risk[s] of serious harm"[31]—by, among other things, treating their serious medical needs[32] and keeping them safe from violence at the hands of other prisoners.[33] As Chief Justice Rehnquist explained in *DeShaney v. Winnebago County*, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[34] This "affirmative duty to protect" arises "from the limitation which [the State] has imposed on [the detained individual's] freedom to act on his own behalf."[35] The state's obligation, in other words, arises from prisoners' total dependence on prison officials,

[26] Bucklew v. Precythe, 139 S. Ct. 1112 (2019).
[27] Sager, *supra* note 4, at 1213.
[28] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (internal quotations omitted); *see also* Wilkerson v. Utah, 99 U.S. 130, 135 (1879) (citing cases "where the prisoner was drawn or dragged to the place of execution . . . [or] embowelled alive, beheaded, and quartered" as examples of tortures forbidden by the Eighth Amendment).
[29] *See Estelle*, 429 U.S. at 103.
[30] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
[31] Farmer v. Brennan, 511 U.S. 825, 828 (1994).
[32] *See Estelle*, 429 U.S. at 103–04.
[33] *See Farmer*, 511 U.S. at 833.
[34] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 199–200 (1989).
[35] *Id*. at 200.

a function of the government's own decision to incarcerate people under conditions depriving them of the capacity to meet their own needs.[36]

Even in the Court's later cases, one finds overt acknowledgment of this obligation. In *Farmer*, for example, the Court emphasized just how dangerous prisons can be and how vulnerable the people inside would be without state aid. As Justice Souter put it, "having stripped [incarcerated persons] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[37] It must instead "provide humane conditions of confinement[,] . . . ensure that [people] receive adequate food, clothing, shelter, and medical care, and . . . 'take reasonable measures to guarantee [their] safety.'"[38]

In short, when the state opts to incarcerate people convicted of crimes, it commits itself to providing for their basic human needs in an ongoing way as long as they are in custody. This, as I have argued elsewhere, is *the state's carceral burden*.[39] More than simply a moral imperative, meeting this burden is a fundamental constitutional requirement, arising directly from the Eighth Amendment prohibition on "cruel and unusual punishment," which forbids "the unnecessary and wanton infliction of pain."[40]

The state, however, is not a natural person, but rather a complex organization. As such, it cannot act independently of the officials authorized to act on its behalf. This means that, if the state's carceral burden is to be fulfilled, prison officials must make it happen. It is therefore to prison officials themselves that the constitutional duty attaches.[41] What is the nature of this duty? Here, the answer emerges from the Court's own reasoning: The incarcerated are both held against their will in close quarters with people who are possibly dangerous and are wholly dependent on state officials for their basic needs. This being so, Chief Justice Rehnquist was right to label this duty an *affirmative* one[42]—not a passive obligation on the part of prison officials to respond to the problems they happen to notice, but an ongoing responsibility to monitor, to investigate, to stay on top of potential threats and to be proactive in their alleviation. Although constitutional in origin, this affirmative obligation is no different from any duty of care pursuant to which duty holders are

[36] *See id*. (explaining that the state's duty of care towards prisoners arises because "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself"); *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911–23 (2009).
[37] *Farmer*, 511 U.S. at 833 (citing *DeShaney*, 489 U.S. at 199–200, along with other opinions) (internal citations and quotation marks omitted); *see also* Estelle, 429 U.S. at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.").
[38] *Farmer*, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).
[39] Dolovich, *supra* note 36, at 911–23.
[40] *Estelle*, 429 U.S. at 103.
[41] *See* Dolovich, *supra* note 36, at 923–30.
[42] *See DeShaney*, 489 U.S. at 200 (explaining that the State's "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf").

expected to take all appropriate steps to keep their charges safe. It is not episodic but rather continuous. At the same time, as with any duty of care, prison officials' liability for harm to prisoners is not unlimited. Here, it is failures of care amounting to the "wanton and unnecessary infliction of pain" that warrant condemnation as unconstitutional. If the burden the Eighth Amendment imposes on prison officials is considerable, it is not strict liability. When people suffer harm in custody as a result of forces about which no correctional officer knew or could have reasonably been expected to know even had he been paying proper attention,[43] the resulting treatment could in no way be said to be "cruel." In such cases, Eighth Amendment liability would be inappropriate.[44]

The key takeaway is this: the Eighth Amendment imposes on prison officials an affirmative duty to ensure in an ongoing way the health and safety of incarcerated persons. This is not simply the thin obligation of providing people only with the minimum inputs they need to remain alive and perhaps protected from the worst forms of physical violence. For one thing, psychological trauma can cause severe pain and suffering even when there is no accompanying physical harm.[45] Thus, even on a thin reading of the state's carceral burden, prison officials would still be obliged not to leave people, for example, living daily with a justifiable fear of violence or of inadequate treatment should they receive a serious medical or mental health diagnosis.

Even beyond the need to protect prisoners from ongoing trauma, to read prison officials' constitutional obligations as solely about keeping people alive is to strip the Eighth Amendment of much of its moral force. As the Court has made clear, the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency."[46] These are the values that give shape to the state's carceral burden. If the Constitution "does not mandate comfortable prisons,"[47] it nonetheless prohibits treatment at odds with basic decency and with the humanity and dignity of the people we punish.[48] It therefore obliges state officials to engage with people inside, not as some lower form of life that merely needs to keep drawing breath for the state's burden to be discharged, but as fellow human beings whose suffering and despair demand a moral response regardless of whether some measure of criminal punishment may be warranted.

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[43] *See* Dolovich, *supra* note 36, at 940–43.
[44] For discussion, see *id.* at 924–26, 940–42.
[45] *See, e.g.*, Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir. 1990) (explaining that the correctional officer "placed his revolver in [the plaintiff's] mouth [and] threatened to blow his head off"), *cited in* Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).
[46] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (opinion of then-Judge Harry Blackmun)); *see also infra* note 48.
[47] Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
[48] *See* Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) ("The primary principle [of the Eighth Amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings."); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

As we will see, the Court's initial efforts to shape the doctrine seemed to reflect this understanding. But when the Court revisited the issue in the 1990s, it radically minimized the state's carceral burden. The effect was to leave the people we punish, and society itself, lacking an effective channel for ensuring that the treatment of prisoners comports with fundamental Eighth Amendment values.

A PROMISING START

Estelle v. Gamble was the first Supreme Court case to directly apply the Eighth Amendment to prison conditions. Gamble, a Texas prisoner, had alleged that prison officials violated the Eighth Amendment by failing to adequately treat a back injury he sustained when "a 600-pound bale of cotton fell upon him during a prison work assignment."[49] Using language acknowledging the state's carceral burden, Justice Marshall, writing for the majority, noted that prisoners are completely dependent on prison officials to treat their medical needs and that, if "the authorities fail to [provide treatment], those needs will not be met."[50] In the worst cases, Justice Marshall found, such a failure would amount to "physical torture or a lingering death," and even in "less serious cases, . . . may result in [gratuitous] pain and suffering."[51] Finding "[t]he infliction of such unnecessary suffering . . . inconsistent with contemporary standards of decency," the Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[52]

Gamble's deliberate indifference standard established the constitutional relevance of the defendant's state of mind vis-à-vis the challenged condition. That any attention at all should be paid to this matter may at first seem wrongheaded: if the issue is the way people are treated in prison, surely the only relevant consideration is the harm prison conditions inflict. This view, suggestive of strict liability, seemed to underpin Justice Stevens's *Gamble* dissent, in which he charged the majority with "improperly attach[ing] significance to the subjective motivation of the defendant."[53] As Justice Stevens saw it, "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." [54]

As already noted, if the Eighth Amendment imposes a considerable burden on prison officials, it cannot fairly be read to establish strict liability. There was, however, another way to understand *Gamble*'s deliberate indifference standard, one that would still accommodate Justice Stevens's view that the primary focus should be on the character of the conditions themselves: as

[49] Gamble v. Estelle, 516 F.2d 937, 938 (5th Cir. 1975), *rev'd*, 429 U.S. 97 (1976).
[50] *Estelle*, 429 U.S. at 103.
[51] *Id*.
[52] *Id*. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182–83 (1976)).
[53] *Id.* at 116 (Stevens, J., dissenting).
[54] *Id*.

a constructive knowledge standard, on which prison officials would be constitutionally liable for failing to address those risks of which they should have known. As we will see, this approach would substantially capture the state's carceral burden and thus enable courts to operationalize prison officials' Eighth Amendment obligation to meet this burden. At the same time, appropriately, it would shield prison officials from liability for harms that could not reasonably be anticipated even by those officers fully committed to protecting people from gratuitous physical and psychological harm.

In *Gamble*, the Court did not specify the precise mental state that constituted deliberate indifference. But it said enough to narrow it down to two possibilities: heightened (a.k.a. "gross") negligence and criminal recklessness. Unlike intentional conduct, which is undertaken purposely, these two intermediate mental states represent the available states of mind with which actors engage in risky conduct and unintentionally cause harm to others. The difference between the two is the defendant's level of knowledge with respect to the risk they have created: on criminal recklessness, the defendant must have actually realized the risk, whereas on gross negligence it is enough to show constructive knowledge, i.e. that the defendant should have realized the risk.

Were deliberate indifference read as an actual knowledge standard, the focus would be on whether the defendant in fact recognized the risk of harm posed by the conditions at issue. On this approach, correctional officers who failed to notice the risk could not be found constitutionally liable, no matter how great the danger or how obvious it would have been to the defendants themselves had they been paying proper attention. A credible showing that defendants lacked such subjective awareness would be the end of it, leaving no need to consider either the character of the conditions or any harm they may have caused the plaintiffs.

By contrast, on a constructive knowledge standard, the relevant perspective would be that of a reasonable correctional officer committed to fulfilling the state's carceral burden. To establish this state of mind, courts would have to squarely address the conditions at issue. Any reasonableness standard, of course, has subjective elements. As the Model Penal Code explains, the factfinder is to consider what a reasonable person would have known in the situation in which the defendant found himself, given "the nature and purpose of the [defendant's conduct] and the circumstances known to him."[55] Reasonable people, appropriately committed to fulfilling their obligations, can still miss things. But even taking the defendant's perspective into account in these ways, no constructive knowledge finding could be made without careful consideration of the reality on the ground. And the worse the conditions, the more one could expect a reasonable correctional officer to have recognized the dangers they represented.

[55] MODEL PENAL CODE § 2.02 (d) (AM. LAW INST. 1985).

If the goal is to minimize the gap between constitutional meaning and constitutional doctrine,[56] the question then becomes: which standard—actual knowledge or constructive knowledge—best comports with the moral imperatives animating the Eighth Amendment? Given the nature of prison officials' constitutional obligations canvassed above, the answer should be obvious. Under the Eighth Amendment, state officials have an affirmative obligation to the incarcerated—an ongoing responsibility to pay attention to the conditions they face, to notice potential dangers as those dangers arise, and to be proactive in taking the necessary steps to mitigate any risks of harm. It is thus a constructive knowledge standard that best reflects this obligation and thus represents the better reading of *Gamble*'s deliberate indifference requirement. Although on this approach the defendant's state of mind would constitute a component of the analysis (thus foreclosing strict liability), such a standard would still channel judicial attention in the direction Justice Stevens advocated: toward "the character of the punishment and not the motivation of the individual who inflicted it."[57]

After *Gamble*, prisoners alleging Eighth Amendment medical neglect were required to show that defendants were deliberately indifferent to their serious medical needs. Yet when, in the 1981 case of *Rhodes v. Chapman*, the Court next entertained an Eighth Amendment prison conditions challenge, it mentioned no state of mind requirement at all, deliberate indifference or otherwise. This silence, and *Rhodes*'s exclusive focus on the nature and impact of the conditions themselves, may seem at odds with *Gamble*'s central holding. However, once we recognize the essential difference between the types of conditions the two cases address, it becomes clear that what may appear to be a doctrinal conflict is only a matter of emphasis. It also becomes apparent just how close the Court came in this pair of cases to mapping an approach that, had it been solidified as governing doctrine, could have bridged the gap between Eighth Amendment values and constitutional doctrine for the prison context.

Rhodes involved a challenge out of Southern Ohio Correctional Facility (SOCF) to the use of double-celling—i.e., housing two people in cells designed for one.[58] The District Court enjoined the practice, and the Sixth Circuit affirmed.[59] Although not a model of clarity, Justice Powell's majority opinion emphasized that, under the Eighth Amendment, "conditions must not involve the wanton and unnecessary infliction of pain." It also invoked as guiding authority the Court's 1978 holding in *Hutto v. Finney*, which had found conditions in two Arkansas prisons unconstitutional "because they resulted in unquestioned and serious deprivations of basic human needs."[60] On the strength of these principles, Justice Powell concluded that conditions, "alone or in combination,

[56] See below, text accompanying notes 91-93 for a discussion (and refutation) of the most likely institutional justifications for underenforcement in this context.
[57] Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).
[58] Double-celling emerged as a standard practice in the late 1970s and early 1980s, when the increase in the incarceration rate began to outpace the speed with which prison officials could authorize and build new prisons. It is now the norm in most American carceral facilities.
[59] *See* Rhodes v. Chapman, 452 U.S. 337, 344 (1981).
[60] *Id*. at 347 (citing Hutto v. Finney, 437 U.S. 678 (1978)).

may deprive [people in custody] of the minimal civilized measure of life's necessities" and thus "could be cruel and unusual under the contemporary standard of decency."[61]

It was left to Justice Brennan in his *Rhodes* concurrence to provide courts with legible guidelines for applying this holding. First, Justice Brennan explained, courts are to scrutinize the conditions themselves, mindful that "individual conditions 'exist in combination . . . and taken together they may have a cumulative impact.'"[62] Second, they must apply "realistic yet humane standards to the conditions as observed." Although acknowledging the "elusive" nature of this "aspect of the judicial inquiry," Justice Brennan emphasized that the "touchstone is the effect on the imprisoned."[63] And when the "'cumulative impact of the conditions of incarceration threatens [the] physical, mental, and emotional health and well-being' [of those in custody]. . . the court must conclude that the conditions violate the Constitution."[64]

Justice Brennan's "totality of the circumstances" framework makes sense.[65] If it is possible to individually itemize the basic requirements for sustaining life and even for ensuring a humane and decent existence, any determination as to whether a carceral experience is bearable, much less humane, can only be made holistically. Conditions that may be scarcely endurable in isolation—say, persistently unpalatable food or crowded living quarters or an absence of meaningful pursuits—may well become wholly *un*endurable when lived all at once. It was this view—that to assess the constitutionality of prison conditions, those conditions must be considered *in toto*—that the district courts largely adopted in the omnibus conditions cases that predated *Gamble*. In his *Rhodes* opinion, Justice Brennan gave shape to this understanding, explaining that courts should determine constitutionality by asking whether "exposure to the cumulative effects of prison conditions" amounts "to cruel and unusual punishment."[66]

In *Rhodes*, the Court clearly endorsed a focus on the conditions themselves, "alone or in combination." But Justice Powell's opinion was also notable for what it did not say, i.e., anything to suggest the doctrinal relevance of defendants' culpability for the harm caused.[67] It would, however, be a mistake to read this silence as an endorsement of strict liability. For one thing, as already noted, this reading would stretch the scope of the state's carceral burden well beyond its constitutional moorings. Moreover, the Court made clear in *Gamble* that ordinary civil negligence would be insufficient to ground an Eighth Amendment medical neglect claim,[68] a constraint plainly

[61] *Id*.
[62] *Id*. at 362 (quoting Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970)).
[63] *Id*. at 363–64 (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (N.H. 1977)).
[64] *Id*. at 364 (quoting *Laaman*, 437 F. Supp. at 323).
[65] Rhodes v. Chapman, 452 U.S. 337, 362–63 (1981) (Brennan, J., concurring).
[66] *Id*. at 363 (quoting *Laaman*, 437 F. Supp. at 322–23).
[67] Indeed, the term "deliberate indifference" surfaced only once in the *Rhodes* majority, in Justice Powell's recounting of *Gamble*'s holding. *See id*. at 347 (majority opinion).
[68] *See* Estelle v. Gamble, 429 U.S. 97, 105 (1976) ("An accident, although it may produce added anguish, is not on that basis alone [unconstitutional]."); *see also id*. ("[I]n the [prison] medical context, an inadvertent failure to

incompatible with a strict liability standard. If just five years after *Gamble*, the Court meant to reverse itself on this salient point, it is unlikely to have done so *sub silentio*.

In any case, *Rhodes* lends itself to a very different reading, one that is still entirely consistent with the understanding of *Gamble* offered above: that under some circumstances, prison officials' culpability for failures of care may be inferred from the character of the conditions themselves. It is plain that double-celling at SOCF could only have been implemented via an affirmative decision on the part of prison administrators to respond to overcrowding by putting bunk beds in single-person cells. And, as any prison official will know, all decisions affecting the living environment in prison can potentially impact physical safety and psychological well-being. For this reason, responsible officials, concerned with maintaining prisoners' health and safety, would only ever institute double celling after carefully considering the consequences of doing so—and having done so, would continuously monitor the effects and remain alert to any danger signs. If double-celling at SOCF proved to put people at risk of "serious mental, emotional, and physical deterioration," this is something about which the defendants *should* have known, if not immediately, then certainly once enough time had passed for any potential risks to become apparent.[69] This being so, the only remaining issue concerns the nature of the deprivation itself, which explains why, in *Rhodes*, the issue of defendants' culpability never came up.

Seen in this light, *Rhodes*'s failure to address defendants' mental state need not be taken to mean that state of mind is irrelevant. It may only indicate—rightly—that when conditions are ongoing and plainly dangerous to prisoners, courts may infer that prison officials knew of the risk. In such cases, no separate focus on the defendant's state of mind would be necessary, so none should be required.

Gamble offers a way to characterize more precisely when such an inference would be appropriate. As noted, in his *Gamble* dissent, Justice Stevens took issue with the emphasis on the defendant's state of mind in Justice Marshall's majority opinion. For Justice Stevens, "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it."[70] But Justices Marshall and Stevens seem to have viewed *Gamble*'s facts in two very different lights. Justice Marshall read Gamble's experience as a series of one-on-one micro-level interactions—seventeen of them—with individual members of the prison's medical team. In contrast, Justice Stevens's dissent adopts a more macro-level perspective. As Justice Stevens saw it, Gamble's suffering may well have been traceable to system-wide deficiencies in the structure and culture of the prison health-care system. That Gamble may have been seen seventeen times and that no individual member of the medical staff may have been "guilty of [anything] more than negligence or malpractice" was to Justice

provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of harm [violating the Eighth Amendment].") (internal quotation marks omitted).

[69] *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting).

[70] *Estelle*, 429 U.S. at 116 (Stevens, J., dissenting).

Stevens beside the point, if—as Gamble's complaint suggested—it should turn out that "an overworked, undermanned medical staff in a crowded prison [was] following the expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would disclose an obvious need for remedial treatment."[71] In that case, the problem was not a micro-level failure of care on the part of any individual prison official,[72] but instead a macro-level failure to provide a health-care system with adequate resources to meet the needs of those in custody.

This distinction suggests that the burden on plaintiffs to demonstrate the defendants' culpability for the challenged conditions should vary depending on the nature of the claim. In cases of micro-level failure, fairness may demand that defendants have an opportunity to demonstrate an absence of culpability. When the need is localized, it is possible for incarcerated persons to suffer serious harm without even those correctional officers who are fully committed to fulfilling their constitutional obligations having any reason to suspect that a danger exists. In such cases, no liability should lie. But with macro-level failures, it is a different matter. When there is a system-wide failure sufficient to cause serious harm, it will always be the case that *some* prison official, specifically the officer or officers responsible for that aspect of the prison's operations, should have known of the risk. In such cases, the demonstrated inadequacies of the system would be proof enough of official culpability.[73] For example, if, as Justice Stevens suggested, the real problem in Gamble's case was a grossly inadequate system for providing medical care, proof of that gross inadequacy should suffice to make out a claim, since that showing alone would establish that the official(s) in charge of the prison's medical services should have known of the dangers the system's deficiencies posed.[74] This reading reflects the appropriate allocation of responsibility in the bureaucratic operation of the prison, where the heads of medical services, of security, of food services, etc. are responsible for—and thus should be expected to know about—what goes on in their departments. It is also consistent with *Rhodes*'s explicit emphasis on the harm inflicted, an emphasis that translates into the need for courts to "scrutinize the actual conditions under

[71] *Id*. at 110 (citations omitted).

[72] Although Justice Stevens acknowledged that human error can create risks of harm to people in prison, he emphasized that this risk may be exacerbated when the medical staff do "not meet minimum standards of competence or diligence or . . . cannot give adequate care because of an excessive caseload or inadequate facilities . . . ." *Id.* at 116–17 n.13.

[73] Arguably, even at a macro-level, there may be rare cases in which a presumption of constructive knowledge could be overcome. As Wilson argued, in cases involving "'short-term' or 'one-time conditions,'" it seems appropriate to allow defendants the opportunity to rebut this presumption. By contrast, in macro-level cases involving "'continuing' or 'systemic'" conditions, prison officials' affirmative obligations would be at their height, and the presumption should thus be irrebuttable. *See, e.g*., Wilson v. Seiter, Br. of United States as amicus curiae at 14 n.16 ("An unheated prison during a cold winter may be viewed as inflicting unnecessary pain, but if the problem is a temporary one caused by a broken boiler [and] officials have endeavored to fix the situation," this case would "not involve the kind of pervasive conditions that can be viewed as an integral part of the penal confinement").

[74] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 505 n.3 (2011) ("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.'").

challenge, to determine whether their "cumulative impact . . . threatens [the] physical, mental and emotional health and well-being" of the people inside.[75]

When *Rhodes* was decided, the Court had not yet defined "deliberate indifference" with any precision. But as we have seen, the state has an obligation to provide prisoners with "the minimal civilized measure of life's necessities" and to keep them safe from "pain [that lacks] any penological purpose." This imperative makes an actual knowledge standard ill-suited to the task.[76] After *Gamble* and *Rhodes*, deliberate indifference ought to have been taken as the equivalent of gross negligence, on which prison officials would be liable for any conditions creating a substantial risk of serious harm[77] of which they should have known.

Read in this light, these two cases thus laid the groundwork for an interpretively appropriate two-pronged approach. Plaintiffs alleging micro-level failures of care would need to show both that they faced a substantial risk of serious harm in some form *and* that defendants had constructive knowledge of that risk, whereas in cases alleging macro-level failures, it would be enough for plaintiffs to demonstrate the risk of harm itself. In the latter set of cases, the state of mind showing would not be irrelevant but simply inferred from the conditions themselves.[78] Though the line between micro- and macro-level failures of care may not always be clear, some indeterminacy in this regard would be an insufficient reason to demand an affirmative state-of-mind showing in all cases. Courts, after all, are constantly called upon to draw distinctions of this sort. The imperative here is to avoid the imputation of official culpability in cases where even reasonably attentive prison officials committed to satisfying the state's carceral burden could well have remained unaware of a given risk. There is no reason to think that, guided by this concern, courts would be unable to draw appropriate lines.

In sum, with *Gamble* and *Rhodes*, the Court charted a course toward doctrinal standards that closely tracked prison officials' non-negotiable constitutional obligation to fulfill the state's carceral burden, on terms—i.e. via the totality of conditions approach—that would have acknowledged the humanity of people in prison. But in the years following *Rhodes*, the practical import of the case quickly eclipsed this doctrinal promise. Despite the considerable evidence

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[75] Rhodes v. Chapman, 452 U.S. 344, 364 (1981) (Brennan, J., concurring) (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (N.H. 1977)).
[76] *Id*. at 347 (majority opinion).
[77] *See* Dolovich, *supra* note 36, at 917–18 ("If prisoners should suffer minor harms while incarcerated, it seems inapt to call the imposition of such harms 'cruel' even if they have arisen from official neglect and even if they may be thought to induce some deprivation of prisoners' basic needs. But when a threshold is crossed such that the victim's suffering is 'serious, not trivial,' the harm suffered would be sufficient to qualify as cruel." (quoting John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834, 837 (1996))).
[78] Justice Scalia appears to have misunderstood this point. In the 1991 case of *Wilson v. Seiter*, 501 U.S. 294 (1991) (discussed below), Justice Scalia chided the petitioner for arguing that, in cases involving "'continuous' or 'systemic' conditions . . . official state of mind would be irrelevant." *Id.* at 300. In fact, what Wilson had argued was that, in such cases, any state of mind showing would be *redundant*, a claim consistent with the framework I lay out here. See Reply Br. for the Petitioner at 16, Wilson v. Seiter, 501 U.S. 294 (No. 89-7376).

introduced at trial that the floor space afforded at SOCF to people subjected to double celling fell well short of what human beings require "to avoid serious mental, emotional and physical deterioration,"[79] the *Rhodes* Court declined to declare double celling *per se* unconstitutional.[80] In fairness, the case left open the possibility that, in future cases, the overall pathological effects of overcrowding might yet tip a given institution into unconstitutionality. But *Rhodes* nonetheless wound up providing constitutional cover for prison officials nationwide to respond to ever-increasing prison populations by jamming two people into cells built to the minimum adequate specifications for a single person. It thus set the stage for broad judicial acquiescence to the endemic overcrowding that came to define American carceral institutions from the 1980s to the present day.

This effect, however, was in no way required by the doctrinal framework established in the case. To the contrary, had the Court's understanding of prisoners' Eighth Amendment protections continued to develop along the lines staked out in *Gamble* and *Rhodes*—and had the federal courts rigorously enforced that understanding—judicial enforcement of Eighth Amendment prison conditions claims could have come close to operationalizing core constitutional values and thus ensuring meaningful Eighth Amendment protections for people in prison.

EVADING THE EIGHTH AMENDMENT

The doctrine, however, did not develop this way. The first sign of divergence came in the 1991 case of *Wilson v. Seiter*. Wilson had brought an omnibus challenge to a raft of macro-level conditions in Hocking Correctional Facility (HCF), the Ohio prison where he was housed. Arguing that *Rhodes* required only "an objective examination of prison conditions,"[81] Wilson maintained that when conditions are "continuous" or "ongoing," some prison official may be presumed to know of them. Thus, Wilson suggested that, in cases like his, such a showing would be "redundant."[82]

Writing for the *Wilson* majority, Justice Scalia rejected this view. "*Rhodes* had not," Justice Scalia insisted, "eliminated the subjective component."[83] As Justice Scalia explained, the "holding in *Rhodes* turned on the objective component . . . (Was the deprivation sufficiently

[79] *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting); *see also id*. at 375 (noting "the concurrent conclusions of two courts that the overcrowding and double celling here in issue are sufficiently severe that they will, if left unchecked, cause deterioration in [residents'] mental and physical health").
[80] Justice Brennan's vote for the government in *Rhodes* appears to have stemmed, at least in part, from a reluctance to endorse a constitutional conclusion that would wholly upend the structural foundations of a regulatory institution as massive, complex, and costly to reform as the carceral system. *See id*. at 367 n.15 (Brennan, J., concurring) ("If it were true that . . . providing less than 63 square feet of cell space per [person] were [per se unconstitutional], then approximately two-thirds of all federal, state, and local [prisoners] today would be unconstitutionally confined.")
[81] Br. for Petitioner at 10–11, Wilson v. Seiter, 501 U.S. 294 (1990) (No. 89-7376).
[82] *See* Reply Br. for the Petitioner, *supra* note 78, at 16, (arguing that a state of mind showing "is unnecessary or redundant in the context of continuing practices and customs"); *see also supra* note 78.
[83] Reply Br. for the Petitioner at 16, *supra* note 78, at 16.

serious?)." It therefore had no occasion to consider the equally necessary "subjective component (Did the officials act with a sufficiently culpable state of mind?)."[84] And, the *Wilson* Court now held, even in cases alleging macro-level failures of care, a showing of deliberate indifference is always required.[85]

Although foreclosing any judicial inference of deliberate indifference, *Wilson* still left open the question of precisely what state of mind deliberate indifference represented. Were constructive knowledge ultimately held to suffice, *Wilson*'s holding need not have greatly blunted the scope of Eighth Amendment protections, nor diverted judicial attention unduly from a focus on the conditions themselves. To minimize the gap between constitutional meaning and constitutional doctrine, the operative question could simply have been whether reasonable correctional officers, committed to fulfilling the state's carceral burden, would have recognized the risk and acted to alleviate it. If even in macro-level cases like *Wilson* the plaintiff would now bear the burden of making the showing, judicial focus could still remain on the character of the conditions themselves and their "effect on the imprisoned."

Then, just three years after *Wilson*, the Court decided otherwise. In the 1994 case of *Farmer v. Brennan*, the Court defined deliberate indifference as the equivalent of criminal recklessness, on which defendants are liable only if they actually realized the risk of harm.[86] To make this showing, the conditions themselves need not be wholly irrelevant. As the *Farmer* Court observed, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious,"[87] and to assess this possibility, courts would presumably need to consider the conditions giving rise to the risk. But after *Farmer*, such relevance would be only contingent. As the Court hastened to note, any inference of defendants' subjective awareness "cannot be conclusive, for we know that people are not always conscious of what reasonable people would be conscious of." In other words, however obvious the circumstances, people may at times remain oblivious.[88] And when this is true of prison officials, no constitutional liability may lie, however "soul-chilling" the conditions and however painful their impact. *Farmer*'s holding thus recasts the affirmative obligation of the state's carceral burden into something more episodic and random. The effect is to incentivize the failure to pay attention, setting the stage for innumerable institutional pathologies carrying great potential for harm.[89]

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[84] *Wilson*, 501 U.S. at 298.
[85] *See id.* at 299–303.
[86] Farmer v. Brennan, 511 U.S. 825, 837 (1994).
[87] *Id*. at 842.
[88] *See id*. (noting the inference of actual knowledge from obvious circumstances) (quoting WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.7 (1st ed.)).
[89] *See Wilson*, 501 U.S. at 310 (White, J., concurring) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time.").

Lawrence Sager has famously argued that the Court will sometimes fail to enforce a constitutional provision "to its full conceptual boundaries" out of "institutional concerns."[90] But the gap *Farmer* creates between Eighth Amendment values and the governing doctrine cannot be explained away on institutional grounds. For one thing, culpability standards being the judiciary's bread and butter, application of a constructive knowledge standard in this context is hardly beyond the ken of the courts, a reality that negates any plausible institutional competence concerns.[91] Nor does the need for judicial deference to prison officials—perhaps the strongest theme in the Court's prison law jurisprudence more generally[92]—provide sufficient justification for standards so directly at odds with the state's Eighth Amendment obligations. Deference might be appropriate in contexts where state officials may be relied upon to fulfill their duties without abusing their authority. But the long and troubling history of unspeakable maltreatment against incarcerated people by the very actors charged with their protection[93] has shown that, absent meaningful external scrutiny, the power that prison officials have over incarcerated persons is sure to be abused. Executive branch corrections agencies, in other words, have demonstrated unequivocally their inability to police themselves. Add to this picture the broad political disenfranchisement of people in prison and their families and communities, and it becomes clear that courts represent the only available mechanism for overseeing the state's treatment of incarcerated persons. Without judicial review, people in custody would be left not only without recourse for constitutional violations but also constantly vulnerable to the "wanton and unnecessary infliction of pain" by state officials who would know their own prerogatives to be absolute. For these reasons, judicial deference to prison officials is entirely inappropriate for this context.

In any case, it was not Sager's "institutional concerns" but instead the language of the Eighth Amendment itself that the Court invoked to justify defining deliberate indifference as requiring subjective awareness of the risk. As the Court put it in *Wilson*, "[t]he source of the intent requirement is . . . the Eighth Amendment itself, which bans only cruel and unusual *punishment*."[94]And punishment, Justice Scalia maintained, is "'a deliberate act intended to chastise or deter.'"[95] Thus, "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[96] But this interpretive move, relied upon by the Court in *Farmer*, in no way justifies *Farmer*'s holding. The problem lies in the theory of punishment Justice Scalia implicitly (and

[90] *See* Sager, *supra* note 4, at 1213.
[91] Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).
[92] *See* Dolovich, *supra* note 21; Dolovich, *supra* note 36, at 961–63 n.306; Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012).
[93] *See supra* note 8 and accompanying text.
[94] *Wilson*, 501 U.S. at 300 (emphasis in the original); *see also* Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").
[95] *Wilson*, 501 U.S. at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).
[96] *Id.*

inappropriately) invokes—an individualistic conception of punishment wholly unsuited to governmental action in general and to the Eighth Amendment context in particular.

In the private sphere, individuals *qua* individuals may and do inflict punishment on others. It is, however, the distinct practice of *state* punishment with which the Eighth Amendment is exclusively concerned. And state punishment cannot be inflicted by one person acting alone, even a person wearing a correctional officer's uniform. It is instead, and can only be, inflicted through the combined actions of the linked institutions that comprise the state's criminal justice apparatus. This means that prison conditions constitute punishment for Eighth Amendment purposes regardless of what responsible officers happened to know or believe or intend regarding the effects of their own conduct on individual prisoners. To echo Justice Scalia's phrasing in *Wilson*, it is the penalty itself—that of being deliberately consigned to prison for the specified term under whatever conditions prison officials impose—that is "intended to chastise or deter." Prison conditions necessarily constituting punishment,[97] the only question is whether the punishment they represent in any given case is one the state is constitutionally entitled to inflict—a question to which the state's carceral burden forms the answer.[98]

Flawed reading notwithstanding, after *Farmer*, Eighth Amendment challenges may be defeated by a showing that defendants did not personally realize the risk—a determination that will often be made with no reference to the conditions themselves or to prisoners' experience of those conditions. True, even on a recklessness standard, courts finding actual knowledge of the risk will then move to examining the challenged conditions to determine whether "the deprivation [was] sufficiently serious." But here too the Court has narrowed the scope of the inquiry in a way that undercuts basic Eighth Amendment values.

Rhodes, recall, held that prison conditions, "*alone or in combination*, may deprive [incarcerated persons] of the minimal civilized measure of life's necessities" in violation of the Eighth Amendment.[99] As Justice Brennan emphasized in his concurrence, this meant that "various deficiencies in prison conditions 'must be considered together'" since "[e]ven if no single condition of confinement would be unconstitutional in itself, exposure to the cumulative effect of prison conditions may subject [people] to cruel and unusual punishment."[100] This view gives life to the constitutional imperative affirmed by the Court in *Gamble*, that punishment must comport

[97] *See* Dolovich, *supra* note 36, at 897–910 (fleshing out this argument in more detail and describing a narrow exception to this general rule).
[98] To put it another way, the real question for Eighth Amendment purposes is not, as the Court put it in *Wilson* and *Farmer*, when prison conditions constitute *punishment*, but when they may be said to be *cruel*. For discussion grounding the imperative of the state's carceral burden in the meaning of "cruelty," see Dolovich, *supra* note 36, at 910–31. For an authoritative historical account, see John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L. J. 441 (2017).
[99] Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (emphasis added).
[100] *Id*. at 362–63 (Brennan, J., concurring) (internal citations and quotations omitted).

with the requirements of "dignity, civilized standards, humanity, and decency."[101] Human experience being cumulative, and physical and psychological health being informed by the totality of a person's circumstances, any other approach would risk willful blindness to the nature and extent of human suffering in custody.[102]

But in *Wilson*, Justice Scalia recast the requisite showing in ways fundamentally at odds with this basic feature of human life. On appeal, the Sixth Circuit had dismissed several of Wilson's claims—including those concerning "inadequate cooling, housing with mentally ill inmates, and overcrowding"—on the grounds that, "even if proved, they did not involve the serious deprivation required by *Rhodes*."[103] Wilson had argued that this was in error because "each condition must be considered as part of the overall conditions challenged."[104] Justice Scalia, however, rejected this notion as a misunderstanding of *Rhodes*. Yes, he acknowledged, "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone." But this is the case "only when they have a mutually enforcing effect that produces the deprivation of a *single, identifiable human need* such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."[105] Dismissing the "totality of the conditions" approach that had prevailed since federal courts first began to entertain Eighth Amendment conditions claims in the 1960s, Justice Scalia held that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[106]

After *Wilson*, courts may consider only those conditions bearing directly on clear and specific requisites of human health and safety. All other aspects of the carceral experience, however much they may compromise plaintiffs' quality of life, become constitutionally irrelevant. But just as free people do not generally evaluate their everyday life experience by considering their various needs in isolation, the character of the prison experience—and thus of carceral punishment—cannot properly be assessed other than holistically. Take, for example, one aspect of life in HCF included in Wilson's complaint: housing with mentally ill inmates. The Sixth Circuit dismissed this claim because, although plaintiffs contended that this practice "place[d] them in fear for their safety," they failed to "cite any particular episodes of violence supporting this fear."[107] And, the Sixth Circuit found, in the absence of "allegations of prior physical violence" involving people with mental illness, "th[is] fear is not

[101] *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (opinion of then-Judge Harry Blackmun).
[102] *See supra* text accompanying notes 64–65.
[103] *Wilson*, 501 U.S. at 304.
[104] *Id.* (internal citations and quotations omitted).
[105] *Id*. (emphasis added).
[106] *Id*. at 305.
[107] Wilson v. Seiter, 893 F.2d 861, 865 (6th Cir. 1990).

reasonable."[108] But the potential danger of being housed in close quarters with people who are mentally ill cannot be reduced simply to whether the experience instills a fear of imminent assault. Nor is the fear of assault by residents with mental illness the only potentially harmful or oppressive aspect of such an arrangement.

In his complaint, among other issues, Wilson alleged "overcrowding, excessive noise . . . inadequate heating and cooling, improper ventilation [and] unclean and inadequate restrooms."[109] Assuming the truth of these allegations, imagine what these conditions meant for the daily life of Wilson and his fellow HCF residents. The dorms were already hot, crowded, noisy, and malodorous. Privacy would be virtually nonexistent, and everyone would feel compelled to be on constant alert for potential threats. Now add to this volatile mix the additional fact that some subset of the dorm's population suffers from (likely insufficiently treated) mental illness. Even if none of these individuals is violent or aggressive, they may still behave in ways that increase the unpleasantness of the environment and thus the general levels of stress and irritability that can make prison both physically harmful and psychologically traumatic.[110] Perhaps some of those with mental illness do not bathe, or, lacking a sense of proper interpersonal boundaries, continually invade the space of others. Or they may say inappropriate things, things that could set off hostile and even violent reactions on the part of other residents. Or it may simply fall to others in the dorm to provide the care that should be given by mental health professionals, thereby creating new sources of pressure in an environment that is already close to the breaking point.

As this brief account suggests, without knowing more, it is impossible to fix precisely in what ways, and how much, the practice of placing people with mental illness in general population units increases the tension, frustration, and threat of violence faced by all residents.[111] We might, for example, want to know: How much time are residents able to spend out of the unit? What is the extant level of violence and tension in the dorms? What kind of support, if any, is provided those residents who take it upon themselves to help those who are mentally ill? It is, however, already clear that this practice would contribute in innumerable ways to the instability of an environment that is already inherently fragile—a fragility, it bears emphasizing, that would be only be further exacerbated by overcrowding and inadequate cooling, to name the other two conditions

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[108] *Id.*

[109] Wilson v. Seiter, 501 U.S. 294, 296 (1991).

[110] Terry A. Kupers, *Prisons and the Decimation of Pro-Social Life Skills*, *in* THE TRAUMA OF PSYCHOLOGICAL TORTURE 127, 130 (Almerindo Ojeda ed. 2008) ("In crowded, noisy, unhygienic environments, human beings tend to treat each other terribly.").

[111] Note that people with untreated mental illness will personally have an Eighth Amendment claim for medical neglect. But the fact of such a claim hardly guarantees that treatment will be provided, *see* Dolovich, *supra* note 21 (describing the many obstacles to the successful prosecution of constitutional claims by prisoners), and the situation described in the text remains a standard experience in many prisons and jails around the country. *See, e.g.,* Sharon Dolovich*, Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 982, 991 & n.110 (2012) (describing the practice in the L.A. County Jail of housing people with untreated mental illness in the dorms and the problems this practice creates for other dorm residents).

the Sixth Circuit struck from Wilson's complaint as not representing "the type of seriously inadequate and indecent surroundings necessary to establish an Eighth Amendment violation."[112]

After *Wilson*, a plaintiff's inability to state with precision the reinforcing effect of a particular condition on the deprivation of a "single, identifiable human need" renders those conditions constitutionally irrelevant.[113] They therefore drop out entirely, to be treated by the court as if they did not exist. But if specific conditions can be erased for constitutional purposes, they cannot be erased as a matter of lived experience. For Wilson and other residents of HCF, the conditions the Sixth Circuit dismissed would have continued to negatively shape their daily reality and thus also—and this is key—the character of the punishment the state was inflicting on them. It is worth recalling that courts will not impose constitutional liability unless they have found that defendants actually realized the risk of harm. This aspect of *Wilson* may thus shield from Eighth Amendment scrutiny even those conditions known by state officials to compromise overall health and safety and thus to cause gratuitous pain and suffering to people inside.

THE NEXT FRONTIER IN EIGHTH AMENDMENT EVASION?

Taken together, *Wilson* and *Farmer* enable courts to reject claims of unconstitutional conditions without ever squarely addressing either the character of those conditions or the suffering they cause the people subjected to them. Thanks to this regime, a victory for defendants in any given case can tell us little or nothing about the constitutional adequacy of the punishment the state is inflicting, via its designated agents, on the people we have collectively consigned to prison. Given the judicial monopoly on constitutional enforcement in the American system, the effect is to leave prisoners in most cases to endure without recourse whatever conditions prison officials choose to inflict.

Twenty-five years on, this is still where things stand. It is unknown whether the new Roberts Court, with its Trump-appointed additions of Justices Gorsuch and Kavanaugh, will revisit the standards governing Eighth Amendment prison conditions claims, or what changes they will make if they do. But for those committed to ensuring that state punishment comports with the basic values of "dignity, civilized standards, humanity, and decency" embraced by the Court in *Gamble*, the early signs are not promising.

In 2019, the Court decided *Bucklew v. Precythe*, a death penalty case that raised an as-applied challenge to Missouri's lethal injection protocol. Justice Gorsuch,[114] writing for the

[112] *Wilson*, 893 F.2d at 865 (internal citations and quotations omitted).
[113] *Wilson*, 501 U.S. at 304.
[114] Bucklew v. Precythe, 139 S. Ct. 1112 (2019). Justice Gorsuch was joined in the majority by Chief Justice Roberts and Justices Alito, Kavanaugh, and Thomas.

majority, framed his holding as a clarification of *Baze*[115] and *Glossip*,[116] the Court's prior decisions concerning the constitutionality of lethal injection. But the opinion reflects a greatly diminished view of the Eighth Amendment in general, one that, were it extended to conditions cases, could portend still broader permission for prison officials to inflict gratuitous suffering with constitutional impunity.

Bucklew suffered from a rare medical condition that caused "tumors filled with blood vessels to grow throughout his body," including his throat.[117] He argued that, because of this condition, execution by lethal injection would likely cause him "prolonged feelings of suffocation and excruciating pain."[118] In turning back Bucklew's challenge, Justice Gorsuch made clear that the "Eighth Amendment does not guarantee a prisoner a painless death." Instead, "when it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved," the question is "whether the punishment '*superadds*' pain well beyond what's needed to effectuate a death sentence."[119] What might this standard mean for people wishing to challenge their conditions of confinement? Optimistically, it might seem to promise careful judicial attention to the nature and impact of the conditions at issue. Incarceration is a punishment of exile, its essence being the loss of liberty for a fixed term. And banishment, even when effectuated through confinement in locked institutions, need not entail the infliction of either physical harm or undue psychological trauma. Perhaps, therefore, courts applying *Bucklew*'s standard of "superadding pain beyond that required to effectuate the penalty" could wind up condemning many conditions that produce gratuitous physical or psychological suffering.

Bucklew, however, offers several indications that this optimistic reading is neither intended nor warranted. For one thing, as already indicated, Justice Gorsuch emphasized that what is constitutionally prohibited is the infliction of pain "well beyond" what is needed to effectuate the penalty. As he put it, "what unites the punishments the Eighth Amendment was understood to forbid" is that they intensify the sentence "with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'"[120] This language alone indicates a minimalist version of Eighth Amendment protections, on which baseline levels of "terror, pain, and disgrace" are an acceptable part of criminal punishment. On this standard, the mere fact that state officials inflict gratuitous pain and suffering would be insufficient to trigger Eighth Amendment protections. And what, for Justice Gorsuch, constitutes this baseline? Is it set with any reference to the demands of humane treatment? *Bucklew* suggests otherwise. Instead, it tells us, assessing whether an execution method "cruel[ly] superadd[s]" pain "involve[s] a comparison with available alternatives"—i.e., "to other known methods" of carrying out the sentence. Courts seeking an appropriate reference point should look

[115] Baze v. Rees, 553 U.S. 35 (2008).
[116] Glossip v. Gross, 135 S. Ct. 2726 (2015).
[117] *Bucklew*, 139 S. Ct. at 1137 (Breyer, J., dissenting).
[118] *Id*. at 1138 (internal citations and quotations omitted).
[119] *Id*. at 1124, 1126–27 (emphasis added) (majority opinion).
[120] *Id*. at 1124 (quoting *Baze*, 553 U.S. at 48 (brackets in the original)).

to current practice or "some other feasible and readily available" means of "carry[ing] out [a] lawful sentence . . . that would have significantly reduced [the] substantial risk of pain."[121] If in death penalty cases this imperative requires defendants to identify a substantially less painful method of execution, applying this standard to prison conditions could leave prisoners with the burden of having to demonstrate the state's capacity to establish less brutal conditions. This approach could allow defendants to defeat Eighth Amendment conditions claims by demonstrating the combined intractability of current incarceration rates and resource constraints, thereby—perversely—allowing conditions of the state's own making to justify reducing its constitutional obligations to keep people safe from harm while they are in prison.

Other features of *Bucklew* also carry the potential to narrow still further prisoners' Eighth Amendment protections. Most notably, Justice Gorsuch takes pains to emphasize the majority's originalist commitments,[122] thus plainly signaling a repudiation—long advocated by the Court's conservative wing—of a "living Constitution" approach to Eighth Amendment interpretation, with its emphasis on the "evolving standards of decency that mark the progress of a maturing society."[123] The full practical implications of this shift remain to be seen. But, for our purposes, a return to originalism could mean that courts assessing prison conditions for any "superadding" of pain will soon be taking as the baseline the carceral experience of people in nineteenth century American prisons.

In his opinion in the 2003 case of *Overton v. Bazzetta*, Justice Thomas provided a chilling preview of this approach. *Overton* involved a First Amendment freedom of association challenge brought by Michigan prisoners against new limits on prison visitation.[124] The Court upheld the regulations, and, in his concurrence, Justice Thomas canvassed the limits on prisoners' interactions with the outside world that defined life in the nation's earliest penitentiaries. At the time, as Justice Thomas described it, people in prison were "permitted virtually no visitors" and "even their letters were censored."[125] In some facilities, they were permitted "to send one letter every six months, provided it was penned by the chaplain and censored by the warden"; were entitled to only "one visit from . . . relatives during [their entire] sentence"; and had access to "[n]o reading materials of any kind, except a Bible." Justice Thomas was not offering these details to condemn the regime

[121] *Id*. at 1127.
[122] Among other things, Justice Gorsuch identified certain methods of execution as "'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words"; bolstered an interpretation of "cruel and unusual" based on "confirm[ing] that people who ratified the Eighth Amendment would have understood it in just this way"; invoked "the Constitution's original understanding" when explicating early death penalty precedent; and contrasted "the modes of execution the Eighth Amendment was understood to forbid with those it was understood to permit [a]t the time of its adoption." *Id*. at 1112, 1123–24.
[123] Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).
[124] Overton v. Bazzetta, 539 U.S. 126 (2003). Justice Thomas agreed with the *Overton* majority that the regulation should be upheld, but he based it on an idiosyncratic theory of incarcerated persons' First Amendment rights, on which the challenged regulation should be upheld if the state legislature intended prison sentences to encompass the termination of those rights. *See id.* at 140-43 (Thomas, J., concurring in the judgment).
[125] *Id*. at 144 (Thomas, J., concurring in the judgment).

they represented. It was simply that, for him, this historical experience set the relevant point of comparison against which the constitutionality of Michigan's new restrictions on visitors should be measured.

In his *Overton* concurrence, Justice Thomas focused only on practices in the early nineteenth-century penitentiaries of New York and Pennsylvania. But after the Civil War, the Southern states adopted a different carceral model: the plantation prison.[126] And when, in the 1960s, the first federal judges began to investigate claims of "brutal and dehumanizing" treatment in those Southern prisons, they unearthed an almost unimaginable level of physical barbarity. In his *Rhodes* concurrence, Justice Brennan offered a snapshot of those findings, as recounted "in gruesome detail" by Judge Frank Johnson of the Alabama District Court in the 1976 omnibus prison conditions case of *Pugh v. Locke*. As Justice Brennan explained, Judge Johnson found the Alabama prisons to be

> "horrendously overcrowded," to the point where some inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals. The physical facilities were "dilapidat[ed]" and "filthy," the cells infested with roaches, flies, mosquitoes, and other vermin. Sanitation facilities were limited and in ill repair, emitting an "overpowering odor"; in one instance, over 200 men were forced to share one toilet. Inmates were not provided with toothpaste, toothbrush, shampoo, shaving cream, razors, combs, or other such necessities. Food was "unappetizing and unwholesome," poorly prepared, and often infested with insects, and served without reasonable utensils. There were no meaningful vocational, educational, recreational, or work programs. . . . [There was also] "rampant violence" within the prison. Weaker inmates were "repeatedly victimized" by the stronger; robbery, rape, extortion, theft, and assault were "everyday occurrences among the general inmate population."[127]

Nor was Alabama an outlier. As Justice Brennan noted, "[s]imilar tales of horror are recounted in dozens of other cases." [128]

This is not the place to engage either *Bucklew*'s originalist turn or Justice Thomas's particular brand of originalism, on which conditions in the earliest American carceral facilities would set the bar on unconstitutional cruelty. Here, what matters is that, were the Court to follow Justice Thomas's lead, evidence that a given carceral environment is currently no worse than the "gruesome" conditions that prevailed in the nation's first prisons would be sufficient to warrant dismissal of plaintiffs' claims. This suggestion, however, is perverse. It was just such unalloyed freedom from external discipline afforded prison officials during the hands-off era that left prisoners so profoundly vulnerable to abuse. The "foul [and] inhuman" conditions that eventually

[126] *See, e.g.*, OSHINSKY, *supra* note 15.
[127] Rhodes v. Chapman, 452 U.S. 337, 355 (1981) (Brennan, J., concurring) (internal citations omitted) (quoting Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); *see also infra* note 130.
[128] *Rhodes*, 452 U.S. at 356.

came to light through litigation proved the folly—and cruelty—of such constitutional impunity.[129] The promise of judicial enforcement lies in the ability of courts to measure state action against the moral imperatives that animate the Eighth Amendment. An originalist approach in the Justice Thomas mold would instead turn this system on its head, allowing the long and sordid history of brutality against people in prison to justify continuing abuse.[130]

Two other seeds planted by the *Bucklew* majority also carry the potential to dramatically contract prisoners' Eighth Amendment protections. The first would considerably raise the bar on the requisite state of mind showing, thereby expanding even further the capacity of courts to reject conditions challenges with minimal attention to the nature and impact of the conditions themselves. In *Baze*, Justice Thomas, joined by Justice Scalia, took the position that "the evil the Eighth Amendment targets is intentional infliction of gratuitous pain" and therefore that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."[131] Although Justice Gorsuch did not explicitly endorse this view in *Bucklew*, he nonetheless implied the readiness of the Court's conservative wing to consider doing so in the future.[132] Should Justice Thomas's preferred approach be applied to conditions claims, *Farmer*'s already high standard would be raised further still, to deny plaintiffs any constitutional recourse unless conditions were imposed deliberately, "for the very purpose of causing harm." This standard would place beyond constitutional concern an enormous range of gratuitous pain and suffering daily inflicted by officers who, although not themselves sadistic (i.e., not inclined to impose pain for no reason other than making prisoners suffer), still know that people for whom they are responsible are in danger of harm and yet fail to take the necessary steps to keep them safe. This is a long way from Chief Justice Rehnquist's recognition in *DeShaney* of the constitutional status of the state's carceral burden.

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[129] Gates v. Collier, 349 F. Supp. 891, 894 (N.D. Miss. 1972).

[130] There is good reason to fear the real-life consequences of a constitutional standard that would validate current abuses in light of historical practices. Forty-three years after *Pugh v. Locke* first brought Eighth Amendment scrutiny to bear on Alabama's prisons, an April 2019 Department of Justice investigation into conditions in that state's prisons found "severe, systemic" violations "exacerbated by serious deficiencies in staffing and supervision; overcrowding; ineffective housing and classification protocols; inadequate incident reporting; inability to control the flow of contraband into and within the prisons, including illegal drugs and weapons; ineffective prison management and training; insufficient maintenance and cleaning of facilities; the use of segregation in solitary confinement to both punish and protect victims of violence and/or sexual abuse; and a high level of violence that is too common, cruel, of an unusual nature, and pervasive." U.S. DEPT. OF JUST. CIV. RTS. DIV. & U.S. ATT'Y OFF. FOR THE N., MIDDLE, & S. DIST. OF ALA., INVESTIGATION OF ALA. ST. PRISONS FOR MEN (Apr. 2, 2019).

[131] Baze v. Rees, 553 U.S. 35, 94, 102 (2008) (Thomas, J., concurring in the judgment). This view echoes the standard that currently applies to Eighth Amendment excessive force claims. Under *Whitley v. Albers*, prisoners alleging excessive force must show that defendants used force "maliciously and sadistically for the very purpose of causing harm." 475 U.S. 312, 321 (1991). The Eighth Amendment theory that Justice Thomas staked out in *Baze* and again in *Bucklew* would effectively extend the *Whitley* standard to all Eighth Amendment claims.

[132] *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1125–26 (2019) (explaining that, for Justices Thomas and Scalia, a person facing the death penalty "must show that the state intended its method to inflict [unnecessary] pain" but that "revisiting that debate isn't necessary here, because . . . the State was entitled to summary judgment even under the more forgiving *Baze*/*Glossip* test").

A second seed planted by Justice Gorsuch in *Bucklew* could, if it takes root, have an even more extreme effect: the foreclosure of virtually any conditions claims at all. In *Bucklew*, Justice Gorsuch cites with approbation Justice Story's view, expressed at the time of ratification, that "the prohibition of cruel and unusual punishments [is] likely unnecessary because no free government would ever authorize atrocious methods of execution like [those that concerned the framers]."[133] Justice Story's assertion was echoed by Justice Thomas, who in his *Bucklew* concurrence expressed his "thankful[ness] . . . that the Eighth Amendment is 'wholly unnecessary in a free government'" and that "States do not attempt to devise such diabolical punishments."[134] Read alongside the assertion that the Eighth Amendment prohibits only "the intentional infliction of gratuitous pain," it is not difficult to see how Justice Story's notion could lead the Court to reject any conditions challenges at all—on the ground that, in a free society like the United States, no government officials would ever deliberately subject prisoners to conditions causing them needless pain and suffering. And if this (stipulated) possibility could never arise, then the courts need never even entertain allegations of unconstitutional prison conditions.

To arrive at such a total evisceration of prisoners' Eighth Amendment protections, the Court would have to cross many a Rubicon. One hopes we never reach that point. Still, *Bucklew* clearly endorses a much a diminished normative vision of the Eighth Amendment, one that, were it implemented, would enable yet further loosening of the already limited constitutional constraints on how state officials treat people in prison. Depending on how things play out, a new hands-off era could well soon be upon us.

[133] *Id.* at 1123 (internal quotation marks omitted). In fairness, states arrived at the standard lethal injection protocol by searching for less obviously painful and traumatic methods of execution. *See* Deborah W. Denno, *Execution Methods in a Nutshell*, *in* ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT 427, 427 (Robert M. Bohm & Gavin Lee eds., 2017) ("This country's centuries-long search for a medically humane method of execution landed at the doorstep of lethal injection."). But Bucklew's situation indicates that best intentions do not always suffice to avert agonizing pain. And as innumerable federal judges discovered in the 1960s as soon as they started to look, left to their own devices, state prison systems are in no way guaranteed to prioritize reducing gratuitous suffering and ensuring the humane treatment of people in custody.

[134] *Bucklew*, 139 S. Ct. at 1123 (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1986 750 (1883)); *id*. at 1135 (Thomas, J., concurring in the judgment) (quoting same).