
RESPONSE

FINDING THE PROPER MEASURE FOR CONDITIONS OF PRETRIAL CONFINEMENT

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In response to Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

INTRODUCTION

I am grateful for the opportunity to comment on Professor Catherine Struve's article, *The Conditions of Pretrial Detention*,¹ which first identifies and then offers a remedy for a difficult doctrinal problem that has beset corrections advocates for decades. Like Struve, I would welcome courts' adoption of a rigorous analytical approach to regulating the conditions under which pretrial detainees and convicted prisoners are confined.² The purpose of this Response is to highlight some narrow concerns I have about the feasibility of her proposals, as well as to note my broader analytical objections to how Struve frames her intervention. Most critically, I fear that

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¹ Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

² There are significant stakes at play in this issue because what we say about pretrial conditions will affect a substantial majority of criminal detainees. Available data do not permit a precise estimation of the number of pretrial versus convicted detainees in America's jails. We do know that local jails admitted 11.8 million individuals between midyear 2010 and midyear 2011. See TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES 3 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>. We also know that at midyear 2011, 60.6% of jail detainees were unconvicted. *Id.* at 7 tbl.7. But it is likely fair to assume that pretrial detainees represent an even greater percentage of total jail admissions throughout a calendar year because convicted prisoners have longer overall stays in jail.

Struve's solution does not directly address the conditions of confinement experienced by detainees, but instead bears indirectly on these conditions by focusing on the circumstances under which individual defendants are held liable in damages for specific abuses of detainees.

I. THE SINGULARITY OF PRISON JURISPRUDENCE

Struve has provided a thorough summary of the constitutional standards that regulate the treatment of convicted prisoners.³ I will emphasize a few broader aspects of this complex doctrine, however, that are relevant to the conditions inflicted on pretrial detainees. First, and uniquely, the Eighth Amendment imposes affirmative duties on the government to provide for the material welfare of *prisoners* in many forms.⁴ That is, when the government uses confinement as punishment, the Constitution *enhances* a prisoner's constitutional rights vis-à-vis the government. Thus, Eighth Amendment jurisprudence serves as an exception to the rule that the Constitution is a document of negative liberties.⁵ This affirmative duty contrasts with the second and relatively straightforward aspect of prison conditions jurisprudence: confinement *limits* the rights of prisoners to enforce negative restraints on state conduct that flow from the Bill of Rights.⁶

³ See Struve, *supra* note 1, at 1010-11, 1015-16.

⁴ See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Farmer v. Brennan*, 511 U.S. 825, 825, 833 (1994) (stating that officials have a duty, rooted in the Eighth Amendment, to protect prisoners from harm); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (recognizing officials' obligation to provide conditions necessary to satisfy "the minimal civilized measure of life's necessities"); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing that officials have a constitutional duty to provide medical care to prisoners).

⁵ See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("[T]he Constitution is a charter of negative rather than positive liberties." (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980) and *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982))).

⁶ That is, constitutional rights are usually significantly narrowed by imprisonment. See *Hudson v. Palmer*, 468 U.S. 517, 524 (1984) ("[W]hile persons imprisoned for crime enjoy many protections of the Constitution, it is . . . clear that imprisonment carries with it the circumscription or loss of many significant rights."). In First Amendment jurisprudence, for instance, the government can subject inmates' free speech to merely reasonable regulation (rather than regulation justified by a compelling interest) under the *Turner v. Safley* test. See 482 U.S. 78, 89-91 (1987) (listing the various considerations that determine whether officials' limitation of prisoners' speech is reasonable). Fourth Amendment rights are also limited within prison walls because those confined have diminished expectations of privacy. See, e.g., *Hudson*, 468 U.S. at 526 (holding that prisoners have no reasonable expectation of privacy in the contents of their prison cell); *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005) (distinguishing prisoners' lack of right to privacy in cells from their limited "right to bodily privacy"). Due process rights, like Fourth Amendment rights, have been restricted mostly because of their fact-intensive nature. Thus, because prisoners already should expect to have their liberty restricted, prisons must only provide due process protections when they threaten the deprivation of liberty that is "atypical and significant" in comparison to

There are aspects of prison conditions jurisprudence that do not neatly fit this dichotomy. The Eighth Amendment limits the use of force through negative restraints on governmental officials,⁷ while areas of prison jurisprudence outside of the Eighth Amendment, such as free exercise of religion and access to the courts, fit within the affirmative obligation rubric.⁸ And some individual liberties remain in full force despite the fact of confinement in prison, most notably the right to be free of discrimination on the basis of race.⁹ In any event, prison conditions jurisprudence is generally an amalgam of affirmative duties and negative restraints on the state, amounting to an unusual mix in our constitutional framework.¹⁰

It is the reality of incarceration that unites this jurisprudence. The state has affirmative obligations to the incarcerated because the state itself burdens individuals' liberties as well as their ability to ameliorate the state-imposed burden.¹¹ Without these affirmative obligations, a short prison sentence could easily be transformed into a death sentence. At the same time, prisoners' entitlement to fundamental civil liberties are limited because they must be balanced against the legitimate penological interest of the state.¹²

the "ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995); *see also* *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (noting the difficulty of following the *Sandin* test but finding that in the case at hand, the state had imposed "an atypical and significant hardship under any plausible baseline").

⁷ *See* *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (stating that the Eighth Amendment prohibits the "malicious[] and sadistic[]" use of force).

⁸ *See, e.g.,* *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (stating that prisons must provide prisoners with "[t]he tools . . . the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement"); *DeHart v. Horn*, 227 F.3d 47, 56 (3d Cir. 2000) (en banc) (finding obligation to provide religious diet where prisoner's request is result of "sincerely held religious beliefs").

⁹ *See* *Johnson v. California*, 543 U.S. 499, 506 (2005) (applying strict scrutiny to racial classifications).

¹⁰ *See, e.g.,* *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (stating that the Due Process Clause is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security").

¹¹ *See, e.g.,* *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (imposing a duty on the state to take reasonable measures to protect inmates from violence because the state itself has "stripped them of virtually every means of self-protection and foreclosed their access to outside aid"); *DeShaney*, 489 U.S. at 200 (explaining that in prison, when "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs[,] . . . it transgresses the substantive limits on state action set by the Eighth Amendment").

¹² *See, e.g.,* *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

Given this complex framework, Struve might have offered a fuller discussion of where pretrial detainees should fit along this affirmative obligation–negative restraint continuum. To the extent that the fact of confinement creates affirmative obligations that prisoners may enforce against the state, one may assume that pretrial detainees are entitled to similar protections. But should the limitations on individual liberties also apply to pretrial detainees? And more importantly, should they be limited in the same way? One can imagine arguments for and against treating pretrial detainees similarly to prisoners in the context of traditional individual liberties, but it would benefit Struve’s readers and prison conditions jurisprudence at large for Struve to engage the question more fully.

Struve’s discussion, however, focuses on areas traditionally understood to implicate Eighth Amendment prison conditions litigation: access to medical and mental health care, failure to protect, excessive force, and overall conditions of confinement.¹³ She proposes that, first, prior to a judicial determination of probable cause, all of these types of claims should be analyzed under a Fourth Amendment reasonableness test; and second, after a judicial determination of probable cause, these claims should normally be subjected to an “objective” deliberate indifference test.¹⁴ If, in any of these contexts, a detainee can show that a defendant official had an express intent to punish, then a detainee can establish a constitutional violation.¹⁵ But, as Struve acknowledges, those cases will be few and far between,¹⁶ and I will focus, as she does, on the selection of the objective deliberate indifference test.

II. PRACTICAL DIFFICULTIES OF APPLYING OBJECTIVE DELIBERATE INDIFFERENCE

I will begin with a practical objection acknowledged by Struve: the difficulty for jail administrators and officials of structuring their behavior so as to satisfy three competing standards.¹⁷ Struve’s response to this difficulty is

¹³ See Struve, *supra* note 1, at 1011; *cf. Farmer*, 511 U.S. at 832-34 (summarizing requirements imposed by the Eighth Amendment).

¹⁴ See Struve, *supra* note 1, at 1061.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.* at 1072. Under Struve’s approach, when a detainee has been arrested without a warrant and has yet to be arraigned, the Fourth Amendment’s objective reasonableness test would provide the framework for evaluating harmful conditions. For arraigned detainees, an objective deliberate indifference standard would be the default test for evaluating complaints. And for prisoners held in a local jail—and as discussed above there are many of them, see *supra* note 2—the

two-fold: first, she notes that officials already have to consider the role that state law may play in regulating conditions of confinement, so adding additional standards will not inevitably be problematic;¹⁸ and second, even if the different standards pose problems for prison administrators, jail officials might respond by housing those held prior to a juridical determination of probable cause separately from other individuals.¹⁹

Struve's first response provides a limited answer to a difficult question. State law is a background regulator of the interactions between jail officials and detainees, but constitutional standards are different for several notable reasons. First, the principle of respondeat superior operates such that most state law causes of action functionally run against entities and not individuals.²⁰ By contrast, actions to enforce the Constitution may not proceed under a principle of respondeat superior, and as such, liability is always personal in nature.²¹ Although this distinction breaks down somewhat as a practical matter, it is not irrelevant.²²

Second, and more importantly, federal constitutional standards do not just add a new legal regime to the mix of laws governing state and local officials. They interact with state law in at least two important ways: sometimes they supplement existing regulation under state law by providing greater protection to individual detainees, and at other times they regulate completely different spheres of activity.²³ Where federal standards serve to augment state law, rather than to create entirely new requirements, state and local officials must understand clearly what is necessary under each standard to determine what a state or municipal official must do *in addition to* what is required under state law. Where federal standards operate in new spheres of state conduct, officials still must have a clear understanding of the content of their obligations. If Struve's standards will operate to create

Eighth Amendment's subjective deliberate indifference would generally apply. See Struve, *supra* note 1, at 1060-61.

¹⁸ See *id.* at 1074.

¹⁹ See *id.* at 1072.

²⁰ See, e.g., David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2192 (2005) (finding widespread application of respondeat superior to nonconstitutional torts against municipal employees).

²¹ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

²² See, e.g., Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555, 1672-77 & 1675 n.389 (2003) (noting that prison officials are typically indemnified in § 1983 damages litigation, but also documenting ways in which litigation deters individual officers).

²³ For instance, when the Constitution imposes affirmative rights in the area of medical care, federal standards often go beyond what state law requires. And when the Constitution regulates the kind of legal assistance that must be provided to detainees, they are regulating in a completely different sphere of activity than state law.

different obligations depending on the status of a detainee—and presumably, that is her goal in proposing the different standards—the application of each standard will multiply the difficulties in an already complex system.

Struve's second response—that the differing standards may incentivize officials to house detainees in different parts of the jail depending on their status (an outcome that Struve suggests may be beneficial in other ways)²⁴—is also only partly satisfactory. For the purposes of the most concrete conditions of confinement—often *Rhodes*-type issues such as cell size, lighting, heating, etc.²⁵—physical separation will perhaps enable officials to tailor conditions to detainee status. Even assuming, however, that officials will be able to make the fine distinctions between appropriate living conditions for warrantless arrestees, detainees housed under a judicial imprimatur of probable cause, and convicted prisoners, many other conditions of confinement will not be so easily regulated in this manner. Access to medical and mental health care, for instance, is usually governed by a uniform, internal policy that provides access to all detainees, regardless of status.²⁶ If Struve's standards will actually result in different conditions of confinement, then jails will presumably be required to have different minimum standards for different categories of detainees. Individual health providers might even be expected to use different criteria to make decisions based on whether a detainee is pretrial or convicted. The same is true for decisions regarding excessive force or failure to protect.

To be clear, these practical objections rest to some extent on predictions about the feasibility of applying the different standards proposed by Struve, which might be resolved through empirical study at some point in the future. And if the standards themselves are sensible, then there is value in articulating and applying them, even if it is difficult to implement them. For reasons that I will explain below, however, my concerns go beyond the practical because I fear that Struve's proposal will not provide courts with a rational and coherent approach to conditions of confinement for pretrial detainees.

²⁴ See Struve, *supra* note 1, at 1073 (arguing that the increased costs of housing pretrial detainees might lead state and local governments to make pretrial processes speedier and more efficient).

²⁵ See *Rhodes v. Chapman*, 452 U.S. 337, 364 (1981) (Brennan, J., concurring) (listing the conditions courts should consider in determining when confinement imposes cruel and unusual punishment).

²⁶ I base this proposition principally on my own experience litigating prison suicide cases, which often involve allegations both of gross incompetence by mental health professionals and inadequate policies by prison and jail administrators. See also *Matos ex rel. Matos v. O'Sullivan*, 335 F.3d 553, 557-58 (7th Cir. 2003) (stating that an inmate received "a great deal" of medical and mental healthcare even while on lockdown).

III. SUBSTANTIVE OBJECTIONS TO OBJECTIVE DELIBERATE INDIFFERENCE

A. *Lack of Fit with Excessive Force Claims*

Let me start with Struve's approach to excessive force claims before I turn to the overall framework she proposes for pretrial conditions of confinement. For those detainees who have not yet been before a judge in some form, Struve proposes use of a Fourth Amendment objective reasonableness standard.²⁷ This seems to me to be grounded in a perfectly logical theory of state power and the role of the Fourth Amendment in limiting it. My worries begin when Struve turns to the adjudication of excessive force claims brought by the vast majority of pretrial detainees: post-arraignment detainees or those who have been arrested pursuant to a warrant. For these detainees, Struve correctly recognizes that the Eighth Amendment excessive force standard, inasmuch as it focuses on malicious and sadistic intent, is inappropriate because these detainees should be free of all punishment, not just treatment imposed solely for the purpose to harm.²⁸ Therefore, Struve proposes that absent a showing of an express intent to punish, a post-arraignment detainee must show both that the conditions imposed on the inmate posed a "substantial risk of serious harm"²⁹ and that "the defendant knew or reasonably should have known of the risk."³⁰ In other words, Struve recommends moving from a test that measures whether an official had a subjective intent to harm (applicable in prison cases) to one that uses an objective, deliberate indifference inquiry.

Struve means for this standard to offer pretrial detainees greater protection than prisoners,³¹ but it is not obvious that her standard would succeed. In particular, the requirement that the defendant knew or should have known that the amount of force "pos[ed] a substantial risk of serious harm"³² to the detainee is problematic. Granted, with respect to the defendant's state of mind, Struve's standard requires less proof from a pretrial detainee than that demanded of a prisoner; it is easier to show deliberate indifference than it is to show sadistic and malicious intent. However, Struve's focus on the "substantial risk of serious harm"—borrowed from the Eighth Amendment's deliberate indifference standard—actually demands

²⁷ See Struve, *supra* note 1, at 1063.

²⁸ See *id.* at 1067.

²⁹ *Id.* at 1068 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

³⁰ *Id.* (emphasis omitted).

³¹ See *id.* at 1067.

³² *Id.* at 1070.

more of a pretrial detainee. In the Eighth Amendment excessive force context, the inquiry does not focus on the harm at all, but on the force used. Thus, under the Eighth Amendment, a prisoner must only show that a defendant used more than a de minimis amount of force while motivated by malicious and sadistic intent.³³ This is not a trivial distinction. The presumption behind prisoner excessive force jurisprudence is that *any* force applied for sadistic or malicious reasons will violate the Eighth Amendment because a prisoner's punishment does not include the unnecessary and abusive use of force.³⁴ Thus, if a prisoner alleges that a corrections officer used force for illegitimate reasons—such as racism—she has alleged a claim without regard to whether she has suffered a physical injury.³⁵ Struve's standard, at least on one reading, does not appear to protect pretrial detainees from the kind of low-level physical harassment that the Court intends the Eighth Amendment to prohibit.³⁶ Thus, although Struve proposes a standard that eases the burdens on a detainee with respect to the showing required for a defendant's state of mind, she has arguably increased the burden on a pretrial detainee in terms of the harm suffered from the excessive force.³⁷ Without further elaboration from Struve, it is difficult to say whether her modified deliberate indifference test will cover uses of force that are currently within the reach of the Eighth Amendment. At the very least, some justification is required for using a standard that focuses on harm as opposed to force.

³³ See *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1179 (2010) (per curiam).

³⁴ See *Hudson v. McMillian* 503 U.S. 1, 9 (1992) (“When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. . . . Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.”).

³⁵ See *Cole v. Fischer*, 379 F. App'x 40, 42 (2d Cir. 2010) (reversing a district court's grant of summary judgment because, even though the plaintiff inmate did not allege that he suffered any physical injury, the use of force may have been malicious in light of the offender's simultaneous racist speech).

³⁶ For instance, in *Abreu v. Nicholls*, the court found that summary judgment was inappropriate where the record suggested a corrections officer used a moderate amount of force in a way that threatened the use of “significantly greater force.” 368 F. App'x 191, 194 (2d Cir. 2010). The officer, after ordering the plaintiff “not to look at me,” allegedly pressed a rubber hammer against a prisoner's forehead with enough force to bend his head halfway back. *Id.* at 193. The court held that the facts created an inference that force was used for the purpose of humiliating the plaintiff and for no other reason. *Id.* at 194. It is not clear that Struve's proposed standard for pretrial detainees would encompass this kind of use of force.

³⁷ Struve leaves a door open for pretrial detainees to show that the force used was for the express purpose of punishing the detainee. See Struve, *supra* note 1, at 1061.

B. *Lack of Connection to Actual Conditions of Confinement*

One can discern a similar logic in Struve's proposal for addressing conditions of confinement for post-arraignment pretrial detainees in general. As in the excessive force context, Struve suggests that we reduce the requirement that pretrial detainees show subjective deliberate indifference and instead require only that pretrial detainees show objective deliberate indifference.³⁸ The theoretical basis for this proposed standard is unclear; rather, it appears to represent a compromise between the Fourth Amendment's reasonableness standard and the Eighth Amendment's more rigorous intent-based standard.³⁹ Struve's test might be an attractive meeting place if the Supreme Court addresses the distinction between conditions of confinement for pretrial and convicted detainees, but that alone does not justify its adoption.⁴⁰

However, even assuming that the distinction proposed by Struve will be beneficial to pretrial detainees in some cases, I fear that it focuses on the aspect of Eighth Amendment jurisprudence that is less directly connected to conditions of confinement. To appreciate this critique, it is important to understand a typical Eighth Amendment case. Whether the issue is excessive force, access to medical care, or failure to protect from harm, every Eighth Amendment claim requires the plaintiff to establish two elements: (1) some measure of harm and (2) some level of culpability tied to the state of mind of the defendant official.⁴¹ There are exceptions, which I will address below inasmuch as they bear on the limitations of Struve's proposal, but this basic framework pervades Eighth Amendment analysis. In the context of *subjective* deliberate indifference, a prisoner must demonstrate the existence of a substantial risk of *serious* harm combined with a subjectively reckless state of mind.⁴² Struve moves the focus in pretrial detention cases to whether a plaintiff can demonstrate that the defendant was objectively reckless,

³⁸ See Struve, *supra* note 1, at 1061.

³⁹ See Struve, *supra* note 1, at 1067 (“[T]he standards governing the conditions of judicial detention should occupy an intermediate ground between objective reasonableness and subjective deliberate indifference.”).

⁴⁰ It is, for example, unclear why we should abandon the reasonableness standard that seemed to inform the Court's decision in *Bell v. Wolfish*, except in the name of compromise. See 441 U.S. 520, 554 (1979) (“[The] due process rights of prisoners . . . are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution.”).

⁴¹ See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (outlining the two-prong test under the Amendment).

⁴² *Id.* at 834-35; see also Struve, *supra* note 1, at 1060-61.

but she retains the requirement that the official create the same objective degree of harm that is prohibited by the Eighth Amendment.⁴³

If Struve hopes to improve pretrial detention conditions, however, a test that focuses on harm is more fruitful than one that focuses on the official's state of mind because the latter does not play a significant role in establishing baseline conditions of confinement. The difference between objective and subjective deliberate indifference has, as a functional matter, little to do with conditions of confinement. Instead, the difference has to do with the level of culpability that will be necessary to impose personal damages liability on a particular prison official, sued in her individual capacity. The conditions of confinement that are prohibited or permitted by the Constitution are better measured by referring directly to the objective degree of harm that the Constitution tolerates under the deliberate indifference test.⁴⁴

One can see this in a variety of contexts. Forward-looking injunctive relief claims, which Struve places outside the scope of her Article,⁴⁵ are arguably the best examples of pure conditions of confinement claims. In those claims, whether for pretrial detainees or convicted prisoners, the dispute will center around the degree of harm posed by the challenged conditions, not the extent to which a particular defendant is conscious of the risk of harm.⁴⁶ After all, if the defendant were not conscious of the risks before the lawsuit, the filing of the claim would suffice to create the level of consciousness required by the subjective deliberate indifference test.⁴⁷ The routine substitution of newly-appointed prison officials as named defendants in ongoing injunctive claims demonstrates the irrelevance of state of mind inquiries to forward-looking injunctive relief.⁴⁸

⁴³ Struve, *supra* note 1, at 1068.

⁴⁴ As Struve notes, the traditional goals of punishment may not be pursued against pretrial detainees. This insight, to put my point another way, is the better starting point. *See* Struve, *supra* note 1, at 1017 n.45.

⁴⁵ *Id.* at 1067 n.344.

⁴⁶ In the systemic litigation surrounding overcrowding and inadequate medical and mental health care in California prisons, the central issue was whether the conditions there fell "below the standard of decency that inheres in the Eighth Amendment," and not the state of mind of defendant officials. *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011). Indeed, the deliberate indifference state of mind was cited only by the dissenters. *Id.* at 1960 (Alito, J., dissenting).

⁴⁷ *See* *Farmer v. Brennan*, 511 U.S. 825, 846 n.9 (1994). In an injunctive relief claim, an official could always claim that despite her awareness of the risk, she is not deliberately indifferent because she has responded reasonably to the risk, *see id.* at 844-45, but this still moves the emphasis away from assessing an official's state of mind toward determining the acceptable level for a risk of harm.

⁴⁸ *See* FED. R. CIV. P. 25(d) (authorizing the substitution of an official's successor should the official pass away or leave office).

Even for retrospective damages claims, it quickly becomes apparent that subjective state of mind requirements are important for determining liability but less relevant for addressing the material conditions of confinement experienced by prisoners or detainees. For example, if we imagine a situation in which a corrections officer used force against a prisoner, the officer will be held liable if she intentionally used force that was excessive in relation to the threat presented by the prisoner.⁴⁹ But if we imagine that same prisoner suing a supervisor who observed and failed to intervene in the beating, the supervisor may be held liable if she was deliberately indifferent to the subordinate's use of excessive force.⁵⁰ The same suit against a bystander officer would require a separate state of mind inquiry. Although these claims would involve different levels of culpability, it would be strange to say that we are talking about different conditions of confinement in these three circumstances. The prisoner has a right to be free of the use of force that goes beyond a "good faith effort to maintain or restore discipline."⁵¹ The different levels of culpability that apply to differently situated defendants are simply ways to focus on the personal involvement of that particular defendant in a single constitutional violation.

A similar observation can be made with regard to *Monell* claims against municipalities.⁵² In prisoners' rights *Monell* claims, courts already use the objective deliberate indifference test that Struve suggests we adopt for pretrial conditions cases.⁵³ This is so even in cases in which the substantive claim—say deliberate indifference to medical care or excessive use of force—would require a plaintiff to establish an individual official's subjective state of mind to recover against the official directly involved in the alleged abuse. Indeed, most *Monell* claims are brought contemporaneously with claims against individual defendants.⁵⁴ Yet it would be inaccurate to say that the claims against individual defendants are directed at regulating different conditions of confinement than the claims against the

⁴⁹ See *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

⁵⁰ See, e.g., *Dodds v. Richardson*, 614 F.3d 1185, 1212-13 (10th Cir. 2010) (summarizing case law on supervisor liability); *Danley v. Allen*, 540 F.3d 1298, 1315 (11th Cir. 2008), ("[S]upervisors are liable for the excessive force and the deliberate indifference of their employees where the supervisors received numerous reports of prior misconduct of that nature by those same employees and did nothing to remedy the situation."), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁵¹ *Hudson*, 503 U.S. at 6.

⁵² See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

⁵³ See *Farmer v. Brennan*, 511 U.S. 825, 840-42 (1994) (contrasting the objective deliberate indifference standard applied to municipalities with the subjective deliberate indifference standard applied to individual prison officials).

⁵⁴ See, e.g., *Doninger v. Niehoff*, 642 F.3d 334, 356 (9th Cir. 2011) (discussing plaintiff's suit both against defendants in their individual capacities and under *Monell*).

municipality. The burden that a plaintiff must meet to establish her claim is different in the two cases, but the ultimate conditions of confinement regulated or enforced are the same.

Thus, if we are to focus on the conditions of *confinement*, and not the conditions under which courts will impose damages liability on individual state officers, we should direct attention to the objective degree of harm the state causes to a particular detainee or prisoner. Struve acknowledges that it would be possible to look to this factor to find space for a pretrial detention standard that differs from the standard for prisoners, but discards it on pragmatic grounds because it “might be more likely . . . to raise problems concerning conflicting standards in the same facility.”⁵⁵ I agree that focusing on the differences between the objective harm constitutionally permissible for prisoners and pretrial detainees may have the effect of resulting in conflicting standards within the same facility,⁵⁶ but it is a more straightforward way to engage in the dialogue that both Struve and I think is worthwhile.

CONCLUSION

It may be uncomfortable to specify the ways in which prisoners may suffer harsher conditions of confinement in comparison to detainees who are presumed innocent. In my view, we would all be better served by having that conversation directly rather than seeking to operationalize the same intuition through the indirect means of adjusting the state of mind requirement in pretrial detention damages cases. Moreover, prisoners may ultimately benefit from an exploration of the state’s ability to impose harsh conditions of confinement on pretrial detainees. Prisoners housed in jails may benefit directly if jail officials have to treat all detainees the same in order to meet obligations to pretrial detainees. Prisoners may even benefit indirectly by having a renewed discussion about when conditions imposed on detainees cannot be justified by the legitimate goal of keeping them safely confined until trial. After all, if such conditions do not have a legitimate connection to holding detainees in confinement, it may be difficult to articulate a reason why they would have a sufficient connection to holding prisoners in confinement.

⁵⁵ Struve, *supra* note 1, at 1078.

⁵⁶ This result is by no means inevitable. We might conclude that prisoners are as entitled as pretrial detainees to safe housing, sufficient medical care, and adequate shelter. But that is a matter beyond the limited scope of this brief Response.

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