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Ensuring That Punishment Does, in Fact, Fit the Crime

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ENSURING THAT PUNISHMENT DOES, IN FACT, FIT THE CRIME

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ABSTRACT

"When the prison gates slam behind an inmate, he does not lose his human quality; . . . his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment."

Justice Thurgood Marshall, Procunier v. Martinez[1]

The United States imprisons a greater proportion of its own population than any other country in the world.[2] *A legal framework provides protections for those individuals who are incarcerated, but that framework is flawed. The jurisprudence distinguishes pretrial detainees (who have not been convicted) from convicted persons (who are serving a sentence).*[3] *Based on that distinction, different standards apply to conditions of confinement and use of force cases brought by pretrial detainees and those brought by convicted persons.*[4] *That distinction–and the resulting disparate application of legal standards–does not comport with the reality of incarceration, the concept of punishment, or the principle that the Constitution still applies behind bars. This Note argues that, as Justice Thomas has long believed, the Eighth Amendment, properly understood, covers only the specific sentence declared by a sentencing court. Beyond that specific sentence, a convicted person has a substantive due process right to be free from unsanctioned punishment; and therefore, any of his claims should be governed by the more protective due process standard that pretrial detainees enjoy.*

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1. 416 U.S. 396, 428 (1974) (concurring).

2. John Gramlich, *America's Incarceration Rate is at a Two-Decade Low*, PEW RESEARCH CENTER (May 2, 2018), http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/.

3. Bell v. Wolfish, 441 U.S. 520, 535–36 (1979).

4. *Id.*

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I. INTRODUCTION

The United States incarcerates over two million people, including many who have not yet been convicted of a crime.[5] The Constitution protects each one of those individuals while he is incarcerated, ensuring that he is not subjected to unconstitutional conditions of confinement or uses of force. However, the current constitutional regime implements different levels of protection for pretrial detainees (who have not been convicted of a crime for which they are detained) and convicted persons (who are serving a criminal sentence).[6] This discrepancy is inconsistent with the reality of incarceration, the concept of punishment, and the principle that the Constitution still applies behind bars. This Note proposes that, as Justice Thomas has consistently argued, the Eighth

5. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, *Correctional Populations in the United States, 2016* (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf (reflecting the most recent data available).

6. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535–36, 537 (1979).

Amendment applies only to whatever terms are explicitly spelled out in an individual's sentence. Justice Thomas's argument is right, but it actually results in more protection for those behind bars. Beyond what is explicitly spelled out in their sentences, convicted persons should be understood to enjoy the substantive due process right of "freedom from punishment"–or freedom from anything that would constitute punishment that was not explicitly sanctioned by the sentencing court.

Part II outlines the constitutional framework that applies to incarcerated individuals, both those not yet convicted and those serving sentences. Part III details the problematic nature of the current framework, explaining how the doctrine creates and fuels an illogical distinction between pretrial detainees and convicted persons that has detrimental constitutional and practical ramifications. Part IV proposes a new regime that would remedy these problems: narrowing the scope of the Eighth Amendment and applying substantive due process to govern use of force and conditions of confinement claims.

II. BACKGROUND & CURRENT REGIME

A. The Constitution, Behind Bars

Even when incarcerated, an individual still has constitutional rights: "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[7] Individuals who are incarcerated retain protections of the First Amendment, Fifth Amendment, Fourth Amendment, Fourteenth Amendment, and other provisions.[8]

Though incarceration does not extinguish these constitutional rights, it may limit them.[9] Such limitations are permissible as long as they are reasonably related to legitimate penological interests.[10]

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7. Wolff v. McDonald, 418 U.S. 539, 555–56 (1974).

8. Cruz v. Beto, 405 U.S. 319, 322 (1972); Sandin v. Connor, 515 U.S. 472, 483–84 (1995) (explaining that prison regulations can create a protected liberty interest); *see also* Wilkinson v. Austin, 545 U.S. 209, 221–22 (2005); Peckham v. Wisconsin Dep't. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) (acknowledging, however, that most searches and seizures would be considered reasonable in the prison context); Lee v. Washington, 390 U.S. 333, 333 (1968).

9. *Wolff*, 418 U.S. at 555–56.

10. Turner v. Safley, 482 U.S. 78, 89 (1987).

Individuals who are incarcerated can assert their general constitutional rights that may be limited by incarceration, but they can also challenge constitutional violations specifically relating to their incarceration. There are two main categories of litigation regarding life in prison: use of force by prison officials and conditions of confinement.[11] "Use of force litigation" addresses physical force exerted by state officials,[12] while "conditions of confinement litigation" addresses medical care, sanitation, levels of overcrowding, violence perpetrated by other incarcerated individuals, extreme solitary confinement, and more.[13] The following sections examine the different standards applied to different types of plaintiffs in prison cases.

B. Pretrial Detainees

Pretrial detainees frequently sue regarding harms experienced during incarceration. Though there is some debate about when seizure (governed by the Fourth Amendment) ends and pretrial detention begins,[14] courts generally consider pretrial detainees to

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11. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 363–64 (2018).

12. *Cf. id.*

13. *See, e.g.*, *id.*; Estelle v. Gamble, 429 U.S. 97 (1976) (considering the quality of medical care to be a condition of confinement for the purpose of Eighth Amendment analysis); Boswell v. Sherburne County, 849 F.2d 1117, 1122 (8th Cir. 1988) (finding a genuine dispute of material fact about whether a jail official's treatment of a pregnant pretrial detainee's medical needs violated her due process rights); DeSpain v. Uphoff, 264 F.3d 965, 974–75 (10th Cir. 2001) (holding that exposure to human waste violated the convicted person's Eighth Amendment rights); Stickley v. Byrd, 703 F.3d 421, 423 (8th Cir. 2013) (holding that the limited provision of toilet paper to a pretrial detainee did not amount to punishment and therefore did not violate his due process rights); Johnson v. Levine, 588 F.2d 1378, 1380–81 (4th Cir. 1978) (holding that overcrowding can constitute a constitutional violation); Jordan v. Wolke, 615 F.2d 749, 753 (7th Cir. 1980) (confirming that pretrial detainees' rights were not abridged by alleged overcrowding but acknowledging that overcrowding can amount to "punishment" and therefore violate pretrial detainees' due process rights); Haley v. Gross, 86 F.3d 630, 640–41 (7th Cir. 1996) (holding that prison officials' failure to protect an individual from attack by allowing the attack to occur may constitute an Eighth Amendment violation); Richko v. Wayne County, Mich., 819 F.3d 907, 915 (6th Cir. 2016) (explaining that pretrial detainees have a due process right to be protected from violence at the hands of other incarcerated people); Kelly v. Brewer, 378 F. Supp. 447, 452–53 (N.D. Iowa 1974) (explaining that solitary confinement, with more, can constitute an Eighth Amendment violation); Magluta v. Samples, 375 F.3d 1269, 1275–76 (11th Cir. 2004) (holding that plaintiff's specific allegations of extreme solitary confinement, if true, would constitute a violation of due process). It is important to note that although the line between "use of force" and "conditions of confinement" can blur, Schlanger, *supra* note 11, at 365, this shorthand provides a useful, albeit simplified, way to understand the courts' doctrinal approach to these types of cases.

14. Erica Haber, Note, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on when Seizure Ends and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y. L. SCH. J. HUM. RTS 939, 948–50 (2003); *see also* Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 823–24 (1990).

be those lawfully detained but not yet convicted of the alleged crime for which they have been detained.[15] Because pretrial detainees have not yet been convicted of their alleged crimes, they cannot be punished (through use of force or conditions of confinement) by the state.[16]

Under *Kingsley v. Hendrickson*, force against pretrial detainees is unlawful if the force is (1) itself purposeful, knowing, or reckless; and also (2) objectively unreasonable.[17] As a threshold matter, the plaintiff must show that the officer used force knowingly or purposefully.[18] Otherwise, the Court explains, "if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim."[19] After making the preliminary determination that the force was intentional, a court must then determine whether the force was objectively reasonable, considering the circumstances from the officer's perspective at the time of the incident.[20] Several factors can contribute to this determination, including but not limited to

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.[21]

The standard governing conditions of confinement for pretrial detainees is based on the same fundamental principle: pretrial detainees cannot be punished.[22] In *Bell v. Wolfish*, the Court reasoned that any condition amounting to "punishment" violates pretrial detainees' constitutional right to due process because they have not yet been convicted of a crime.[23] Any condition that is subjectively intended as punishment or that is not reasonably related to a legit-

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15. *See, e.g.*, Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).
16. Bell v. Wolfish, 441 U.S. 520, 536 (1979). This protection arises from the Constitution's Fifth and Fourteenth Amendments' guarantees of due process. *See id.* at 532–33 (explaining that it is substantive due process, rather than the presumption of innocence, that protects pretrial detainees from punishment).
17. *Kingsley*, 135 S. Ct. at 2472–73.
18. *Id.*
19. *Id.* at 2472.
20. *Id.* at 2472–73.
21. *Id.* at 2473.
22. Bell v. Wolfish, 441 U.S. 520, 535–37 (1979).
23. *Id.* at 535–36.

imate governmental objective is considered to be punishment.[24] Justice Rehnquist explained that legitimate government objectives may include, but are not necessarily limited to, ensuring the pretrial detainee is present at trial, maintaining security, and keeping order at the jail or facility.[25]

C. Convicted Persons[26]

Unlike pretrial detainees, convicted persons are those currently serving a sentence for crimes of which they have been convicted. Convicted persons "may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment."[27] In its inception, the Eighth Amendment was targeted at torture and other "physically barbarous punishments."[28] However, in the early twentieth century, the Supreme Court began to apply the Eighth Amendment's prohibition on cruel and unusual punishment to punishments that contravene "the evolving standards of decency that mark the progress of a maturing society."[29] Ultimately, the Eighth Amendment was extended by the Supreme Court to regulate not only the sentences given out by

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24. *Id.* at 538–39.

25. *Id.* at 540.

26. In this Note, I will refer to individuals who have been convicted of crimes and are serving sentences for those convictions as "convicted persons." Although much of the existing scholarship refers to this population as "prisoners" or "inmates," *see, e.g.*, Dianna L. Nelson, Hudson v. McMillian*: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force against Prison Inmates*, 71 N.C. L. REV. 1814 (1993); Jordan A. Shannon, Note, *Reasonableness as Corrections Reform in Kingsley v. Hendrickson*, 62 LOY. L. REV. 577 (2016), that language is perniciously reductive, confining the identity of convicted persons solely to their crime and punishment. *See* Khalil Cumberbatch, Letter to the Editor, *"I Remember when I First Heard the Term 'Inmate.' It Was Used to Describe Me."*, THE MARSHALL PROJECT, Apr. 1, 2015, https://www.themarshallproject.org/letters/387-khalil-cumberbatch-letter-i-remember-when-i-first-heard-the-term ("I remember when I first heard the term 'inmate' . . . I recall feeling violated. It was the first time in my life that someone used a term—to my face—to describe me in a way that dehumanized me on so many levels."); Tina Reynolds, *Glossary of Terms*, in INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES 26–27 (Rickie Solinger et al. eds., 2010); Eddie Ellis, founder-director, Center for NuLeadership on Urban Solutions, *An Open Letter to Our Friends on the Question of Language*, https://cnus.squarespace.com/language-letter-campaign/ (click on the hyperlinked phrase "our letter to partners and allies") (last visited Oct. 8, 2018). In order to properly understand what is at stake in answering these legal questions, the language used in these discussions must conceptualize "prisoners" as *people*.

27. *Bell*, 441 U.S. at 535 n.16.

28. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

29. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); *see also* Weems v. United States, 217 U.S. 349, 373 (1910). Note, Weems interpreted the Philippine Bill of Rights, which prohibited cruel and unusual punishment and was considered to have the same meaning as the Eighth Amendment to the United States Constitution. *Weems*, 217 U.S. at 367. Thus, it carries precedential value in U.S. Eighth Amendment jurisprudence. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) (citing *Weems*).

courts, but also the use of force against and the conditions of confinement experienced by convicted persons.[30] For anything beyond the fact of incarceration, specifically use of force and conditions of confinement, only the "unnecessary and wanton infliction of pain" constitutes an Eighth Amendment violation.[31]

In *Whitley v. Albers*, the Supreme Court declared that use of force against a convicted person is only unlawful, or unnecessary and wanton, when it is done "maliciously and sadistically for the very purpose of causing harm."[32] Thus, a subjective intent requirement was born.[33] However, courts may consider other factors when evaluating intent, including the necessity of force, the proportionality of force used to the degree of necessity, any resulting injury to a convicted person, and any efforts to lessen the force used.[34] Though the degree of a convicted person's injury can be a factor in determining whether the force was malicious and sadistic, a convicted person does not have to suffer a serious injury to suffer a violation of his or her Eighth Amendment right.[35]

Estelle v. Gamble, one of the first conditions of confinement cases heard by the Supreme Court,[36] held that subjective intent, which can be shown by proving deliberate indifference, was also necessary to prove an Eighth Amendment violation due to prison conditions (in that case, a lack of medical care).[37] Further cases continued to develop the doctrine, requiring both an objective showing and a subjective showing to prove that prison conditions violate the Eighth Amendment.[38] First, the deprivation caused by the conditions must be objectively "sufficiently serious."[39] Second, "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."[40] This "mental element," or deliberate indifference to prison conditions, occurs only

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30. *E.g.*, Whitley v. Albers, 475 U.S. 312, 322 (1986); *Estelle*, 429 U.S. at 102. Note, the Eighth Amendment also limits state, as well as federal, power, by virtue of incorporation in the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962).

31. Ingraham v. Wright, 430 U.S. 651, 669–670 (1977) (citations omitted).

32. *Whitley*, 475 U.S. at 320–21.

33. *See* Schlanger, *supra* note 11, at 377–78 (explaining the subjective intent requirement in the context of efforts to retake prisons during riots).

34. *Whitley*, 475 U.S. at 320–21.

35. Hudson v. McMillian, 503 U.S. 1, 4 (1992).

36. Schlanger, *supra* note 11, at 369-70.

37. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

38. *E.g.*, Wilson v. Seiter, 501 U.S. 294, 298 (1991); Helling v. McKinney, 509 U.S. 25, 36 (1993); Farmer v. Brennan, 511 U.S. 825, 835 (1994).

39. *Wilson*, 501 U.S. at 298 ("The Constitution, we said, 'does not mandate comfortable prisons,' and only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.") (citing Rhodes v. Chapman, 452 U.S. 337, 349, 347 (1981)).

40. *Wilson*, 501 U.S. 199; *see also Farmer*, 511 U.S. at 837.

when a prison official (1) is actually aware of "an excessive risk to inmate health or safety" and (2) disregards that risk.[41]

III. CONSEQUENCES OF THE CURRENT REGIME

A. The Status Quo: An Untenable Distinction

The standards governing use of force and conditions of confinement for pretrial detainees, grounded in due process rights, differ significantly from the standards used for convicted persons, which are grounded in the Eighth Amendment.[42] This creates an untenable divide between pretrial and post-conviction individuals that ignores the constitutional rights of convicted persons. This divide proves absurd in application.

In 2015, the Supreme Court's decision in *Kingsley* revealed this tension inherent in the doctrinal separation of pretrial and post-conviction individuals.[43] By establishing an objective reasonableness standard for pretrial detainees,[44] in contrast to the subjective standard for convicted persons,[45] *Kingsley* created a pronounced distinction. The practical outcome of this distinction is illogical: a pretrial detainee and a convicted person who are housed in the same institution and who undergo the same exact use of force can have different legal outcomes. Thus, even if the prison official using the force does not know that one is a pretrial detainee and the other is a convicted person, that official could be liable for his actions against the pretrial detainee while escaping liability for his actions against the convicted person.[46] Currently, according to the Supreme Court, the two similarly situated individuals have very different rights.

Examples may illustrate this dichotomy. The following cases have similar fact patterns; however, in one case, the plaintiff is a pretrial detainee, and in the other, the plaintiff is a convicted person. In *Choate v. Arms*, a pretrial detainee "escaped his maximum

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41. *Farmer*, 511 U.S. at 837.
42. *See* discussion *supra* Part II.
43. *See* discussion *supra* Part II.B.
44. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).
45. Whitley v. Albers, 475 U.S. 312, 320–21 (1986).
46. It is also worth noting that an individual can occupy both the status of pretrial detainee and convicted person at the same time: for example, if he or she is serving a sentence and is charged for another crime. This shows that the distinction is not so sound as the Court implies.

security cell and refused to return."[47] When a guard was escorting Choate back to his cell, Choate, handcuffed at the time, turned toward the guard and uttered a profane threat against the guard's family.[48] Believing Choate to pose a security risk, the guard says that he "grabbed [him] and put him against the wall," resulting in Choate "bump[ing] his head" against the wall.[49] Choate, on the other hand, alleges that the guard used more force, choking him and slamming him into the wall.[50] The court denied the defendant's motion for summary judgment, finding that there was a genuine dispute of material fact that, if resolved in the favor of the plaintiff, would constitute a due process violation.[51]

Similarly, in *Brown v. Smith*, a convicted person had a verbal confrontation with guards immediately prior to the incident, in which he resisted returning to his cell.[52] In response, though Brown, the convicted person, claims that he was handcuffed at the time,[53] "guard Smith placed his riot baton against Brown's neck with some degree of force, pinned him against a wall, and that another officer came to assist Smith put Brown back into his cell."[54] The facts in *Brown* are similar to those in *Choate*. In each case, the incarcerated individual had engaged in a verbal confrontation with guards and then resisted moving into a cell. Even so, the outcome was different: in *Brown*, the Eleventh Circuit granted the defendant's motion for summary judgment, finding no genuine dispute of material fact and determining that, even if the allegations were true, Brown had not pled facts that would amount to an Eighth Amendment violation.[55]

The Court roots this doctrinal distinction in the presence or lack of a conviction.[56] In short, if there is a conviction, the Eighth Amendment applies (governing use of force and conditions of confinement with a more lenient standard); if not, substantive due process applies.[57] But as the Court has made clear, "[t]here is no iron curtain drawn between the Constitution and the prisons of

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47. Choate v. Arms, 274 F. Supp. 3d 782, 783 (M.D. Tenn. 2017) (internal quotation marks omitted).
48. *Id.*
49. *Id.* (internal quotation marks omitted).
50. *Id.* at 784.
51. *Id.* at 787.
52. Brown v. Smith, 813 F.2d 1187, 1189 (11th Cir. 1987).
53. *Id.* at 1189 n.3.
54. *Id.*
55. *Id.* at 1189–90.
56. *See, e.g.*, Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475.
57. *See, e.g.*, *id.*

this country."[58] So, why do convicted persons not enjoy the same rights as pretrial detainees?

B. Constitutional Implications

1. "Freedom from Punishment"

The protections afforded pretrial detainees arise not from the presumption of innocence but from their substantive due process right to be "[free] from punishment."[59] On the other hand, the Court implies, convicted persons have no right to be free from punishment.[60] The question of what "freedom from punishment" means depends, of course, on the definition of punishment. The word can have two different meanings: punishment can either be (1) an individual person's sentence for a specific crime (individual punishment) or (2) an entire category of sanctions (category of punishment).[61] The Court's current stance is that a convicted person has no right to be free from the entire category of punishment.[62]

However, that conclusion is illogical. A convicted person undeniably may be punished for his crime, but that wrongdoing should not subject him to the entire category of punishment. Thus, "freedom from punishment" is more precisely described as freedom from punishment *not explicitly sanctioned by the sentencing court*, and convicted persons also enjoy that substantive due process right. Black's Law Dictionary definition of punishment supports this interpretation, asserting that punishment is a "sanction — such as a fine, penalty, confinement, or loss of property, right, or privilege — assessed against a person who has violated the law."[63] If punishment is the finite sentence a court assesses against a defendant, then "freedom from punishment" means "freedom from any punishment beyond that which a court specifically sanctioned as the person's individual punishment." The freedom would thus apply to anything beyond an individual's finite sentence. The current regime fundamentally disregards the important difference between individual punishment and the category of punishment. The resulting doctrine renders each convicted person susceptible to the

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58. Wolff v. McDonald, 418 U.S. 539, 555–56 (1974).
59. Bell v. Wolfish, 441 U.S. 520, 534 (1979).
60. *Id.* at 535 n.16.
61. For clarity, this note will refer to the different types of punishment as "individual punishment" and "category of punishment."
62. *Cf., Bell*, 441 U.S. at 535 n.16.
63. *Punishment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

entire category of punishment, rather than just his or her individual punishment.

A hypothetical provides a useful case study to understand this concept. John Doe was convicted of a crime. His sentence required him to serve ten years in prison and included no other specifications. While in prison, Mr. Doe was subjected to severe overcrowding. Under the current regime, the overcrowding, even if it is "punishment," would not violate Mr. Doe's constitutional rights unless it is cruel and unusual.[64] On the other hand, if "freedom from punishment" is understood as "freedom from the category of punishment beyond an individual punishment," anything beyond Mr. Doe's incarceration of ten years is in excess of his individual punishment. Therefore, he has a right to be free from that punishment, whether or not it is cruel and unusual. Under such a regime, the overcrowding would violate Mr. Doe's constitutional rights if the overcrowding is not reasonably related to a legitimate government objective.[65]

C. Practical Implications

1. Barriers to Claims by Convicted Persons

The current regime has established serious hurdles that convicted persons' claims must overcome. Specifically, the requirement of subjective intent to prove an Eighth Amendment violation[66] is a high bar to reach. Even though the subjective intent requirement can be met by a showing of "deliberate indifference"[67] or "malicious[] and sadistic[] [force] with the purpose of causing harm,"[68] the evidence required to convincingly make such allegations is difficult to acquire, especially from within the walls of a prison.

2. Social Perception

Additionally, the law has significant power to influence social norms.[69] Consequently, the current regime influences the way soci-

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64. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).
65. *See Bell*, 441 U.S. at 538–39.
66. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
67. *Id.*
68. Whitley v. Albers, 475 U.S. 312, 320–21 (1986).
69. *Cf.* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C.D. L. REV. 1235, 1263 (2016) (discussing the power of criminal law to express social norms).

ety thinks about convicted persons and their quality of life in prison.[70] The current regime imagines that prison itself, and all of the indignities that come with it, even those beyond a person's individual punishment, is appropriate punishment. Therefore, the current regime has serious consequences for society's perception of the occurrence of constitutional violations in prisons and of convicted persons themselves.

First, it normalizes degrading treatment in prisons. By setting such high thresholds to establish Eighth Amendment violations,[71] the Court allows anything below those thresholds to occur without repercussion, even if the conduct is dehumanizing or brutal.[72] In doing so, those practices, some of which might not be acceptable under the standards governing the rights of pretrial detainees, are normalized.

Second, the current regime influences society's perceptions of convicted persons. In the eyes of the Court, convicted persons do not have a right to be free from punishment, even when the punishment exceeds their individual sentence.[73] Regardless of his or her crime, once a convicted person is behind bars, he or she is classified as a prisoner, subject to punishment, and nothing more.

IV. SUGGESTED REFORM: APPLYING SUBSTANTIVE DUE PROCESS

In an attempt to establish a regulatory framework for what happens in prison, courts held that the Eighth Amendment governs conditions of confinement for post-conviction inmates.[74] But *Kingsley* highlighted the availability of other tools to deal with this, particularly the due process clause as used to protect pretrial detainees. Under this proposal, the Eighth Amendment should be understood as governing only whatever is explicitly included in the sentence and nothing else. For all other purposes, a convicted person shares the same legal status as a pretrial detainee: because the Eighth Amendment does not apply to conditions of confinement and use of force cases, those claims are governed by substantive due process (as long as the alleged violation was not formally part of the person's sentence).[75]

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70. *Cf. id.*
71. *See* discussion *supra* Part III.B.
72. *See* discussion *supra* Part II.C.
73. *See* discussion *supra* Part III.A.
74. *See* Schlanger, *supra* note 11, at 368–69; *cf.* Estelle v. Gamble, 429 U.S. 97, 102–04 (1976).
75. *See* discussion *supra* Part II.B.

A. Narrow the Eighth Amendment's Purview: Following Justice Thomas's Lead

Justice Thomas has consistently insisted on an originalist definition of punishment–one that aligns with this Note's use of the term "individual punishment." He insisted that the Eighth Amendment "was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime . . . [judges and commentators in the early Republic] did not conceive of the Eighth Amendment as protecting inmates from harsh treatment."[76] He later reiterated, "I adhere to my belief . . . that judges or juries—but not jailers—impose 'punishment'. . . . Because the unfortunate attack that befell petitioner was not a part of his sentence, it did not constitute 'punishment under the Eighth Amendment.'"[77]

Nevertheless, Justice Thomas reluctantly acquiesced to the Court's use of the dual-pronged objective and subjective test set forth in *Wilson v. Seiter*.[78] In *Wilson*, Justice Scalia agreed with Justice Thomas in part that the Court should take an originalist and textualist approach to defining the Eighth Amendment's prohibition on cruel and unusual punishment; however, Justice Scalia extended the Eighth Amendment's reach to include intentional violations perpetrated by state officials.[79] He wrote, "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."[80] Justice Scalia's willingness to "cut the Eighth Amendment loose from its historical moorings and [apply] it to a broad range of prison deprivations"[81] stretched his textualist interpretive principles to, and possibly beyond, their limit. Perhaps, he thought an exception was necessary because refusing to regulate deliberate conduct by officers would be untenable and absurd. But if the Eighth Amendment does not apply, it is not necessarily true that intentional conduct would go unaddressed, as explained below in Part IV.B.

Justice Thomas's analysis diverges from the Court's view, as announced in *Wilson* by Justice Scalia, that punishment can occur at the hands of correctional officials as long as there is subjective intent. The regime proposed by this Note endorses Justices Thomas's

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76. Hudson v. McMillan, 503 U.S. 1, 18–19 (1992) (Thomas, J., dissenting).

77. Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring) (internal citations and quotations omitted).

78. *Hudson*, 503 U.S. at 18–19 (Thomas, J. dissenting); *Farmer*, 511 U.S. at 859–60 (Thomas, J., concurring).

79. Wilson v. Seiter, 501 U.S. 294, 300 (1991).

80. *Id.*

81. *Hudson*, 503 U.S. at 21 (Thomas, J., dissenting).

approach, defining the scope of the Eighth Amendment to cover only that which is "meted out by . . . the statute or the sentencing judge."[82] Consequentially, the Eighth Amendment covers only what is absolutely necessary to effectuate the sentence and nothing more. A prison sentence could still be served in a facility with cushy conditions and an absolute policy against the use of force; therefore, conditions of confinement and use of force cannot be a necessary part of punishment. Thus, the Eighth Amendment covers the deprivation of a convicted person's liberty but not use of force or conditions of confinement (so long as those are not specified by the sentencing court). The characteristics of punishment in the United States–specifically the nature of punishment and restraints thereon–support the proposed regime's approach.

First, a sentence is assessed against an individual in response to a specific criminal act, which has been proven beyond a reasonable doubt and which is generally condemned by society. This concept of stimulus (crime) and response (punishment) is refined by the principle of proportionality, which has a significant historical pedigree.[83] Proportionality serves more than one role in the criminal justice process: while the concept of proportionality has been incorporated into Eighth Amendment jurisprudence,[84] it exists independently as a fundamental characteristic of punishment.[85] And this characteristic of punishment presupposes that the punisher has complete control over the punishment that is doled out, so as to ensure it is proportional. Therefore, "punishment," for the purposes of the Eighth Amendment, should be confined to a person's individual punishment: otherwise, there would be no way to ensure that exposure to the entire category of punishment is proportional to the crime committed.

Moreover, the choice to include conditions of confinement and use of force in the Eighth Amendment's purview renders "punishment" inconsistent. Different institutions–even similar types of institutions within the same district–can have different conditions of confinement and use of force.[86] If two individuals are sentenced to the same term of years for the same crime and then are housed

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82. *Wilson*, 501 U.S. at 300.

83. *See, e.g.*, Weems v. United States, 217 U.S. 349, 380–81 (1910).

84. *See* O'Neil v. Vermont, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) ("The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.").

85. *See Weems*, 217 U.S. 349, 380–81 (1910).

86. Christopher Wildeman et al., *Conditions of Confinement in American Prisons and Jails*, ANN. REV. OF L. & SOC. SCI., June 2018, at 19.10 (2018); *see also* Scott D. Camp, *Do Inmate Survey Data Reflect Prison Conditions? Using Surveys to Assess Prison Conditions of Confinement*, 79 PRISON J. 250, 250 (1999).

in separate facilities, one person may experience harsher conditions of confinement and use of force than the other person. Surely, that result does not effectuate the legislative intent behind whatever sentencing guidance is enshrined in statutes.

Additionally, punishment is presumably rendered by an authority, namely a judge or jury. Specifically, the Eighth Amendment is "inten[ded] to limit the power of those entrusted with the criminal-law function of government."[87] That does not include correctional officers: though they perform the mechanical duties of incarceration, such as supervision and transportation, it is a stretch to say they are "entrusted with the criminal-law function of government." Prison officials do not have any say in the prescription of a defendant's sentence and are not required to have legal education. And ultimately, individual punishments may not be altered by anyone, including legal authorities, outside of the proper channels for direct or collateral review.

Relatedly, the current regime undermines democratic accountability. While legislatures often set sentencing guidelines, which assist in determining the sentence sanctioned by a court, conditions of confinement and use of force are largely determined by prison officials. Therefore, different parts of the "punishment" governed by the Eighth Amendment come from different decisionmakers.[88] As a result, the public does not know which decisionmakers are responsible for what decision, and therefore the mechanisms of accountability are weakened.

B. In That Void, Substantive Due Process Applies

The Eighth Amendment is not the only regulatory tool in effect in prisons; substantive due process is also available to govern what the Eighth Amendment does not.[89] This Note proposes that, with respect to anything that does not fall within the scope of the Eighth Amendment, convicted persons would functionally share the legal status of pretrial detainees: any use of force or conditions of confinement allegations would be governed by the substantive due process standards announced in *Kingsley*[90] and *Bell*.[91]

Of course, if a specific decree in the Bill of Rights applies to a certain action, substantive due process is not appropriate to govern

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87. Ingraham v. Wright, 430 U.S. 651, 664 (1977).
88. *Cf.* Shon Hopwood, *Clarity in Criminal Law*, AM. CRIM. L. REV. 695, 732 (2017).
89. *See* Bell v. Wolfish, 441 U.S. 520, 535–36, 537 (1979).
90. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472–73 (2015).
91. *Bell*, 441 U.S. at 535–36.

that action.[92] But this Note argues that the Eighth Amendment is more narrow: adopting Justice Thomas's definition of "punishment," the Eighth Amendment does not govern use of force or conditions of confinement claims brought by convicted persons. The Eighth Amendment regulates "punishment," which includes only whatever is specifically included in a convicted person's sentence. Therefore, the Eighth Amendment only governs if: (1) a person has been convicted of a crime; (2) the sentencing authority has imposed a specific sentence; and (3) the proposed object of regulation was expressly included in the sentence. Beyond that realm, an individual still retains the substantive due process protection ensuring "freedom from punishment [that was not sanctioned by a court]." In that formulation, substantive due process regulates only what the Eighth Amendment's reduced scope excludes.

Each population of individuals, pretrial detainees and convicted persons, is detained for a specific purpose: pretrial detainees to ensure their presence at trial and convicted persons to allow the state to impose a sentence. That incarceration necessarily carries with it incidental occurrences or obligations, such as the need to provide incarcerated individuals with sustenance, shelter, and medical care. The detention of pretrial detainees is justified by the state's need to ensure their appearance at trial.[93] Convicted persons' incarceration is analogous. They are incarcerated for a government purpose: to deprive them of liberty, pursuant to a criminal sentence. And incidental to that incarceration is the state's treatment of a convicted person while that person is deprived of his or her liberty. The Supreme Court has implicitly acknowledged this, explaining, "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration."[94] Therefore, convicted persons are similarly situated to pretrial detainees: they are incarcerated to serve a legitimate government purpose and, aside from that purpose, should retain substantive due process rights regarding conditions of confinement and the use of force.

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92. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'") (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

93. *Cf.*, *Bell*, 441 U.S. at 523.

94. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

C. Mechanics: How the Proposed Regime Would Work

Some examples may clarify how the proposed regime would function. Sentences are often a term of years, but sometimes they include more specific determinations. For example, the state of Louisiana sentences people to terms of years at hard labor.[95] Because the requirement of "hard labor" is a directive from the sentencing court, if challenged, it would be evaluated under the Eighth Amendment. On the other hand, if state officials running a prison imposed the requirement of hard labor on convicted persons without a directive from the sentencing court, the requirement would be evaluated under the due process standard.

Or, for example, if an individual were specifically sentenced to serve time in a supermax facility, where every person lives in what is functionally solitary confinement,[96] the sentence would be evaluated under the Eighth Amendment. However, if a convicted person were transferred there without a court directive, any conditions of confinement allegations would be evaluated as if he or she were a pretrial detainee.

Another example: a woman in Texas was sentenced to thirty days in jail for neglecting her horses, and as part of her sentence, the judge ordered that she receive only bread and water as sustenance for the first three days of her sentence.[97] Because the court ordered the sustenance limitations as part of the woman's punishment, under the proposed paradigm, those restrictions would be evaluated under the Eighth Amendment if challenged. On the other hand, if the judge had not ordered those specific "dietary restrictions" but state correctional officials had imposed them anyway, any challenge to those restrictions would be evaluated under an objective due process standard.

This proposed regime is not impractical to implement. Courts already implement objective standards when evaluating the claims of pretrial detainees. And, as the Supreme Court noted in *Kingsley*, an objective standard is workable and also protects officers acting

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95. Julia O'Donoghue, *Sheriff: Louisiana's Early Release of Prisoners Means Loss of 'the Ones You Can Work,'* TIMES-PICAYUNE (Oct. 13, 2017), http://www.nola.com/politics/index.ssf/2017/10/louisiana_good _prisoners.html (quoting the Caddo County Sherriff's Office as saying "It is a fact that state inmates serving a hard-labor sentence can be required to work as part of their court-ordered sentence in Louisiana"); *see, e.g.*, State v. Brown, 849 So. 2d 566, 569 (La. Ct. App. 2003).

96. *E.g.*, Wilkinson v. Austin, 545 U.S. 209, 209 (2005).

97. *Horse Neglect Draws Bread-and-Water Sentence*, NBC NEWS (June 8, 2004), http://www.nbcnews.com/id/5164349/ns/us_news-weird_news/t/horse-neglect-draws-bread-and-water-sentence/#.WneghJM-e9Z.

in good faith.[98] Because the standards for use of force and conditions of confinement for pretrial detainees already exist, they have been developed in case law. Consequently, there is no need for a completely new standard; because there is already guidance in case law, there will be less uncertainty as convicted persons' rights are vindicated through these same standards.

D. *Benefits of the Proposed Regime*

1. Doctrinal Outcomes

Proponents of extending the Eighth Amendment's meaning cite its dependence on "evolving standards of decency."[99] But the "evolving *standards* of decency" (emphasis added) refers to the standard that evaluates the content–not the content that is evaluated. The proposed regime would render the doctrinal foundation of Eighth Amendment jurisprudence more coherent. Moreover, the proposed regime essentially maintains the current legal structure. In other words, although it would implement significant changes in practice, it does not completely overrule the current regime. Rather, the analysis merely shifts: courts would evaluate the same issues, and the standards governing constitutional guarantees would remain the same. The constitutional tools are all still in the toolbox, but under the proposed regime, courts would be using the proper tools. *Estelle* would still govern Eighth Amendment conditions of confinement cases, and *Whitley* would still govern Eighth Amendment use of force claims–those claims would just be limited to any punishments meted out by the sentencing court. However, the proposed regime would eliminate the untenable distinction between convicted persons and pretrial detainees.[100] This shift would ultimately result in more coherence in Eighth Amendment jurisprudence, which is currently lacking.[101]

Additionally, the proposed regime would impose an objective standard in most use of force and conditions of confinement cases. Both scholars and judges have argued that Eighth Amendment

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98. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015); *see also* Jordan A. Shannon, Note, *Reasonableness as Corrections Reform in* Kingsley v. Hendrickson, 62 LOY. L. REV. 577, 599 (2016).

99. *Cf.*., William H. Forman, Jr., *The Cruel Punishment Proscription: Evolving Standards of Decency*, 19 LOY. L. REV. 81, 105 (1972). Note that even Justice Thomas, though disagreeing with its use, contextualizes the regulation of additional conduct in prisons as Eighth Amendment violations through this phrase. Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring).

100. *See* discussion *supra* Part III.A.

101. *See* Schlanger, *supra* note 11, at 361.

analyses should be governed by an objective standard.[102] Justice Stevens, for example, dissented in *Estelle*, protesting, "[w]hether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the conditions . . . were the product of design, negligence, or mere poverty, they were cruel and inhuman."[103] Even though the solution proposed here does not change the standards under the Eighth Amendment, it would impose an objective standard for much of what the Eighth Amendment currently covers. That leaves open another distinct question: whether the current Eighth Amendment standards, requiring both an objective and a subjective showing, are appropriate.

2. Practical and Social Outcomes

The proposed regime would reduce barriers to the legitimate constitutional claims of convicted persons. Removing those barriers–such as the impractical requirement to prove an officer's subjective intent or the high bar required by previous Eighth Amendment standards–would increase convicted persons' access to the judicial system and legitimize the judicial system as a mechanism to defend the constitutional rights of all people.

Moreover, this Note's proposal enhances the transparency and democratic accountability of the criminal justice system. Criminal laws are a product of our government, which is a product of the democratic process. And civilians serve an important role in monitoring the criminal justice system and providing a check on the power of its institutions. Because the proposed solution would clarify and delineate an individual's punishment at the time of sentencing (allowing nothing further to be imposed), citizens would more easily be able to understand the impact of local, state, or federal laws. The proposed regime would improve the criminal justice process by making it more explicit and accessible.[104] In doing so, it may enhance the democratic accountability of our systems of criminal justice.[105]

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102. *E.g.*, *id.*; Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 62 N.Y.U. L. REV. 881, 948 (2009); Estelle v. Gamble, 429 U.S. 97, 116–17 (1976) (Stevens, J., dissenting).

103. *Estelle*, 429 U.S. at 116–17 (Stevens, J., dissenting).

104. *Cf.* Shon Hopwood, *Clarity in Criminal Law*, AM. CRIM. L. REV. 695, 732 (2017) (arguing that clarity and specificity in law "creates democratic accountability").

105. *Cf. id.*

Additionally, the proposed regime would cultivate a new and better way of thinking about convicted persons. As discussed above, the law plays a role in defining social norms.[106] By acknowledging that not everything that happens in prison is governed by the Eighth Amendment and that convicted persons can have other, actionable constitutional claims regarding their treatment in prison, the proposed paradigm would do more to recognize the humanity of convicted persons. Rather than casting convicted persons away in prison and seeing them only as an "inmates," the proposed regime maintains a perception of a convicted person as a member of society who, though he has lost some constitutional rights by virtue of his criminal conviction, still retains many rights and deserves the protection of those guarantees.

V. CONCLUSION

Close inspection of current doctrine governing conditions of confinement and use of force for pretrial detainees and convicted persons reveals an inherent tension that, upon examination, cannot withstand scrutiny. Specifically, the application of a substantive due process protection ensuring "freedom from punishment" to pretrial detainees but not to convicted persons defies fundamental principles of our criminal justice system. Therefore, the scope of the Eighth Amendment is properly understood as covering only a specified sentence. Then, the substantive due process right of "freedom from punishment" and its objective standard govern anything beyond a specified sentence, including conditions of confinement or use of force.

The proposed regime offers many significant benefits. First, it does not disrupt the doctrine's current standards at all; rather, it merely suggests a shift in the content to which those standards apply. Second, it offers coherence to Eighth Amendment doctrine that is currently lacking, potentially resolving some of the issues addressed in other scholarship arguing for an objective standard in Eighth Amendment cases. Third, and perhaps most importantly, it recognizes the inherent dignity of convicted persons. The proposed regime acknowledges that a crime was committed and that there is a punishment for that crime. But it conceptualizes a convicted person as more than just a criminal; specifically, the pro-

106. *Cf.* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C.D. L. REV. 1235, 1263 (2016) (discussing the power of criminal law to express social norms).

posed regime acknowledges that a convicted person not only retains–but also deserves–robust constitutional protections.