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Inmate Constitutional Claims and the Scienter Requirement

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INMATE CONSTITUTIONAL CLAIMS AND THE SCIENTER REQUIREMENT

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ABSTRACT

Scholars have criticized requirements that inmates prove malice or deliberate indifference to establish constitutional claims against corrections officials. The Eighth Amendment currently requires convicted prisoners to show that a prison official acted "maliciously or sadistically" to establish an excessive force claim and with subjective "deliberate indifference" to establish a claim of unconstitutional prison conditions. Similar requirements can apply with respect to claims by pretrial detainees, whose claims are governed by substantive due process rather than the Eighth Amendment.

Scienter critics have argued for use of an objective reasonableness standard for all inmate claims—both those brought by convicted prisoners and pretrial detainees. This Essay argues that the scienter requirements are more justified than critics claim. Critics argue that the Court has based its state-of-mind requirements on a mistaken notion that, for an action to constitute punishment, it must necessarily involve a purpose to chastise or deter. Intentions to chastise and deter, however, remain central to the concept of punishment, and reference to other purposes of punishment does not suggest dispensing with a culpable state-of-mind requirement in inmate suits against corrections officials. Scienter requirements, moreover, may be justified apart from notions of punishment, by the need to maintain order in prisons and to distinguish constitutional violations from ordinary torts. Finally, state-of-mind requirements do not pose the impenetrable barrier to liability that critics claim. This is particularly true in systemic conditions cases—the cases that have the most promise for improving the lives of inmates.

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INTRODUCTION

Scholars have criticized requirements that inmates prove malice or deliberate indifference to establish certain kinds of constitutional claims against corrections officials.[1] The Eighth Amendment is currently understood to require convicted prisoners to show that a prison official acted "maliciously or sadistically" to establish an excessive force claim and with subjective "deliberate indifference" to make out a claim of unconstitutional prison conditions. Similar requirements can apply with respect to pretrial detainees, whose claims—because the detainees are not yet convicted—are governed by substantive due process rather than the Eighth Amendment.[2]

1. *See, e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 360–61 (2018); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 895–97 (2009); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1380–84 (2008). There are others who question scienter requirements, see, e.g., *infra* notes 6–7, but this Essay focuses on arguments by Professors Schlanger, Dolovich, and Ristroph.

2. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." (quoting Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977))). Substantive due process claims are brought under the Fifth Amendment by federal detainees and under the Fourteenth Amendment by state and local detainees. The term "inmate suits," as used herein, refers to both the claims of convicted prisoners and of pretrial detainees and encompasses claims regarding general conditions, specific conditions, and excessive force. The Essay does not address First Amendment claims, Equal Protection claims, or procedural due process claims.

The Supreme Court's decision in *Kingsley v. Hendrickson*[3] heightened the criticism of scienter[4] requirements for inmate suits. In *Kingsley*, the Court held that a pretrial detainee claiming that corrections officials used excessive force in violation of the Fourteenth Amendment's Due Process Clause need only show that the force was objectively unreasonable.[5] The plaintiff was not required to make the further showing of malice that would have been required under the Eighth Amendment for excessive force claims by convicted prisoners. In the wake of *Kingsley*, Professor Margo Schlanger and others have argued for use of an objective reasonableness standard for all inmate claims, including those brought by convicted prisoners under the Eighth Amendment.[6] These proposals echoed pre-*Kingsley* calls by scholars such as Professors Sharon Dolovich and Alice Ristroph for minimizing or eliminating scienter requirements in inmate suits in favor of negligence or strict liability standards.[7]

These critics not only agree that the Court should move toward using only objective standards, but they are also largely in accord as to reasons for doing so. They claim that the state-of-mind requirements for both Eighth Amendment and substantive due process claims[8] originate from a mistaken belief that an intent to punish must be established to invoke the Eighth

3. 135 S. Ct. 2466 (2015).

4. Scienter refers to a state of mind either of purpose or knowledge with respect to wrongdoing. The deliberate indifference standard used in inmate cases requires knowledge about the risks of certain harms. *See* Farmer v. Brennan, 511 U.S. 825, 837–38 (1994). This article uses the term "deliberate indifference" to refer to a subjective standard requiring knowledge.

5. *Kingsley*, 135 S. Ct. at 2475–76.

6. Schlanger, *supra* note 1, at 360–61; Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 358–59 (2017) (favoring an objective reasonableness standard); *cf.* Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817, 824, 840, 859 (2016) (providing some historical evidence of a malice requirement in cases involving prohibitions on cruel and unusual punishments of enslaved persons, but arguing against a malice standard in the current Eighth Amendment context as not reflecting current standards of decency); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 458, 463–64 (2017) (arguing that an intent to be cruel should not be required for Eighth Amendment violations); Meredith D. McPhail, *Ensuring that Punishment Does, in Fact, Fit the Crime*, 52 U. MICH. J.L. REFORM 213, 220, 227–28 (2018) (arguing *Kingsley* indicates that prisoners' claims should be considered under more lenient substantive due process standards).

7. *See, e.g.*, Dolovich, *supra* note 1, at 881–82, 971 (recommending alternative standards of heightened negligence or modified strict liability); Ristroph, *supra* note 1, at 1397–99, 1404 (arguing that punitive intent is not a necessary condition of punishment); Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1060–61 (2013) (arguing for an objective deliberate indifference standard for most pretrial detainee claims); Paulo Barrozo, *Reconstructing Constitutional Punishment*, 6 WASH. U. JURIS. REV. 175, 231–32 (2014) (arguing for greater attention to the suffering component of cruelty).

8. Schlanger, *supra* note 1, at 385–86 (whether "'punishment' definitionally requires the subjectively culpable intent of a punisher" is relevant to both Eighth Amendment and Fourteenth Amendment cases).

Amendment's prohibition of cruel and unusual punishment.[9] And they argue that the intent requirements mistakenly treat what are essentially systemic harms as individual wrongs by corrections officials.[10] They assume, moreover, that the scienter requirements impose a significant roadblock to successful inmate claims and thus to meaningful improvement in the treatment of prisoners.[11]

This Essay evaluates the arguments against scienter requirements in inmate constitutional litigation. It concludes that state-of-mind requirements are more justified than critics claim.

I. UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT AND EXCESSIVE FORCE: AN OVERVIEW

The kinds of inmate claims that this Essay addresses—both with respect to convicted prisoners and pretrial detainees—are claims of unconstitutional conditions of confinement and claims of excessive force.[12] As noted above, these are treated as Eighth Amendment claims when brought by convicted prisoners, whether in state or federal custody. The Eighth Amendment is inapplicable to pretrial detainees, however, because they are not convicted prisoners subject to punishment.[13] Substantive due process is therefore the source of rights for pretrial detainee claims regarding conditions of confinement and excessive force.

Conditions claims. Conditions claims can be subdivided into two main groups: claims that raise more systemic issues, such as overcrowding, and claims that allege more episodic harms, such as those involving the failure of corrections officials to protect an inmate from third-party violence or the

9. *See, e.g.*, Schlanger, *supra* note 1, at 359–61 (claiming the Court's unsupported definition of punishment is the foundation for its subjective standards under the Eighth Amendment); *id.* at 386–88 (arguing that intention should not be definitional to punishment); Ristroph, *supra* note 1, at 1395–97 (citing various aims of punishment, such as incapacitation, as undermining any requirement that an intent to chastise or deter be central to an Eighth Amendment claim).

10. *See, e.g.*, Dolovich, *supra* note 1, at 905 (arguing that current approaches do not "appreciate the state's responsibility for *all* official conduct that impacts prisoners"); *id.* at 937–38 (cases against individual officers should address "institutional cruelty, arising from the character of the institutional arrangements the state has created"); Schlanger, *supra* note 1, at 420–21 (arguing that subjective standards allow easily preventable harm to escape liability, given the fragmented knowledge and responsibility that follow from ordinary bureaucratic design).

11. Schlanger, *supra* note 1, at 360 (claiming the Court's interpretation of the Eighth Amendment "has radically undermined prison officials' accountability for tragedies behind bars"); Ristroph, *supra* note 1, at 1382–83 (assuming judges almost always resolve state-of-mind issues in inmate cases and that their findings generally favor defendants).

12. Both types of claims are "prison conditions" claims under the Prison Litigation Reform Act (PLRA), 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523 (2000), 18 U.S.C. §§ 3624, 3626 (2000); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2000); 42 U.S.C. §§ 1997a–1997h (2000)). *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.").

13. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

failure to attend to serious medical needs of an individual prisoner.[14] All Eighth Amendment conditions claims—i.e., those that involve convicted prisoners—contain an objective component as well as a subjective component. In general prison conditions cases, convicted prisoners must show that the challenged conditions objectively failed to meet basic human needs[15] and that prison officials were deliberately indifferent to such harms.[16] Claims of failure to address serious medical needs require both the objective showing of a serious medical need and deliberate indifference to the serious need.[17] Similarly, a claim based on failure to protect a prisoner from third-party violence—e.g., violence by a fellow prisoner—requires showing an objectively substantial risk of serious harm to the prisoner and deliberate indifference of the official.[18] Deliberate indifference in these inmate cases is subjective deliberate indifference—that is, it requires actual knowledge of a substantial risk of serious harm.[19]

With respect to conditions, the Due Process Clauses of the Fourteenth and Fifth Amendments provide protections for state and federal detainees that are similar to those that the Eighth Amendment provides for convicted prisoners. Most courts use a subjective deliberate indifference standard for pretrial detainee particularized conditions cases, as they do in all Eighth Amendment prison conditions claims.[20] There is, however, some division and lack of clarity among the federal appellate courts as to whether a

14. Professor Schlanger provides a chart of various standards. Schlanger, *supra* note 1, at 364. Her chart appears to assume that the requirement of deliberate indifference is inapplicable to any conditions claims by pretrial detainees. *But cf.* Struve, *supra* note 7, at 1023–30 (indicating that courts have generally used a deliberate indifference standard for pretrial detainee episodic conditions claims and that many require a finding of deliberate indifference for general conditions claims). Professor Schlanger's assumption is based on *Bell*, a pretrial detainee case. Schlanger, *supra* note 1, at 377 (concluding that *Bell* is best read as announcing and utilizing an objective approach). According to the Court in *Bell*, determining whether restrictions are punishment could involve an inquiry into "whether an alternative purpose . . . rationally . . . is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Bell*, 441 U.S. at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)). The Court used this language primarily to evaluate policies restricting the receipt of books from certain sources and policies regarding body and room searches. *Id.* at 560–62. The Court, with little discussion, concluded that the practices were reasonable responses to security concerns and did not involve punishment. *Id.*

15. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 346–47 (1981).

16. Wilson v. Seiter, 501 U.S. 294, 303 (1991) (requiring a showing of deliberate indifference in a general conditions case). In *Wilson*, "[t]he complaint alleged 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." *Id.* at 296.

17. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976).

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

19. *See id.* at 837–38 (third-party violence); *Gamble*, 429 U.S. at 106 (medical care).

20. Struve, *supra* note 7, at 1023, 1026–30 (showing that lower courts have generally used the deliberate indifference standards for individualized conditions claims).

subjective deliberate indifference or an objective unreasonableness standard applies for general conditions claims of pretrial detainees.[21]

Excessive force. Convicted prisoners' Eighth Amendment excessive force claims also contain an objective and subjective component. They require an objective showing of unreasonable force and a subjective element that looks to "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[22] For pretrial detainees claiming the use of excessive force under the Fourteenth Amendment, however, the Court in *Kingsley v. Hendrickson* applied an objective reasonableness test rather than the malice test required for convicted prisoners.[23]

In summary, convicted prisoners under Eighth Amendment standards must show subjective deliberate indifference in both general and specific conditions claims. And they must show malice in excessive force claims. Pretrial detainees under Due Process standards usually need to show subjective deliberate indifference as to specific conditions claims, and many circuits require such a showing for general conditions claims. Pretrial detainees need only show objective unreasonableness in excessive force claims.

II. PURPOSE AND PUNISHMENT

Many scholars object to scienter requirements (such as malice or subjective deliberate indifference) in prisoner or pretrial detainee claims regarding conditions and excessive force. Professor Schlanger, for example, applauded *Kingsley*'s use of an objective reasonableness test for pretrial detainees' excessive force claims and recommended the use of such a reasonableness test across the board for all inmate claims of excessive force and conditions—whether general or particular, and whether brought by convicted prisoners or pretrial detainees.[24] Professor Dolovich has suggested a "modified" strict liability or negligence standard for convicted

21. *Id.* at 1023, 1025–26 (noting some equivocation and division among the circuits regarding use of the Eighth Amendment standard or the somewhat more lenient standard of *Bell*).

22. Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d. Cir. 1973)); *accord* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

23. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475–76 (2015); *cf.* Schlanger, *supra* note 1, at 408 (stating that many lower courts pre-*Kingsley* required a showing of both excessiveness and a culpable state of mind).

24. Schlanger, *supra* note 1, at 360–61. Writing prior to *Kingsley*, Professor Struve recommended an across-the-board objective deliberate indifference standard for pretrial detainee claims. Her standard would require a showing that the defendant officer knew or should have known of a substantial risk of serious harm which he/she failed to address—effectively prescribing a form of negligence by allowing liability based on what the defendant officer should have known. Struve, *supra* note 7, at 1061, 1068. Professor Levinson subsequently argued for similar standards in light of *Kingsley*. Levinson, *supra* note 6, at 358–59.

prisoners' claims,[25] while Professor Ristroph has generally questioned the Court's focus on an intent to chastise or deter as critical to Eighth Amendment standards.[26]

These critics argue that the Court derives the scienter requirement from its mistaken conclusion that the Eighth Amendment cruel and unusual punishment prohibition requires an intent to punish. To assess their arguments, it is first necessary to determine what role punishment plays in both Eighth Amendment and analogous substantive due process doctrine.

A. The Role of a No-Punishment Norm in Eighth Amendment and Substantive Due Process Cases

The Eighth Amendment historically addressed legislatively and judicially imposed sentences.[27] These practices clearly involved an intent to chastise or deter, and constitutional issues often focused on whether the intended punishment was cruel and unusual.[28] As the Eighth Amendment expanded into other areas, Judge Henry Friendly's influential opinion in *Johnson v. Glick*[29] suggested that a showing of deliberate imposition of punishment was required to hold corrections officials liable for Eighth Amendment violations:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted suggests action taken, usually by a court, in carrying out a legislative authorization or command. . . . The background of our own Bill of Rights, however, makes clear that the Eighth Amendment was intended to apply not

25. Dolovich, *supra* note 1, at 936. Although her standard seems addressed to Eighth Amendment conditions claims, particular and general, she sometimes appears to consider excessive force claims. *See, e.g.*, *id.* at 905–06 (considering *Hudson*, an excessive force case, to show that state agents' "treatment of prisoners in the course of administering state-imposed prison terms constitutes the penalty the state has imposed"). Professor Dolovich also seems to see pretrial detainee claims as more or less encompassed by her discussion, on the assumption that courts tend to accord detainees the same rights as convicted prisoners. *Id.* at 886 n.15.

26. Ristroph, *supra* note 1, at 1395–97 ("It is simply not true that only acts intended to chastise or deter are commonly recognized as punishment."); *cf.* Reinert, *supra* note 6, at 824, 859 (providing some historical evidence of a malice requirement but disfavoring a malice requirement for contemporary Eighth Amendment claims); Stinneford, *supra* note 6, at 458, 463–64 (arguing against a requirement that cruelty be intentional).

27. *See generally* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 54, 61–68 (2009) (providing a history of Eighth Amendment case law).

28. *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 441–42, 447–49 (1890) (upholding a statutory provision for electrocution); Weems v. United States, 217 U.S. 349, 382 (1910) (finding the harsh penalties provided by Philippine law under which the defendant was sentenced to be cruel and unusual).

29. 481 F.2d 1028 (2d Cir. 1973). *Glick* involved a pretrial detainee claim of excessive force, but Judge Friendly discussed convicted prisoners as well. Substantive due process—not the Eighth Amendment—was generally the source of the prohibition against excessive force for convicted prisoners as well as pretrial detainees at that time. *See id.* at 1032–33.

> only to the acts of judges but as a restraint on legislative action as well. . . . Indeed, every decision of the Supreme Court striking down a punishment under the Eighth Amendment has concerned a legislative act.
>
> We do not suggest, however, that the cruel and unusual punishment clause must necessarily be read as limited to acts of legislatures in authorizing sentences or of judges imposing them. It can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence, as the death penalty was then thought to be, is carried out by an executioner, or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment. On a parity of reasoning, we find no difficulty in considering the cruel and unusual punishment clause to be applicable to such systems of prison discipline as solitary confinement or corporal punishment. The thread common to all these cases is that "punishment" has been deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners. In contrast, although a spontaneous attack by a guard is "cruel" and, we hope, "unusual," it does not fit any ordinary concept of "punishment."[30]

Since Friendly wrote in 1973, Eighth Amendment claims have further expanded, and now include not only general conditions claims (to which Friendly alluded), but also episodic harms such as specific conditions claims (e.g., third-party violence and medical needs claims) and excessive force claims. For the most part, these inmate Eight Amendment claims do not involve infliction of harm as part of the legislatively and judicially prescribed sentences, nor even as part of prescribed penalties for disciplinary infractions.[31]

In this expanded Eighth Amendment universe, the Court has required scienter as a rough substitute for the intent to punish that inherently accompanies legislatively and judicially imposed sentences. If a corrections official is deliberately indifferent or malicious in causing certain harms, his reprobated intent is treated as a kind of intent to punish (beyond the legally imposed penalties). In effect, a no-punishment norm is reflected in the scienter requirements for prison conditions and excessive force cases.

Characterizing the cases as prescribing a no-punishment norm may seem odd, because convicted prisoners can obviously be subjected to the intended

30. *Id.* at 1031–32 (citations omitted).

31. *But cf.* Hope v. Pelzer, 536 U.S. 730 (2002) (considering the sanctioned use of a hitching post as punishment for disciplinary infractions).

punishment of incarceration. And imprisonment may properly entail some discomfort, including less-than-ideal living conditions, as part of the lawfully prescribed punishment.[32] But to establish an Eighth Amendment violation as outlined in Part I, a prisoner needs to show both an objective harm that crosses some threshold beyond the ordinary attributes of prison life, together with a subjective element. When both of those elements are present, the harm becomes illicit punishment.

For example, a general conditions case could not be established by showing routine discomforts associated with incarceration; the objective component of a constitutional violation would be missing, even if an intent to impose such discomforts may be present. By contrast, failure to meet basic human needs due to prison officials' deliberate indifference crosses into illicit punishment—meeting both an objective standard (failure to meet basic human needs rather than ordinary discomforts that attend prison life)[33] plus a subjective standard (deliberate indifference).[34] And in specific conditions cases involving a particular prisoner's medical care, officials' failure to provide top flight medical care will not meet an objective standard, but serious medical needs to which officers are deliberately indifferent will cross into an Eighth Amendment violation.[35] While some prisoner-on-prisoner jostling and injuries may follow from not holding prisoners in isolation,[36] substantial risks of serious injury to which officers are deliberately indifferent will make out a specific conditions case.[37] Similarly, while some use of physical force by guards is necessary to maintain order and discipline, objectively unreasonable force that is maliciously inflicted on a convicted prisoner to cause pain is treated as illicit punishment.[38]

Although the language of "punishment" is not found in the Due Process Clauses, a no-punishment notion is nevertheless relevant to pretrial detainees' substantive due process claims. In *Bell v. Wolfish*,[39] pretrial detainees challenged several general conditions, including double bunking and limitations on the receipt of books.[40] To ground protections for detainees in the constitutional text, then-Justice Rehnquist reasoned that

32. Rhodes v. Chapman, 452 U.S. 337, 348–49 (1981) ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

33. *Id*. at 347.

34. *See* Wilson v. Seiter, 501 U.S. 294, 303–04 (1991).

35. Estelle v. Gamble, 429 U.S. 97, 104–06 (1976).

36. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (considering the involuntary confinement of persons with mental disabilities) ("And an institution cannot protect its residents from all danger of violence if it is to permit them any freedom of movement.").

37. *See* Farmer v. Brennan, 511 U.S. 825, 837–38 (1994).

38. *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

39. 441 U.S. 520 (1979).

40. *Id*. at 520, 527.

pretrial detainees are not yet subject to official state punishment under the Eighth Amendment, and therefore it would violate due process if state officials did subject them to punishment.[41] Thus, the no-punishment notion will often play a role in pretrial detainee cases similar to the no-punishment notion in convicted prisoner cases.[42]

One might suppose that it would be easier to meet the Fourteenth Amendment no-punishment standard than the Eighth Amendment no-punishment standard,[43] given that the Eighth Amendment proscribes only cruel and unusual punishment whereas substantive due process under *Bell* proscribes punishment altogether. Alternatively, one might assume that it would be easier to make out a claim under a specific Bill of Rights provision, such as the Eighth Amendment, than under the vaguer standards of substantive due process.[44] But in both contexts the Court uses similar no-punishment norms, and the standards have tended to be the same (*Kingsley* and some courts' approaches to general conditions cases excepted). For example, in neither the pretrial detention nor the postconviction context are state officials liable for all prisoner-on-prisoner altercations; it is only when officials are deliberately indifferent to a substantial risk of serious harm that illicit state punishment has occurred. In both contexts, the state may provide less-than-ideal medical care, but at some point officials cross a line into illicit punishment—where the medical needs are objectively serious and officials are deliberately indifferent to them. And as to general conditions cases, the Court has indicated that both convicted prisoners and pretrial detainees can be subjected to some discomfort without violating either the Eighth Amendment or substantive due process, but deliberate indifference to basic human needs violates both.[45]

Although the Court has prescribed a no-punishment norm for claims not involving attacks on legislatively or judicially prescribed sentences, and views the no-punishment norm as requiring scienter, this does not mean that the Court in fact requires a specific intention to chastise or deter to meet the

41. *Id*. at 535 n.16 ("Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." (quoting Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977))).

42. *See supra* note 9.

43. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." (citation omitted)); *cf.* Schlanger, *supra* note 1, at 432–33 (arguing against allowing harsher standards for convicted prisoners and noting that "jails tend to be harsher, more idle, and more dangerous than prisons").

44. *See* County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (noting the Court's "reluctan[ce] to expand the concept of substantive due process"); *id.* at 846 (only egregious conduct by executive officers should be deemed violative of substantive due process).

45. *Bell*, 441 U.S. at 534 (some discomfort experienced by a pretrial detainee does not rise to deprivation of a fundamental liberty interest). As noted above, some courts see the standard for general conditions claims as more lenient for pretrial detainees. *See supra* note 21.

scienter requirement. As Justice O'Connor stated when using the Eighth Amendment to address a claim of excessive force in *Whitley v. Albers*[46] and in prescribing a malice standard: "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety."[47] Justice Scalia analogously stated in *Wilson v. Seiter*,[48] "If 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."[49] To the extent the Court uses a no-punishment concept to define a more extended range of harms than those directed by legislatively and judicially imposed sentences, the Court sensibly has required an official's culpable state of mind—even if a specific intention to punish is not required.[50]

B. Punishment and Other Purposes

The background no-punishment principle in the Eighth Amendment and the Due Process Clauses has somewhat benefitted inmates by treating certain injuries that occur during incarceration as constitutional violations if the action or inaction that caused them was accompanied by scienter. But critics would make the standards even more helpful to inmates by eliminating the scienter element altogether.[51] They particularly fault Justice Scalia's opinion in *Wilson v. Seiter*,[52] in which a convicted prisoner sought injunctive relief for general prison conditions such as insufficient heating and cooling.[53] In requiring a showing of prison officials' deliberate indifference to make out an Eighth Amendment claim—even in a general conditions case—Scalia stated:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and

46. 475 U.S. 312 (1986).
47. *Id.* at 319.
48. 501 U.S. 294, 300 (1991).
49. *Id.* at 300.
50. Both Professors Schlanger and Dolovich argue that if an intent to punish is required to constitute a violation of the Eighth Amendment, then deliberate indifference standards are inconsistent with the Eighth Amendment. Schlanger, *supra* note 1, at 386; Dolovich, *supra* note 1, at 895–96. But if the Supreme Court—as it purports to do—is translating an Eighth Amendment standard to situations not involving a focused intent to punish, some culpable state-of-mind requirement may be appropriate. As discussed below, moreover, proof of scienter is often required for substantive due process claims. *See infra* text accompanying notes 82–91.
51. *See supra* note 7.
52. *See* Schlanger, *supra* note 1, at 378 (stating that *Gamble* and *Albers* "gestured towards a textual hook" that would later become central to Scalia's Eighth Amendment jurisprudence with *Wilson*).
53. *Wilson*, 501 U.S. at 296.

> unusual *punishment*. . . . As Judge Posner has observed: "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . ."[54]

The scienter critics do not claim that a purpose to punish, in the sense of intent to chastise or deter, is necessarily irrelevant in determining whether an inmate is suffering impermissible punishment. They do claim, however, that such purposes are not the only purposes behind punishment, and they apparently view such alternative purposes as dissipating a scienter requirement.

As Professor Schlanger has stated, "The point is that chastisement and deterrence are far from the only purposes of punishment, and that intent to punish is important but not definitional in identifying what punishment is."[55] She points out, for example, that "[c]riminal restitution . . . is intended to make victims whole. In the era of self-supporting or profit-making prisons, sentences of hard labor were intended to promote profitable use of prison labor."[56] These cited purposes, however, are generally consistent with, and overlap with, intentions to chastise or deter. Imposing restitution as part of a criminal sentence comports with intentions to chastise and deter, even if it serves the additional purpose of compensating a victim. Imposing hard labor is part of a sentence intended to chastise and deter, even if profit may also have been a motive. It is not clear why possible additional purposes for punishment displace reliance on intentions to chastise and deter to support state-of-mind requirements in inmate suits.

Alternative purposes to chastisement and deterrence, moreover, may still constitute purposes that support scienter requirements. For example, Professor Ristroph points out that some framers saw the Eighth Amendment as encompassing a prohibition on torture with a purpose to obtain information.[57] The torturer, however, surely has a culpable state of mind: an intent to inflict pain that is not legally justified. And it is a culpable state of

54. *Id.* at 300 (citation omitted); *cf.* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1859 (2012) (arguing the text of the Eighth Amendment requires subjective intent).

55. Schlanger, *supra* note 1, at 388; *see also id.* at 361 (considering this "undersupported and idiosyncratic definition of the concept of 'punishment'" to be the "foundation for a subjective liability standard").

56. *Id.* at 386–87; *see also* Ristroph, *supra* note 1, at 1396 ("There is little doubt that what we call punishment is sometimes aimed at incapacitation, sometimes at reform or rehabilitation, and in still other instances at restoration of wealth or other goods to the victim, at demonstrating the punisher's political power, or at the satisfaction of popular sentiment.").

57. Ristroph, *supra* note 1, at 1396. She recognizes, however, that such claims are generally not considered under the Eighth Amendment today. *Id.*

mind, not a focused intent to chastise or deter, that the Court requires in inmate cases.[58]

C. Effects as Punishment?

The scienter critics apparently see their undermining of purposes to chastise and deter as supporting the idea that harsh effects should be enough to qualify as punishment.[59] Focusing on effects means that the objective component of inmate claims would be the central element in determining liability, and scienter requirements could be eliminated in favor of negligence or strict liability standards.

Both Professors Schlanger and Ristroph rely on *Kennedy v. Mendoza-Martinez*[60] to support their claims that effects should suffice.[61] The Court in *Mendoza-Martinez* held unconstitutional a statute that allowed administrative imposition of the loss of citizenship on citizens who departed the United States to avoid military service. The Court held that the loss of citizenship was penal, and thus its administrative imposition inflicted punishment "without affording the procedural safeguard guaranteed by the Fifth and Sixth Amendments" for criminal trials.[62] As to whether such a disadvantage should be considered "penal or regulatory in character,"[63] the Court stated:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on

58. *See supra* notes 46–50 and accompanying text.

59. *See* Dolovich, *supra* note 1, at 905–06 (arguing that the intent to imprison is enough to infer an intent to punish, so harms that occur during confinement should be actionable if they are cruel, without reference to state of mind); *see also* Ristroph, *supra* note 1, at 1358, 1391–94 (discussing scholarship that argues intent is in all events morally irrelevant); Barrozo, *supra* note 7, at 231–32 (explaining a "victim-subjective" conception of cruelty).

60. 372 U.S. 144 (1963).

61. *See infra* notes 65–66 and accompanying text.

62. *Mendoza-Martinez*, 372 U.S. at 165–66.

63. *Id.* at 168.

its face.[64]

Professor Schlanger points out that "promot[ing] the traditional aims of punishment—retribution and deterrence" is only one of many factors, and that other factors are "explicitly about effects, not intent."[65] Professor Ristroph argues that "[t]he doctrine allows, in theory, for a statute's effects to take precedence over its intent."[66]

The *Mendoza-Martinez* factors, however, seem overall directed to ascertaining a legislative intention to punish.[67] The most effects-based language in the Court's opinion is "whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." But even this inquiry appears to be directed toward discerning underlying punitive legislative intent.[68] What is more, the case law on characterizing purportedly noncriminal statutes has adhered closely to intent to punish requirements, as Professor Ristroph herself points out.[69]

III. THE PROPRIETY OF A SCIENTER REQUIREMENT FOR INMATE SUITS EVEN APART FROM PUNISHMENT

The scienter critics believe that by arguing that an intent to chastise or deter is not necessary for an act to constitute punishment, they have cleared the way for standards they believe more appropriate for inmate suits.[70] Malice and subjective deliberate indifference requirements would be reduced to negligence or even strict liability. But even putting aside the premise that punishment requires scienter, the context of incarceration suggests the propriety of scienter requirements. Indeed, the malice standard for excessive force claims largely developed by reference to prison management rather than by reference to "punishment."

In *Johnson v. Glick*, discussed above, Judge Friendly articulated the malice standard in a pretrial detainee excessive force case under the Fourteenth Amendment, famously stating: "The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree

64. *Id.* at 168–69.

65. Schlanger, *supra* note 1, at 387–88.

66. Ristroph, *supra* note 1, at 1372.

67. For example: "whether the behavior to which [a sanction] applies is already a crime." *Mendoza-Martinez*, 372 U.S. at 168. *See also* Ristroph, *supra* note 1, at 1373 (noting courts have generally looked for a legislative punitive intent, but that establishing such intent can be difficult).

68. *Cf.* Ristroph, *supra* note 1, at 1372 (stating that *Mendoza-Martinez* may allow for determination of legislative intent "by a more complex analysis of multiple factors").

69. *See id.* at 1372–73 & nn.82–83.

70. *See supra* notes 24–26 and accompanying text.

of intentional force."[71] Justice O'Connor resorted to the *Glick* standards for convicted prisoner excessive force claims under the Eighth Amendment in *Whitley v. Albers*,[72] a case involving force used to suppress a prison riot. While adverting to punishment as suggesting that more than negligence should be required, she also relied on the "ever-present potential for violent confrontation and conflagration," which had ripened "into *actual* unrest and conflict" in that particular case.[73] In later extending the malice standard to a non-riot situation in *Hudson v. McMillian*,[74] Justice O'Connor stated, "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively."[75] The difference between a reprobated purpose to inflict harm and a permissible purpose to maintain order and discipline is not always a clear one. The Court gave some leeway to corrections officials through scienter requirements, rather than applying a reasonableness standard similar to that used in Fourth Amendment excessive force cases—which do not involve inmates.

Justice Breyer in *Kingsley* departed from the *Whitley* malice standard for pretrial detainees' excessive force claims, in favor of an objective reasonableness standard like that used in Fourth Amendment cases.[76] Pretrial detainee claims, however, are similar to convicted prisoner claims with respect to officials' need to maintain order and discipline.[77] Indeed, the facts of *Kingsley* suggest as much—Kingsley, a pretrial detainee, resisted an order to remove some paper from a light bulb in his cell, leading to a physical altercation when officers removed him from his cell.[78]

Justice Breyer's ground for distinguishing *Whitley*'s standard from the Fourteenth Amendment substantive due process standard was: "The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"[79] But as Professor Schlanger correctly points out, convicted prisoners and pretrial detainees generally are not distinguishable with respect to a no-punishment rationale; putting aside the death penalty for convicted prisoners, corporal punishment such as disciplinary flogging is

71. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
72. 475 U.S. 312, 320–21 (1986).
73. *Id.* at 321 (citation omitted).
74. 503 U.S. 1 (1992).
75. *Id.* at 6.
76. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475–76 (2015).
77. *Cf. id.* at 2474 (highlighting the need to maintain institutional order as relevant).
78. *Id.* at 2470.
79. *Id.* at 2475.

generally forbidden as to all inmates.[80] While Professor Schlanger treats this similarity as a reason to extend the *Kingsley* holding to convicted prisoners,[81] it might just as easily suggest that *Kingsley* was wrongly decided. In short, both with respect to the need to maintain order, as well as with respect to a no-punishment rationale, pretrial detainees and convicted prisoners are similarly situated.

Putting aside excessive force claims, moreover, the requirement of subjective deliberate indifference for episodic conditions claims comports with generally applicable substantive due process standards. Professor Dolovich argues that the context of imprisonment imposes on the state affirmative duties to protect prisoners and that recognizing such affirmative duties should dispense with scienter requirements.[82] No one doubts that the state has affirmative duties toward inmates. For example, neither private persons nor public officers have general duties to protect free persons from nonofficial violence,[83] nor to assure that their serious medical needs are addressed.[84] By contrast, corrections officials are under duties with respect to such harms given the sequestration of prisoners, which entails foreclosing other sources of help.[85]

But just because corrections officials owe affirmative duties to inmates does not answer the question of whether scienter should be required to make out a violation of those duties. On the one hand, when general tort law imposes an affirmative duty, the duty is generally one of reasonableness.[86] But constitutional violations are distinguishable from tort law, and the overall direction of the Supreme Court's jurisprudence as to executive official liability for episodic deficiencies has separated torts from constitutional violations by requiring more than negligence. In *County of Sacramento v. Lewis*[87]—a case involving a death resulting from a high-

80. Schlanger, *supra* note 1, at 431–32 ("[N]either pretrial detainees nor post-conviction prisoners can lawfully be subjected to any corporal punishment . . . .").

81. *Id.* at 425 ("American jail and prison officials do not distinguish between pretrial detainees and convicted prisoners, in either conditions-of-confinement or use-of-force policy. The Constitution is best read to do the same.").

82. Dolovich, *supra* note 1, at 945 (arguing that the actual knowledge standard is underinclusive, and that "[t]o 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").

83. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

84. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316–18 (1980) (holding that Congress was not required to provide funds for medically necessary abortions to indigent women).

85. *Cf.* Dolovich, *supra* note 1, at 915 (prisons create dangerous circumstances); Schlanger, *supra* note 1, at 418 ("Jail and prison render inmates unable to protect themselves without state participation . . . .").

86. *See* WILLIAM L. PROSSER, THE LAW OF TORTS 343–48 (4th ed. 1971).

87. 523 U.S. 833 (1998).

speed chase—Justice Souter reasoned that constitutional violations by executive officials generally require more than negligence, because "our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[88] Accordingly, non-prisoner suits for constitutional liability against officers for third-party violence require—in addition to special factors giving rise to an affirmative duty (such as creating the danger)—a showing of deliberate indifference to a risk of which the officer was actually aware.[89] And the line of cases associated with *Parratt v. Taylor*,[90] involving episodic injuries to property and bodily integrity by state and local officials, has required proof of something more than negligence, based on the idea that constitutional violations should generally cover more aggravated situations than ordinary tort law violations.[91]

The substantive due process cases, however, may suggest that scienter requirements should be less important in general conditions cases. As *County of Sacramento v. Lewis*[92] pointed out, scienter is more often required for substantive due process claims concerning random executive acts than it is for legislation.[93] Ongoing conditions or practices may be more analogous to legislation than to episodic executive actions. But the intuition that objective elements should be the primary concern in general conditions claims may be less because scienter is not required in such cases, than

88. *Id.* at 848–49 (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)); *see also id.* at 848 ("In *Paul v. Davis*, 424 U.S. 693, 701 (1976), . . . we explained that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'"); Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). In *Youngberg v. Romeo*, 457 U.S. 307 (1982), a case involving an involuntarily committed patient at a state hospital, the Court distinguished prisoner cases, *id.* at 321–22, and discussed a duty to provide reasonable safety to such patients, *id.* at 319. The Court, however, also required more than negligence to establish liability as to determinations regarding treatment or habilitation. *Id.* at 323 ("[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible actually did not base the decision on such a judgement.").

89. *See* Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1187–88 (2005) (stating that the circuits articulate the state-of-mind requirements as "'deliberate indifference,' 'willful disregard for the safety of the plaintiff,' or 'reckless' action in 'conscious disregard of [the] risk,' that, when viewed in total, shocks the conscience").

90. 451 U.S 527 (1981). Inmates were plaintiffs in many of these cases. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984); Davidson v. Cannon, 474 U.S. 344 (1986).

91. Daniels v. Williams, 474 U.S. 327 (1986) (holding that prison official negligence did not constitute a deprivation for purposes of the Due Process Clause); Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 674 (1998) (claiming the Court was motivated by federalism concerns as well as concerns about trivializing constitutional rights).

92. 523 U.S. 833 (1998).

93. *See id.* at 846 ("[C]riteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.").

because it may generally be implicit.[94] This is because officials will generally be aware of, or can be made aware of, ongoing systemic failures to meet basic human needs.

IV. SYSTEMIC HARMS VERSUS INDIVIDUAL HARMS

Scienter critics also argue that emphasis on scienter inappropriately treats systemic problems as individual wrongs of identifiable officials.[95] Of course, injunctive claims challenging general conditions such as overcrowding raise systemic problems. And as noted above, scienter might be seen—not so much as irrelevant to such constitutional violations—as readily inferable from ongoing systemic conditions. The scienter critics, however, do not necessarily want to separate systemic conditions cases from episodic cases.[96] They claim that even episodic conditions and uses of excessive force can be seen as systemic.[97] To focus on the mental states of individual officers, they argue, fails to recognize that almost all harms to prisoners are "traceable to state-created conditions of confinement."[98] Individual fault, they claim, is not particularly relevant to liability determinations.[99] Rather, liability should readily attach to any significant harms that occur to inmates during their confinement. Indeed, Professor Dolovich indicates that under her strict liability regime, it would not much

94. *Cf.* Wilson v. Seiter, 501 U.S. 294, 300–01 (1991) (rejecting a distinction between short and long term conditions for purposes of scienter) ("The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent, but there is no logical reason why it should cause the *requirement* of intent to evaporate."); *id.* at 300 (noting the petitioner's acknowledgment that an accidental boiler malfunction would not provide a basis for a claim); Glidden, *supra* note 54, at 1860–61 (arguing that in injunctive actions addressing conditions, intent should be inferable from "persistent inaction"). In addition, prisoners sometimes join general and particular claims as well as damages and injunctive claims. *See Wilson*, 501 U.S. at 296 (plaintiff sought compensatory and injunctive relief).

95. *See supra* note 10.

96. While Professor Dolovich at points distinguishes micro and macro conditions, she ultimately appears to prefer treating all serious harms as more or less systemic. Dolovich, *supra* note 1, at 942–43, 945; *cf.* Schlanger, *supra* note 1, at 431 (beginning with the premise that all post-conviction conditions count as punishment).

97. Ristroph, *supra* note 1, at 1403–04 (considering whether state-of-mind requirements might be appropriate in specific conditions and excessive force cases, but suggesting that one should not give moral weight to intentions); *id.* at 1399 (arguing against a focus on punitive intent, because "punishment is . . . a complex set of practices that involve a wide array of actors and institutions").

98. Dolovich, *supra* note 1, at 908.

99. *Id.* at 893 (claiming that cruel conditions represent "not personal but *institutional* cruelty, which arises when an institution by its design and operation inflicts unnecessary and avoidable harm"); *cf.* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1864 (2015) (criticizing the deliberate indifference standard used in conditions cases as overly individualistic and insufficiently institutional).

matter who was named as defendant—the officer or prison administrators—even though liability would still be imposed under 42 U.S.C. § 1983.[100]

It is certainly possible to look at even episodic events through a systemic lens, as these critics do. Incarceration lends itself to such a perspective, given the more pervasive state control in prisons and jails than in the free world.[101] What is more, even episodic defaults of corrections officials might often be traced to failures of funding, staffing, training, or ethos. But if episodic harms to inmates can largely be attributed to an underfunded and understaffed system, it may be all the more appropriate to require scienter as a prerequisite for holding individuals liable for damages judgments.[102] Our civil rights liability system, moreover, operates under traditional rule-of-law notions that individuals are responsible for their own wrongdoing. If courts are going to hold an individual liable, and particularly for damages, the legal system appropriately requires that the individual have the requisite fault for a violation.[103]

Scienter critics point to widespread indemnification of officers by their government employers as alleviating concerns for individual defendants' being held liable for damages.[104] Even if one assumes pervasive indemnity, however, one can hardly think that being sued and held liable as an individual for a constitutional violation is a matter of indifference to defendant officials—in terms of time, reputational harm, job security, and

100. Dolovich, *supra* note 1, at 970 (reasoning that "so long as the causation requirement is satisfied, it should not matter which defendants plaintiffs sue"); *id.* at 937–38 (claiming § 1983 liability is appropriate because cruelty is "manifested most immediately by the inflicting officer, who acts on behalf of the state and is the necessary vehicle for any state action" (footnote omitted)). *See also id.* at 939 (arguing that § 1983 liability importantly focuses on the specific actions that caused harm).

101. *See, e.g.*, Lisa Kerr, *How the Prison is a Black Box in Punishment Theory*, 69 UNIV. OF TORONTO L.J. 85, 95 (2019) (calling prisons "total institutions" (citing ERVING GOFFMAN, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961))).

102. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (stating that "good-faith immunity would bar liability" if budgetary constraints prevented a professional from meeting "normal professional standards").

103. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 94–96 (1989) (arguing that both causation and fault are essential to a corrective justice basis for awarding damages); Ristroph, *supra* note 1, at 1403 (while criticizing scienter requirements, noting that "[o]ne could make consequentialist, expressivist, and character-based arguments in support of the claims that prison officials' intentions are relevant to constitutional analysis"); *cf.* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 242 (2013) (stating that damages are "ordinarily not a constitutionally required remedy for constitutional violations"); *id.* at 259, 262–63 (in the context of qualified immunity decisions, arguing for a standard considering whether the defendant's actions were unreasonable in the sense that they were "clearly unconstitutional").

104. *See* Schlanger, *supra* note 1, at 435 (stating that qualified immunity and universal indemnity render the prospect of "unfair monetary assessments against innocent officials . . . extremely implausible"); *cf.* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 579 (2020) (concluding that individual Bureau of Prisons officials rarely contribute to payments of settlements and judgments); Dolovich, *supra* note 1, at 938 n.227 (favoring indemnity, given that prison problems are systemic).

even inmate taunting.[105] For the scienter critics, however, individual liability may largely be a way to impose costs on the system.[106] Of course, it is possible that more lenient standards of proof for damages that will ultimately be paid by the government would translate into greater funding for prisons and jails, leading to the more systemic reforms that the scienter critics aim for. Nevertheless, a better way to achieve systemic reform would likely lie in injunctive cases addressing systemic conditions.[107] And in such cases, the court's subjective standards likely are not the main barrier to reform, as discussed below.

V. THE EFFECT OF SCIENTER ON OUTCOMES

Scienter critics also claim that the subjective standards put an almost impossible burden on inmate plaintiffs' ability to succeed in constitutional litigation against corrections officials.[108] For example, one critic stated that, "Whatever transpires in the nation's prisons, the officials involved can nearly always claim that they did not intend for the harm to occur. The burden to prove otherwise is on the prisoner plaintiff, and it is a nearly impossible burden to meet."[109] Another said that the Court's scienter requirements have "radically undermined prison officials' accountability for tragedies behind bars."[110] Lowering the standard for liability will presumably allow more prisoners to prevail and improve conditions in prisons and jails.

105. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 848 (2010) ("Lawsuits can deter in nonmonetary ways, of course, by educating wrongdoers, creating stigma and adverse publicity, or causing personal offense."); Armacost, *supra* note 91, at 669 (arguing that "individual damages liability for constitutional violations serves a role that is analogous to the moral blaming function of criminal law"); Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1567–58 (2018) (expressing doubt about bureaucrats' sensitivity to financial penalties, but noting that "[t]ort and habeas litigation . . . impose nonpecuniary costs upon defendants related to lost time and damaged reputation"); *see also* Reinert, *supra*, at 850 & nn.185–86 (indicating that the indemnification standard for federal officials is generally premised on whether indemnification "is in the interests of the United States").

106. *See* Dolovich, *supra* note 1, at 938 n.227.

107. *Cf.* Metzger, *supra* note 99, at 1917–18 (indicating that *Bivens* actions are not a promising avenue for expanding supervisory liability, and that incorporating such liability "would entail a fundamental reorientation of *Bivens* actions" (citing Reinert, *supra* note 105, at 846–50)).

108. Schlanger, *supra* note 1, at 434 (agreeing with the concurrence of Justice White in Wilson v. Seiter, 501 U.S. 294, 311 (1991), that making constitutional liability turn on individual officials' states of mind means "serious deprivations of basic human needs" will go unredressed).

109. Ristroph, *supra* note 1, at 1404; *id.* at 1357 ("[T]he mental state of a particular prison official, can usually be presented at the time of litigation in a way that avoids constitutional offense."); *cf.* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2039–42 (2018) (arguing that "exacting mens rea requirements" are among the factors that make winning prison cases difficult); *id.* at 2058 ("[P]ractical and qualified immunity provide jail officials with an ironclad defense in nearly every case.").

110. Schlanger, *supra* note 1, at 360.

The area in which scienter requirements seem most subject to criticism is general conditions cases in which plaintiffs seek injunctive relief; these are also the cases that may have the most promise of improving conditions. It is not clear, however, that the deliberate indifference standard has had much impact on the success of such cases. To the extent scienter in general conditions cases imposes a burden on plaintiffs to show that higher level officials had knowledge of an institution's failure to meet basic human needs, such proof will generally be available. Plaintiffs and their attorneys can themselves assure that such knowledge exists by informing officials in writing of ongoing problems. Indeed, Professor Schlanger herself characterized the scienter requirements in general conditions cases as a complicating factor, but "hardly insurmountable."[111]

This is not to say that those bringing conditions cases have an easy time of it, but this may largely be due to a number of other hurdles that the Court and Congress have imposed.[112] The objective requirements for general conditions cases are high; the Court in *Rhodes v. Chapman*[113] required plaintiffs to point to specific defects affecting basic human needs.[114] What is more, the Prison Litigation Reform Act's[115] presumptive two-year limitation on injunctions means that fewer prisons will remain under injunctive decrees, even when plaintiffs have previously succeeded in obtaining relief.[116] The PLRA also has limitations on attorneys' fees, making inmate cases generally less attractive to lawyers.[117] In summary, the

111. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 617 (2006); *see also* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 191 (2020) (claiming that in prison cases seeking injunctions, "courts tend to focus on whether the defendant named in his or her official capacity has the ability to correct the violation, not whether the named defendant has the knowledge or intent sufficient to demonstrate deliberate indifference"); Glidden, *supra* note 54, at 1817 ("When a harmful condition is ongoing, many courts also seem to infer intent on the part of prison defendants since the officials are willing to allow the conditions to persist.").

112. *Cf.* Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301, 345, 349 (2016) (suggesting that subjective requirements may not be the main cause of limited prisoner rights, and pointing to the fact that rights can be defeated by contrary interests, as in the case of allowing supermax prisons).

113. 452 U.S. 337 (1981).

114. *See id.* at 347; Schlanger, *supra* note 111, at 555, 602 (conditions litigation remains stronger than conventional wisdom assumes, although decrees have become more precise); *id.* at 605 (attributing greater precision in public law prison cases in part to the increasing sophistication of plaintiffs' counsel); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1420 (2007) (requiring more rigorous proof for public law decrees is not necessarily undesirable).

115. 110 Stat. 1321, 1321-66 to 1321-77 (1996).

116. 18 U.S.C. § 3626(b) (2000); *see* Schlanger, *supra* note 111, at 591 (stating that this provision "both shrank the stock of old orders and slowed the flow of new ones").

117. 42 U.S.C. § 1997e(d) (2000); *see* Schlanger, *supra* note 111, at 593–94; *cf. id.* at 592–93 (also discussing problems with administrative exhaustion requirements, although indicating that lawyers' involvement mitigates the problems in general conditions cases).

knowledge requirement may not be a significant cause of the difficulties in pursuing general conditions cases when compared to other legal obstacles.

Nevertheless, state-of-mind requirements pose greater hurdles for episodic claims, where a plaintiff will need to show evidence of scienter with respect to a discrete past event, rather than as to ongoing systemic conditions. If the standard was merely negligence (or strict liability), the claims would be easier to prove. But one might get the impression from reading the scienter critics that such cases never make it beyond summary judgment motions.[118]

Scienter, however, often presents factual questions that preclude summary judgment.[119] In Eighth Amendment excessive force cases, for example, presenting sufficient evidence of malice to avoid summary judgment is by no means impossible. Plaintiffs are allowed to use circumstantial evidence to prove malice inferentially, such as by showings of repeated tasing[120] or continued immobilization of an inmate for an extended period after the threat has ceased.[121] Courts have also treated evidence that officers perceive a prisoner as recalcitrant or annoying as evidence of malice.[122]

What is more, scienter requirements may lower qualified immunity hurdles. Overcoming qualified immunity ordinarily requires that the defendant's acts were not just unconstitutional, but clearly unconstitutional at the time the defendant acted—usually shown by closely analogous decisional law at the time the officer acted.[123] Professor Armacost has

118. *See* Ristroph, *supra* note 1, at 1382 ("It is almost always judges rather than jurors who make factual findings about what prison officials intended."); *id.* at 1380 n.120 (claiming judges in qualified immunity determinations "end up effectively deciding the factual questions, including those concerning the official's intentions"). *But cf.* Reinert, *supra* note 105, at 843 (finding qualified immunity defenses were the basis of dismissal in only 5 of the 244 *Bivens* cases he studied); *id.* at 844 (suggesting the possibility that a majority of *Bivens* cases involved well-established law for which qualified immunity defenses might not be available).

119. *See, e.g.*, Perry v. Roy, 782 F.3d 73 (1st Cir. 2015) (reversing summary judgment for the defendants, because there were material issues of fact in dispute as to the deliberate indifference of nurses who adopted a wait-and-see attitude that delayed treatment for plaintiff's broken jaw for seventeen hours); *id.* at 80 (noting the factual dispute as to whether the defendants subjectively knew that plaintiff's jaw was broken).

120. Brooks v. Johnson, 924 F.3d 104, 107, 114–16 (4th Cir. 2019) (reversing summary judgment because a reasonable jury could conclude that repeated tasing after a prisoner failed to cooperate in securing a photograph was wanton infliction of pain).

121. Young v. Martin, 801 F.3d 172, 182 (3d Cir. 2015) (reversing grant of summary judgment to defendants where a prisoner was immobilized in a restraint chair for an extended period of time).

122. *See, e.g.*, *Brooks*, 924 F.3d at 115 (officers' noting in the incident report that the plaintiff was disrespectful and threatened to sue officers could be indicative of malice). Courts may also treat the malice requirement as impliedly lowering the injury severity an inmate needs to show in Eighth Amendment excessive force cases. *Cf.* Hudson v. McMillian, 503 U.S. 1, 4, 9–10 (1992) (holding that a lack of serious injury resulting from the plaintiff's being struck while handcuffed did not preclude an Eighth Amendment claim).

123. *See* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1413–15 (2019).

observed, however, that "qualified immunity often drops out of the analysis when the underlying claim requires a showing of bad intent."[124] She concludes that for many claims requiring a showing of deliberate indifference where there seemingly is such intent, including inmate claims concerning medical needs, "the courts have found it unnecessary to ask whether officials had notice that their conduct would likely violate the Constitution or to scour precedent for closely analogous cases."[125] This has also been true in many prisoner excessive force cases,[126] where the need to show closely analogous cases is often lightened.[127]

Despite the scienter requirements, federal courts still see large numbers of inmate cases,[128] and Professor Reinert has presented evidence that they have a higher rate of success than many assumed they would. Reinert looked

124. Armacost, *supra* note 91, at 591; Struve, *supra* note 7, at 1074–75 (finding that "[a]t least some courts have held that, when the Eighth Amendment excessive force test applies, there is no room for qualified immunity," and thus suggesting that an objective standard for pretrial detainee claims would not be discontinuous with Eighth Amendment standards).

125. Armacost, *supra* note 91, at 641–43 (and citing cases). *But cf. id.* at 644–45 (noting cases where conduct did not carry its own indicia of fault such that "analogous precedent [was] necessary to ensure that only culpable officials are exposed to liability," such as cases involving inmates' refusing antipsychotic drugs).

126. Thompson v. Commonwealth, 878 F.3d 89, 106 (4th Cir. 2017) ("For claims where intent is an element, an official's state of mind is a reference point by which she can reasonably assess conformity to the law because the case law is intent-specific."); Skrtich v. Thornton, 280 F.3d 1295, 1301 (11th Cir. 2002) ("In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution . . . ."). *But cf.* Henry v. Dinelle, 929 F. Supp. 2d 107, 128 (N.D.N.Y. 2013) (indicating a jury finding of malicious use of force was not irreconcilably inconsistent with a jury finding that the force was objectively reasonable, which entitled the officers to qualified immunity).

127. *Thompson*, 878 F.3d at 103 (although there were not many cases addressing rough rides, "there [was] a clear consensus among the circuits . . . that infliction of pain and suffering without penological justification violates the Eighth Amendment in an array of contexts"); *Brooks*, 924 F.3d at 119 (indicating the use of force in bad faith was clearly established as an Eighth Amendment violation); *cf.* Furnace v. Sullivan, 705 F.3d 1021, 1028 (9th Cir. 2013) (determining that reference to analogous cases involving the allegedly excessive use of pepper spray was not required); Perez v. Cox, 788 F. App'x 438 (9th Cir. 2019) (denying qualified immunity despite a prior Ninth Circuit decision approving the use of birdshot to control inmates). *But cf.* McCoy v. Alamu, 950 F.3d 226 (5th Cir. 2020) (holding that an isolated single use of pepper spray did not clearly cross over the de minimis line and therefore that the officer was entitled to qualified immunity); *id.* at 235–36 (Costa, J., dissenting) (arguing that an unprovoked use of force violates clearly established law).

128. The statistics for the year ending September 30, 2019, show 19,350 prisoner "civil rights" filings and an additional 10,095 filings for "prison conditions." *See* ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-2. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_c2_0930.2019.pdf [https://perma.cc/3ATM-3HH4]. This represents approximately 10% of the total 297,877 suits commenced in the district courts. *Id.*; *see also* Reinert, *supra* note 6, at 818–19 n.1 (referring to comparable statistics for 2013). Civil rights suits would include some types of cases not discussed in this Essay, such as procedural due process cases. *See supra* note 2. The legislative history of the PLRA reveals past concerns about inmates' filing too many meritless suits. *See, e.g.*, H.R. REP. NO. 104-667, at 21–23 (1995) (House Judiciary Committee Report on the related bill: Violent Criminal Incarceration Act of 1995).

at success rates for *Bivens* claims[129]—constitutional claims for damages against federal officers—in five federal districts during the period from 2001 to 2003.[130] The cases included a large number of prison conditions damages claims, particularly in two of the districts.[131] After excluding cases that district courts dismissed sua sponte for frivolousness, the success rate for prisoner suits was 26.1%.[132] Previous estimates for § 1983 prisoner-case success by Professor Schlanger and Professors Schwab and Eisenberg ranged from 15 to 18%,[133] which Reinert opined would have been higher had the sua sponte dismissals been excluded.[134] In addition, Schwab and Eisenberg indicated that in counsel-filed cases, prisoners succeeded in 53% of cases, which was comparable to success rates of 56% for non-prisoner constitutional tort claimants.[135]

It may be that the prisoner damages claims succeed primarily in aggravated cases. But as Professors Jeffries and Rutherglen have stated, "Money damages are most likely to prove effective against extreme or egregious constitutional violations" under current doctrine, which perhaps "should be true."[136] They cite to the desirability of a fault standard, to concerns about overdeterrence, and to possible inhibition of constitutional change.[137] In a similar vein, Professor Armacost has observed that "limiting constitutional damages liability to cases involving truly blameworthy conduct may best preserve the moral force of such liability."[138]

129. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court recognized an implied right of action under the Fourth Amendment against federal law enforcement officers. Such implied constitutional actions are used for Eighth Amendment and Fifth Amendment inmate claims against federal officers. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (allowing an implied damages action under the Eighth Amendment for an alleged failure to address serious medical needs).

130. Reinert, *supra* note 105, at 832.

131. *Id.* at 836.

132. *Id.* at 841 n.154.

133. *Id.* at 829 (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 732–33 (1988)).

134. Reinert, *supra* note 105, at 842–43.

135. *Id.* at 830 & n.109 (citing Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987), which analyzed data from the Central District of California).

136. Jeffries & Rutherglen, *supra* note 114, at 1405.

137. *Id.* at 1403–04; *cf. id.* at 1404–05 (recommending that damages remedies be tailored to specific rights violated).

138. Armacost, *supra* note 91, at 680; *id.* at 679 ("The notion that section 1983 liability entails some level of moral stigma also suggests an argument against the conventional view that more constitutional damages liability is necessarily better . . . .").

CONCLUSION

The scienter critics argue that the Court has based its state-of-mind requirements on a mistaken notion that, for an action to constitute punishment, it must necessarily involve a purpose to chastise or deter. Intentions to chastise and deter, however, remain central to the concept of punishment, and reference to other purposes of punishment does not suggest dispensing with a culpable state-of-mind requirement in inmate suits against corrections officials. Scienter requirements, moreover, may be justified apart from notions of punishment—by the need to maintain order in prisons and to distinguish constitutional violations from ordinary torts. State-of-mind requirements, moreover, do not pose the impenetrable barrier to liability that critics claim. This is particularly true in systemic conditions cases—the cases that have the most promise of improving the lives of inmates.