Cornell Law Review

Volume 103
Issue 2 *January 2018*

Article 3

The Constitutional Law of Incarceration, Reconfigured

Margo Schlanger
University of Michigan Law School

THE CONSTITUTIONAL LAW OF INCARCERATION, RECONFIGURED

Margo Schlanger†

† Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan. Thanks to the participants in Vanderbilt University Law School's faculty workshop, the Prison Scholarship Roundtable, John Boston, and (as always) Sam Bagenstos. All remaining errors are my own responsibility. I wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan.

INTRODUCTION

On any given day, about 2.2 million people are confined in U.S. jails and prisons[1]—nearly 0.9% of American men are in prison,[2] and another 0.4% are in jail.[3] This year, 9 or 10 million people will spend time in our prisons and jails;[4] about 5000 of them will die there.[5] A decade into a frustratingly gradual decline in incarceration numbers,[6] the statistics have

---

1 E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015, at 5 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf [https://perma.cc/SSQ9-RE6A]; TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2015, at 3 (2016), https://www.bjs.gov/content/pub/pdf/ji15.pdf [https://perma.cc/58YJ-L7UY].

2 CARSON & ANDERSON, *supra* note 1, at 5; U.S. Census Bureau, *Group Quarters Population By Sex By Age By Group Quarters Type*, AMERICAN FACTFINDER, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_PCT21&prodType=table [https://perma.cc/BGX9-FF9E].

3 MINTON & ZENG, *supra* note 1, at 3; U.S. Census Bureau, *supra* note 2. I count the 81,200 people in state prison custody who are housed in local jails in the jail statistics above, subtracting them from the prison figures in the source to avoid double counting.

4 Tallying this figure with any certainty is challenging. For prisons, in 2015 (last count), there were 1.5 million prisoners on any given day, of whom about 640,000 were released and another 608,000 admitted in the course of the year. CARSON & ANDERSON, *supra* note 1, at 5, 11. Some were both released and readmitted. So that is somewhere between 1.5 and 2 million individuals, over 2015. For jails, about 10.9 million people were admitted in 2014. MINTON & ZENG, *supra* note 1, at 3. Some portion of those were admitted more than once; a 2005 estimate by a Bureau of Justice Statistics expert put the individual admission figure at 9 million, for a year with 12.6 million total admissions to jails. *See* Allen Beck, Chief, Correction Statistics Program, Bureau of Justice Statistics, Address at The Jail Reentry Roundtable: The Importance of Successful Reentry to Jail Population Growth (June 27, 2006), http://www.urban.org/sites/default/files/beck.ppt [https://perma.cc/MQ7F-CCKY]. Given the lower admission rate in 2014, perhaps the corresponding figure for individuals admitted to jail is more like 7.7 million individuals.

5 MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS, 2000–2014 – STATISTICAL TABLES 1 (2016), https://www.bjs.gov/content/pub/pdf/mlj0014st.pdf [https://perma.cc/T5TY-2QCB] (~1,000/year in jail); MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN STATE PRISONS, 2001–2014 – STATISTICAL TABLES 1 (2016), https://www.bjs.gov/content/pub/pdf/msp0114st.pdf [https://perma.cc/GK26-86D6] (~4,000/year in prison).

6 E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INMATES IN CUSTODY OF STATE OR FEDERAL CORRECTIONAL FACILITIES, INCLUDING PRIVATE PRISON FACILITIES, DECEMBER 31, 1999–2015 (2016), https://www.bjs.gov/nps/resources

grown familiar: We have 4.4% of the world's population but over 20% of its prisoners.[7] Our incarceration rate is 57% higher than Russia's (our closest major country rival in imprisonment), nearly four times the rate in England, and over ten times the rate in Nordic and Scandinavian countries.[8] And while American jails and prisons are less brutal and unhealthy now than they were in the 1970s (when the total incarcerated population was under half a million people),[9] current conditions behind bars are sometimes horrendous.

As American incarcerated populations grew starting in the 1970s, so too did court oversight of prisons. That changed in the late 1980s. Incarceration continued to boom but federal court oversight shrank.[10] A share of the responsibility goes to Congress, which in 1996 enacted sharp limits on prisoners' rights litigation.[11] But both before and after that date, the Supreme Court also imposed numerous doctrinal obstacles to prisoners' rights litigation. Many of those obstacles related to civil rights litigation generally—to attorneys' fees, the scope

---

/documents/QT_custody%20population%20including%20private%20prisons_total.xlsx [https://perma.cc/U3ZH-H8HB]. As of 2015 (latest data), prison and jail populations were down about 6% from their 2008 peak. BUREAU OF JUSTICE STATISTICS, ESTIMATED NUMBER OF PERSONS SUPERVISED BY U.S. ADULT CORRECTIONAL SYSTEMS, BY CORRECTIONAL STATUS, 1980–2014 (2016), https://www.bjs.gov/content/keystatistics/excel/Correctional_population_counts_by_status_1980-2014.xlsx [https://perma.cc/MUX8-6DQ5].

7 U.S. Census Bureau, *U.S. and World Population Clock*, https://www.census.gov/popclock/?intcmp=home_pop [https://perma.cc/994U-NF5S]; Inst. for Criminal Policy Research, *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=all [https://perma.cc/4W5Z-KMXR].

8 Inst. for Criminal Policy Research, *supra* note 7.

9 U.S. DEP'T OF JUSTICE, NAT'L PRISONER STAT. BULL., PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS: 1968–1970, at 22, tbl.10c (Apr. 1972); U.S. DEP'T OF JUSTICE, LAW ENF'T ASSISTANCE ADMIN., NATIONAL JAIL CENSUS 1970, at 10, tbl.2 (1971).

10 *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*] (discussing the trends and their causes and consequences).

11 *See* Prison Litigation Reform Act, Pub. L. No. 104-134, tit. 8, §§ 801–10, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2012); 42 U.S.C. §§ 1997a–c, e–f, h (2012)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. For in-depth examination of the PLRA's impact on damage actions, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]. For in-depth examination of the PLRA's impact on injunctive litigation, see Schlanger, *Civil Rights Injunctions*, *supra* note 10. For statistics on the impact on prisoners' lawsuits, see Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) [hereinafter Schlanger, *Trends*].

and sturdiness of injunctions, and similar issues.[12] Others restricted the scope of Bill of Rights protections available to prisoners.[13] This Article addresses the most central doctrinal limit: the Supreme Court's restrictive reading of the constitutional provisions governing treatment of prisoners—the Cruel and Unusual Punishments Clause and the Due Process Clause, which regulate, respectively, post-conviction imprisonment and pretrial detention. 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—allowing, even encouraging, them to avoid constitutional accountability. And lower courts compounded the error by importing that reading into Due Process doctrine as well.

We must do better. As Justice Kennedy recently wrote:

> Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.[14]

An opportunity exists, right now, to reconfigure the constitutional law of incarceration to facilitate additional judicial oversight, and to be simultaneously more logical, consistent, and just. That possibility was opened up by the Supreme Court's 2015 opinion in *Kingsley v. Hendrickson*,[15] a jail case addressing the liability standard for official uses of force against pretrial detainees. Justice Breyer's majority opinion rejected jail officials' proposed standards—that officers' use of force be deemed to violate detainees' constitutional rights only when the officer imposed force "maliciously and sadistically for the very

---

12 *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001) (limiting availability of fee shifting; no fees may be awarded based on defendants' voluntary cessation of challenged conduct, even if induced by a lawsuit); Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367 (1992) (insisting on a flexible standard for alteration of structural reform consent decrees).

13 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84–88 (1987) (holding that constitutional rights in prison may be abridged if the challenged policy is reasonably related to legitimate penological interests); O'Lone v. Estate of Shabazz, 482 U.S. 342, 347–50 (1987) (allowing constraints on religious exercise in prison, even when alternative accommodations might be available); Hudson v. Palmer, 468 U.S. 517, 522–28 (1984) (holding that prisoners have no reasonable expectation of privacy in their cells).

14 Davis v. Ayala, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring).

15 135 S. Ct. 2466 (2015).

purpose of causing harm"[16] or was criminally reckless. Instead, relying on 1970s precedent, not subsequent case law that had placed undue emphasis on the subjective culpability of prison and jail officials as the crucial source of constitutional concern, the *Kingsley* Court returned to a more appropriate objective analysis.

In finding for the plaintiff in *Kingsley*, the Supreme Court unsettled the law far past the case's direct factual setting of pretrial detention, expressly inviting post-conviction challenges to restrictive—and incoherent—Eighth Amendment case law. Over the vehement opposition of Justice Scalia, the Court rejected not only the defendants' position but the logic that underlies twenty-five years of pro-government outcomes in prisoners' rights cases. But commentary and developing case law since *Kingsley* has not fully recognized its implications. Even courts and commentators who have understood that *Kingsley*'s logic reaches past use-of-force to conditions-of-confinement cases have not appreciated that it suggests not merely a softening of the liability standard from criminal recklessness to civil recklessness, but a more sweeping change.[17] And so far, no court or sustained commentary has analyzed the logical and normative considerations that suggest that the same analysis applies to post-conviction prisoners as well. In this Article, I argue that constitutional doctrine should follow *Kingsley*'s lead and center on the objective experience of incarcerated prisoners, rather than the culpability of their keepers. The bottom line of my analysis is that the Constitution imposes governmental liability for harm caused to prisoners—whether pretrial or post-conviction—by unreasonably dangerous conditions of confinement and unjustified uses of force.

Part I begins with a doctrinal history; prisoners' rights precedents are unfamiliar to many, and I summarize the pre-*Kingsley* Supreme Court case law as it evolved over time. Even for those conversant with recent prisoners' rights cases, the 1980s/90s doctrinal shift I describe may come as a surprise. Then I examine the key logical fault line in the doctrine—its reliance on an undersupported and idiosyncratic definition of the concept of "punishment" as the foundation for a subjective liability standard under the Eighth Amendment. Part II examines several jail use-of-force scenarios, using them as test cases facilitating normative evaluation of various liability rules.

---

16 Brief for Respondents at 15, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1519055, at *15.

17 *See infra* Part III.

Part III addresses *Kingsley* itself, exploring the two principal opinions in depth. I suggest that *Kingsley*'s reading of its chief precedent, *Bell v. Wolfish*, is a fair one, and I explain how that reading directs adjudicatory attention to objective evaluation of the reasonableness of uses of force, rather than conditioning liability for excessive force on either the punitive intent or recklessness of the jail officer. I then move from use of force to conditions of confinement, arguing that *Kingsley* doctrinally entails a similar objective liability rule in that context as well, and I defend that outcome normatively. In Part IV, I look at the ways organizational dynamics support the *Kingsley* rule and argue that *Kingsley*'s salutary return to a non-culpability-based liability regime avoids a deeply problematic entailment of a culpability-based system, a "cost defense" to constitutional liability. In Part V, I shift from pretrial detainees and the Fourteenth Amendment to convicted prisoners and the Eighth Amendment; the reasonableness approach is compelling there, too.

The Supreme Court took a wrong turn in the 1980s and 1990s, adopting an unjustified and unproductive Eighth Amendment doctrine that made jailers' hearts the touchstone for prisoners' rights litigation, rather than the objective impact of their choices. In *Kingsley*, the Court appropriately declined to compound the error in a pretrial detainee case. Often ruling on cases brought by pro se prisoners, not all lower courts have yet understood the full scope of what *Kingsley* requires. That must change. In addition, prisoners' rights lawyers should begin pressing to realize *Kingsley*'s full potential, bringing to the Supreme Court a case that allows the Court to rectify its Eighth Amendment wrong turn and resume a better path. In this era of mass incarceration, our jails and prisons should not be shielded from accountability by legal standards that lack both doctrinal and normative warrant.

I
CONSTITUTIONAL REGULATION OF JAIL AND PRISON CONDITIONS: DOCTRINAL DEVELOPMENTS

Current case law holds that three different clauses of the Constitution protect people detained in American jails or prisons from excessively harsh or dangerous treatment or conditions.[18] Beginning at some as-yet-undertheorized point in the

[18] Graham v. Connor, 490 U.S. 386, 394 (1989) ("In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In

arrest/detention process[19] up until criminal conviction, the Fourteenth and Fifth Amendments' Due Process Clauses afford detainees protection against excessive force and harmful conditions of confinement.[20] Analogous protections for convicted prisoners are governed by the Eighth Amendment's Cruel and Unusual Punishments Clause.[21] (In addition, though not discussed in this Article, the Fourth Amendment bans unreasonable searches and seizures, which includes excessive force or other abusive treatment of arrestees.[22]) Case law further divides claims into two general categories: use of force and conditions of confinement. The latter includes, for example, claims relating to medical and mental health care; failure to protect a prisoner from other prisoners; problems relating to nutrition, vermin, ventilation; and so on.

Table 1 summarizes the current Supreme Court case law in a two-by-two grid; the four cells include four different liability standards.

---

most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." (internal citation omitted)).

19 See *Kingsley*, 135 S. Ct. at 2479 (Alito, J., dissenting); see also Erica Haber, Note, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on When Seizure Ends and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y.L. SCH. J. HUM. RTS. 939 (2003).

20 Bell v. Wolfish, 441 U.S. 520, 535 (1979); *see Kingsley*, 135 S. Ct. at 2477.

21 *See* Farmer v. Brennan, 511 U.S. 825, 832–33 (1994); Hudson v. McMillian, 503 U.S. 1, 5–6 (1992); Whitley v. Albers, 475 U.S. 312, 318–19 (1986).

22 *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013) (arguing that, prior to a judicial determination of probable cause, detainees' conditions and force claims should be analyzed under a Fourth Amendment reasonableness test; and after such a determination, under a Fourteenth Amendment objective deliberate indifference test). The Fourth Amendment also governs searches in jails and prisons. *See* Florence v. Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 1516–17 (2012); *Bell*, 441 U.S. at 558–59.

TABLE 1: PRISONERS' RIGHTS LIABILITY STANDARDS

	Pretrial detention (Due Process Clauses)	Post-conviction imprisonment (Cruel & Unusual Punishment Clause)
Use of Force	*Kingsley v. Hendrickson* (2015) "force purposely or knowingly used . . . was objectively unreasonable"[23]	*Whitley v. Albers* (1986)/ *Hudson v. McMillian* (1992) "maliciously and sadistically for the very purpose of causing harm"[24]
Conditions of confinement	*Bell v. Wolfish* (1979) "an expressed intent to punish on the part of detention facility officials," *or* "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[25]	*Wilson v. Seiter* (1991)/ *Farmer v. Brennan* (1994) Liability depends on both an "objective component . . . (Was the deprivation sufficiently serious?), and . . . [a] subjective component (Did the officials act with a sufficiently culpable state of mind?)."[26] The subjective component—"deliberate indifference"—means "conscious[ ] disregar[d]" [of] a substantial risk of serious harm."[27]

The table suggests more clarity to the divisions between its four cells than lower court case law reflects. Between 1979 (*Bell*) and 2015 (*Kingsley*), the Supreme Court offered little guidance on the difference between pretrial and post-conviction standards, instead offering only the comment that "due process rights . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner."[28] In response,

23 *Kingsley*, 135 S. Ct. at 2473.

24 *Whitley*, 475 U.S. at 320–21; *Hudson*, 503 U.S. at 6.

25 *Bell*, 441 U.S. at 538 (alterations in the original).

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

27 Farmer v. Brennan, 511 U.S. 825, 839 (1994).

28 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). For a typical Court of Appeals treatment, see, for example, Williams v. Rodriguez, 509 F.3d 392, 401 (7th Cir. 2007) ("Although the Eighth Amendment only applies to convicted prisoners, this court has previously stated that the same standard applies to pretrial detainees under the Fourteenth Amendment's due process clause."). *See* Cavalieri v. Shepard, 321 F.3d 616, 620 (7th Cir. 2003) ("The Eighth Amendment does not apply to pretrial detainees, but as a pretrial detainee, [Plaintiff] was entitled to at least the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment."); *see also* Jackson v. Ill. Medi–Car, Inc., 300 F.3d 760, 764 (7th Cir. 2002) ("[W]hen considering a pretrial detainee's claim of inadequate medical care, we frequently turn to the analogous standards of Eighth Amendment jurisprudence.").

the lower federal courts blurred the standards. The distinction between use of force and conditions is contestable as well. For example, which category describes use of restraints—handcuffs, shackles, restraint chairs, etc.? Restraints are considered a use of force in jail and prison policies[29] but have been analyzed as conditions in the Supreme Court.[30]

I move now to the relevant doctrinal development.

A. Stage 1: Before the 1970s

Most conditions-of-confinement litigation has involved convicted prisoners[31] and, therefore, the Eighth Amendment's Cruel and Unusual Punishment Clause. Constitutional challenges to conditions of confinement were unusual until the 1960s. The delay was not because the Supreme Court struggled to conclude that the Eighth Amendment covered prison conditions; the few relevant cases made clear the Court's understanding that the Constitution forbids inhumane penal conditions. In fact, this was the taken-for-granted part of Eighth Amendment jurisprudence, as other more contested issues were litigated. For example, in the 1910 case *Weems v. United States*,[32] when the Court held unconstitutional a punishment handed down in the Philippines of fifteen years' imprisonment and "*cadena temporal*," the Court emphasized that the Eighth Amendment was very much concerned with the mode and conditions of punishment. It explained that the punishment under review was more than a long period of imprisonment. The defendant, the Court explained, was sentenced to "bear a chain night and day. He is condemned to painful as well as hard labor."[33] In the end, the Court concluded that both the term and the type of punishment were problematic: The sentence "is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."[34]

Weems's discussion of *cadena temporal* and painful and hard labor as illegal thus expressly acknowledges that the

---

29 *E.g.*, AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 32–33, 4-ALDF-2B-01 to -03 (4th ed. 2004).

30 *See* Hope v. Pelzer, 536 U.S. 730, 736–38 (2002).

31 *Cf.* Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIR. LEGAL STUD. 79 (2004).

32 217 U.S. 349 (1910).

33 *Id.* at 366.

34 *Id.* at 377.

treatment of prisoners is regulated by the Eighth Amendment. This was not even the controversial part of *Weems*: It was the Court's holding with respect to the *length* rather than the *mode* of punishment that provoked the dissent, by Justice Edward White, and that overrode the prosecution brief.[35] The Court's *cadena temporal* holding was contested on the merits—the dissent argued that the conditions were not all that bad.[36] But unlike the proportionality holding, this part of the majority's approach did not elicit the objection that conditions were categorically beyond the reach of the Cruel and Unusual Punishments Clause.[37]

Early death penalty jurisprudence similarly suggested that the Cruel and Unusual Punishments Clause is concerned with the method of punishment. For example, when in 1890 the Supreme Court upheld the use of the electric chair as a method of execution in *In re Kemmler*, the Court commented that the method (rather than the fact of execution) was precisely the subject of the Eighth Amendment challenge[38]: "Punishments are cruel when they involve torture or a lingering death, but the

---

35 *See id.* at 411 (White, J., dissenting). The United States defended the prisoner's sentence by explaining, "There is nothing cruel or unusual in a long term of imprisonment, as the words are used in the Bill of Rights. The description there refers rather to mutilations and degradations, and not to length or duration of the punishment." Brief for Respondent-Appellee at 12, Weems v. United States, 217 U.S. 349 (1910) (No. 193). Rather than covering the length of the sentence, the United States argued, "cruel and unusual punishment" indicated the *nature* of the punishment: "such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied." *Id.* at 13; *see also* Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910) ("All courts would agree in holding some punishments forbidden, as, to chain a prisoner by the neck for several hours so that he must remain standing, a modern imitation of the pillory.") (citing *In re* Birdsong, 39 F. 599 (S.D. Ga. 1889)).

36 *See Weems*, 217 U.S. at 412 (White, J., dissenting) (describing the conditions as merely "irksome").

37 The Philippine Supreme Court, looking to limit the impact of *Weems*, read it to outlaw *cadena temporal* only when imposed as a punishment for the precise crime adjudicated in that case. *See* Margaret Raymond, *"No Fellow in American Legislation":* Weems v. United States *and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 294 (2006) (citing United States v. Pico, 18 PHIL. REP. 386, 389–90 (S.C., Feb. 11, 1911)) ("Confronted as we are with the knowledge that consequences so far-reaching and disastrous must result from a holding favorable to the contention of counsel on this motion, it is manifestly our duty rigidly to restrict the application of the doctrine laid down in the Weems case to cases wherein the *ratio decidendi* in that case is clearly applicable and to decline to be bound by inferences drawn from observations and comments contained in the opinion in that case which appear to be based upon a misapprehension of facts, or upon assumed facts which do not accord with the facts in the cases brought before us.").

38 *See In re* Kemmler, 136 U.S. 436, 447 (1890). Notably, the Court did not devote even a word to the issue of whether the method was chosen by the legislature, a judge or jury, or the executive.

punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[39] In a later electric chair case, *Louisiana ex rel. Francis v. Resweber*, a Supreme Court plurality explained that "the Constitution protects a convicted man" from the "cruelty inherent in the method of punishment,"[40] or any other "execution by a state in a cruel manner."[41] In this case, the petitioner had already been subjected to a failed attempt at electrocution; he challenged the state's second try. The Court agreed that the Constitution forbids "the infliction of unnecessary pain in the execution of the death sentence" as part of an Eighth Amendment "prohibition against the wanton infliction of pain."[42] Expressly under the "assum[ption] that the state officials carried out their duties under the death warrant in a careful and humane manner," the Court explained that the petitioner failed because he had presented neither a "purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution."[43] Thus, as Sharon Dolovich has summarized the cases: "For more than a century, the Court has confronted Eighth Amendment challenges to the methods by which state officials have administered death sentences and in each case has assumed without question that the challenged methods, as punishment, are appropriately subject to Eighth Amendment scrutiny."[44]

Moreover, while lower courts in the 1940s and 1950s frequently declined to regulate prison conditions,[45] there are some important, if scattered, cases in which lower courts did indeed declare conditions of confinement unconstitutional, when they (as they rarely did) had jurisdiction to decide the issue. For example, in 1889, District Judge Emory Speer held that a federal prisoner's Eighth Amendment rights had been violated by a county jailer who chained him by the neck to a grating in his cell at night "so that he could not put his heels to the ground."[46] And in a famous series of habeas corpus cases in the 1940s, federal courts held that the Eighth Amendment

---

39 *Id.*
40 329 U.S. 459, 464 (1947).
41 *Id.* at 463.
42 *Id.*
43 *Id.* at 462, 464.
44 Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 898 (2009).
45 For a sampling of cases, see Hudson v. McMillian, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting).
46 *In re* Birdsong, 39 F. 599, 602 (S.D. Ga. 1889).

was violated by brutal conditions of confinement escaped state prisoner-petitioners faced if they were extradited to complete their sentences.[47] (These extradition attacks ended when the Supreme Court intimated that their petitioners must first bring their claims in the courts of the states from which they had fled. But the Court did not address the merits.[48])

If the Eighth Amendment encompassed prison conditions, why were prisoners' conditions-of-confinement lawsuits so scarce? Numerous barriers existed until toppled, one by one, by the Supreme Court. First, in 1941, the Court barred official censorship practices that prevented prisoners' petitions from even arriving at federal courthouses.[49] Then the Supreme Court in 1961 revived 42 U.S.C. § 1983 and thereby gave prisoner plaintiffs a jurisdictional path into federal court.[50] In 1962, the Court deemed the Cruel and Unusual Punishments Clause applicable against states and localities.[51] And in 1964, it held that there was no categorical bar to prisoner constitutional lawsuits.[52] The federal disinclination to meddle in prison operations—labeled, after the fact, the "hands-off doctrine"[53]—was dead.

So it was not until the 1960s, with the path thus cleared, that lower courts began to frequently scrutinize conditions of confinement in state prison and local jails, and occasionally to find them unconstitutional under the Cruel and Unusual Punishments Clause. As I have previously described, the first such cases involved prison discipline—corporal punishment[54] and conditions in disciplinary isolation[55]—perhaps because these were easiest to conceptualize as "punishment" additional to the

---

47 *See, e.g.*, Johnson v. Dye, 175 F.2d 250, 255–56 (1949).

48 The Court stated only, "The petition for writ of certiorari is granted and the judgment is reversed. *Ex parte* Hawk, 321 U.S. 114." Dye v. Johnson, 338 U.S. 864 (1949). The citation to *Ex parte* Hawk, an exhaustion case, had the import explained in text.

49 *Ex parte* Hull, 312 U.S. 546 (1941); *see also* Johnson v. Avery, 393 U.S. 483, 485–86 (1969).

50 Monroe v. Pape, 365 U.S. 167 (1961).

51 Robinson v. California, 370 U.S. 660 (1962).

52 Cooper v. Pate, 378 U.S. 546 (1964).

53 The "hands-off" phrase originated in a document prepared in 1961 for the Federal Bureau of Prisons, but was put in circulation by a 1963 law student journal note. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) (citing M. FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961)). It was first used by the Supreme Court in 1974, after the hands-off era had closed. *See* Procunier v. Martinez, 416 U.S. 396, 404 (1974).

54 Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

55 Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

sentence of incarceration.[56] But further evolution was very speedy: by 1970, plaintiffs had won the first federal case to order wholesale reform of a prison, in Arkansas.[57] With few other effective avenues for complaint, prisoners started to bring federal cases in large numbers,[58] alleging various types of inhumane treatment—brutal disciplinary sanctions for prison misconduct,[59] excessive force, failures to provide adequate medical care, failures to protect from violence and extortion by other prisoners,[60] and the like.[61]

B. Stage 2: *Estelle* Through *Rhodes*, 1976–1981

The first case in which the Court articulated a liability standard was *Estelle v. Gamble*,[62] a prisoner's lawsuit seeking damages for allegedly poor medical care in a Texas prison. *Estelle* was quite a low-profile case—no amicus briefs were filed, and the *New York Times* described the majority opinion as "generally stat[ing] the law as it has been developing in the lower Federal courts."[63] In the 1976 opinion by Justice Marshall, joined by six colleagues, the Court began with the observation that while the Eighth Amendment had long been seen to "proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment,"[64] "[o]ur more recent cases" reach more broadly: "The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . .'"[65] The Court stated, quoting then-Judge Blackmun's Eighth Circuit opinion forbidding the prison punishment of whipping: "Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that

---

56 *See* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2003–04 (1999) and cases cited.

57 Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Holt v. Sarver*, PC-AR-0004 (E.D. Ark.), CIV. RIGHTS LITIG. CLEARINGHOUSE, https://www.clearinghouse.net/detail.php?id=553 [https://perma.cc/9KK6-3SY8].

58 The federal court system began keeping track in 1970; for data, see Schlanger, *Trends*, *supra* note 11, at 157.

59 *Jackson*, 404 F.2d at 574–76.

60 Hutto v. Finney, 437 U.S. 678, 687–88 (1978).

61 For an early "how to" guide for prisoner plaintiffs' counsel, see William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971).

62 429 U.S. 97 (1976).

63 Lesley Oelsner, *Prison Medical Care Assayed by Justices*, N.Y. TIMES, Dec. 1, 1976, at D24, http://www.nytimes.com/1976/12/01/archives/prison-medical-care-assayed-by-justices-deliberate-indifference-is.html [https://perma.cc/U7W8-E9AA].

64 *Estelle*, 429 U.S. at 102 (internal alterations in original).

65 *Id.* (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

mark the progress of a maturing society,' . . . or which 'involve the unnecessary and wanton infliction of pain.'"[66]

On the basis of "[t]hese elementary principles," the Court had no difficulty concluding that the government has an

> obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . .[67]

Indeed, none of this was even contested. The briefs show that both parties in *Estelle* agreed that the Eighth Amendment required provision of medical care in prison. What the briefs disagreed about was the precise liability standard.[68] On that issue, Justice Marshall wrote for the majority that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.'"[69] The Court's reasoning featured precedent rather than first principles or textual or historical analysis of the Eighth Amendment. Just as a second electrocution attempt in *Louisiana ex rel. Francis v. Resweber* was not unconstitutional, the *Estelle* Court held,

> Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." . . . Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend

---

66 *Id.* at 102–03.

67 *Id.* at 103 (internal citations omitted).

68 *Compare* Brief for Respondent, *Estelle*, 429 U.S. 97 (1976) (No. 75-929), 1976 WL 181424, at *20 ("If the treatment or lack of treatment of a prisoner is such that it amounts to indifference or intentional mistreatment, it violates the prisoner's constitutional guarantees."), *with* Brief for Petitioners, *Estelle*, 429 U.S. 97 (1976) (No. 75-929), 1976 WL 181423, at *10 ("[A] complaint alleging a failure or refusal to provide medical care states a claim upon which relief can be granted and should not be dismissed. To the contrary, a complaint alleging inadequate medical treatment should be dismissed unless exceptional circumstances exist which warrant judicial inquiry." (emphasis omitted) (citation omitted)).

69 *Estelle*, 429 U.S. at 104.

> "evolving standards of decency" in violation of the Eighth Amendment.[70]

But, like the plaintiff's brief that had offered the expression as the touchstone for liability,[71] Justice Marshall did not elaborate further on the meaning of "deliberate indifference," a phrase that had entered Eighth Amendment jurisprudence only a few years earlier, in a Second Circuit case.[72]

Justice Blackmun declined to join this analysis; he concurred in the outcome only, without opinion.[73] Justice Stevens dissented from the left, stating the position to which he would hold for the next two decades,[74] that the standard for liability should be objective. Although he described the Court's opinion as "[m]ost[ly] . . . consistent with the way the lower federal courts have been processing claims that the medical treatment of prison inmates is so inadequate as to constitute the cruel and unusual punishment prohibited by the Eighth Amendment," Justice Stevens criticized other passages in the majority opinion because they "describe[ ] the State'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"[75]:

> Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it. Whether the

---

70 *Id.* at 105–06.

71 Brief for Respondent, *Estelle*, *supra* note 68, at *13.

72 *See* Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970).

73 Examination of the Blackmun papers sheds little light on why Blackmun declined to join; his explanatory letter to Justice Marshall lists a number of concerns, but none seem terribly important. *See* Memorandum from Justice Harry Blackmun to Justice Thurgood Marshall (Nov. 22, 1976) (on file with the Harry A. Blackmun papers, Library of Congress) (concerning Estelle v. Gamble, No. 75-929).

74 *See Estelle*, 429 U.S. at 108–17 (Stevens, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 579–99 (1979) (Stevens, J., dissenting); Hudson v. McMillian, 503 U.S. 1, 12–13 (1992) (Stevens, J., concurring in part and concurring in the judgment). *Compare* Farmer v. Brennan, 511 U.S. 825, 858 (1994) (Stevens, J., concurring) ("While I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation . . . ."), *with* Daniels v. Williams, 474 U.S. 327, 341 (1986) (Stevens, J., concurring) (making the same point with respect to Procedural Due Process under the Fourteenth Amendment: "'Deprivation,' it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss.").

75 *Estelle*, 429 U.S. at 108–09 (Stevens, J., dissenting).

> conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman.[76]

Justice Stevens did not disagree with the Court that mere negligence is not unconstitutional. He explained:

> Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty.[77]

Stevens's *Estelle* dissent linked the objective standard to his view that constitutional obligations to prisoners amount to affirmative rather than negative duties:

> If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.[78]

The dissent was prescient; it took ten years, but eventually Justice Stevens's feared close examination of particular officials' intentions, rather than of the felt experience of incarceration, did indeed materialize in Supreme Court case law.[79]

During the intervening decade, however, the Court took a quite different approach. Just two years after *Estelle*, in the 1978 case of *Hutto v. Finney*, Justice Stevens himself wrote for the majority, describing conditions of confinement in Arkansas as "constitut[ing] cruel and unusual punishment" by emphasizing the objectively horrendous conditions.[80] The *Hutto* district court's conclusion that the imprisonment in Arkansas was "a dark and evil world completely alien to the free world" was,

---

76 *Id.* at 116–17.
77 *Id.* at 116 n.13.
78 *Id.*
79 *See infra* Part III.
80 437 U.S. 678, 685–87 (1978).

Justice Stevens wrote, "amply supported by the evidence."[81] There was no discussion of deliberate indifference or any other kind of scienter or subjective motivation. Perhaps this was because the case was injunctive and forward-looking—so at least once they received the complaint, the defendants were on notice of the conditions. But the opinion does not suggest, or even so much as hint, that the remedial posture is the reason for its objective perspective.

The very next term, in another injunctive case, *Bell v. Wolfish*, the Court flirted with, but in the end did not quite adopt, a scienter requirement in a jail conditions-of-confinement case brought under the Due Process Clause. *Bell*, in 1979, was the Court's first pretrial detention conditions-of-confinement opinion. In it, the Court reviewed a Second Circuit opinion by Judge Irving Kaufman which held that, in light of the presumption of innocence, "pretrial detainees may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'"[82] In an opinion by then-Justice Rehnquist, the Court rejected this approach as too pro-prisoner. The presumption of innocence, the Court emphasized, "is a doctrine that allocates the burden of proof in criminal trials" but "it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[83] The protection afforded pretrial detainees was more limited, the majority wrote: "[W]e think that the proper inquiry is whether those conditions amount to punishment of the detainee. . . . Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however."[84]

The Court explained:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate

81 *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).
82 Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978).
83 Bell v. Wolfish, 441 U.S. 520, 533 (1979).
84 *Id.* at 535, 537.

> [nonpunitive] governmental objective, it does not, without more, amount to "punishment."[85]

Justice Marshall dissented, arguing that the balancing test should be less deferentially performed and without the gloss that its purpose was to discern if a particular restraint should be deemed "punishment."[86] He emphasized, as well, that the appropriate constitutional inquiry should be entirely objective: "By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis."[87]

Justice Stevens also dissented. Joined by Justice Brennan, Stevens took the same approach as he had in *Estelle*. Stevens agreed with the Court that the key to the constitutional inquiry was whether a plaintiff's "treatment amounts to punishment."[88] But like Marshall, he thought the Court's methodology far too deferential.[89] In addition, and most important for the analysis in this article, Stevens explained that he feared an aggressive reading of the Court's "intent" language. He noted that "the Court does not expressly disavow the objective criteria identified in *Mendoza-Martinez*" but nonetheless criticized the Court for simultaneously adverting to the subjective state of mind of jail officials. This subjective inquiry, he wrote, "can only 'encourage hypocrisy and unconscious self-deception.'"[90] And doctrinally, "[w]hile a subjective intent may provide a sufficient reason for finding that punishment has been inflicted, such an intent is clearly not a necessary nor even the most common element of a punitive sanction."[91]

Thus in Justice Stevens's view, conditions evaluated for constitutionality under the Due Process Clause could fail that evaluation for two independently sufficient reasons: Conditions may have been *intended* as punishment, or they may have *functioned* as punishment. The latter analysis "is not always

---

85 *Id.* at 538–39 (citations omitted) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

86 *See id.* at 564 (Marshall, J., dissenting).

87 *Id.* at 567.

88 *Id.* at 583–84 (Stevens, J., dissenting).

89 *See id.* at 585 ("In my view, the Court has reached an untenable conclusion because its test for punishment is unduly permissive.").

90 *Id.* at 585 (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 33 (1968)).

91 *Id.* at 585–86.

easy," Justice Stevens conceded, but it was nonetheless required.[92] He offered three factors:

> When sanctions involve "affirmative disabilit[ies]" and when they have "historically been regarded as a punishment," *Kennedy v. Mendoza-Martinez,* 372 U. S., at 168–169, courts must be sensitive to the possibility that those sanctions are punitive. So, too, when the rules governing detention fail to draw any distinction among those who are detained—suggesting that all may be subject to rules designed for the most dangerous few—careful scrutiny must be applied. Finally, and perhaps most important, when there is a significant and unnecessary disparity between the severity of the harm to the individual and the demonstrated importance of the regulatory objective, see *ibid.*, courts must be justified in drawing an inference of punishment.[93]

There was, actually, less distance between the *Bell* majority and Justice Stevens's dissent than that dissent acknowledges. To be sure, it is possible to read the Court's specified method for identifying "punishment" as resting, ultimately, on the jailers' scienter. The first way for a jail to fail the constitutional test was for plaintiffs to demonstrate officials' intent to punish. Perhaps the second way—"[a]bsent a showing of an expressed intent to punish"[94]—conceptually also depended on punitive intent, allowing plaintiffs to show the arbitrariness of the challenged jail condition as circumstantial evidence of such intent. Indeed, the Court implied this in one part of the opinion: "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[95] At another point, however, the opinion described the standard as mandatory, not permissive: "[T]he determination whether these restrictions and practices constitute punishment in the constitutional sense *depends on* whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose."[96]

---

92 *Id.* at 584 ("Having recognized the constitutional right to be free of punishment, the Court may not point to the difficulty of the task as a justification for confining the scope of the punishment concept so narrowly that it effectively abdicates to correction officials the judicial responsibility to enforce the guarantees of due process.").

93 *Id.* at 588.

94 *Id.* at 538.

95 *Id.* at 539.

96 *Id.* at 561 (emphasis added).

Moreover, as Justice Stevens acknowledged, the Court expressly invoked the *Kennedy v. Mendoza-Martinez* factors for evaluating what is punishment, quoting:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . . .[97]

In *Mendoza-Martinez* itself, these factors were evaluated objectively, independent of "congressional intent as to the penal nature of a statute."[98] The *Bell* Court, consistent with that approach, labeled them "useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word."[99] "Amount to" indicates that the objective indicia are themselves the object of inquiry, not mere evidence of subjective intent to punish.

Finally, when the Court actually proceeded from doctrinal exposition to application, it examined not the minds of the defendants but whether the double celling in the jail that plaintiffs complained about caused sufficient "genuine privations and hardship over an extended period of time [to] raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment."[100] Without even a word devoted to jail officials' subjective beliefs about double celling, the Court evaluated the objective circumstances—for example, the size of the cells and the hours spent in-cell—and concluded that "nothing even approaching such hardship is shown by this record."[101] Some such restrictions, the Court said, are, on evaluation, "an incident of a legitimate nonpunitive governmental objective."[102] But others, whose harshness exceeds their nonpunitive justification, will not pass muster. The actual inquiry the *Bell* Court modeled did not turn on the intent

---

97 *Id.* at 587 (Marshall, J., dissenting) (emphasis omitted) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

98 *Mendoza-Martinez*, 372 U.S. at 169.

99 *Bell*, 441 U.S. at 538.

100 *Id.* at 542.

101 *Id.*

102 *Id.* at 539 n.20.

of a particular jail official or of the jail administration as a whole; it turned on the impact on the inmate and the justification offered for that impact. *Bell* reversed the Court of Appeals because the objective degree of hardship the plaintiffs demonstrated was insufficient to make out a case. So Justice Stevens is correct that the *Bell* majority opinion includes some subjective language—but in the final analysis, *Bell* is best read to announce, and itself utilizes, an objective approach and standard.

The next case was back in the Eighth Amendment column; as in *Hutto*, the Court devoted no words to scienter in the 1981 *Rhodes v. Chapman*.[103] There the Court upheld double celling in a maximum-security Ohio prison, rejecting a request for a prospective injunction. The majority opinion, by Justice Powell—writing for the five Justices on the Court's right wing—evaluated the overcrowded conditions entirely objectively, from the perspective of the inmates' actual experience:

> The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments.[104]

Two concurrences in the judgment by Justices Brennan and Blackmun, and a dissent by Justice Marshall, urged a more aggressive flavor of court review of prison conditions.

In sum, in its 1976 *Estelle* opinion, the Court stated that the constitutionality of conditions of confinement turned on the "deliberate indifference" of the officials who created those conditions—but in no Supreme Court case over the subsequent decade did this verbiage ripen into any real examination of any real person's state of mind.[105]

C. Stage 3: *Whitley* Through *Farmer*, 1986–1994

Things changed in 1986, in *Whitley v. Albers*, a damage action in which the Court denied liability to a non-rioting prisoner shot in the leg as authorities responded to a prison riot.

---

103 452 U.S. 337 (1981).
104 *Id.* at 348 (citation omitted).
105 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

The resignation of Justice Stewart and Chief Justice Burger and appointments of Justices O'Connor and Scalia had shifted the Court considerably to the right. In a (bare) majority opinion by Justice O'Connor, the Court quoted *Estelle*'s reference to "unnecessary and wanton infliction of pain" as the essence of "cruel and unusual punishment forbidden by the Eighth Amendment,"[106] and explained:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "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."[107]

Whitley thus required prisoner-plaintiffs complaining of excessive force in a riot situation to demonstrate official-defendants' intent to harm in order to make out a constitutional case. While Justice O'Connor primarily justified that requirement by policy considerations relating to the difficulty and urgent need to quell prison riots, her opinion also gestured towards a textual hook, which would emerge in Justice Scalia's jurisprudence several years later as the conceptual center of Eighth Amendment doctrine. She wrote that a high bar to liability was appropriate because force in prison was "conduct that does not purport to be punishment at all."[108] (Although her opinion several times cited the school corporal punishment case, *Ingraham v. Wright*, she did not address its statement—admittedly dicta—that "[p]rison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'"[109])

Justice Marshall (joined by Brennan, Blackmun, and Stevens) dissented: the correct standard, he argued, was the already-high "unnecessary and wanton" standard from *Estelle*.[110] The Court's "maliciously and sadistically for the very purpose of causing harm" standard was inappropriate,

---

106 Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting *Estelle*, 429 U.S. at 103).

107 *Id.* at 319, 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.)).

108 *Id.* at 319.

109 Ingraham v. Wright, 430 U.S. 651, 669 (1977) (citation omitted).

110 *Whitley*, 475 U.S. at 328 (Marshall, J., dissenting) (quoting *Estelle*, 429 U.S. at 104).

and without support in the precedents cited in its favor.[111] Justice O'Connor had cited a famous excessive force opinion by Judge Friendly as the source for the "malicious and sadistic" standard, but, Marshall pointed out, "That opinion . . . considered maliciousness not as a prerequisite to a constitutional violation, but rather as a factor that, if present, could enable a plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a claim."[112] (Interestingly, Justice Stevens, who critiqued the deliberate indifference test in its original appearance in *Estelle*, evidently saw prison use-of-force issues as different; he signed Justice Marshall's concurrence without cavil on this issue.[113])

The next case in the series was *Wilson v. Seiter*,[114] decided in 1991. The plaintiff state prisoner alleged "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates."[115] The issue before the Court was whether Eighth Amendment conditions-of-confinement cases would be governed by the subjective standard *Whitley* applied to prison use of force and *Estelle* applied in medical care cases, or by the objective standard manifested in the two most recent conditions-of-confinement cases, *Rhodes v. Chapman* (under the Eighth Amendment) and *Bell v. Wolfish* (under the Due Process Clause). In his opinion for the (again bare) majority, Justice Scalia not only chose the former but went much farther, denying that the precedents were in conflict. Justice Scalia argued that rather than wavering between a subjective and objective approach to the Eighth Amendment, the Court had, without explaining itself, adopted *both* subjective and objective tests as independent hurdles to constitutional liability. That is, Justice Scalia explained the absence of a subjective test in *Hutto* and *Rhodes* as indicating not that scienter didn't matter, but simply that it was not at issue: those cases had, sub silentio, been applying the objective half of a two-part standard.[116]

---

111 *Id.* at 320–21 (quoting *Glick*, 481 F.2d at 1033).

112 *Id.* at 329 n.1 (Marshall, J., dissenting) (discussing *Glick*, 481 F.2d at 1033).

113 Justice Stevens did disclaim one footnote in the dissent, but it dealt with a different issue. *See Whitley*, 475 U.S. at 334 n.2. The Blackmun and Marshall papers shed no additional light on his thinking on this point.

114 498 U.S. 808 (1990) (granting the petition for a writ of certiorari); 501 U.S. 294 (1991).

115 *Wilson*, 501 U.S. at 296.

116 *Id.* at 296–99, 301 n.2.

In *Estelle* and *Whitley*, the majority opinions had merely gestured towards constitutional text or theory in offering their subjective tests. *Estelle* offered the "deliberate indifference" standard as a gloss on the entire Cruel and Unusual Punishments Clause. *Whitley* supported its malicious-and-sadistic standard by noting that prison official force "does not purport to be punishment at all."[117] In *Wilson*, Justice Scalia offered a more extensive doctrinal argument:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.[118]

He justified the point as implementing the plain meaning of the word, quoting Judge Posner:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[119]

Given this justification—that punishment means "intended to chastise or deter"—one reads Justice Scalia's opinion expecting that in the next paragraphs it will choose the extant intent-focused standard, and attach *Whitley v. Albers*'s "malicious and sadistic" language to conditions-of-confinement cases. Here, however, Justice Scalia backed off. Whether reflecting his own judgment or because he could go no farther given others' views,[120] he wrote: "Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind, it remains for us to consider what state of mind applies in cases challenging prison condi-

---

117 *Whitley*, 475 U.S. at 319.

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

119 *Id.* (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.)).

120 Justice Blackmun's conference notes show that in the discussion of the case, the Court's conservatives, including the Chief Justice at the very start of discussion, endorsed a deliberate indifference standard. Justice Blackmun writes of Justice Scalia's position, "Reverse and remand. With SOC and use delib indiff." (Some additional description is illegible.) Conference Notes (Jan. 9, 1991) (on file with the Harry A. Blackmun papers, Library of Congress, Box 65) (concerning Wilson v. Seiter, No. 89-7376).

tions."[121] His answer? *Estelle* had already stated the rule: deliberate indifference is the mental state forbidden by the Eighth Amendment.[122] *Estelle*'s approach could not be limited to medical care alone, Justice Scalia explained, but rather covers all conditions of confinement: "Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."[123] The Court remanded for application of the correct standard to the facts in the case.[124]

There is no indication whatsoever in the *Hutto* or *Rhodes* opinions or briefs that Justice Scalia's reading of them in *Whitley* is correct—that is, that the objective approach they took constituted just one half of a two-part test. A concurrence in the *Whitley* judgment by Justice White (joined by Justices Marshall, Blackmun, and Stevens) emphasized the point. As a matter of precedent and policy, Justice White suggested, the Court's approach was wrongheaded:

> *Rhodes* makes it crystal clear . . . that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is 'formally meted out as punishment by the statute or the sentencing judge,'—we examine only the objective severity, not the subjective intent of government officials.[125]

The White concurrence reads very like Justice Stevens's *Estelle* dissent. But White had signed onto Marshall's majority opinion in *Estelle*, and both Marshall and White evidently saw the *Estelle* "deliberate indifference" holding as quite limited. Justice White now distinguished *Estelle* as involving a challenge "not to a general lack of access to medical care at the prison, but to the allegedly inadequate delivery of that treatment to the plaintiff."[126] Its deliberate indifference approach, he suggested, was properly restricted to that circumstance. In more general cases, Justice White explained, a deliberate indifference test was

> Not only . . . a departure from precedent, [but] likely . . . impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions

---

121 *Wilson*, 501 U.S. at 302.
122 *Id.* at 303.
123 *Id.*
124 *Id.* at 306.
125 *Id.* at 309 (White, J., concurring in the judgment) (emphasis omitted) (citation omitted).
126 *Id.*

> 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, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.[127]

Moreover, said Justice White, the Court's approach was "unwise" because

> [i]t leaves open the possibility, for example, that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials.[128]

This was an unappealing doctrinal result. A more attractive standard, Justice White wrote, was objective:

> [H]aving chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the "contemporary standard of decency" required by the Eighth Amendment. . . . The ultimate result of today's decision, I fear, is that "serious deprivations of basic human needs" will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."[129]

Next came the 1993 case *Hudson v. McMillian*. In this damage action, the defendant corrections officers, at Louisiana's Angola prison, had beaten the (restrained) prisoner. The plaintiff won a trial verdict after presenting proof that he was hurt but not grievously; he had some loosened teeth and some bruises.[130] The Court first held that the *Whitley v. Albers* "malicious[ ] and sadistic[ ] for the very purpose of causing harm" standard applied to all challenges to uses of force in prison—not just those occurring in the stress of a prison disturbance.[131] But then it addressed whether the *Wilson* framework would apply, as well, in use-of-force cases—whether the subjective scienter requirement would be coupled with an objective requirement of demonstrated serious harm. In her opinion for the Court, Justice O'Connor said there would be no serious harm requirement imposed. She began by explaining that the

---

127 *Id.* at 310.

128 *Id.* at 311.

129 *Id.* (internal citations omitted).

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

131 *See id.* at 6–7 (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986)).

"seriousness" requirement was designed as a bulwark against too much liability:

> Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious."[132]

The bulwark was not needed in use-of-force cases: "In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." Justice O'Connor continued:

> This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.[133]

(The Court did, however, hold that, absent particularly "repugnant" circumstances, "*de minimis* uses of physical force" were not constitutionally actionable.[134])

The majority opinion was joined by Chief Justice Rehnquist and Justices White, Kennedy, and Souter. Justices Stevens and Blackmun disagreed from the left. Justice Stevens took the position that the *Whitley v. Albers* malicious-and-sadistic standard should be applied only during a "serious prison disturbance" but concurred in the rest of the opinion.[135] Justice Blackmun reiterated his position that the *Whitley v. Albers* standard was erroneous even in the context of a riot.[136] Justice Thomas, newly on the Court, dissented, setting out a position far to the right of any that had been previously expressed—that the Eighth Amendment simply does not regulate prison conditions at all.[137]

---

132 *Id.* at 9 (citation omitted) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

133 *Id.*

134 *Id.* at 9–10.

135 *Id.* at 12 (Stevens, J., concurring in the judgment).

136 *Id.* at 14 (Blackmun, J., concurring).

137 Justice Thomas's dissent decried the "artificiality of applying the Eighth Amendment to prisoner grievances, whether caused by the random misdeeds of

The final pre-*Kingsley* case was *Farmer v. Brennan*, in which the Court more carefully defined "deliberate indifference." Justice Souter's opinion for the Court (joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Ginsburg) framed the choice as between civil and criminal recklessness.[138] The civil recklessness standard, the Court explained, labels "reckless" a "person . . . who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."[139] Civil recklessness is a familiar standard in federal civil rights cases, because it is one path to municipal constitutional tort liability under 42 U.S.C. § 1983. Liability under that general civil rights statute exists "[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens."[140] Criminal recklessness, by contrast, "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware."[141] Justice Souter followed in Justice Scalia's path by explaining the choice of the latter, subjective standard, as guided by the text of the Eighth Amendment:

> The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage[ ]. . . . But an official's failure to alleviate a signifi-

---

prison officials or by official policy." *Id.* at 22, n.2 (Thomas, J., dissenting). Certainly if prison conditions were going to be considered under the Cruel and Unusual Punishments Clause, he said, serious injury should be considered a prerequisite to constitutional liability. (That said, Justice Thomas described as "unwarranted" the application in this non-riot situation of Whitley's high standard of culpability.) *Id.* at 22, 24. In a case the following year, *Helling v. McKinney*, Thomas (again joined by Scalia) hardened that view: "[A]lthough the evidence is not overwhelming, 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.'" 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

138 Farmer v. Brennan, 511 U.S. 825, 836 (1994).

139 *Id.* (citing WILLIAM PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 34, 213-214 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1965)).

140 City of Canton v. Harris, 489 U.S. 378, 396 (1989); *see Farmer*, 511 U.S. at 840 (describing *Canton*).

141 *Farmer*, 511 U.S. at 837 (citing ROLLIN MORRIS PERKINS & RONALD N. BOYCE, CRIMINAL LAW 850–51 (3d ed. 1982); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 115–16, 120, 128 (2d ed. 1960); MODEL PENAL CODE § 2.02(2)(c), cmt. 3 (AM. LAW INST. 1985)).

> cant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.[142]

Once a prison official knows of a risk of serious harm, the *Farmer* Court emphasized, it is his obligation to "respond[ ] reasonably to the risk," though of course he may in the event fail to avert the harm.[143] That is, the Court said, in the event of an official's conscious awareness of serious risks, the Eighth Amendment imposes a "duty . . . to ensure 'reasonable safety.'"[144]

Justices Blackmun and Stevens reiterated their oft-expressed objective position. To quote Blackmun's concurrence:

> [I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind. This Court's holding in *Wilson v. Seiter*, to the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with our precedents interpreting the Cruel and Unusual Punishments Clause. Whether the Constitution has been violated "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Wilson v. Seiter* should be overruled.[145]

And Justice Thomas—this time without Justice Scalia—reiterated his position that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence," and accordingly declined to join the Court's opinion.[146]

D. The Problem with "Punishment"

The conditions-of-confinement/use-of-force case law just described 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.[147] This issue is relevant not only to cases brought under the Cruel and Unusual Punishments Clause but to Fourteenth Amendment cases, as well; recall that *Bell* held that jail conditions violate pretrial detainees' rights when

---

142 *Farmer*, 511 U.S. at 837–38.
143 *Id.* at 844.
144 *Id.*
145 *Id.* at 851–52 (Blackmun, J., concurring) (internal citations omitted).
146 *Id.* at 859 (Thomas, J., concurring in the judgment).
147 *See supra* notes 114–16 and accompanying text.

they "amount to punishment."[148] Two analytic flaws render the argument incoherent.

First, the argument proves too much. If it were correct—if, to quote Judge Posner, as quoted in *Wilson*, punishment requires "inten[t] to chastise or deter"[149]—deliberate indifference, whose scienter does not rise to the level of "intent" (that is, knowledge or purpose[150]) would be insufficient. Rather, the appropriate liability standard would be *Whitley*'s intent-to-punish standard. But no Justice has ever been willing to hold that conditions of confinement violate the Eighth Amendment only if the relevant prison official intended to punish. That means that the deliberate indifference standard chosen in *Wilson* and elaborated in *Farmer* is left entirely unsupported.

More important, intentionality has a far weaker connection to "punishment" than Justice Scalia suggests. Justice Scalia premised the link between the Eighth Amendment's reference to "punishment" and an intent standard on Judge Posner's discussion, in the Seventh Circuit case *Duckworth v. Franzen*, of the "accepted meaning" of the word and of a 1755 dictionary definition.[151] But the premise that punishment means "intended to chastise or deter" is erroneous. In *Farmer*, Justice Blackmun persuasively offered some competing, less intent-focused dictionary definitions of punishment.[152] Moreover, many consequences of criminal misbehavior that are indisputably part of the punishment are not "intended to chastise or deter." Criminal restitution, for example, is intended to make victims whole.[153] In the era of self-supporting or profit-making prisons, sentences of hard labor were intended to promote prof-

---

148 *See supra* notes 83–84 and accompanying text.

149 Wilson v. Seiter, 501 U.S. 294, 300 (1991) (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

150 MODEL PENAL CODE § 2.02 (AM. LAW INST., 2009).

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

152 Farmer v. Brennan, 511 U.S. 825, 854–55 (1994) (Blackmun, J., concurring) ("A prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' see, *e.g.*, Webster's Third New International Dictionary 1843 (1961), regardless of whether a state actor intended the cruel treatment to chastise or deter. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as '[a]ny pain, suffering, or loss inflicted on or *suffered by* a person because of a crime or evil-doing') . . . ." (emphasis added by Justice Blackmun)).

153 *See, e.g.*, Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982); *see also* Bearden v. Georgia, 461 U.S. 660, 670 (1983) (identifying as one legitimate purpose of restitution the state's "interest in ensuring that restitution be paid to the victims of crime").

itable use of prisoner labor.[154] Conversely, deterrence is a common purpose of both private and public civil law. The examples could multiply, but the point is simple; an "intent to chastise or deter" is neither necessary nor sufficient to identify punishment.[155]

Indeed, as Justice Stevens explained in *Bell*, the Court has in other contexts deemed retribution and deterrence relevant but not dispositive to the categorization of something as punishment.[156] Consider the leading case explaining how judges should decide whether a particular statutory consequence imposed on someone as a result of their conduct "is penal or[, instead,] regulatory in character."[157] In the 1963 case *Kennedy v. Mendoza-Martinez*, the Court, per Justice Goldberg, identified seven factors "relevant to the inquiry," noting that they remained important even though they "may often point in differing directions."[158] I already quoted the factors in their entirety, in the discussion above of *Bell*. For current purposes, the point is that "whether [a legislative prescription] will promote the traditional aims of punishment—retribution and deterrence" is joined by many other *Mendoza-Martinez* factors.[159] Moreover, in contrast to Justice Scalia's emphasis in *Wilson* on intent to punish as definitional, *Mendoza-Martinez* and later cases make the intent of the body imposing a restriction important but again not dispositive. The *Mendoza-Martinez* factors are explicitly about effects, not intent; they are offered as supplements or alternatives to an evaluation of intent.[160] As the Court developed in subsequent jurisprudence,

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] inten-

---

154 *See, e.g.*, Martin B. Miller, *At Hard Labor: Rediscovering the 19th Century Prison*, 9 ISSUES CRIMINOLOGY 91 (1974); GEORG RUSCHE, & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939).

155 For an extended discussion of this same point, see Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008).

156 *See supra* notes 88–91 and accompanying text.

157 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

158 *Id.* at 169.

159 *Id.* at 168.

160 *Mendoza-Martinez* has itself been much criticized as unduly deferential. *See, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 36 (2005); Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1281–82 (1998); John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 678–79 (2012).

> tion' to deem it 'civil.'" Because we "ordinarily defer to the legislature's stated intent," "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[161]

The point is that chastisement and deterrence are far from the only purposes of punishment, and that intent to punish is important but not definitional in identifying what punishment is. *Bell*'s model of punishment as *either* subjective or objective thus aligns conditions-of-confinement litigation with other precedents; *Wilson v. Seiter*'s insistence to the contrary is anomalous.

II
THE NORMATIVE CASE FOR A CONSTITUTIONAL BAN ON OBJECTIVELY UNREASONABLE FORCE

Thus far in this Article, I have limited my discussion to doctrine. My goal to this point has been to summarize the Supreme Court's doctrinal analysis of both the Eighth Amendment and Fourteenth Amendment regulation of jail and prison operations, including both use of force and conditions of confinement, prior to the 2015 *Kingsley* opinion. I move in this Part to a more normative analysis.

I will examine *Kingsley*'s answer in more detail in Part III. But to summarize in advance, the *Kingsley* Court announces that constitutional liability attaches when the force used against a pretrial detainee is objectively unreasonable, evaluated "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight," and deferring to the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," and to "'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'"[162] It is a good answer because it is both morally attractive and capable of accurate implementation. To make that case, it is helpful to consider jail use of force in much more detail. Jails can be dangerous places—and some jail officers' uses of force are needed to protect inmates

---

161 Smith v. Doe, 538 U.S. 84, 92 (2003) (internal citations omitted); *see also id.* at 107 (Souter, J., concurring in the judgment) ("I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction.").

162 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015) (alterations in original) (quoting Bell v. Wolfish, 441 U.S. 520, 540, 547 (1979)).

from each other, for self-defense by officers, or to correct dangerous disorder. But other uses of force in jail are unduly harsh or altogether unnecessary, for a variety of reasons. In this Part, I look at four categories of excessive force common in jails and prisons:

A. Officers sometimes inflict obvious summary corporal punishment.
B. Officers sometimes escalate a situation that could reasonably be managed with minor force, to cover summary corporal punishment.
C. Officers sometimes use force to accomplish legitimate purposes, indifferent to the pain or injury it inflicts.
D. Officers sometimes use force that is unreasonable under the circumstances.

For each, I first provide a couple of examples, to allow better understanding of the dynamics. Then I examine how the various potential liability standards operate in the particular context.

A. Officers Sometimes Inflict Obvious Summary Corporal Punishment

As corrections expert Steve J. Martin has summarized, "It is an unfortunate reality of confinement operations that rogue officers, rogue shifts, and rogue commands sometimes dispense outright corporal punishment on their charges."[163] Consider, for example, the 2014 findings of the U.S. Department of Justice in its investigation of abuses of young inmates in the New York City jails on Rikers Island:

> Inmates are beaten as a form of punishment, sometimes in apparent retribution for some perceived disrespectful conduct. Correction officers improperly use injurious force in response to refusals to follow orders, verbal taunts, or insults, even when the inmate presents no threat to the safety or security of staff or other inmates.[164]

The report sets out numerous examples:

---

163 Steve J. Martin, *Staff Use of Force in United States Confinement Settings*, 22 WASH. U. J.L. & POL'Y 145, 146 (2006).

164 U.S. ATTORNEY'S OFFICE, S.D.N.Y., DEP'T OF JUSTICE, CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 11 (2014), [hereinafter DOJ RIKERS FINDINGS] https://www.clearinghouse.net/chDocs/public/JC-NY-0062-0001.pdf [https://perma.cc/4CEW-SGD8]; *CRIPA Investigation of NYC Department of Correction Jails on Rikers Island, JC-NY-0062 (S.D.N.Y)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=14044 [https://perma.cc/D4SM-GPC4].

- "On October 29, 2013, an inmate reportedly spat in the face of an officer. The officer 'punched the inmate in the face and the inmate sat on the bench terminating the incident.'"[165]
- "In January 2012, an inmate splashed a correction officer with a liquid substance. While the inmate was flex-cuffed and being escorted away, the correction officer approached him and started punching him in his facial area, according to the investigating Captain's report."[166]
- "In January 2013, an RNDC correction officer punched an inmate multiple times in the face and upper body area. According to the inmate, the officer was upset because the inmates had been playing with their food."[167]

The Department of Justice made similar findings about force in the Miami/Dade County jail:

> MDCR [Miami Dade Corrections and Rehabilitation] corrections officers openly engage in abusive and retaliatory conduct, frequently resulting in injuries to prisoners. In particular, there is a disturbing and distinct trend of MDCR corrections officers reacting to low-level aggression from prisoners (e.g., abusive language or passive resistance to an order) by slapping or punching the prisoner in the head and verbally provoking the prisoner to physically respond.[168]

Gruesome summary punishment may also occur in the aftermath of a jail or prison disturbance, when officers sometimes make prisoners pay, in blood and pain, for the harm and trouble they have caused. After the quelling of the Attica riot, for example, historian Heather Thompson has documented how

> [f]or hours and days after state order had been fully restored, troopers and COs forced men with multiple gunshot wounds and shattered limbs to crawl naked towards the door of cell block A, then forced them to run barefoot through the shards of jagged glass that littered the entrance and, once they managed to make it through that narrow enclosure, then made them run a gauntlet in which trooper clubs, fists, and gun butts rained down on their bodies.[169]

---

165 DOJ RIKERS FINDINGS, *supra* note 164, at 13.

166 *Id.* at 15.

167 *Id.* at 18.

168 Dep't of Justice, Office of Pub. Affairs, *Justice Department Releases Findings of Unconstitutional Conditions at Miami-Dade Jail Facilities*, JUSTICE NEWS (Aug. 29, 2011), https://www.justice.gov/opa/pr/justice-department-releases-findings-unconstittuional-conditions-miami-dade-jail-facilities [https://perma.cc/EBB8-5APG].

169 Heather Ann Thompson, *Lessons from Attica: From Prisoner Rebellion to Mass Incarceration and Back*, J. RES. GROUP SOCIALISM & DEMOCRACY (Nov. 8,

Similar accounts are common for other prison riots, as well.[170]

Use of force as a summary corporal punishment is particularly offensive to judges, who tend to value the judicial monopoly on penal sanctioning. But even apart from that, obvious summary punishment is important for both its prevalence and its severity. Nonetheless, at first blush the problem of summary punishment is not a strong argument for an objective reasonableness standard. After all, when inmate plaintiffs are able to prove up such allegations of punitive purposes, these kinds of uses of force are unconstitutional even under the *Whitley* malicious-and-sadistic standard. But that caveat—*when inmate plaintiffs are able to prove up such allegations*—is important. The *Whitley* standard raises a daunting adjudication hurdle. As a group of former corrections officials argued in a Supreme Court amicus brief in *Kingsley*:

> [A] subjective standard would erode staff accountability because instances of excessive force would be more difficult to discipline. If a jail staff member can cure an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice, then a new and formidable barrier to staff accountability will have been erected. Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions.[171]

2015), http://sdonline.org/66/lessons-from-attica-from-prisoner-rebellion-to-mass-incarceration-and-back/ [https://perma.cc/CF23-98YS]; HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY 213 (2016); *see also, e.g.*, Al-Jundi v. Mancusi, 113 F. Supp. 2d 441, 448 (W.D.N.Y. 2000) (describing Attica inmate testimony: "They were then ordered to get up and move single file with their hands over their heads and ordered to run 'the gauntlet' through the A–Yard tunnel. As the inmates ran or crawled or stumbled in the tunnel leading to A–Block with their hands behind their heads and stripped of their clothing, the corrections officers hit them with their clubs—calling them 'nigger' or 'nigger lover S.O.B.' and other racial epithets. Each described the viciousness of the beatings with vivid detail.").

170 *See, e.g.*, JEFFREY A. SCHWARTZ ET AL., NAT'L INST. OF CORR., RIOT AT MAX: AN ADMINISTRATIVE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE MONTANA STATE PRISON RIOT OF SEPTEMBER 22, 1991, at 58 (Dec. 14, 1991) (on file with author) (describing a post-riot gauntlet at the Montana State Prison in 1991: "handcuffed inmates coming through the gauntlet were in some cases kicked, punched or hit with batons"); Brief for Appellee at 8, United States v. Mathis, 31 F.3d 1174 (Table) (3d Cir. 1994) (No. 94-1052), 1994 WL 16176974, at *8 ("As a direct result of these illegal orders, the remaining 15 or so inmates were grabbed off the bus one at a time by two officers, run through a gauntlet of guards, who repeatedly beat the handcuffed, shackled, and otherwise defenseless inmates with 36 inch riot sticks without justification.").

171 Brief of Former Corrections Administrators and Experts as *Amici Curiae* in Support of Petitioner at 21, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1045423, at *21.

What is true for jail administrators is even more true for inmates. Even when, in fact, officers engaged in summary corporal punishment, inmates—who nearly always proceed pro se[172]—are unlikely to be able to prove it. So even if the *Whitley* standard were asking the conceptually correct question, one would expect many false negatives. As Alice Ristroph explains:

> Whatever transpires in the nation's prisons, the officials involved can nearly always claim that they did not intend for the harm to occur. The burden to prove otherwise is on the prisoner plaintiff, and it is a nearly impossible burden to meet. And of course, the problem is not simply that prisoners, and courts, lack good evidence of prison officials' intentions. The further problem—one familiar to us by now—is that judgments about intentions are inevitably contestable. When a judge or other third party tries to ascertain a state actor's intentions, she inevitably brings to bear her own background knowledge and normative predilections. When the constitutional law of punishment focuses on government motives, outcomes depend on subjective [decision-maker] . . . preferences.[173]

Against uses of force that constitute summary punishment, the benefit of an objective reasonableness standard is administrability—a standard that turns on observable facts, and not inferences about subjective intent, is bound to be more accurately applied.

B. Officers Sometimes Escalate a Situation that Could Reasonably Be Managed with Minor Force, to Cover Summary Corporal Punishment

Correctional officers who wish to muddy the evidentiary waters further have an easy time. Again quoting penologist Steve Martin:

> It is not uncommon for ostensibly lawful applications of physical force to mask the intentional infliction of punishment, retaliation or reprisal on prisoners. Manufacturing or exaggerating the need to physically control a prisoner is one means by which staff pretextually use force for inflicting punishment on a prisoner. An application of force that is legitimately initiated but which escalates to a level of force disproportionate to the objective risks presented by the inmate can likewise be used pretextually by correctional personnel to punish prisoners. On those occasions in which unnecessary or disproportionate force is applied for the pri-

172 Schlanger, *Trends*, *supra* note 11, at 167.
173 Ristroph, *supra* note 155, at 1404.

> mary purpose of inflicting punishment, retaliation, or reprisal, rather than control, such application of force constitutes de facto corporal punishment regardless of its ostensible justification.[174]

The Department of Justice's Rikers Island findings described above provide an example. In its report, the Department of Justice found that Rikers "staff frequently continue to strike inmates after they are clearly under control and effectively restrained, often attempting to justify their actions later by reporting that the inmate continued to resist."[175] For example:

> In January 2013, after reportedly being disruptive while waiting to enter the RNDC dining hall, an inmate, who was on suicide watch at the time, was taken down by a Captain and punched repeatedly on his head and upper torso while he lay face down on the ground covering his head with his hands. The inmate told investigators that the Captain had "punched [him] everywhere." According to the Tour Commander's report, the Captain's use of force was "excessive and avoidable" because the inmate presented no threat while lying on the ground.[176]

In this incident, it seems that some force may have been appropriate at the start. The force used, however, was both more than necessary (punches to the head) and continued for longer than necessary (after the inmate was lying on the floor).

As with the gauntlet-type abuses described in subpart A, uses of force that are escalated on purpose, and without need, also constitute summary corporal punishment. But they are even less susceptible to litigation-related regulation under the *Whitley* malicious-and-sadistic standard, because prisoners are even less likely to be able to prove punitive intent, even where it exists. Again, the objective reasonableness standard is normatively attractive in this context not because of its substantive reach but its administrability advantage.

C. Officers Sometimes Use Excessive Force to Accomplish Legitimate Purposes, Indifferent to the Pain or Injury the Force Inflicts

In the paragraphs above, the officers' purpose in using force was to inflict pain. But many uses of force in jail occur when officers simply don't care about the pain they are inflicting—rather than relishing pain, they are indifferent to it.

---

174 Martin, *supra* note 163, at 147.
175 DOJ RIKERS FINDINGS, *supra* note 164, at 11.
176 *Id.* at 16.

Here, I look at two different situations where this can occur: use of pain compliance techniques in the absence of a security need, and recklessly aggressive force.

Pain compliance—inducing obedience by application of pain—has become a more available tactic in jail in recent years, as standard weaponry has multiplied.[177] Pepper spray and Tasers, now routinely carried by officers in many jails,[178] can be used to incapacitate, but they can also be used, instead, to cause pain.[179] For example, an officer may seek to induce an inmate to comply with an order—perhaps an order to return a meal tray, or to put his hands behind his back for handcuffing so he can be taken out of a high-security cell.[180] Enforcing institutional order is a legitimate purpose in a jail. So perhaps

---

177 I have been unable to find longitudinal data for jails and prisons, though I would guess that the trends are similar, but some years behind, policing experience. In police departments, the increase in Taser authorization in recent years has been sharp—from 7% of departments in 2000 to 81% in 2013. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 248767, LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY 1 (2015), https://www.bjs.gov/content/pub/pdf/lpd13et.pdf [https://perma.cc/N267-JQZ6].

178 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, NAT'L SHERIFF'S ASS'N, BUREAU OF JUSTICE ASSISTANCE, CONDUCTED ENERGY DEVICES: USE IN A CUSTODIAL SETTING 7, 9 (2009), https://www.bja.gov/Publications/PERFNSA_CED.pdf [https://perma.cc/3GQC-YPPJ] (reporting that 64% of responding sheriff's offices authorized the use of conducted energy devices (CED), where 86% of responding offices ran detention facilities). I am unaware of any recent research on the prevalence of pepper spray in jails or prisons, but my own experience is that its use is common in many jurisdictions.

179 Tasers from a distance briefly incapacitate movement, but in a direct-contact mode, as used against Kingsley himself, Tasers cause pain without incapacitation. *See* Brief for Respondents at 9 n.2, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1519055, at *9 ("The use of a Taser in contact stun mode, although painful, does not result in neuromuscular incapacitation or injury. JA224-25; R154, pp. 67–68."). This kind of use is often referred to as "drive-stun." The Taser company's manual explains: "Drive-stun Taser use produces a continuous extremely painful electrical shock useful for an officer engaged in close hand to hand contact with a resisting subject; pain forces the resisting subject to stop violently resisting and submit to handcuffing." Second Amended Individual Complaint for Damages at 4, Shreve v. Franklin Cty., No. 2:10-cv-244, 2010 WL 5173162 (S.D. Ohio Dec. 15, 2010), https://www.clearinghouse.net/chDocs/public/JC-OH-0016-0003.pdf. [https://perma.cc/S4PJ-PUGE]. Drive-stun use of a Taser is thus a pain compliance technique, not an incapacitory response to a security threat. TASER, TASER X26C OPERATING MANUAL 19 (2007), http://www.womenonguard.com/images/TASER-X26c-manual.pdf [https://perma.cc/82X2-P9FK] ("The drive-stun mode will not cause NMI and generally becomes primarily a pain compliance option.").

180 *See generally* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-5.6 (3d ed. 2011), [hereinafter ABA, TREATMENT OF PRISONER STANDARDS] http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf [https://perma.cc/4VQC-KCNV] (explaining that excessive force is sometimes used in such circumstances).

first the officer issues the order. But the inmate does not comply. Then the officer threatens use of a Taser. The inmate, again, does not comply. Then, even though non-compliance is posing no particular threat to institutional safety and could easily be addressed by a disciplinary or other non-force response, the officer uses the Taser for "pain compliance." Having been shocked by the Taser, the inmate will often comply. And of course, the possibility of actual use is what makes the threat work in other incidents.

A horrifying video recently posted online shows one such incident in New Mexico's Bernalillo County jail, in Albuquerque. As described by the *Albuquerque Journal*, whose public records request obtained the video's release:

> The video shows jail officers confronting [an inmate] over pictures—perhaps pages torn from a magazine—put up near her bunk. [The inmate] won't hold still, demanding to know the name of the officer holding her against a wall. An officer applies a stun gun to her.
>
> The inmate, who is 4 feet, 11 inches tall, falls to the ground and shrieks and sobs after that, so much so that jail officers try repeatedly to get her to be quiet.
>
> "Put her in a wrist lock," one officer tells another, "and twist her wrist until she shuts up and stops crying."
>
> [She] cries out in pain and continues to sob. Officers threaten to spray her with Mace if she won't be quiet. Eventually, she is sprayed in the face after she starts banging her head on the floor.[181]

The video continues in this vein for an almost endless forty-five minutes; even after the inmate is escorted/dragged to an infirmary and allowed to wash her face, repeated warnings of additional force are punctuated by the casual whistling of the sergeant wearing the video camera.[182] It is extremely hard to watch. And the justification offered by the officers' union president is beyond weak: as summarized by the *Albuquerque Jour-*

---

181 Dan McKay & Maggie Shepard, *County Commission Chairman Wants Oversight Board to Study Jail Video*, ALBUQUERQUE J. (Aug. 12, 2016, 11:42 PM), http://www.abqjournal.com/824777/official-wants-oversight-board-to-study-video.html [https://perma.cc/G48U-2Z3V]; *see* Dan McKay, *"Twist Her Wrist Until She Shuts Up,"* ALBUQUERQUE J. (Aug. 11, 2016, 10:56 PM), http://www.abqjournal.com/823915/county-releases-disturbing-video-of-jail-incident.html [https://perma.cc/WAM2-88F6]; Albuquerque J., *Susie Chavez Jail Video*, YOUTUBE (Aug. 11, 2016), https://www.youtube.com/watch?v-ZFf782fyJw [https://perma.cc/7L7L-8MCL].

182 *Susie Chavez Jail Video*, *supra* note 181, at 14:21.

nal, he said, "[I]t's appropriate to use force to get an inmate to stop making noise, if the noise is keeping the inmate from following commands."[183] But the noise was not keeping the inmate from following commands, except the command to stop crying—a command that had no institutional purpose.

Other incidents in this mold are summarized in a 2010 Department of Justice court filing in a case about Taser use in the county jail in Columbus, Ohio:

> Often, when an arrestee voices a verbal objection to having to remove his or her clothes, or otherwise shows any lack of cooperation during the booking process, such as failing to answer routine medical questions from a nurse, a team of deputies takes the person into a side tank, forcibly strips the individual without telling the person why they are being "dressed out," and tases the person if there is any degree of resistance, including passive or verbal resistance, to being stripped.[184]

The same filing recounts that, similarly, officers at the Columbus jail routinely used Tasers to address a situation that did indeed call for a physical intervention, but a less painful one, by which officers could nonetheless easily "control the individual, or accomplish the task at hand."[185] The same Department of Justice complaint describes an incident when

> deputies came to a cell ostensibly to assist a mentally ill inmate who was banging his head against his bed. Instead of entering the cell to remove the inmate, a team of deputies stood around outside the cell while a sergeant repeatedly tased this inmate a total of fourteen times because he would not slide out of the cell by himself.[186]

These kinds of pain compliance techniques are not summary punishment—the goal truly is compliance, not retribution. But the coercive method chosen drastically undervalues the pain imposed.

Use of *unduly aggressive tactics* is a slightly different way in which jail officers may undervalue pain they cause, when they address an actual security risk not with pain compliance but with other force. To illustrate the point, consider the tactics at issue in *Whitley v. Albers*, itself. *Whitley* was a damage

---

183 McKay & Shepard, *supra* note 181.

184 Petitioner's Complaint in Intervention at 3, Shreve v. Franklin Cty., No. 2:10-cv-644, 2010 WL 5173162 (S.D. Ohio Dec. 14, 2010), http://www.clearinghouse.net/chDocs/public/JC-OH-0016-0010.pdf [https://perma.cc/B6AX-28S6].

185 *Id.*

186 *Id.*

action brought by a prisoner shot in the leg as officials quelled a prison riot; Albers, the prisoner, had not participated in the riot, indeed, he was assisting prison authorities.[187] The 5–4 majority opinion by Justice O'Connor approved the district court's directed verdict for the defendant. She justified the "maliciously and sadistically for the very purpose of causing harm"[188] standard by explaining:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.[189]

Under this test, the plaintiff lost; he had alleged not summary punishment, but indifference to his safety. In his version of events, prison officials were so hyped up and so angry that they simply did not care if an inmate who had not participated in creating the hostage situation they were faced with—indeed, an inmate who had worked to keep a hostage safe—was hurt as that situation was resolved. Whitley, the officer-defendant, shouted, "Let's go, let's go. Shoot the bastards!" before he and other officers charged into a cellblock and shot several non-rioting prisoners.[190]

As Justice Marshall explained in dissent, "[A]lthough most of the inmates assembled in the area were clearly not participating in the misconduct, they received no warning, instructions, or opportunity to leave the area and return to their cells before the officers started shooting."[191] On the plaintiff's allegations, the officers in *Whitley* were thus responding to a real security risk, but they were entirely cavalier as to the very significant collateral damage to non-culpable inmates. In Albers's version of events, Whitley and his colleagues failed to give appropriate weight to the welfare of the inmate bystanders.

---

187 Whitley v. Albers, 475 U.S. 312, 315 (1986).

188 *Id.* at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

189 *Id.* at 319.

190 *See id.* at 331–32 (Marshall, J., dissenting).

191 *Id.* at 332.

Neither pain compliance incidents like the ones described above nor the unduly aggressive tactics on display in *Whitley* violate the *Whitley* malicious-and-sadistic standard. In using pain compliance techniques, the officers' ultimate goal is not the pain they cause; their purpose is, rather, to induce compliance. They would be just as happy to see compliance based on the order alone, or on the mere threat of Taser use. In the aggressive tactics incidents, likewise, the goal is not punishment but control. In both, the officers' actions thus pass muster under a standard whose verbiage includes references to malice and sadism.

Pain compliance frequently does, however, violate either a criminal or a civil recklessness standard. Consider Professor Catherine Struve's version of the latter standard; I have italicized the part that distinguishes civil from criminal recklessness: "(1) the force employed was unreasonable under the circumstances, and (2) the defendant knew *or reasonably should have known* that employing that amount of force posed a substantial risk of serious harm to the inmate."[192] Pain compliance to elicit obedience to an order capable of being enforced another way—like the order to return a lunch tray—or unnecessary to enforce at all—like the order to stop crying—seems to me to be unconstitutional under both the criminal and civil recklessness standards. The level of force is unreasonable, and the officer knows that using force exerts pain (that is the whole point). The unduly aggressive force in *Whitley*, by contrast, violates the civil recklessness but not the criminal recklessness standard. The officer who shot Albers did not disregard a known risk but one he *should* have known—the whole gravamen of the complaint is that although assessment of the situation would have been easy, he did not care enough to figure out which inmates in the dayroom were rioters and which were not.

So if each of these examples is to be actionable, the constitutional liability standard must be civil recklessness or lower. I think this is normatively attractive. In using either pain compliance or aggressive tactics that simply fail to consider the cost to prisoners, officers act with unconcern about the pain and harm they impose. Although this is not "malicious or sadistic," it does violate a crucial moral imperative, which is that the state should value every person's welfare. And surely this normative principle is beyond argument. It is appalling for a government official to use pain as a method to control another

192 Struve, *supra* note 22, at 1070 (emphasis added).

human being, in the absence of a legitimate need that is—or at least that reasonably seems, in the moment—pressing enough to outweigh that pain. The officer who whistles his way past a prisoner's distress as she is pepper sprayed and her wrist is twisted is the model, not of sadism, but of an equally abhorrent nonchalance. The same is true of an officer who walks into a dayroom and starts shooting without bothering to distinguish between rioters and non-rioters. The point is, both pain compliance and other intentional uses of force that have a patently insufficient security justification deny the full humanity of their subjects, by failing to value their welfare. It may be unclear in any given case whether in fact there was insufficient justification—but where the answer *is* clear, so too is the normative principle. The *Whitley* rule contradicts that principle, and so does a criminal recklessness standard, whereas a standard of either civil recklessness or objective reasonableness comport with it.

D. Officers Sometimes Use Force that Is Unreasonable Under the Circumstances

Finally, even without any kind of punitive intent or recklessness, sometimes jail officers simply use more force than is objectively needed, or use an unreasonably dangerous type of force. Should the lesser culpability of the officer make a difference? I have a hard time understanding why it should. Consider four inmates who are tased for four different reasons: (a) as punishment for calling an officer a rude name; (b) to induce the return of a meal tray; (c) by a cowboy officer paying no attention to which inmates are involved in an ongoing altercation; and (d) by an officer who unreasonably fails to notice that he has ceased resisting. In each scenario, the prisoner experiences the same pain. Justice Holmes may have been correct that "even a dog distinguishes between being stumbled over and being kicked"[193]—but these are all kicks. We might want our legal system to provide a different remedy for these different scenarios. Only more culpable conduct should lead to criminal sanction against the officer, for example. And an injunction would be appropriate only if the violation is systemic and redressable by the court order.[194] But why would we want our constitutional law to entirely excuse one or more of them? It seems to me that the answer can only be instrumental: the

193 OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe ed., Little, Brown and Co. 1963) (1881).

194 *See* Lewis v. Casey, 518 U.S. 343, 357–60 (1996).

goal of whatever standard is chosen should be to encourage only reasonable uses of force. Unreasonable uses of force are, well, unreasonable, and undesirable for that reason. Aligning the standard with the desired behavior seems simple and attractive.

The federal government, state governments, corrections standards-setting organizations, and jails themselves have insisted in their policies[195] that the standard must be objective, and that reasonable force is proportionate force. To quote a U.S. Department of Justice letter finding systemically unconstitutional force at the jail in New Orleans, "appropriate uses of force in a given circumstance should include a continuum of interventions, and . . . the amount of force used should not be disproportionate to the threat."[196] Disproportionate force can result from poor training or poor execution. Implementing this approach requires training and implementation of a variety of tactics—including the tactic of waiting out a problem. Agencies typically deem certain types of force—blows to the head and chokeholds, for example, because they can cause brain damage and even death—out of bounds except as a last resort.[197]

There is, moreover, a further reason to avoid inquiry into mental states. Officers' mental states are themselves affected by standards for behavior. A report by the Los Angeles Citizens' Commission on Jail Violence, for example, found that in the violent setting of the L.A. county jail system:

> [T]olerance for excessive force used by at least some deputies . . . has the danger of leading to what one expert cautioned can become "abuses of force . . . so 'normalized' that deputies can no longer perceive them as abusive." This can perpetuate a damaging culture that can ultimately affect even those deputies . . . who do not subscribe to these views and are intent on doing the right thing.[198]

An amicus brief filed by the ACLU in *Kingsley* makes the point more generally:

---

195 For a summary of each of these types of sources, see Brief of Former Corrections Administrators and Experts as *Amici Curiae* in Support of Petitioner, *supra* note 171, at *ii.

196 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ORLEANS PARISH PRISON SYSTEM FINDINGS 6, https://www.clearinghouse.net/chDocs/public/JC-LA-0028-0006.pdf [https://perma.cc/4F3C-ERSZ].

197 *See* DOJ RIKERS FINDING, *supra* note 164, at 11–12.

198 COUNTY OF LOS ANGELES CITIZENS' COMMISSION ON JAIL VIOLENCE, REPORT OF THE CITIZENS' COMMISSION ON JAIL VIOLENCE 98 (2012), http://www.lacounty.gov/files/CCJV-Report.pdf [https://perma.cc/DA2C-9NSR].

> When objectively unreasonable uses of force pervade the jail environment, that culture shapes guards' subjective perceptions of the appropriateness of violence. . . . [T]he perpetrator [of excessive force] should not be able to evade liability by invoking a subjective perception of violence that reflects an environment in which such violence is par for the course.[199]

To be clear, objective reasonableness does not require perfection. *Kingsley* (and *Graham v. Connor*) instruct that the objective inquiry should proceed "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."[200] So the point here is not that jail officers are required to use surgical precision when they deal with threats to safety and security. It is worth noting, however, that concerns about unduly high expectations given the stress of dangerous situations may be inapposite for the many uses of force in jails and prisons that are planned—for example, in *Kingsley* itself, when officers entered a locked cell to enforce an order.[201] In the planned force context, officers have time to check on various contingencies. It might, for example, be objectively unreasonable for an officer to direct pepper spray into the cell of a prisoner known by officials to be asthmatic who is refusing to return a meal tray[202] (the officer perhaps having neglected, unreasonably, to check the prisoner's medical status prior to the planned use of force). Similarly, it might be unreasonable to fail to summon mental health staff to assist with de-escalation of a confrontation with a prisoner with mental illness.[203] But whether the use of force is planned or not, an objective reasonableness standard directs attention where it normatively belongs: to the objective need for the force, or lack thereof.

---

199 Brief for American Civil Liberties Union and American Civil Liberties Union of Wisconsin as Amici Curiae in Support of Petitioner at 15–16, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1045424, at *15–16.

200 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015); Graham v. Connor, 490 U.S. 386, 396 (1989).

201 *See infra* notes 205–06 and accompanying text.

202 *Cf.* U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, THE EFFECTIVENESS AND SAFETY OF PEPPER SPRAY 1 (2003), https://www.ncjrs.gov/pdffiles1/nij/195739.pdf [https://perma.cc/5ZJ8-PXCV] (noting that "exposure to pepper spray was a contributing cause of death in 2 of the 63 fatalities [that occurred in-custody where pepper spray was used during the arrest], and both cases involved people with asthma"); ABA, TREATMENT OF PRISONER STANDARDS, *supra* note 180, at § 23-5.6, 132 ("'Force' means offensive or defensive physical contact with a prisoner, including . . . discharge of chemical agents . . . .").

203 Memorandum of Agreement Between the U.S. Department of Justice and the Consol. Gov't of Columbus, Georgia, Regarding the Muscogee County Jail 5–18 (Jan. 15, 2015), https://www.clearinghouse.net/chDocs/public/JC-GA-0003-0004.pdf [https://perma.cc/YM6Q-HDYP].

Finally, I return to the administrability point. When liability has a subjective focus, the central factual issue—the officer's state of mind—is extremely difficult to adjudicate accurately. Plaintiffs will rarely have direct evidence, and officers will nearly always be able to argue that even if the force they used was objectively excessive, they were honestly (if unreasonably) mistaken, rather than malicious, sadistic, or reckless. As a *Kingsley* amicus brief by retired corrections officials argued,

> Clear, enforceable standards ensure that jail staff members know what they can and cannot do, and they guarantee that officers who use excessive force can be held accountable for their actions. Accountability, in turn, prevents systemic problems with the use of excessive force—such as those seen in New York, Los Angeles, and New Orleans—and it protects against the spread of such systemic abuses to other institutions.[204]

Returning to an objective focus aligns policy and law; the issue that matters for good practice matters for law as well, and legal institutions are actually capable of assessing it.

In sum, normative considerations counsel strongly in favor of an objective reasonableness standard for constitutional adjudication of the lawfulness of custodial uses of force. And an objective reasonableness standard is actually most susceptible to accurate administration in litigation. I turn now to *Kingsley v. Hendrickson*, in which the Court adopted an objective reasonableness standard for use of force against a pretrial detainee.

III
KINGSLEY V. HENDRICKSON

In 2010, Michael Kingsley, the plaintiff in *Kingsley v. Hendrickson*, was detained in a Wisconsin county jail awaiting trial on drug charges.[205] After Kingsley refused several times to remove a piece of paper covering the light fixture over his bed, jail officers handcuffed and forcibly removed him from his cell. He alleged that while he was handcuffed, the officer-defendants first slammed his head into a concrete bed and then stunned him with a Taser. (The officers agreed that a Taser had been used but denied the rest; they justified the Taser use by asserting that it was intended to encourage the plaintiff to stop re-

---

204 Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner, *supra* note 171, at *20.

205 *Kingsley*, 135 S. Ct. at 2470.

sisting their attempts to remove his handcuffs.) At trial, the jury found for the officers on jury instructions endorsing a subjective recklessness standard; the appeal challenged the instructions as legally erroneous.[206]

In this Part, I look in Section A at *Kingsley*'s majority opinion, by Justice Breyer, including examining two doctrinal paths not taken—criminal recklessness (as in *Farmer v. Brennan*) and civil recklessness (the standard plaintiffs unsuccessfully proposed in *Farmer*). In Section B, I analyze *Kingsley*'s primary dissent, by Justice Scalia. In Section C, I argue that *Kingsley*'s Due Process standard necessarily applies not just to excessive-force cases but to conditions-of-confinement claims as well.

A. The *Kingsley* Majority

In an opinion by Justice Breyer (joined by Kennedy, Ginsburg, Sotomayor, and Kagan), the Supreme Court held in *Kingsley* that when jail officials intentionally direct force against a detainee, that force is unconstitutional if it is objectively unreasonable. The opinion explained that the use of force at issue in *Kingsley* was "deliberate—i.e., purposeful or knowing."[207] Thus, Justice Breyer stressed, nobody was disagreeing with the Court's prior conclusion, in both a prior policing case and one about prisoners' rights, that "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process."[208] Likewise, the Court put off for another day an issue *not* raised by the case—what to do with unintentional force (the example it cited was a police vehicular pursuit gone bad).[209] Mere negligence would not be enough, in that situation, it explained, while reserving the question "[w]hether [a recklessness] standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee."[210] What *Kingsley* did decide was how constitutional law should treat the "defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used."[211] The Court framed its choice as whether "a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective stan-

---

206 *Id.* at 2470–71.
207 *Id.* at 2472.
208 *Id.* (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (emphasis in *Kingsley*)); *see also* Daniels v. Williams, 474 U.S. 327 (1986).
209 *Lewis*, 523 U.S. at 849 (1998).
210 *Kingsley*, 135 S. Ct. at 2472.
211 *Id.*

dard."[212] On that issue, the Court held, "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[213] The Court canvassed three reasons for its decision: precedent, feasibility, and the safeguard of an ex ante perspective.

Justice Breyer began by emphasizing the objective approach's consistency with precedent:

> We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." And in *Bell*, we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." The *Bell* Court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double-bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. Rather, the Court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose.[214]

Thus, the *Kingsley* Court read the word "punishment" to encompass *either* official measures taken with "expressed intent to punish" *or* a mismatch between "legitimate nonpunitive governmental purpose[s]" and the action under challenge.[215] The former was subjective; the latter objective.

Second, the Court noted that "experience suggests that an objective standard is workable."[216] A number of circuit courts had already taken the approach the Court adopted, without ill effect.[217] In addition, an amicus brief by former corrections officials cited abundant evidence that jail officers nationwide were already trained and required by their agency policy to use only objectively reasonable force.[218]

---

212 *Id.*

213 *Id.* at 2473.

214 *Id.* at 2473 (internal citations omitted).

215 *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 561 (1979)).

216 *Id.* at 2474.

217 *Id.*

218 Brief of Former Corrections Administrators and Experts as Amici Curiae in Support of Petitioner, *supra* note 171, at 8–18.

And finally, the Court emphasized that its approach would not undermine jailers' ability to keep order, because the objective reasonableness of force should be evaluated "from the perspective and with the knowledge of the defendant officer," "tak[ing] account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate."[219]

The *Kingsley* Court expressly rejected the defendants' urging to apply to pretrial detainees, under the Fourteenth Amendment, the *Whitley* "malicious[ ] and sadistic[ ] for the very purpose of causing harm" standard applicable to convicted prisoners under the Eighth Amendment.[220] The "most important[ ]" reason, Justice Breyer explained, was that "pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"[221] Accordingly the Court held erroneous the jury instructions under which the jury had found for the defendants, and remanded the case for further proceedings.[222] However, at the same time as it dismissed the relevance of Eighth Amendment precedents, the Court embraced Fourth Amendment case law, citing *Graham v. Connor* a half-dozen times. In *Graham*, the Court (per Chief Justice Rehnquist) established the general rule that the Fourth Amendment requires police to use only objectively reasonable force in non-detention settings.[223] The *Kingsley* Court relied on *Graham* to explain what "reasonable" means: that "reasonableness turns on the 'facts and circumstances of each particular case,'" and that "[a] court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."[224]

The Court also expressly rejected the defendants' fallback position—that liability could attach only if defendants were subjectively reckless with respect to the excessiveness of force.

---

219 *Kingsley*, 135 S. Ct. at 2469, 2474.

220 *Id.* at 2476 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

221 *Id.* at 2475.

222 On remand, the 7th Circuit rejected the defendant-officers' argument that any error was harmless, and itself remanded the matter for retrial. On retrial, the (new) jury was instructed that whether force was excessive was an entirely objective question, and on that instruction rendered a defense verdict. Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015); Jury Instructions at 5, Kingsley v. Hendrickson, No. 10-cv-832-jdp (W.D. Wis. Feb. 26, 2016); Judgment, Kingsley v. Hendrickson, No. 3:10-cv-832-jdp (W.D. Wis. Mar. 1, 2016).

223 490 U.S. 386 (1989).

224 *Kingsley*, 135 S. Ct. at 2473.

The jury instructions the Court found erroneous in *Kingsley* had endorsed this standard of subjective recklessness. The instructions stated, in part:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;
>
> (2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;
>
> (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> (4) Defendants' conduct caused harm to plaintiff.[225]

The defendant-officers' brief in the Supreme Court contended principally that the *Whitley* malicious-and-sadistic standard was correct—so the jury instruction was actually "unduly favorable to the petitioner [plaintiff]."[226] But "at an absolute minimum," the defendants argued, criminal recklessness, as in the jury instruction, should set the floor for liability: "this Court should require some showing of subjective intent, with a recklessness standard providing the only viable alternative."[227] Neither the *Kingsley* majority nor dissent comprehensively analyzed this potential middle ground, which echoed the Court's approach, in *Farmer v. Brennan*,[228] to prison conditions-of-confinement challenges. Indeed, the majority never cited *Farmer* and never used its language of "deliberate indifference." The Court simply reiterated that the jury instructions' reference to recklessness "suggested the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of the force. As we have just held, that was error."[229]

The Court was less explicit but no less definitive in its rejection of (objective) civil recklessness, the scienter standard one tick more pro-plaintiff than criminal recklessness. When civil recklessness is the standard, as the Court explained in *Farmer*, plaintiffs can win their case by showing that defend-

---

225 *Id.* at 2471.

226 Brief for Respondents at 36, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1519055, at *36.

227 *Id.* at *34.

228 511 U.S. 825 (1994).

229 *Kingsley*, 135 S. Ct. at 2477.

ants disregarded serious risks they *should* have known about.[230] In *Farmer*, when the Court chose a subjective criminal recklessness standard, it overrode plaintiff's argument that *Wilson v. Seiter*'s "deliberate indifference" language allowed liability based on civil recklessness—already used as an attribution rule in § 1983 cases against municipalities.[231] *Kingsley*'s rejection of civil recklessness was from the opposite direction. When a jail official intentionally acts or fails to act, and harm results, *Kingsley*—like *Bell*, before it—endorses liability when the act or omission was objectively unreasonable. In both *Kingsley* and *Bell*, the majorities not only fail to use the word "reckless" to describe the chosen standard, they also omit any of the other words associated with recklessness: "disregard," "wanton," or "deliberate indifference." The *Kingsley* and *Bell* Courts thus spurned not just the *Whitley* malicious-and-sadistic standard, and not just *Farmer*'s subjective deliberate indifference/criminal recklessness standard, but also *Wilson*'s less specified requirement of deliberate indifference altogether.

The Court's "objective unreasonableness" language sounds very like negligence.[232] And, as customary for negligence adjudication, the *Kingsley* Court emphasized the required ex ante perspective. The majority opinion explained, for example, that reasonableness is to be evaluated "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."[233] Yet the Supreme Court has been reluctant to constitutionalize negligence law. The Court made the point firmly in *Kingsley* itself:

> [A]s we have stated, "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (emphasis added). See also *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property").[234]

This poses a bit of a puzzle. After all, legal analysis of states of mind usually arrays them on a spectrum where the mindset

---

230 *See supra* text accompanying notes 139–41.

231 Brief for Petitioner at 10–11, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247), 1993 WL 625980, at *10–11 (citing City of Canton v. Harris, 489 U.S. 378 (1989)).

232 HOLMES, *supra* note 193, at 63–67; *see* Vaughan v. Menlove, 132 ER 490 (LRPC 1837) (Eng.).

233 *Kingsley*, 135 S. Ct. at 2473.

234 *Id.* at 2472 (parallel citations omitted).

one tick more culpable than negligence is civil recklessness, and one more tick over is criminal recklessness.[235] But, as just seen, the *Kingsley* Court repudiates negligence, but also expressly rejects criminal recklessness and rules out without comment the possibility of civil recklessness. Justice Breyer solves the puzzle by emphasizing that uses of force must be *intentional* to be unconstitutional: "Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—i.e., purposeful or knowing—the pretrial detainee's claim may proceed."[236] Of course not all deliberate/purposeful/knowing uses of force are in any way culpable, but nonetheless under *Kingsley*, the decision to use force renders state actors susceptible to liability if that force is objectively unreasonable.

This is a doctrinal distinction, but does it make sense? I think it does. To understand why, it is useful to review why the Court has declined to constitutionalize ordinary negligence law, a topic most fully explored in *Daniels v. Williams*, in which the Court disallowed due process liability for an inmate's injury caused by a Sheriff's deputy's alleged negligence in leaving a pillow on a staircase. The Court explained, "It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns."[237] The key difference? "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[238] Returning to *Kingsley*, this passage supports the Court's holding: intentional force imposed under color of law certainly does relate to the "large concerns of the governors and the governed."[239]

At the end of the day, *Kingsley* was an unambiguous win for pretrial detainee plaintiffs: where many lower courts had required them to demonstrate *both* that force was, in fact, excessive, and that the defendant officials had a culpable state of mind, *Kingsley* clarified that only the former showing is required.

---

235 *E.g.*, MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1962).
236 *Kingsley*, 135 S. Ct. at 2472.
237 Daniels v. Williams, 474 U.S. 327, 333 (1986).
238 *Id.* at 332.
239 *Id.*; *Kingsley*, 135 S. Ct. at 2472.

B. The *Kingsley* Dissent

Justice Scalia dissented, joined by Chief Justice Roberts and Justice Thomas,[240] chiefly relying on a different reading of the precedents. Justice Scalia claimed that the Court's prior "cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of 'objectively unreasonable' force, without more, is not the intentional infliction of punishment."[241] Both *Bell* and *Wilson v. Seiter*, Scalia said, dictated that "punishment" means something intentional. *Wilson* was explicit on the point, he emphasized, explaining that "[a]cting with the intent to punish means taking a 'deliberate act intended to chastise or deter.'"[242] And Scalia explained *Bell*'s mismatch approach as evidentiary rather than conceptual, and, in any event, making sense only in *Bell*'s conditions-of-confinement setting. He wrote:

> The conditions in which pretrial detainees are held, and the security policies to which they are subject, are the result of considered deliberation by the authority imposing the detention. If those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent.[243]

For use of force, however, such an inference would be illogical, Justice Scalia argued; a prison officer's use of more force than was, objectively, necessary, might well be based on a mistake rather than a considered judgment.[244] Accordingly *Bell*'s approach—already more government-friendly than the Court acknowledged, according to Justice Scalia—shouldn't apply at all.[245]

---

240 Justice Alito dissented separately, suggesting that the Court should not have granted certiorari review of the case, because pretrial detainees might be able to frame excessive force claims under the Fourth Amendment rather than the Fourteenth Amendment. *Id.* at 2479 (Alito, J., dissenting) (citing Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)); *Graham*, 490 U.S. at 395 n.10 ("Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.").

241 *Id.* at 2477 (Scalia, J., dissenting).

242 *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 300 (1991)).

243 *Id.* at 2478.

244 *See id.*

245 *See id.*

C. *Kingsley* Requires an Objective Reasonableness Conditions-of-Confinement Standard, Too

I have just argued that the *Kingsley* opinion's resolution of the precise issue before it—the standard for liability in an excessive force case brought by a pretrial detainee—is correct and attractive. In this section, I explain how *Kingsley*'s approach also requires, logically, a similar standard focused on objective unreasonableness in jail conditions-of-confinement cases, as a matter of the same *Bell* precedent, and how this outcome, as in the excessive force context, is consistent with the Court's longstanding reluctance to constitutionalize negligence law.

Doctrinally, the matter is not complicated: *Kingsley*'s objective standard necessarily governs pretrial conditions-of-confinement cases. After all, *Kingsley* rested its holding on its reading of *Bell*—and *Bell* was a conditions case, not an excessive force case. Indeed, as explained above, Justice Scalia's *Kingsley* dissent argued that *Bell*'s "reasonable relation" test—the one *Kingsley* interpreted to foreclose a subjective standard of liability—was *more* appropriate in cases complaining about jail conditions of confinement than those challenging uses of force.[246]

In most circuits, this will require revisiting pre-*Kingsley* case law. Prior to *Kingsley*, most of the federal appeals courts conditioned constitutional liability for objectively dangerous conditions of confinement for pretrial detainees on plaintiffs' additional demonstration of the subjective deliberate indifference by the officials involved. Court of Appeals decisions relied jointly on the Supreme Court's Eighth Amendment precedent and the intent-to-punish reading of *Bell v. Wolfish* that *Kingsley* rejected. A prominent example was the 2010 Ninth Circuit precedent of *Clouthier v. County of Contra Costa*,[247] a case whose plaintiffs sued various jail officials and the County of Contra Costa for failing to take reasonable precautions to prevent an inmate they knew was suicidal from killing himself. The Court of Appeals held that the appropriate standard of liability under the Fourteenth Amendment was the *Wilson/Farmer* subjective deliberate indifference standard. The court began with *Bell*, which it read to focus on punitive purpose. Next, the Ninth Circuit explained that precedents relating to

---

246 Making this point, see Hatter v. Dyer, 154 F. Supp. 3d 940, 952–53 (C.D. Cal. 2015).

247 591 F.3d 1232 (9th Cir. 2010).

the Eighth Amendment filled in what this meant more concretely. First, the opinion noted, *Wilson* equated intentional punishment and a "culpable state of mind."[248] The Court of Appeals next cited *Farmer*'s explanation that deliberate indifference was the same as (subjective) criminal recklessness.[249] And so, the court concluded, the Fourteenth Amendment rights of pretrial detainees were coincident with the Eighth Amendment rights of post-conviction prisoners.[250] Other Courts of Appeals reached similar conclusions.

A few weeks after *Kingsley*, a Ninth Circuit panel issued an opinion in *Castro v. County of Los Angeles*. Castro sued for the devastating injuries he suffered when he was beaten by another inmate in a "sobering cell." Officers had "ignored Castro's attempts to attract attention" and checked the cell only sporadically.[251] In addition, notwithstanding the contrary requirements of California's Minimum Standards for Adult Detention Facilities, officials had decided against equipping the cell with audio or video monitoring.[252] The panel held that the new Supreme Court precedent had "no bearing on the failure-to-protect claims presented here and in *Clouthier*," because "[t]he standard for a failure-to-protect claim—deliberate indifference to a substantial risk of serious harm—is completely different from the standard for an excessive-force claim."[253] Judge Graber's dissent, however, vehemently took the opposite position, and the court granted rehearing en banc.[254] On rehearing, the Ninth Circuit reversed. Holding that *Kingsley* "expressly rejected the interpretation of *Bell* on which we had relied in *Clouthier*," the en banc court announced an objective standard of liability in pretrial detention failure-to-protect cases.[255]

The overruled *Castro* panel stands close to alone in its limited reading of *Kingsley*. Some post-*Kingsley* courts have, with little or no discussion of or briefing on *Kingsley*, continued (usually in dicta) to describe the liability standard in jail conditions cases as subjective.[256] And other courts have expressly

---

248 *Id.* at 1242.
249 *Id.* (quoting Farmer v. Brennan, 511 U.S. 825, 834, 837 (1994)).
250 *See id.* at 1241–43.
251 Castro v. Cty of Los Angeles, 797 F.3d 654, 666 (9th Cir. 2015).
252 *Id.* at 673.
253 *Id.* at 665.
254 *See id.* at 679–82 (Graber, J., dissenting).
255 Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc).
256 Court of Appeals cases in this category include Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (stating that only the en banc court could examine the issue under the court's "rule of orderliness"); Morabito v.

declined to address whether *Kingsley* entails a change from the prior subjective liability standard to an objective one, because resolution of the issue is unnecessary to the case before them.[257] But in the cases in which the issue has been briefed and analyzed, all the Court of Appeals case law so far reads *Kingsley* as requiring an objective standard in pretrial detention conditions cases;[258] this includes cases in the Second, Seventh, Eighth, and Ninth Circuits. I have uncovered only a single district court decision taking the opposite approach on the merits.[259] Again, given that *Bell* itself was a conditions-of-confinement case, and that the *Kingsley* Court premised its approach on *Bell*, it is surely only a matter of time and full briefing before the other Courts of Appeals insist on an objective standard for jail conditions cases.

However, in conditions-of-confinement cases, the lower courts have differed on the subsidiary doctrinal question:

Holmes, 628 F. App'x 353, 360 (6th Cir. 2015); Linden v. Piotrowski, 619 F. App'x 495, 500 (6th Cir. 2015); Baynes v. Cleland, 799 F.3d 600, 617–18 (6th Cir. 2015); Smith v. Dart, 803 F.3d 304, 309–10 (7th Cir. 2015); McBride v. Houston Cty. Health Care Auth., 658 F. App'x. 991, 999 (11th Cir. 2016). For a catalog of district court opinions that have, since the *Kingsley* decision, applied a subjective test in jail conditions cases without discussion, see Wilber v. Cty. of Jackson, No. 13-cv-14524, 2016 WL 892800, at *6 n.1 (E.D. Mich. Mar. 9, 2016).

257 Court of Appeals cases in this category include: Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70 (1st Cir. 2016); Ross v. Corr. Officers John and Jane Does 1–5, 610 F. App'x. 75, 76 n.1 (2d Cir. 2015); Collins v. Al-Shami, 851 F.3d 727, 731 (7th Cir. 2017); Werner v. Wall, 836 F.3d 751, 761 (7th Cir. 2016); Bailey v. Feltmann, 810 F.3d 589, 593 (8th Cir. 2016); Barton v. Taber, 820 F.3d 958, 964 n.3 (8th Cir. 2016); United States v. Brown, 654 F. App'x. 896, 906 n.6 (10th Cir. 2016).

258 Court of Appeals cases applying an objective standard to pretrial detention conditions of confinement include: Darnell v. Pineiro, 849 F.3d 17, 34–35 (2d Cir. 2017); Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 856 (7th Cir. 2017); Ingram v. Cole Cty., 846 F.3d 282, 286 (8th Cir. 2017); Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1069 (9th Cir. 2016) (limiting the holding to failure-to-protect cases).

259 Order at 15, Gomes v. Cty. of Lake, No. 1:12-cv-04439 (N.D. Ill. Oct. 4, 2016) (declining to extend *Kingsley*'s objective approach to professional decisions by medical staff in jail). Many district courts have declined to depart from circuit case law; alterations, they have said, are up to the Courts of Appeals. *See, e.g.*, Buffer v. Frazier, No. 14-2497-JDT-DKV, 2016 WL 1178810, at *2 n.2 (W.D. Tenn. Mar. 24, 2016) ("Absent further guidance from the appellate courts, this Court will continue to apply the [subjective] deliberate indifference analysis to claims concerning a pretrial detainee's health and safety."); Castillo v. Dubose, No. 3:14-CV-987-WKW, 2017 WL 3765772, at *6 (M.D. Ala. July 31, 2017), report and recommendation adopted 2017 WL 3765745 (M.D. Ala. Aug. 30, 2017) (giving no substantive analysis, but "an extensive search of post-*Kingsley* cases indicates that the vast majority of federal courts, including [this court and] the Eleventh Circuit Court of Appeals, have continued to utilize the deliberate indifference standard in deciding claims of pretrial detainees which challenge medical treatment and other conditions").

Which objective standard applies—recklessness or reasonableness? In its en banc *Castro* decision, the Ninth Circuit endorsed the former. The court held that where a jail officer's non-force intentional action—for example, placing two inmates in the same cell, or monitoring the cell only every half hour—led to the challenged harm, liability attaches based on the purely objective question, "Was there a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take, thus causing the injury that the plaintiff suffered?"[260] The liability standard, the court said, was "more than negligence but less than subjective intent—something akin to reckless disregard."[261] The prisoner-plaintiff should win only if "[t]he defendant did not take reasonable available measures to abate [a substantial risk of serious harm], even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious."[262] The court explicitly equated this to civil—that is, objective—recklessness, citing the Restatement (Second) of Torts.[263] In other words, what the Ninth Circuit did in *Castro* was to maintain *Wilson v. Seiter*'s "deliberate indifference" approach, but use an *objective* rather than a *subjective* definition of deliberate indifference. It adopted the standard the plaintiff unsuccessfully urged in *Farmer v. Brennan*—the objective definition of deliberate indifference already used as an attribution rule in § 1983 municipal liability cases to adjudicate a city's liability.[264]

By contrast, in the other major Court of Appeals decision, so far, to analyze *Kingsley*'s application to pretrial detention conditions-of-confinement cases, the Second Circuit offers a different doctrinal analysis. In a case about "appalling conditions"[265] in Brooklyn Central Booking, *Darnell v. Piniero*, the Second Circuit held earlier this year:

---

260 *Castro*, 833 F.3d at 1070.

261 *Id.* at 1071.

262 *Id.*

263 *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (AM. LAW INST. 2016) ("[R]ecognizing that 'reckless disregard' may be shown by an objective standard under which an individual 'is held to the realization of the aggravated risk which a reasonable [person] in his place would have, although he does not himself have it.'")).

264 Brief for Petitioner at 10–11, Farmer v. Brennan, 511 U.S. 825 (1994) (No. 92-7247), 1993 WL 625980, at *10–11 (citing City of Canton v. Harris, 489 U.S. 378 (1989)).

265 Darnell v. Pineiro, 849 F.3d 17, 21 (2d Cir. 2017).

> [T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.[266]

That is, given objectively unreasonable pretrial detention conditions, liability can rest on the plaintiffs' demonstration that a jail official defendant *either* "acted intentionally to impose the alleged condition," or "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety."[267]

The en banc *Castro* opinion was an important win for its plaintiff and other pretrial detainees. But its civil recklessness standard still did not appreciate what *Kingsley* entails. As I argued in Section A, *Kingsley* rejects both criminal and civil recklessness as the liability standard. And relying as it does on *Bell*, the *Kingsley* standard must apply both to excessive force and conditions-of-confinement claims. So *Castro* must be wrong, setting an unduly high bar to liability. This conclusion is bolstered by a separate consideration. If *Castro* were correct, the liability standard would be *higher* for conditions-of-confinement claims than those that allege excessive force. That simply cannot be right. In *Whitley*, Justice O'Connor's opinion for the Court in support of the Eighth Amendment use-of-force malicious-and-sadistic standard explained that the use-of-force setting required more, not less, deference to prison officers' in-the-moment decision making than appropriate in conditions-of-confinement cases. Her opinion distinguished *Estelle* and its deliberate indifference approach; while suitable in a conditions case, she wrote, "In this [use-of-force] setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."[268] Compared to conditions of confinement,

---

266 *Id.* at 35.

267 *Id.*

268 Whitley v. Albers, 475 U.S. 312, 320 (1986).

that is, use of force is adjudicated with more, not less, deference. So even if *Kingsley*'s reliance on *Bell* did not make the point inescapable, *Kingsley*'s rejection of a recklessness liability rule for use of force requires, *a fortiori*, the same rule's rejection in a pretrial detention conditions-of-confinement case.

The liability standard for intentional actions and omissions is simpler: objective reasonableness. The Second Circuit got this right in *Darnell*; although *Kingsley* explained that something more than negligence is required, that "something" is not civil recklessness with respect to potential harm, but intentional conduct that, in the event, amounts to unreasonable force or creates an objectively unreasonable degree of risk. Intentionally using force, intentionally declining to install audio or video monitoring in a "sobering cell," intentionally setting up a cell's toilet facilities, or intentionally placing a vulnerable pretrial detainee in that cell with a dangerous cellmate are not the same as unintentionally leaving a pillow on a staircase.[269] When intentional decisions create objectively unreasonable conditions—whether or not anyone in particular exhibits recklessness—*Kingsley* dictates that the conditions are unconstitutional.[270]

Unsurprisingly, since it was addressing use of force, not conditions of confinement, the *Kingsley* liability standard is not fully fleshed out for the latter type of case. Presumably more is required than simply *any* intentional act. After all, it would be the rare injury that does not involve an intentional act or omission. Even for a pillow negligently left on the staircase, no doubt the sheriff's deputy intentionally picked up the pillow from wherever it belonged. There is, however, a compelling account that explains when liability should attach. Justice Stevens, all the way at the beginning of the Supreme Court's jurisprudence of conditions of confinement, offered an analysis that seems to me precisely on point.

The key quote from the Stevens *Estelle* dissent is:

> Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make

---

269 *Cf.* Daniels v. Williams, 474 U.S. 327, 332 (1986) (rejecting liability against a deputy sheriff who unintentionally left a pillow on jail stairs).

270 *Darnell* does, however, extend *Kingsley* in one respect. *Kingsley* reserved the issue of unintentional conduct, and in *Darnell*, the Second Circuit held that reckless conduct, too, could create unconstitutional conditions of pretrial detention.

> an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty.[271]

As he explained, Justice Stevens's standard excludes some negligently caused harm. But his carve-out does not tighten the scienter requirement to recklessness—even civil recklessness—by the doctor or a particular prison official. Rather, the key to his analysis is the generally elevated level of risk created by overall conditions.

Although Justice Stevens did not offer the comparison, a helpful analogy is to tort liability for product defects. Under the influential Section 402A of the Restatement (Second) of Torts, liability attaches for harms caused to consumers when a product is sold "in a defective condition unreasonably dangerous to the user or consumer" even if "the seller has exercised all possible care."[272] This is often labeled "strict liability," because the test is based not on the defendant's degree of care but on the outcome.[273] But it is very different from traditional flavors of strict liability based on causation alone, such as the common law regime for intrusions on land by livestock, or for harms caused by wild animals.[274] Tort law scholars have emphasized that product liability proceeds without examining scienter, and is premised neither on traditional negligence nor on most tradi-

---

271 Estelle v. Gamble, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting).

272 RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998) ("One . . . who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."); RESTATEMENT (THIRD) TORTS: PRODS. LIAB. § 2 (AM. LAW INST. 1998) ("A product is defective when . . . it contains a manufacturing defect. . . . A product . . . contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.").

273 *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW 315–16 (3d ed. 2015) ("In contrast [to negligence], the very basis of strict products liability in tort is the supplier's responsibility for harm caused by product defects *regardless* of fault.").

274 *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 21 (AM. LAW INST. 2010) ("An owner or possessor of livestock or other animals, except for dogs and cats, that intrude upon the land of another is subject to strict liability for physical harm caused by the intrusion."); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 22(a) (AM. LAW INST. 2010) ("An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal."). For a discussion of the development and variation from this original English common-law rule in the United States, see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 22 cmt. c (AM. LAW INST. 2010).

tional strict liability.[275] Rather, products liability exists only in the presence of excessive danger; it is premised not merely on causation but causation plus ex ante unreasonable risk. What makes something a defect is precisely the unreasonable risk it introduces. For manufacturing defect cases, the "defect" is the difference between the intended and the actual product; for design defect cases, the "defect" is the unacceptable risk introduced by the product.[276]

The test Justice Stevens proposed in *Estelle* stated a similar excessive-danger-based form of liability. The intentional provision of undertrained, overworked, or under-resourced medical care is the defect; when improper health care ensues, the combination is enough to constitute cruel and unusual punishment. Similarly, the intentional under-supervision of a sobering cell is a defect; when a prisoner is beaten nearly to death as a result, that too is unconstitutional. I don't mean to overstate the similarities here. The comparison to products liability is an analogy, nothing more. Products liability, after all, is at least somewhat broader than negligence, whereas the liability Justice Stevens proposed in *Estelle* is narrower. The point is, just as *Kingsley* does for excessive force, Justice Stevens's *Estelle* dissent offers a liability standard for conditions of confinement that is narrower than negligence, without tightening scienter.

IV
THE ORGANIZATIONAL NORMATIVE CASE FOR A CONSTITUTIONAL BAN ON OBJECTIVELY UNREASONABLE FORCE OR CONDITIONS

In Part II, I offered normative arguments in favor of *Kingsley*'s objective reasonableness standard in light of the dynamics of individual officers' excessive force against prisoners. Here, I return to the normative, but focus on jails and prisons as complex governmental organizations, and on conditions in addition to force cases. This lens offers additional support for *Kingsley*'s choice of an objective reasonableness standard and its concomitant rejection of either criminal or civil recklessness as the applicable standard. I argue in subpart A that *Farmer*'s criminal recklessness standard, urged as a fallback by the defendants in *Kingsley*, constitutionally immunizes facilities in which knowledge and decision making are separated, excusing

---

275 *See* OWEN, *supra* note 273, at 3–6. In some ways, products liability is akin to the common law strict liability for "abnormally dangerous activities." *Id.* at 314–16.

276 *See id.* at 445–48.

and even encouraging official ignorance about serious risks. By contrast, an objective standard encourages appropriate risk regulation. In subpart B I suggest that, similarly, an objective standard avoids ratifying underfunding of jails and prisons as a constitutional excuse for inhumane conditions.

A. Solving the Problem of Culpable Ignorance

Many observers before me have pointed out that a subjective recklessness standard immunizes even culpable ignorance, whereas objective recklessness or reasonableness makes culpable ignorance actionable.[277] *Farmer* held that prison officials are liable only for risks they actually know about; the *Farmer* Court rejected a civil recklessness standard that would have imposed liability for disregard of obvious risks, adopting instead a criminal recklessness standard violated "only when a person disregards a risk of harm of which he is aware."[278] In many settings, a rule that the Constitution does not require officials to become informed about risks would work hand-in-glove with the Supreme Court's general reluctance to constitutionalize affirmative duties. For example, the Court has insisted that no constitutional breach occurs when police fail to intervene to protect a crime victim—even if a defendant police officer knows about the risk that victim faces and could easily prevent the looming harm.[279] If there is no constitutional obligation to intervene even when a risk is known, a constitutional obligation to become informed would make no sense.

But jail and prison are exceptions to the general rule against constitutionalization of affirmative duties. Jail and prison render inmates unable to protect themselves without state participation; they are unable to lock their doors, unable to exit a threatening situation, unable to seek medical treatment, unable to buy food, and so on. For this reason, the Supreme Court has explained, the Constitution does, indeed, impose an affirmative obligation to protect inmates from serious risks of harm[280] and to provide them "the minimal civilized measure of life's necessities."[281] As the Court has noted (in dicta), "in the custodial situation of a prison, forethought about

---

277 *See, e.g.*, Dolovich, *supra* note 44, at 945; Struve, *supra* note 22, at 1069.
278 Farmer v. Brennan, 511 U.S. 825, 837 (1994).
279 *See* Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768–69 (2005).
280 *See Deshaney*, 489 U.S. at 199–200.
281 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

an inmate's welfare is not only feasible but obligatory."[282] In this context, as in other contexts of affirmative duties, it is anomalous to immunize ignorance.[283] Consider, for example, the affirmative duties of parents. Parents cannot defend against parental neglect charges by asserting that they simply did not notice their child starving or suffering from a medical issue;[284] the failure to notice is, if anything, confirmation of the neglect accusation. Similarly, an official's unreasonable failure to notice a dangerous situation is just as individually culpable as a failure to act reasonably to avert a noticed danger. And it is just as harmful. As Sharon Dolovich has argued in an extensive exploration of Eighth Amendment conditions-of-confinement doctrine, "[W]hen prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse."[285]

---

282 Cty. of Sacramento v. Lewis, 523 U.S. 833, 851 (1998).

283 *Cf.* Davidson v. Cannon, 474 U.S. 344, 354 (1986) (Blackmun, J., dissenting) ("[W]hen a State assumes sole responsibility for one's physical security and then ignores his call for help, the State cannot claim that it did not know a subsequent injury was likely to occur. Under such circumstances, the State should not automatically be excused from responsibility. In the context of prisons, this means that once the State has taken away an inmate's means of protecting himself from attack by other inmates, a prison official's negligence in providing protection can amount to a deprivation of the inmate's liberty, at least absent extenuating circumstances.").

284 *See* State *ex rel.* N.K.C., 995 P.2d 1, 6 (Utah Ct. App. 1999) ("Perhaps the mother was unaware of the severity of her child's condition when he appeared limp and lethargic. Perhaps she did not fully understand the precise significance of fixed pupils and the child's inability to nurse. A reasonable parent standard may accommodate the cautious and the hesitant, but it cannot accommodate inaction in the face of an obvious cause for immediate concern." (footnote omitted)), cited as offering useful guidance in JOHN E.B. MYERS, 1 MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 319 (3d ed. 2005); People v. Northrup, 442 N.Y.S.2d 658, 659 (N.Y. App. Div. 1981) ("The record does, however, support a finding of guilt of the lesser included charge of criminally negligent homicide, for defendant's failure to perceive that there was a substantial and unjustifiable risk Chad would die was a gross deviation from the standard of care a reasonable parent would have exercised in this situation." (citations omitted)); People v. Henson, 304 N.E.2d 358, 361 (N.Y. 1973) ("[T]he record evidence warranted the verdict that the defendants' failure to provide prompt medical care for their son reflected a culpable failure to perceive a substantial and unjustifiable risk of death, constituting a gross deviation from the standard of care that a reasonable [parent] would observe." (alteration in original) (internal quotation marks omitted)); People v. Manon, 640 N.Y.S.2d 318, 320 (N.Y. App. Div. 1996) ("[D]efendant's maintenance of her son's condition of dehydration and undernutrition, without perceiving the grave risk to his young life, was such a '"gross deviation" from reasonable care' so as to constitute criminally negligent homicide." (citation omitted) (quoting People v. Boutin, 75 N.Y.2d 692, 696 (N.Y. 1990))).

285 Dolovich, *supra* note 44, at 892.

Indeed, it is possible that *Farmer* actually makes things worse by *discouraging* situational awareness. In the same article, Dolovich suggests that by "hold[ing] officers liable only for those risks they happen to notice," *Farmer*'s conscious disregard rule "creates incentives for officers *not* to notice."[286] The *Farmer* Court itself gave this incentive problem short shrift:

> We doubt that a subjective approach will present prison officials with any serious motivation "to take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'" Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.[287]

But the Court's answer is not very satisfying; even if juries can see through *phony* ignorance, that does not address the reality that ignorance is frequently not phony at all. Correctional staff members' ignorance of particular risks to prisoners, after all, is not an occasional, regrettable oddity, but the routine result of modern, bureaucratized operation of a complex institution. David Luban, Alan Strudler, and David Wasserman explained several decades ago that "fragmentation of knowledge and responsibility in large organizations, including government, business corporations, and professional groups"[288] is commonplace. The problem is not that institutions are warping their structure in order to evade liability. Rather, the fragmented responsibility follows from ordinary hierarchical, specialized bureaucratic design, which often separates decision making and decision implementation into different organizational locations.[289] That is, the person assigned by the organization to understand the facts on the ground—in a jail or a prison, the officer who sees evidence of a particular inmate's need for protection from a violent cellmate (e.g., a line-level correctional officer)—may not be the person who makes housing assignments (e.g., a unit administrator), much less the person who decides *how* housing assignments are made (e.g., a deputy warden or warden). Thus the officer who knows of the

---

286 *Id.*

287 Farmer v. Brennan, 511 U.S. 825, 842 (1994) (citation omitted).

288 David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2355 (1992).

289 Such separation is far from universal, *see* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (2d ed. 2010), but it is common.

risk may lack authority or opportunity to alleviate that risk, while the officer who creates the risk may lack specific knowledge about it.[290] Moreover, even when knowledge and responsibility are assigned to a single location within a bureaucracy, hand-off problems (endemic to so many institutions) obstruct safe practices; without appropriate procedures, shift change often means that the officer with knowledge of a problem leaves no trace of that knowledge with his next-shift analog.[291]

Under *Farmer*'s subjective approach, in short, easily preventable harm may incur no constitutional liability. Even if a requested cell move might easily have prevented a serious assault, only if—unusually—a particular defendant both knew the individual circumstances and was authorized to approve the move will liability follow. This is what Luban, Strudler, and Wasserman called the "problem of fragmented knowledge."[292] *Farmer*'s response is, to quote the same article, simply to "accept as a tragic fact of modern existence that organizational wrongs may be committed for which no one—neither individuals nor the organization—can rightly be held responsible."[293] But normatively, the problem of fragmented knowledge demands a solution—use of an objective rather than subjective standard.

This argument, however, pushes the liability standard only to objective recklessness. I have already offered, in subpart II.D, several reasons why an objective reasonableness standard is preferable—because objectively reasonable conduct is the goal, and it is best to align the liability and conduct rule, and because objective reasonableness is the most capable of accurate administration in litigation. To state the points more generally, the reasons to like *Kingsley*'s choice of a reasonableness rather than a recklessness standard are the ordinary advantages of negligence liability: liability for unreasonable conduct incentivizes reasonable behavior, allocates loss to the party more responsible for the loss, and implements the moral insight that everyone's welfare matters. When organizations that pay damages—like jails and prisons, when their staff are

290 I am not arguing that *Farmer* blocks liability in all such circumstances; a plaintiff may be able to persuade a judge or jury that a particular officer both knew of the risk and failed to reasonably address it.

291 *See* Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2095 (2016).

292 Luban, Strudler & Wasserman, *supra* note 288, at 2365.

293 *Id.*

sued[294]—care about their budgets (of course not all organizations do care),[295] they have abundant methods to translate damages incentives into behavioral changes. When the liability standard is more forgiving than the desired standard of conduct—as a recklessness standard is—that muddles both the incentives and the moral account. *Kingsley*'s reasonableness approach instead aligns doctrine with the conduct towards pretrial detainees that our polity desires.

B. Solving the Problem of a Cost Defense

A final normative point is that *Kingsley*'s rejection of individual culpability as the constitutional touchstone avoids what I will call the "cost defense problem." Returning to Justice Blackmun's dissent in *Farmer*, he explained the point:

> *Wilson*'s myopic focus on the intentions of *prison officials* is also mistaken. Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably. *Wilson* failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level."[296]

The argument seems to me compelling: If individual culpability is essential for a constitutional violation, a cost defense to constitutional liability follows logically (if not inevitably). After all, no individual defendant has the ability to solve problems that stem from decisions by a funder—usually a legislature—to provide only inadequate resources. And there is nothing individually culpable about the resulting failures. But allowing officials to exculpate themselves by pointing to the resource constraints imposed upon them by legislative bodies, even if those resource constraints are unreasonable, would render constitutional protections nearly meaningless.

The Supreme Court has not fully analyzed the issue of the "cost defense" in civil rights litigation. In *Block v. Rutherford*, in 1984, the Court listed the "substantial" "costs—financial and otherwise"—of individuated pre- and post-visit searches of pretrial detainees as something "a facility's administrators might

---

294 Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

295 For a discussion of this issue for jails and prisons, see Schlanger, *Inmate Litigation*, *supra* note 11, at 1681.

296 Farmer v. Brennan, 511 U.S. 825, 855 (1994) (Blackmun, J., concurring) (quoting *The Supreme Court: 1990 Term Leading Cases*, 105 HARV. L. REV. 177, 243 (1991)).

reasonably attempt to avoid,"[297] and, in a footnote, weighed those costs against a finding of Fourteenth Amendment violation under *Bell*.[298] But the Court has never again adverted to *Block*'s treatment of costs, and has at other times been far less friendly to a cost defense. In fact, two cases implicitly reject the defense. First, in *Bell*, when the Supreme Court allowed the government to defend harsh conditions of pretrial detention by explaining how those conditions served a legitimate non-punitive purpose, that approach sub silentio rejected an invocation of economy as such a purpose. As Justice Stevens pointed out in the dissent, if costs count, "[a]ny restriction that may reduce the cost of the facility's warehousing function could not be characterized as 'arbitrary or purposeless' and could not be 'conclusively shown' to have no reasonable relation to the Government's mission."[299] For *Bell* to have any teeth—including on its own facts—costs, again, must not count. And second, in *Whitley v. Albers*, the case in which Justice O'Connor set out the malicious-and-sadistic standard by which excessive force is adjudicated under the Eighth Amendment, she distinguished use of force from medical care: "The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."[300] If costs were permissibly weighed in the constitutional balance, the quoted statement would be self-evidently false. So costs must not count.

In any event, Justice White's concurrence in the judgment in *Wilson*, in 1991, warned that the Court's holding "leaves open the possibility . . . that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials."[301] Justice Scalia's majority opinion expressed some skepticism that this was a problem worth taking seriously:

> The United States suggests that a state-of-mind inquiry might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond

---

297 Block v. Rutherford, 468 U.S. 576, 588 n.9 (1984).
298 *See id.* at 600 n.10.
299 Bell v. Wolfish, 441 U.S. 520, 585 (1979) (Stevens, J., dissenting).
300 Whitley v. Albers, 475 U.S. 312, 320 (1986).
301 Wilson v. Seiter, 501 U.S. 294, 311 (1991) (White, J., concurring in the judgment).

> their control prevent the elimination of inhumane conditions. Even if that were so, it is hard to understand how it could control the meaning of "cruel and unusual punishments" in the Eighth Amendment. An intent requirement is either implicit in the word "punishment" or is not; it cannot be alternately required and ignored as policy considerations might dictate. At any rate, the validity of a "cost" defense as negating the requisite intent is not at issue in this case, since respondents have never advanced it. Nor, we might note, is there any indication that other officials have sought to use such a defense to avoid the holding of *Estelle v. Gamble*, 429 U. S. 97 (1976).[302]

For obvious reasons, omitting costs from the constitutional calculus in conditions-of-confinement challenges is a more attractive way of thinking about the Constitution's protections. A constitutional right trumped by (nearly inevitable) resource constraints is an awfully thin right. Yet if the subjective culpability of an individual defendant is paramount—as the Court held in *Wilson*—a cost defense seems to follow. In a 2015 en banc Ninth Circuit opinion, *Peralta v. Dillard*, Judge Kozinski wrote that, given the Supreme Court's insistence on an intent requirement, "[a] prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate."[303] An intent requirement leads if not inevitably then at least arguably to a cost defense that would often render illusory constitutional protection against inhumane conditions of confinement. Focusing on the conditions actually experienced, rather than either intentional or reckless misconduct by jail or prison officials, suffers no such flaw.

---

302 *Id.* at 301–02.

303 744 F.3d 1076, 1084 (9th Cir. 2014) (en banc), *cert. denied* 135 S. Ct. 946 (2015). Judge Kozinski emphasized that injunctive relief would still be available, without explaining why the limited liability he explicated varied based on requested remedy. *See id.* at 1099 ("[T]he majority's distinction between damages and injunctive relief finds no support in the Eighth Amendment. . . . [I]n the eyes of the majority, refusing to treat an inmate because of budget constraints is cruel and unusual when an inmate requests equitable relief, but somehow not so when he requests monetary relief." (Hurwitz, J., dissenting in part and concurring in part)).

V
THE EIGHTH AMENDMENT "MALICIOUS AND SADISTIC" AND DELIBERATE INDIFFERENCE STANDARDS ARE WRONG, TOO

I move now to cases brought by convicted prisoners rather than pretrial detainees, under the Eighth Amendment's Cruel and Unusual Punishments Clause rather than under the Due Process Clauses. I argue in this part that notwithstanding these different sources underlying liability, the implementing doctrine should be the same objective reasonableness standard. American jail and prison officials do not distinguish between pretrial detainees and convicted prisoners, in either conditions-of-confinement or use-of-force policy. The Constitution is best read to do the same.

It is worth noting, practically, that of the nearly 750,000 people housed in American jails, over a third are convicted prisoners.[304] Post-conviction prisoners may be confined in a jail while they await sentencing, if they are convicted of a misdemeanor, or when their felony sentence is less than some length chosen by the state for prison incarceration. (This is often less than one year, but in some states can be far longer.)[305] In addition, over 80,000 "state prisoners" are, in fact, housed in county jails.[306] Moreover, in many states, jails do not systematically separate pretrial detainees from convicted prisoners; housing assignments are made on the basis of more individualized risk and supervision factors. That is, operationally, jail classification experts find that it is safer to mix pretrial and post-conviction populations, separating people based on risk and need rather than status.[307] So if the Constitution imposes different liability standards for pretrial detainees and convicted prisoners, those differences cannot, practically, be reflected in different policy, training, or treatment. Of course liability standards can and do diverge from standards for conduct. For example, "mere . . . malpractice"[308]

---

304 TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014 (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/D4JB-8QKW].

305 *See* Brian Albert, Nat'l Assoc. of Ctys. Research Div., State Prisoners in County Jails 3 (2010), http://www.naco.org/sites/default/files/documents/State%20Prisoners%20in%20County%20Jails%20Updated.pdf [https://perma.cc/WQ7A-7QBQ].

306 CARSON & ANDERSON, *supra* note 1, at 16. For discussion, see ALBERT, *supra* note 305.

307 *See* ABA, TREATMENT OF PRISONER STANDARDS, *supra* note 180, at 40–43.

308 Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976).

does not engender constitutional liability under *Estelle*, but prison and jail policies nonetheless require their doctors to practice medicine reasonably, consistent with the community standard of care.[309] Nonetheless, it is an important reality of American incarceration that there is little distinction made in practice between pretrial detainees and convicted prisoners with respect to either use of force or conditions of confinement. (In *Florence v. Board of Chosen Freeholders of County of Burlington*, the Court focused on operational considerations to hold that pretrial detainees housed in a jail's general population do not have any more right to avoid a strip search than do convicted prisoners.[310])

Considering the issues doctrinally rather than operationally, the *Kingsley* Court itself acknowledged that its reasoning casts doubt on *Whitley*'s malicious-and-sadistic standard in the prison context as well. Justice Breyer essentially invited future challenges by noting:

> [O]ur view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.[311]

I have already argued (in subpart I.D.) that both *Whitley*'s malicious-and-sadistic standard and *Wilson/Farmer*'s deliberate indifference standard depend on the flimsy foundation of Justice Scalia's misreading of the word "punishment." *Kingsley* entirely rejects that understanding of "punishment" as necessarily intentional, holding, instead, that punishment can be demonstrated with either a subjective or objective showing; it can consist of actions taken with "expressed intent to punish" or of conditions creating a mismatch between "legitimate nonpunitive governmental purpose[s]" and the action under challenge.[312] That rejection dictates not just the standard for pretrial detainees but for convicted prisoners as well; *Whitley* and *Wilson/Farmer*'s foundation are gone.

---

309 *See* NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JAILS (2014); AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS FOR CORRECTIONAL HEALTH CARE IN ADULT CORRECTIONAL INSTITUTIONS vii (1st ed. 2002); AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (4th ed. 2004).

310 566 U.S. 318, 335–39 (2012).

311 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2476 (2015).

312 *Id.* at 2473 (quoting Bell v. Wolfish, 441 U.S. 520, 561 (1979)).

Of course "punishment" could mean something different in the *Kingsley/Bell* Fourteenth Amendment context than for purposes of the Cruel and Unusual Punishments Clause.[313] But recall that the *Wilson* Court did not bolster its reading of the word based on context, policy, or normative considerations. Quite the contrary. In *Wilson*, Justice Scalia described the Court's requirement of subjective culpability as entirely linguistic, apolitical, and beyond these kinds of arguments:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. . . . An intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate.[314]

And Justice Scalia's *Kingsley* dissent declared the Eighth Amendment and Fourteenth Amendment concepts of punishment one and the same, protesting the Court's rejection of the *Wilson* approach.[315] That is, Justice Scalia—who wrote *Wilson*—thought that *Kingsley* was inconsistent with *Wilson.* He was correct; if *Kingsley* is right (as I have argued it is), then *Wilson* is wrong, and its approach must be jettisoned.

The *Kingsley* Court, however, didn't quite say that. While inviting a future Eighth Amendment challenge, the *Kingsley* majority instead offered the following hint on its approach to the Cruel and Unusual Punishments Clause, compared to the Due Process Clause:

> The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less "maliciously and sadistically." Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.[316]

In other words, where a pretrial detainee can win a lawsuit based on her demonstration that she was subjected to punishment, a convicted prisoner has to show more. For convicted prisoners, only "cruel and unusual punishments" are uncon-

---

313 *Cf.* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

314 Wilson v. Seiter, 501 U.S. 294, 300–02 (1991).

315 *See Kingsley*, 135 S. Ct. at 2477–78 (Scalia, J., dissenting).

316 *Id.* at 2475 (citations omitted).

stitutional. Prior to *Kingsley*, the Supreme Court had not clearly used the words "cruel and unusual" as a textual hook in a conditions/use-of-force case, but it did on at least one other occasion hint that it might do so, in the Fourth Amendment case *Graham v. Connor*. There, the Court noted "the Eighth Amendment terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind."[317]

The implication of all these gestures toward the phrase "cruel and unusual" is that the *Whitley* and *Wilson/Farmer* subjective standards can't survive on their foundation of the Eighth Amendment's reference to "punishment"—but they might survive if premised, instead, on the adjectives that precede that reference. I think this is incorrect; a simple swap of the constitutional text under consideration from "punishment" to "cruel and unusual" cannot support a culpability-based focus. Both Eighth Amendment case law in other contexts and scholarship suggest that *Graham*'s off-handed assurance that "cruel" "clearly suggest[s] some inquiry into subjective state of mind" was made with undue confidence.[318]

The doctrinal point is easily made. There is fully developed Eighth Amendment jurisprudence elaborating on the meaning of "cruel and unusual," with respect to sentencing. In that jurisprudence, the Court has implemented the constitutional ban on cruelty by testing state-inflicted punishments against the "evolving standards of decency that mark the progress of a maturing society."[319] The Court has insisted on use of "objective factors to the maximum possible extent."[320] The mental state of any state actor plays no part of the "cruel and unusual" inquiry.

Recent scholarship exploring the interpretation of the entire Cruel and Unusual Punishments Clause in a conditions-of-confinement context has confirmed the point. Scholars offer various bottom lines, but they share the position that the constitutional text cannot justify an intent-based constitutional approach. For those moved by an original intent methodology, John Stinneford comprehensively canvasses historical materials to understand the contemporary meaning of the words "cruel and unusual." He finds abundant eighteenth century

317 Graham v. Connor, 490 U.S. 386, 398 (1989).

318 *Id.*

319 Trop v. Dulles, 356 U.S. 86, 101 (1958).

320 Rummel v. Estelle, 445 U.S. 263, 274–75 (1980); *see also, e.g.*, Miller v. Alabama, 567 U.S. 460, 482 (2012) (describing the search for "objective indicia of society's standards" (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).

evidence that the word "cruel" "refers to the pain caused by a given punishment, not the punisher's attitude toward that pain."[321] That is, a cruel punishment is "one whose effects are unduly harsh, not as one imposed with a cruel intent."[322] He argues further that a "punishment is cruel and unusual if it is unjustly harsh in light of longstanding prior punishment practice"[323]: "The key issue is not the public officials' cruel intent regarding this issue, but the likelihood and severity of the harm as compared to longstanding prior practice."[324]

Applying this reading to conditions of confinement, he concludes that "[i]f officials create or permit conditions that significantly enhance the risk of severe harm, as compared to longstanding prior practice, the resulting punishment may appropriately be called cruel and unusual."[325] He offers several examples, including "[p]utting 2,000 prisoners in a facility traditionally used for 1,000 prisoners, . . . when it predictably results in higher rates of assault and rape"; "[p]lacing prisoners in solitary confinement for much longer periods of time than was traditionally permissible, which predictably causes severe psychological and sometimes physical harm"; and "[p]lacing a person with strong feminine physical characteristics in a general male population."[326] Combining research into a different set of historical materials—sources addressing the permissible punishment of slaves—with modern Eighth Amendment sentencing jurisprudence, Alex Reinert likewise suggests that the phrase "cruel and unusual punishment" evidences little interest in the intent of the punisher.[327] Rather, he says, it connotes an idea about proportionality; conditions-of-confinement doctrine should therefore import this concept, reducing the "emphasis on subjective states of mind of prison officials."[328]

Other scholars taking a more explicitly normative approach similarly find no warrant for a subjective focus in the

---

321 John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 471 (2017).

322 *Id.* at 473–74.

323 *Id.* at 497.

324 *Id.* at 503.

325 *Id.* at 502.

326 *Id.* at 502–03.

327 *See generally* Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817, 833–34 (2016); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 68–71 (2009).

328 Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, *supra* note 327, at 76.

word "cruel." Sharon Dolovich argues that all post-conviction imprisonment constitutes punishment, and that "[a]lthough the Clause prohibits cruel and unusual punishment, its normative force derives chiefly from its use of the word cruel."[329] Based on non-conditions Eighth Amendment case law, philosophy, and sociology, she suggests that "[i]n its most basic sense, to be cruel is to inflict unjustified suffering."[330] Because imprisonment disables prisoners from safeguarding their own welfare, she says, "the imposition of cruel prison conditions represents not personal but institutional cruelty, which arises when an institution by its design and operation inflicts unnecessary and avoidable harm on those subject to its effects."[331] Taking as her chief target *Farmer v. Brennan*, she argues that its criminal recklessness approach is inappropriate, and offers in its stead several proposed liability standards sounding in negligence or strict liability.[332] Paulo Barrozo argues that the punishment is cruel—and should be deemed to violate the Constitution—when it causes "a grave violation of human dignity . . . severe[ly] violat[ing] . . . the respect, consideration, and care commanded by the dignity individuals embody."[333] He develops at length the difference between this approach and an intent-focused one. Alice Ristroph likewise argues that *Whitley*, *Wilson*, and *Farmer* implement a vision of cruelty that is unduly taken with the moral significance of intentionality.[334] While "[o]ne could make consequentialist, expressivist, and character-based arguments in support of the claims that prison officials' intentions are relevant to constitutional analysis," she writes, those arguments are far from compelling.[335] Moreover, "federal decisions involving prisoners' claims of cruel and unusual punishment do seem to establish that official intentions are a device to evade responsibility," normatively pernicious in light of "the state's responsibility for the safety and well-being of individual human beings . . . when the state forcibly confines them."[336]

In short, the words "cruel and unusual" do not support a subjective focus. What, then, are the parameters of the Eighth

---

329 Dolovich, *supra* note 44, at 883 (emphasis omitted).
330 *Id.* at 884.
331 *Id.* at 893 (emphasis omitted).
332 *See id.* at 883–84, 893, 895–972.
333 Paulo D. Barrozo, *Reconstructing Constitutional Punishment*, 6 WASH. U. JURIS. REV. 175, 242 (2014).
334 *See* Ristroph, *supra* note 155, at 1401.
335 *Id.* at 1403.
336 *Id.* at 1403–04; *see* David Enoch, *Intending, Foreseeing and the State*, 13 LEGAL THEORY 1, 13–14 (2007).

Amendment's constraints on use of force and conditions of confinement? Like Justice Stevens, I begin with the premise that because post-conviction "imprisonment [is] a punishment for crime,"[337] all its conditions count as punishment. Similarly, as the Court phrased the point in *Ingraham v. Wright*, "[p]rison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'"[338] The question is how to determine when force or conditions are and are not constitutional. Although I think the bottom line—objective reasonableness—is the same for use of force and conditions of confinement, the analysis is different, so I take them in turn.

I will start with use of force. The constitutional hooks for regulation of the jail and prison officials who supervise pretrial detainees and convicts may vary, but, with respect to use of force, the moral and practical imperatives do not. Morally and practically, force in jail and force in prison are both appropriate only when reasonably necessary to maintain order and safety. Both Justice Kennedy and Justice Sotomayor emphasized this point with respect to use of force, during the *Kingsley* oral argument. Justice Kennedy began: "I just have to tell you, I find it very difficult to understand how it would be a different standard if these same facts occurred, but it was an inmate who was serving a sentence. What—what is the rationale for why they should be different?"[339] And Justice Sotomayor similarly asked, "Why are we giving a license to prison guards to use unreasonable or unnecessary force . . . against anybody?"[340] Kingsley's counsel responded, "Convicted prisoners actually can be punished. That is one of the legitimate objectives with respect to convicted prisoners."[341] To which Justice Sotomayor responded, "But they can't be punished corporally. . . . Do you think . . . you can knock them against the wall as punishment?"[342] Sotomayor later stated, "Whether it's a pretrial detainee or post-trial detainee, I don't think the Constitution gives you a free pass to punish a prisoner by inflicting unwanted corporal punishment."[343]

---

337 Estelle v. Gamble, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting).
338 430 U.S. 651, 669 (1977) (quoting Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)).
339 Transcript of Oral Argument at 7, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-6368_linq.pdf [https://perma.cc/57CZ-HDN4].
340 *Id.* at 12.
341 *Id.*
342 *Id.*
343 *Id.* at 20.

Justice Sotomayor was exactly right. With the exception of the death penalty, corporal punishment for crime is categorically forbidden by the Eighth Amendment. While the Supreme Court has not—quite—baldly stated the point, this was the effective bottom line[344] of the Eighth Circuit case *Jackson v. Bishop*, in which then-Judge Blackmun enjoined the use of disciplinary flogging in the Arkansas prison system[345] in an opinion that has been repeatedly cited with approval by the Supreme Court.[346] If *some* corporal punishment of prisoners were allowed, there might be some textual justification to use the malicious-and-sadistic (or deliberate indifference) standard to distinguish permissible from impermissible force/punishment under the Eighth Amendment. But since neither pretrial detainees nor post-conviction prisoners can lawfully be subjected to any corporal punishment, such a distinction makes no sense. Instead, the same doctrinal and normative considerations that influenced the outcome in *Kingsley* should apply under the Eighth Amendment as well. The only defensible liability standard for official deliberate use of force against a prisoner is the standard of objective unreasonableness.

Shifting to conditions of confinement, there *is* a need to distinguish permissibly from impermissibly harsh prison conditions.[347] Some might even think it is appropriate for conditions to be harsher for convicted prisoners than for pretrial detainees. I do not, personally, agree; in my ideal criminal justice system, the loss of liberty inherent in incarceration, not harsh conditions on the inside, would be the punitive aspect of post-conviction imprisonment. And in actual practice, the differences run in the opposite direction: jails tend to be harsher,

---

344 *See* Furman v. Georgia, 408 U.S. 238, 287–88 (1972) ("Since the discontinuance of flogging as a constitutionally permissible punishment, death remains as the only punishment that may involve the conscious infliction of physical pain." (Brennan, J., concurring) (citing Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968))); *id.* at 430 ("Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears—punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution." (Powell, J., dissenting) (footnote omitted) (citing Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968))).

345 Jackson v. Bishop, 404 F.2d 571, 581 (8th Cir. 1968).

346 *See* Rhodes v. Chapman, 452 U.S. 337, 359 (1981); Ingraham v. Wright, 430 U.S. 651, 669 (1977); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Estelle v. Gamble, 429 U.S. 97, 102 (1976).

347 *Cf. Rhodes*, 452 U.S. at 347 ("But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

more idle, and more dangerous than prisons.[348] But in any event, even if post-conviction conditions *are* permissibly harsher than pretrial conditions, and granted that there is a need to separate appropriate from inappropriate conditions, that need is simply no justification for using a particular officer or official's state of mind to mark the separation. Intentionality, as I have already argued, is not required by the Eighth Amendment's text, whether the relevant words are "cruel and unusual" or "punishment." And *Wilson*'s intent requirement suffers from the practical and normative flaws already identified.

Bell/*Kingsley*'s alternative approach of testing conditions to ensure they are "reasonably related to a legitimate governmental objective"[349]—that is, to ensure that they are objectively reasonable—is both more direct, and lacks these untoward effects. *Wilson* should be overruled and Eighth Amendment aligned with Fourteenth Amendment doctrine. Harsh post-conviction conditions that risk "serious deprivations of basic human needs"[350] while serving no legitimate function constitute cruel and unusual punishment.

CONCLUSION

In a forthcoming article, Aziz Huq and Genevieve Lakier trace what they label the "triumph of fault in public law."[351] They argue persuasively that the trend since the 1970s in constitutional doctrine has been to unduly emphasize individual culpability as a prerequisite for liability. Huq and Lakier's article barely touches jail and prison litigation, but the developments it identifies are consonant with the notable but contested shifts towards a fault-based system described in Part I. The modern constitutional law of incarceration, as I showed there, did not consistently focus on the culpability of individual

---

348 See Schlanger, *Inmate Litigation*, *supra* note 11, at 1686–87 & sources cited ("[J]ails are more dangerous than prisons, in large part because of the primary operational difference between the two types of facilities: prisons take and hold inmates while jails take and release them. This extremely fast turnover makes jails inherently more chaotic. More generally comparing jails to prisons, classification of jail inmates is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis. Jail inmates are also more likely to be vulnerable to harm in many ways—mentally ill, inexperienced with incarceration, drunk or high, or suicidal." (footnotes omitted)).

349 Bell v. Wolfish, 441 U.S. 520, 539 (1979).

350 *Rhodes*, 452 U.S. at 347.

351 Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. (forthcoming 2018) (manuscript at 1), https://ssrn.com/abstract=2940016 [https://perma.cc/CM2H-NH6V].

governmental defendants until 1986, in *Whitley v. Albers*, and 1991, in *Wilson v. Seiter*. And ever since the Supreme Court began examining how the Constitution regulates force and conditions in jails and prisons, there have been Justices arguing—in majorities, prior to 1986, and in dissents since—that constitutional liability should not turn on a particular official's state of mind.[352] As Justice Blackmun summarized the position:

> A punishment is simply no less cruel or unusual because its harm is unintended. . . . [Pre-*Wilson* Supreme Court cases,] which employed an objective standard to chart the boundaries of the Eighth Amendment, reflected the practical reality that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." [Their approach] also, however, demonstrated a commitment to the principles underlying the Eighth Amendment. The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measures will be taken to ensure his safety. Where a prisoner can prove that no such reasonable steps were taken and, as a result, he experienced severe pain or suffering without any penological justification, the Eighth Amendment is violated *regardless of whether there is an easily identifiable wrongdoer with poor intentions*.[353]

And as Justice White explained in *Wilson*: "The ultimate result of today's decision, I fear, is that 'serious deprivations of basic human needs,' will go unredressed due to an unnecessary and meaningless search for 'deliberate indifference.'"[354]

Kingsley's embrace of an objective standard brings constitutional doctrine at least a few steps back towards the 1970s non-fault approach, adopting the Blackmun and White positions just quoted for pretrial detainees in excessive-force cases.

---

352 These were the consistent views of Justices Stevens, Blackmun, Marshall, Brennan, and White. *See supra* note 74; Estelle v. Gamble, 429 U.S. 97, 108–17 (1976) (Stevens, J., dissenting); *Bell*, 441 U.S. at 579 (Stevens, J., dissenting); *Rhodes*, 452 U.S. at 352, 368 (Brennan, J., concurring in the judgment) (Blackmun, J., concurring in the judgment); Daniels v. Williams, 474 U.S. 327, 336, 341 (1986) (Blackmun, J., concurring in the judgment) (Stevens, J., concurring); Davidson v. Cannon, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting) (Blackmun, J., dissenting); Whitley v. Albers, 475 U.S. 312, 328 (1986) (Marshall, J., dissenting); Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring in the judgment); Hudson v. McMillian, 503 U.S. 1, 12–13 (1992) (Stevens, J., concurring in part and concurring in the judgment) (Blackmun, J., concurring in the judgment); Farmer v. Brennan, 511 U.S. 825, 851, 858 (1994) (Blackmun, J., concurring) (Stevens, J., concurring).

353 *Farmer*, 511 U.S. at 856–57 (Blackmun, J., concurring) (emphasis added) (citations omitted).

354 *Wilson*, 501 U.S. at 311 (White, J., concurring in the judgment).

The results seem to me entirely salutary. (I note for anyone concerned about unfair monetary assessments against innocent officials that qualified immunity doctrine[355] and universal indemnification of such officials by their employing agencies[356] render this prospect extremely implausible.) For the reasons discussed in subpart III.C, district courts and courts of appeals can and should follow *Kingsley*'s lead as to pretrial detention conditions, as well.

For convicted prisoners, the path forward is steeper. Unfortunately, even though the Supreme Court's Eighth Amendment case law rests on "increasingly wobbly, moth-eaten foundations,"[357] district courts and courts of appeals cannot easily avoid it. The Court has claimed for itself "alone"[358] "the prerogative of overruling its own decisions" whenever "a precedent of this Court has direct application in a case," even if that precedent "appears to rest on reasons rejected in some other line of decisions."[359] District courts and courts of appeals can and should, however, acknowledge the conflict between *Kingsley* and *Whitley/Wilson/Farmer*, and can decline to unnecessarily extend the logic of existing Supreme Court precedent. And litigants can and should preserve for appeal the argument that *Kingsley*'s logic requires an objective standard in the Eighth as well as the Fourteenth Amendment context and should work to bring an appropriate case to the Supreme Court so it can exercise its prerogative. For both pretrial detainees and convicted prisoners, the Constitution should guarantee that deliberate force and intentionally created conditions do not deliver "serious deprivation[s] of basic human needs"[360] without justification. Unreasonable force and unreasonable conditions of confinement undermine the dignity of American prisoners and

---

355 *See, e.g.*, Ramirez v. Butte-Silver Bow Cty., 298 F.3d 1022, 1028 (9th Cir. 2002) (noting that qualified immunity protects those who execute an unlawful search warrant, unless "the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it"), *aff'd sub nom.* Groh v. Ramirez, 540 U.S. 551 (2004).

356 *See* Schlanger, *Inmate Litigation*, *supra* note 11, at 1676 ("[I]n nearly all inmate litigation, it is the correctional agency that pays both litigation costs and any judgments or settlements, even though individual officers are the nominal defendants."); Schwartz, *supra* note , at 885 (explaining that 99.98% of money recovered in lawsuits against law enforcement agencies is paid by the agency, not by the individual defendants).

357 State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (quoting Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996) (Posner, J.)).

358 *Id.*

359 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

360 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

of the American criminal justice system. The Supreme Court should revisit *Whitley*, *Wilson*, and *Farmer*, returning to the approach the Court took in *Hutto* and other cases in the 1970s, to simultaneously serve justice and improve doctrinal coherence.