

## CONDITIONS OF CONFINEMENT AND STATE CONSTITUTIONS

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### ABSTRACT

*Many people experience severe harm in prison. In theory, the Eighth Amendment's protections against cruel and unusual punishment should provide a meaningful remedy when such harms occur. However, as punishment scholars have long lamented, the federal courts do a dismal job of protecting the rights of the incarcerated. Procedural and structural hurdles such as stringent exhaustion requirements, lack of access to counsel, and the doctrine of qualified immunity are just a few of the barriers to relief for people looking to redress harms through the federal courts.*

*Worse, Eighth Amendment doctrine requires a showing of "deliberate indifference" on the part of a prison official. This stringent scienter requirement, akin to willful blindness, has resulted in an onerous standard of proof for plaintiffs litigating conditions of confinement claims in federal court.*

*Given weak federal protections and the threat of further rights contraction, state constitutions and their Eighth Amendment analogues may provide a promising alternative. In the sentencing context, at least a dozen state high courts have found that their state constitutions' anti-punishment clauses—as some scholars refer to state provisions barring cruel and/or unusual punishment—offer greater protections against excessive prison sentences than does the Federal Eighth Amendment. In states where favorable legal climates exist, incarcerated plaintiffs and their lawyers should consider ways to pursue relief in state court, under state Eighth Amendment cognates and related state constitutional provisions.*

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## INTRODUCTION

Most people believe that the Eighth Amendment's bar against cruel and unusual punishment requires that incarcerated people<sup>1</sup> be treated humanely. In practice, however, federal courts allow deplorable conditions to flourish behind bars.<sup>2</sup> For example, many incarcerated people suffer severe physical abuse,<sup>3</sup> traumatic medical neglect,<sup>4</sup> extreme overcrowding,<sup>5</sup> and other adverse conditions.<sup>6</sup> There is a profound over-

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1. There is debate in the scholarly literature about whether to refer to people incarcerated in prisons as "prisoners" or "incarcerated people." In this Article, we use the terms "incarcerated people" or "incarcerated individuals" instead of "prisoners." We do this deliberately, although not without some hesitation. There are valid reasons for utilizing the word "prisoner," including the implicit recognition in that word of the oppressiveness and dehumanization that occurs behind prison walls. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021); Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. ST. THOMAS L. J. 435, 435 n.1 (2023). However, we believe that the choice to use "incarcerated people" rather than "prisoners" recognizes the individualized harm inflicted by the state on those to whom the state owes a duty of care.

2. Throughout this Article, we use "conditions" as an umbrella term to describe the adverse circumstances incarcerated people face, as described in nn.3–7, *infra*. *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 440 (2014) ("The case law is replete with examples of prison sentences that impose extreme punishment through unconstitutional prison conditions."); *see also* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2024–36 (2018) (detailing dozens of examples of extraordinarily severe, cruel, and inhumane treatment and neglect of incarcerated people).

3. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 733–35 (2002) (describing how a lower court granted qualified immunity to prison employees who handcuffed an incarcerated person to a hitching post for a prolonged period of time without water or breaks while the sun burned his skin, and taunting him with water but not providing any); *Payne v. Parnell*, 246 F. App'x 884, 886–87 (5th Cir. 2007) (per curiam) (reversing summary judgment granted to a prison officer because an unprovoked electric shock from a cattle prod applied to incarcerated person presented a fact question about whether the officer who used the cattle prod acted maliciously and sadistically); *Blake v. Ross*, 787 F.3d 693, 695–96 (4th Cir. 2015), *vacated*, 578 U.S. 632 (2016) (describing how a prison official wrapped a key ring around his fingers and then punched an incarcerated person at least four times in the face in quick succession, and was granted summary judgment on an administrative technicality by the lower court).

4. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 97, 100–02, 104 (1976) (describing how a district court dismissed a case involving severe medical neglect but concluding that "deliberate indifference" to a prisoner's medical needs can violate the Eighth Amendment).

5. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 501–02, 545 (2011) (detailing the overcrowded conditions and upholding the three-judge lower court decision ordering the release of prisoners to alleviate overcrowding in California's state prisons).

6. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 27–28, 35 (1993) (describing that the district court directed verdict for prison officials in a toxic exposure case but holding that risk of exposure to environmental tobacco smoke may support an Eighth Amendment claim).

reliance on prolonged solitary confinement, despite decades of research showing that such treatment amounts to torture.<sup>7</sup>

Sadly, however, the Eighth Amendment's prohibition against "cruel and unusual punishment" is hard to enforce against prisons and prison officials charged with the safeguarding of people held in carceral facilities. A complex maze of procedural<sup>8</sup> and doctrinal hurdles stand in the way of the meaningful redressability and prevention of serious harm.<sup>9</sup> Before a litigant can even have their case heard on the merits, for example, onerous exhaustion requirements<sup>10</sup> and strict pleading standards<sup>11</sup> stand in the way. Further, lack of access to pro bono counsel on the front end, and qualified immunity for federal officials on the back

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7. See Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 508–10 (1997) (surveying the literature comparing prolonged solitary confinement to torture); see also *Davis v. Ayala*, 576 U.S. 257, 288–89 (2015) (Kennedy, J., concurring) (“[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.”).

8. See Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015) [hereinafter Schlanger, *Trends in Prisoner Litigation*] (describing onerous exhaustion requirements under the Prison Litigation Reform Act (PLRA)); Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1158 (2023) (describing barriers to access to the courts for incarcerated people because of onerous pleading requirements under the PLRA).

9. This Article uses the word “harm” to refer to a host of ills that can occur in the prison setting. This term is used in restorative justice practices, which focus on repair rather than on retribution. See, e.g., Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020) (“restorative justice emphasizes relational harms”). The term is also utilized within the abolitionist movement to emphasize the value of harm reduction. Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1215 (2022) (“Abolitionist political and moral commitments require addressing present harms as well as long-term goals, and so harm reduction is embedded into abolitionist practice.”).

10. See Schlanger, *Trends in Prisoner Litigation*, *supra* note 8, at 153–54; Yang, *supra* note 8, at 1159.

11. Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 212–13 (2015) (describing problems with *Iqbal*'s heightened civil pleading requirement and explaining that “constitutional civil rights claims were significantly more likely to be dismissed by district courts after *Iqbal* than under the earlier liberal pleading regime”).

end,<sup>12</sup> make meaningful relief for conditions-based claims elusive.<sup>13</sup> Finally, federal courts have interpreted the Eighth Amendment as requiring an incarcerated plaintiff to prove that a prison official has “inflicted” punishment in an intentional or criminally reckless manner.<sup>14</sup>

Indeed, federal courts have not asked whether the state has a duty to protect the people it takes into custody. Instead, the Supreme Court has held that, under the U.S. Constitution, “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”<sup>15</sup> The Eighth Amendment, then, often reveals itself to be a right without a remedy.<sup>16</sup>

These lamentations are not new—legal scholars have long argued that traditional federal civil suits are usually wholly inadequate to account for the suffering that can occur behind prison walls.<sup>17</sup> But an

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12. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (stating how government officials are protected by qualified immunity from monetary liability in constitutional claims so long as their conduct does not violate a clearly established statutory or constitutional right of which they should have known); see also, e.g., Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79, 81 (2022) (noting that “the qualified immunity doctrine compounds other barriers to asserting legal accountability of prison and jail administrators”).

13. See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (explaining that the doctrine of “[q]ualified immunity shields federal and state officials from [liability for] money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct” (quoting *Harlow*, 457 U.S. at 818)).

14. See *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (“The infliction of punishment is a deliberate act intended to chastise or deter.” (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)); see also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009) [hereinafter Dolovich, *Cruelty*] (“[P]rison conditions not explicitly authorized by the statute or the sentencing judge qualify as punishment only if some prison official actually knew of and disregarded the risk of harm.”); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 385 (2018) [hereinafter Schlanger, *Constitutional Law of Incarceration*] (lamenting the Eighth Amendment’s scienter requirement and noting that “[t]he conditions-of-confinement/use-of-force case law . . . suffers from a glaring doctrinal problem, introduced by Justice Scalia when, in his opinion for the Court in *Wilson*, he centered the entire formal apparatus around a claim that ‘punishment’ definitionally requires the subjectively culpable intent of a punisher”). See generally U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” (emphasis added)).

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

16. Meredith B. Esser, *Extraordinary Punishment: Conditions of Confinement and Compassionate Release*, 92 FORDHAM L. REV. 1369, 1377 (2024); see also Shapiro & Hogle, *supra* note 2, at 2022 (lamenting that “a combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start”).

17. See Shapiro & Hogle, *supra* note 2, at 2022 (“[A] combination of interrelated legal and situational barriers dooms many prison-conditions suits from the start.”); Dolovich, *Cruelty*, *supra* note 14, at 890 (discussing how the Eighth Amendment jurisprudence “rests

overwhelming majority of claims related to conditions of confinement are still litigated in federal, rather than state, court.<sup>18</sup>

Unfortunately, there is reason to fear that federal courts could roll back protections for incarcerated people in the coming years. In a series of dissents and concurrences going back decades, Justice Clarence Thomas has made clear that he believes the Eighth Amendment should not apply to prison conditions at all and that he hopes to convince a majority of the Court of that position.<sup>19</sup> As Thomas settles into his new role as an ideological leader on the Court, it is possible that he may eventually sway four Justices to his side.

But people behind bars are not protected only by the U.S. Constitution. Every state has its own constitution, and forty-eight have explicit Eighth Amendment cognates that protect against cruel and/or unusual punishments.<sup>20</sup> Some states have provisions related to incarcerated people that do not appear in the U.S. Constitution at all, like a prohibition on treating people in custody with “unnecessary rigor.”<sup>21</sup> State courts are free to interpret their constitutions more broadly than their federal counterpart, even where the language is identical.<sup>22</sup>

Given weak federal protections and the existence of barriers to relief in federal court, it may seem surprising that most state supreme courts have never applied their Eighth Amendment analogues to prison conditions. By comparison, in the sentencing context, at least a dozen

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on a conception of punishment that is inappropriate for the context”); Schlanger, *Constitutional Law of Incarceration*, *supra* note 14, at 360 (“The Court’s interpretation of the Eighth Amendment’s ban of cruel and unusual punishment, in particular, has radically undermined prison officials’ accountability for tragedies behind bars . . .”).

18. See generally Note, *A Textual Argument for Challenging Conditions of Confinement Under Habeas*, 13 HARV. L. REV. 1397, 1398 (2022) (detailing the various federal causes of action under which prisoners may challenge their conditions of confinement).

19. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (“For generations, . . . the Eighth Amendment [applied] only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration.”); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (“I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’”).

20. Bridget Lavender, *States Can Protect Unhoused People When the U.S. Supreme Court Won’t*, STATE CT. REP. (Oct. 17, 2024), <https://statecourtreport.org/our-work/analysis-opinion/states-can-protect-unhoused-people-when-us-supreme-court-wont>.

21. Kathrina Szyborski Wolfkot, *Using State Constitutional Protections to Improve Life Behind Bars*, STATE CT. REP. (Jan. 4, 2025), <https://statecourtreport.org/our-work/analysis-opinion/using-state-constitutional-protections-improve-life-behind-bars>.

22. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (each state has a “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

state high courts have found their anti-punishment clauses offer broader protections against excessive prison sentences than does the Federal Eighth Amendment.<sup>23</sup> And state constitutional excessive sentencing litigation is gaining momentum. In the last few years, state high courts in multiple states, including Massachusetts,<sup>24</sup> Michigan,<sup>25</sup> and New

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23. Compare *Miller v. Alabama*, 567 U.S. 460, 460 (2012) (holding that imposing mandatory life without parole sentences on those under age eighteen at the time of their crimes violates the Eighth Amendment), and *Nance v. Ward* 597 U.S. 159, 162 (2022) (proceeding to an analysis about the state's method of execution without addressing the constitutionality of capital punishment), with *People v. Taylor*, No. 166428, 2025 WL 1085247, at \*16 (Mich. Apr. 10, 2025) (holding that mandatory life-without-parole sentences violate the state constitution's protection against "cruel or unusual" punishment for anyone under age 21 at the time of the offense), and *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024) (barring all life without parole sentences for anyone under twenty-one), and *People v. Parks*, 987 N.W.2d 161, 182–83 (Mich. 2022) (extending *Miller* to people aged eighteen), and *In re Monschke*, 482 P.3d 276, 280–81 (Wash. 2021) (extending *Miller* to people aged twenty), and *State v. Bassett*, 428 P.3d 343, 354 (Wash. 2018) (declaring it categorically unconstitutional to sentence people under eighteen to life without parole), and *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (categorically banning sentencing juvenile offenders to life without the possibility of parole under article I, section 17 of the Iowa Constitution), and *State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017) (extending *Miller* to sentences that are the practical equivalent of life without parole), and *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022) (holding that juvenile offenders must have the chance at release from prison after forty years), and *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015) (holding the state due process clause encompasses a prohibition against cruel and unusual punishments and prohibits the death penalty), and *Fletcher v. State*, 532 P.3d 286, 311 (Alaska Ct. App. 2023) (holding *Miller* requires on-the-record findings and applies to de facto life-without-parole sentences), and *People v. Dillon*, 668 P.2d 697, 727 (Cal. 1983) (holding life-without-parole sentences for felony-murder are unconstitutional for juveniles), and *Wells-Yates v. People*, 454 P.3d 191, 206 (Colo. 2019) (holding prospective sentencing reform is relevant to excessive sentencing claims), and *People v. Carrasquillo*, 177 N.E.3d 327, 351–52 (Ill. App. Ct. 2020) (holding repeated parole denials can amount to an excessive sentence), and *State v. Keefe*, 478 P.3d 830, 839–40 (Mont. 2021) (holding courts must consider progress toward rehabilitation as a mitigating factor for *Miller* purposes), and *State v. Mata*, 745 N.W.2d 229, 259, 278 (Neb. 2008) (declaring execution by the electric chair is "cruel and unusual" punishment under state constitution), and *State v. Ryan*, 396 P.3d 867, 876–77, 879 (Or. 2017) (directing courts to consider intellectual disability as part of proportionality review).

24. *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024) (holding that that life-without-parole sentences are unconstitutional for anyone under age twenty-one).

25. *People v. Parks*, 987 N.W.2d 161, 182–83 (holding that mandatory life-without-parole for people who were 18 at the time of their charged crimes violated the state's "cruel or unusual" punishment clause); *People v. Poole*, No. 166813, 2025 WL 978646, at \*9 (Mich. Apr. 1, 2025) (holding that *Parks* is retroactive); *People v. Taylor*, No. 166428, 2025 WL 1085247, at \*16 (Mich. Apr. 10, 2025) (extending *Parks* to emerging adults aged nineteen and twenty); *People v. Lymon*, No. 164685, 2024 WL 3573528, at \*17 (Mich. July 29, 2024) (holding that requiring people with convictions that lack a sexual component to register as sex offenders violates state cruel or unusual punishment clause); see also Kathrina Szymorski Wolfkot, *Michigan's High Court Is Charting a Course Against Punitive Excess*, STATE CT. REP. (Apr. 25, 2025), <https://statecourtreport.org/our-work/analysis->

Jersey,<sup>26</sup> have issued groundbreaking decisions expanding sentencing protections under their state constitutions. At the same time, there is a growing body of scholarship addressing the importance of state constitutions in creating greater protections for criminal defendants at sentencing.<sup>27</sup> In the conditions-of-confinement context, however, there is much less litigation seeking to advance state constitutional rights for incarcerated people. And there is similarly a void to fill in the scholarly literature around this topic. This Article thus aims to start a conversation around the importance of state courts in the advancement of rights and protections for people experiencing degrading, inhumane, or otherwise harmful prison conditions.

This Article proceeds as follows. Part I will explore the current legal landscape for litigating Federal Eighth Amendment claims, covering the primary barriers to relief for incarcerated plaintiffs in federal court as an important backdrop to the larger aims of this Article. In particular, Part I will explain how the Eighth Amendment's deliberate indifference standard works against incarcerated plaintiffs and creates onerous doctrinal hurdles.

Part II will describe the current legal landscape in state anti-punishment clause litigation. It will start by summarizing the text of the clauses and the ways they differ from their federal counterpart. Noting that many states have already begun to reinterpret their own state constitutions in relation to excessive sentencing, Part II will address nascent legal developments and leading cases in the state constitutional conditions of confinement space. This Article will mostly focus on two states, Washington and Oregon, whose recent state conditions-of-confinement jurisprudence may provide lessons and examples for advocates seeking to expand protections for people incarcerated in state prisons and jails. Part II will conclude by addressing barriers to state litigation in this sphere.

Finally, Part III focuses on specific jurisprudential approaches state courts can adopt in conditions litigation to expand the rights of incarcerated people above the federal floor. Indeed, this Article will conclude with a note of optimism and will urge practitioners and scholars

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opinion/michigans-high-court-charting-course-against-punitive-excess (lauding the Michigan Supreme Court's "recent expansions of the rights of people ensnared in the criminal justice system").

26. *State v. Comer*, 266 A.3d 374, 399 (N.J. 2022) (holding that people sentenced to mandatory lengthy sentences for homicides committed as juveniles are entitled to petition for a review of their sentence after serving twenty years in prison).

27. See, e.g., Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 568–77 (2023) (describing the law of excessive sentencing under various state constitutions).

of conditions of confinement law to explore how state courts can continue to be instrumental in improving conditions of carceral confinement.

#### I. FEDERAL COURTS AND CONDITIONS OF CONFINEMENT LITIGATION

Litigants face many barriers—procedural, structural and doctrinal—when challenging conditions of confinement under the Eighth Amendment in federal court. While this Article does not detail all these obstacles, it touches on a few of the most devastating impediments to relief that are common in prisoners' rights cases. This background is important to set up the idea that state court mechanisms may provide a promising alternative to federal civil rights litigation.

First, doctrinal barriers contained in the Eighth Amendment's stringent mens rea requirements mean that prison officials are shielded from liability unless an incarcerated litigant can show purposeful or criminally reckless conduct on the part of a prison official.<sup>28</sup>

What's more, procedural barriers such as the Prison Litigation Reform Act (PLRA)'s exhaustion and other provisions can make it hard to get into court in the first instance.<sup>29</sup> Similarly, structural impediments such as the lack of access to lawyers who litigate prison cases—made even more difficult by a cap on attorneys' fees—mean that many litigants are left to proceed with litigating complex prison cases without the benefit of legal representation.<sup>30</sup> Moreover, civil remedies are often inadequate to address the real harms that befall people in prison.<sup>31</sup>

##### A. Doctrinal Impediments to Federal Conditions of Confinement Claims

The Eighth Amendment's doctrinal legal standards make litigating federal conditions-of-confinement claims extremely difficult for incarcerated plaintiffs.<sup>32</sup> In fact, the federal constitutional standards outlined by the Supreme Court create a disincentive for prison officials to care for the people that are incarcerated in prisons that they oversee.

Notoriously, incarcerated people must prove that a prison official exhibited "deliberate indifference" to a substantial risk of serious harm

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28. See *infra* Part I.A.

29. See *infra* text accompanying notes 60–63.

30. See *infra* text accompanying notes 68–71.

31. See *infra* text accompanying notes 66–67.

32. See, e.g., Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 477 (2018) (“[J]udicial interpretations of prisoners’ constitutional claims have made prisoners’ rights cases very difficult to win.”); Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323, 368 (2022) (describing problems with the Eighth Amendment’s scienter requirements).

or denial of a basic human need in order to obtain relief.<sup>33</sup> This standard includes an objective prong—“the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists”—as well as a subjective prong—“he must also draw the inference.”<sup>34</sup> The objective prong’s inquiry is whether the harm being suffered is objectively “sufficiently serious” to raise a constitutional concern.<sup>35</sup> The subjective prong’s inquiry is whether a prison official subjectively and consciously disregarded a substantial risk of harm.<sup>36</sup> An even higher standard applies in Eighth Amendment use-of-force cases: “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.”<sup>37</sup>

The implications of these scienter requirements are dire. People in prison often objectively suffer harms that are “sufficiently serious” to result in the denial of “the minimal civilized measure of life’s necessities.”<sup>38</sup> But no matter how much suffering they experience, they can only prevail in federal court if they prove that a prison official has acted (or failed to act) with either intent or criminal recklessness. A recent study of Eighth Amendment claims reported that less than one percent of incarcerated plaintiffs win cases alleging violations including inhumane conditions, inadequate medical care, and excessive force.<sup>39</sup> The biggest reason these plaintiffs fail, the study found, was insurmountable scienter requirements, which resulted in a ruling for state defendants in over half the cases reviewed.<sup>40</sup>

Under the deliberate indifference framework, civil defendants can avoid being held accountable by showing that they did not *subjectively*

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33. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (“[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety . . .”).

34. *Id.*

35. *Id.* at 834. Sufficiently serious deprivations have been interpreted to include those that “deprive inmates of the minimal civilized measure of life’s necessities.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). For claims involving the failure to prevent harm, an incarcerated person must show that he is incarcerated under conditions “posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834.

36. *See Farmer*, 511 U.S. at 842 (“[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”).

37. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (internal citation omitted).

38. *Farmer*, 511 U.S. at 834 (internal citations omitted).

39. Hannah Beckler et al., *The Gutting of the Eighth Amendment*, BUS. INSIDER (Dec 19, 2024, 9:21 AM), <https://www.businessinsider.com/eighth-amendment-prohibit-protect-prisoners-cruel-and-unusual-punishment-gutted-2024-12>.

40. *Id.* Other reasons included failure to clear the hurdles set by the Prison Litigation Reform Act and officials’ reliance on a qualified immunity defense. *Id.*

know about a specific deprivation or risk of harm.<sup>41</sup> In practice, this gives prison officials an incentive to essentially avoid knowledge of what is happening in a prison or with a particular incarcerated person.<sup>42</sup> Civil defendants can also avoid liability if they show they were not indifferent. Taking some corrective action, however minimal—even if that action does not ultimately result in mitigation of the harm or deprivation—will generally enable civil defendants to prevail under deliberate indifference.<sup>43</sup> Because the standard is written in such a way that presupposes *individual* indifference, it is particularly challenging to prove “institutional indifference.” How does an incarcerated plaintiff prove the indifference of a prison system as a whole to obtain systemic relief?<sup>44</sup>

These doctrinal problems were starkly evident during the COVID-19 era. Prisons were a notoriously dangerous place to be during the pandemic.<sup>45</sup> Social distancing is near-impossible in prison—unless a person is held in isolation.<sup>46</sup> Furthermore, a lack of access to hygienic and personal protective equipment such as masks and sanitizer resulted in the rapid and deadly spread of COVID-19 in carceral institutions.<sup>47</sup> Advocates were initially optimistic that the Eighth Amendment’s protections against cruel and unusual punishment might make a difference during this period of global upheaval.<sup>48</sup> However, as Professor

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41. See, e.g., *Vega v. Davis*, 673 F. App’x 885, 890 (10th Cir. 2016) (explaining that the court could not plausibly draw inference that the warden specifically both knew that Vega was suffering from a mental illness and consciously disregarded the risks condition untreated).

42. Dolovich, *Cruelty*, *supra* note 14, at 892 (describing how the deliberate indifference standard “creates incentives for officers *not* to notice”).

43. Cf. *Farmer*, 511 U.S. at 845–46 (discussing the evidentiary standard required for a plaintiff to successfully prove deliberate indifference, including that the defendants are “unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so”). In this way, the Supreme Court’s Eighth Amendment jurisprudence encourages (contrary to the Court’s prediction) prison officials to “take refuge in the zone between ignorance of obvious risks and actual knowledge of risks.” *Id.* at 842 (internal quotation marks and citations omitted).

44. See Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 186–94 (2020) (describing the problems with the deliberate indifference test as applied to institutional rather than individual defendants). People incarcerated in BOP have an easier task suing institutional defendants because suits against state entities are subject to constitutional Eleventh Amendment immunity. *Id.* at 178.

45. See Sharon Dolovich, *Mass Incarceration, Meet Covid-19*, 2020 U. CHI. L. REV. ONLINE 4, 4.

46. See *id.* at 8.

47. See *id.* at 8–11.

48. See, e.g., We the People, *Will Coronavirus Change Criminal Justice?*, NAT’L CONST. CTR., at 46:33 (Apr. 30, 2020), <https://constitutioncenter.org/news-debate/podcasts/will->

Sharon Dolovich has described, even where plaintiffs had some initial success with district courts granting preliminary injunctions or temporary restraining orders directing correctional officials to improve conditions, “in virtually every case framed as a constitutional class action, decisions in plaintiffs’ favor were eventually overturned on appeal.”<sup>49</sup>

Most of these attempts to address COVID-19-based harms in prison were unsuccessful precisely because of the difficulty of demonstrating “deliberate indifference.”<sup>50</sup> That is because “evidence of *any* affirmative measures on the part of prison officials undertaken in response to COVID-19 was sufficient to rebut deliberate indifference, regardless of whether the defendants knew full well that the danger persisted.”<sup>51</sup> Thus, where prisons could show that they took any measure—however minimal—to prevent the spread of disease, they were not held liable for violations of the Eighth Amendment, and injunctive orders were overturned. In many respects, the failures of the Eighth Amendment to protect incarcerated people during this time served as a harsh reminder of how difficult it is to protect people in prison using current federal standards.

The deliberate indifference standard is now the established legal framework for conditions-of-confinement claims in federal court. But the articulation of the standard that has become entrenched in Eighth Amendment doctrine was not a foregone conclusion. In fact, two of the concurring opinions in *Farmer v. Brennan* expressed opposition to the deliberate indifference standard because of its required subjective component.<sup>52</sup> As Justice John Paul Stevens pointed out, heightened

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coronavirus-change-criminal-justice (containing discussion about how we might “see the Eighth Amendment have more heft to it when there are dangerous conditions in prison”).

49. Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 333–34 (2022) [hereinafter Dolovich, *The Coherence of Prison Law*].

50. See, e.g., *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (“[D]efendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent.”).

51. Dolovich, *The Coherence of Prison Law*, *supra* note 49, at 335 (2022); see also, e.g., Danielle C. Jefferis, *American Punishment and Pandemic*, 21 NEV. L.J. 1207, 1220 (2021) (describing appellate courts’ overturning of district court pandemic-related Eighth Amendment decisions); *Cameron v. Bouchard*, 815 F. App’x 978, 985 (6th Cir. 2020) (reversing grant of preliminary injunction ordering pretrial detention facility to consider release for people housed there because “the steps that jail officials took to prevent the spread of COVID-19 were reasonable”); *Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020) (“[T]he evidence shows that [the prison] has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus.”).

52. See 511 U.S. 825, 851 (1994) (Blackmun, J., concurring) (“[I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper,

scienter requirements “incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution.”<sup>53</sup> Thus, of all the impediments to Federal Eighth Amendment relief, the subjective prong of the deliberate indifference test may be the most devastating. The subjective scienter requirement does not take into account the severity of any harm being suffered, nor the myriad ways in which prison officials should take affirmative steps to safeguard the people in their care and custody. Instead, as noted, this standard incentivizes prison officials to look the other way when potential violations arise.<sup>54</sup>

*B. Procedural and Structural Impediments to Conditions of Confinement Claims*

Heightened scienter requirements are not the only barriers to relief for incarcerated plaintiffs seeking to challenge cruel and inhumane conditions and treatment. Even before an incarcerated litigant can file a civil action against a prison for abuses suffered behind bars, a complex administrative grievance process—including various stages of appeal and short deadlines—can prove near-impossible to navigate.<sup>55</sup> Grievance processes are not uniform across prisons; institutions often have their own specialized rules.<sup>56</sup> Incarcerated people who make any misstep at the administrative grievance stage risk later having their claims dismissed by a court without consideration of the merits.<sup>57</sup> As such, the abuses described in the filings of incarcerated people are often never considered by any federal court—and this was by design.<sup>58</sup>

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subjective state of mind.”); *id.* at 858 (Stevens, J., concurring) (“I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation . . .”).

53. *Estelle v. Gamble*, 429 U.S. 97, 109 (1976) (Stevens, J., dissenting).

54. See Brief of Professors Sharon Dolovich et al. as Amici Curiae Supporting Plaintiff-Appellants at \*15–16, *Dewalt v. Hooks*, 879 S.E.2d 179 (N.C. 2022) (No. 165A21), 2021 WL 3007629.

55. See, e.g., Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae Supporting Respondent at 6–13, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 (detailing onerous grievance requirements and appeal processes in various institutions).

56. *Jones v. Bock*, 549 U.S. 199, 218 (2007) (“The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”).

57. See 42 U.S.C. § 1997e(a); see also *Woodford v. Ngo*, 548 U.S. 81, 90–91, 93 (2006).

58. *Woodford*, 548 U.S. at 93–94.

The PLRA requires incarcerated people to “comply with all time limits, appeal levels, and other procedural requirements”<sup>59</sup>—and even a small mistake can mean that a claim is no longer viable.<sup>60</sup> These hurdles can be particularly difficult to clear for people who have language limitations, a low education level, suffer from mental illness, or are in solitary confinement. For example, one man was not provided with the necessary grievance form while he was in solitary confinement and his federal civil case was later dismissed for failure to exhaust his administrative remedies.<sup>61</sup>

From the standpoint of tangible relief, the PLRA limits civil claims in other ways, such as requiring more than a de minimis physical injury for a claim to be viable<sup>62</sup> and narrowing the scope of injunctive relief.<sup>63</sup> And, regardless of the type of relief sought, the doctrine of qualified immunity means that prison officials are seldom held liable for the harms that they cause.<sup>64</sup>

Furthermore, most prison conditions cases are litigated pro se,<sup>65</sup> in part because of a cap placed on fees available to attorneys in prison

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59. Hill, *supra* note 11, at 200; *see also* Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 586–88 (2014); *Ross v. Blake*, 578 U.S. 632, 641–42 (2016) (explaining that a court may not excuse a failure to exhaust, even to take “special circumstances” into account).

60. *See Woodford*, 548 U.S. at 120–22 (Stevens, J., dissenting) (listing examples from around the country of claims dismissed because of minor procedural technicalities); *Mack v. Klopotoski*, 540 F. App’x 108, 113 (3d Cir. 2013) (dismissal upheld where incarcerated person submitted handwritten copies, rather than photocopies, of required documents during the grievance process). Scholars have likewise lamented the unforgiving exhaustion requirement under the PLRA. *See, e.g.*, Hill, *supra* note 11, at 199–201 (explaining the PLRA’s onerous and exacting exhaustion requirement); Shapiro & Hogle, *supra* note 2, at 2044–45 (“[T]he PLRA’s exhaustion requirement has been interpreted by many federal courts to require a degree of minute technical compliance that would be challenging for anyone, let alone someone locked in prison. And a single lapse in technical compliance can easily lead to dismissal of a prisoner’s otherwise meritorious claim.”).

61. *Latham v. Pate*, No. 1:06-CV-150, 2007 WL 171792, at \*2 (W.D. Mich. Jan. 18, 2007).

62. Shapiro & Hogle, *supra* note 2, at 2046–47 (describing instances of grave maltreatment of incarcerated people that courts determined involved de minimis injury and thus no remedy was available).

63. 18 U.S.C. § 3626(a)(1)(A) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.”). Even where an injunction is obtained, it can be difficult to enforce. *See generally* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 564–72 (2016) (discussing enforcement of equitable remedies).

64. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

65. Shapiro & Hogle, *supra* note 2, at 2048 (citing Schlanger, *Trends in Prisoner Litigation*, *supra* note 8, at 167 tbl.6 (2015)) (“Plaintiffs represented themselves in 94.9% of

lawsuits.<sup>66</sup> “Information asymmetry,”<sup>67</sup> as well as a dearth of legal research materials,<sup>68</sup> further entrench the status quo: the inability of most incarcerated plaintiffs to successfully litigate their often-righteous claims. As prison law scholars have pointed out, “[a]lthough prisoners have the right to sue prison officials for violations of the Constitution, they have no corresponding right to the resources necessary to litigate effectively.”<sup>69</sup>

C. *Federal Conditions of Confinement Jurisprudence as a Harbinger of Rights Contraction*

Another emerging concern has contributed to the already-pessimistic outlook regarding Eighth Amendment lawsuits seeking to uphold the rights of incarcerated people: There is reason to fear that even the minimal constitutional protections for incarcerated people currently in existence under federal law will be eroded in the near future. Supreme Court Justices have long used dissents to outline their visions for how a future Court might approach the law, signaling their desired legal evolution.<sup>70</sup> For decades, Justice Clarence Thomas has done just that in his opinions related to claims challenging inhumane prison conditions as “cruel and unusual punishment.”<sup>71</sup> In his dissents and concurrences, he repeatedly asserts that the Eighth Amendment should not apply to prison conditions at all.<sup>72</sup>

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prisoners’ civil rights cases litigated in federal court in 2012 (compared to 26.1% for the entire pool of federal cases).”).

66. See 42 U.S.C. § 1997e(d)(3) (citing 18 U.S.C. § 3006A(d)). Rates for lawyers are limited to 150% of the Criminal Justice Act rates for criminal defense representation. *Id.* Because this is much lower than the going rate for most civil litigators, the PLRA, by design, creates a disincentive to taking cases on behalf of incarcerated people.

67. See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 159 (2011) (noting the impact of pleading standards on “cases in which state of mind plays a large role or in which there are large information asymmetries, such as civil rights . . .”).

68. See generally Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171 (2013) (detailing the failure of prison law libraries to provide access to the courts).

69. Shapiro & Hogle, *supra* note 2, at 2049.

70. See Vanessa Baird & Konja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 196–212 (2009).

71. See Christopher E. Smith, *What If?: Human Experience and Supreme Court Decision Making on Criminal Justice*, 99 MARQ. L. REV. 813, 833 (2016).

72. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 861 (1994) (Thomas, J., concurring in judgment); *Erickson v. Pardus*, 551 U.S. 89, 95 (2007) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); *Wilkins v. Gaddy*, 559 U.S. 34, 41 (2010) (Thomas, J., concurring in judgment).

Punishment, says Thomas, “has always meant a ‘fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.’”<sup>73</sup> According to Thomas, only “judges or juries—but not jailers—impose ‘punishment.’”<sup>74</sup> Horrific conditions of confinement endured or any injuries suffered behind bars, then, “are not punishment in any recognized sense of the term, unless imposed as part of a sentence.”<sup>75</sup>

“Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt,” Thomas has acknowledged.<sup>76</sup> It “may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution,” he says, “[b]ut that does not mean that it is invariably unconstitutional”<sup>77</sup>—and it is certainly “not cruel and unusual punishment.”<sup>78</sup> Current federal jurisprudence, in Thomas’s view, turns the Cruel and Unusual Punishments Clause into “a National Code of Prison Regulation”<sup>79</sup> and “transform[s] federal judges into superintendents of prison conditions nationwide.”<sup>80</sup>

Thomas claims that history supports his restrictive view of the Eighth Amendment—pointing to Founding-era dictionary entries he says reflect “the original meaning of ‘punishment,’” alongside “the silence in the historical record[] and the 185 years of uniform precedent” declining

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73. *Helling*, 509 U.S. at 38 (Thomas, J., dissenting); see also *Erickson*, 551 U.S. at 95 (Thomas, J., dissenting) (“I have repeatedly stated that the Eighth Amendment’s prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence.” (citing *Farmer*, 511 U.S. at 861)).

74. *Farmer*, 511 U.S. at 859 (Thomas, J., concurring in judgment) (quoting *Helling*, 509 U.S. at 40).

75. *Id.* at 859; see also *Helling*, 509 U.S. at 38 (Thomas, J., dissenting) (“[The original understanding of ‘punishment’] . . . of course, does not encompass a prisoner’s injuries that bear no relation to his sentence.”); *id.* at 37–38 (explaining that “I have serious doubts about this premise” that “deprivations suffered by a prisoner constitute ‘punishmen[t]’ for Eighth Amendment purposes” (alteration in original)).

76. *Hudson*, 503 U.S. at 28.

77. *Id.* at 18, 28.

78. *Id.* at 18. But see *Taylor v. Riojas*, 592 U.S. 7 (2020), in which an incarcerated man was held in cells first covered in “massive amounts’ of feces,” including “packed inside the water faucet” and extremely cold, without a bed or toilet and was forced to “sleep naked in sewage.” *Id.* at 7–8. The Court found the violation so egregious that it denied qualified immunity. *Id.* at 8–9. Thomas dissented without explanation. *Id.* at 10.

79. *Hudson*, 503 U.S. at 28; see also *Farmer*, 511 U.S. at 859 (Thomas, J., dissenting) (“Today, in an attempt to rectify such unfortunate conditions, the Court further refines the ‘National Code of Prison Regulation,’ otherwise known as the Cruel and Unusual Punishments Clause.”).

80. *Farmer*, 511 U.S. at 860 (Thomas, J., dissenting).

to extend the Amendment's protections to conditions.<sup>81</sup> "Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life," he has written.<sup>82</sup> "Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment."<sup>83</sup> In fact, scholars have unearthed historical records indicating that prisons were more humane places at the time of the founding and that founding-era leaders believed prohibitions on cruel and unusual punishments outlawed more indignities than today's federal courts would allow.<sup>84</sup>

Given his "serious doubts" about the Court's extension of Eighth Amendment protections to prison conditions, Thomas has explicitly called for the Court to overrule *Estelle v. Gamble*, the 1976 case in which the Court first extended the Federal Eighth Amendment to prison conditions.<sup>85</sup> In *Farmer*, for example, Thomas asserted that he "remain[ed] unwilling to subscribe to the view, adopted by *ipse dixit* in *Estelle*, that the Eighth Amendment regulates prison conditions not imposed as part of a sentence."<sup>86</sup> "As an original matter, therefore, this

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81. *Helling v. McKinney*, 509 U.S. 25, 40 (1993); *see also* *Wilkins v. Gaddy*, 559 U.S. 34, 41 (2010) (Thomas, J., concurring in judgment) ("At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime.").

82. *Hudson*, 503 U.S. at 19. Given that his historical analysis is largely—in his words—based on silence, it seems flimsy at best. *See* David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 547 (2019) (discussing that courts did, in fact, superintend conditions in solitary confinement).

83. *Hudson*, 503 U.S. at 19; *see also* *Farmer*, 511 U.S. at 860 (Thomas, J., concurring in judgment) ("*Estelle v. Gamble* loosed the Eighth Amendment from its historical moorings. . .").

84. *E.g.*, Wynne Muscatine Graham, *The Forgotten History of Prison Law: Judicial Oversight of Detention Facilities in the Nation's Early Years*, 138 HARV. L. REV. 1715, 1722 (2025) ("If early theorists, advocates, judges, and even prison authorities were somehow to see the carceral system that has emerged in the twentieth century, they would likely be shocked by several features: the scale, the filth, and the use of long-term solitary confinement, to name a few."); Shapiro, *supra* note 82, at 544 ("Historical and archival evidence . . . demonstrates that the unchecked use of solitary confinement in today's correctional facilities contravenes norms that prevailed in the Constitution's founding era. . . . Most importantly, long periods of seclusion could be imposed only by courts acting pursuant to criminal sentencing statutes. Jail officials had the power to impose solitary confinement for disciplinary violations, but only for a matter of days or weeks. Today, however, deference to prison officials has swallowed these constraints."). *But see* JUDITH RESNIK, IMPERMISSIBLE PUNISHMENTS 60–62 (2025).

85. *Farmer*, 511 U.S. at 861 (Thomas, J., concurring in judgment) ("Given my serious doubts concerning the correctness of *Estelle* in extending the Eighth Amendment to cover challenges to conditions of confinement . . .").

86. *Id.* Scholars have pushed back against the idea that conditions of confinement are not imposed as part of a sentence. *See, e.g.*, Kyle C. Barry, *What Is 'Punishment'? How State*

case would be an easy one for me: Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute ‘punishment’ under the Eighth Amendment,” he wrote.<sup>87</sup> He continued: “I remain hopeful that in a proper case the Court will reconsider *Estelle* in light of the constitutional text and history.”<sup>88</sup>

Civil rights advocates should take seriously Thomas’s push for rights contraction. This is not the first context in which Thomas has spent decades as an outlier, logging his unpopular viewpoint through dissents and concurrences. Some of his previously fringe opinions have eventually garnered the support of a majority of the Court. Indeed, before recent course reversals that upended decades of settled law—like the elimination of federal abortion rights, the tossing of deference to agency decision-making, and the rejection of race-based affirmative action—Thomas’s opinions previewed these doctrinal swings.

Thomas spent thirty years leading up to *Dobbs v. Jackson Women’s Health Organization* arguing in dissent after dissent that the Constitution does not constrain the states’ ability prohibit abortion and urging the Court to throw out its abortion jurisprudence.<sup>89</sup> Just as Thomas asserts that the text of the Eighth Amendment does not support protection for prison conditions, so too did he argue that *Roe v. Wade*’s 1973 holding “that the Constitution protects a woman’s right to abort her unborn child [] finds no support in the text of the Fourteenth

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*Courts Can Fix a Destructive Flaw In Eighth Amendment Case Law*, STATE CT. REP. (Dec. 13, 2023), <https://statecourtreport.org/our-work/analysis-opinion/what-punishment-how-state-courts-can-fix-destructive-flaw-eighth> (“[T]he U.S. Supreme Court, tasked with enforcing constitutional rights against excessive punishment, often acts as though prison sentences are a term of years and nothing more. It excludes the horrors that people face inside prison from one’s ‘sentence,’ thus forcing claimants to meet a needlessly difficult standard.”); *see also infra*, Section III.C.

87. *Id.* at 859.

88. *Id.* at 861; *see also id.* (“Were the issue squarely presented, . . . I might vote to overrule *Estelle*.”); *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) (“I seriously doubt that *Estelle* was correctly decided.”); *Erickson v. Pardus*, 551 U.S. 89, 95 (2007) (Thomas, J., dissenting) (referring to “the Court’s flawed Eighth Amendment jurisprudence”).

89. *E.g.*, *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 371 (2020) (Thomas, J., dissenting) (“The Constitution does not constrain the [s]tates’ ability to regulate or even prohibit abortion.”), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (“Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, J., dissenting) (joined by Thomas and White) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”).

Amendment.”<sup>90</sup> In *Dobbs*, five Justices agreed, holding there was no right to an abortion in the Constitution and overturning *Roe*.<sup>91</sup>

Similarly, Thomas for years advocated for the demise of *Chevron* deference,<sup>92</sup> a decades-old doctrine requiring federal courts to defer to agencies’ interpretations of ambiguous language in their governing statutes.<sup>93</sup> Mirroring his expression of hope “that in a proper case the Court will reconsider *Estelle*,”<sup>94</sup> he asserted that “[i]n an appropriate case, this Court should reconsider th[e] fiction of *Chevron*.”<sup>95</sup> Fast forward to summer 2024: The six conservative Justices abolished *Chevron* deference, throwing out 40 years of precedent.<sup>96</sup>

Thomas criticized affirmative action in dissent in 2003’s *Grutter v. Bollinger*.<sup>97</sup> In June 2023 the Court declared that race-conscious admissions violate the Equal Protection Clause.<sup>98</sup> He pushed an individual right to bear arms years before it was a conservative litmus test<sup>99</sup>—and before it became the law of the land in *District of Columbia v. Heller*.<sup>100</sup>

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90. *June Med. Servs.*, 591 U.S. at 373 (Thomas, J. dissenting).

91. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022).

92. *E.g.*, *Cuozzo Speed Techs. v. Com. for Intell. Prop.*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring) (referring to “*Chevron*’s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law”); *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (“*Chevron* deference raises serious separation-of-powers questions.”); *Dept of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring) (“[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.”); *Perez v. Mortgage Bankers Ass’n.*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment) (“Those who ratified the Constitution knew that legal texts would often contain ambiguities. . . . The judicial power was understood to include the power to resolve these ambiguities over time.”).

93. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

94. *Farmer v. Brennan*, 511 U.S. 825, 862 (1994) (Thomas, J., concurring in judgment).

95. *Cuozzo*, 579 U.S. at 286 (2016) (Thomas, J., concurring).

96. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369 (2024).

97. 539 U.S. 306, 349–78 (2003) (Thomas, J., concurring in part and dissenting in part).

98. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

99. *E.g.*, *Printz v. United States*, 521 U.S. 898, 937–39 (1997) (Thomas, J., concurring) (suggesting the Second Amendment confers a *personal* right to keep and bear arms and noting that “[p]erhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms has justly been considered, as the palladium of the liberties of a republic.”); *see also* Varad Mehta, *The Second Amendment: A New Litmus Test?*, NAT’L REV. (Aug. 8, 2018, 6:30 AM), <https://www.nationalreview.com/2018/08/second-amendment-new-litmus-test-for-judges/>.

100. 554 U.S. 570, 636 (2008).

Today, some see Thomas as the ideological leader of the Court.<sup>101</sup> These recent doctrinal victories for Thomas thus underscore another concern for those of us who care about humane prison conditions: This is not a Court that shies away from overturning decades of precedent. Thomas's decades-long campaign to roll back the Eighth Amendment's meager protections for incarcerated people, then, should not be ignored. Incarcerated litigants and advocates must explore paths for rights protection that do not lead to the U.S. Supreme Court.

## II. STATE CONSTITUTIONS AND CURRENT LITIGATION

In response to the serious impediments described above—especially the federal deliberate indifference standard as it currently exists and the anticipation of a possible retraction of federal prisoners' rights more generally—litigators and advocates have already begun raising state constitutional conditions-of-confinement claims in state courts. This Part of the Article will first introduce the idea of expanding individual rights under state constitutions and briefly discuss how state courts have been doing so in the excessive sentencing sphere. It will then describe efforts to expand civil rights for incarcerated people through state court conditions litigation. This Part will focus on two states, Washington and Oregon, whose constitutions have already been interpreted to provide greater protections to incarcerated people than the Federal Eighth Amendment by rejecting the need for incarcerated litigants to prove the subjective motivation of prison officials before obtaining conditions of confinement relief.

This Part will also touch upon possible impediments to the expansion of such litigation in other states and describe measures that advocates could take—such as pressing state legislatures to pass state civil rights statutes or other vehicles to get such claims before state courts—to further the availability of state-court remedies to adverse conditions of confinement.

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101. See, e.g., James Romoser, *John Roberts Is the Chief. But It's Clarence Thomas's Court*, SCOTUSBLOG (Oct. 2, 2022, 12:00 AM), <https://www.scotusblog.com/2022/10/john-roberts-is-the-chief-but-its-clarence-thomass-court/>; David Smith, *The 'Thomas Court': After Biding His Time, Rightwing Justice Finds His Power*, GUARDIAN (July 10, 2022, 2:00 AM), <https://www.theguardian.com/us-news/2022/jul/10/clarence-thomas-supreme-court-justice>.

A. *Eighth Amendment Analogues and Other Constitutional Provisions That Could Provide Greater Protections Than the Federal Constitution*

The Eighth Amendment prohibits “cruel and unusual punishments.”<sup>102</sup> Almost every state has an analogue to the Eighth Amendment in its constitution.<sup>103</sup> But state courts are generally not bound by federal constitutional law when interpreting these provisions.<sup>104</sup>

The text of many states’ anti-punishment clauses differs from the Eighth Amendment, providing a strong basis for a broader reading of their protections.<sup>105</sup> Indeed, sixteen states prohibit “cruel *or* unusual punishments,”<sup>106</sup> and another six states bar cruel punishments, with no mention of unusualness.<sup>107</sup> As Professor William Berry has pointed out, this language should “allow the state supreme courts to proscribe ‘cruel’ punishments, irrespective of their unusualness.”<sup>108</sup>

Twenty-three state constitutions contain language prohibiting “cruel and unusual” punishment, like the U.S. Constitution.<sup>109</sup> Yet even in states with anti-punishment provisions that precisely mirror the Eighth Amendment, courts need not interpret those clauses in lockstep with federal law.<sup>110</sup> The rights provided in the Federal Constitution are but a floor.<sup>111</sup> Thus, even where the text is identical to the federal counterpart, many states still interpret certain constitutional clauses as more

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102. U.S. CONST. amend. VIII.

103. William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205 (2020).

104. *See id.* at 1214.

105. *Id.*

106. *Id.* at 1227, 1232, 1237. These are Alabama, Arkansas, California, Hawaii, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Texas, and Wyoming. *Id.* at 1227. California, Michigan, and Minnesota contain additional language, such as requirements that punishments be proportional or that the purpose of punishment is rehabilitation. *Id.* at 1232–35.

107. *Id.* at 1235, 1238. These are Delaware, Kentucky, Pennsylvania, Rhode Island, South Dakota, and Washington. *Id.*

108. *Id.* at 1227.

109. Berry, *supra* note 103, at 1252–53. They are Alaska, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *Id.*

110. *See State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011) (“Pals brings these claims under both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. While these provisions use nearly identical language and were generally designed with the same scope, import, and purpose, we jealously protect this court’s authority to follow an independent approach under our state constitution.”).

111. *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

protective than the same language under federal law.<sup>112</sup> Although a notable exception exists in states whose constitutions contain explicit lockstepping provisions requiring that their constitutions, or certain parts of their constitutions, be interpreted identically to their federal counterpart, most state constitutions contain no such requirement.<sup>113</sup>

Finally, many state constitutions have additional or different clauses that apply—or could apply—to the treatment of people behind bars. For example, the constitutions of Oregon, Utah, Indiana, Tennessee, and Wyoming guarantee that “no person arrested or confined in jail shall be treated with unnecessary rigor.”<sup>114</sup> Delaware’s constitution requires that “in the construction of jails a proper regard shall be had to the health of prisoners.”<sup>115</sup> Georgia’s provides that no person “shall . . . be abused in being arrested, while under arrest, or in prison.”<sup>116</sup> Montana’s contains a provision guaranteeing that “[t]he dignity of the human being is inviolable.”<sup>117</sup> The Louisiana Constitution asserts that “[n]o law shall subject any person to . . . torture.”<sup>118</sup> Illinois’s constitution declares that “[a]ll penalties shall be determined . . . with the objective of restoring the offender to useful citizenship.”<sup>119</sup> Alaska’s provides that “[c]riminal administration shall be based upon . . . the principle of reformation.”<sup>120</sup>

In the excessive sentencing context, multiple state supreme courts have already departed from federal interpretations of the Eighth Amendment, declaring that their anti-punishment clauses are more protective than the Eighth Amendment. At least six state supreme courts have declared that their constitutions bar life-without-parole sentences (or the de facto equivalent) for juveniles or young adults that would be permitted under the Federal Constitution.<sup>121</sup> The Washington and

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112. *See id.*

113. *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502–20 (2005) (discussing the different types of lockstepping provisions in state constitutions).

114. Wolfkot, *supra* note 21.

115. DEL. CONST. art. I, § 11.

116. GA. CONST. art. I, § 1, para. XVII.

117. MONT. CONST. art. II, § 4.

118. LA. CONST. art. I, § 20.

119. ILL. CONST. art. I, § 11.

120. AK. CONST. art. I, § 12.

121. *See* cases cited *supra* note 23. State high courts have varied in the ways they have announced broader protections against juvenile life-without-parole than available under the Federal Constitution. Some have said it is unconstitutional to sentence *anyone* 17 and under to life without parole, doing away with the exception for children deemed incapable of rehabilitation. *See State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016); *State v. Bassett*, 428 P.3d 343, 354 (Wash. 2018). Others have extended federal *Miller* protections against *mandatory* life-without-parole sentences to people older than 17. *See People v. Taylor*, No.

Connecticut state high courts have said that their constitutions—unlike their federal counterpart—prohibit the death penalty.<sup>122</sup> And some state high courts have declared that their constitutions require sentencing judges to consider mitigating factors that federal judges are free to ignore in determining punishments, such as intellectual disability and youth.<sup>123</sup>

But while these states have departed from federal standards in the area of law that governs prison terms announced by sentencing courts, there has been comparatively little conditions litigation under Eighth Amendment cognates and other state constitutional provisions.<sup>124</sup>

Several recent cases indicate that some state courts are willing to extend protections against inhumane conditions beyond the federal floor—and suggest that state constitutional litigation is a viable alternative to Federal Eighth Amendment challenges to inhumane conditions. Specifically, state courts in Washington and Oregon have recently held that their state constitutions are more protective than their federal counterpart in the conditions-of-confinement arena. Accordingly, this Part of the Article discusses these two jurisdictions in detail. Notably, and as described more fully below, both Washington and Oregon ultimately rejected the notion that incarcerated litigants need to show subjective intent on the part of prison officials or other state actors.

*B. In re Pers. Restraint of Williams: Washington Rejects the Subjective Prong of the Federal Deliberate Indifference Standard*

The Washington Supreme Court has provided a detailed and compelling roadmap for advocates in other states looking to expand protections for incarcerated people beyond those provided by the U.S. Constitution. Although Washington's Eighth Amendment cognate is similar to the federal version, the state high court nonetheless broke new

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166428, 2025 WL 1085247, at \*16 (Mich. Apr. 10, 2025); *In re Monschke*, 482 P.3d 276, 280–81 (Wash. 2021). One—Massachusetts—has incorporated both these extensions into its doctrine, announcing that no one under the age of 21 may be sentenced to life without parole. *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024). And others have declared that long prison terms are de facto life-without-parole sentences when applied to juveniles, such that their mandatory imposition is unconstitutional. *See State v. Zuber*, 152 A.3d 197, 201 (N.J. 2017); *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022).

122. *State v. Gregory*, 427 P.3d 621, 632 (Wash. 2018); *State v. Santiago*, 122 A.3d 1, 74–75 (Conn. 2015).

123. *See, e.g., State v. Ryan*, 396 P.3d 867, 877 (Or. 2017) (declaring that the state constitution requires courts to consider intellectual disability as part of proportionality review because it speaks to “gravity of the offense”).

124. Kathrina Szymborski Wolfkot, *Why Are State Constitutional Challenges to Inhumane Prison Conditions So Rare?*, STATE CT. REP. (Aug. 1, 2024), <https://statecourtreport.org/our-work/analysis-opinion/why-are-state-constitutional-challenges-inhumane-prison-conditions-so>.

ground in 2021 when it rejected the federal subjective deliberate indifference standard, instead holding that incarcerated plaintiffs must demonstrate that their “conditions create an objectively significant risk of serious harm or otherwise deprive [them] of the basic necessities of human dignity” and “are not reasonably necessary to accomplish any legitimate penological goal.”<sup>125</sup>

In *In re Pers. Restraint of Williams*, Robert Rufus Williams, a seventy-eight-year-old incarcerated man, filed a petition seeking release from prison to home confinement during the COVID-19 pandemic.<sup>126</sup> Williams used a wheelchair as a result of a stroke years earlier that had immobilized the right side of his body.<sup>127</sup> He relied on therapy aides to push his wheelchair and assist him with daily tasks.<sup>128</sup> He also suffered from diabetes and hypertension.<sup>129</sup>

In the early stages of the pandemic, Williams shared a dry cell—or one that lacked a sink or toilet—with three other men.<sup>130</sup> Whenever he needed to use the bathroom, he had to wait for prison staff to move him to a bathroom that could accommodate him.<sup>131</sup> He sometimes was forced to wait for so long that he would end up urinating in bottles<sup>132</sup> or would soil himself.<sup>133</sup> Given the lack of readily accessible facilities, he was also unable to keep himself clean.<sup>134</sup> He alleged that these conditions rendered cruel his continued incarceration under both the federal and state constitutions.<sup>135</sup>

The Washington Supreme Court agreed that Williams’s conditions violated the state constitution. Because Washington courts follow the primacy approach to state constitutional interpretation—i.e., they resolve constitutional questions first under their own constitution before turning to federal law—it did not reach the federal claims.<sup>136</sup> The U.S. Constitution nevertheless featured prominently in the holding, if only as

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125. *In re Pers. Restraint of Williams*, 496 P.3d 289, 301 (Wash. 2021) (en banc).

126. *Id.* at 293.

127. *Id.* at 294.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 304.

134. *Id.* at 295.

135. *Id.*

136. *See id.* at 296; *see also* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647 (1987) (“[P]rimacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought.”).

a low-water mark: The court explicitly recognized that article I, section 14 of the Washington Constitution was more protective than the Eighth Amendment regarding conditions of confinement.<sup>137</sup> And the court went further, announcing a new test to analyze whether conditions of confinement violate article I, section 14—one that departed significantly from the federal subjective deliberate indifference standard.<sup>138</sup>

Before *Williams*, the Washington high court had recognized that the state anti-punishment provision was more protective than its federal counterpart—but, like many state high courts, only in the excessive sentencing context.<sup>139</sup> To determine whether extended protections also applied to conditions, the court considered several factors: the text of the state constitution, which bars “cruel” punishment but omits any reference to unusualness; differences in the texts of the federal and state constitutional provisions; structural differences between the federal and state constitutions; state constitutional and common law history that could inform the meaning of the prohibition on cruel punishments; whether prison conditions are a matter of particular state interest or local concern; and whether any preexisting state statutory or case law supported increased protections.<sup>140</sup>

Turning first to the text of the state constitution and how it differs from the federal counterpart, the court explained that the omission of the words “and unusual” from the state clause meant that cruel punishments are unconstitutional “without the additional requirement that they also be unusual.”<sup>141</sup> The court noted it had previously held this difference “is material and supports a more expansive interpretation.”<sup>142</sup> Regarding the structural differences between the two constitutions, it said that the U.S. Constitution “is a grant of limited power authorizing the federal government to exercise only constitutionally enumerated powers delegated to it by the states, while Washington’s constitution limits the plenary power of the State to act in any way not forbidden by the state constitution or federal law.”<sup>143</sup> Accordingly, it said, structural differences between the constitutions “will always point toward pursuing an independent state constitutional analysis.”<sup>144</sup>

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137. *In re Williams*, 496 P.3d at 304.

138. *Id.* at 301.

139. *Id.* at 296 (citing *State v. Bassett*, 428 P.3d 343, 348 (Wash. 2018)).

140. *Id.* at 296–97. These factors derive from a Washington Supreme Court case, *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (en banc), and guide a court’s analysis of the relative scope of state constitutional rights in any particular context. *Id.*

141. *In re Williams*, 496 P.3d at 297.

142. *Id.* (citing *Bassett*, 428 P.3d at 349; *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980)).

143. *Id.* at 300.

144. *Id.* (citing *State v. Young*, 867 P.2d 593, 596 (Wash. 1994)).

The court then engaged in an extensive analysis of Washington's constitutional history and past prison reforms. It called the inclusion of a separate provision of the state constitution forbidding the contracting of the labor of incarcerated people to private entities "historical context" that supported "a more protective interpretation" of the anti-punishment clause.<sup>145</sup> When the state constitution was written, the court explained, people forced to work through "convict leasing" arrangements were subjected to "unspeakable brutality."<sup>146</sup> As such, the court said, the prison labor provision was meant to protect incarcerated people "from the cruelty of the lease system," demonstrating the state's "long-standing interest in providing some measure of protection against harsh conditions of confinement."<sup>147</sup> The court also highlighted state prison reforms dating back to the 1970s to demonstrate the state's "interest in the conditions in which prisoners are confined," which "weighs in favor of a more protective interpretation of article I, section 14 in the present context."<sup>148</sup>

The fact that prison conditions were a matter "of particular state interest or local concern" also supported a robust interpretation of state constitutional protections for conditions, the court said.<sup>149</sup> The court pointed to the state's "responsibility to financially support its prison systems" and to state correctional officials' authority over the "treatment or discipline of prisoners in penal institutions" as evidence that conditions were a state issue.<sup>150</sup>

Next, the court considered "whether established bodies of state law, including statutory law, support more protective state constitutional rights."<sup>151</sup> It noted that "Washington precedent on prison conditions is sparse,"<sup>152</sup> as is true in almost every state.<sup>153</sup> In the absence of precedent directly on point, the court instead looked to statutory law relating to conditions, cases considering torts against incarcerated people, and case

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145. *Id.* at 297–98.

146. *Id.* at 297 (citing *Wash. Water Jet Workers v. Yarbrough*, 90 P.3d 42, 46 (Wash. 2004)).

147. *Id.* at 298.

148. *Id.* at 298.

149. *See id.* at 300 (citing *State v. Gunwall*, 720 P.2d 808 (Wash. 1986) (en banc)).

150. *Id.* at 298 (quoting *Woods v. Burton*, 503 P.2d 1079, 1080 (Wash. Ct. App. 1972)). The court also noted that a separate provision of the state constitution provides that "penal institutions . . . shall be fostered and supported by the state" and that the state legislature has significant discretion to determine the method and extent of financial support to provide to the department of corrections. *Id.* (citing *Pierce Cnty. Off. of Involuntary Commitment v. W. State Hosp.*, 644 P.2d 131 (Wash. 1982) (en banc)).

151. *Id.* (citing *Gunwall*, 720 P.2d at 812).

152. *Id.*

153. *See* Wolfkot, *supra* note 124.

law interpreting the anti-punishment clause in the excessive sentencing context. These sources supported a conclusion that “Washington law has been more protective than federal law in the context of prison conditions.”<sup>154</sup>

The court suggested that Washington’s prohibition on private prisons and detention centers—which are allowed under federal law—evinced greater care for the wellbeing of people behind bars.<sup>155</sup> Moreover, the court noted that “[a]s a matter of tort law, Washington courts have long recognized ‘a jailer’s special relationship with [incarcerated people], particularly the duty to ensure health, welfare, and safety.’”<sup>156</sup> The court explained that incarcerated people “rely completely on [the Department of Corrections] to make decisions as to their safety and health care, similar to students relying on schools, guests on innkeepers, and patients on hospitals.”<sup>157</sup> The duty to “keep convicted individuals ‘in health and safety’”<sup>158</sup> further underscored the state’s concern about prison conditions and supported a departure from federal conditions jurisprudence.

Finally, the court pointed to two excessive sentencing cases that it said highlighted “the effect of immutable characteristics on disproportionate sentencing” and “illustrate[d] an evolution in understanding of immutable characteristics such as physical and mental disability, and the need for accommodation.”<sup>159</sup> In other words, “punishments that were once constitutional ‘can become cruel under article I, section 14 if there is a material change in circumstances.’”<sup>160</sup> The court suggested that a sentence imposed upon an individual who does not have a disability may be unconstitutional for a disabled

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154. *In re Williams*, 496 P.3d at 299.

155. *See id.*

156. *Id.* (citing *Gregoire v. City of Oak Harbor*, 244 P.3d 924, 927 (Wash. 2010)).

157. *Id.* (citing *H.B.H. v. State*, 429 P.3d 484, 492 (Wash. 2018)).

158. *Id.* (quoting *Kusah v. McCorkle*, 170 P. 1023, 1025 (Wash. 1918)).

159. *Id.* at 300. This portion of the opinion highlights another possible doctrinal departure that states can make from federal law: acknowledging the reality that when a judge hands down a prison sentence, the punishment necessarily includes the conditions in which the condemned person will be held and the treatment they will endure. Part III.C of this Article, *infra*, discusses the opportunity for states to reinvigorate the debate over what punishment is. The court later reinforces this point, writing: “Today, we recognize that conditions of confinement are inherently part of the punishment imposed on prisoners.” *Id.* at 303. After all, “[b]ut for their conviction and sentence, prisoners would not be confined or subject to the attendant conditions of confinement.” *Id.*

160. *Id.* at 299 (citing *State v. Bassett*, 428 P.3d 343, 343 (Wash. 2018); *State v. Gregory*, 427 P.3d 621, 621 (Wash. 2018)).

individual if the conditions in which the sentence is served do not include disability accommodations.<sup>161</sup>

Having determined that the state anti-punishment clause provides more protection for conditions of confinement than the Eighth Amendment, the court concluded that the federal deliberate indifference standard was “inadequate to address claims arising under article I, section 14.”<sup>162</sup> Instead, to prevail, a plaintiff challenging their conditions of confinement under the Washington Constitution “must demonstrate that (1) those conditions create an objectively significant risk of serious harm or otherwise deprive the petitioner of the basic necessities of human dignity and (2) those conditions are not reasonably necessary to accomplish any legitimate penological goal.”<sup>163</sup>

The court identified two main shortcomings in the *Farmer* Court’s subjective deliberate indifference standard. First, it said, the federal standard “mistakenly assumes that conditions of confinement can be considered punishment, and therefore subject to constitutional limitations, only if they are subjectively intended as punishment by an identifiable prison official.”<sup>164</sup> Second, the standard “fails to recognize that cruel conditions of confinement can result from institutional policies and practices just as readily as from intentional acts by individual prison officials.”<sup>165</sup> “Together, these shortcomings allow conditions of confinement to persist—even if those conditions are unquestionably cruel—so long as the relevant prison official pleads ignorance or good intentions.”<sup>166</sup>

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161. *See id.* at 300 (discussing the impact of “immutable characteristics on disproportionate sentencing,” and the “evolution in understanding of immutable characteristics such as physical and mental disability, and the need for accommodation”).

162. *Id.* at 301.

163. *Id.*

164. *Id.* at 302 (citing *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (“If the pain inflicted [by a condition of confinement] 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” as punishment subject to Eighth Amendment limitations.)).

165. *Id.* (citing *Wilson*, 501 U.S. at 310 (White, J., concurring in judgment) (“Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.”)).

166. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (“Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to [avoid liability by] prov[ing] that they were unaware even of an obvious risk to inmate health or safety . . . . or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.”)).

By contrast, “Washington prisons may not cause ‘the deprivation of human dignity by conditions . . . so base, inhumane and barbaric they offend the dignity of any human being,’ whether intentionally or accidentally.”<sup>167</sup> The *In re Williams* Court “recognize[d] that unconstitutionally cruel conditions of confinement can arise from institutional policies and practices just as readily as from the malicious actions of individual prison officials.”<sup>168</sup> Either way, the court said, Washington’s constitution prohibits such treatment and the Department of Corrections has an obligation to fix the unconstitutionally cruel conditions.<sup>169</sup> This obligation stems from “the special relationship that results when a custodian has complete control over a prisoner deprived of liberty.”<sup>170</sup>

The court noted that the mechanism under which Williams sought relief—injunctive relief through state personal restraint petitions, akin to habeas corpus petitions—“further highlight[ed] the shortcomings of the subjective component.”<sup>171</sup> Rather than attaching personal liability to an individual official, the court explained, a request for injunctive relief “seek[s] an institutional change to remedy an unconstitutional action or condition.”<sup>172</sup> The court recognized that a subjective standard is incompatible with a request for institutional change to remedy unconstitutional conditions.<sup>173</sup> “This focus on the institution rather than the prison official’s intent further supports our conclusion that Washington’s constitution provides greater protection than is offered under the subjective component of the federal standard,” the court explained.<sup>174</sup>

An objective test, the court concluded, protected the dignity of incarcerated people without disregarding the “practical challenges facing prison administrators.”<sup>175</sup> The court “acknowledge[d] that some harsh

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167. *Id.* at 303 (citing *Woods v. Burton*, 503 P.2d 1079, 1080 (Wash. Ct. App. 1972)).

168. *Id.*

169. *Id.*

170. *Id.* (citing *Shea v. City of Spokane*, 562 P.2d 264, 268 (Wash. App. Ct. 1977)).

171. *Id.* at 302.

172. *Id.*

173. *See id.* Many scholars have noted that the subjective deliberate indifference standard allows institutional violations to go unremedied; some even state that the standard allows unconstitutional conditions to flourish at an institutional level by incentivizing ignorance to avoid liability. *See Schlanger, Constitutional Law of Incarceration, supra* note 14, at 429–30 (citing several scholars’ opposition to the use of subjectivity in interpreting what is cruel punishment, including one who states that “federal decisions involving prisoners’ claims of cruel and unusual punishment . . . seem to establish that official intentions are a devise to evade responsibility”).

174. *In re Williams*, 496 P.3d at 302.

175. *Id.* at 303.

conditions of confinement that might otherwise be cruel may sometimes be justified by legitimate penological interests, including the health and safety of the prison population as a whole.”<sup>176</sup> The test, then, is that when harsh conditions “create an objectively intolerable risk of harm, they can survive constitutional scrutiny under article I, section 14 only when they are reasonably necessary to accomplish legitimate penological goals.”<sup>177</sup> “Some conditions of confinement may be so unquestionably cruel that no penological interest could justify them,” while others “may become cruel when they are imposed without any legitimate penological interest.”<sup>178</sup>

Under this test, Williams’s conditions of confinement violated the state constitution.<sup>179</sup> As to the first prong—whether the conditions created an objectively significant risk of serious harm—the court held his lack of reasonable access to bathroom facilities and running water and the prison’s failure to provide him with appropriate assistance were objectively cruel.<sup>180</sup> Turning to the second prong—whether the conditions were necessary to accomplish a legitimate penological goal—the court rejected the state’s contention that, in light of the violent nature of Williams’s offense and any continued risk he posed, the unsanitary conditions he faced while imprisoned were sufficiently related to legitimate penological goals.<sup>181</sup> While those considerations might have justified his continued incarceration, the court said, they did not justify the failure to meet his basic sanitary needs.<sup>182</sup> The court directed the Department of Corrections to remedy those conditions or to release Williams.<sup>183</sup>

Over time, Washington conditions jurisprudence will reveal the extent to which the objective test announced in *In re Williams* results in greater protections for incarcerated people. Thus far, however, the *In re Williams* test has not appeared to translate into an increase in lower court wins for incarcerated people seeking to improve prison conditions.<sup>184</sup> Though it has been applied in very few decisions—perhaps

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176. *Id.*

177. *Id.*

178. *Id.* at 303 n.8.

179. *Id.* at 304.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 293.

184. Because very few Washington state trial decisions are available on legal research platforms like Westlaw, it is difficult to determine how many conditions-of-confinement claims have been decided under the state constitution since *Williams* at that level. Incarcerated plaintiffs have, however, been dealt a string of losses post-*Williams* at the appellate level. *See, e.g., In re M.T.M.L.*, 580 P.3d 464, 473 (2025) (finding that long periods of confinement to cells and long bathroom wait times resulting in peeing or defecating in

too few to draw any meaningful conclusions about its overall impact—the dearth of favorable decisions for incarcerated plaintiffs suggests that doing away with subjective deliberate indifference is not enough to ensure incarcerated people challenging cruel, inhumane, or dangerous conditions can prevail.<sup>185</sup> Other barriers impact the ability of these plaintiffs to obtain relief.

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bags did not violate state cruel punishment clause); *In re Kim*, 34 Wash. App. 2d 1099 (2025) (finding that transfer of transgender woman to men's facility did not violate state constitutional bar on cruel punishments); *In re Penwell*, 26 Wash. App. 2d 1033 (2023) (rejecting claims that prison closures in response to budget cuts violated anti-punishment clause). Federal district courts applying *Williams* have also ruled against plaintiffs. *See, e.g., Powell v. Whatcom Cnty. Jail*, No. C22-0728JLR-TLF, 2022 WL 17834368, at \*4-5 (W.D. Wash. Dec. 21, 2022) (rejecting cruel punishment claims relating to bedbugs and threats of violence); *Gibson v. Haynes*, No. 2:23-CV-0256-TOR, 2024 WL 3015517, at \*3 (E.D. Wash. June 14, 2024) (holding that denial of immediate access to bathroom did not constitute serious risk of harm).

<sup>185</sup> Courts' reasoning differed across the post-*Williams* conditions-of-confinement cases. Most recently, in *In re M.T.M.L.*, children in a juvenile correctional facility alleged that "being confined to their rooms for extended periods of time, deprived of timely access to the restroom, and forced to relieve themselves in their cells"—including by urinating in plastic containers or defecating in bags—violated the state constitutional ban on cruel punishment. 580 P.3d at 473.

A Washington appellate court disagreed, holding that petitioners' "conditions of confinement did not deprive them of the basic necessities of human dignity." *Id.* at 474. The court said the claims were "not analogous" to *Williams*'s because *Williams* "suffered from multiple ailments, and was completely dependent on aides to assist him with daily tasks." *Id.* at 473. *Williams*'s disabilities led to "severely unhygienic conditions" that "exposed him to 'a significant risk of serious harm,'" the court said. *Id.* By contrast, the court said, the petitioners did not "suffer[] from a disability that required assistance when using the restroom" or "soil[] themselves." *Id.* at 474. Plus, it added, *Williams*'s case "arose during the height of the COVID-19 pandemic"—a circumstance that "did not explicitly guide the court's holding" but "was a factor the court considered." *Id.* at 473.

In *In re Kim*, discussed in more detail *infra*, a court in July 2024 deferred to the judgment of correctional officials to determine that there was a legitimate penological purpose behind the transfer of a transgender woman to a men's facility. 34 Wash. App. 2d 1099.

*In re Penwell*, decided in 2023, involved an incarcerated man who contended that the Department of Corrections violated the state anti-punishment clause by "consolidating prisoners, closing prisons, and transferring prisoners from facility-to-facility to effectuate [pandemic-related] shutdowns" in response to budget cuts. 26 Wash. App. 2d 1033, at \*1-2. He argued that the increased density of people behind bars created "an objectively significant risk of serious harm from COVID-19 and tuberculosis," *id.* at \*2, and that saving money does not serve a legitimate penological purpose. *Id.* at \*4. The court rejected *Penwell*'s claims. It noted that he "failed to demonstrate that he face[d] any significant risk of serious harm," while the state showed "comprehensive and extensive policies to mitigate the risk of the pandemic to incarcerated persons, generally and as to *Penwell* himself." *Id.* at \*2. Moreover, the court said, the plan to close some prisons did have a legitimate penological purpose, as it was "designed to wrench the most benefit for detainees out of the limited resources it is provided." *Id.* at \*4.

For example, a Washington appellate court recently denied a transgender woman's claims that her transfer from a women's facility to a men's prison violated the ban on cruel punishment.<sup>186</sup> The Department of Corrections transferred the plaintiff in the case, Amber Kim, after a correctional official said he saw her having sexual relations with another incarcerated woman.<sup>187</sup> Relying on *Williams*, Kim argued that housing her in a men's prison created an objectively serious risk of harm to her and did not serve any legitimate penological goal.<sup>188</sup> The court acknowledged the risk of sexual assault to transgender women in men's prisons and highlighted the department's assessment that "Kim had a potential for victimization due to her small stature," but stressed that Kim had not yet reported any instances of abuse.<sup>189</sup> The court did not dwell further on the "distinct and real risk of sexual victimization" Kim raised.<sup>190</sup>

Instead, it turned to whether the transfer served a legitimate penological goal—declining to determine whether the risk of harm to Kim was objectively serious. "Regardless of whether Ms. Kim's transfer created an objectively serious risk of harm," the court held, "she has failed to demonstrate the second prong of the analysis: the transfer was not reasonably necessary to accomplish a legitimate penological goal."<sup>191</sup> Like so many federal courts before it,<sup>192</sup> the Washington court noted that "courts are ill-situated to involve themselves in the day-to-day management of prisons and doing so often results in a waste of judicial resources, with little to no actual benefit."<sup>193</sup> The court accepted that the

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In *Powell v. Whatcom County Jail*, a detained man alleged that a jail did not take his complaints about bedbugs seriously enough. 2022 WL 17834368, at \*1. In rejecting his claim on the first prong of the *In re Williams* test—whether the conditions create an objectively significant risk of serious harm—a federal district court noted that the plaintiff "sought and received medical care for his rash and moved to a new room on two separate occasions." *Id.* at \*5. The court also dismissed the plaintiff's allegations that threats from other incarcerated people violated the state constitution as posing an objectively significant risk of serious harm; the complaint only stated that he "was threatened with violence," with no additional details, the court explained. *Id.* And in *Gibson v. Haynes*, a federal district court applied *In re Williams* to reject an incarcerated person's claim that "a single instance" of officials "denying him immediate access to a bathroom" amounted to a risk of serious harm. 2024 WL 3015517, at \*3.

186. *In re Kim*, 34 Wash. App. 2d 1099 (2025).

187. *Id.* at \*4.

188. *Id.* at \*1.

189. *Id.*

190. *See id.*

191. *Id.* at \*4.

192. *See, e.g., Turner v. Safley*, 482 U.S. 78, 85–90 (1987) (discussing federal courts' approach to judicial deference even where constitutional rights of incarcerated people are infringed).

193. *In re Kim*, 34 Wash. App. 2d at \*3.

department had “a legitimate penological interest in preventing Ms. Kim from engaging in sexual contact with other inmates” and concluded that the department was “in the best position to decide how to handle this unique and somewhat complex situation.”<sup>194</sup>

*In re Kim* highlights a feature of the *Williams* test that threatens to undermine the objectivity encompassed in the first prong: Courts in Washington may skip directly to the second prong, which asks whether the conditions were necessary to accomplish a legitimate penological purpose. Judges frequently give outsized deference to prison officials’ assessments of what counts as “legitimate penological objectives.”<sup>195</sup>

It seems an uncontroversial assertion that transgender women in men’s prisons face an “objectively serious risk of harm,” including a heightened risk of sexual assault and other abuse.<sup>196</sup> One study found that 37 percent of incarcerated trans women were sexually assaulted, compared with 3 percent of the overall prison population.<sup>197</sup> But no matter how serious that risk, it did not matter in *Kim*; *In re Williams* allows a court to skip that assessment altogether. What good is an objective standard for assessing prison conditions if a court has the option to avoid the question altogether?

That none of the post-*In re Williams* cases came out in favor of the incarcerated plaintiffs could also reflect the existence of additional impediments for people challenging their conditions of confinement, including difficulty obtaining legal representation.<sup>198</sup> For example, a court dismissed a claim in *Powell v. Whatcom County Jail* that a threat of violence from other incarcerated people constituted cruel punishment because the pro se plaintiff did not provide any details about the alleged threat. The plaintiff in *Powell* may indeed have faced serious harm from the threat of violence by other incarcerated people, but the court said it did not have enough information to assess that claim.<sup>199</sup> Counsel could have helped the plaintiff meet pleading requirements, move beyond conclusory allegations, and adduce factual evidence to support his claims.

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194. *Id.* at \*4.

195. *Beard v. Banks*, 548 U.S. 521, 531 (2006) (citing *Turner*, 482 U. S. at 95).

196. See KELSIE CHESNUT & JENNIFER PEIRCE, VERA INST. OF JUST., ADVANCING TRANSGENDER JUSTICE 44 (2024), <https://vera-institute.files.svdcdn.com/production/downloads/publications/advancing-transgender-justice.pdf>; Beth Schwartzapfel, *3 Things to Know About Prison Violence Against Transgender People*, MARSHALL PROJECT (Nov. 13, 2024, 6:00 AM), <https://www.themarshallproject.org/2024/11/13/trans-prison-violence-prea-politics>.

197. Schwartzapfel, *supra* note 196.

198. See discussion *infra* Section II.D.

199. See *Powell v. Whatcom Cnty. Jail*, No. C22-0728JLR-TLF, 2022 WL 17834368, at \*5 (W.D. Wash. Dec. 21, 2022).

Additionally, courts may be reluctant to conclude that a particular plaintiff faces a “significant risk.” They may be inclined to dismiss all manner of discomfort, inconvenience, and even indignity experienced by incarcerated people as failing to amount to “serious harm.”<sup>200</sup>

A fuller picture of the impact of Washington’s objective standard will emerge as courts decide more conditions cases, but one thing is clear: An objective standard is just one step toward facilitating justice for those held in inhumane, dangerous, or degrading carceral conditions. But this doctrinal shift alone is not enough to ensure people in custody have recourse for abuses.

### C. Oregon Prohibits Treating Incarcerated People with “Unnecessary Rigor”

As discussed in Section II.A of this Article, Eighth Amendment analogues are not the only state constitutional provisions that apply to prison conditions. One provision that has the potential to improve life behind bars is the unnecessary rigor clause found in the constitutions of five states: Oregon, Utah, Indiana, Tennessee, and Wyoming.<sup>201</sup> In these states, the clause guarantees that “no person arrested or confined in jail shall be treated with unnecessary rigor.”<sup>202</sup> Where courts have had the opportunity to apply this clause to conditions of confinement—most notably in Oregon—the provision has been interpreted expansively.

Courts in Oregon have “framed the [unnecessary rigor] inquiry as whether a police or prison practice ‘constitutes a cognizable indignity and if so, whether it is justified by necessity.’”<sup>203</sup> This protective interpretation dates back to the 1981 decision in *Sterling v. Cupp*, in which the Oregon Supreme Court held that pat-down searches of incarcerated men by female prison officers constituted unnecessary rigor.<sup>204</sup> The court explained that the Unnecessary Rigor Clause is “directly addressed to prison practices”<sup>205</sup> and that its meaning is not “confined only to such historically ‘rigorous’ practices as shackles, the ball

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200. See, e.g., Sharon Dolovich, *The Coherence of Prison Law*, *supra* note 49, at 302 (describing how prison law “is consistently and predictably pro-state, highly deferential to prison officials’ decisionmaking, and largely insensitive to the harms people experience while incarcerated”).

201. Wolfkot, *supra* note 21; OR. CONST. art. I, § 13; UTAH CONST. art. I, § 9; IND. CONST. art. I, § 15; TENN. CONST. art. I, § 13; WYO. CONST. art. I, § 16.

202. Wolfkot, *supra* note 21.

203. *Lawson v. Cain*, 524 P.3d 529, 532 (Or. Ct. App. 2023) (quoting *Sterling v. Cupp*, 625 P.2d 123, 131–32 (Or. 1981) (en banc)).

204. *Sterling v. Cupp*, 625 P.2d 123, 137 (Or. 1981).

205. *Id.* at 129.

and chain, or to physically brutal treatment or conditions.”<sup>206</sup> The clause “reflect[s] a widespread interest in penal reform in the states during the post-Revolutionary decades” and “a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude independently of any concern of the Congress or of Madison’s Bill of Rights.”<sup>207</sup> The *Sterling* court further acknowledged that the case included “no claim that shakedowns by female guards were *purposely* designed to humiliate the prisoners.”<sup>208</sup> While a practice may qualify as indignity because of “the purpose of its imposition”—like punishment—an indignity may also arise “from the viewpoint of the prisoner[] or in the perception of the general public.”<sup>209</sup>

Forty years later, an Oregon appellate court confirmed that, unlike the Federal Eighth Amendment’s deliberate indifference standard, Oregon’s unnecessary rigor standard lacks a subjective element. In *Lawson v. Cain*, a sixty-two-year-old incarcerated man with chronic obstructive pulmonary disease alleged that the prison in which he was confined did not put in place adequate measures to protect him and other medically vulnerable people from COVID-19.<sup>210</sup> His complaint was largely centered on allegations that inconsistent enforcement of masking requirements for both correctional officials and incarcerated people<sup>211</sup>

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206. *Id.*

207. *Id.* at 128–29; *see also id.* at 128–29 nn.10–15 (providing background on the history of penal reform).

208. *Id.* at 132 (emphasis added).

209. *Id.* (“[W]hat is or is not an indignity is largely a matter of social and individual psychology.”); *see also* Linda Hemphill, *Challenging Conditions of Confinement: A State Constitutional Approach*, 20 WILLAMETTE L. REV. 409, 432 (1984) (arguing that *Sterling* “implicitly recognizes the legitimacy of psychological pain”).

210. 524 P.3d 529, 530 (Or. Ct. App. 2023).

211. The court explained the issue as follows:

Defendant’s efforts to enforce compliance with masking requirements were met with resistance and the spread of misinformation by both prison officials and [incarcerated people]. . . . Staff were on the whole skeptical about virus risks and the value of masking, and staff views on the pandemic, including misinformation and conspiracy theories, spread to [incarcerated people]. . . . [S]taff and [incarcerated people] were subject to discipline for not complying with masking rules, but defendant did not consistently enforce the rules because the issue was so controversial with staff and because defendant did not want to risk organized resistance from [incarcerated people]. [Incarcerated people] could file a grievance to report staff who failed to wear masks, but understandably feared retaliation from staff in positions of power over them. [Incarcerated people] refused to report COVID-19 symptoms because those suspected of being exposed to or contracting the virus were moved to the disciplinary unit for isolation, which they viewed as punishment. As a result, some [incarcerated people] hid their symptoms and threatened others for reporting symptoms.

*Id.* at 530.

amounted to “unnecessary rigor” by creating “an unjustifiable risk of a serious health hazard.”<sup>212</sup> The defendant prison superintendent urged the appellate court to require the plaintiff to show that he had been subjected to unnecessarily harmful treatment—an objective component—and that the defendant acted with subjective deliberate indifference, arguing that no standard had definitively been established for evaluating unnecessary rigor claims.<sup>213</sup> The court rejected that argument, explicitly holding that *Sterling* announced “a purely objective framework.”<sup>214</sup>

*Lawson* was part of a wave of conditions litigation in Oregon stemming from the COVID-19 pandemic.<sup>215</sup> In the last few years, multiple incarcerated plaintiffs across Oregon have prevailed in trial and appellate courts on claims that the treatment they have endured behind bars amounted to unnecessary rigor.<sup>216</sup> In particular, incarcerated

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212. *Id.* at 530–31.

213. *See id.* at 531, 533.

214. *Id.* at 533. The defendant’s petition for review to the Oregon Supreme Court was denied. *Lawson v. Cain*, 530 P.3d 488, 488 (Or. 2023).

215. *See, e.g.*, Conrad Wilson, *Oregon’s Former Governor Dismissed from Class-Action COVID Lawsuit*, OPB (May 3, 2024, 11:00 AM), <https://www.opb.org/article/2024/05/03/oregon-former-governor-kate-brown-dismissed-class-action-covid-lawsuit-prison/> (discussing a class-action lawsuit filed by inmates who contracted COVID-19 while in prison against Oregon’s former governor, as well as a separate wrongful death class action covering the estates of some who died from COVID-19 while in prison). In the early days of the COVID-19 pandemic—as the disease ravaged prisons and strict lockdowns limited access to attorneys—the ACLU of Oregon distributed sample complaints to incarcerated people that included an unnecessary rigor claim. *COVID-19 Response*, ACLU OR., <https://www.aclu-or.org/en/covid19> (last visited Mar. 21, 2025). This resulted in a sharp uptick in unnecessary rigor litigation. *See* Kristen Bell, *State Constitutional Prohibitions Against Unnecessary Rigor in Arrest and Confinement*, 17 TENN. J.L. & POL’Y 124, 128–29 (internal citation omitted). Many trial courts issued favorable decisions. *See, e.g.*, *Maney v. Oregon*, 729 F. Supp. 3d 1087, 1186 (D. Or. 2024) (granting in relevant part plaintiffs’ motion for summary judgment on defendants’ comparative fault and legislative immunity affirmative defenses related to Eighth Amendment claim, as well as their failure to make use of empty facilities).

216. *See, e.g.*, *Zyst v. Miller*, 346 Or. App. 801, 812–14 (2026); *Wonnacott v. Brown*, No. 22CV2811 (Or. Cir. Ct. Multnomah Cnty. June 28, 2023) (on file with Rutgers University Law Review); *Milhoan v. McLay*, No. 22CV12982 (Or. Cir. Ct. for Baker Cnty. May 15, 2024) (on file with Rutgers University Law Review); *Osborne v. Reyes*, No. 22CV38171 (Or. Cir. Ct. Umatilla Cnty. Mar. 4, 2024) (on file with Rutgers University Law Review); *Garges v. Reyes*, No. 21CV13013 (Or. Cir. Ct. Umatilla Cnty. Apr. 26, 2024) (on file with Rutgers University Law Review); *Gaia v. Miller*, No. 22CV41938 (Or. Cir. Ct. Malheur Cnty. June 2, 2023) (on file with Rutgers University Law Review); *Laseur v. Miller*, No. 22CV43857 (Or. Cir. Ct. Malheur Cnty. Oct. 2, 2023) (on file with Rutgers University Law Review); *Zyst v. Miller*, No. 19CV19556 (Or. Cir. Ct. Malheur Cnty. Dec. 11, 2023) (on file with Rutgers University Law Review); *Mileham v. Highberger*, No. 23CV01690 (Or. Cir. Ct. Marion Cnty. Nov. 3, 2023) (on file with Rutgers University Law Review); *Longjaw v. Reyes*, No. 23CV00205 (Or. Cir. Ct. Umatilla Cnty. Feb. 6, 2024) (on file with Rutgers University Law Review).

plaintiffs have prevailed on unnecessary rigor claims related to inadequate medical care. For example, an appellate court held earlier this year that the state constitution required a prison to provide gender-affirming care to a transgender woman in custody, including hair removal.<sup>217</sup> A lower court ruled that a prison must offer ongoing suppressive therapy for herpes simplex, rather than treating only acute outbreaks.<sup>218</sup> Another trial court held that a prison had violated the unnecessary rigor clause by failing to give a plaintiff particular medications to treat nerve pain—Gabapentin, augmented by the opiod Tramadol—which correctional officials had deemed “a number one problem” due to a desire by other incarcerated people “to get their hands on those drugs.”<sup>219</sup> “[P]laintiff has been treated somewhat as a guinea pig in this Court’s view with regard to all the[] different medications that have been attempted” to manage his pain in place of Gabapentin and Tramadol.<sup>220</sup>

Utah courts have also interpreted their state’s unnecessary rigor clause more broadly than the Eighth Amendment, though there have been far fewer such cases in the state.<sup>221</sup> In *Dexter v. Bosko*, two correctional officials refused to fasten the seatbelt of Kelvin Dexter, who was incarcerated, while transporting him.<sup>222</sup> The vehicle crashed,

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Review); *Cushman v. Miller*, No. 23CV14615 (Or. Cir. Ct. Malheur Cnty. Feb. 1, 2024) (on file with Rutgers University Law Review); *Farrell v. Brown*, No. 23CV20259 (Or. Cir. Ct. Washington Cnty. May 31, 2024) (on file with Rutgers University Law Review); *Cardenas v. Pedro*, No. 21CV16354 (Or. Cir. Ct. Umatilla Cnty. March 5, 2024) (on file with Rutgers University Law Review).

217. *Zyst*, 346 Or. App. at 812–14; see also Noelle Crombie, *Court Orders Oregon Department of Corrections to Provide Gender-Affirming Care to Prisoner*, Chronicle (May 24, 2023, 8:38 AM), <https://www.chronline.com/stories/court-orders-oregon-department-of-corrections-to-provide-gender-affirming-care-to-prisoner,319791> (“Pellegrini’s order directs the Department of Corrections to arrange for a range of [gender-affirming] treatments – including facial feminization surgery . . . .”); Sage Van Wing, *Recent Cases Highlight Situation for Transgender Prisoners in Oregon*, OPB (Nov. 6, 2023, 1:39 PM), <https://www.opb.org/article/2023/11/06/recent-cases-highlight-situation-for-transgender-prisoners-in-oregon/> (discussing how an incarcerated plaintiff received electrolysis hair removal following their victory in court).

218. See *Gaia v. Miller*, No. 22CV41938 (Or. Cir. Ct. Malheur Cnty. June 2, 2023) (on file with Rutgers University Law Review); Crombie, *supra* note 217.

219. *Cardenas v. Pedro*, No. 21CV16354 (Or. Cir. Ct. Umatilla Cnty. March 5, 2024) (on file with Rutgers University Law Review).

220. *Id.*

221. See *Bott v. DeLand*, 922 P.2d 732, 738–39 (Utah 1996). The Supreme Court of Utah has held that people may seek money damages for violations of the unnecessary rigor clause. *Id.* Most state courts have not announced similar implied causes of action under their state constitutions. See *infra*, Section II.D.2.

222. See *Dexter v. Bosko*, 184 P.3d 592, 594 (Utah 2008).

resulting in serious injuries to Dexter that included paralysis.<sup>223</sup> The Supreme Court of Utah affirmed that Dexter had stated a judicable claim for unnecessary rigor and remanded the case, underscoring that the provision was more protective than the Eighth Amendment.<sup>224</sup> For example, the court said, requiring strict silence during given hours would likely not violate the Eighth Amendment, but it “may impose unnecessary rigor.”<sup>225</sup> However, the court made clear that “the conduct at issue [must] be more than negligent to be actionable.”<sup>226</sup>

Courts in Tennessee and Wyoming have never interpreted their unnecessary rigor clauses.<sup>227</sup> Indiana’s case law on “unnecessary rigor,” meanwhile, is less developed than Oregon and Utah’s—and less protective.<sup>228</sup> Advocates in states with such clauses can and should look to Oregon’s groundbreaking unnecessary rigor litigation for inspiration in how to circumvent the stringent subjective prong of the Federal Eighth Amendment in favor of potentially more protective state constitutional provisions.

*D. Structural and Doctrinal Barriers to Conditions Claims in the States*

Given the potential for state constitutions to provide more protection to incarcerated people seeking to remedy their conditions of confinement, why do most incarcerated plaintiffs challenging their conditions of confinement litigation rely chiefly on the Federal Eighth Amendment?

In *In re Williams*, the Washington Supreme Court noted the trend of bringing state constitutional claims only alongside federal ones—and articulating deliberate indifference as the proper standard.<sup>229</sup> Because no plaintiff had sought an independent state constitutional analysis until *In re Williams*, Washington courts had applied the deliberate indifference standard to conditions claims.<sup>230</sup> When Williams pushed for a more protective standard under the state anti-punishment clause and fully articulated why the state constitution called for a different standard, the court adopted one.<sup>231</sup>

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223. *Id.* Dexter would later die from complications stemming from those injuries. *Id.*

224. *Id.* at 598.

225. *Id.* at 596.

226. *Id.* at 597.

227. Wolfkot, *supra* note 21.

228. *Id.*

229. *In re Pers. Restraint of Williams*, 496 P.3d 289, 301 (Wash. 2021).

230. *Id.* at 301.

231. *Id.* at 304.

This suggests that more state litigation, pushing for an independent state constitutional interpretation, could be fruitful for incarcerated plaintiffs seeking to remedy inhumane conditions of confinement. But structural and doctrinal barriers discourage incarcerated plaintiffs from bringing such claims. These barriers include lack of counsel and inadequate provision of attorney's fees, inability to seek damages because of limited vehicles, the need to meet individualized state tests for departure from federal law, and lack of knowledge about state procedures and precedent.

1. Lack of Counsel and Inadequate Provision of Attorneys' Fees

The Federal Constitution does not guarantee lawyers to incarcerated people bringing civil rights claims, as it does in criminal matters.<sup>232</sup> And most cannot afford to hire counsel.<sup>233</sup> But legal representation is often the difference between winning and losing. Professor Joanna Schwartz found that unrepresented civil rights plaintiffs prevailed less than 17% of the time, compared with 70% for those bringing similar claims with the help of counsel.<sup>234</sup> The statistics are the same across subject matter areas. In immigration removal hearings, unaccompanied children without lawyers win only 15% of the time, while 73% of unaccompanied children with representation are allowed to remain in this country.<sup>235</sup>

For incarcerated plaintiffs who want the help of a lawyer, the federal system offers advantages.<sup>236</sup> Some federal courts, like the U.S. Courts of Appeals for the Ninth and Second Circuits and the Southern and Western Districts of New York, have programs to match indigent people with pro bono counsel.<sup>237</sup> In the Ninth Circuit, for example, staff attorneys screen cases brought by unrepresented plaintiffs and choose those that are

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232. Compare U.S. CONST. amend. VI (establishing the right to assistance of counsel in criminal trials), with U.S. CONST. amend. VII (providing no such right in civil trials).

233. See generally Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> (providing data about the incomes for incarcerated people prior to their incarceration).

234. Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 677 (2023).

235. *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (Nov. 25, 2014), <https://tracreports.org/immigration/reports/371/>.

236. As noted in Part I of this Article, it is also extremely difficult for incarcerated plaintiffs to obtain a pro bono lawyer in federal court. Most plaintiffs challenging their conditions of confinement or alleging they were abused behind bars proceed pro se, whether in state or federal court. See *supra* Section I.

237. See, e.g., UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PRO BONO PROGRAM 1–2 (2019), <https://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>.

particularly complex, present issues of first impression, or “otherwise warrant further briefing or oral argument” for appointment of pro bono counsel.<sup>238</sup> The majority of cases chosen for appointment of counsel are prisoner civil rights appeals or immigration petitions for review.<sup>239</sup>

Even in federal jurisdictions that do not have pro bono programs, incarcerated litigants might hope the availability of attorneys’ fees could entice an attorney to take on their case.<sup>240</sup> Federal law entitles a winning civil rights plaintiff to legal fees.<sup>241</sup> Very few states have similar fee-shifting provisions.<sup>242</sup> Some federal jurisdictions also offer reimbursement of fees, including for travel, telephone calls with clients, and photocopying.<sup>243</sup>

## 2. Many States Do Not Provide a Mechanism for Plaintiffs to Seek Money Damages

Incarcerated plaintiffs bringing claims in federal court for constitutional violations behind bars generally proceed under 42 U.S.C. § 1983, a federal statute passed in 1871 to allow citizens to recover damages for violations of federal constitutional rights by state and local government employees performing their official duties.<sup>244</sup> Because almost ninety percent of incarcerated Americans are in state or local custody,<sup>245</sup> most proceed under § 1983 when alleging federal constitutional violations.<sup>246</sup> In theory, incarcerated people suing for constitutional violations by *federal* employees may bring *Bivens* actions, so called for the 1971 Supreme Court case *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>247</sup> which announced the availability of money damages

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238. *Id.* at 1.

239. *Id.* at 2.

240. See Alicia Bannon, *One Simple Way to Support State Constitutionalism*, STATE CT. REP. (May 6, 2024), <https://statecourtreport.org/our-work/analysis-opinion/one-simple-way-support-state-constitutionalism>.

241. 42 U.S.C. § 1988(b); see also Bannon, *supra* note 240.

242. Bannon, *supra* note 240.

243. NOTICE TO COUNSEL APPOINTED IN PRO BONO CASES, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT (Aug. 2014), <https://www2.ca3.uscourts.gov/legacyfiles/probono.pdf>.

244. 42 U.S.C. § 1983.

245. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLY INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.

246. See Gary S. Gildin, *A Primer on Advocating Independent State Constitutional Remedies*, STATE CT. REP. (Feb. 27, 2024), <https://statecourtreport.org/our-work/analysis-opinion/primer-advocating-independent-state-constitutional-remedies>.

247. 403 U.S. 388, 389 (1971). In some jurisdictions, it is also possible to challenge prison conditions under 28 U.S.C. § 2241, a provision of the federal habeas corpus statute, the Antiterrorism and Effective Death Penalty Act of 1996. *E.g.*, *Ilina v. Zickefoose*, 591 F. Supp. 2d 145, 145, 149 (D. Conn. 2008) (holding that federal prisoner’s § 2241 petition for

for constitutional violations under certain circumstances.<sup>248</sup> *Bivens* actions were extended to conditions-of-confinement claims in *Carlson v. Green*.<sup>249</sup> However, that court-created remedy has been rendered “essentially nonexistent” by subsequent U.S. Supreme Court decisions.<sup>250</sup>

Plaintiffs bringing federal constitutional claims can ask for a wide array of relief. In addition to injunctive relief—which is generally available for state constitutional violations even absent a legislative or judicially created cause of action—they can seek a declaratory judgment or ask for compensatory, punitive, and/or nominal damages.

Compensatory damages are meant to make the plaintiff whole by accounting for “out-of-pocket loss and other monetary harms” associated with the violation, along with “such injuries as ‘impairment of reputation[,] personal humiliation, and mental anguish and suffering.’”<sup>251</sup> “Deterrence is also an important purpose” of compensatory damages.<sup>252</sup>

Punitive damages are additional monies sometimes awarded beyond compensatory damages as punishment for particularly egregious abuses; they may be “awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”<sup>253</sup>

Nominal damages serve to vindicate the constitutional right that has been violated—regardless of whether the violation has caused a compensable injury.<sup>254</sup> For example, in *Carey v. Piphus*, the Supreme

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writ of habeas corpus alleging that she was denied necessary medical care in violation of her Eighth Amendment rights was cognizable).

248. *Bivens*, 403 U.S. at 389, 397. However, the Court has “emphasized that recognizing a cause of action under *Bivens* is ‘a disfavored judicial activity,’” signaling a potential rollback of the availability of such actions. *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017)); *see also id.* at 486 (“[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts . . .”); Marcus Gadson, *Nevada Supreme Court Chips Away at Immunity for Law Enforcement Misconduct*, STATE CT. REP. (Mar. 17, 2023), <https://statecourtreport.org/our-work/analysis-opinion/nevada-supreme-court-chips-away-immunity-law-enforcement-misconduct> (“I suspect [the Court] may overrule *Bivens* in the near future . . .”).

249. 446 U.S. 14, 14, 17–18 (1980).

<sup>250</sup> Harrison Stark, *Resuscitating State Damages Remedies Against Federal Officials*, STATE CT. REP. (Oct. 14, 2025), <https://statecourtreport.org/our-work/analysis-opinion/resuscitating-state-damages-remedies-against-federal-officials>; *see* E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858 (2025).

251. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

252. *Id.*

253. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

254. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978). Nominal damages and declaratory judgments are functional equivalents. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 221–22 (2d ed.1993); *Memphis Cmty. Sch. Dist.*, 477 U.S. at 308 n.11

Court held that nominal damages were available to elementary and secondary students who claimed they had been suspended from school without procedural due process, even if the suspensions were justified.<sup>255</sup> A declaratory judgment, meanwhile, “embod[ies] a binding declaration of constitutional rights.”<sup>256</sup>

For Eighth Amendment challenges, then, all these remedies are available *in addition to* injunctive relief. But very few state legislatures have passed § 1983 equivalents authorizing damages claims for violations of state constitutions. Fewer than ten states have statutes authorizing such actions.<sup>257</sup> Courts in another handful of states have held that the people can sue for money damages directly under their state constitutions, announcing *Bivens*-type claims for state constitutional deprivations.<sup>258</sup> In those states, no statute is required to authorize a private cause of action for money damages for state constitutional violations.<sup>259</sup>

Absent a § 1983 equivalent or case allowing a cause of action directly under the state constitution, incarcerated plaintiffs who want to seek money damages in state court for the abuses they suffered behind bars can rely on tort law. In theory, tort cases should be easier to win than constitutional claims, as a plaintiff need only show negligence.<sup>260</sup> But there are limitations on relief in tort actions.<sup>261</sup> For example, in New

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(“[N]ominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.”)

255. 435 U.S. 247 (1978).

256. *Morris v. Travisono*, 509 F.2d 1358, 1361 (1st Cir. 1975); *see also* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1099, 1120 (2014).

257. Kendall Morton et al., *50 Shades of Government Immunity: Complications with Bringing Civil Rights Claims Under State Laws*, INST. FOR JUST. (Jan. 25, 2022), <https://ij.org/report/50-shades-of-government-immunity>; *see, e.g.*, Ill. Public Act 104-0440.

258. *See* Morton et al., *supra* note 257.

259. *Id.*; *see, e.g.*, *Mack v. Williams*, 522 P.3d 434, 439 (Nev. 2022) (“[A] private right of action for money damages exists to vindicate violations of search-and-seizure rights under the Nevada Constitution . . .”).

260. *See* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 516–17 (1989); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. L. INST. 2010) (detailing the negligence standard).

261. Moreover, bringing a torts claim can be particularly confusing for uncounseled incarcerated people due to procedural barriers like, in New York for example, a torts plaintiff having only ninety days “from the time of the injury or loss to either (1) file your claim, or (2) serve a Notice of Intention to File a Claim with the Attorney General.” Jonathan Gant et al., *Chapter 17: The State’s Duty to Protect You and Your Property: Tort Actions*, in A JAILHOUSE LAWYER’S MANUAL 496, 510–11 (Colum. Hum. Rts. L. Rev. ed., 13th ed. 2024), <https://jlm.law.columbia.edu/files/2017/05/29.-Ch.-17.pdf>; N.Y. CT. CL. ACT § 10 (McKinney Supp. 2012). And the applicable laws differ based on whether a plaintiff is

York, tort claims against the state must be brought in the Court of Claims—which does not have jurisdiction to grant injunctive relief—rather than in a regular trial court.<sup>262</sup> The Court of Claims also may not award punitive damages.<sup>263</sup> There are also caps on compensatory damages for torts in many states.<sup>264</sup>

### 3. Lack of Resources to Help File State Constitutional Claims

Incarcerated people proceeding pro se conduct their own research and prepare their filings largely unassisted. They rely on the resources available in the prison library, on prison litigation handbooks, and on advice from other incarcerated people.<sup>265</sup>

The overwhelming majority of conditions cases they will come across in their research are Eighth Amendment claims brought under § 1983.<sup>266</sup> This is both because most plaintiffs have historically proceeded under § 1983<sup>267</sup> and because even the few state cases out there are not as readily available online as federal cases.<sup>268</sup> Some states only report appellate or supreme court decisions to Westlaw and LEXIS, not trial court orders.

The advocacy resources that incarcerated people rely on similarly add to the inertia toward filing § 1983 claims in federal court. For example, *The Jailhouse Lawyer's Handbook*, published by the Center for Constitutional Rights and the National Lawyers Guild, includes less than one page about state court cases—focusing almost exclusively on using § 1983 to bring claims of federal constitutional violations in state courts.<sup>269</sup> The book's 177 pages contain only two sentences about the promise of state constitutions: "Another type of state claim is a claim

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incarcerated in a county jail or a state prison. Gant et al., *supra*, at 519 ("The Court of Claims has no jurisdiction over lawsuits involving county, town, city or village governments, agencies or employees. These governmental bodies, such as Rikers Island Jail, are all distinct from the State, and litigation against them is governed by provisions of the General Municipal law.").

262. See Gant et al., *supra* note 261, at 508 ("[T]he Court of Claims can generally only award money damages. It cannot prohibit the prison from using punishment that violates your constitutional rights, or fix unconstitutional conditions in the prison. You must address these concerns in either a Section 1983 proceeding or an Article 78 claim.").

263. *Id.* at 510.

264. CTR. FOR CONST. RTS. & NAT'L LAWS. GUILD, *THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON* 12 (6th ed. 2021), [https://www.jailhouselaw.org/sites/all/themes/rktp\\_jailhouselaw/assets/pdf/Jailhouse%20Lawyers%20Handbook%202021.pdf](https://www.jailhouselaw.org/sites/all/themes/rktp_jailhouselaw/assets/pdf/Jailhouse%20Lawyers%20Handbook%202021.pdf).

265. See *id.* at 1, 43–44.

266. See *id.* at 7, 33.

267. *Id.* at 7.

268. *Id.* at 112.

269. *Id.* at 9.

based on your state's constitution. Some state constitutions provide more rights than the [F]ederal [C]onstitution."<sup>270</sup>

One formerly incarcerated man put it simply. "Filing a lawsuit is *a lot* of work, and you have to remember some people aren't literate and aren't great at research," explained Michael Crawford, who spent twenty years behind bars before New York Governor Andrew Cuomo commuted his sentence in 2019.<sup>271</sup> "They're going to do the easiest thing, the thing they know, and that's Section 1983."<sup>272</sup>

### III. THE PROMISE OF STATE CONSTITUTIONS

As noted, both the federal and state contexts for challenging conditions of confinement present hurdles for incarcerated litigants. But lessons learned from the excessive sentencing context can be applied to challenging conditions of confinement under state Eighth Amendment analogues. State excessive sentencing challenges are becoming more and more common, and many people are experiencing relief from unconstitutional sentences as a result.

Similarly, despite obvious challenges, state conditions-of-confinement litigation holds much promise for the hundreds of thousands of people incarcerated in state prisons.<sup>273</sup> States now have an opportunity

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270. *Id.* By contrast, when the ACLU of Oregon circulated to incarcerated people sample complaints alleging conditions of confinement during the COVID-19 pandemic violated the state constitution, state conditions litigation in the state increased appreciably—and yielded many notable positive decisions. *COVID-19 Response*, ACLU OF OREGON, <https://www.aclu-or.org/en/covid19> (last visited Mar. 3, 2025).

271. Interview by Kathrina Szymborski Wolfkot with Michael Crawford (October 14, 2024); George Richert, *Governor Grants Clemency to Buffalo Murder Convict*, WIVB4 (Jan. 3, 2019), <https://www.wivb.com/news/governor-grants-clemency-to-buffalo-murder-convict/>; Press Release, *Firm Helps Secure Grants of Clemency for Two Pro Bono Clients*, PATTERSON BELKNAP (Jan. 2, 2019), <https://www.pbwt.com/news/firm-helps-secure-grants-of-clemency-for-two-pro-bono-clients>.

272. Interview by Kathrina Szymborski Wolfkot with Michael Crawford (October 14, 2024).

273. Beyond the possibility that states will interpret their analogues more protectively than the Eighth Amendment, there are additional aspects of some states' legal climates that may counsel in favor of bringing state—rather than federal—constitutional challenges to inhumane conditions. Whereas even meritorious federal conditions claims are frequently dismissed based on the defense of qualified immunity, *see, e.g.*, *Hamlet v. Martin* Corectional [sic] Inst., No. 21-11937, 2022 WL 16827438, at \*3 (11th Cir. Nov. 9, 2022), many states have less robust immunities available to defendants accused of constitutional violations. For example, in *Mack v. Williams*, the Nevada Supreme Court declared that qualified immunity was not an available defense for correctional officials accused of conducting an unnecessary and humiliating search of a woman visiting her incarcerated boyfriend, in violation of the Nevada Constitution. 522 P.3d 434, 451 (Nev. 2022). And in Montana, the high court has interpreted the state constitution as barring the qualified

to expand the limited view of Federal Eighth Amendment relief. Accordingly, this Part of the Article proposes some ideas for ways in which states can begin to raise the constitutional floor in Eighth Amendment-type claims under their own state constitutions.

A. *State Courts Could Move Away from the Problematic Scierter Requirements That the Supreme Court Has Outlined Under Federal Law*

One way in which state courts could significantly improve the legal climate for advancing conditions-of-confinement claims is by moving away from the stringent scierter requirements that the federal context entails. Specifically, the requirement that prison officials demonstrate reckless indifference to a person's serious harms is a onerous standard to meet. States could look to Washington and Oregon as examples of this type of analysis and for how to break with the federal deliberate indifference standard to provide better protections for individuals incarcerated in their state prisons.

As described above, many state courts have Eighth Amendment analogues that contain similar or identical wording to the Federal Eighth Amendment.<sup>274</sup> But many also include other provisions—such as the unnecessary rigor clauses—that could lead to an entirely new way of conceiving the rights of the incarcerated and duties of prisons and prison officials.<sup>275</sup> Advocates could start by simply pushing state courts to interpret the rights sitting unused in their constitutions.

While federal courts have not asked whether the state has a duty to protect the people whom it incarcerates, state courts could flip the

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immunity defense. Gary S. Gildin, *Paths Toward Abolishing Qualified Immunity for Violations of State Constitutional Rights*, STATE CT. REP. (Jun. 25, 2024), <https://statecourtreport.org/our-work/analysis-opinion/paths-toward-abolishing-qualified-immunity-violations-state>. Moreover, as described in Section I.A of this Article, *supra*, another hurdle that incarcerated plaintiffs must clear—even those with meritorious claims—is the Prison Litigation Reform Act (PLRA). Enacted in 1997, the PLRA keeps the suits of incarcerated people out of federal court by creating strict procedural requirements that must be met before filing. By contrast, some states, like California, have no PLRA equivalent. See Jacqueline Hayley Summs, Comment, *Grappling With Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement in Ross v. Blake*, 69 ADMIN. L. REV. 467, 476 n.69 (discussing that there are states with no PLRA equivalent).

274. The temptation to be in lockstep with the Federal Constitution is especially strong where state Eighth Amendment analogues contain identical or similar language to the Federal Constitution. See, e.g., Berry, *supra* note 103, at 1201–40 (outlining the similarity between the Eighth Amendment and state constitutional analogues, even where linguistic differences exist).

275. See Bell, *supra* note 215, at 83–99 (discussing the application of unnecessary rigor clauses in the sentencing context).

inquiry. Currently, rather than imposing affirmative obligations of care on prison officials and administrators, Eighth Amendment conditions-of-confinement jurisprudence instead places the burden on incarcerated plaintiffs to fight an uphill legal battle on deliberate indifference—even while continuing to deprive them of life’s necessities.<sup>276</sup> As noted above, Washington has recognized that it is the state’s “duty to ensure health, welfare, and safety” of the people it incarcerates.<sup>277</sup> Other state courts could similarly move away from the unprotective federal framework, instead requiring prisons and prison administrators to take affirmative steps to safeguard people in prison, rather than simply reacting to the current Eighth Amendment standards that incentivize prison staff to “not know” when harm is occurring.<sup>278</sup>

An additional benefit of asking states to reframe conditions of confinement in terms of an affirmative duty is that states are more likely to be interested in the plight of their own citizens. The overwhelming number of incarcerated people in the United States are imprisoned in state carceral facilities.<sup>279</sup> State courts have not historically been involved in oversight or accountability over their own state prisons.<sup>280</sup> It stands to reason, however, that state judges may be more interested in the conditions of prisons in their own jurisdictions than federal judges who often are a step removed and have not sentenced any individuals to serve a sentence in those facilities. Moreover, “[u]nconstrained by federalism concerns,” state court judges interpreting their own states’ constitutional provisions “are able to focus exclusively on their own state’s interests,”<sup>281</sup> as well as the interests of its citizens, including those who are incarcerated, their families, and their communities.

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276. *Estelle v. Gamble*, 429 U.S. 97, 109 (1976) (Stevens, J., dissenting) (lamenting that the majority opinion “describes the [s]tate’s duty to provide adequate medical care to prisoners in ambiguous terms which incorrectly relate to the subjective motivation of persons accused of violating the Eighth Amendment rather than to the standard of care required by the Constitution”).

277. *In re Pers. Restraint of Williams*, 496 P.3d 289, 299 (Wash. 2021) (en banc) (citing *Gregoire v. City of Oak Harbor*, 244 P.3d 924, 927 (Wash. 2010)).

278. Esser, *supra* note 16, at 1407 (“Perversely, the Eighth Amendment’s deliberate indifference test acts as a disincentive to the provision of adequate medical treatment because it encourages prison medical staff to not know, not test, and not discover incarcerated peoples’ legitimate medical concerns.”).

279. See Sawyer & Wagner, *supra* note 245.

280. Cf. CTR. FOR CONST. RTS. & NAT’L LAWS. GUILD, *supra* note 264, at 7 (describing how most claims brought by incarcerated people to enforce their rights use § 1983).

281. Smith et al., *supra* note 27, at 547 (describing the benefits of moving criminal justice reform from the federal level to the local level).

*B. State Courts Could Contemplate Different Remedies for Conditions-Based Claims Such as Sentence Reductions or Release from Prison*

Eighth Amendment remedies are limited to damages or injunctions, which may not adequately redress a specific harm that a person is suffering. For these reasons, the Eighth Amendment has often fallen far short of providing incarcerated litigants with meaningful relief, even where they have technically prevailed in a lawsuit or legal claim. For example, money damages are not a useful remedy for some constitutional violations that happen behind bars such as medical neglect or psychological trauma from abuse or prolonged isolation.<sup>282</sup> In such cases, release for the purposes of treatment is a better way to address individualized harm. Already, in Oregon, advocates are securing release for individuals in conditions-based lawsuits challenging unconstitutional conditions.<sup>283</sup> Similarly, the Washington high court in *In re Williams* ordered the Department of Corrections to improve Williams's conditions or release him to home confinement.<sup>284</sup> Knowing this, state courts could offer additional remedies such as early release, sentence reductions, or other protective measures in the context of state constitutional rights litigation.

The path to obtaining civil injunctive relief in federal court is often long and difficult, and enforceability of injunctions is an additional challenge.<sup>285</sup> Instead, advocates could urge state courts to use other mechanisms to find that prisons or prison administrators are violating peoples' rights—and urge release if possible. These state mechanisms might speed up the resolution of conditions-of-confinement claims in state prison systems. It is important to note that retaliation is rampant in the carceral setting, especially when prison officials inevitably find out that an incarcerated person has reported misconduct or prevailed in

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282. See, e.g., Alexander A. Reinert, *Release As Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1625 (2012) (noting that the term “punishment” within the Eighth Amendment “means different things in different contexts” and that “courts have long recognized that legal remedies are not a complete remedy for the violation of a constitutional right. This is particularly the case when the violation also involves physical injury or emotional distress.”).

283. E.g., *LaSeur v. Miller*, No. 22-CV-43857 (Malheur County, Or., Jan. 7, 2025); see also Noelle Crombie, *Oregon Judge Orders Prisoner's Immediate Release After Finding State in Contempt*, OREGONIAN: OREGONLIVE (Jan. 7, 2025, 3:57 PM), <https://www.oregonlive.com/crime/2025/01/oregon-judge-orders-prisoners-immediate-release-after-finding-state-in-contempt.html>.

284. *In re Pers. Restraint of Williams*, 496 P.3d 289, 293 (Wash. 2021).

285. See Edward T. Kole & Willard C. Shih, *Basics of Injunctive Relief in the Federal Court*, 2004 N.J. LAW. 29, 29–31. See generally Bray, *supra* note 63, at 564–72 (discussing enforcement of equitable remedies).

suing a correctional officer or institution.<sup>286</sup> State courts could order heightened protections or oversight for incarcerated people when they positively prevail in conditions-based litigation.

C. *State Courts Could Reinvigorate Debates About What Counts as “Punishment” in the First Place*

A backdrop to all of this is the meaning of the word “punishment(s)” in both state and federal court jurisprudence.<sup>287</sup> Legal scholarship interpreting the word “punishment” has flourished in the Eighth Amendment context.<sup>288</sup> Similarly, legal philosophers have long asked what punishment has meant in historical and normative debates about what the purpose and intent of punishment should be in the first instance.<sup>289</sup> Most problematically, as explained above, conservative judges have long urged that the word “punishment” in the Federal Eighth Amendment context means only deprivations that are intentionally imposed by judges and juries—it does not apply to the many deprivations that are inflicted by prison administrators and that are not specifically imposed as part of a sentence.<sup>290</sup>

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286. Meredith Esser, *Who Bears the Burden When Prison Guards Rape?*, 109 IOWA L. REV. ONLINE 188, 195, 197 (2024) (describing retaliation meted out against survivors of institutional sexual assault in California federal prison).

287. See generally William W. Berry III, *Unlocking State Punishment Clauses*, 77 RUTGERS U. L. REV. 1033 (2025) (analyzing the effect of linguistic differences in state punishment clauses, including the differences between those states which prohibit cruel “punishment” and those that prohibit cruel “punishments”).

288. See, e.g., Dolovich, *Cruelty*, *supra* note 14, at 890 (describing the appropriateness of *Farmer*’s conception of “punishment” in the Eighth Amendment prison conditions context).

289. See, e.g., ADAM KOLBER, PUNISHMENT FOR THE GREATER GOOD 2–5 (2024) (describing the philosophical idea of pure consequentialism in the context of criminal punishment and its utility); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 78 (2005) (noting that utilitarian approaches to punishment date back to the Enlightenment-era philosophies of Beccaria and Bentham); H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–2 (Oxford Univ. Press 2d. ed., 2008) (discussing the “Benthamite confidence in fear of the penalties threatened by law as a powerful deterrent” and “the cloud of doubt [that] has settled over . . . ‘retributive’ theory”); MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 74 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (“This need for punishment without torture was first formulated as a cry from the heart or from an outraged nature.”).

290. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (“Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration.”); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (“I believe that the text and history of the Eighth

State constitutions may give state jurists the opportunity to decide for themselves what the word punishment means in their own state constitutions. This could involve reinterpreting punishment in the context of sentencing, conditions of confinement, as well as how these different spheres of punishment intersect. Further, state courts could be instrumental in dismantling and de-legitimizing certain carceral practices. Indeed, mass incarceration—and the consequences that flow from it—are among the greatest civil rights issues of this era.<sup>291</sup> And most of the incarceration that happens originates in the states and through state criminal courts.<sup>292</sup> Many scholars have criticized our system of incarceration and have advocated that it be dismantled.<sup>293</sup> Although the Federal Constitution has served to entrench systems of mass incarceration and carceral social control,<sup>294</sup> state courts have an opportunity to move the criminal legal system in a new direction, away from the over-reliance on excessive punishment and overly-harsh prison conditions. The first step in this project might be for state courts to think about what punishment means, why we punish in the first place, and to think more deeply about such first principles in the service of less punitive prison conditions—and less punishment generally.

#### CONCLUSION

Advocates should begin to look to state constitutional provisions to afford greater rights to incarcerated people in the conditions-of-confinement space. As the federal courts move further and further away from providing meaningful relief to incarcerated people for conditions of confinement-based claims, state courts should step in to protect people behind bars.

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Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’”).

291. Smith et al., *supra* note 27, at 540.

292. *See id.* at 541.

293. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1159–61 (2015); Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 216 (2000).

294. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 34, 76, 90 (2019) (lamenting “[t]he Supreme Court’s anti-abolitionist jurisprudence”).