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Cruelty, Prison Conditions, and the Eighth Amendment

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CRUELTY, PRISON CONDITIONS, AND THE EIGHTH AMENDMENT

SHARON DOLOVICH*

The Eighth Amendment prohibits cruel and unusual punishment, but its normative force derives chiefly from its use of the word cruel. For this prohibition to be meaningful in a society where incarceration is the primary mode of criminal punishment, it is necessary to determine when prison conditions are cruel. Yet the Supreme Court has thus far avoided this question, instead holding in Farmer v. Brennan that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not "punishment" within the meaning of the Eighth Amendment. Farmer's reasoning, however, does not withstand scrutiny. As this Article shows, all state-created prison conditions should be understood to constitute punishment for Eighth Amendment purposes. With this in mind, this Article first addresses the question of when prison conditions are cruel, by considering as a normative matter what the state is doing when it incarcerates convicted offenders as punishment and what obligations it thereby incurs toward its prisoners. This Article then turns to the question of constitutional implementation and considers what doctrinal standards would best capture this understanding of cruel conditions.

At the heart of the argument is the recognition that the state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. For this reason, the state has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for pris-

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oners' basic human needs, may be understood as the state's carceral burden. This, at its core, is the problem with Farmer's recklessness standard: It holds officers liable only for those risks they happen to notice—and thereby creates incentives for officers not to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse. As this Article shows, either a heightened negligence standard on which a lesser burden would attach to those claims alleging macro-level failures of care or a modified strict liability approach would be far more consistent with the possibility of meaningful Eighth Amendment enforcement. Unfortunately, by encouraging judges to deny the existence of cruel treatment in the prisons, the prevailing doctrinal regime instead makes the judiciary into yet another cruel institution vis-à-vis society's prisoners.

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INTRODUCTION

The Eighth Amendment to the United States Constitution prohibits the infliction of “cruel and unusual punishment.”¹ This interdiction has an explicitly normative cast, limiting on moral grounds what

¹ The full text of the Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

the state may do to convicted criminal offenders as punishment.² Although the Clause prohibits cruel and *unusual* punishment, its normative force derives chiefly from its use of the word *cruel*.³ This is evident from the various principles the Supreme Court has identified for guiding judicial analyses of the Eighth Amendment. The prohibition on cruel and unusual punishment has been held to forbid punish-

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 It is not clear what work, if any, the term “unusual” does in identifying those punishments that violate the prohibition on “cruel and unusual punishment.” As the Court noted in *Trop v. Dulles*, “[o]n the few occasions [the] Court has had to consider the meaning of the [Clause], precise distinctions between cruelty and unusualness do not seem to have been drawn.” 356 U.S. 86, 100 n.32 (1958); see also *id.* (“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear.”). The Court’s emphasis in recent death penalty cases on calculating the number of states prohibiting the challenged practice may seem to reflect a concern with whether the death penalty could be said to be “unusual” in the particular context presented. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008) (calculating number of states prohibiting death penalty for defendants convicted of child rape); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (same for defendants who committed their crimes as juveniles); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (same for “mentally retarded” defendants). But the concern with “evolving standards of decency” that motivates the dueling census-taking of state practices found in the Court’s recent death penalty decisions stems from the Clause’s prohibition on *cruelty*, and reflects a rejection of the originalist position that Eighth Amendment cruelty should be interpreted to mean what it meant when the Bill of Rights was adopted. As the Court noted in *Trop v. Dulles*, “[t]he [Eighth] Amendment . . . draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 101 (plurality opinion). The reason, Chief Justice Burger explained in the later case of *Furman v. Georgia*, is that “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting). Concern with “evolving standards” may still seem to indicate that “unusual” does *some* interpretive work in this area, that it reflects, if not a concern with the actual frequency of any given punishment as an objective matter, then a subjective determination that, under the circumstances, the proposed punishment is so far out of the mainstream of what is considered appropriate that it would be widely rejected, and would thus be “unusual” wherever it remained. See, e.g., *Furman*, 408 U.S. at 277 (Brennan, J., concurring) (identifying as principle “inherent in the Clause [prohibiting ‘cruel and unusual punishment’] . . . that a severe punishment must not be unacceptable to contemporary society”). But even this interpretation relies on a normative judgment as to the cruelty of a given treatment, in this case, a judgment attributed to “the people” and embodied in contemporary standards of decency. What seems hard to credit is the notion that a given punishment should be judged constitutional however cruel it may be, so long as its use is sufficiently widespread. The conjunction “and” in “cruel and unusual” notwithstanding, if thirty-seven states were suddenly to reintroduce drawing and quartering as a mode of criminal punishment, there is no doubt that this punishment would and should be constitutionally prohibited. For recent work on this issue, see generally David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel To Be Unconstitutional?*, 16 PUB. AFF. Q. 77 (2002); and John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. 1739 (2008).

ments that are “grossly disproportionate” to the crime;⁴ that are “totally without penological justification”;⁵ that “involve the unnecessary and wanton infliction of pain”;⁶ and that are inconsistent with “evolving standards of decency.”⁷ In its most basic sense, to be cruel is to inflict unjustified suffering,⁸ and each of these principles may be read as condemning those criminal punishments that do just that.⁹

To the extent that the Supreme Court has considered what makes a punishment cruel, it has done so primarily in assessing criminal sanctions. In some cases, the Court has found the use of certain penalties to be *per se* unconstitutional, something the state may never do to anyone as punishment.¹⁰ But for the most part, when courts consider challenges to criminal sentences, whether the death penalty or a prison sentence or some other penalty, the linchpin of the analysis is the criminal offense. That is, the court must ask whether the state is justified in imposing the stipulated sentence or whether the sentence would be cruel in light of the crime.¹¹

But the Eighth Amendment does not only limit the criminal sentences the state may impose; it also constrains the administration of those sentences—the way the state executes otherwise constitutional punishments. This only makes sense. There are, for example, many different ways to put someone to death, and it takes little imagi-

⁴ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

⁵ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

⁶ *Id.* at 173.

⁷ *Atkins*, 536 U.S. at 311–12 (quoting *Trop*, 356 U.S. at 101).

⁸ See *infra* Part II.B for focused consideration of the meaning of cruelty; see also Philip P. Hallie, *Cruelty*, in 1 *ENCYCLOPEDIA OF ETHICS* 229, 229 (Lawrence C. Becker & Charlotte B. Becker eds., 1992) (“Cruelty is the activity of hurting sentient beings.”); John Kekes, *Cruelty and Liberalism*, 106 *ETHICS* 834, 838 (1996) (defining cruelty as “the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims”).

⁹ The last of these principles, that concerned with “evolving standards of decency,” comes closest to ascribing some doctrinal meaning to the term “unusual.” But even this principle is ultimately concerned with a moral judgment as to whether the suffering inflicted may be countenanced by today’s standards of cruelty. For more on this point, see *supra* note 3.

¹⁰ The Eighth Amendment, for example, has been found to prohibit “[t]he barbaric punishments condemned by history, ‘punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like.’” *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting)); see also *Trop*, 356 U.S. 86 (prohibiting state from stripping offenders of American citizenship as punishment).

¹¹ See *Harmelin v. Michigan*, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring) (controlling opinion) (directing courts assessing prison sentences under Eighth Amendment to make threshold determination whether sentence was “grossly disproportionate” in light of crime).

nation to conjure methods that would be incontrovertibly cruel, even if other methods might be considered humane.¹²

That the Eighth Amendment must also apply to a punishment's administration is particularly evident when considering prison sentences. A judicial decision upholding, say, a sentence of life in prison for murder is made before the sentence is served and is typically made with little or no attention to the conditions under which the offender will serve the time. But that offender will be in state custody for years and even decades after the habeas court has affirmed the sentence, and over that time he or she may endure all manner of unspeakable conditions. If the prohibition on cruel punishment is to mean anything in a society where incarceration is the most common penalty for criminal acts, it must also limit what the state can do to prisoners over the course of their incarceration.

But applying the Eighth Amendment to the administration of prison sentences requires a different understanding of cruel punishment, one unrelated to the offense for which the claimant was originally convicted. It is not that a prisoner's original crime is irrelevant to the punishment. But in the existing system, the crime determines only the length of the prison sentence, not the conditions under which that sentence will be served.¹³ Indeed, any harm prisoners suffer at the hands of the state while incarcerated is typically wholly unrelated to their original offense.¹⁴ When prisoners challenge the conditions of their confinement as cruel, therefore, different considerations must

¹² There is, of course, an ongoing and heated debate over whether execution can *ever* not be cruel. But this question has no bearing on my main argument, so I leave it to one side.

¹³ To be sure, prisoners' conditions of confinement are affected by the security classification they receive upon entering the system. See DEAN J. CHAMPION, MEASURING OFFENDER RISK 53–54 (1994) (“Minimum-security housing is often of a dormitory-like quality, with grounds and physical plant features resembling a university campus rather than a prison.”). But although a prisoner's crime will affect the security classification he receives, many other factors are also taken into account. The aim is to place prisoners in the least restrictive classification in which they can be housed safely and coexist peaceably with other inmates. If the profile of a convicted murderer indicates a nonviolent and cooperative disposition, he may well end up in minimum security, whereas a check kiter with a long institutional history of violence will wind up in maximum security. See *id.* at 53–54 (“Minimum-security prisons are facilities designed to house low-risk, nonviolent first offenders. . . . Those sentenced to maximum-security facilities are considered among the most dangerous, high-risk offenders.”).

¹⁴ Correctional officers are generally unaware of the crimes committed by the people in their custody. Even in those cases in which a prisoner is harmed due, in part, to his original offense—when, for example, a convicted child molester is stabbed by fellow inmates—the original offense of conviction will typically have had no bearing on the state's failure to prevent that harm. For more discussion on this point, see *infra* notes 152–58 and accompanying text.

apply. But what considerations exactly? When *are* prison conditions cruel?

It is past time to address this question. Over the last 35 years, the population of America's prisons and jails¹⁵ has soared from approximately 360,000 to over 2.3 million people.¹⁶ More than one in a hun-

¹⁵ Not all those being held in jail have been convicted of a crime. To the contrary, the majority are pretrial detainees, although at any given time some portion of a jail's population will also be comprised of sentenced offenders. These may include offenders sentenced to short stints (generally under a year), sentenced offenders awaiting transfer to prison, and people transferred from prison to serve as trial witnesses in their own cases or in those of others, or to go to court for other reasons. See Margo Schlanger, Differences Between Jails and Prisons 42 (Spring 2003) (unpublished manuscript) available at <http://law.wustl.edu/Faculty/Documents/Schlanger/differencesjailprisons.pdf> (contrasting jail with prison, which houses long-term felony offenders). The Eighth Amendment does not formally apply to pretrial detainees, so their claims for unconstitutional conditions must be brought under the Fourteenth Amendment Due Process Clause. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment."). However, courts routinely regard the Fourteenth Amendment due process rights of plaintiffs challenging the conditions of their confinement in jail as identical to those accorded sentenced offenders under the Eighth Amendment. It is widely acknowledged that pretrial detainees cannot be accorded fewer rights than convicted offenders. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) ("[T]he due process rights of a person [in state custody] are at least as great as the Eighth Amendment protections available to a convicted prisoner."). But as regards conditions claims, this principle has not translated into anything more than an assurance of parity of treatment. See, e.g., *Meyers v. Majkic*, 189 F. App'x 142, 143 n.2 (3d Cir. 2006) ("The standard for violations of the Eighth Amendment applies to pretrial detainees through the Due Process Clause."); *Suprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005) ("A pretrial detainee's claim that he has been subjected to unconstitutional conditions of confinement implicates Fourteenth Amendment liberty interests. The parameters of such an interest are coextensive with those of the Eighth Amendment's prohibition against cruel and unusual punishment."); *Turner v. Kight*, 121 F. App'x 9, 13 (4th Cir. 2005) (finding that although pretrial detainees must pursue "claims of deliberate indifference to serious medical needs" under Due Process Clause of Fourteenth Amendment, "with respect to such claims, a pretrial detainee's due process rights are co-extensive with a convicted prisoner's Eighth Amendment rights"); *Estate of Harbin v. City of Detroit*, 147 F. App'x 566, 569 (6th Cir. 2005) ("Though the Eighth Amendment's prohibition of cruel and unusual punishment does not apply to pretrial detainees, the Fourteenth Amendment's Due Process Clause affords pretrial detainees a right to adequate medical treatment that is analogous to the Eighth Amendment rights of prisoners.").

¹⁶ See THEODORE L. DORPAT, CRIMES OF PUNISHMENT: AMERICA'S CULTURE OF VIOLENCE 55 (2007) ("In 1970, there were about 200,000 Americans in prison."); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 104 (2d ed., 1988) (reporting that number of jail inmates reached 160,863 in 1970); THE PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008) ("With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258."). The United States now incarcerates more people per capita than any other country, and close to twenty-five percent of the world's prisoners are held in the United States. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1 ("The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners."); see also THE SENTENCING PROJECT, FACTS ABOUT

dred American adults is currently behind bars.¹⁷ Correctional facilities across the country are chronically overcrowded and short-staffed, with prisoners jammed into dormitories¹⁸ or doubled up in tiny cells designed for a single person,¹⁹ under conditions that increase volatility and the risk of violence while decreasing the amount of control prison officials have over the institution.²⁰ Rape and other forms of coerced sexual conduct are commonplace,²¹ and inmate health care

PRISONS AND PRISONERS (2006), http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprison.pdf (“The 2005 United States’ rate of incarceration of 737 inmates per 100,000 population is the highest reported rate in the world . . .”).

¹⁷ THE PEW CTR. ON STATES, *supra* note 16, at 5.

¹⁸ As of 2006, over 15,000 California inmates were sleeping in prison common areas “such as prison gymnasiums, dayrooms, and program rooms.” Governor of the State of Cal., *Prison Overcrowding State of Emergency Proclamation* (Oct. 14, 2006), <http://gov.ca.gov/index.php?/proclamation/4278> [hereinafter *Proclamation*].

¹⁹ These cells are often as small as 55 square feet (including bunk bed, desk, toilet, and sink) and routinely house two men, leaving each inmate approximately “20–24 square feet” of living space, “an area about the size of a typical door.” *Rhodes v. Chapman*, 452 U.S. 337, 371 n.3 (1981) (Marshall, J., dissenting). This is despite the fact that a number of professional correctional associations have found that a minimum of 50 to 80 square feet of living space *per person* is necessary to prevent “serious mental, emotional, and physical deterioration.” *Id.* at 372 & n.4 (citing reports by American Public Health Association, Commission on Accreditation for Corrections, National Institute of Justice, National Sheriffs’ Association, U.S. Department of Justice, and National Council on Crime and Delinquency).

²⁰ In the fall of 2006, California Governor Arnold Schwarzenegger declared a “Prison Overcrowding State of Emergency.” *Proclamation, supra* note 18. As Governor Schwarzenegger noted in his declaration, overcrowding creates an “increased, substantial risk of violence, and greater difficulty controlling large inmate populations.” *Id.*; *see also* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 438–39 (2004) (discussing problem of prison overcrowding). Explaining this phenomenon, psychiatrist Terry Kupers observes that,

In crowded, noisy, unhygienic environments, human beings tend to treat each other terribly. Imagine sleeping in a converted gymnasium with 150 to 200 prisoners. There are constant lines to use the toilets and phones, and altercations erupt when one irritable prisoner thinks another has been on the phone too long. There are rows of bunks blocking the view, so beatings and rapes can go on in one part of the dorm while officers sit at their desks in another area. The noise level is so loud that muffled screams cannot be heard. Meanwhile the constant noise and unhygienic conditions cause irritability on everyone’s part. Individuals who are vulnerable to attack and sexual assault—for example, smaller men, men suffering from serious mental illness, and gay or transgender persons—have no cell to retreat to when they feel endangered.

Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 130 (Almerindo Ojeda ed., 2008). Under these conditions, Kupers asks, “[i]s it any wonder that research clearly links prison crowding with increased rates of violence, psychiatric breakdowns, rapes, and suicides”? *Id.*

²¹ A 2007 survey by the Bureau of Justice Statistics (BJS) estimates that more than 60,000 people serving time in prison annually experience some form of sexual misconduct. ALLEN J. BECK & PAIGE M. HARRISON, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 1 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svsfpri07>

is frequently so inadequate that “preventable suffering and death behind bars” has been “normaliz[ed].”²² The serious threat to

.pdf (revised Apr. 9, 2008). Moreover, although this survey is the product of concerted efforts to overcome endemic problems of underreporting, it still likely understates the problem, though by how much it is impossible to say. The definitions used by BJS did not account for sex that takes place in protective pairings, in which prisoners frequently consent to sex only to avoid more violent sexual assaults, and identifies the number of victims rather than the number of incidents, despite the fact that “[o]nce raped, an inmate is likely to be marked as a victim and abused repeatedly.” STOP PRISONER RAPE, PREA UPDATE: UNIQUE OPPORTUNITY TO STIMULATE REFORM 6 (2008), available at http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf.

Anecdotal evidence suggests that the actual numbers are higher, and in some cases far higher, than BJS estimates. At greatest risk of sexual victimization behind bars are young men, nonviolent offenders, gay men, and transgender prisoners. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 70 (2001) (explaining that although problem of prison rape is frequently referred to as homosexual rape, “prisoners who self-identify as gay are much more likely than other prisoners to be *targeted* for rape, rather than being themselves the perpetrators of it”); see also STOP PRISONER RAPE, *supra*, at 6 (reporting that one recent academic study “conducted at seven California men’s prisons [found that] 59 percent of transgender inmates reported having been sexually assaulted by another inmate during their incarceration, a rate that was more than 13 times higher than for the inmate population overall”); see also *id.* (“[M]arginalized and special needs populations are at heightened risk [of sexual abuse in prison]. Among women, typical survivors of sexual abuse [in prison] are non-violent, young, and mentally ill inmates. Among men, non-violent, young inmates, and gay and transgender prisoners have the highest rates of victimization.”). As noted, prisoners vulnerable to rape are typically compelled to enter into protective pairings with a more powerful inmate who will protect them from forcible rape in exchange for regular sex, as well as cleaning, cooking, and other “wifely” chores. See Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens*, in PRISON MASCULINITIES 119, 120 (Don Sabo, Terry A. Kupers & Willie London eds., 2001). In *Fish: A Memoir of a Boy in a Man’s Prison*, T.J. Parsell recounts the following conversation he had with a prison psychiatrist when, as a seventeen-year-old boy about to start a multiyear prison sentence, Parsell learned he was to be sent to the Michigan Reformatory, a.k.a. “Gladiator School[,] ‘[w]here motherfuckers fight each other off with broomstick handles and garbage can lids’”:

“A pretty boy like you,” the psychologist [said], “you’ll need to get a man.”

“Fuck *that!*” I said, my eyes darted to the floor. I could feel my face burning.

“If you don’t get a man, you’ll be open game.”

“They’ll have to kill me first,” I said, sitting up in my chair.

“That can be arranged,” he said, calmly.

T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN’S PRISON* xi (2006).

Some vulnerable inmates are even less fortunate. For example, Roderick Johnson, “a black gay man with a gentle manner,” spent eighteen months in a Texas prison as a sex slave to the Gangster Disciples prison gang. Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1. Renamed “Coco” by the gang, Johnson was “forced into oral sex and anal sex on a daily basis,” “bought and sold,” and “rented” out for sex for the benefit of the gang. *Id.* During this period, Johnson was repeatedly gang-raped in the prison’s cells, stairwells, and showers. *Id.* A 2001 Human Rights Watch report documented similar cases of sexual slavery in prisons in Illinois, Michigan, California, and Arkansas as well as Texas, where, according to prisoners’ reports, sexual slavery is “commonplace in the system’s more dangerous prison units.” HUMAN RIGHTS WATCH, *supra*, at 8.

²² BENJAMIN FLEURY-STEINER WITH CARLA CROWDER, DYING INSIDE: THE HIV/AIDS WARD AT LIMESTONE PRISON 5 (2008). There are endless examples of such pre-

inmates' health and safety posed by existing prison conditions is, moreover, widely recognized. One study found that "[w]hen Americans think about someone they know being incarcerated, the vast majority, 84 percent, say they would be concerned about the person's physical safety. And 76 percent say they would be concerned about the person's health."²³

Urgent problems thus plainly exist in the nation's prisons. But to date, the Supreme Court has avoided consideration as a constitutional matter of when prison conditions are properly judged cruel. It is not that there is no doctrinal basis for Eighth Amendment prison conditions claims. In a line of cases starting with *Estelle v. Gamble* in 1976,²⁴ the Supreme Court established that prisoners may recover for unconstitutional conditions when they satisfy two doctrinal components, one "objective" and one "subjective."²⁵ First, plaintiffs must show as an objective matter that they suffered a "deprivation [that

ventable suffering in American prisons and jails. See *id.* at 177–80 (providing "snapshots" of "institutional problems associated with penal health bureaucracies in the contemporary United States"). To take just two, Brian Tetrault, jailed for burglary and suffering from Parkinson's disease, died in a cell in upstate New York after jail staff cut off the medications he needed to control the disease. Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES, Feb. 27, 2005, at A1. Although Tetrault quickly slid "into a stupor, soaked in his own sweat and urine" and unable to move, jail nurses "dismissed him as a faker." *Id.* While Tetrault was in this incapacitated condition, a jail nurse wrote in the log that he "[c]ontinues to be manipulative." *Id.* And Diane Nelson, held in a jail in Pinellas County, Florida, died of a heart attack ten days after being admitted, "after nurses failed for two days to order the heart medication her private doctor had prescribed." *Id.* When Nelson collapsed, a nurse told her to "[s]top the theatrics." *Id.* In *Dying Inside*, Benjamin Fleury-Steiner reports "catastrophic" medical care in prisons and jails around the country and describes what he calls "the normalization of preventable suffering and death behind bars by overwhelmed medical personnel." FLEURY-STEINER WITH CROWDER, *supra*, at 5. One federal court judge in California recently found as

an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California Department of Corrections and Rehabilitation's] medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system.

Plata v. Schwarzenegger, No. C01-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at *2–3 (N.D. Cal. Oct. 3, 2005).

²³ JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 29 (2006), http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (citing "[s]urvey in March and April of 2006 by Princeton Survey Research Associates International").

²⁴ 429 U.S. 97 (1976).

²⁵ See *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

was] sufficiently serious.”²⁶ Second, they must show that “officials act[ed] with a sufficiently culpable state of mind,”²⁷ that of “deliberate indifference,”²⁸ which the Court in *Farmer v. Brennan*²⁹ defined as actual awareness of the risk.³⁰ But the holding in *Farmer*—the key case in this area³¹—was motivated by consideration not of when prison conditions are *cruel*, but of when they are *punishment*. As the *Farmer* Court put it, “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”³² And, the Court found, prison conditions not explicitly authorized by the statute or the sentencing judge qualify as punishment only if some prison official actually knew of and disregarded the risk of harm.³³

Farmer’s reasoning, however, does not withstand scrutiny.³⁴ Not only does it fail on its own terms,³⁵ but it rests on a conception of punishment that is inappropriate for the context. The Eighth Amendment is concerned not with private punishment but with *state* punishment.³⁶ And as I show in Part I, when punishment is understood in this sense, *all* state-created prison conditions should be regarded as punishment for Eighth Amendment purposes.³⁷ But if this is so, meaningful application of the Eighth Amendment requires a determination of when prison conditions are cruel. In this Article, I address this issue directly. Taking the prohibition on cruel punishment as my starting point, I first consider what the state is doing when it incarcerates convicted offenders as punishment and what obligations it thereby incurs toward its prisoners. Doing so helps to reveal the boundary that separates those prison conditions that are merely unpleasant from those that are cruel. I then turn to the question of

²⁶ *Id.* Deprivations that have been found by the Court to satisfy this standard include “serious medical needs,” *Gamble*, 429 U.S. at 104, “deprivation of . . . identifiable human need[s] such as food, warmth, or exercise, *Wilson*, 501 U.S. at 304, and being subjected to “a substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

²⁷ *Wilson*, 501 U.S. at 298.

²⁸ *Id.* at 297.

²⁹ 511 U.S. 825.

³⁰ *See id.* at 837 (holding that prison official may not be said to be deliberately indifferent “unless [he or she] knows of and disregards an excessive risk to inmate health or safety”).

³¹ For further discussion of *Farmer*, see *infra* Parts I.A, III.C.

³² *Farmer*, 511 U.S. at 837.

³³ *See infra* Part I.A.

³⁴ *See infra* Part I.

³⁵ *See infra* Part I.A.

³⁶ *See infra* Part I.A–B.

³⁷ *See infra* Part I.B.

constitutional implementation and consider what doctrinal standards³⁸ would best capture this understanding of cruel conditions.³⁹

My argument can be summarized as follows. The state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. The state therefore has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners' basic human needs, may be understood as *the state's carceral burden*.⁴⁰ When the state, indifferent to its obligation, violates this

³⁸ This focus on doctrinal standards is not intended to imply that only the courts have an obligation to consider when prison conditions are cruel. Arguably, it is the responsibility of all governmental actors (and citizens) to ensure the constitutionality of state action. The question of when prison conditions constitute cruel punishment is thus relevant well beyond the judicial context. But even assuming that nonjudicial actors were to take seriously their independent obligation to determine what the Eighth Amendment requires and act accordingly—a dim prospect in a culture in which the courts have an apparent monopoly on constitutional interpretation—the deep and abiding hatred and fear that generally defines society's attitude toward incarcerated offenders mean that the political branches are unlikely to attend seriously to the question of what constitutional protections the state owes its prisoners. The doctrinal question, therefore, is a necessary component of the analysis if an understanding of when prison conditions are cruel is to have any practical effect.

³⁹ In this endeavor, I do not seek to discover what the Constitution actually “means.” Cruelty is an inescapably moral concept, which means that any plausible understanding of its application to prison conditions (or any other penal form) cannot be “found” in the text but must instead be argued for on normative grounds. In this sense, mine is akin to at least one form of what has been called “living constitutionalism,” in which the “general principles of political morality” present in the constitutional text are to be interpreted in terms comprehensible and relevant to the present day. See Howard Gillman, *Political Development and the Origins of the “Living Constitutionalism”* 4, http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1052&context=schmooze_papers (last visited Aug. 31, 2009). Although living constitutionalism is generally regarded as opposed to originalism, Jack Balkin has recently argued that it is wholly consonant with what he calls “framework originalism.” Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 557 (2009). As Balkin describes it, framework originalism looks to “the reasons why constitutional designers choose particular language.” *Id.* at 553. Where those designers opted for principles or standards that are “broad, abstract, or vague,” later interpretations must necessarily fill in the meaning of these terms in particular cases. In doing so, we are not violating but rather realizing the intent of the Framers. *Id.* The idea of a “living constitution” also applies here in a further sense, in that this project is concerned with the contemporary experience of incarceration and not with the way prison was understood or experienced at the time the Eighth Amendment was adopted. In the United States today, punishing with incarceration is practiced in a form and on a scale, see *supra* note 16, that would have been unrecognizable when the Bill of Rights was passed. If the prohibition on cruel punishment—which limits what the state may do to convicted criminal offenders as punishment—is to be meaningful in the twenty-first century United States, it is necessary to consider the meaning of cruelty in light of the practice of incarceration as it is now pursued.

⁴⁰ See *infra* note 162.

burden and thereby causes serious harm to prisoners, prison conditions may be said to be cruel.

The state's carceral burden is the price society pays for the decision to incarcerate convicted offenders. This arrangement may be thought of as *society's carceral bargain*. It allows society to remove certain individuals from the shared public space, but only on the condition that the state assumes an ongoing affirmative obligation to meet the basic human needs of the people exiled in this way. The prohibition on cruel punishment means that the terms of the bargain are nonnegotiable. If society prefers, it can choose not to incarcerate. But if it wants the benefits of incarceration, society must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world.

Because the state's carceral burden is ongoing, those prison officials charged with fulfilling its terms are obliged to be proactive. They must pay attention to existing conditions, notice possible dangers, investigate them, and take appropriate steps to prevent unnecessary suffering. This, at its core, is the problem with *Farmer's* recklessness standard: It holds officers liable only for those risks they happen to notice—and thereby creates incentives for officers *not* to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse. A more appropriate standard would at the very least hold prison officials liable for failures to recognize substantial risks of serious harm that a reasonable prison official, appropriately attentive to prisoners' basic needs, would have recognized. On this standard, it would matter little whether the responsible officer had direct contact with the plaintiff or was instead answerable for system-wide inadequacies that caused the plaintiff harm. The obligation to identify and mitigate risks to the health and safety of the people in prison lies both with the line officers who have direct micro-level contact with those in custody and the prison administrators responsible for running the institution at the macro level.

This argument proceeds as follows. Part I argues that *Farmer* relies on an individualistic conception of punishment that is inappropriate for the prison conditions context (or, indeed, for the Eighth Amendment context more generally). The Eighth Amendment is concerned exclusively with state punishment, which is produced not by one individual acting alone but by the state acting on behalf of the collective. When the state punishes with incarceration, it authorizes a process whereby offenders are transferred to the custody of prison officials and forced to endure whatever conditions those officials

create in the course of administering the sentence. A prisoner's conditions of confinement thus constitute the punishment in its most concrete manifestation and should be subject to Eighth Amendment scrutiny regardless of the state of mind of any given prison official.

Part II is the theoretical heart of the Article. Part II.A describes and justifies the state's carceral burden and argues that cruel prison conditions arise when the state fails to satisfy this burden such that prisoners suffer serious physical or psychological harm. Part II.B explains what makes such failures cruel. It argues that the imposition of cruel prison conditions represents not personal but *institutional* cruelty, which arises when an institution by its design and operation inflicts unnecessary and avoidable harm on those subject to its effects. Part II.C argues that the state, as a complex organization, cannot act independently of the individual officers who have been authorized to act on its behalf, and therefore that for prison conditions to be institutionally cruel, *some* prison official must have done something to bring about those conditions.⁴¹ At the same time, Part II.C argues that when prison conditions are appropriately judged cruel, it is the institutional act of subjecting prisoners to the power of prison officials who would cause them harm that justifies this judgment. It is therefore possible for prison conditions to be judged institutionally cruel without the responsible officer(s) being personally cruel. Part II.D expands on the idea of institutional cruelty in the prison context. It argues that the state will be unable to meet its carceral burden—which requires that prison officials meet prisoners' basic human needs—unless prison officials are able to acknowledge and are willing to affirm the humanity and capacity for suffering of the people in their custody. Unfortunately, as Part II.D goes on to show, the structure and culture of the contemporary American prison often operate to dehumanize prisoners in the eyes of prison officials. In this way, prisons as institutions may systematically undermine the capacity of prison officials to recognize the very needs they are charged with fulfilling. As a consequence, Part II.D suggests, meaningful legal constraints (among other reforms) are urgently needed to combat the institutional tendency to dehumanize prisoners and thereby foster official abuses of power.

Part III considers what doctrinal standards would best capture the theory of cruel prison conditions developed in Part II. Part III.A argues that Eleventh Amendment sovereign immunity is no obstacle

⁴¹ Given Eleventh Amendment sovereign immunity, this point proves crucial to the prospect of designing workable doctrinal standards. For discussion on this point, see *infra* Part III.A.

to Eighth Amendment claims on this theory. Part III.B identifies a key problem with the use of strict liability in this context: Such a standard would allow liability even in circumstances where the conduct of prison officials indicated no lack of appropriate concern for prisoners' needs. A strict liability standard therefore risks being overbroad. Part III.C addresses *Farmer's* recklessness standard directly. It argues that a recklessness standard is inconsistent with the ongoing nature of the state's carceral burden and suggests that an objective standard, on which prison officials would be liable if they failed to recognize substantial risks of serious harm, would be more appropriate. Part III.D further explores the possibility of an objective standard. It argues that were such a standard adopted, courts confronted with cases involving macro-level (i.e., system-wide) failures of care should irrebuttably presume official culpability. Part III.E considers some practical limitations of an objective knowledge standard that stem from the reasonableness determination at the heart of a negligence approach. It identifies two possible pitfalls as a practical matter: that judges and juries will inappropriately consider justifications for defendants' actions, despite the fact that in the prison context, to inflict serious harm on prisoners is never justified; and that the broad cultural tendency to dehumanize the people in prison could lead to verdicts for defendants in cases where adequate acknowledgment of plaintiffs' humanity would require a finding of unconstitutional conditions. In response to these possible dangers, Part III.F reconsiders the case for strict liability, which in this context would best be understood as establishing an irrebuttable presumption of constructive knowledge in all cases of sufficiently serious state-created harm. It suggests that with safeguards designed to protect against the danger identified in Part III.B, a modified strict liability standard may be an effective way to ensure meaningful enforcement of the Eighth Amendment in the prison conditions context while still guarding against possible unfairness to defendants.

In conclusion, Part IV suggests that the current state of American prisons, coupled with the political disenfranchisement of prisoners and their allies, is precisely why courts should commit to meaningful enforcement of the Eighth Amendment in the prison conditions context. It argues that, by encouraging judges to deny the existence of cruel treatment in the prisons, the prevailing doctrinal regime has made courts into yet another cruel institution vis-à-vis society's prisoners. This observation, together with the present-day cruelty of the prison as an institution⁴² and the evident unwillingness of legislators

⁴² See *infra* Part II.D.

(or their constituents) to commit to meaningful prison reform, suggests a vicious circle of collective unconcern regarding the way incarcerated offenders—fellow human beings—are being treated in our name.

I

WHEN ARE PRISON CONDITIONS PUNISHMENT?

A. Farmer's *Flawed Reasoning*

In *Estelle v. Gamble*, 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.”⁴³ The question of what “deliberate indifference” amounted to was answered in *Farmer*, where the Court held that prison officials are deliberately indifferent only when they are aware of and disregard a substantial risk of harm.⁴⁴ The *Farmer* majority based its holding on the language of the Eighth Amendment, specifically the requirement that the challenged treatment constitute “punishment[.]”⁴⁵ As the Court put it, “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”⁴⁶ And although “an official’s failure to alleviate a significant risk that he should have perceived but did not” is “no cause for commendation,” the Court found that “unless the official knows of and disregards an excessive risk to inmate health or safety,” the harm a prisoner suffers as a result does not constitute punishment within the meaning of the Eighth Amendment.⁴⁷

Beyond noting that it “comports best with the [text] of the [Eighth] Amendment as our cases have interpreted it,” the *Farmer* Court offered little justification for this claim.⁴⁸ To find any supporting reasoning, we must look to *Wilson v. Seiter*, decided three years prior to *Farmer*. In *Wilson*, an Ohio prisoner who challenged a

⁴³ 429 U.S. 97, 104 (1976) (internal citations omitted).

⁴⁴ The *Farmer* Court characterized this standard as criminal recklessness. *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994). *But see infra* Part III.C–E (exploring differences between *Farmer*’s standard and criminal recklessness more broadly applied). The *Farmer* Court framed the choice as that between criminal recklessness and what it called “civil-law recklessness,” a culpability standard amounting to heightened negligence. *Farmer*, 511 U.S. at 837. Had the Court adopted this alternative standard, it would have been enough for plaintiffs to show that the risk was sufficiently obvious that prison officials should have known of its existence. *See id.* at 837 n.5.

⁴⁵ *Farmer*, 511 U.S. at 837.

⁴⁶ *Id.*

⁴⁷ *Id.* at 837–38.

⁴⁸ *Id.* at 837.

host of conditions in his facility⁴⁹ argued that claims as to conditions of general applicability—i.e., macro-level conditions⁵⁰—should require no showing of official culpability.⁵¹ Justice Scalia, writing for the majority, rejected this argument, holding that *all* challenges to prison conditions require a showing of culpability on the part of the defendant. Otherwise, he argued, the challenged condition could not be said to be “punishment” at all. Punishment, Justice Scalia maintained, is “a deliberate act intended to chastise or deter.”⁵² Thus, he concluded, “[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.”⁵³

There are, however, two serious conceptual problems with this reasoning. First, even assuming that the question of whether prison conditions constitute “punishment” turns on the mental state of the inflicting officer, to establish recklessness as the threshold standard makes no sense. As Justice Scalia noted in *Wilson*, punishment involves “a deliberate act intended to chastise or deter.”⁵⁴ An actor who is reckless, however, is by definition *not* acting intentionally⁵⁵ and thus cannot be said to be “punishing” those harmed by her action.⁵⁶

⁴⁹ See *Wilson v. Seiter*, 501 U.S. 294, 296 (1991) (identifying challenged conditions as “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates”).

⁵⁰ See *infra* Part III.D (arguing that in cases involving macro-level failures of care, courts applying objective knowledge standard should irrebuttably presume knowledge of risk on part of those actors responsible for ensuring adequacy of challenged conditions).

⁵¹ The petitioner in *Wilson* relied on the previous case of *Rhodes v. Chapman*, 452 U.S. 337 (1981)—in which the Court considered an Eighth Amendment prison conditions challenge but made no mention of any culpability requirement—to argue that such a requirement is unnecessary in cases of “‘continuing’ or ‘systemic’ conditions.” *Wilson*, 501 U.S. at 300.

⁵² *Wilson*, 501 U.S. at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

⁵³ *Id.* (emphasis in original).

⁵⁴ *Id.*

⁵⁵ According to the Model Penal Code, “[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.” MODEL PENAL CODE § 2.02(2)(c) (1962). In other words, an actor who acts recklessly is culpable not because she has intentionally caused harm but because she has engaged in risky conduct causing *unintentional* yet serious harm.

⁵⁶ An example may help to illustrate this point. In *Commonwealth v. Welansky*, 55 N.E.2d 902 (Mass. 1944), cited in *Farmer v. Brennan*, 511 U.S. 825, 844 (1994), the defendant was charged with multiple counts of involuntary manslaughter after a fire at his nightclub claimed the lives of almost 500 patrons. No one alleged that Welansky intended those deaths. To the contrary, it seems reasonable to believe that he regretted them deeply. But he was nonetheless found culpable because he operated a club which, given its design and decor, created an extremely high risk of harm in the event of a fire. See *Welansky*, 55 N.E.2d at 905–07 (explaining that club was adorned with cloth decorations, had only one

But second and more importantly for our purposes, *Farmer* is premised on a narrow, individualistic conception of punishment that is wholly unsuited to the Eighth Amendment context. 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 as will be shown, once the nature of state punishment is properly understood, it becomes clear that what makes an experience “punishment” is not the mental state of the inflicting officer, but whether prisoners’ suffering is traceable to state-created conditions of confinement.

B. Prison Conditions as State Punishment

Defining punishment as a “deliberate act intended to chastise or deter,”⁵⁷ Justice Scalia concluded in *Wilson* that unless the challenged condition was “formally meted out *as punishment* by the statute or the sentencing judge,”⁵⁸ the question of whether prison conditions constitute punishment will depend on the mental state of the inflicting officer vis-à-vis those conditions. Admittedly, there is a logic to this view. If the correctional officer who caused a prisoner harm does not even realize she did so, how can she herself be said to have “punished” the victim at all? The answer is, she cannot. But even if she *had* realized, even if she had intentionally inflicted the harm as a way

entrance, through revolving door at front, that emergency exits were poorly marked and hard to see, and that of remaining three exits, one was blocked by tables and screen, and other was regularly kept locked in order to prevent any patron from leaving without paying his bill). It is unclear from the case whether Welansky ever actually realized the risk the club posed to its patrons. But even if he had realized the risk, and thus was criminally reckless and not merely criminally negligent, it still makes no sense to think of the harm ultimately suffered by his patrons as either deliberately imposed by Welansky or as inflicted in response to any conduct on the part of the victims. This is so even if Welansky had the least palatable of motives for disregarding the risk he ran (say, he didn’t want to shoulder the expense of reconfiguring the club, or he was unwilling to clarify the location of the fire exits for fear of patrons leaving without paying their bills). Had he in fact intended the harm, he would be culpable not for reckless conduct but for intentional conduct, and charged not with involuntary manslaughter but with murder. Indeed, the manslaughter charge signals the prosecutor’s recognition of the absence of any intent to harm.

There *is* a category of homicide known as “depraved heart murder,” under which extremely reckless conduct leading to death is charged as second degree murder. But in such cases, the defendant is judged sufficiently culpable to warrant a murder charge not because the killing was intended but because the conduct was so risky as to evince “a depraved heart,” or, in Model Penal Code parlance, “extreme indifference to the value of human life.” See MODEL PENAL CODE § 210.2(1)(b) (1962). Here too, the defendant need not have intended the harm; indeed, it is because no intention could be shown that the charge in such cases is not intentional murder but is instead “depraved heart” murder.

⁵⁷ *Wilson*, 501 U.S. at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

⁵⁸ *Id.*

to condemn a prior bad act of the victim or prevent its recurrence (i.e., “to chastise or deter”),⁵⁹ the harm she inflicted would still not, on this basis alone, qualify as punishment for Eighth Amendment purposes. Why not? Because the Eighth Amendment is concerned with a very particular form of punishment: that imposed by the state as penalty for crimes. And state punishment cannot be inflicted by one person acting alone, even a person acting on behalf of the state. It is instead, and can only be, the result of a collective process undertaken by a series of state officials who derive their power from the set of linked institutions—the legislature, police, prosecutors, courts, and prisons—that together comprise “the system of coercion upon which all governments have to rely to fulfill their essential functions.”⁶⁰ An official’s treatment of a convicted offender only constitutes punishment for Eighth Amendment purposes when—and because—it is inflicted in the course of administering a penalty pronounced by a duly authorized sentencing court. And the resulting conditions represent the state punishment imposed on the target regardless of what responsible officers happened to know or believe or intend as to the effects of their own conduct on individual prisoners.

When the authorized punishment is death, it is taken for granted that the way state-imposed criminal penalties are administered is cognizable as punishment under the Eighth Amendment.⁶¹ For more than a century, the Court has confronted Eighth Amendment challenges to the methods by which state officials have administered death sentences and in each case has assumed without question that the challenged methods, as punishment, are appropriately subject to Eighth Amendment scrutiny.⁶² This is true even of *Louisiana ex rel. Francis v. Resweber*,⁶³ in which the petitioner brought an Eighth Amendment challenge to a plan to subject him “to a second electrocu-

⁵⁹ *Id.*

⁶⁰ Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21, 29 (Nancy L. Rosenblum ed., 1989).

⁶¹ It might be argued that the death penalty is an inappropriate analogy here because in that context, the method of execution is specified by statute and is thus indisputably part of the intended punishment, whereas the precise character of prison conditions is determined only after the fact and is thus necessarily unknown when the penalty is authorized by the judge at the time of sentencing. However, for the reasons presented in the text, this difference proves irrelevant to the question of whether prison conditions should be understood as punishment for Eighth Amendment purposes.

⁶² See, e.g., *Baze v. Rees*, 128 S. Ct. 1520 (2008) (execution by lethal injection); *In re Kemmler*, 136 U.S. 436 (1890) (execution by electric chair); *Wilkerson v. Utah*, 99 U.S. 130 (1878) (execution by firing squad). Indeed, in none of these cases did the Court even allude to the possibility that the method by which a duly authorized death sentence is administered is not “punishment” under the Eighth Amendment.

⁶³ 329 U.S. 459 (1947).

tion after the first attempt failed by reason of a malfunction in the electric chair.”⁶⁴ The holding in *Francis*, in which the Court rejected an Eighth Amendment challenge to the second execution attempt, turned on the finding that officials responsible for the first, failed attempt lacked a sufficiently culpable mental state. But as even the *Wilson* Court acknowledged,⁶⁵ the basis for this holding was that, absent sufficient culpability on the part of inflicting officers, the second attempt could not be said to be *cruel*.⁶⁶ That the method of execution was constitutionally cognizable as *punishment* was never in doubt, whatever the mental state of the official who botched the first attempt. This only makes sense. As the Court noted in *Francis*, “the Constitution protects a convicted man” from the “cruelty inherent in the method of punishment.”⁶⁷

What is true for the death penalty is also true for a prison sentence. Prison officials who create the conditions under which a prisoner will live are by their actions administering a state punishment, whatever their mental state regarding the conditions they create. In the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, *is* the punishment the state has imposed. For this reason, *all* the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny. Understood in this light, the requirement that the punishment be “deliberate[ly]” imposed in order “to chastise or deter”⁶⁸ does not disappear. Its satisfaction may simply be taken for granted whenever a convicted criminal offender is sentenced to prison. The sentences imposed by the state’s criminal justice apparatus are not always appropriate nor are they always just. But they are always deliberately applied to the target, as a response to what has been judicially determined to be that individual’s bad act. That these penalties can take years to administer and their precise shape determined only over time by the acts and omissions of prison officials who may know nothing of the original crime does not make the offender’s conditions of confinement any less the terms of her punishment. They simply reflect the

⁶⁴ *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (discussing facts of *Francis*, 329 U.S. 459).

⁶⁵ *See id.* (explaining that state prevailed in *Francis* “because . . . officials lacked the culpable state of mind necessary for the punishment to be regarded as ‘cruel’”).

⁶⁶ *See Francis*, 329 U.S. at 464 (asserting that “[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely”).

⁶⁷ *Id.*

⁶⁸ *Wilson*, 501 U.S. at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

particular nature of incarceration as a penal form, which in these ways is fundamentally different from more discrete penalties like fines or capital punishment.

Such an expansive understanding of Eighth Amendment punishment in the prison conditions context would assuredly have its critics. On joining the Court, for example, Justice Thomas (joined only by a post-*Wilson* Justice Scalia) advocated a far narrower view, one that would foreclose all Eighth Amendment prison conditions claims unless the challenged condition had been specifically authorized by the sentencing judge.⁶⁹ As Justice Thomas saw it, a prisoner's punishment is the sentence imposed by "judges or juries—but not jailers."⁷⁰ From this perspective, "unless [they are] imposed as part of a sentence," a prisoner's "[c]onditions of confinement are not punishment in any recognized sense of the term."⁷¹ This amounts to what Thomas Landry has called the "*strictural* view," which "limits punishment to the term of the penal statute and sentence and excludes reference to conditions or events in prison."⁷²

There is, however, an extreme formalism to this approach which ultimately makes it untenable. True, when the sentencing court imposes a prison term, it does not specify the precise conditions of confinement. But once a person is sentenced to prison by the judge acting on behalf of the state, she is consigned to the custody of prison officials whose acts or omissions will determine the conditions under which she will serve her sentence. Any discomfort these conditions prove to involve need not be the purpose of the sentence; at least in theory, the burden incarceration creates is supposed to be the deprivation of liberty for the specified term, with the attendant conditions the inevitable byproducts of this deprivation.⁷³ Still, it is quite plain—and a necessary feature of the penalty, backed up by force of law—that the offender will be subject to whatever conditions the state's Department of Corrections (DOC) provides for her for the stipulated term. It is thus implausible to suggest that, because the particular conditions

⁶⁹ See *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

⁷⁰ *Id.*; see also *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring). For this reason, according to Justice Thomas, punishment "has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'" *Id.* (quoting *Helling*, 509 U.S. at 38 (Thomas, J., dissenting)).

⁷¹ *Farmer*, 511 U.S. at 859 (Thomas, J., dissenting).

⁷² Thomas K. Landry, "*Punishment*" and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1610 (1996).

⁷³ But see *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981) (stating that "the Constitution does not mandate comfortable prisons," and that "[t]o the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society").

of an inmate's confinement are determined by prison officials after the fact and not by the legislature or the judge at the time the sentence is announced, those conditions are somehow not part of the penalty the sentence represents.

The implausible formalism of the stricturalist definition has driven even Justice Thomas to a more expansive view. In a 2003 opinion, again joined by Justice Scalia,⁷⁴ Justice Thomas reiterated that “[a] prisoner’s sentence is the punishment imposed pursuant to state law.”⁷⁵ He conceded, however, that “[s]entencing a criminal to a term of imprisonment may . . . carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated,” and thus that “restrictions imposed by prison officials may also be a part of the sentence.”⁷⁶ The guiding assumption of this revised account, which amounts to what Landry has called the “governmentalist” view,⁷⁷ is that only those conditions contemplated or intended by the “penal statute and sentence”⁷⁸ can be considered part of the pain or other “unpleasant” consequences⁷⁹ intended to chastise or deter, and thus that only those conditions can be understood as punishment for Eighth Amendment purposes.⁸⁰ At the same time, it is acknowledged on this revised view that implicit in the penalty as judicially pronounced is the reality that at least some features of the sentence will be determined by prison officials over the course of its administration.

The governmentalist account appropriately acknowledges that when the state decides to send offenders to prison, it must bear the ongoing administrative burden of that decision. Imposing a sentence of imprisonment carries with it the implied commitment on the part of the state to build, staff, and run the institutions in which the sentence will be served. Punishment on this view thus includes “all that a legislature or sentencer expects and intends a prisoner to endure, including the physical setting of confinement and the quality and quantity of

⁷⁴ *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Thomas, J., concurring).

⁷⁵ *Id.* at 140 n.*.

⁷⁶ *Id.*

⁷⁷ See Landry, *supra* note 72, at 1610–11. On the governmentalist approach, punishment has three elements: It is “(1) a penalty, (2) inflicted for criminal conduct, (3) pursuant to regular processes of governmental administration and thus attributable to the government in its role as monopolist over punishment.” *Id.* On this approach, the key is to determine “those conditions or events in prison that are attributable to the punitive intent of the government in its role as monopolist over the machinery of punishment.” *Id.* at 1610.

⁷⁸ *Id.*

⁷⁹ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968).

⁸⁰ Landry, *supra* note 72, at 1610–11.

life's daily incidents (e.g., food, clothing, and activities) over which prisoners are denied choice."⁸¹

To this extent, the governmentalist position seems right. But as with the strictural view, this account rests on an inappropriately individualistic notion of punishment, one that focuses not (as it should) on the effects of state power but instead on what individual legislators and judges may be said to have known or intended regarding the conditions of confinement. This focus obscures the implications of setting the state's penal machinery in motion and thus yields an account of Eighth Amendment punishment that is still unjustifiably narrow.

From the governmentalist perspective, prison conditions constitute punishment only when they arise from official action duly authorized by the state. Thus, as Justice Thomas put it, if prisoners are harmed by officials acting "ultra vires with respect to the discretion given them, by implication, in the sentence,"⁸² any resulting suffering, however severe, does not amount to "punishment" for Eighth Amendment purposes.⁸³ The structure of this position is a familiar one, recalling the analogous treatment of § 1983⁸⁴ claims in the federal courts prior to the Supreme Court's 1961 decision in *Monroe v. Pape*.⁸⁵ Before *Monroe*, federal courts routinely dismissed § 1983 claims on the ground that the challenged conduct by state officers was illegal.⁸⁶ According to the logic then prevailing, officials who acted "contrary to State law"⁸⁷ were not acting "under color of state law" as required to find liability under the statute.⁸⁸ Thus, § 1983 was held not to apply to their conduct.

On the governmentalist approach, too, consistent with this pre-*Monroe* logic, prison officials are held to act on behalf of the state only so long as their conduct does not exceed the bounds of delegated authority. Once those bounds are breached, the act is regarded as that of a lone individual with no relevant relationship to the state.

⁸¹ *Id.* at 1611.

⁸² *Overton v. Bazzetta*, 539 U.S. 126, 140 n.* (2003) (Thomas, J., concurring).

⁸³ *See id.* Landry specifies that his governmentalist definition excludes "illegal injuries, whether inflicted by prison guards [or] fellow prisoners." Landry, *supra* note 72, at 1611. Landry also excludes "accidental, exigent, [or] random" injuries. *Id.*

⁸⁴ Section 1983 provides a cause of action for anyone whose constitutional rights have been violated by any person acting "under color of" state law. 42 U.S.C. § 1983 (2006).

⁸⁵ 365 U.S. 167 (1961). I thank Linn Schulte-Sasse for first drawing my attention to this parallel.

⁸⁶ *See, e.g., United States ex rel. Atterbury v. Ragen*, 237 F.2d 953, 954–55 (7th Cir. 1956) ("[I]t is clear that the alleged tortious conduct of defendants was and is contrary to the laws of Illinois. In our view, such charges . . . do not state a claim upon which relief can be granted under the federal Civil Rights Act.").

⁸⁷ *See, e.g., id.* at 958.

⁸⁸ *See, e.g., id.* at 954–55.

This view, however, demands the supposition that once an individual official exceeds his authority, he no longer exercises power conferred by the state. And this notion is simply naïve. State power, once delegated, cannot be so easily cabined.⁸⁹ The facts of *Monroe* are a case in point. Among other violations, the complaint alleged that:

[T]hirteen Chicago police officers . . . broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him “nigger” and “black boy”; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; . . . [and] that the actions of the officers throughout were without authority of a search warrant . . .⁹⁰

Pre-*Monroe*, the absence of a search warrant and the consequent illegality of the search would have been sufficient to defeat the Monroes’ § 1983 claim.⁹¹ To use Justice Thomas’s formulation, because the defendants’ conduct was “ultra vires,” it could not have been undertaken under color of state law.⁹² But this understanding obscures the fact that the trauma suffered by the Monroes, and the terror they experienced, arose precisely *because* their assailants were agents of the state, backed by the full might of sovereign power.⁹³ In *Monroe*, the defendants’ conduct may have been illegal, but in the moment, what recourse did the victims have? They could not call the police because the police were already there—a circumstance that both foreclosed any realistic possibility of rescue and symbolized the

⁸⁹ To the contrary, as Judith Shklar once put it, it has been “amply justified by every page of political history . . . that some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so.” Shklar, *supra* note 60, at 28.

⁹⁰ *Monroe*, 365 U.S. at 203 (Frankfurter, J., dissenting).

⁹¹ See *supra* note 86. Indeed, in order to avoid liability under § 1983, the defendants in *Monroe* argued that they were not acting “under [the] color of” state law because their actions violated state law and the state constitution. *Monroe*, 365 U.S. at 172.

⁹² See *Overton v. Bazzetta*, 539 U.S. 126, 140 n.* (2003) (Thomas, J., concurring).

⁹³ Ironically, it was Justice Frankfurter in his dissent in *Monroe v. Pape* who captured most powerfully the terror and fear that the Monroe family must have felt when the police forced their way into the Monroes’ home. As Justice Frankfurter noted:

Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man. . . . Night-time search was the evil in its most obnoxious form.

Monroe, 365 U.S. at 209–10 (Frankfurter, J., dissenting).

Monroe family's utter inability to resist even patently illegal abuse at the hands of state officials.

With its decision in *Monroe*, the Court acknowledged citizens' particular vulnerability to abuse at the hands of renegade state officials, appropriately opening up the possibility of constitutional liability in such cases. Rejecting the approach then prevailing, the *Monroe* Court held that official acts need not be consistent with state law to be taken "under color of state law."⁹⁴ It was enough that the challenged conduct represented a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."⁹⁵

Yet if a police officer with a badge can wield that much power against private citizens in their own homes, imagine the scope of correctional officers' authority in the prison. Not only the badge but the very architecture of incarceration gives prison officials, in a practical sense, enormous power over the incarcerated. The wholesale removal of prisoners from their homes and communities; their containment in small locked cells; the power of prison officials to dictate prisoners' every move; prisoners' utter dependence on state officials for the fulfillment of their most basic needs;⁹⁶ the state's monopoly on the legitimate use of force; the ability of state officials to use or threaten ever-increasing force to put down any sort of resistance; the consequent inevitable futility of any such resistance on the part of prisoners: all these features of prison life render prisoners deeply vulnerable to those officers whose actions, whether from malice, caprice, or simple indifference, transgress the legal bounds of their authority. A prisoner on the receiving end of illegal abuse could recite the relevant law chapter and verse and thus plainly show the illegality, but it would not avail him. Indeed, given the power dynamics that often reign in prisons, assertions of this kind may only provoke renegade officers to even greater aggression.⁹⁷

⁹⁴ *Id.* at 184–87.

⁹⁵ *Id.* at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

⁹⁶ For more on this relationship of dependence and the obligations it creates on the part of the state, see *infra* Part II.A.

⁹⁷ Consider, for example, the facts of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). In that case, the plaintiff, jail inmate Australia Johnson, had been reprimanded along with others by Officer Fuller "for a claimed failure to follow instructions." *Id.* at 1029. According to the complaint, when Johnson "endeavored to explain that they were doing only what another officer had told them to do, Officer Fuller rushed into the holding cell, grabbed [Johnson] by the collar and struck him twice on the head with something enclosed in the officer's fist," saying as he did so, "I'll kill you, old man, I'll break you in half." *Id.* at 1029–30. After this outburst, Officer Fuller continued to harass Johnson "by detaining him in the holding cell for two hours before returning him to his cell," and "when Johnson requested medical attention, Fuller, who was called upon by another officer to escort

Ultimately, the governmentalist theory of punishment is inappropriate for the Eighth Amendment context for the same reason as the strictural approach: It is unable to appreciate the state's responsibility for *all* official conduct that impacts prisoners while they are in custody, whether anticipated by the legislative delegation of power to the state's DOC or beyond the scope of that delegation. If the state is to incarcerate, it must delegate to state agents the power to run the prisons. Those agents in turn select subagents, those employees to whom the responsibility—and attendant discretion—to administer the prisons on a day-to-day basis will be accorded.⁹⁸ These subagents, otherwise known as correctional officers (COs), are hired, trained, and authorized by the state to administer the offender's prison sentence. What they do to the prisoners in their custody they can do only because the state has placed them in a position of authority and has given them considerable power to shape prisoners' conditions of confinement. As a practical matter, their treatment of prisoners in the course of administering state-imposed prison terms constitutes the penalty the state has imposed. That treatment should therefore be understood as punishment under the Eighth Amendment regardless of whether it is consistent with the legal limits of their delegated power.

To see why this must be, consider the facts of *Hudson v. McMillian*.⁹⁹ Keith Hudson, a prisoner in the Louisiana state penitentiary at Angola, was beaten by three guards on the way to the facility's "lockdown" unit. One guard (McMillian) "punched Hudson in the mouth, eyes, chest, and stomach" while another guard "held the inmate in place and kicked and punched him from behind."¹⁰⁰ During the beating, Arthur Mezo, the supervising officer on duty, looked on and warned the two guards "not to have too much fun."¹⁰¹ This conduct was plainly illegal; no policy would have authorized prison officials to use this kind of force against an unresisting prisoner who posed no security risk. It is, moreover, precisely the conduct most to be feared¹⁰² when the discretion to use force is delegated to state

Johnson to the jail doctor, instead held him for another two hours in another cell before permitting him to see the doctor." *Id.* at 1030.

⁹⁸ See 2 RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 7.03 cmt. d(1) (2006) ("A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the principal.").

⁹⁹ 503 U.S. 1 (1992).

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² See *infra* Part II.B (discussing Judith Shklar's *Liberalism of Fear* and nature of public cruelty).

agents.¹⁰³ On Justice Thomas's governmentalist view, the conduct of McMillian and his colleagues would be beyond Eighth Amendment scrutiny because it was illegal and thus "ultra vires."¹⁰⁴ But this conclusion fails to appreciate that Hudson's beating, however inappropriate, was the form in which those officials authorized by the state to administer Hudson's punishment executed this task, and thus represented his punishment at its most concrete. True, the judge in Hudson's case did not know that Hudson would be beaten by guards at Angola under these circumstances. Yet by acting on behalf of the state to sentence Hudson to prison, the judge ensured that Hudson would be turned over to the Louisiana DOC for the length of his sentence and that the Louisiana DOC would place Hudson in one of the facilities over which, by virtue of a legislative delegation, it has sole authority. The judge's sentence, backed by state power, also ensured that Hudson would remain locked in his cell block under the supervision of correctional officers hired, trained, and assigned by the state's DOC to oversee Hudson's unit, under constraints that prevented him from protecting himself against assaults like the one he suffered. To say that Hudson's beating was not part of his punishment is to draw an unsustainable distinction between the state's sentencing Hudson to prison for his crime and what the state did to Hudson while he was there.

Or consider the facts of *Farmer* itself. Dee Farmer was a male-to-female transgender who "project[ed] feminine characteristics." In 1989, Farmer, a federal prisoner, was transferred to the men's¹⁰⁵ maximum-security penitentiary at Terre Haute, Indiana.¹⁰⁶ Typically, prisoners known to prison officials to be at risk of attack by other

¹⁰³ This is not to deny the serious threat that prisoners can pose to the health and safety of correctional officers. Prisons are violent places, and much of the danger comes from the prisoners themselves. For this reason, it is appropriate to delegate to prison officials the authority to use force when necessary to protect themselves or others. Problems arise, however, when state officials abuse this authority to impose harms that are unnecessary and unwarranted. Judicial oversight is necessary to guard against just such abuses.

¹⁰⁴ *Overton v. Bazzetta*, 539 U.S. 126, 140 n.* (2003) (Thomas, J., concurring).

¹⁰⁵ Although Farmer identified as a woman, she had not yet had successful gender-reassignment surgery and was therefore housed as a man. See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). In this regard, Farmer was housed pursuant to federal Bureau of Prison policy. See *id.* ("The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex . . ."). For criticism of this policy and alternative proposals, see Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1247 (2004); Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 213–14 (2006).

¹⁰⁶ *Farmer*, 511 U.S. at 830. At the time, Farmer was "serving a 20-year sentence for credit card fraud." *Id.* at 852 (Blackmun, J., concurring).

prisoners can expect to be housed in protective custody. Instead, upon transfer to Terre Haute, Farmer was housed in a general population (GP) unit. Within two weeks, Farmer was beaten and raped by another prisoner in the unit.¹⁰⁷ On Justice Thomas's governmentalist approach, if the defendant's placement of Farmer in GP had violated the prison's housing policy, the classification itself would have been *ultra vires*, and the subsequent harm Farmer suffered would thus not constitute "punishment" for Eighth Amendment purposes. But this suggestion hardly seems plausible. As a consequence of her crime, Dee Farmer was consigned for twenty years to the custody of the federal Bureau of Prisons (BOP), forced to go where the state put her. And in the course of administering that sentence, the BOP placed her under the control of an officer hired and trained by the BOP itself and assigned to decide where Farmer would be housed. As a direct consequence of this series of actions, undertaken by agents empowered by the state to administer her prison sentence, Farmer was put at great risk of serious harm in a situation she was powerless to avoid. This treatment was the shape her punishment took, and, as such, it is appropriately subject to Eighth Amendment scrutiny.

Notice that in this last example, the official conduct at issue need not have been intentionally harmful. The classification officer's failure to house Farmer according to policy might not even have been reckless but merely negligent; he or she might have sent Farmer to GP inadvertently, perhaps by mixing up inmate housing cards during a hectic period in the classification office. But this is neither here nor there. To determine whether the conditions under which Farmer was beaten and raped ought to constitute part of the punishment for Eighth Amendment purposes, the question should be whether Farmer was subjected to those conditions by state officials administering a duly authorized prison sentence. If so, those conditions ought to be constitutionally cognizable regardless of the classification officer's state of mind.¹⁰⁸

C. *The Reach of State Punishment: Harms on the Margins*

In short, when convicted offenders are sentenced to time in prison, living in prison for that time under existing conditions *is* the punishment. Although framed by the sentencing court in terms of the length of sentence, the nature and content of the punishment is only

¹⁰⁷ *Id.* at 830.

¹⁰⁸ Such a finding, of course, does not mean that Farmer would necessarily prevail on a constitutional claim for the harm she suffered. That recovery would depend on a subsequent inquiry into whether the challenged treatment would qualify as cruel.

manifest through the conditions of confinement to which the offender is ultimately subject.¹⁰⁹ Any harm people experience while incarcerated should therefore be cognizable under the Eighth Amendment if it is traceable to state-created conditions of confinement.

In most cases, the causal connection between state-created conditions and the harm suffered will be obvious. The person who is placed in a cell with an inmate prone to violence and is raped or stabbed as a result, or whose serious medical needs are improperly or inadequately treated by prison medical staff, or who suffers physical or psychological harm from living under conditions of extreme overcrowding and its attendant effects, is harmed by the conditions that the state, through the acts or omissions of its agents, has created for his confinement. There will, however, be some marginal cases in which it is debatable whether a given harm a prisoner suffers while incarcerated is traceable to the conditions of his incarceration. Imagine, for example, the prisoner who has a silent stroke in his cell and dies before a prison official doing nightly checks can get to him, or the prisoner whose toe is broken when a guard accidentally steps on it,¹¹⁰ or the prisoner who slips on a pillowcase left by a guard on the stair.¹¹¹ Arguably, the prisoner in each of these cases could have suffered an equivalent harm had he been free. This being so, it may seem inappropriate to regard the harm in any of these cases as caused by his confinement.

The question is how these marginal cases should be treated doctrinally. Two options present themselves. The first would be to distinguish doctrinally between those harms prisoners suffer while incarcerated that are traceable to state-created conditions of confinement (which would count as Eighth Amendment “punishment”) and those harms that arose independently of those conditions (as to which any constitutional challenge would be dismissed). Certainly, given the

¹⁰⁹ Justice Blackmun made a similar point in his concurring opinion in *Farmer*: The Court’s unduly narrow definition of punishment blinds it to the reality of prison life. Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. . . . The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.

Farmer, 511 U.S. at 855 (Blackmun, J., concurring).

¹¹⁰ See *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (discussing whether case in which guard “accidentally stepped on [a] prisoner’s toe and broke it” would present instance of Eighth Amendment punishment and concluding it would not (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (alteration in original))).

¹¹¹ See *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

totalizing nature of incarceration and the deep vulnerability to harm prisoners routinely face as a result, in the vast majority of cases, the harm a prisoner suffers behind bars *will* be the result of state-created conditions. As a practical matter, therefore, this doctrinal distinction may not prove too great an obstacle for plaintiffs in most cases. At the same time, its recognition would acknowledge that not every harm a person suffers while in prison is chargeable to the state.

A second approach would foreclose defendants' arguments to this effect and instead treat *all* prison conditions claims as challenges to state punishment cognizable under the Eighth Amendment. This approach may make practical sense since in any given case it may not be possible to say definitively that the harm did *not* occur as a consequence of state-created conditions. Consider the case of the silent stroke. Perhaps the same thing would have happened had the stroke victim been free at the time. But had he been free, he may also have been in bed with a spouse more attuned to his distress than his cellmate. And who is to say that the stroke would even have occurred had he been free and not subject to the deleterious health effects of extended imprisonment? Or consider the prisoner whose toe was accidentally broken when a guard stepped on it. He too might have experienced a similar fate had he been free. But he was not free. He was in an environment in which guards—even the clumsy ones—had the power to tell him to go or to stay, to move or to stand still, even at the risk of his own well-being. He was, moreover, in an environment in which officers but not inmates may wear heavy boots and in which prisoners are typically required to wear cloth shoes that provide little protection from the errant steps of those more substantially shod. The point is not that these factors necessarily explain the harm suffered in these cases. It is merely that it may be very difficult, if not impossible, to say whether a given harm was caused by the conditions of a prisoner's confinement or arose independently of them.

One could simply acknowledge this distinction doctrinally and trust the judicial process to weed out those cases involving harms not properly regarded as part of the punishment. There is, however, a danger in doing so: Inviting efforts to portray the harms prisoners suffer as unrelated to the conditions of their confinement may distract from the main issue of Eighth Amendment concern, that of whether prison conditions are cruel. This possibility may be reason enough to foreclose such inquiry as a doctrinal matter—as long as doing so would not create a risk of inappropriate governmental liability.¹¹² But

¹¹² I return to this issue in Part III.F. There, I suggest that if liability would apply absent any showing of culpability on the defendant's part, fairness may require that defendants be

even if courts were to adopt the first option, thus allowing a threshold doctrinal inquiry into whether the harm alleged by plaintiffs constitutes punishment for Eighth Amendment purposes, the vast majority of prison conditions challenges would still satisfy this standard and qualify for Eighth Amendment scrutiny. If these cases are to be decided, therefore, it is necessary to confront the issue the Court has thus far avoided: when prison conditions may be said to be cruel.

II

WHEN ARE PRISON CONDITIONS CRUEL?

The prohibition on cruel punishment sets normative limits on what the state may do to convicted offenders as penalty for their crimes. If this injunction is to be meaningful in a polity where incarceration is the primary mode of criminal punishment, it is necessary to determine when prison conditions cross the line from mere unpleasantness into cruelty.¹¹³ And to make this determination, we must start by asking as a purely normative matter what the state is doing when it incarcerates and what obligations it thereby incurs toward its prisoners.

This may seem an odd place to start for an enterprise motivated by a constitutional injunction, particularly one so sorely in need of a workable doctrinal framework. But as is by now well understood, the judicial implementation of constitutional directives is often shaped by instrumental concerns divorced from, and at times even at odds with, the moral imperatives these directives embody¹¹⁴—a phenomenon particularly evident when prisoners' constitutional rights are at issue.¹¹⁵ So too do the structural constraints arising from the Court's interpretation of sovereign immunity tend to foreclose certain kinds of moral arguments from getting a meaningful hearing in constitutional litigation. I therefore defer consideration of the appropriate doctrinal standards governing Eighth Amendment prison conditions claims

allowed to argue that the harm experienced was independent of any state-created conditions and thus did not constitute punishment.

¹¹³ See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (“To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”); see also *id.* at 349 (“[T]he Constitution does not mandate comfortable prisons . . .”).

¹¹⁴ See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1277–79 (2006) (arguing that concern for judicially manageable standards often causes courts to underenforce constitutional guarantees); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (arguing that Court often fails to enforce constitutional provisions to their full conceptual boundaries due to institutional concerns).

¹¹⁵ See Fallon, *supra* note 114, at 1299–303 (providing three examples of judicial underenforcement of constitutional norms, two of which involve prisoners' rights cases).

until Part III, in order to ensure that the instrumental concerns and structural constraints that often influence the shape of such standards do not short-circuit what is first and foremost a normative inquiry into the moral limits of state power.¹¹⁶

A. *The State's Carceral Burden*

When a judge imposes a prison sentence, a process is set in motion whereby the sentenced offender is removed from society and kept separate and apart for the duration of the sentence. The burden this arrangement imposes on that offender is obvious. What may not be obvious is the burden the sentence imposes on the state itself. By sentencing an offender to prison time, the judge commits the state to providing for the prisoner's needs in an ongoing way for the specified term. There are no limits to the comforts a state may provide its prisoners should it so choose. But it is clear that there is a minimum the state *must* provide for those offenders it opts to punish in this way.¹¹⁷

That anything at all need be done for prisoners beyond keeping them confined in a secure facility may at first seem puzzling. Have they not broken the law, leaving innocent victims in their wake? Are there not more deserving people on whom the state could expend its resources? But these questions mistake the source of the moral obligation. What the state owes its prisoners it owes not because prisoners deserve it¹¹⁸ but because of the choice the state has made to punish with incarceration. Having made this choice, the state is equally obliged to each inmate, whether he is Martin Luther King, Jr. or Jeffrey Dahmer.

What, then, *does* the state owe its prisoners? For an answer, we must consider the implications of the state's decision to incarcerate for the prisoners themselves. It is a commonplace that incarcerated offenders are deprived of their liberty for the specified term. And this is true: For the duration of the sentence, prisoners may not go where they would like, associate with whom they choose, or otherwise freely define the terms of their own existence. But perhaps even more debilitating, incarcerated prisoners are deprived of the capacity to provide for their own needs. It is possible to imagine a penal system that did not inflict this deprivation, one that removed offenders from

¹¹⁶ Any effort to make the Eighth Amendment meaningful for the contemporary era of mass incarceration will necessarily rest on an understanding of the state's moral obligations to its prisoners. One may reject a particular account of these obligations, but the normativity of the enterprise is inescapable.

¹¹⁷ See *infra* note 162 (noting cases that describe in general terms states' affirmative obligations to prisoners).

¹¹⁸ I discuss this point in more detail at the end of this section.

the bounds of society but placed them somewhere they could continue to provide for themselves. The English system of transportation to the colonies comes to mind.¹¹⁹ But contemporary incarceration is more than simply banishment; it is banishment plus total institutional control.¹²⁰ Today's prisoners, having been excluded from society, are kept under lock and key in close quarters without the means to provide for themselves.¹²¹ As a consequence, if prisoners are to have even the very basics of continued existence—food, water, a place to sleep, even the means necessary for personal hygiene, like soap, hot water, a toilet, and toilet paper—they must receive these things from others.

In the early jails of England and America, family members on the outside provided prisoners with life's basic necessities.¹²² But as those early experiments made clear, in such a system, those without money or family members willing and able to provide for their needs will go without.¹²³ Today, as before, prisoners with money can still provide for many of their own needs, although not all of those needs; what

¹¹⁹ See Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321, 327 (2002) (“Beginning in the 17th century, merchant ship-pers pioneered . . . the development of transportation as a form of punishment. Once institutionalized, transportation remained a standard form of punishment for well over 200 years; for half or more of this period, it constituted the single most significant sentence for serious offenders.”) (citations omitted).

¹²⁰ See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4 (1961) (defining “total institutions” as those which represent complete “barrier to social intercourse with the outside”).

¹²¹ Even those inmates who work full time in the prison earn insufficient sums to allow for the purchase of all the goods and services necessary to keep a person alive and minimally safe and healthy. See *Inmate Pay Rates, Schedule and Exceptions*, CAL. CODE REGS. tit. 15 § 3041.2 (2009) (fixing wage rates for California prisoners at between \$0.08 and \$0.37 per hour); Alison Hawkes, *Druce Up For Parole: In March, the Former State Representative Will Have Served Two Years for Hit-and-Run*, THE INTELLIGENCER (Doylestown, Pa.), Jan. 17, 2006, at A1 (“The minimum prison wage [in Pennsylvania] is 19 cents an hour.”); Reggie Rivers, *Wages Unfair in Prisons*, DENVER POST, Sept. 23, 2005, at B.07 (“At 40 cents an hour, [Utah] inmates are earning \$1.60 a day. Assuming that an inmate works five days a week, he makes \$32 a month. . . . [Wages for prisoners] who work for the state of Colorado (in general prison maintenance jobs) are capped at 60 cents a day. Inmates who work for private industries fare only slightly better.”).

¹²² See Sean McConville, *Local Justice: The Jail*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 297, 300 (Norval Morris & David J. Rothman eds., 1995) (explaining that in early English jails, there were “admittance and discharge fees, fees for ironing and de-ironing,” i.e., putting prisoners in, and releasing them from, shackles, as well as “fees for food, water, and lodgings”); see also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450–51 (2005) (explaining that early English and American jails were profit centers for jailors).

¹²³ See McConville, *supra* note 122, at 301 (“How did those prisoners exist who had neither friends nor family to support them, no corrupt relationship with the jailer, no creditor on a string? Many starved to death or died from disease.”).

prisoners can buy is greatly restricted by prison authorities.¹²⁴ And in any case, the vast majority of American prisoners are indigent.¹²⁵ This means that, unless the state provides for prisoners' basic needs, those needs will not be met.¹²⁶

This is the crux of the matter, the foundation of the state's obligation to its prisoners. People in prison are both wholly dependent on the state for the means of their survival and deeply vulnerable to harm. Should the state fail to meet prisoners' needs, their suffering—and thus the burdens of their incarceration—would increase markedly, changing the character of the punishment itself. This point bears emphasizing. We are used to thinking of prison sentences in terms of length—five years or fifteen years or life. But in fact, the severity of the punishment ultimately depends on the conditions of confinement.¹²⁷ A prisoner whose basic needs are not met receives a more severe punishment than those prisoners who receive minimally adequate provisions.¹²⁸

To establish the scope of the state's obligations to its prisoners, the question then becomes: What deprivations may the state legitimately impose as punishment? Imagine, for example, a prison that fails to provide a diet sufficient to sustain its residents, leaving to slow starvation those unable, through their wits or connections, to procure enough food to live on. Are such conditions among those the state may affirmatively impose as punishment? In other words, may the

¹²⁴ Medical care is the most obvious example. Even prisoners with sufficient financial means to pay the cost of bringing in their own physicians are not allowed to do so.

¹²⁵ Of all state prisoners arrested in 1997, well over half—from 61.4 percent to 84.9 percent, depending on education level—earned less than \$2000 in the month before their arrest. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 10 tbl.14 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>. To take another measure of indigence, less than 20 percent of felony defendants in state courts in the country's 75 largest counties in 1996 and only a third of felony defendants in federal court in 1998 could afford their own attorneys. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <http://www.ojp.gov/bjs/pub/pdf/dccc.pdf>. As Joan Petersilia explains,

[f]ully one-third of all prisoners were unemployed at their most recent arrest, and just 60 percent of inmates have a GED or high school diploma (compared to 85 percent of the U.S. adult population). The National Adult Literacy Survey (NALS) has established that 11 percent of inmates, compared with 3 percent of the general population, self-reported having a learning disability.

JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 4 (2003).

¹²⁶ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("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.").

¹²⁷ See *supra* Part I.B (arguing that prisoners' conditions of confinement constitute penalty in its most concrete sense).

¹²⁸ See *supra* note 109.

state, as punishment for a crime, leave an offender to starve? Or imagine a prison in which the drinking water is contaminated, leaving some residents perennially thirsty and others wasting away from severe dysentery or other waterborne illnesses. Or imagine a prison that provides no medical care to its prisoners, so that, for example, a broken bone remains unset, a gaping wound unstitched, or obvious physical distress ignored.

May the state deliberately punish in these ways? To some, there is no meaningful difference between the conditions described above and the essence of incarceration itself, a form of punishment widely acknowledged as legitimate. That is, one might try to construe these cases simply as different prison experiences: Some prisoners serve their sentences with adequate food and water, while others do not. But forced starvation, dehydration, and the experience of extreme pain and anguish are not simply alternative approaches to incarceration. When they are affirmatively inflicted, they arguably constitute torture.¹²⁹ There are, of course, degrees of deprivation. It is one thing to have barely enough food or water to sustain oneself at a minimally adequate level of functioning and another thing to have no food and water at all. But the deprivation of what one must have to survive need not be total to cause deep and gratuitous physical and psychological suffering.

It is axiomatic that treatment of this sort is beyond the scope of what the state may legitimately do to its citizens in liberal democratic societies, even as punishment for criminal violations.¹³⁰ More than simply a moral imperative, this prohibition on the infliction of such gratuitous suffering is also a basic constitutional principle, incorporated directly into the Eighth Amendment's prohibition on cruel punishment, which may be understood to prohibit the "unnecessary and wanton infliction of pain."¹³¹ And where prisoners are deprived of their basic needs such that they suffer serious physical or psychological pain, it is irrelevant whether the state affirmatively inflicted the

¹²⁹ See, e.g., Rebecca B. Schechter, Comment, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1253 (2003) ("Depriving individuals of food or water produces the same, if not a higher, level of suffering as acts currently stigmatized as torture.").

¹³⁰ True, as has been clear since the events at the Abu Ghraib military prison in Iraq became public, there are those in the United States who would defend the use of torture as an interrogation tool when doing so might produce information about possible attacks by al Qaeda and its allies. But the urgent debate on this issue, and the strong objection by many to the use of torture even in such extreme cases, offers evidence (if such evidence is needed) of the extent to which state-sponsored torture has been repudiated as a general matter in contemporary liberal democratic societies like the United States.

¹³¹ *Gamble*, 429 U.S. at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

deprivation as an explicit part of the punishment or merely caused the deprivation to be endured by a failure to act. Where there is a duty to protect, an omission is as culpable as an affirmative act.¹³²

To this point, I have considered those basic needs which all human beings must satisfy if they are to avoid serious physical and psychological suffering. But the state, by incarcerating, does not only deprive offenders of the capacity to provide for their own needs. It also compels them to remain under affirmatively dangerous circumstances, thus making them vulnerable to serious harms arising from the incarceration itself. There is thus another urgent and ongoing need that prisoners have by virtue of their incarceration, which the state is also responsible for meeting: that of physical safety.¹³³ When the state puts offenders in prison, it forces them into close quarters with hundreds and sometimes thousands of other offenders, some of whom have, as the *Farmer* Court put it, “demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct.”¹³⁴ To force prisoners to live in constant fear of violent assault, under conditions in which many of the most vulnerable among them can expect that fear to be realized,¹³⁵ is to inflict a form of physical and psychological suffering akin to torture.¹³⁶ It is plainly cruel to punish criminal offenders with the strap,¹³⁷ with rape, or with any other form of brutal corporal treatment. And for the same reason, the state may not place incarcerated offenders in a position of ongoing vulnerability to assault by predatory prisoners,¹³⁸ thus creating conditions that would amount

¹³² See MODEL PENAL CODE § 2.01(3) (1962) (providing criteria for omission liability).

¹³³ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (explaining that having stripped prisoners of means of self-protection, government is not free to fail to protect prisoners).

¹³⁴ *Id.* at 833 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (alteration in original)).

¹³⁵ See, e.g., *supra* note 21 (noting especially high rates of sexual victimization suffered by transgender prisoners, and noting that young men and gay men are also at higher than average risk of such treatment).

¹³⁶ To see that this is so, one need only consider the lot of Roderick Johnson, a Texas prisoner who spent the eighteen months of his confinement as a sex slave to a prison gang, “forced into oral sex and anal sex on a daily basis.” See Liptak, *supra* note 21.

¹³⁷ See *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (finding that use of strap “runs afoul of the Eighth Amendment; that the strap’s use . . . offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess”).

¹³⁸ See JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 166 (1996) (arguing that “[prison] authorities tacitly and knowingly tolerate” sexual violence by some prisoners against others “so that the rapists in this situation are acting as the vicarious enforcers of a form of punishment that the legal system does not itself enforce formally or directly”).

to the same thing.¹³⁹ To the list of basic human needs that the state is obliged to provide its prisoners, therefore, it is necessary to add protection from physical harm—harm that will often take the form of assault at the hands of fellow prisoners.

Focusing on the risk to prisoners of rape and other forms of physical violence underscores the fact that prisoners may suffer both physical and psychological pain when deprived of their basic human needs.¹⁴⁰ It also makes clear that the experience of serious pain in either form is arguably a marker of cruel punishment. Imagine, for example, the effects of facing an ongoing threat of rape or other forms of physical violence. The harm suffered would not only be the physical effects of the fear or the physical pain experienced if that fear were realized. In addition—and perhaps even more excruciating—being forced to live for extended periods in dread of attack, the subject of such treatment would exist in a permanently traumatized state, bereft of any peace of mind and constantly terrorized. There is something deeply dehumanizing about being forced to endure such conditions, which could leave victims desperate to protect themselves at all costs and rob them of the ability to function in any reasoned or self-possessed way.

At the same time, psychological suffering need not leave its victims in a state of such heightened desperation for its infliction to be cruel. Consider the fear one would experience when living daily with, for example, “exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates.”¹⁴¹ These examples indicate why, for

¹³⁹ Indeed, allowing the danger to passively exist may be even worse, as it creates on the part of the victim a constant expectation and terror of assault that ultimately may be even more psychologically damaging than it would be if the treatment were administered by the state at a specified time and place.

¹⁴⁰ Some psychological pain, as with some physical pain, will be temporally bounded in its effects. In other cases, the damage will be permanent. But for the reasons stated above, the infliction of serious suffering need not be permanent to be cruel. Indeed, the state’s constitutional obligation to avoid the infliction of even temporally limited pain in the administration of punishment is a hallmark of Eighth Amendment doctrine in the death penalty context. Recent cases focusing on the potential for pain caused by the three-drug cocktail used for executions by lethal injection reflect the view that, whatever else is entailed by the term “cruel punishment,” at the very least it precludes the state from inflicting unnecessary pain. *See, e.g., Baze v. Rees*, 128 S.Ct. 1520, 1530–31 (2008) (requiring that prisoner show that “the conditions presenting the risk must be ‘*sure or very likely* to cause serious illness and needless suffering,’ and give rise to ‘sufficiently *imminent* dangers’” (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993))). I thank Robert Goldstein for this observation.

¹⁴¹ *Helling v. McKinney*, 509 U.S. 25, 34 (1993) (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974)). As to this last example, the fear of contracting a highly contagious disease like tuberculosis or staph from being forced into close and unhygienic quarters with

prison conditions to qualify as cruel, the threatened harm need not have already materialized.¹⁴² It is enough that conditions create a substantial risk of sufficiently serious harm.¹⁴³

Certainly, not every deprivation prisoners suffer will rise to the level of cruelty. Prisons inflict deprivation by design, and to some extent forcing prisoners to do without things they would otherwise enjoy is part of the punishment.¹⁴⁴ If prisoners should suffer minor harms¹⁴⁵ while incarcerated, it seems inapt to call the imposition of

infected inmates is all too real for people in prisons and jails across the country. *See, e.g.*, Jessica R. MacNiel, Mark N. Lobato & Marisa Moore, *An Unanswered Health Disparity: Tuberculosis Among Correctional Inmates, 1993 Through 2003*, 95 AM. J. PUB. HEALTH 1800, 1802 (2005) (finding that tuberculosis rates among prisoners were substantially higher than among general population); Brent Staples, Editorial, *Treat the Epidemic Behind Bars Before It Hits the Streets*, N.Y. TIMES, June 22, 2004, at A18 (describing widespread incidence of H.I.V., hepatitis, tuberculosis, and staph in U.S. prisons); Silja J.A. Talvi, *Deadly Staph Infection 'Superbug' Has a Dangerous Foothold in U.S. Jails*, ALTERNET, Dec. 4, 2007, <http://www.alternet.org/story/69576> (describing resistant strain of staphylococcus in prison system).

¹⁴² *See Helling*, 509 U.S. at 33 (“It is ‘cruel and unusual punishment to hold convicted criminals in unsafe conditions.’”) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982)). As the Court put it in *Helling*, just as prison officials may not ignore “an inmate’s current health problems,” they may not ignore “a condition of confinement that is sure . . . to cause serious illness and needless suffering the next week or month or year.” *Id.* As a doctrinal matter, there is also practical wisdom in allowing a substantial risk of serious harm to satisfy the objective component of a prison conditions claim. *See id.* (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. . . . [A] remedy for unsafe conditions need not await a tragic event.”).

¹⁴³ This view is consistent with that which the Court has adopted. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (stating that prison officials’ deliberate indifference to substantial risk of serious harm violates Eighth Amendment); *Helling*, 509 U.S. at 33 (establishing that Eighth Amendment protects against future harm).

¹⁴⁴ *See supra* note 113.

¹⁴⁵ What constitutes a minor harm is an open question. There is, however, a danger that those who are called upon to assess the magnitude of prisoners’ suffering from the comfort of their own homes or offices may underestimate the extent of that suffering. The debate surrounding the passage of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 to 1321-77 (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C.), demonstrates the ease with which the suffering of prisoners may be trivialized in order to excuse its infliction. *See FLEURY-STEINER WITH CROWDER, supra* note 22, at 67–68 (describing anecdotes regarding frivolous prisoner lawsuits promulgated by PLRA supporters and providing evidence that their anecdotes were misleading); Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996) (citing three examples of prisoner suits condemned as frivolous in letter by four state attorneys general; showing that in each case, more detailed understanding of factual context revealed more legitimate claim; and condemning letter’s decontextualized presentation of facts as “misleading”); Jennifer Winslow, Comment, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1666–67 (2002) (detailing allegations of “frivolous” prisoner lawsuits made during Congressional debates over PLRA, and noting that such allegations obscured many meritorious claims prisoners brought regarding conditions of their confinement). For example, in recounting the “verbal parade of examples of ridicu-

such harms “cruel,”¹⁴⁶ even if they have arisen from official neglect and even if they may be thought to involve some deprivation of prisoners’ basic needs.¹⁴⁷ But when a threshold is crossed such that the victim’s suffering is “serious, not trivial,”¹⁴⁸ the harm suffered would be sufficient to qualify as cruel. Cruelty thus has an objective component: the character of the victim’s suffering.¹⁴⁹ And for this objective component to be satisfied, the victim must have suffered serious harm or faced a substantial risk of serious harm at the hands of the state.¹⁵⁰

To some, the foregoing may seem to have missed a key point: Offenders are sent to prison because they have committed a crime, perhaps a very serious one. And if while in prison they experience serious physical or psychological pain, it is not because the state is cruel but because the prisoners deserve it. To be cruel, the infliction of harm must be not only severe but also “unjustified or excessive.”¹⁵¹ On this view, if prisoners suffer serious harm, it may be unpleasant. But, being justified by the offense of conviction, it cannot be cruel.

lous lawsuits filed by prisoners” offered by U.S. senators in their debate over the PLRA, Winslow notes that among the examples of ostensibly absurd prisoner suits offered by Senator Robert Dole was a case challenging “insufficient storage locker space.” *See id.* at 1666 (noting that list offered by Senator Dole included lawsuits “complaining of ‘insufficient storage locker space, a defective haircut by a prison barber, [and] the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee’” (alteration in original) (quoting 141 Cong. Rec. S26,548 (1995) (statement of Sen. Dole))). However, as I suggest below, *see infra* note 279, in overcrowded prisons, insufficient locker storage space is a wholly legitimate concern, since it can encourage theft of prisoners’ personal items, which in turn provokes often serious violence. The point is not that prisoners never file lawsuits complaining of truly minor harms but that determinations that harms alleged by prisoners were minor must be made with care and circumspection. Where, however, careful consideration yields a conclusion that the harm was indeed minor, the underlying conditions may not properly be judged cruel.

¹⁴⁶ Of course, if repeated frequently enough, the imposition of otherwise minor harms may add up to a serious harm.

¹⁴⁷ For example, HIV-positive prisoners typically get a high-calorie, high-protein dietary supplement at mealtimes. The failure on occasion to provide the supplements would not seem a sufficiently serious deprivation to judge it cruel, despite the fact that the deprivation goes to the prisoners’ demonstrated need for extra calories. However, should the deprivation be frequent or routine and the negative health effects severe, one might well reach a different conclusion.

¹⁴⁸ *See Kekes, supra* note 8, at 837 (discussing nature of cruelty).

¹⁴⁹ *See id.* (observing that cruelty has “three essential elements: the agent’s state of mind, the agent’s action, and the victim’s suffering”).

¹⁵⁰ In this respect, my account is consistent with prevailing doctrine, on which prisoners must demonstrate as an objective matter that the “deprivation [was] sufficiently serious.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). For discussion of the particular claims that may satisfy this objective component, *see supra* note 26.

¹⁵¹ *See Kekes, supra* note 8, at 838. As John Kekes puts it in his study of cruelty, “[t]he victim does not deserve the pain, or that much of it, and there is no morally acceptable reason for its infliction.” *Id.*

There are, however, two problems with this objection, one practical and one normative. First, as a practical matter, when prisoners are deprived of their basic needs such that they suffer serious harm, that deprivation will generally be wholly unrelated to the offense of conviction.¹⁵² To suggest that deprivations of this sort are deserved on account of the victim's prior crime presumes that the harm inflicted bears some relationship to that offense, so that someone who committed a heinous murder is subject to greater deprivations and thus greater harm than, say, an identity thief. But this is not the case; instead, the kinds of deprivations that violate the state's carceral burden—for example, denials of urgently needed medical care or the failure to intervene to prevent a gang rape—are in practice inflicted randomly,¹⁵³ with no correlation to the victim's original crime.¹⁵⁴ Moreover, the notion that prisoners who are subjected to seriously harmful prison conditions deserve it does not square with the fact that, in today's prison context, when prisoners suffer serious harm through the acts or omissions of state officials, it is more often through carelessness or neglect¹⁵⁵ than deliberate action. Since all prisoners are equally subject to harm caused by such laxity, these harms can have no connection to the crime that justified the original sentence. Even when, as in *Hudson*, the harm is inflicted deliberately,¹⁵⁶ it is far more likely to be tied to the victim's conduct in the prison (or the

¹⁵² At the time of her rape and beating, for example, Farmer was “serving a 20-year sentence . . . for credit card fraud.” *Farmer v. Brennan*, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring).

¹⁵³ Sex offenders may seem to be an exception, since they are frequently singled out for violent treatment in prison. But this targeting is generally done by fellow prisoners. *See, e.g.*, Lorna A. Rhodes, *Changing the Subject: Conversation in Supermax*, 20 *CULTURAL ANTHROPOLOGY* 388, 397–98 (2005) (noting that “a major area of intensity and hazard in supermax involves the presence of sex criminals and especially of child molesters,” since “the hierarchy of crimes in the prison's general population” means that “some prisoners actively persecute sex criminals”). Even if officers in individual cases were to condone or facilitate this abuse, their conduct would be that of vigilantes and would be wholly unauthorized by the state.

¹⁵⁴ If a prisoner's offense does have any bearing on his chances of receiving official care and protection, it would likely have the opposite effect to that imagined by this objection, since it is typically the prisoners who have committed serious violent crimes, especially murder, who command the most respect on the inside, not only from fellow inmates but also from correctional officers. *See, e.g.*, SANYIKA SHAKUR, AKA MONSTER KODY SCOTT, *MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER* 327–28 (1993) (noting conversation with correctional officer in L.A. County Jail who explained that facility's officers were “scared to death” of Scott and his gang).

¹⁵⁵ *See* David T. Risser, *The Social Dimension of Moral Responsibility: Taking Organizations Seriously*, 27 *J. SOC. PHIL.* 189, 201 (1996) (“When organizations are implicated in causing harm, it is more likely to be because of negligence or carelessness than conscious design or purposive malfeasance.”).

¹⁵⁶ *See supra* text accompanying notes 99–101 (describing facts in *Hudson v. McMillan*, 503 U.S. 1 (1991)).

assailant's perceptions of that conduct)¹⁵⁷ than the offense of conviction,¹⁵⁸ of which in any case correctional officers typically know nothing.

Second, as a normative matter, when prisoners are incarcerated as punishment, it is the length of the prison term that is supposed to reflect society's collective judgment as to the seriousness of the crime and thus the degree of the offender's blameworthiness. Although this assertion may seem to beg the question, it in fact reflects a critical difference between private judgments of moral desert and the necessarily constrained expressions of societal condemnation embodied in the state's decision to incarcerate. The deliberate infliction of corporal harm has long since been rejected in the United States as a form of legitimate punishment.¹⁵⁹ Although the death penalty persists, the decision to incarcerate rather than execute reflects an affirmative choice not to destroy the offender but merely to banish him or her from society for the specified term. In a given case, the choice to banish and not to destroy may fail to satisfy those private citizens who feel the offender merited greater suffering than the state has determined to inflict. But the use of incarceration as punishment represents a collective commitment to constrain the nature of the harm to be inflicted, notwithstanding that the target may deserve worse.

One might prefer another system in which, say, prison sentences would specify not just the duration of the confinement but also the nature of the conditions under which the offender would be kept, calibrated to the degree of the perceived wrongfulness of the offense. Were this our system, a separate inquiry into the cruelty of the punishments thereby authorized would be necessary.¹⁶⁰ But this is not the

¹⁵⁷ See *supra* note 97 (discussing facts of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), in which officer who regarded prisoner's conduct as insubordinate subjected him to violent verbal and physical assault).

¹⁵⁸ In *Hudson*, for example, prior to the assault, the defendant guards had written Hudson up for using disrespectful language toward them and had assaulted him while escorting him to disciplinary segregation as punishment for that behavior. See *Hudson*, 503 U.S. at 4.

¹⁵⁹ *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . are forbidden by that amendment to the Constitution.”); see also *supra* note 10 (citing *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring), for proposition that Eighth Amendment has been held to prohibit “the barbaric punishments condemned by history, ‘punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like’” (citation omitted)); *supra* note 137 (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), on the unconstitutionality of the strap).

¹⁶⁰ The problem with such a system, of course, would be that, to the extent that the prescribed conditions would affirmatively call for the deliberate infliction of serious phys-

system we have. In our system, when an offender sentenced to prison time is subjected to serious physical or psychological harm, that harm is by definition unjustified, since whatever price she may be required to pay for her crime has already been fixed by the state in terms of a more legitimate currency—the time to be served.

Viewed as a whole, the state's obligation to its incarcerated offenders may be understood as that of ensuring the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being—those basic necessities of human life, including protection from assault, without which human beings cannot function and that people in prison need just by virtue of being human. In what follows, I refer collectively to this set of minimum requirements as "basic human needs."¹⁶¹ Although it is impossible to provide in advance a list of all the specific requirements this category encompasses, understanding the state's obligation as that of ensuring the conditions by which prisoners' basic human needs will be met offers a standard for assessing claims of cruel prison conditions as they arise.

The state may thus in practice be required to provide for the needs of the people it incarcerates to a greater extent than it does for people on the outside. This may seem a perverse effect, one that must refute the notion of any such obligation. But this challenge rests on that same faulty premise, that the scope of the state's duty to those it incarcerates derives from the desert of the imprisoned. People in need on the outside may well deserve state aid—arguably far more than at least some of the people currently in prison—and in any case, compelling arguments may exist that the state is obliged to provide for the basic human needs of all. But the state's obligation to meet the basic human needs of its prisoners stems from a very particular source: the state's own decision to incarcerate those it has convicted of crimes. By virtue of this decision, the state acquires distinct duties toward members of this group that it may not owe to other people, however deserving those others might be.

How the state is to fulfill its obligations to the people it has incarcerated is a policy question to be decided by those state officials to whom the legislature has delegated the task of running the prisons. But however it is satisfied, this obligation is ongoing, lasting for the duration of the custodial sentence. This point cannot be overemphasized. When the state opts to incarcerate convicted offenders as pun-

ical or psychological harm, they would be authorizing treatment arguably amounting to torture. They would therefore violate the prohibition on cruel punishment.

¹⁶¹ To minimize repetition, I also use the phrases "health and safety" and "care and protection" to capture the set of basic human needs that the state is obliged to provide its prisoners.

ishment, it is committing itself to providing for prisoners' basic human needs in an ongoing way as long as they are in custody. This is *the state's carceral burden*.¹⁶² If, for the public at large, an offender's prison sentence means his or her disappearance from the public consciousness and from society itself for the length of the sentence, it means just the opposite for the state. The state's carceral burden turns incarcerated offenders into perennial wards, a constant presence and a continuous responsibility. In this way, what may appear a mechanism for society finally to be rid of a set of undesirables turns out to be the very process that binds citizens and prisoners inextricably together in an ongoing relationship of obligation and dependence. Call this arrangement *society's carceral bargain*. The terms of this bargain allow society to remove convicted offenders from the public space on the condition that the state assumes the burden of attending in an ongoing way to prisoners' basic human needs. As a consequence, those charged with meeting the state's part of the bargain—its carceral burden—must remain conscious of prisoners' humanity and consequent capacity for suffering.¹⁶³ A system that regards convicted offenders as somehow subhuman is a system that will consistently fail to meet the obligations that the state incurs when it opts to imprison as punishment.

¹⁶² As a general matter, this account is consistent with the Court's own view of the state's obligations in the prison conditions context. As the *Farmer* Court put it, "[h]aving incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' having stripped them 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." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)). Instead, "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 well-being." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). This "affirmative duty to protect" arises, as Chief Justice Rehnquist made clear in *DeShaney*, "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." *Id.* at 200. Chief Justice Rehnquist further explained that

[t]he rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 200; *see also* *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("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.").

¹⁶³ For a discussion of the importance of recognizing prisoners' humanity, *see infra* Part II.D.

Thinking of the decision to imprison in terms of a bargain helps to highlight an important feature of incarceration: It is a public good, just like health care, education, or airport security. That this is so can be hard to see. Unlike in these other cases, the investment decision is not made explicitly as social policy but is instead the effect of the case-by-case imposition of prison sentences on individual offenders. And because the carceral decision in individual cases is prompted by many other collective impulses—to condemn cruel acts, to ensure public safety, to punish wrongdoing, and so on—we can fail to notice that this decision also entails the investment of considerable resources. But incarceration is no less a public good as a result. And as the foregoing suggests, there is a minimum cost that must be borne if the state is to engage in this practice at all. Society may choose not to do so. Or it may decide in a given case that the benefits are worth the cost. But the prohibition on cruel punishment means that what society may not do is try to reap the benefits without also bearing the accompanying burden.

B. *State Punishment and Cruel Institutions*

Until now, I have spoken of the state in the abstract as the bearer of moral obligations. Notwithstanding the difficulties of ascribing moral agency to an organizational entity,¹⁶⁴ it is important to recognize that the obligations being explored here *do* inhere in this corporate body. States *qua* states can and do perform actions that are properly ascribed to the collective.¹⁶⁵ States wage wars, sign treaties,

¹⁶⁴ Compare Peter A. French, *The Corporation as a Moral Person*, in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 133, 133 (Larry May & Stacey Hoffman eds., 1991) [hereinafter COLLECTIVE RESPONSIBILITY] (arguing that corporations can be regarded as “full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons”), with Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in COLLECTIVE RESPONSIBILITY, *supra*, at 111, 117 (disagreeing with French’s position that corporations are morally responsible for their actions). See generally Martin Benjamin, *Can Moral Responsibility Be Collective and Nondistributive?*, 4 SOC. THEORY & PRAC. 93, 93 (1976) (“[A]ttributions of moral responsibility for collective action must ultimately be analyzed in terms of individual moral responsibility.”); David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2374 (1992) (“We do not alter an organization by appealing to its sense of decency or duty; we do so by appealing to the sensibilities of its employees and officials . . .”).

¹⁶⁵ Consider, for example, the signature of an authorized official on an international treaty. That signature, the act of an individual officer, is necessary before it may be said that the nation that the official represents is a signatory to that treaty. But after the signature has been affixed to the appropriate paper, it is possible to refer to the act of the state itself in joining the treaty. Indeed, any suggestion that with that signature, only the individual official and not the state as an entity is committed to the terms of the treaty would be regarded as incoherent.

raise taxes, and open or shut their borders to immigration.¹⁶⁶ States also put people in prison and keep them there. And not only may states act, but their actions are also open to moral appraisal. A state-imposed punishment may thus be judged as justified or unjustified, humane or cruel.

This brings us to a key point. When the state imposes a punishment alleged to be cruel, it is an allegation not of personal but of institutional cruelty. This is clear from the necessarily institutional character of state punishment explored in Part I.¹⁶⁷ But in what way may an institution be cruel? Cruelty has an objective component, embodied in the nature and extent of the victim's suffering, which in the prison context is satisfied when a prisoner experiences serious physical or psychological harm or faces a substantial risk of such harm.¹⁶⁸ But cruelty connotes something more than mere suffering (as disturbing as that suffering may be). In the case of personal cruelty, that "something more" is generally understood as some attitude on the part of the agent toward the victim's suffering which warrants a judgment of cruelty.¹⁶⁹ Perhaps the most obvious of such attitudes is what Tom Regan calls "sadistic cruelty," that of taking affirmative delight in the suffering one causes others.¹⁷⁰ But an actor who feels utter indifference to the suffering she causes may also be judged cruel, thus manifesting what Regan labels "brutal cruelty."¹⁷¹ As Regan explains, "[s]ome cruel people do not feel pleasure in making others suffer. Indeed, they seem not to feel anything. Their cruelty is manifested by a lack of what is judged appropriate feeling . . . for the plight of the individual whose suffering they cause."¹⁷² Such people are "insensitive to the suffering they inflict."¹⁷³

¹⁶⁶ As David Copp observes, "collectives can and do perform actions. Nation-states wage wars, corporations change their price schedules, and charitable organizations solicit funds." David Copp, *Collective Actions and Secondary Actions*, 16 AM. PHIL. Q. 177, 177 (1979). Indeed, as Copp goes on to argue, "[e]ven relatively unorganized and impermanent collectives perform actions. The Paris mob stormed the Bastille, for example." *Id.*

¹⁶⁷ See *supra* Part I.B.

¹⁶⁸ See *supra* Part II.A.

¹⁶⁹ See Kekes, *supra* note 8, at 838 (defining cruelty "in its primary sense" as "the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims").

¹⁷⁰ Tom Regan, *Cruelty, Kindness, and Unnecessary Suffering*, 55 PHIL. 532, 534 (1980); see also *id.* at 533-34 (suggesting that "sadistic cruelty" may be "[t]he central case of cruelty").

¹⁷¹ *Id.* at 534

¹⁷² *Id.*

¹⁷³ *Id.*

In short, people may be judged cruel when they take delight in or are indifferent to the suffering they cause others.¹⁷⁴ But what about institutions? One might object that only people and not institutions can be cruel. But if this were so, it would be hard to know what to make of the Eighth Amendment, given that state punishment can be inflicted only through the combined actions of the linked institutions comprising the state's criminal justice apparatus.¹⁷⁵ If the constitutional prohibition on cruel punishment is to have any meaning for the prison conditions context, it must be the case that, in some sense and under some circumstances, institutions may be cruel. The challenge is to identify when this might be so.

In what sense, then, might institutions be said to act cruelly? Institutions, as complex organizations, lack the unified psychology of natural persons. To judge the character of an institutional action, one must therefore look to the institution's design and to the consequences of its operation for those subject to it. From this perspective, at least one of the dispositions typically associated with cruel individuals—that of brutal cruelty, which “involves indifference to . . . suffering caused to others”¹⁷⁶—is suggestive of when an institution may be judged cruel. As for sadistic cruelty, it is hard to see how an institution could be said to take delight in the suffering caused by its oper-

¹⁷⁴ Admittedly, the meaning of the term “cruelty” as used in moral and political theory “is by no means univocal.” Giorgio Baruchello & Wendy Hamblet, *What Is Cruelty? A Discussion Between Giorgio Baruchello and Wendy Hamblet*, 5 APPRAISAL 33, 34 (2005); see also Margaret Schein, *Cruelty: On the Limits of Humanity* 46–47 (Mar. 2006) (unpublished dissertation, University of Chicago) (on file with the *New York University Law Review*) (noting “imprecise usage” of term “‘cruelty’ in history and literature,” and concluding that “a survey of political theory, history and ethics reveals scattered, contradictory, and impoverished definitions of cruelty”). There is, however, agreement among philosophers who have studied the question that an actor may be judged cruel either when she takes delight in or when she is indifferent to the suffering she causes others. See, e.g., Baruchello & Hamblet, *supra*, at 34 (statement of Giorgio Baruchello) (noting that “human cruelty” can be divided into “that which stems from ‘delight’ in another’s suffering, and that which stems from ‘indifference’ to another’s suffering”); Wendy C. Hamblet & Giorgio Baruchello, *Discussion: Is Violence Always Cruel?*, 5 APPRAISAL 91, 91 (2005) (statement of Wendy Hamblet) (noting that “for action to be named truly cruel, there must be . . . a certain pleasure in the suffering of the other, or at the very least indifference to that suffering”); Kekes, *supra* note 8, at 838 (defining cruelty as “disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims”); Regan, *supra* note 170, at 534 (defining “indifference to, rather than enjoyment of, suffering caused to others” as “brutal cruelty”); see also Schein, *supra*, at 56 (“Definitions of cruelty that restrict their focus to the malice or sadism of the perpetrator are too shallow and too narrow to carry us to the heart of cruelty’s nature.”); *id.* at 59 (“Certainly most instances of sadism or relishing the suffering of another are cruel. But not all of them are, and not all instances of cruelty involve this particular vice.” (footnote omitted)).

¹⁷⁵ See *supra* Part I.B.

¹⁷⁶ Regan, *supra* note 170, at 534.

ation, since this attitude—a simultaneously self-conscious and other-directed emotional reaction—would seem to require a natural person’s unified self. But as anyone who has experienced a bureaucracy can attest, it is much less difficult to perceive an institution to be indifferent to the harm it inflicts. If an institution cannot be “indifferent” in an emotional or psychological sense, it may still arguably be so in a structural sense, when, by virtue of its design and operation, it systematically subjects some subset of the population to needless and avoidable suffering.

Understanding institutional cruelty in this sense helps to flesh out the claim of the previous section:¹⁷⁷ that prison conditions are cruel when the state fails to meet prisoners’ basic needs, thereby causing them serious harm. The state, by virtue of its decision to incarcerate, has an obligation to create institutional mechanisms that will ensure the satisfaction of prisoners’ basic human needs. To fail to do so and instead to create conditions under which prisoners suffer unnecessary and avoidable harm indicates what might be thought of as a collective indifference to the fate of those whom the state has chosen to incarcerate. It is this attitude of collective indifference, manifest in the institutional failure to protect prisoners from unnecessary harm, that justifies a judgment of cruelty.

That institutional cruelty takes this form helps make clear that not every official failure to meet prisoners’ basic needs may be condemned as cruel. This judgment is warranted only when the institution by its design or operation inflicts unnecessary or avoidable harm. Here, reasons matter. A state that incarcerates as punishment has serious obligations to its prisoners, but it may also have equally serious obligations to some other members of society. As a consequence, the state may at times face a dilemma where it lacks the financial or other resources necessary to fulfill all its most urgent duties. In such cases, although the duties persist, a failure to prevent unnecessary suffering of prisoners may not necessarily indicate institutional cruelty, since given the state’s other obligations, the harm prisoners suffered may have been truly unavoidable. If, however, the state is to rebut a charge of cruelty on this basis, the dilemma must have been genuine, meaning that the claimed obligations were both actually incompatible and equally pressing.¹⁷⁸ Entailed by what might be

¹⁷⁷ See *supra* Part II.A.

¹⁷⁸ This point has particular relevance regarding efforts to excuse contemporary failures of carceral care. Cases involving genuine dilemmas of this sort are likely to be rare in any case, and especially so in the prison conditions context, given the urgent and immediate dangers prisoners face on a daily basis and the depth of the obligation the state owes its prisoners by virtue of its decision to incarcerate. Thus, there will be few other citizens to

called the “priority of the most urgent interests,”¹⁷⁹ this last point bears particular emphasis. From this standpoint, it would be insufficient merely to show that by operating the prisons in ways at odds with fulfillment of the state’s carceral burden, money or other institutional resources would thereby be freed up that could be spent improving the lives—and meeting the less urgent needs—of free citizens. The state has chosen to incarcerate and therefore has assumed an obligation to meet prisoners’ basic needs. Failing to meet this obligation out of a preference for addressing the less urgent needs of others—even others thought more deserving than convicted criminal offenders—would only demonstrate the very indifference to prisoners’ suffering that is the hallmark of institutional cruelty in the prison context.

That institutions may be cruel in the structural sense sketched here seems clear enough. To take two obvious examples, consider the treatment of blacks in the antebellum American South or during Jim Crow,¹⁸⁰ and the treatment of Jews in Nazi Germany.¹⁸¹ But the kind of institutional cruelty described here need not depend for its existence on the deep institutionalized evils of state-sponsored slavery or

whom the state owes obligations as pressing and profound as those it owes the people it puts behind bars. For this reason, the state will rarely be able to defeat a charge of institutional cruelty on the ground that the structural changes necessary to provide prisoners adequate care and protection would be too burdensome, too costly, or require too great an investment in institutional reform. Cf. *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring) (criticizing majority’s focus on mental state of individual prison officials as “unwise,” since it “leaves open the possibility . . . that prison officials will be able to defeat [an Eighth Amendment prison conditions challenge] simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials”).

¹⁷⁹ Dolovich, *supra* note 122, at 470 (“[N]o punishment that compromises the essential aspects of the target’s moral personhood may be imposed unless it can be reasonably certain and necessary to appreciably deter violations of the equally urgent interests of others who are as badly off as the incarcerated.”).

¹⁸⁰ John Howard Griffin’s *Black Like Me* offers a chilling portrait of life for African Americans in the Jim Crow South, one which leaves no doubt about the possibility of institutional cruelty in this sense. See generally JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (Penguin Group 1996) (1961).

¹⁸¹ It might be thought that both these examples would be better understood as manifesting sadistic rather than brutal cruelty—that is, delight in the victims’ suffering rather than mere indifference to it. No doubt that was frequently the case under all these regimes. But as Hannah Arendt’s portrait of Adolf Eichmann memorably demonstrates, bureaucratic indifference to the suffering inflicted on subject populations can explain institutional cruelty as readily as can a sadistic impulse. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 135 (Penguin Books 2006) (1963). In either case, the institution at issue would properly be judged cruel. I focus on indifference here both because it is easier to demonstrate by reference to institutional structures and because, notwithstanding the psychological gratification many citizens seem to enjoy at the thought of prisoners’ suffering, I believe indifference reflects the more dominant collective attitude toward that suffering.

genocide. To the contrary, as Judith Shklar observes, the political institutions of even liberal democratic societies are potential sites of institutional cruelty or, as she calls it, “public cruelty.”¹⁸² Some may resist the suggestion that liberal democratic institutions may be systematically cruel. But, as Shklar notes, citizens in liberal democracies must delegate power to the state to secure the conditions of freedom.¹⁸³ And once that power has been further delegated to individual state officers, individual citizens become vulnerable to harm at the hands of those officers—harm that existing institutions may be ill-equipped to prevent.¹⁸⁴ The infliction of such “public cruelty” is not merely a function of the personal character of the individuals who seek out public power, although “sadistic individuals may flock to occupy positions of power that permit them to indulge their urges.”¹⁸⁵ It is instead “made possible by differences in public power, and it is almost always built into the system of coercion upon which all governments have to rely to fulfill their essential functions.”¹⁸⁶

If Shklar is right, the challenge for liberal democracies is to create safeguards to prevent, or at least minimize, the official abuses of power—and thus the institutional cruelty—that such coercive institutions enable.¹⁸⁷ This may be especially true in the context of the contemporary prison. But to see why this matters for our purposes, it is first necessary to consider the relationship between cruel institutions and those actions of individual officers that justify the judgment of cruelty.

C. Official Actions and Institutional Cruelty

Although not a natural person, the state may still undertake actions for which the state itself may be judged. At the same time, the

¹⁸² Shklar, *supra* note 60, at 29.

¹⁸³ *Id.*

¹⁸⁴ Indeed, Shklar views the further delegation to government officials of the state’s coercive power—the inevitable effect of this initial delegation—to be the greatest existing threat to citizens’ security and freedom. *Id.* at 29.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 30 (“What is to be feared is every extralegal, secret, and unauthorized act by public agents or their deputies.”). Although for Shklar, public institutions make public cruelty possible, it is the government’s agents, invested with the power to impose institutionalized cruelty, that manifest such cruelty through their actions. Shklar thus cautions that “any confidence that we might develop” in the agents of government “must rest firmly on deep suspicion.” *Id.* No doubt, government agents—including most notably “military, paramilitary, and police agents”—cause much suffering through the use of legally authorized force. *Id.* at 29. But it is the discretionary conduct, made possible by the delegated power government agents enjoy, that for Shklar is most to be feared. *See id.* at 29–30.

¹⁸⁷ As Shklar puts it, it has been “amply justified by every page of political history” that “some agents of government will behave lawlessly and brutally in small or big ways most of the time *unless they are prevented from doing so.*” *Id.* at 28 (emphasis added).

state cannot act independently of the officials charged with acting on its behalf.¹⁸⁸ The state is a complex organization, and “organizations can do nothing without their members doing things.”¹⁸⁹ Following David Copp, we can think of the individual acts on which the possibility of collective action depends as “primary actions,” and those acts “attributable to [collectives] on the basis of . . . [the] actions of some other agents” as “secondary actions.”¹⁹⁰ If a collective may only act in a secondary sense, through the primary actions of the individuals acting on its behalf, it is only through the primary actions of its officers that the state—a collective entity—may honor (or fail to honor) moral obligations, including its carceral burden.¹⁹¹

In practical terms, this means that the state’s carceral burden is transferred to the agencies that run the prisons and to the innumerable individuals who staff those agencies. If the state is to incarcerate offenders as punishment, it must rely on its agents to perform their assigned roles.¹⁹² And given the nature of incarceration—in particular the need for constant direct contact between line officers and prisoners—the individual officers charged with running the facility need considerable power and discretion to perform their duties. There is, however, a contradiction at the heart of this arrangement: It both creates and potentially undermines the state’s capacity to satisfy its carceral burden. On the one hand, without the many individuals collectively tasked with running the prisons, the state’s obligation to provide for prisoners’ care and protection cannot be met. On the other hand, those same officials are also the ones who, whether

¹⁸⁸ See Copp, *supra* note 166, at 177 (“It is plain that collectives do not act independent of the actions of persons.”); Luban et al., *supra* note 164, at 2374 (arguing that institutions can only act through actions of institutional agents).

¹⁸⁹ Risser, *supra* note 155, at 200; *see also id.* (“In one sense, the actions of complex organizations and the actions of their individual members are causally inseparable”); Luban et al., *supra* note 164, at 2375 (suggesting that “an organizational culture [cannot] act except through individuals, who ultimately bear the praise or blame for the lives they craft out of the raw material the culture provides”).

¹⁹⁰ Copp, *supra* note 166, at 183; *see also id.* at 177 (“An agent’s action is a secondary action if, and only if, it is correctly attributable to this agent on the basis of either an action of some other agent, or actions of some other agents.”).

¹⁹¹ *See id.* at 177 (noting that agent’s secondary actions “can violate obligations he has, and can fulfil his commitments”).

¹⁹² Incarceration, like other state services in the modern administrative state, is undertaken on a vast scale by complex bureaucracies that depend for their functioning on the collective labor of innumerable individual actors at all levels. In the prison context, these actors include everyone from the most senior officials who run statewide corrections policies, to the wardens and administrative staff of the individual facilities, to the custodial officials (or “line officers”) who work three shifts to maintain security and order, to the countless other staff required to run the wide array of systems, programs, and services necessary to meet prisoners’ needs (housing units, kitchen, laundry, cleaning crews, maintenance, medical, dental, mental health care, pharmacy, law library, and so on).

through inattention, incompetence, carelessness, or malice, might put prisoners at risk of harm. As a consequence, the state's carceral burden involves not only the provision of care for and protection of prisoners but also the burden of ensuring that any prison officials in a position to affect the conditions of prisoners' confinement have the capacity and tendency to exercise their authority in ways consistent with the state's affirmative obligations to its prisoners.¹⁹³

Note that the burden of ensuring adequately trained and motivated prison officials, although it can be met only through the "primary actions" of individual prison administrators,¹⁹⁴ still attaches to the state itself. Individual officers may certainly fail to address the basic needs of prisoners, a failure for which they may be held responsible. But what makes the conduct cruel is not the character of the individual officer's conduct itself, but the fact that, through a series of official acts collectively attributable to the state—acts which together created the institutional structure in which prisoners serve their sentences—prisoners were placed in the custody of individual officers who would create those conditions or allow them to exist. These officers may be personally cruel (think *Hudson*¹⁹⁵), and in such cases, the state too may be judged cruel for vesting in such sadistic or cruelly indifferent people the power to treat vulnerable prisoners this way. But for a finding of cruel punishment, the inflicting officer need not himself be cruel.¹⁹⁶ It is enough to show that the institution, through the combined actions of the various officials charged with its functioning, created a set of conditions—manifested most directly by the inflicting officer—that caused prisoners serious harm. In that case, we can say that the institution operated cruelly toward those prisoners regardless of whether the inflicting officer was himself personally cruel.¹⁹⁷

¹⁹³ This is true both of officials charged with providing micro-level attention to prisoners' needs and of officials responsible for the creation of macro-level institutional structures. I return to this point in *infra* Part III.

¹⁹⁴ See Copp, *supra* note 166, at 183 ("When an action performed by a person is the basis for attributing an action to a collective, the collective's action is constituted by the person's action.").

¹⁹⁵ *Hudson v. McMillian*, 503 U.S. 1 (1992); see also *supra* text accompanying notes 99–104 (describing facts of *Hudson*).

¹⁹⁶ This is not to say that under such conditions, no state actor may be held responsible for the state's cruel act. I explore this point in more detail in *infra* Part III.A.

¹⁹⁷ See Copp, *supra* note 166, at 185–86 (noting that "it is possible for a collective to be blameworthy for doing something even though the person whose action constituted the collective's action is not blameworthy for what he did"). At the same time, for prison conditions to be judged cruel, some prison official must have done something to bring about those harmful conditions. I return to this point in *infra* Part III.A.

D. Prisons as Sites of Institutional Cruelty

The concern here is with institutional cruelty. When a prisoner is deprived of her basic needs and suffers serious harm as a result, it is the institution and not (or not merely) the individual officers acting on the state's behalf that may be judged cruel. Prison officials are only able to inflict suffering on incarcerated people because a series of institutional decisions put them in a position to do so. Any harm thereby inflicted is therefore chargeable to the institution, which by its design and operation fostered the conditions at issue.

This is not the place for determining what institutional design would be most conducive to the avoidance of cruel conditions. But one feature seems plainly essential: Those individual officers responsible for designing and running the prison must be ever-conscious that prisoners are human beings with the same capacity for suffering as anyone else. Otherwise, those officers will be incapable of meeting prisoners' basic needs or of recognizing dangers to their well-being. Unfortunately, in their design and operation, contemporary prisons often have exactly the opposite effect on the officers charged with meeting the state's carceral burden. If non-cruel prison conditions are to be possible, meaningful institutional reform is therefore necessary.

This institutional fostering of official cruelty is evident from the workings of the typical American prison. In a classic 1956 article, sociologist Howard Garfinkel described the "status degradation ceremony" as consisting of "[a]ny communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types."¹⁹⁸ As James Gilligan describes, applying Garfinkel's terminology, this process of degrading prisoners begins early, with the "[r]itual [d]egradation of '[b]ooking.'"¹⁹⁹ During this ceremony, prisoners are stripped naked in front of a group of officers. They are then forced to bend over and submit to what Gilligan calls "digital anal rape," which is "ostensibly to determine if the man is smuggling drugs into prison," but which prison officials conceded to Gilligan "is consciously and deliberately intended to terrify and humiliate the new inmate."²⁰⁰

This ritual, so deeply damaging to prisoners' self-respect, is repeated endlessly on new arrivals by prison officials who, it is reason-

¹⁹⁸ Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AM. J. SOC.* 420, 420 (1956).

¹⁹⁹ JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 152–53 (1996).

²⁰⁰ *Id.* at 153–54. To the extent that this process is unnecessary for prison security, or could be modified to achieve the same benefits without the humiliation, it is arguably cruel for that reason alone.

able to expect, will at some point inevitably stop noticing either the humanity or the humiliation of the inmates.²⁰¹ And for the prisoners themselves, the booking process is only the first of many degrading experiences they will face. To name just two, throughout their incarceration, prisoners will shower and relieve themselves in full view of officers and other prisoners, and they must petition housing officers for virtually everything they will need to maintain themselves and retain their self-respect, including such basics as soap and toilet paper. In some circumstances, the indignity may be justified by the legitimate security needs of the institution. Drugs are, after all, smuggled into the facility in the rectums of new arrivals, and it seems only right to keep razors out of prisoners' hands except when they are shaving under the eye of the guards. But a meaningful commitment to constraining institutional cruelty would reduce these indignities as much as possible, since they dehumanize prisoners in the eyes of officers in ways that encourage those officers to stop seeing them as fellow human beings with a human's capacity for suffering, and to start seeing them as "lower in the local scheme of social types."²⁰²

Not all aspects of the process by which prisoners are dehumanized in the eyes of prison officials involve humiliations as extreme as the ones just described. In addition, "there are countless everyday indignities that reinforce perceptions that prisoners are a lower class of people."²⁰³ Correctional officers are "trained: don't touch, don't even shake hands, don't call them by their name, call them by their number."²⁰⁴ The culture of the prison thus often teaches officials that convicted offenders are "a breed apart, . . . the scum of the earth," beings utterly distinct from the officers who run the prisons.²⁰⁵ These

²⁰¹ See, e.g., PARSELL, *supra* note 21, at 21 ("The deputy [doing the strip searches] ran through his routine like the one who had taken my fingerprints. As if he was working at The Fisher Body Plant—just putting in an eight-hour shift as the endless stream of chassis came down the line.").

²⁰² Garfinkel, *supra* note 198, at 420.

²⁰³ GIBBONS & KATZENBACH, *supra* note 23, at 65.

²⁰⁴ *Id.* (quoting former prison warden Jack Cowley).

²⁰⁵ KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 231 (1988). As Kauffman explained:

The perception that a class of individuals constitute a breed apart, "that those people are the scum of the earth and there is not even a slight resemblance to me," plays an important part in lowering barriers to violence in prison Officers . . . spoke of maggots killing each other, of inmates bleeding and dying, not men. "What happens here to the inmates does not bother me now in the least. I have no compassion for the inmates as a group . . . I used to pass out at the sight of blood. Now it doesn't bother me. It's inmate blood."

Id. (fourth omission in original); see also Dick Franklin, *Culture IS . . . as Culture DOES*, in NAT'L INST. OF CORR., CONTEMPORARY ISSUES IN PRISON MANAGEMENT: ADDITIONAL READINGS 24, 28 (1999), available at <http://www.nicic.org/pubs/1999/015778.pdf> (explaining

cultural tendencies are both enabled and reinforced by the considerable and largely unchecked power prison officers have over the inmates in their charge. As Albert Bandura notes, “when authorities have coercive power over others and adequate safeguards for constraining the behaviour of powerholders are lacking, powerholders come to devalue those over whom they wield control.”²⁰⁶

As a result of this desensitization, even those prison officials who in their private lives would be regarded as “normal, morally upright, and even usually idealistic people,”²⁰⁷ may come to treat inmates in ways that even the officers themselves would previously have viewed as repugnant and inhumane.²⁰⁸ In this way, the institution itself creates the conditions for cruel treatment and the violation of the state’s carceral burden. To some extent, the desensitization of prison officials to the suffering of prisoners may be an “adaptive” mechanism, necessary if the officers are to be able to do their jobs.²⁰⁹ But the fact

ability of correctional officers to “view inmates as less-than-deserving of respect because of their offense, conduct, intelligence, etc.”).

²⁰⁶ Albert Bandura, *Selective Moral Disengagement in the Exercise of Moral Agency*, 31 J. MORAL EDUC. 101, 111 (2002) (describing famous Zimbardo prison simulation experiment in which college students randomly chosen to be guards with unilateral power began immediately mistreating those students chosen to be prisoners).

²⁰⁷ PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 307 (2007) (“By identifying certain individuals or groups as being outside the sphere of humanity, dehumanizing agents suspend the morality that might typically govern reasoned actions toward their fellows. . . . Under such conditions, it becomes possible for normal, morally upright, and even usually idealistic people to perform acts of destructive cruelty.”).

²⁰⁸ As Kauffman describes:

In order to cope with even their minimum daily duties officers found they “started developing calluses.” Actions that at first were troubling eventually became routine and, in the process, lost much of their moral sting. A former officer recalled the appalling conditions in Walpole’s punishment cells with urine and feces backed up onto the floor and maggots and roaches everywhere. Yet he got used to putting men in there. . . . As the Bridgewater officer who at first hated to put men into cold isolation cells reflected, “After a while you get immune to it. You have to. It’s not that you’re cold and all that—well, maybe some people are, but . . . you have to get immune to it.”

Once having gotten used to their involvement in lesser acts of degradation, use of physical violence also lost some of its repugnance.

KAUFFMAN, *supra* note 205, at 226.

²⁰⁹ See Philip G. Zimbardo & Christina Maslach, *Depersonalization*, in 4 INTERNATIONAL ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, PSYCHOANALYSIS, & NEUROLOGY 52, 52 (Benjamin B. Wolman ed., 1977) (“Dehumanization does have some adaptive functions [in that] it protects the individual against any kind of emotion that is painful, overwhelming, debilitating, inhibiting, or which interferes with some necessary, ongoing behavior.”). *But cf.* Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL’Y 175, 181–82 (2006) (suggesting that even in correctional setting, “[v]iewing anyone as less than ‘human’ dulls our senses of observation. The need to establish appropriate boundaries presents a difficult line to walk.

remains that, for a combination of reasons, prison officials often develop an extremely dismissive attitude toward the people in their charge.²¹⁰ And over time, those officers who do so will likely become less troubled by the possibility of prisoners' suffering and may even cease to see prisoners as fellow "persons to whom one owes moral obligations at all."²¹¹

The individual actors charged with carrying out the state's carceral burden necessarily operate within the institutional context of the prison, the structure and culture of which will define the terms of their interactions with prisoners. As Shklar teaches, delegating power over fellow citizens to individual state officers creates a particularly virulent moral hazard. But institutions can be more or less effective at reining in the exercise of that delegated power, more or less committed to affirming the humanity of those people subject to that power, and thus more or less cruel. What is required to combat the effects of systematic dehumanization is the creation of legal and other mechanisms²¹² that will shift the dynamics.²¹³ In the absence of concerted efforts to redesign institutional forces to combat the tendency

The need for boundaries is imperative, yet the consequence of dehumanization is catastrophic").

²¹⁰ One study of correctional officers showed that the months employed in [the prison system studied] are negatively associated with attitudes toward inmates. The correctional literature has explained this relationship in several ways. First, the role demands of the occupation may socialize correctional officers over time to hold more unfavorable views of inmates, their rights, and rehabilitation prospects. Second, this negative correlation may simply reflect a more general cynicism or alienation with which more seasoned officers regard their jobs. Finally, this effect may also be the result of an organizational selection process that, over time, causes more proinmate officers to quit their jobs. Regardless of which one or combination of these explanations is correct, this finding suggests that continued work in the prison environment produces/attracts those officers who regard inmates more negatively.

Nancy C. Jurik, *Individual and Organizational Determinants of Correctional Officer Attitudes Toward Inmates*, 23 *CRIMINOLOGY* 523, 534–35 (1985) (citations omitted).

²¹¹ KAUFFMAN, *supra* note 205, at 230 (describing how seeing prisoners as having "relinquished their claims to moral consideration" was one way of "neutralizing guilt" about mistreatment of inmates).

²¹² Even if legal constraints do not directly alter the prison culture, meaningful enforcement of the Eighth Amendment would mean that the state would have to bear the full cost of constitutional prison conditions. The likely result would be reduced use of incarceration as the penalty for behavior judged socially undesirable, which would in turn take the pressure off the prisons, making it easier to cultivate a humane prison culture. Of course, meaningful change would not be possible absent focused attention to the socioeconomic and psychological dynamics that define a prison's institutional culture. As the work of Ann Chih Lin has shown, because carceral institutions vary widely in their culture and character, the particularities of each institution must be taken into account if there is to be any possibility of real reform. *See generally* ANN CHIH LIN, *REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON* (2000) (conducting detailed examina-

of prison officials to regard prisoners as “lower in the local scheme of social types,”²¹⁴ it should come as no surprise if the contemporary prison is the site of systematically cruel punishment. There is a tragic irony here for a polity that both prohibits cruel punishment and relies on incarceration as the primary mode of criminal punishment: The very institution designed to satisfy the state’s obligations to those it incarcerates may systematically undermine the capacity of the individual officers charged with meeting those obligations day-to-day to recognize the humanity of those whose needs they are obliged to meet. As a result, these officers become blind to those needs, thereby guaranteeing that the state’s carceral burden will remain unfulfilled.

As a matter of fact, this may be an accurate description of the current state of incarceration in the United States. This does not mean that the situation is inevitable, or that nothing can be done to improve it. But it seems clear that reform efforts will come to naught unless a commitment is made to treat those we incarcerate with the consideration and respect due to them as fellow human beings.²¹⁵ This brings us to the question of what role the Eighth Amendment prohibition on cruel punishment may play in constraining cruelty in the prison conditions context.

III

CAPTURING CRUELTY DOCTRINALLY

If there is something to the above account, the question then becomes how it may be translated into workable doctrinal standards. Practically speaking, some gap between constitutional meaning and constitutional doctrine may be inevitable.²¹⁶ But ideally, that gap would be as small as possible, and, to this end, there is value in taking

tion and comparative analysis of different U.S. prisons in order to assess and explain successes and failures of prison reform policies).

²¹³ Again, as Bandura puts it, “when authorities have coercive power over others and *adequate safeguards for constraining the behaviour of powerholders are lacking*[, p]owerholders come to devalue those over whom they wield control.” Bandura, *supra* note 206, at 111 (emphasis added). Shklar makes a similar observation as to the need for institutional constraints on public cruelty. As she puts it, it has been “amply justified by every page of political history,” that “some agents of government will behave lawlessly and brutally in small or big ways most of the time *unless they are prevented from doing so*.” Shklar, *supra* note 60, at 28 (emphasis added).

²¹⁴ Garfinkel, *supra* note 198, at 420.

²¹⁵ Incarceration need not be inconsistent with this commitment. One can be deprived of one’s liberty as punishment for a crime without also forfeiting one’s status as a moral subject and a human being.

²¹⁶ See Fallon, *supra* note 114, at 1277–79 (noting that “[b]ecause the demand for judicially manageable standards stands partly distinct from the search for constitutional meaning,” gaps in constitutional meaning and constitutional doctrine are inevitable).

as a starting point those standards most consistent with constitutional meaning. The aim of this Part is to identify that starting point.

As will be seen, this enterprise need not require a wholesale recasting of the existing doctrinal framework. That framework has two components. As to the first, the “objective component,”²¹⁷ the existing standard is satisfied by showing that plaintiffs suffered serious harm or were subjected to a substantial risk of serious harm, which is consistent with the account sketched above as to the nature and extent of the harm required before prison conditions may be judged cruel.²¹⁸ And as to the second, the “subjective component,”²¹⁹ although the prevailing standard for when prison officials have “a sufficiently culpable state of mind”²²⁰ is, as will be shown, woefully underinclusive, the focus on individual culpability is not necessarily at odds with efforts to identify unconstitutional conditions. It is the state that incarcerates, but the state cannot act independently of the individual officers who act on its behalf. If the state is to fulfill its carceral burden, the prison officials to whom the state has delegated the task must take the necessary steps to ensure that prisoners’ basic needs are met, and are responsible for any failures to do so.

In what follows, I first address the question of why Eleventh Amendment sovereign immunity is no obstacle to claims for unconstitutional conditions. I then consider three possible standards for determining the cruelty of prison conditions created by official acts: criminal recklessness, heightened negligence, and strict liability. With regard to recklessness, I show this standard to be at odds with meaningful efforts to identify cruel conditions. As for the remaining alternatives, I suggest that a negligence standard designed to account for key differences between cases involving micro-level and macro-level failures of care is probably the most compelling as a theoretical matter, although problems likely to attend its application may provide reason to opt instead for a strict liability standard suitably modified to guard against potential unfairness to defendants. Ultimately, either of these alternatives—a negligence standard applied differently in cases of micro-level and macro-level failures of care, or a modified strict liability standard—would suit. Moreover, either would go far toward remedying the unconstitutional conditions that currently exist in many of the nation’s prisons and jails.

²¹⁷ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

²¹⁸ *See supra* Part II.A.

²¹⁹ *Wilson*, 501 U.S. at 298.

²²⁰ *Id.*

A. *Overcoming the Eleventh Amendment*

The most immediate issue for the project of capturing Eighth Amendment cruelty doctrinally may seem to be overcoming the obstacle posed by the Eleventh Amendment.²²¹ If state punishment is necessarily a collective act and may not be inflicted by any individual *qua* individual, the party responsible for any cruel conditions must be the state itself. The Eleventh Amendment, however, prohibits “suits in federal courts against state governments in law [or] equity . . . by a state’s own citizens, [or] by citizens of another state.”²²² Thus, even if there were grounds for finding an Eighth Amendment violation, sovereign immunity would seem to preclude a judicial hearing.

This move, however, is too quick. The state, as a collective entity, may act, but it cannot act independently.²²³ Any time a prisoner experiences harm for which the state itself is alleged to be responsible, the harm in question will necessarily have been caused by an act or omission on the part of an individual agent acting on the state’s behalf. This means that whenever a prisoner suffers harm sufficient to ground an Eighth Amendment prison conditions challenge, there will be some identifiable state official responsible for the challenged condition and thus the basis for a § 1983 action.²²⁴

This suggestion may seem at odds with what I have described as the necessarily institutional character of cruel prison conditions. As I have argued, no set of prison conditions will be created by any one official acting alone, but will instead arise from the combined actions of the innumerable state officials who design, manage, and staff the prisons.²²⁵ Any individual officer, moreover, operates in a difficult

²²¹ “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. *But see Alden v. Maine*, 527 U.S. 706, 713, 728 (1999) (explaining that phrase “Eleventh Amendment immunity” is “convenient shorthand but something of a misnomer,” since state sovereign immunity “derives not from the Eleventh Amendment but from the structure of the original Constitution itself”).

²²² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 180 (3d ed. 2006). The Supreme Court has also ruled that sovereign immunity “bars suits against state governments in state court without their consent.” *Id.* (citing *Alden*, 527 U.S. at 706).

²²³ *See supra* Part II.C (explaining that the state cannot act to fulfill burdens of incarceration without prison officials who carry out tasks necessary to run prisons on day-to-day basis); *see also* Copp, *supra* note 166, at 177 (“It is plain that collectives do not act independently of the actions of persons.”).

²²⁴ The inflicting officer need not have direct inmate contact to cause prisoners harm. For this reason, even senior prison administrators may be liable under § 1983 for their role in creating cruel conditions. *See infra* Part III.D (discussing liability of prison administrators for macro-level conditions).

²²⁵ *See supra* Part II.C (explaining that the state’s carceral burden is transferred to agencies that run prisons and officials who staff agencies).

and dangerous environment under conditions that may systematically undermine the capacity of even well-meaning officials to recognize prisoners' suffering and thus the nature of their needs. It may therefore seem that suing an individual officer under § 1983 for harm to prisoners is to target that individual unfairly. This notion, however, misconstrues the allegation at the heart of a § 1983 prison conditions claim. It is not that the defendant has necessarily exhibited personal cruelty (although depending on the facts, a judgment of personal cruelty may well be warranted). It is instead an allegation of institutional cruelty, arising from the character of the institutional arrangements the state has created to house its prisoners—cruelty that happens to be manifested most immediately by the inflicting officer, who acts on behalf of the state and is the necessary vehicle for any state action.²²⁶ It is for this reason, and in this capacity as an agent of the state, that an individual officer is vulnerable to suit.²²⁷

Section 1983 is a fitting vehicle for prison conditions claims for another reason: It compels the court to specify precisely the treatment the prisoner actually received. To determine whether particular conditions were cruel, it is necessary to be clear about what exactly

²²⁶ That individual officers only act by virtue of the power conferred on them by the state means that there is moral significance to an individual's institutional affiliation. The fact that officers act within the context of particular institutions may explain how and why particular wrongful acts came about and give rise to specific obligations on the actor's part to take particular care to avoid such wrongs. *See* Luban et al., *supra* note 164, at 2377 (“[A]n individual's participation in organizational activity involves special risks and imposes special obligations . . .”). As I argue in Part II.D, institutional culture—which may in some cases operate to promote praiseworthy behavior on the part of individual actors—creates in the prison context the conditions under which prisoners are more likely to be harmed. But this does not excuse individual wrongdoing. *See id.* at 2375 (arguing that it is individuals “who ultimately bear the praise or blame for the lives they craft out of the raw material the culture provides”). It instead obliges prison officials to act affirmatively to resist the pressures and temptations prison culture creates to minimize, dismiss, or ignore risks of harm to prisoners. *See* Benjamin, *supra* note 164, at 104 (“[W]e as individuals are not only morally responsible for opposing offending collectives that we already know about, but also . . . we are responsible for learning about and assessing the causal consequences of collectives.”).

²²⁷ That state actors are able to cause citizens harm only by virtue of state-conferred power suggests the appropriateness of state indemnification of public officers. If the state (through the actions of its officials) is to run its institutions in ways that allow officers to harm vulnerable individuals in violation of the Constitution, it is only appropriate that the state itself should bear the cost. This is so whether the failure was one of hiring, training, or institutional design. Certainly, depending on the circumstances, individual officers may bear some responsibility for the harm. But they could only cause such harm because the state gave them the opportunity in the first place. State indemnification of individual officers is also consistent with the deterrent theory of § 1983 actions. It is the institution itself that ought to pay, in order that the institution—personified in the senior administrators responsible for hiring, training, and other policies, and also for staying within budget—feel pressure to make the changes necessary to avoid future recurrences.

the allegedly cruel conditions involved. In many cases, the nature of the conditions will be obvious, but in many others, it will not. To achieve greater specificity in cases of the latter sort, we need to understand what the responsible individuals actually did.²²⁸ Because the state cannot act independently of the actions of its officers, when a prisoner endures a harmful condition, *some* individual or individuals acting on behalf of the state will necessarily have done something to create the specifics of that condition.²²⁹ A § 1983 action will compel a focus on the question of exactly what that something was.

Still, it may be wondered why anything at all need be said as to the nature of official conduct. If prison conditions are cruel when prisoners, deprived of basic human needs, suffer serious harm, it should be enough that the plaintiff can demonstrate sufficient harm as an objective matter. But suffering on its own, independent of some responsible external source, cannot be said to be cruel;²³⁰ cruelty also requires a causal act on the part of some actor.²³¹ In the prison context, that causal act is the deprivation of prisoners' basic needs. Unless the allegedly cruel condition is caused by some state official, there can be no finding of cruelty and thus no Eighth Amendment violation. True, there will likely be few cases in which harm to prisoners is *not* traceable to official conduct. It is, moreover, important that doctrinal standards not facilitate the obfuscation of official responsibility for objectively demonstrable harm. But if we aim to identify *cruel* punishment, some official act or omission must necessarily have caused the harm.²³²

²²⁸ See Risser, *supra* note 155, at 193 (arguing that "specifying the nature and extent of a particular collective harm is a necessary part of the process of identifying the agent or agents responsible"); see also DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 48 (1987) (suggesting that "[a]scribing moral responsibility calls for specificity in characterizing outcomes as much as in identifying agents").

²²⁹ This is so whether the responsible act was undertaken at the micro level by an officer in direct contact with prisoners or at the macro level by administrators making policy decisions. This micro/macro distinction proves to have significant implications for a defensible doctrinal framework for Eighth Amendment prison conditions claims. I therefore treat it in more detail below. See *infra* Part III.C–D.

²³⁰ Certainly, one might bemoan a cruel fate, but this invocation of the term seems to be more metaphorical than literal, unless one actually believes that fate has some agency.

²³¹ See Kekes, *supra* note 8, at 837 ("To say that an action is cruel is . . . to say that it is the kind of action that would be performed by a cruel agent, and that is why when actions are correctly said to be cruel, a derivative sense of 'cruelty' is being used.").

²³² It is not enough to say that, because the state has incarcerated the prisoner in the first place, the state (through the acts of its officials) is always responsible when a prisoner suffers a sufficiently serious harm as an objective matter. To determine whether the conditions of a prisoner's confinement qualify as cruel punishment, there must have been something particular about those conditions that set them apart from the basic fact of the incarceration. One might argue that the act of incarcerating convicted offenders is sufficiently cruel in itself to negate any need for some further showing. But for present pur-

B. *The Problem with Strict Liability*

As a doctrinal matter, then, a prisoner alleging unconstitutional conditions must show both that she suffered a sufficiently serious harm and that the harm was caused by some act or omission on the part of some prison official. Here one might well ask why anything else should be required. The state is obliged to provide for prisoners' basic needs sufficient to prevent unnecessary suffering. When existing institutional arrangements instead cause prisoners serious harm, cruel punishment has been inflicted. Why then, if a prison official causes a prisoner serious harm, is the doctrinal inquiry not at an end? In other words, why not strict liability?

As will be explored later in this Part, there may well be a case for strict liability.²³³ Here, I merely want to note why this approach may risk unfairness to defendants. The infliction of cruelty in the carceral context involves not just causal responsibility but also a failure by the state to respond appropriately to the human beings in its custody. Absent safeguards, however, a strict liability standard could allow liability even in circumstances where nothing in the conduct of state officers evinced any disregard for prisoners' basic needs or any inconsistency with a fully adequate commitment to humane treatment. Such a standard would therefore be overbroad.

Imagine Luis, a prisoner alone in his cell. It is midnight, and the housing unit is quiet. Luis has been feeling unwell for most of the evening but has said nothing about it to anyone. Shortly after last count, Luis begins to suffer the onset of a stroke. During this attack he moans and thrashes around in his bunk. Had Luis received medical care in the first few hours after his attack began, his condition could have been stabilized and he would have avoided the worst effects. Instead, he gets no medical attention until morning, which is too late to prevent extreme paralysis. There is no question that Luis has suffered terribly, both during the attack and afterwards, for lack of timely medical care. There is, moreover, no question that the state, having incarcerated Luis, is obliged to treat his serious medical needs.

The question is whether the failure to provide medical treatment in this case represents a cruel deprivation. To answer this question we need more details.²³⁴ Imagine, then, that in this case, the officer in

poses at least, I am not prepared to take such a sweeping position. And unless one is to regard the practice of incarceration as per se cruel, a successful Eighth Amendment prison conditions challenge must show some harm over and above the fact of incarceration, which in turn requires a showing that some state actor did something to bring about that harm.

²³³ See *infra* Part III.F.

²³⁴ See *supra* note 228 and accompanying text (discussing importance of specific characterization of outcome in determination of responsibility).

Luis's housing unit made her rounds every half hour as policy required. More than once, she shone her flashlight into Luis's cell and saw him thrashing around. As it happened, however, this officer had worked the night shift in Luis's unit for the past three years, and, as she well knew, he was always a rough sleeper. She thus saw nothing that would put her on notice of his medical distress and consequently took no steps to get him medical care. On these facts, there would have been nothing to justify a finding that Luis's treatment was cruel because nothing in the officer's conduct indicated a lack of concern with Luis's welfare or a failure to be attentive to his needs. Indeed, on these facts, the conditions of Luis's confinement suggest that the system is functioning as it should, with attentive officers following a policy appropriately designed to ensure regular monitoring of prisoners even during sleep.

Or consider the further case of Juan and Milton, two sworn enemies. One day, Juan is transferred to Milton's housing unit. There ensues a period during which each tries to harm the other. Finally, Juan stabs Milton, seriously wounding him. Milton sues the officers in the housing unit under the Eighth Amendment, alleging failure to protect. There is no question that the state, having incarcerated Milton, is obliged to protect him from violent assault at the hands of fellow prisoners,²³⁵ nor is there any question that, after Juan arrived in his unit, Milton faced a substantial risk of serious harm. But further details are again required to determine whether the housing officer or any other officer on the floor failed in her obligation to Milton. In prison, issues between enemies can be hard to ferret out, especially if the prisoners involved are determined to keep the situation secret. It therefore matters if, when Juan appeared, both he and Milton decided to say nothing to anyone, each hoping to launch a successful attack on the other. It would also matter if, to prevent official interference, each took care not to give himself away by overt signs of mutual hostility in the presence of guards or any fellow inmates suspected of passing information to prison investigators. On these facts, constitutional liability would seem inappropriate. Yes, Milton suffered serious harm, but in this case, even concerted efforts on the part of responsible officers to prevent violence among those in custody may not have made a difference.²³⁶

It is, of course, possible that if we pull back the lens, we may discover some conduct on the part of *other* prison officials that would

²³⁵ See *supra* Part II.A (discussing state's carceral burden).

²³⁶ Even repeated weapons searches can be insufficient to prevent prisoner-on-prisoner violence if prisoners are determined to keep their weapons hidden.

yield a different conclusion in each case. In Luis's case, perhaps the housing officer ought to have been better trained by her supervisors to distinguish rough sleep from medical distress. Or perhaps Luis's stroke could have been anticipated and thus prevented had he had regular checkups, which he had not received due to understaffing in the prison medical services or overcrowding in the prison. Or maybe it will turn out that he had gone to sick call earlier in the day to complain of symptoms strongly suggesting the onset of a stroke, which were misinterpreted or ignored by an incompetent or dismissive nurse. In such cases, one may justify a judgment of cruel conditions²³⁷ precisely because some state official, whether the training officer, the head of medical services, or the nurse, failed to take appropriate steps to prevent unnecessary suffering.²³⁸ As for the case of Juan and Milton, among corrections administrators, enemy issues are well recognized, and well-run facilities will have policies in place to identify enemies and keep them separated. Sworn enemies should not be classified into the same unit, and housing officers should be trained to be attuned to such problems in their units. Prison investigators, moreover, should seek to learn about the existence or emergence of such enmities in the facility. Even if Juan and Milton sought to keep their secret, a system-wide program designed to deal with enemy issues as they arise might yet have unearthed their mutual hostility. And given the urgency of guarding against inmate-on-inmate violence, a prison without such a program, or where the existing program has become ineffective through neglect, may arguably be charged with cruelty toward a prisoner like Milton notwithstanding that no individual housing officer acted inappropriately in this case.

This broader perspective on these two cases reveals a key point: It is not only line officers with direct inmate contact who may by their acts or omissions cause prisoners harm. Senior officials—who make the policies (say, how often line officers must walk through the housing unit with a flashlight at night), establish standards for preven-

²³⁷ If, on the other hand, it turns out on investigation that everyone involved—from the housing officer to the nurse who saw Luis the day of the episode to the director of the prison's medical services who designed and oversees the prison health system—acted in a reasonable and attentive manner vis-à-vis Luis's health care, it would be hard to conclude that Luis had been subject to cruel punishment.

²³⁸ Notice that even when the failure to take appropriate steps is chargeable to some official who is senior to the housing officer, a suit against the housing officer herself would still be appropriate, since by her failure to act she most directly manifested what amounts to an institutional failure to attend sufficiently to prisoners' needs. She may not personally have been cruel, but the treatment to which Luis was subject as a result of her conduct was institutionally cruel and thus sufficient to violate the Eighth Amendment. For further discussion on this point, see *infra* Part III.E.

tive health care or institutional security, hire the prison's nurses and train the internal investigators—may also conduct themselves in ways inconsistent with a commitment to protecting prisoners from unnecessary suffering. This distinction is that between micro-level and macro-level failures of care. In Part III.D, I suggest that on a regime requiring some showing of official culpability, different and less burdensome standards should govern claims in which the harm suffered was a product of macro-level as opposed to micro-level failures. But first, it is necessary to consider why, if the aim is to capture those prison conditions properly judged cruel, *Farmer's* recklessness standard is the wrong vehicle.

C. *The Problem with Recklessness and the Case for (Heightened) Negligence*

First, a brief word on terminology. *Farmer* held that “deliberate indifference” in the prison context amounts to criminal recklessness, which it defined as officials actually “know[ing] of and disregard[ing] an excessive risk to inmate health or safety.”²³⁹ In opting for this standard, the Court rejected a standard it called “civil-law recklessness,”²⁴⁰ a culpability standard known in torts as “gross negligence”²⁴¹ and familiar to students of criminal law as “criminal negligence.”²⁴² These two standards—recklessness and heightened negligence (or, for brevity's sake, just plain negligence²⁴³)—constitute mental states associated with engagement in very risky conduct.²⁴⁴ To demonstrate either state of mind requires inquiry into two issues: (1) the nature of the risk created by the actor's conduct; and (2) the actor's level of

²³⁹ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

²⁴⁰ *Id.*

²⁴¹ *See id.* at 836 n.4 (noting that, in practice, “‘gross negligence’ . . . typically mean[s] little different from recklessness as generally understood in the civil law” (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 212 (5th ed. 1984))).

²⁴² According to the Model Penal Code, a “person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” MODEL PENAL CODE § 2.02(2)(d) (1962).

²⁴³ It should be remembered, however, that because the risk that must be proved to make out an Eighth Amendment claim is a “substantial risk of serious harm,” negligence in this context is necessarily heightened and not ordinary negligence. *See infra* Part III.D for a further discussion of this point.

²⁴⁴ Generally speaking, heightened negligence is distinguished from ordinary civil negligence only with respect to the nature of the risk, which in the former case must be “substantial and unjustifiable,” *see* MODEL PENAL CODE § 2.02(2)(d) (1962), as compared with only an undue or unreasonable risk in the latter, *see* KEETON ET AL., *supra* note 241, § 31, at 169.

awareness as to that risk.²⁴⁵ As a general matter, in the case of both recklessness and heightened negligence, the nature of the risk is the same—it must have been, as the Model Penal Code puts it, “substantial and unjustifiable.”²⁴⁶ The difference lies in the actor’s level of awareness of the risk.

Farmer focused on this latter difference of actual versus constructive knowledge, taking as settled the nature of the risk that must be proved in either case.²⁴⁷ But as regards this risk, it bears emphasizing, the prison context is importantly distinct from the ordinary case. Ordinarily, to demonstrate either recklessness or heightened negligence, the existing risk must be “substantial *and unjustifiable*.”²⁴⁸ This phrasing directs courts to consider not only the magnitude of the risk but also the defendant’s reasons for creating the risk or failing to respond to it when she had a duty to do so. In contrast, as the Court’s holdings have consistently made clear, in the Eighth Amendment prison conditions context, it is enough that plaintiffs demonstrate “a substantial risk of serious harm.”²⁴⁹ On this formulation, the term “unjustifiable” drops out, a modification reflecting the fact that subjecting prisoners to a substantial risk of serious harm is cruel regardless of the reason for doing so.

This point—that in the Eighth Amendment prison conditions context, the risk necessary for a finding of culpability need only be substantial and not also unjustifiable—is an important one, which is apt to be misunderstood. I return to it and to the difficulties it raises for the possibility of a meaningful alternative to *Farmer* later in this Part.²⁵⁰ For now, in this and the following section, I am concerned

²⁴⁵ See, e.g., MODEL PENAL CODE § 2.02(2)(c) (1962) (explaining that “[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct”); MODEL PENAL CODE § 2.02(2)(d) (1962) (explaining that person acts with criminal negligence “with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct”).

²⁴⁶ MODEL PENAL CODE § 2.02(2)(c) (1962) (defining criminal recklessness); MODEL PENAL CODE § 2.02(2)(d) (1962) (defining criminal negligence).

²⁴⁷ The Court, however, left open the question of the point at which “a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes.” *Farmer v. Brennan*, 511 U.S. 825, 834 n.3 (1994).

²⁴⁸ See MODEL PENAL CODE § 2.02(c)–(d) (1962) (emphasis added); see also *supra* note 245.

²⁴⁹ See *Farmer*, 511 U.S. at 828 (stating that “[a] prison official’s deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment” (citations omitted)); *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993) (finding that Eighth Amendment protects against future harm).

²⁵⁰ See *infra* Part III.E.

solely with the choice between actual and constructive knowledge that the Court addressed in *Farmer*.

Farmer opted for an actual knowledge standard. The problem with this standard is not overinclusiveness but underinclusiveness. To meet the state's carceral burden, prison officials at all levels must take affirmative steps to monitor, investigate, discover, and avert potential problems before those problems manifest themselves in prisoners' actual suffering. *Farmer's* standard, however, suggests that prison officials' obligations to prisoners are merely *episodic*,²⁵¹ arising only when they happen to notice possible threats to prisoners' well-being. On such a standard, conditions cannot be judged cruel even when prison officials fail to notice risks that any reasonably attentive prison official, mindful of his duty to ensure the provision of prisoners' basic needs, would have noticed and addressed. Nor can conditions be considered cruel under *Farmer* even if officials' failure to notice had been systematically fostered by a prison culture that desensitizes prison officials to prisoners' suffering, thereby creating a context in which those officials learn *not* to be proactive, *not* to look, and thus not to take it upon themselves to discover existing risks.²⁵² But prison officials' responsibilities are not only episodic. And it is irrelevant if the reason they fail to notice risks of harm is that they were taught by the institutional culture to be blind to prisoners' needs. Whatever the cause, an officer's failure to notice existing risks of which a reasonably attentive prison official would have been aware, far from being exculpatory, is an indication of institutional inattention to the conditions necessary to protect prisoners from serious harm, and is thus an institutional abdication of the state's affirmative obligations to its prisoners.

The inadequacies of *Farmer's* standard reverberate throughout the institution, encouraging officials at all levels to take insufficient steps to guard against serious harm. If line officers have an affirmative obligation to pay attention, monitor, investigate, and address possible risks, prison administrators have an affirmative obligation to ensure the adequacy and efficacy of the prison's various structural aspects, including the systems in place to meet prisoners' basic needs and keep them safe. To understand the full scope of the problem, it is worth examining more closely the distinction between micro-level and macro-level failures of care.

²⁵¹ See Luban et al., *supra* note 164, at 2390–91 (criticizing “[t]raditional moral theories” as presupposing “episodic” model of morality).

²⁵² For more on this effect in the prison context, see *supra* Part II.D.

In the prison context, micro-level failures arise from the conduct of individual prison officials toward individual prisoners—think of these as transactional or retail failures. Every day, prisoners interact personally at the retail level with any number of custodial officers and prison staff whose responsibility it is to, among other things, provide food, supply clean clothes and linens, dispense pills, treat medical complaints, run housing units, and ensure prisoner safety at all times. But because prison officials do not always act as they should, these interactions are both a means through which prisoners' basic needs are met and an avenue for harming prisoners.²⁵³ Macro-level failures, in contrast, are system-wide failures in which prisoners are harmed through generally applicable conditions that put any number of inmates at risk. Among other things, macro-level problems can include inadequacies regarding the operation of the physical plant (heating and cooling, ventilation, plumbing, sanitation, etc.), the provision of essential services (food, laundry, medical, psychiatric, dental, etc.), and policies regarding the screening, hiring, and placement of correctional officers.²⁵⁴ Depending on the form such inadequacies take, they can cause widespread harm to any number of prisoners throughout a given facility.

A recklessness standard promotes failures of care at both the micro and macro levels, thereby enabling cruel conditions on multiple fronts. At the macro level, prison officials may create such conditions by neglecting and thus allowing to degenerate the systems through which the state's carceral burden is supposed to be met. Absent affirmative efforts on the part of responsible prison officials, such degeneration is inevitable. Prisons are bureaucracies, and as with all bureaucracies, inertia and negligence can create the potential for enormous harm.²⁵⁵ If the aim is to capture those macro-level condi-

²⁵³ See, e.g., *Rodriguez v. Lozano*, 108 F. App'x 823, 828 (5th Cir. 2004) (describing allegations that officer opened plaintiff's cell door so other inmates could attack, then failed to stop resulting beating); *Lytle v. Gebhart*, 14 F. App'x 675, 677 (7th Cir. 2001) (involving plaintiff attacked by prisoner to whom he was handcuffed, after guard refused to release him); *Trevino v. Jimenez*, No. 1:05CV00836REC-LJO-P, 2006 WL 903529, at *2 (E.D. Cal. Apr. 6, 2006) (describing allegations of guard's failure to respond to plaintiff's requests for stitches, cleansing of wounds, or bandages after plaintiff had been stabbed by cellmate); *Hull v. Ford*, No. C.A. C-05-043, 2006 WL 470597, at *8–9 (S.D. Tex. Feb. 27, 2006), *aff'd*, 235 F. App'x 972 (5th Cir. 2007) (describing allegations that officer witnessed assault leaving plaintiff bleeding, in pain, and with wounds to his nose, bottom lip, and left eye, with swelling and bruising on left side of his face, and neglected to take plaintiff to infirmary).

²⁵⁴ This last set of concerns has perhaps the greatest effect on whether or not prison conditions are cruel.

²⁵⁵ See *Risser*, *supra* note 155, at 201 (observing that “[w]hen organizations are implicated in causing harm, it is more likely to be because of negligence or carelessness than conscious design or purposive malfeasance”). As Justice White noted in his concurrence in

tions appropriately judged cruel, recklessness is therefore insufficient. This standard would not only forgive failures to ensure adequately functioning systems or to recognize when conditions pose a risk to prisoners' health or safety, but it would also arguably create incentives for those responsible for adequate service delivery and other macro-level conditions *not* to know about or investigate the possibility of even system-wide inadequacies that could cause serious harm.

Farmer's standard creates a similar dynamic at the micro level. Here too, rather than directing officials' attention to possible risks, it would create incentives for officials not to notice such risks. Granted, prisons are crowded, chaotic, and volatile, and correctional officers cannot easily know about every risk faced by the inmates in their custody. But line officers and other prison staff in contact positions *will* know that they work only eight-hour shifts while prisoners never leave the facility. They are thus obliged to recognize that, at any given time, the prisoners in their charge may face threats of which they are not personally aware. Luban, Strudler, and Wasserman note in a more general discussion of the dangers of bureaucratic structure that "because of the great potential for harm arising from the division of labor and fragmentation of knowledge in a corporate or bureaucratic organization, employees may acquire duties far more demanding than doing no evil."²⁵⁶ In addition, "[t]hey must look and listen for evil and attempt to thwart it if they discover it."²⁵⁷ Just as prison administrators with responsibility for macro-level systems have affirmative obligations to determine the ongoing adequacy of those systems, line officers and other prison staff have an obligation to be aware of those "evils" or potential evils that put individual inmates at risk and which reasonable efforts to investigate would reveal.

Instead, a recklessness standard creates a no-liability zone in which conditions that escape the notice of prison officials can be as brutal, as violent—as scary—as one could imagine²⁵⁸ without implicating the Eighth Amendment. Yet it is precisely the inherent cruelty of forcing people to exist in such a zone, in which "the state of nature [would be allowed to] take its course,"²⁵⁹ that should disallow the

Wilson, "[i]n humane 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." *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring).

²⁵⁶ Luban et al., *supra* note 164, at 2383.

²⁵⁷ *Id.*

²⁵⁸ See, e.g., MICHAEL G. SANTOS, *INSIDE: LIFE BEHIND BARS IN AMERICA* 24 (2006) (describing scene author witnessed while serving sentence in federal prison in which prisoner was stabbed in main penitentiary corridor while other inmates casually looked on, unmoved).

²⁵⁹ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

state's incarceration of convicted offenders under such circumstances and impose a burden on the state through its individual officers to be aware of obvious risks in the facility. When prison officials fail to be aware and prisoners are seriously harmed as a result, the institution has inflicted cruel conditions notwithstanding an absence of subjective awareness of the risk on the part of any individual officers.

D. Implementing Negligence: The Case for a Double Standard

The above discussion suggests that the appropriate doctrinal standard for Eighth Amendment prison conditions claims is an objective standard under which prison officials would be held liable for the failure to respond to risks of harm of which they should have known. Because the risks posed to prisoners' well-being must be substantial for the conditions creating those risks to be judged cruel,²⁶⁰ the standard considered here is heightened and not ordinary negligence. The issue on this standard would be whether plaintiffs were subjected to a substantial risk of serious harm of which a reasonably attentive prison official would have known.²⁶¹ In this section, I consider what form an objective "should have known" standard ought to take. Specifically, I suggest that plaintiffs alleging macro-level failures should bear a lesser burden than those alleging micro-level failures. The appropriateness of such a double standard is the implicit claim of Justice Stevens's dissent in *Estelle v. Gamble*.²⁶² In what follows, I tease out the basis for this claim in Justice Stevens's dissent and argue that, assuming some culpability standard were required, the doctrinal framework his argument implies is the one courts ought to adopt.²⁶³

Gamble was the first case in which the Court considered the applicability of the Eighth Amendment to prison conditions.²⁶⁴ In

²⁶⁰ See *supra* Part II.A (arguing that for conditions to be cruel, prisoners must have suffered serious harm or faced substantial risk of serious harm).

²⁶¹ Because the key difference between this approach and *Farmer's* recklessness standard is the level of awareness and not the degree of risk, any subsequent references to negligence will assume that the degree of risk required is the elevated risk of heightened negligence.

²⁶² 429 U.S. 97 (1976).

²⁶³ In *infra* Part III.E, I discuss possible obstacles to the appropriate practical application of a heightened negligence standard in this context. In *infra* Part III.F, I suggest one way around these obstacles: to adopt a strict liability regime suitably modified to address the hazards that standard would pose.

²⁶⁴ In *Gamble*, the Court identified "serious medical needs" as the objective showing of inmate harm necessary to ground an Eighth Amendment claim for medical neglect. *Gamble*, 429 U.S. at 104. But in a series of subsequent cases, the Court expanded the list of conditions claims prisoners may bring. In *Farmer v. Brennan*, it recognized a claim for the failure to protect prisoners from the "substantial risk of serious harm." 511 U.S. 825, 834 (1994). And in *Rhodes v. Chapman*, the Court permitted challenges to general conditions of confinement that deprive prisoners of their basic needs, or what Justice Powell

that case, *Gamble*, a Texas prisoner, alleged that prison officials' failure to adequately treat a back injury he sustained when "a 600-pound bale of cotton fell upon him during a prison work assignment" violated the Eighth Amendment.²⁶⁵ Invoking one of the principles identified in previous Eighth Amendment cases, the *Gamble* Court held that "deliberate indifference to serious medical needs of prisoners constitutes 'the unnecessary and wanton infliction of pain'" proscribed by the Eighth Amendment.²⁶⁶ Although *Gamble* did not define "deliberate indifference," its use of the term clearly indicated the need for some showing of official culpability.

In his dissent, Justice Stevens charged the majority with "improperly attach[ing] significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted."²⁶⁷ Although this language seems to imply an endorsement of strict liability, such a reading is inconsistent with other parts of the dissent. Most notably, Justice Stevens agreed with the majority that harms arising from ordinary negligence on the part of prison medical staff may not be sufficient to state a constitutional claim.²⁶⁸ This position, which implies that ordinary negligence

called "the minimal civilized measure of life's necessities." 452 U.S. 337, 347 (1981). Following *Rhodes*, courts have since extended the Eighth Amendment to prisoners' claims for, among other things, clean water, clean air, sufficient clothing and bedding, protection from extreme temperatures and excessive noise, adequate food, adequate sanitation, and opportunities for maintaining personal hygiene. See, e.g., *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008) ("The Eighth Amendment's prohibition of cruel and unusual punishment imposes a duty on prison officials to provide humane conditions of confinement, including adequate food, clothing, shelter, sanitation, medical care, and reasonable safety from serious bodily harm."); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) ("Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety."); *French v. Owens*, 777 F.2d 1250, 1252 (7th Cir. 1985) (holding that conditions at state prison, including lack of space and furnishing due to overcrowding and double ceiling, unwholesome food, excessive use of medical restraints, medical neglect, and continuous threats to inmates' safety, violated the Eighth Amendment).

²⁶⁵ *Gamble v. Estelle*, 516 F.2d 937, 938 (5th Cir. 1975), *rev'd*, 429 U.S. 97 (1976).

²⁶⁶ *Gamble*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²⁶⁷ *Id.* at 116 (Stevens, J., dissenting).

²⁶⁸ *Id.* at 116 n.13. Seemingly concerned that an ordinary negligence standard would elevate medical malpractice to a constitutional violation, the majority had similarly emphasized the insufficiency of ordinary negligence in the Eighth Amendment medical neglect context. See *id.* at 106 (majority opinion) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *id.* at 105 ("[I]n the [prison] medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' [violating the Eighth Amendment]."). In his dissent, Justice Stevens echoed the point, noting that "[l]ike the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim." *Id.* at 116 n.13 (Stevens, J., dissenting).

is too *low* a culpability standard, is incompatible with a defense of strict liability. And indeed, a closer reading points to another explanation: an implicit call for a different doctrinal approach for claims based on macro-level as opposed to micro-level failures. Assuming the adoption of an objective “should have known” standard in both contexts, Justice Stevens’s dissent helps us to see that in the case of macro-level failures, official knowledge of the risk ought to be *irrebutably presumed*—not because official culpability is unnecessary but because when prisoners suffer sufficiently serious harms from macro-level inadequacies, the mere fact of such inadequacies is proof enough of official culpability.

Justice Stevens saw the facts of *Gamble* in a very different light than the majority. The majority read Gamble’s experience with the prison’s health services as a series of one-on-one interactions with individual members of the medical team. In rejecting his claim of medical neglect, the Court emphasized that Gamble had been “seen by medical personnel on 17 occasions spanning a three-month period,”²⁶⁹ and that each time, his complaints were apparently heard and responded to (albeit less effectively than might have been wished).²⁷⁰ In contrast, Justice Stevens’s dissent adopts a macro-level perspective. As he saw it, the cause of Gamble’s suffering was not the actions or omissions of individual officers, but rather system-wide deficiencies in the structure and culture of the prison health care system. That Gamble may have been seen 17 times and that no individual member of the medical staff may have been “guilty of [anything] more than negligence or malpractice” was to Justice 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.”²⁷¹ In that case, the problem would not have been a micro-level failure of care on the part of any individual prison official²⁷² but instead a macro-level failure to

²⁶⁹ *Id.* at 107.

²⁷⁰ That the *Gamble* Court took a micro-level perspective helps to explain the notably individualist cast of the examples the opinion offers of deliberately indifferent conduct, which, it suggests, may be manifested by “prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Id.* at 104–05 (footnotes omitted).

²⁷¹ *Id.* at 110 (Stevens, J., dissenting) (footnote omitted).

²⁷² Although Justice Stevens acknowledged that human error can create risks of harm to prisoners, he emphasized that this risk may be exacerbated when the medical staff do “not

provide a health-care system with adequate resources to meet the needs of those in custody.²⁷³

Justice Stevens regarded as the likely source of the harm a connected set of macro-level failures in the operation of the prison's medical system: It had too few staff members for too many prisoners, and the staff was too overwhelmed to take the trouble to make an accurate diagnosis. But a prison's medical system does not spring to life of its own accord. It is designed, constructed, and operated by prison administrators who are appointed to do so. If the physicians and nurses who repeatedly sought to treat Gamble's injury failed to "meet minimum standards of competence or diligence"²⁷⁴ or could not "give adequate care because of an excessive caseload or inadequate facilities,"²⁷⁵ the fault lies simultaneously with the state (which has established such a plainly deficient system for the provision of prison medical care) and the individual officers whose particular responsibility it was to ensure a medical system in which doctors and nurses were competent and the facilities in which they worked were adequate to treat prisoners' serious medical needs.²⁷⁶

Justice Stevens's perspective has two important implications. First, the argument for official liability rests at most on an objective knowledge standard. When the Chief Medical Officer of the prison is unaware that, say, none of her nurses has professional training, that her medical equipment is used for keeping goldfish, or that the prison pharmacy has stocked nothing but aspirin for the past three years,²⁷⁷

meet minimum standards of competence or diligence or . . . cannot give adequate care because of an excessive caseload or inadequate facilities . . ." *Id.* at 116 n.13.

²⁷³ In making this case, Justice Stevens used language that evokes the state's carceral burden. As he put it, specifically speaking to Gamble's claim of medical neglect, "[i]f a State elects to impose imprisonment as a punishment for crime . . . it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy." *Id.* at 116 n.13. Justice Stevens described the implications of this choice in terms of the state's obligations. For example, he argued that "when the state . . . provid[es] a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the *State's* constitutional duty." *Id.* (emphasis added). Justice White took the same view in *Wilson*. See *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring) ("[H]aving chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the 'contemporary standard of decency' required by the Eighth Amendment.").

²⁷⁴ *Gamble*, 429 U.S. at 117 n.13 (1976) (Stevens, J., dissenting).

²⁷⁵ *Id.*

²⁷⁶ In this respect, medical care is no different than any other aspect of the prison's operation. *Whenever* a prisoner suffers a serious deprivation of his basic human needs traceable to a macro-level failure, some prison administrator will necessarily have been responsible for creating, or failing to address, the systemic cause of the harm.

²⁷⁷ See *Wellman v. Faulkner*, 715 F.2d 269, 272-74 (7th Cir. 1983) (finding Eighth Amendment violation for medical neglect under conditions in which two of three doctors

her lack of knowledge cannot excuse the failure. Given her responsibility for the prison's medical services, she *should have known* about these conditions.

Second, in such cases, the demonstrated inadequacies of the system that caused the harm are proof enough of official culpability. When there is a system-wide failure sufficient to cause prisoners serious harm, *some* prison official will necessarily have been responsible for that aspect of the prison's operations. Prison administrators responsible for the prison's various policies, services, and programs and for maintaining the operation of the physical plant are obliged to know if prisoners are at risk of serious harm from inadequacies in those areas. They therefore need no opportunity to rebut the presumption of knowledge. To show that some prison official should have known of a substantial risk of harm at the macro level, it is enough to show that such a risk in fact existed.

It is a different story in the case of micro-level failures. There, fairness may demand that defendants have an opportunity to demonstrate an absence of culpability. Micro-level failures of care result when line officers or other staff fail to meet the basic needs of individual prisoners with whom they have direct contact. It cannot, however, be said that every time a prisoner suffers serious harm, it is because some official actor has failed in her obligations. When the need is specific to an individual prisoner, that prisoner may suffer serious harm without any prison official knowing or having any reason to suspect that the problem existed. Indeed, with localized needs, it is possible that even those officials who act reasonably and carefully in the performance of their duties might fail to prevent serious harm. The cases of Luis and of Juan and Milton explored above illustrate this point.²⁷⁸

at prison could barely speak English, there was no on-site psychiatrist, and prison clinic failed to stock necessary medical supplies such as colostomy bags); Williams v. Edwards, 547 F.2d 1206, 1216–19 (5th Cir. 1977) (finding Eighth Amendment violation when about half of inmate nurses had fifth grade education or less, pharmacist in prison had neither pharmacological license nor schooling in pharmacology, emergency room equipment was “filthy,” and live fish were kept in whirlpool bath in physical therapy department).

²⁷⁸ See *supra* Part III.B. Or consider a case in which the plaintiff turns out to have been someone known to trump up medical ailments in order to get out of the housing unit, and that, on several occasions, concerted efforts on the part of line officers and medical staff to determine the cause of his ostensible suffering had revealed the ruse. It is not that under such circumstances, all subsequent entreaties from that person for medical attention should be ignored. It is simply that, should that person actually *be* in need of medical care that prison officials fail to provide, those officials may have a case that, given the plaintiff's history of dissembling, they should not have been expected to know of the risk, and thus their conduct should not be judged cruel. For further discussion on this point, see *infra* Part III.F.

The presumption of culpability in the case of macro-level inadequacies was precisely the view urged on the Court by the petitioner in *Wilson v. Seiter*. *Wilson* involved a broad challenge to a number of macro-level conditions, including “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.”²⁷⁹ *Wilson* argued that a distinction should be drawn between “short-term” or “one-time” conditions and “continuing” or “systemic” conditions,²⁸⁰ and that even if a showing of deliberate indifference were required in the former circumstances, it should not be required in the latter. Justice Scalia, writing for the majority, understood this to be an argument that, in cases involving continuing or systemic conditions, “official state of mind would be irrelevant.”²⁸¹ But as *Wilson* made clear in his reply brief, the claim was not that in such cases a state of mind inquiry would be *irrelevant* but instead that it would be “*redundant*.”²⁸² Why redundant? Because prison officials, obliged to provide for prisoners’ care and protection in an ongoing way, have a concomitant obligation to be aware of existing conditions in their facilities in order to avert threats to prisoners’ health and safety. If, therefore, the prisoners in *Wilson*’s facility had lived for an extended time under the conditions he described, and if those conditions were found to pose a substantial risk of serious harm, prison officials may be presumed to have known about their existence because those officials had a duty to know.

²⁷⁹ *Wilson v. Seiter*, 501 U.S. 294, 296 (1991). To some, the complaint over insufficient locker storage space may seem a minor or even frivolous one. See Winslow, *supra* note 145, at 1666 (recounting that during debate in United States Senate over PLRA, Senator Dole included “insufficient storage locker space” among supposedly self-evidently ridiculous claims brought by prisoners in federal court). But for prisoners, especially those living in dorm settings and thus greatly restricted in the amount of personal property they are able to keep with them, adequate locker space can be the difference between being able to keep or having to discard their most treasured or important personal items: legal papers, personal letters, a favorite book, or even necessary personal hygiene products. Moreover, property that is not properly contained has a high risk of being stolen, which in many facilities means not just the loss of that property but also the imperative to fight the thief (whose identity will often be widely known). And anyone whose property is stolen thus faces a terrible dilemma: to fight and risk serious physical harm, time in disciplinary segregation, the possible loss of accumulated good time and even in some cases a new criminal charge; or not to fight and be labeled an easy mark and thus liable to future thefts, physical assaults and even rape. If true, therefore, Pearly *Wilson*’s allegation of insufficient locker storage space is a wholly legitimate complaint.

²⁸⁰ *Id.* at 300.

²⁸¹ *Id.*

²⁸² See Reply Brief for the Petitioner at 16, *Wilson v. Seiter*, 501 U.S. 294 (1991) (No. 89-7376) (emphasis added).

Nothing the defendants could argue could refute the point, so no opportunity need be given them to do so.²⁸³

True, the line between micro- and macro-level failures of care will not always be so easily drawn. In *Wilson*, the distinction the petitioner drew between “short-term” or “one-time” conditions and “continuing” or “systemic” conditions suggested that the longer the conditions exist and the more widespread the harm, the more reasonable it is to expect that appropriately attentive prison officials will be aware of them.²⁸⁴ But as Justice Stevens’s opinion in *Gamble* indicates, even claims of unmet medical need—perhaps the most quintessentially localized need a prisoner may suffer—may be the result of macro-level failures. So too with claims like Farmer’s:²⁸⁵ Although Farmer’s classification to general population was a “one-time” act, one could point to more systemic causes of her rape—for example, the lack of a policy for ensuring the safety of transgender prisoners or the lax training of officers. And as Justice Scalia demonstrated in the *Wilson* majority (perhaps to make precisely this point), even those claims that seem obviously macro-level (e.g., the quality of the food, the adequacy of the clothing provided, or the temperature of the cell-block) can be reframed as individual interactions for which a finding of official culpability would still be necessary on the scheme proposed here. As Justice Scalia put it, “the medical care a prisoner receives is just as much a ‘condition’ of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.”²⁸⁶

But such indeterminacy is an insufficient reason to reject this approach. 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 courts, guided by this concern, would be unable to draw appropriate lines.

²⁸³ This conclusion, of course, assumes that plaintiffs will sue the appropriate defendants: those whose job it was to address the systemic problems alleged in the case. For present purposes, I assume the correct defendants.

²⁸⁴ See *Wilson*, 501 U.S. at 300. To the same end, Justice White in *Wilson* drew a distinction between “specific acts or omissions directed at individual prisoners” and more generally applicable conditions of confinement. *Id.* at 309 (White, J., concurring). This distinction tracks even more closely the difference between what I have termed micro-level and macro-level failures of care.

²⁸⁵ For the facts of *Farmer*, see *supra* Part I.B.

²⁸⁶ *Wilson*, 501 U.S. at 303.

E. The Problem with Negligence

A negligence standard of the sort just described represents a far better doctrinal means to capture those prison conditions properly judged cruel than *Farmer's* recklessness standard. Inappropriate application of a negligence standard in this context, however, would undercut this theoretical potential. In this section, I explore two possible pitfalls: that factfinders would inappropriately accord weight to the reasons for defendants' harmful conduct; and that prevailing cultural indifference to the fate of people serving prison time would lead to verdicts for defendants, even in cases where proper acknowledgement of the plaintiffs' humanity would require the opposite outcome.

The concept of heightened negligence is familiar from both torts and criminal law. As with ordinary negligence, at the heart of a typical heightened negligence inquiry is a reasonableness determination: Was the defendant's failure to perceive the risk of harm reasonable under the circumstances? On a heightened negligence standard, the risk the defendant failed to perceive must be not merely an unreasonable risk (as in ordinary negligence) but "substantial and unjustifiable."²⁸⁷ To make this determination, courts routinely look to the circumstances as they were known to the defendant at the time, along with the "nature and purpose of his conduct."²⁸⁸

The pervasiveness of the negligence inquiry across a range of legal contexts means that courts are very familiar with its application. Were this standard adopted for Eighth Amendment purposes, courts could thus be expected to consider the reasonableness of the defendant's actions in light of extant conditions in the prisons. And, given the nature of those conditions, courts would be likely in many cases to conclude that the defendant's conduct was not unduly unreasonable—or, in Model Penal Code parlance, not "a gross deviation from the standard of care" a reasonable prison official would have observed in the same situation.²⁸⁹ American prisons today are chronically overcrowded and understaffed, a combination that creates a climate ripe for violence and often makes it hard for line officers to do all that needs doing. Under these circumstances, consideration of events from the defendant's perspective would likely incline judges and juries—

²⁸⁷ MODEL PENAL CODE § 2.02(2)(d) (1962); *see also id.* § 2.02 cmt. 3, at 237 (explaining that jury should "measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe").

²⁸⁸ *Id.* § 2.02(2)(d).

²⁸⁹ *Id.*

who are already prone to sympathize with uniformed peace officers—to find officers' conduct reasonable and not to impose liability.²⁹⁰

The standard approach to assessing the reasonableness of the defendant's conduct, however, is inappropriate in the prison context. In the ordinary case, such calculations require balancing the risk created against the actor's justifications. In doing so, juries assess the strength of the defendant's reasons for acting the way she did. The more understandable the reasons, the more justifiable the conduct and the less persuasive the allegation of negligence will be.²⁹¹ But in the prison context, it is *never* justifiable to expose inmates to substantial risks of serious harm because the harms likely to result are outside the bounds of legitimate punishment—that is, incarceration under conditions that do not inflict serious physical or psychological suffering. For this reason, in gauging the nature of the risk to prisoners, the only relevant question will be whether the risk of serious harm to which they were exposed was substantial.

An example may help to illustrate this point. Imagine a line officer supervising a group of prisoners in the shower. His presence under the circumstances is crucial to the continued safety of those prisoners, especially those who are by virtue of their size, profile, or some other characteristic highly vulnerable to rape or physical assault by predators. Were this officer to abandon his post, he would thereby expose one or more of the group to the risk of rape or other forms of violence.²⁹² If he did so and a rape occurred, whether his conduct should be judged cruel may at first seem to depend on the officer's reasons. If the officer abandoned his post to check the hockey scores, a conclusion of cruel conditions would seem warranted. If, however, the officer left his post to break up a fight on the tier that he reasonably feared would start a riot if left to continue unimpeded (and thus

²⁹⁰ This is not to minimize the risks of harm to correctional officers in carceral facilities. Theirs is a difficult and dangerous job, performed under conditions that sometimes make it impossible to avoid the cruel treatment of the people in their custody. But courts do correctional officers no favors by finding for the state in these cases, since meaningful enforcement of the Eighth Amendment in the prison conditions context would force states to engage in widespread institutional reforms that would make prisons safer for correctional officers and prisoners alike.

²⁹¹ For this reason, the father who speeds through red lights to rush his dying child to the hospital will have a stronger defense than a teenager driving in the same way to show off to his friends. See Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 106, 150–51 (1996) (“Criminal responsibility should depend on the nature of the risk involved, their obviousness, and the reasons for the defendant's lack of perception or disregard of those risks.”).

²⁹² This example assumes a shower in a general population unit. If the group were made up of prisoners who, for whatever reason, were unlikely to be predatory and the officer knew of their disposition, the officer temporarily abandoning his post may not necessarily create a substantial risk of serious harm.

cause more widespread harm), the resulting situation, it might be argued, should be judged differently, even assuming the rape of a prisoner.²⁹³

But subjecting prisoners to a substantial risk of serious physical or psychological harm is never justified. For this reason, why this officer abandoned his post is irrelevant to the question of whether his conduct created cruel conditions for the individuals in the shower. This is true whether the officer actually realized the risk or if he merely should have realized it. Either way, the risk of such harm is substantial and the resulting conditions may be judged cruel.²⁹⁴ True, other prisoners elsewhere on the tier may have been harmed as a result of the officer's remaining at his post. These others may thus have an Eighth Amendment claim against the officer as regards the conditions of *their* confinement. This may seem unfair to the officer forced to make such a choice by circumstances beyond his control. But these circumstances only indicate the depth of the inadequacy of the existing institutional arrangements for protecting prisoners from harm. If the nature of those arrangements means that some set of prisoners will be treated cruelly no matter how hard officers try, this is a reason for condemnation, not exoneration.²⁹⁵

Recognition of this point—that the justifiability inquiry has no place in assessing the risk to which prisoners are subject—is already built into existing Eighth Amendment standards. To recover under current doctrine, prisoners must show that officials actually knew of and disregarded a substantial risk of serious harm.²⁹⁶ Although the *Farmer* Court labels this standard “recklessness,” it frames the risk in a way that forecloses arguments as to its justifiability—arguments that would also constitute a defense on a typical recklessness analysis. On this point, prevailing doctrine is both wholly appropriate and straightforward as a matter of implementation. The issue of reasonableness need never enter into the equation.

In short, on either standard—recklessness or negligence—the nature of the risk in the prison context would be the same: a substan-

²⁹³ It bears noting that in most cases, correctional officers who fail to realize risks to prisoners do so not because they are distracted by equally urgent needs elsewhere, but because they are not paying enough attention. I focus on the shower/riot example not because it is representative, but because it illustrates the point I am making—that even when officers have legitimate reasons for creating harmful conditions, those conditions may still be judged cruel.

²⁹⁴ It is arguably *always* “a gross deviation from the standard of care” the state owes the people it incarcerates to leave a prisoner in conditions creating a high likelihood that she will be raped. MODEL PENAL CODE § 2.02(2)(d) (1962).

²⁹⁵ See *infra* note 304.

²⁹⁶ See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

tial risk of serious harm. Theoretically, therefore, any resistance to the foreclosure of arguments justifying the risk should equally undermine implementation of either standard. But as a practical matter, *Farmer's* approach is able to avoid any such difficulty, since *Farmer's* subjective awareness requirement transforms the key inquiry into a factual matter²⁹⁷—did the defendant actually know of the risk?—which may be resolved without tempting the factfinder to smuggle in illegitimate consideration of the reasons for the defendant's conduct. On a constructive knowledge standard, however, the temptation may not be so readily cabined, since the notion of reasonableness typically informs determinations not only as to the nature of the risk (i.e., was the risk substantial and justifiable?) but also as to the defendant's constructive knowledge as to that risk (i.e., should the defendant have known of it?).

Typically, whether the defendant should have known of the risk is an all-things-considered inquiry into whether the defendant's conduct under the circumstances was unreasonable—or, in the case of heightened negligence, grossly unreasonable. Here, even in the prison context, the reasons why a reasonable person in the defendant's circumstances may not have realized the risk are not irrelevant.²⁹⁸ But it is crucial at this stage to keep in mind the question to be answered, which is whether, “considering the nature and purpose of [the defendant's] conduct and the circumstances known to him,”²⁹⁹ the defendant *should have perceived* the risk. And in the prison context, where the dangers lurking are extreme, correctional officers charged with protecting the people in their custody are obliged to be keenly attentive to possible threats in order to avert them.

This is the practical manifestation of the state's carceral burden for those charged with its fulfillment. To find for the defendant in the shower/riot example, it would have to be the case that a reasonably attentive correctional officer would not have thought twice about leaving vulnerable people unprotected in the shower. But when the assignment is to monitor the shower to guard the most vulnerable prisoners from rape or other physical violence, it is difficult to see how an officer who took that assignment seriously and was in no physical

²⁹⁷ Indeed, this feature of the standard may explain its appeal notwithstanding its serious underinclusivity as a matter of constitutional meaning. See Fallon, *supra* note 114, at 1277–79 (arguing that need to craft workable doctrine may lead to gaps between constitutional doctrine and constitutional meaning).

²⁹⁸ This is opposed to his reasons for creating the risk in the first place, which, as has been seen, *are* irrelevant.

²⁹⁹ MODEL PENAL CODE § 2.02(2)(d) (1962).

danger himself³⁰⁰ would not at least realize the risk of leaving his post, even if he had good reason for doing so. Indeed, failure to do so even in this case would only indicate an utter failure to value the humanity of the vulnerable people left unprotected, a sign of the dehumanization of prisoners that makes cruel indifference possible—and is arguably also a sign of *per se* unreasonableness.³⁰¹

Barring a real risk of physical danger to the officer himself, the question as to whether a reasonably attentive correctional officer would have realized the risk of stepping away from the shower comes down to how urgent the obligation to prevent the rape is perceived to be. If one's task is truly not that important, a reasonable person might be expected not to give a second thought to abandoning it if an urgent need for action, like preventing a possible riot, arose. But when the present task *is* urgent, a reasonable person *would* think twice, even in the case of an urgent call to arms. With apologies for the gruesomeness of the analogy, imagine that instead of a correctional officer guarding a shower full of prisoners, the defendant was a security guard monitoring a room containing a serial rapist and a lovely and considerate young woman. The guard does not know for sure that the rapist will attack the woman if left without supervision, but there is good reason to think that he might. Now imagine that the security guard hears noises from another part of the building suggesting that other young women are also at risk of serious physical harm. He might under these circumstances decide to take a calculated risk and leave his post. But if he were reasonably attentive to the assigned task, we would still expect him to recognize the potential danger he would thereby be creating to the woman in the room. We would expect him at least to *hesitate*. And this hesitation, which would signal at a minimum that the risk involved has *registered*, is all that would be necessary to hold the officer liable in my shower hypothetical,³⁰² since liability would attach anytime a person was subjected to a substantial

³⁰⁰ Even a reasonably attentive prison official mindful of the pressing need to protect vulnerable inmates from rape may be distracted from this duty by threats of violence against him personally. Under such circumstances, it could well be found that a reasonable person would not have perceived the risk. In such a case, therefore, the plaintiff would have to look elsewhere for a sufficiently culpable party. But this should prove no impediment to recovery, since in most cases where prisoners suffer substantial risks of serious harm, there will almost certainly be one or more culpable officials higher up in the chain of command who bear responsibility for the challenged conditions.

³⁰¹ See *supra* Part II.B.

³⁰² Note that on a negligence standard, the question is not whether the defendant actually hesitated, but whether a reasonable person under the circumstances would have done so.

risk of serious harm of which a reasonable prison official would have known.

Notice that, to expect the security guard but not the correctional officer to hesitate, one would have to regard the danger of prison rape as a less urgent problem than the danger of rape to young women on the outside. But when the state's carceral burden is taken seriously, this distinction must be rejected as illegitimate. That the young woman may have been kind, considerate, and law-abiding and the vulnerable prisoner in the shower a convicted criminal offender is irrelevant. The prisoner was not sentenced to rape for his crime, nor could he legitimately have been so sentenced. The state, having chosen to put him in a dangerous environment, is obliged to keep him safe. If the state instead hands him over to the custody of officers who do not think twice about leaving him under conditions where he might well be raped, it seems appropriate to judge those conditions cruel.

For a negligence standard to be applied fairly in the prison context, however, both judge and jury would have to acknowledge the shared humanity of the people in that shower. This brings us to the second practical problem with a negligence standard in this context, which is that the tendency to regard as less than human the people we incarcerate for their crimes is not confined to the prisons. Even assuming that the factfinder asks the appropriate question—whether a reasonably attentive prison official would have perceived a substantial risk of serious harm—the collective tendency to dehumanize the people in prison may lead juries, and therefore courts, to ratify cruel prison conditions rather than condemn them.

It may seem that these objections to a verdict for the defendant on the shower/riot hypothetical are misplaced, since on these facts, the officer ought not to be held liable for failure to protect. Instead, if liability is appropriate, it should only attach to those higher-ups who are responsible for putting both this officer and those in his custody in this position in the first place. Certainly, there is a strong case here of serious macro-level failure. Why, it might be asked, was this officer forced to make this choice? Why were there not enough officers on the line to allow both adequate supervision of the showers and the maintenance of order on the tier? A number of possible explanations suggest themselves. Maybe the facility was understaffed, forcing even responsible correctional officers to create dangerous conditions for inmates. Or maybe the tiers were overcrowded, creating tension and placing more pressure on the staff than they could handle. Or maybe the facility was being used for higher security prisoners than is appropriate in a setting with open showers. Whatever the explanation—and only a focus on the specifics of the situation will make clear the causes

in any given case³⁰³—the fact that the officer felt compelled to act as he did would only support the claim that existing macro-level arrangements put prisoners at risk, and thus that those prison administrators responsible for ensuring safe conditions should be held liable.

The possible causes just enumerated certainly suggest a strong Eighth Amendment claim against one or more prison administrators on grounds of macro-level failure. But on the theory advanced here, the line officer himself would be an equally appropriate target of suit, theoretically if not strategically. A finding against that officer would not be a judgment of personal cruelty, and thus need contain no moral condemnation. He may indeed have been genuinely committed to maintaining the safety of the people on his tier. It would instead be a finding of institutional cruelty, that existing conditions created a substantial risk of serious harm to prisoners. The line officer did not single-handedly create those conditions but nor did any of the senior administrators chargeable for the macro-level inadequacies. Prisons are complex institutions, their character emerging from innumerable acts and omissions on the part of innumerable actors over the life of the prison. To single out individual actors at any level is only to acknowledge their especial relationship to the harm in question, the way their individual conduct—undertaken on behalf of the state within the institutional framework of the prison—most directly manifested the structural deficiencies that made possible the infliction of unnecessary harm.³⁰⁴

The irrebuttable presumption of constructive knowledge in the case of macro-level failures of care³⁰⁵ represents one way to avoid this difficulty. But for the reasons explored here, sympathetic judges and juries may still be reluctant to find for plaintiffs when the defendants themselves seem personally blameless—especially given the general lack of sympathy for prisoners. And this worry becomes even more pronounced once one considers the strong tendency of the federal courts to defer to prison officials. Judicial deference to prison officials is perhaps the strongest theme to emerge from a historical survey of prisoners' rights litigation in the federal courts.³⁰⁶ And as the above

³⁰³ See *supra* note 228.

³⁰⁴ There is admittedly something counterintuitive about this view of the matter, which may counsel in favor of not suing the line officers in cases like the shower/riot example and instead only targeting more senior administrators. But in many cases, the same objection would only be repeated on a higher level, since prison administrators too may often find themselves responsible for institutionally cruel conditions about which they are unable to do anything.

³⁰⁵ See *supra* Part III.D.

³⁰⁶ From the turn of the twentieth century until the 1960s, the federal courts generally took what has been labeled a “hands-off” approach to prisoners' constitutional claims,

refusing even to acknowledge jurisdiction over such claims despite their plainly constitutional basis. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 30–39 (1999). This era was preceded by a period dating roughly from 1865 to 1900 during which prisoners' constitutional claims were routinely denied not for jurisdictional reasons but for what might be called status reasons: Prisoners were viewed as "slaves of the State," without rights except those "as the law in its benignity accords [sic] to them," which most certainly did not include "the rights of freemen." See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (explaining that convicted felons are "*civiliter mortuus*," and that "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead"). In the late 1960s and early 1970s, the Court heard a number of cases involving prisoners' constitutional claims, thus signaling an end to the "hands-off" era and an opening up of the federal courts to prisoner suits. But even in those cases, the Court was careful to emphasize the ongoing need for deference to prison officials. For example, in *Procunier v. Martinez*, a 1974 case which struck down two separate California Department of Corrections regulations, the Court still managed to remark that "[t]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration," and made a point of emphasizing the general wisdom of that stance. 416 U.S. 396, 404–05 (1974), *overruled in part by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). As the Court explained:

The Herculean obstacles to effective discharge of [prison officials'] duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Id. at 404–05; see also *id.* at 404 ("Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody."). Moreover, since that brief reform era, the Court has moved beyond merely stating its ongoing commitment to judicial deference to actually weaving that imperative directly into the doctrine itself. In *Turner v. Safley*, for example, the Court established a standard of review specifically for prisoners' constitutional rights, holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987), *partially superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006). The Court justified this standard as "necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Id.* (alterations in original) (citation omitted). And in *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 455 (1985), the Court held that in prison disciplinary hearings, "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits." As the Court explained it, "[t]his standard is met if 'there was some evidence from which the conclusion of the administrative tribunal could be deduced.'" *Id.* (quoting *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927)). The Court "decline[d] to adopt a more stringent evidentiary standard as a constitutional requirement," for the reason that

[p]rison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact.

discussion suggests, when applying a negligence standard, courts inclined to defer will find many opportunities to do so. It is not that the replacement of *Farmer's* subjective knowledge requirement with an objective standard of the form proposed here would make no practical difference. Even granting the deferential bent of the federal courts, there are still reasons to think that this change would yield greater constitutional scrutiny of prison conditions than the current regime.³⁰⁷ But any such changes will likely be incremental, and as a

Id. at 456 (citation omitted). Fallon identifies both *Turner* and *Hill* as examples of judicial underenforcement of constitutional norms in consequence of the search for judicially manageable standards. Fallon, *supra* note 114, at 1299–302.

³⁰⁷ For example, an objective knowledge standard would refocus the courts' attention toward the specific details of the challenged conditions and away from the subjective states of mind of responsible officials. This change may more effectively bring home the realities of prison conditions to the judges themselves, thus reducing over time their inclination to defer to prison officials' characterization of the circumstances. A criminal negligence standard might also undercut at least one strategic advantage prison officials currently enjoy. On a criminal recklessness standard, a court's attention is focused on what was inside the defendant's head. As a consequence, the burden on the plaintiff will often be that of rebutting the defendant's claim of lack of awareness. To find for the plaintiff, therefore, the factfinder would have to find that the defendant's claims are not credible. But defendants in prison conditions cases are generally uniformed peace officers who tend to receive the benefit of the doubt from courts and juries alike. Factfinders thus may be reluctant to find for plaintiffs even when the evidence appears to tell in their favor. A constructive knowledge standard mitigates this effect by allowing a judgment for the plaintiff without the factfinder having overtly to disbelieve the defendant's claims. (I owe this point to Carol Steiker.) Furthermore, a change to a criminal negligence standard may prompt prison officials to be more proactive about identifying and remedying dangers to prisoners in efforts to forestall judicial involvement. True, to the extent that courts would still be inclined to defer, prison officials might continue to feel immune from meaningful judicial scrutiny, and thus continue to see no need to institute reforms. But the possibility of Eighth Amendment liability for substantial risks of serious harm about which reasonably attentive prison officials would know may prompt risk-averse prison officials to preempt the possibility of lawsuits by improving prison conditions before prisoners are harmed and file claims. Finally, a presumptive culpability approach for challenges to macro-level conditions would make it easier for prisoners to prove their cases. As it stands now, if prisoners are to avoid losing on summary judgment, they must put the defendants' state of mind in issue. But even for those prisoners sophisticated enough to put their petitions in these terms, meeting this requirement may be difficult for such plaintiffs to satisfy, given the obstacles that typically exist to their gathering evidence. See *Jacobsen v. Filler*, 790 F.2d 1362, 1364–65 n.4 (9th Cir. 1986) (noting that incarceration imposes obstacles to prisoners' evidence-gathering ability); *Phillips v. U.S. Bd. of Parole*, 352 F.2d 711, 713 (D.C. Cir. 1965) (per curiam) (“Appellant has been in [prison] from the inception of this litigation and has, thus, been operating under the handicaps such detention necessarily imposes upon a litigant, both in terms of ability to secure the advice of counsel and of opportunities to track down the evidence necessary to support his case.”); see also PRISONERS SELF HELP LEGAL CLINIC, INSTRUCTIONS AND SAMPLE LETTER-BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 3, available at <http://www.pshlc.org/panthlets/Summary%20Judgment.rtf> (noting that “the need to gather evidence on somewhat short notice” is often problem for prisoners). On a presumptive culpability approach, to create a triable issue of fact, prisoners would only need to focus on the conditions themselves, about which they necessarily have some knowledge. Prisoners would thus not only have a greater

practical matter, a negligence standard may still be expected to leave the Eighth Amendment considerably underenforced.³⁰⁸ A question raised once before thus reappears: Why not strict liability?

F. The Case for (Modified) Strict Liability

The case for strict liability would go something like this. On the negligence framework sketched above, at least as to those claims arising from macro-level failures of care, the applicable standard is already the functional equivalent of strict liability. And, as the examples of Luis and of Juan and Milton suggest, even in cases involving micro-level failures, there will likely also be macro-level causes about which prison officials should have known, and with respect to which prisoners should not have to overcome the hurdle of proving official culpability. Adopting the above-delineated version of negligence would thus operate like strict liability in the main run of cases. At the same time, as we have just seen,³⁰⁹ the retention of a negligence standard will open up wide possibilities for skewing the analysis in defendants' favor, thus creating the risk of injustice in any cases where constructive knowledge is not irrebuttably presumed. True, the set of cases posing this risk—those micro-level failures in which no plausible macro-level cause exists—ought to be small. But there is a danger that the reasonableness inquiry, with its possibility of injustice for plaintiffs,³¹⁰ may yet be smuggled in even beyond the cases where it is appropriate, as a consequence of likely judicial reluctance to find evidence of macro-level causes. Why such reluctance? On the standard proposed, such a finding would be tantamount to finding that some prison officials should have known of the problem—and thus that liability should attach on a showing of harm and causation. Courts sympathetic to prison officials and inclined to defer may therefore resist this finding, thereby opening a way for deference to prison officials on the question of whether the defendant should have realized the risk.

chance of surviving summary judgment, but they may also succeed more often in prompting the court to appoint counsel, an effort that would greatly increase the chances that they will ultimately prevail. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610–11 (2003) (finding in study of prisoner litigation terminating in 2000 that “counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff’s victory at trial,” and that “[o]ne-quarter of settlements and one-third of plaintiff’s trial victories occurred in the four percent of cases with counsel”).

³⁰⁸ See Fallon, *supra* note 114, at 1275, 1299–302 (exploring relationship between underenforced constitutional norms and construction of “judicially manageable standards”); Sager, *supra* note 114 (discussing underenforcement of constitutional norms by federal judiciary).

³⁰⁹ See *supra* Part III.E.

³¹⁰ See discussion *supra* Part III.E.

This move, where made, would only expand the set of cases potentially subject to the problems of application just explored.³¹¹

A strict liability standard would avoid this set of problems altogether. On this approach, plaintiffs who suffered sufficiently serious harm at the hands of the state would recover notwithstanding a finding of good intentions on the part of individual officers, a result that would ensure both appropriate judicial condemnation of cruel prison conditions³¹² and the creation of pressure for institutional reform.

The notion of strict liability that would apply in this context is importantly distinct from strict liability in the ordinary case. Typically, on a strict liability standard, defendants may be held liable despite an absence of culpability, even in cases where defendants exercised due care and were thus not even negligent. In the prison conditions context, however, the Eighth Amendment operates against the backdrop of a heightened official obligation to take care as regards the health and safety of prisoners. For the most part,³¹³ when state officials subject prisoners to substantial risks of serious harm, they have manifested a gross deviation from the standard of care that the state owes its prisoners. To apply strict liability in this context would, as a formal matter, relieve prisoners from the burden of proving defendants' culpability. But the heightened obligation the state owes its prisoners means that this approach is better understood as an across-the-board irrebuttable presumption of official culpability—that defendants had constructive knowledge of the risk whenever prisoners were subject to sufficiently harmful conditions.

The heightened risk requirement reveals as misplaced one possible objection to a strict liability standard in this context—that it would constitutionalize ordinary failures of care. True, the urgency of the need to keep prisoners safe shrinks the margin of error that actors who are engaged in less inherently risky enterprises may enjoy. But notwithstanding the use of the term strict liability (employed to highlight the plaintiff's freedom from having to prove culpability), liability on this standard is justified not despite an absence of fault but because, when prisoners suffer serious harm at the hands of the state, fault is necessarily present.

The use of this approach in the prison condition context is not without its problems. As we have seen,³¹⁴ in micro-level cases, a strict

³¹¹ See *supra* Part III.E.

³¹² See *infra* Conclusion on the role courts currently play in fostering and reinforcing cruel prison conditions.

³¹³ See the pages immediately following for consideration of possible exceptions.

³¹⁴ See *supra* Part III.B.

liability standard risks unfairness by foreclosing officers from showing that nothing in their conduct, or in the institutional context more generally, indicated insufficient concern with prisoners' needs. Three kinds of cases come to mind where this problem may exist. With respect to each, however, doctrinal safeguards against unfairness are at hand. There may yet be other types of worrisome situations that I have overlooked. But the possibility of guarding against unfairness in the main run of potentially problematic cases suggests at least the theoretical possibility of a defensible strict liability standard in this context—however unlikely its adoption may be as a practical matter.

First, there are Luis-type cases,³¹⁵ as to which an argument exists that no state-created conditions—i.e., no action on the part of any prison official—caused the prisoner's suffering. Here, the causation requirement would arguably be sufficient to guard against unfairness.³¹⁶ But further protection against inappropriate governmental liability would also lie in a doctrinal move already considered, that of allowing defendants to argue that the harm the plaintiff suffered did not constitute punishment within the meaning of the Eighth Amendment.³¹⁷

In Part I, I argued that any serious harm to prisoners traceable to state-created conditions of confinement should be considered punishment for Eighth Amendment purposes.³¹⁸ On this standard, most harms prisoners experience will constitute punishment. However, some marginal cases may arise in which defendants would have a colorable claim to the contrary. It may therefore seem beyond doubt that defendants should be entitled to argue as much in a given case. There is, however, a concern that allowing such arguments may distract from the more pressing question of whether prison conditions were cruel.³¹⁹ Arguably, on a heightened negligence standard, no injustice would be done by foreclosing this argument as a doctrinal matter, since where the defendant was in fact culpable, it may fairly be said that the harm was state-created. But were plaintiffs freed from having to prove culpability, prison officials might be held liable for suffering that was neither cruel (because nothing in the conduct of the defendant or any other state official was inconsistent with a fully ade-

³¹⁵ See *supra* Part III.B.

³¹⁶ See *supra* Part III.A.

³¹⁷ See *supra* Part I.C.

³¹⁸ See *supra* Part I.B (arguing that when officer acting on behalf of state administers criminal penalty duly imposed by sentencing judge, conditions to which prisoners are thereby subject constitute that penalty in its most concrete form, and thus represent very treatment with which Eighth Amendment is most concerned).

³¹⁹ See *supra* Part I.C.

quate commitment to meeting prisoners' basic needs) nor punishment (because no state official caused the harm by their acts or omissions). This danger, however, could be alleviated in a strict liability regime by leaving the state free to argue that no state-created condition could properly be said to have caused the harm and thus that the claim, not implicating state punishment, should not be cognizable under the Eighth Amendment.

The second kind of case that might raise fairness concerns for a strict liability approach is that like Juan and Milton's, in which inmates' own actions thwarted the institution's protective efforts. Here, it would be implausible to argue that Milton's stabbing by Juan did not constitute "punishment," since by the authority of the state officials administering his sentence, Milton was placed in a locked unit and kept there in close quarters with someone bent on doing him serious harm. But this case suggests that, were a strict liability regime to be adopted, courts ought to recognize a defense of contributory negligence.³²⁰ Allowing this defense would bar a plaintiff from recovery when, by his own conduct, the plaintiff created "an undue risk of harm to . . . himself."³²¹

A determination of contributory negligence on the part of the plaintiff in this context would involve the familiar balancing of possible harm against the reasons for acting that typifies negligence in the ordinary case.³²² Providing the opportunity to justify what might otherwise seem to be contributory fault on the plaintiffs' part is especially

³²⁰ I thank Jonathan Masur for this idea.

³²¹ KEETON ET AL., *supra* note 241, § 65, at 453; *see also id.* at 451 (explaining that contributory negligence "is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection"). Prosser and Keeton note that contributory negligence would be more aptly called "contributory fault," since unlike negligence in the ordinary sense, "which creates an undue risk of harm to others," contributory negligence "is conduct which involves an undue risk of harm to the actor himself." *Id.* at 453. Contributory negligence is available as a defense even in a strict liability context, although Prosser and Keeton suggest that, in that case, the defendant must show that the plaintiff's conduct subjecting herself to the possibility of danger at the hands of the defendant was not only unreasonable but also knowing. *See id.* § 79, at 565 ("[C]ontributory negligence by way of knowingly and unreasonably subjecting oneself to a risk of harm . . . will constitute a defense.").

³²² *See id.* at 453–54. Here, in other words, the plaintiff's reasons *would* be relevant to a contributory negligence determination, even though prison officials would be unable to introduce the reasons for *their* harmful actions on a negligence standard. *See supra* Part III.E. This asymmetry may at first seem unfair. But the utter dissimilarity between the relative positions of prison officials and prisoners indicates the folly of expecting an equivalence of doctrinal burdens. The grounds for regarding prison officials' reasons for inflicting serious harm on prisoners as irrelevant on a negligence standard have been explored elsewhere in the text. *See supra* Parts II.A, III.E. That logic, however, has no bearing on the case of prisoners whose own risky conduct puts them in harm's way.

necessary in the prison context since in many cases the state itself will have created the circumstances motivating otherwise inexplicable readiness on the part of prisoners to put themselves in harm's way. Take the case of Juan and Milton. Viewed from the outside, it may seem foolish or foolhardy—and thus contributorily negligent—not to alert the authorities when someone in your cell block is trying to kill you. But in prison, people thought to be at all cowardly run a great risk of being viewed as a “punk,” not worthy of respect and thus an eligible target for ongoing harassment, physical assault, and even rape.³²³ And were Juan and Milton in rival gangs and their enmity gang-related, any efforts to avoid possible assault at the hands of the other by, for example, petitioning officers for removal from the situation could well have meant swift and harsh “discipline” at the hands of their own gang. Thus, both Juan and Milton may have reasonably concluded that they would face a still greater danger were they to report the situation. On these facts, Milton would have a colorable claim that his failure to alert the authorities to Juan's presence in the housing unit was not unreasonable under the circumstances and thus that his suit should not be dismissed on grounds of contributory negligence.

Still, a contributory negligence regime would protect the state from liability in cases where the plaintiff was indeed at fault. There is admittedly a risk that allowing this defense would be the thin edge of the wedge, opening the way for courts inclined to defer to prison officials to find that the plaintiffs themselves acted unreasonably. Certain features of contributory negligence should guard against this possibility, including the fact that the plaintiff should not be held to the same standard of care as defendants when defendants are better situated than the plaintiff to take appropriate care³²⁴ or when the defendant has a particular duty to protect the plaintiff.³²⁵ Nor should the fact of the plaintiff's prior culpable conduct—here, the crime that landed her in prison—have any bearing on whether there was contributory negligence on her part as to risks of harm she faced while she

³²³ See Terry A. Kupers, *Rape and the Prison Code*, in *PRISON MASCULINITIES*, *supra* note 21, at 111, 114 (“Prison is an extreme environment. The men have to act tough, lift weights, and be willing to fight to settle grudges. Any sign of weakness leads to being labeled a victim, and weaklings are subject to beatings and sodomy.”).

³²⁴ See *KEETON ET AL.*, *supra* note 241, § 65, at 454–55 (explaining that “[t]he defendant may have more information than the plaintiff as to the risk, or by reason of the enterprise . . . may be required to obtain it” (footnote omitted)).

³²⁵ *Id.* at 455 (explaining that defendant may have greater obligation to take care than plaintiff if he has “undertaken a responsibility toward [plaintiff] which [would] require him to exercise an amount of care for [the plaintiff] which he would not be required to exercise for his own safety”).

was there.³²⁶ Of course, if courts are determined to side with the state, these doctrinal safeguards may not be enough to prevent inappropriate judgments for defendants. But this concern merely indicates the limits of doctrinal reform. Absent some judicial commitment to meaningful enforcement, *no* doctrinal change would be enough to make a difference.

Finally, there is potential unfairness on a strict liability regime in cases where the state's failure to protect prisoners from serious harm stems from a genuine dilemma consistent with the priority of the most urgent interests.³²⁷ For such a dilemma truly to justify otherwise cruel prison conditions, the state would need to have been undermined in its efforts to satisfy its carceral burden by the demands of meeting equally urgent needs elsewhere. In such a case, the state's failure would not necessarily indicate cruelty on the state's part, and liability may therefore be unfair. Unlike the two previous classes of troubling cases, however, this one seems not to call at present for any doctrinal fix. The monumental inadequacy of existing prison conditions has arisen not because conflicting moral duties are undermining a genuine public commitment to meeting the state's carceral burden but because the state has repeatedly proved unwilling to tackle the problem, preferring instead to prioritize any number of pursuits arguably far less urgent than maintaining in minimally decent conditions the fellow human beings we keep behind bars.³²⁸ Before a genuine dilemma of

³²⁶ *See id.* (explaining demise of “[t]he ‘clean hands’ theory of contributory negligence, which induced a few early courts to deny recovery to a plaintiff whose conduct was unlawful in any way whatever, as in the case of one driving quite carefully in violation of a Sunday law”). As Prosser and Keeton explain, on the “last clear chance” rule, when the plaintiff by his own prior conduct puts himself in a position “from which he is powerless to extricate himself by the exercise of any ordinary care,” and the defendant recognizes the danger “while there is still time to avoid it and then fails to do so,” courts have uniformly held that the plaintiff can recover. *See id.* § 66, at 465 (footnote omitted).

³²⁷ *See supra* Part II.B. Note that such a dilemma is not demonstrated just because prison officials fail to meet the urgent needs of one prisoner because they are attending to the equally urgent needs of other prisoners. The state itself is directly responsible for ensuring adequate conditions for all its prisoners. If one person suffers a serious deprivation because another prisoner has an urgent need, this only affirms the inadequacy of the institutional arrangements under which the prisoners are collectively housed. The dilemma considered here exists only when the state has no resources not already directed at relieving the equally urgent needs of other citizens and thus may not redirect any resources to the project of protecting prisoners from serious harm without causing equally serious harm to other citizens. It is only in such a case that a true such dilemma may be said to exist and thus to offer a valid defense to a charge of cruelty.

³²⁸ Arguably, among these less urgent pursuits is the incarceration of many nonviolent offenders, who could be released from prison with little, if any, danger to public safety and whose imprisonment contributes to the overcrowding and consequent overloading of the system that makes it difficult, if not impossible, to achieve even minimally decent conditions.

this sort could possibly arise, not only the state's carceral machinery but society itself would have to undergo a dramatic transformation. Until then, it seems safe to say that, even assuming a strict liability standard, no steps need be taken to guard against unfairness on account of this third case.

On a strict liability standard, so long as the causation requirement is satisfied, it should not matter which defendants plaintiffs sue. If the harm suffered was sufficiently serious and was caused by prison officials in the course of administering the stipulated sentence, liability should attach unless contributory negligence can be shown. If the harm arose from both micro-level and macro-level failures of care, plaintiffs may sue either the inflicting officer or the prison administrators responsible for the structural causes of the harm. If, for example, a prisoner who was in "a stupor, soaked in his own sweat and urine" and unable to move dies after a housing officer failed to procure needed medical care,³²⁹ the victim's survivors could sue the officer herself. They could also sue the administrators responsible for any macro-level causes, which in this case may prove to include a failure adequately to train officers to recognize grave medical distress, a failure to implement and enforce a policy requiring that only medical staff make determinations as to the need for medical care, and/or a failure to ensure an institutional culture in which officers take prisoners' evident agony seriously. Whatever the reason, if macro-level causes may be demonstrated, prison administrators would be appropriate subjects of suit.

Those familiar with prison life may fear that this regime would reward those prisoners who by their conduct give prison officials reason for skepticism as to the genuine character of alleged suffering. Prisoners, who exist in an institutional setting in which they often do not get what they want, may try to manipulate those in authority to their own advantage. If a prisoner is known for crying wolf, prison officials should not, in fairness, be held responsible if they fail to respond adequately when the wolf really is at the door.³³⁰ But this concern is not a reason to reject a strict liability approach, since a defense of contributory negligence should provide sufficient protection against unfairness of this sort. This defense, however, should apply only if the plaintiff's perceived untrustworthiness was the result of his own conduct. It would not avail the officer who ignored the medical distress of the prisoner described in the previous paragraph if

³²⁹ See von Zielbauer, *supra* note 22 (describing case of Brian Tetrault, who died in New York jail after jail staff cut off his meds and "dismissed him as a faker" despite Tetrault's exhibiting symptoms of serious illness).

³³⁰ See discussion *supra* note 278.

she believed that the prisoner who seemed incapacitated was “faking”³³¹ only because in her view *all* prisoners are fundamentally mendacious. This doctrinal limit is appropriate. The idea that all prisoners lie and thus that every assertion of need is exaggerated or a wholesale untruth, if allowed to justify a failure to take such assertions seriously, would inevitably result in serious harm to prisoners whose signs of distress are genuine. Allowing belief in inmates’ inherent dishonesty to justify such inaction would, moreover, only reinforce the indifference with which too many correctional officers already meet prisoners’ claims of serious need.³³² A rejection of this defense would thus strengthen efforts to combat the cultural tendencies toward dehumanization that can make prisons sites of institutional cruelty.³³³

The motivating question of this Part has been what doctrinal standards would best capture the understanding of cruel conditions sketched in Part II. I have argued that *Farmer*’s recklessness standard is wholly unsuited to the task, being seriously underinclusive. By way of alternatives, I have considered both a heightened negligence standard, under which a lesser burden would attach to those claims alleging macro-level failures of care, and a modified strict liability approach. Each of these options is far more consistent with the possibility of meaningful Eighth Amendment enforcement than the *Farmer* standard. Assuming courts would apply a heightened negligence standard correctly and in good faith, either would serve the purpose.

Admittedly, there is at present little reason to expect doctrinal reform in the direction I advocate. Not only is there no sign that the Supreme Court is inclined to revisit *Farmer*, but were it to do so, it is not clear that it would be to expand, rather than to further limit, the possible scope of governmental liability.³³⁴ And in any case, even

³³¹ See *supra* note 22 (describing case of woman held in Florida jail who, in throes of heart attack from which she subsequently died, was told by jail nurse to “stop the theatrics”).

³³² It may be objected that foreclosing the defense of a general belief in prisoners’ tendencies to manipulate will lead officers to waste time investigating false claims, time that could be better spent addressing dangers that are known to be genuine. But it is appropriate that officers investigate plausible assertions of serious threats, even if some prove false. If they lack the time to do this adequately, it only strengthens the case as to the cruelty of existing institutional arrangements.

³³³ See *supra* Part II.D.

³³⁴ Indeed, given the recent changes to the composition of the Court, in particular the appointment of Justice Alito to replace Justice O’Connor, any changes to the scope of judicial enforcement of prisoners’ constitutional protections may well go in the opposite direction to that advocated here. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 139–40 (2003) (Thomas, J., concurring, joined by Scalia, J.) (arguing that prisoners have no constitutional rights beyond those provided in Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 18, 20, 27 (1992) (Thomas, J., dissenting, joined by Scalia, J.) (arguing that Eighth Amendment protects prisoners only from significant physical injury).

assuming the judicial inclination, court orders consistent with more protective doctrinal standards may well have little practical effect absent real political will to guard against cruel prison conditions.³³⁵ Still, there is value to the present enterprise. In American society, the scope of judicial enforcement of constitutional protections is taken to define the outer limits of those protections as a normative matter.³³⁶ Clearly describing the distance between a meaningful prohibition on cruel prison conditions and existing doctrine thus demonstrates the extent to which not just the courts but society as a whole is in ongoing violation of our collective constitutional obligations.

CONCLUSION: JUDICIAL CRUELTY AND THE LIMITS OF THE LAW

The incarceration of criminal offenders can be understood as a bargain between the state and civil society. To society in general, imprisoned offenders are an absence, even a nullity. Banished into nonexistence, prisoners are noticed, if at all, only at the moment of sentencing or upon release, or when through an escape or some other notorious act they force themselves upon the public consciousness. But if the public benefits from this (temporary) freedom from the company of those deemed unfit to live in society, it does so only because the state commits to providing for the ongoing care and protection of the people society wishes to exclude during their incarceration.

The state's carceral burden, assumed on behalf of society, is the price paid by the collective for whatever benefits incarceration brings.³³⁷ The greater society's appetite for imprisoning convicted offenders, the greater the burden. But incarceration is expensive.

³³⁵ As Robert Post and Reva Siegal put it, “[i]f courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.” Robert Post & Reva Siegal, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); see also Jack Landman Goldsmith III & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1834 (2009) (noting that Supreme Court “lacks the power to push constitutional law very far from the center of political gravity”).

³³⁶ See Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 243 (2006) (identifying what she calls “three definitional equivalencies” in American constitutional culture, in which “moral questions are equated with constitutional questions, constitutional questions are understood to be legal questions, and legal questions are understood to be adjudicative”); see also Sager, *supra* note 114, at 1228; see also generally Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

³³⁷ I leave to one side the question of what these benefits might be, and whether they are worth the considerable social harms caused by mass incarceration. For discussion of the latter, see generally Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARVARD LAW & POL’Y REV. 237 (2009).

When, as in the early-twenty-first century, the public's taste for incarceration is considerable, the state may therefore try to do the minimum possible to meet its burden, and perhaps to do even less if it can get away with it.

The constitutional prohibition on cruel punishment checks this impulse, demanding at the very least that the state provide for prisoners' basic needs so that their removal from society does not also cause them serious gratuitous suffering.³³⁸ But incarceration is a dangerous state, and meeting this demand requires constant vigilance on the part of state officials. To guard against cruel conditions, state officials must be proactive, identifying threats to prisoners' health and safety in order to prevent possibly serious harm.

Farmer's holding suggests that the Supreme Court fundamentally misunderstands the nature of this bargain. To limit liability to cases where officials actually realized the risk of harm is to accord state actors the same privilege of disregard and even obliviousness to the fate of imprisoned offenders that the public takes for granted. But this privilege is not open to state officials to enjoy; indeed, it is available to members of civil society only because the state, in taking prisoners into custody, has agreed to renounce this privilege for the duration of the sentence and instead to assume ongoing responsibility for prisoners' health and safety.

To validate official inattention in the prisons is to guarantee that the people being held in those prisons will suffer gratuitous physical and psychological harm. That this is so should trouble anyone who takes seriously the role of the courts in checking official abuses of power.³³⁹ To some, judicial restraint in this context may be wholly appropriate. After all, prisons are extremely complex institutions that

³³⁸ No doubt, even prisoners held in the most humane carceral conditions possible would experience some psychological suffering due to the mere fact of their being incarcerated and thus cut off from loved ones and from society in general.

³³⁹ See Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 677–78 (arguing that § 1983 actions should not be vehicle to compensate for official mistakes but should instead be way to hold governmental officials to account for abuses of particular powers delegated to them by state). Whitman argues that even apparently isolated instances of such official abuses of power require judicial consideration, for such “incidents can accumulate and become intrinsic to the functioning of the law enforcement system without any formal articulation of policy.” See *id.* at 691. Connecting Whitman with Shklar suggests the bite of Whitman's approach in the Eighth Amendment context. See Shklar, *supra* note 60, at 28. Whitman counsels a focus on official abuse of the uniquely governmental powers accorded to state actors so that they might keep the peace, make the government function, and otherwise ensure the conditions for liberty. Shklar makes clear both why checking such abuse is the particular imperative of the Eighth Amendment and the wisdom of a prohibition on cruel punishment. If Shklar is right that state power delegated to individual officials will invariably be abused unless it is checked, there is reason to be especially concerned about such abuses in the prison

are hard to understand from the outside, and prison officials have the expertise, which federal judges lack, to make the necessary “empirical findings [and] predictive judgments”³⁴⁰ that dictate the functioning of their facilities.³⁴¹ There is no doubt, moreover, that more protective standards would place a corresponding pressure on legislatures to implement potentially costly institutional reforms, an effect that may expose the Court to charges of usurping the legislative prerogative. When, however, the Court allows these concerns to reduce constitutional protections in the prison context, there is a real danger that it will thereby enable unduly harsh treatment and serious failures of care at odds with the explicit constitutional command prohibiting cruel punishment.

Here, one might respond with what might pass as a dose of political realism. Judicial power is not unlimited. The Court must be careful not to expend its political capital on unpopular causes for fear of compromising its influence in the main run of issues. And in any case, the judiciary is just one branch of government. Those petitioners who get no relief through the courts can always look to the political branches to make their case. But in the case of prisoners, this is no answer. For this group, there is no prospect of relief through political channels. If powerful political constituencies notice prisoners at all, the result is usually³⁴² a worsening of the conditions of confine-

context, where correctional officers have vast discretion over virtually all aspects of prisoners’ lives, with minimal external oversight of how this discretion is used.

To this, it might be argued that prisoners too have power, since they outnumber the guards whose fear of prisoners’ violent aggression acts as a check on the worst abuses. Indeed, this fear arguably creates a trauma unique to correctional officers, and indicates that, in prison, correctional officers have no monopoly on power. Certainly, the job of correctional officer is dangerous and stressful and exposes those who do it to a constant threat of assault. This is why prison officials need the means to defend themselves. But at the same time, in the prison, officers do have a monopoly over the legitimate use of force and enjoy considerable discretion as to when to employ it. Violent prisoners may strike out against an officer but when they do, their punishment—which these days will likely include a long period of total sensory deprivation in a supermax unit—is swift, sure, and harsh. However dangerous prisons are for the officers, they are still more so for the inmates.

³⁴⁰ Fallon, *supra* note 114, at 1291.

³⁴¹ See *Turner v. Safley*, 482 U.S. 78, 84, 89 (1987) (finding that “the problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree” and therefore that “‘prison administrators . . . , and not the courts, [should] make the difficult judgments concerning institutional operations’” (second omission in original) (citations omitted)).

³⁴² Although not always. In 2003, Congress passed the Prison Rape Elimination Act (PREA) of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–15609 (2006)), which allocated funding for research into the incidence of prison rape, created the National Prison Rape Elimination Commission, and directed the U.S. Attorney General to promulgate regulations for passage by the states reflecting best practices for prevention. PREA passed with the combined efforts of progressives, prisoners’ rights activists, and

ment.³⁴³ As a general matter, prisoners and their allies (family, friends, community) tend to be poor and without political resources.³⁴⁴ Prisoners' disenfranchisement is captured most obviously in the realm of the ballot: In almost all states, incarcerated offenders cannot vote, and in many cases, people with felony convictions are unable to vote even after release.³⁴⁵ Prison inmates thus lack any political clout, and indeed are routinely scapegoated; prisoners have become the group that, as Carol Steiker notes, "it is socially and politically acceptable to hate and deride."³⁴⁶ Thus, as with any other

evangelical Christians. See Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize To End Prison Rape*, 32 J. LEGIS. 129, 129 (2006) (noting "unique coalition of civil rights groups and religious organizations that pressed prison rape onto Congress' agenda"). Critics charge that PREA lacks teeth, especially given that it directs the Attorney General not to propose regulations likely to impose substantial financial burdens on the states. See, e.g., Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. OF GENDER & L. 139, 176 (2006) (noting that PREA "prohibits the establishment of any national prevention standards that 'would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities'" (quoting 42 U.S.C. § 15607(a)(3) (2000 & Supp. V 2006))); see also Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, <http://www.slate.com/id/2089095/> (observing that "the main thing [PREA] aims to do is collect data, and that may be, paradoxically, both quixotic and redundant"). But it is certainly a start.

³⁴³ For instance, Congress and various states have passed "No Frills" laws, which effected the elimination or restriction of particular inmate privileges, such as visitation, telephone privileges, access to personal property, access to television, recreation time, and access to weightlifting equipment. See CYNDI BANKS, PUNISHMENT IN AMERICA 138 (2005); Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. PROBATION 35, 35-36 (1996). In addition, in 1994 Congress eliminated the availability of Pell Grants for prisoners, thus largely foreclosing the possibility of post-secondary education in the prisons. See Violent Crime Control and Law Enforcement Act of 1994, § 20411, 20 U.S.C. § 1070a(b)(8) (2006) ("No Federal Pell Grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.").

³⁴⁴ See *supra* note 125.

³⁴⁵ According to the Sentencing Project:

48 states and the District of Columbia prohibit inmates from voting while incarcerated . . . 35 states prohibit felons from voting while they are on parole and 30 of these states exclude felony probationers as well. . . . Two states deny the right to vote to all ex-offenders who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period Each state has developed its own process of restoring voting rights to ex-offenders but most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them. . . . An estimated 5.3 million Americans, or one in forty-one adults, have currently or permanently lost their voting rights as a result of a felony conviction.

THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2008), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

³⁴⁶ Carol S. Steiker, *Death, Taxes and—Punishment? A Response to Braithwaite and Tonry*, 46 UCLA L. REV. 1793, 1797 (1999) ("[Q]uite apart from serving as a subtle proxy for race or class hatred, harsh penological practices give people a new 'outsider' to hate, at a time when so many other outsiders have become more assimilated into society.

discrete and insular minority subject to popular prejudice, there is no point in referring incarcerated offenders to the democratic process, since the majoritarian nature of that process virtually ensures that they will lose. This is precisely why there is a need for more meaningful judicial review in this context.³⁴⁷ True, the strength of the prejudice against prisoners may make for unwelcome political pushback against the policy implications of a more protective constitutional standard. But even if expected political resistance undercuts the potential scope of judicial enforcement, it is still open to courts to condemn as unconstitutional those conditions found cruel, thereby acknowledging the urgent need for change and setting standards that states are obliged at least to try to meet.³⁴⁸ For the Court to refrain from taking steps to protect despised minorities out of deference to popular prejudice would be a troubling abdication of the judicial role in our constitutional scheme.

This abdication is even more troubling when one considers the racial composition of the American prison population. Although African Americans make up no more than 13% of the American population,³⁴⁹ at least 40% of the people behind bars in the United States are African-American.³⁵⁰ Latinos too are overrepresented, making

Criminals, after all, are *criminals* Why it should be that people need some ‘outsider’ to hate and blame is a good question; but that people seem to need such a scapegoat is supported by much of human history.”).

³⁴⁷ As the Court noted in its famous footnote in *United States v. Carolene Products*, when “prejudice against discrete and insular minorities” has had the effect of “curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities,” “correspondingly more searching judicial inquiry” may be necessary. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

³⁴⁸ Courts have plenty of mechanisms for limiting remedies even when constitutional rights are found to have been violated. The most obvious of these mechanisms in the prison conditions context is qualified immunity, which allows courts to find in favor of the defendant even when the plaintiff’s constitutional rights were violated, if at the time of the violation the right in question was found not to have been “clearly established.” *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982); *see also* *Procunier v. Navarette*, 434 U.S. 555 (1978) (holding that prison officials are entitled to qualified immunity). In the most extreme cases, courts may also resort to the *Brown v. Board* formulation “with all deliberate speed,” which although controversial would allow courts to respond to the most egregious violations while acknowledging the obstacles to reform. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955); *see also* Whitman, *supra* note 339, at 672, 681 (criticizing tendency of courts to avoid remedial issues by shrinking scope of constitutional right).

³⁴⁹ U.S. Census Bureau, State & County QuickFacts, “USA,” <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Aug. 26, 2009).

³⁵⁰ *See* WILLIAM J. SABOL & HEATHER COUTRE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISON INMATES AT MIDYEAR 2007, at 7 tbl.9 (2008), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (estimating that of 2,090,800 people behind bars in United States in 2007, 814,700 were Black males and 67,600 were Black females); *see also* THE SENTENCING PROJECT: FACTS ABOUT PRISONS AND PRISONERS,

up 20% of the incarcerated population³⁵¹ although they are only 14.8% of the population in general.³⁵² One can only speculate as to the reason for the overrepresentation of minorities in the prisons. But the history of incarceration in the United States suggests a readiness to use incarceration as a means to disempower and control those members of society the majority regards as a threat,³⁵³ and suggests as well a complicated relationship between this desire for control and the definition of what counts as an imprisonable offense.³⁵⁴

http://www.sentencingproject.org/doc/publications/inc_factsaboutprisons.pdf (estimating that 40% of persons in jails or prisons in 2005 were Black).

³⁵¹ *Id.* (reporting that 410,900 of 2,090,800 prisoners are Hispanic).

³⁵² U.S. Census Bureau, *supra* note 349. Native Americans are also overrepresented in the prison population. See SUZANNE J. CRAWFORD & DENNIS F. KELLEY, *AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA* 486 (2005) (“Disproportionately high numbers of Native Americans are confined in U.S. prisons.”); RONALD BARRI FLOWERS, *MINORITIES AND CRIMINALITY* 111 (1988) (“Native Americans have a strikingly high overall rate of arrest relative to their population size.”).

³⁵³ See DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 63–67 (1996) (describing practice in post–Civil War South of using the criminal law to target emancipated former slaves by dramatically increasing sentences exacted for petty crimes); Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as a Surrogate Ghetto*, 4 *THEORETICAL CRIMINOLOGY* 377, 384 (2000) (arguing that today’s “black ghetto,” together with contemporary American prison, “constitute[s] a single *carceral continuum* which entraps a redundant population of younger black men (and increasingly women) who circulate in closed circuit between its two poles in a self-perpetuating cycle of social and legal marginality with devastating personal and social consequences”).

³⁵⁴ What we decide to define as a crime, in other words, may not be wholly unrelated to the identity and conduct of those we want to incarcerate. See *supra* note 353. In the present day, there is a strong argument that the war on drugs is motivated at some level by racial animus. See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 144–46 (1999); STEVEN R. DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 115–21 (1996); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 104–16 (1995). Although African Americans use illegal drugs in the same proportion as whites, African Americans are overrepresented in arrests, prosecutions, convictions, and incarcerations for drug crimes. According to the U.S. Department of Justice 2006 Uniform Crime Report, African Americans comprise 35.1% of the total percentage arrested for drug offenses, including crimes relating to sales, manufacture, and possession. U.S. DEPARTMENT OF JUSTICE, *UNIFORM CRIME REPORT 2006*, tbl.43, http://www.fbi.gov/ucr/cius2006/data/table_43.html. Of the defendants in U.S. district courts sentenced for drug offenses, 29.5% were Black, 42.7% were Hispanic, and only 24.3% were White. See Sourcebook of Criminal Justice Statistics Online, *Drug Offenders Sentenced in U.S. District Courts Under the U.S. Sentencing Commission Guidelines, By Offender Characteristics, Mode of Conviction, and Drug Offense, Fiscal Year 2007*, <http://www.albany.edu/sourcebook/pdf/t5392007.pdf>; see also THE SENTENCING PROJECT, *THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 2*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf (“African American drug offenders have a 20% greater chance [than whites] of being sentenced to prison In 2002, the average prison term of 105 months for African Americans was 69% longer than the average of 62 months for whites.”).

The successes of the civil rights movement have meant that systematic abuses by state officials of African-Americans and other visible minorities are subject to close judicial scrutiny as well as public opprobrium. Yet by excusing institutional cruelty toward prisoners, courts create the conditions whereby society's most despised population, a population disproportionately comprised of people of color, may routinely suffer systematic abuses of state power without any meaningful judicial check. And not only do the courts fail to check the cruel treatment these abuses represent, they also legitimize such treatment, legally transforming the cruelty of institutional indifference to prisoners' suffering into *not*-cruelty by validating the harmful effects of that indifference as consistent with the Eighth Amendment.

Recognizing this judicial sleight-of-hand makes clear that the courts play a key role in sustaining and even creating the cruel conditions currently found in many American prisons and jails. In this sense, judges, too, become agents of cruelty. Just as prison officials learn cruelty through repeated exposure to prisoners in a context that denies their shared humanity, judges develop a cruel disposition toward prisoners through the repeated demand that they validate as not cruel conditions that are clearly at odds with the state's carceral burden. Existing constitutional standards require courts to find for the state even when prisoners face obvious risks of serious physical or psychological harm. To do so, judges must learn to suppress any instinctive sympathy they may have for fellow human beings who have experienced gratuitous suffering. Indeed, if they are to enforce prevailing standards, judges must learn to cease altogether to recognize prisoners' shared humanity—a lesson, it bears remarking, that once learned only makes it easier for courts to satisfy the imperative of judicial deference to prison officials.

This is the full extent of the problem revealed. The institutional cruelty of prisons means that, absent some external pressure, state officials will routinely fail to fulfill the affirmative obligations to prisoners of the state's carceral burden. The courts, according to our constitutional scheme, are responsible for applying that external pressure. But the current doctrinal framework means that courts are instead enforcing standards that *relieve* state officials of the obligation to be proactive vis-à-vis the health and safety of the people we put behind bars. And what's more, through the application of those standards, judges too come to regard the suffering of those people with indifference. Over time, the courts themselves thus also become sites of institutional cruelty.

It will take more than a doctrinal change to disrupt this system. As a start, we need the courts fully to enforce the Eighth Amendment,

to protect a despised minority from the cruelty that so often attends incarceration in American prisons and jails.³⁵⁵ Yet no such commitment will emerge so long as the courts themselves are sites of institutional cruelty toward prisoners. It is hard to know what will break this vicious circle. But a good faith effort to determine both the nature of cruelty in the prison context and the scope of the state's Eighth Amendment obligations to the people it incarcerates seems a good place to start.

³⁵⁵ Of course, a change in the political climate and an increased willingness on the part of legislators and the public in general to ensure humane conditions of confinement would likely bring even greater positive change. *See* Post & Siegal, *supra* note 335. Here, however, I focus on what might disrupt the system that reinforces the unwillingness of the courts to meaningfully enforce the Eighth Amendment.