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Restoring Objectivity to the Constitutional Law of Incarceration

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Our national self-interest and our best national aspirations—to be a humane democracy—compel the human rights imperative that jail and prison conditions should not damage our many neighbors who spend time behind bars. And yet, prisons and jails are very much underregulated. Out of sight, populated by poor and disempowered prisoners, with enormous overconcentration of people of color, and presenting difficult management challenges, prisons and jails cry out for special, and especially careful, oversight methods and approaches. Since the 1970s, lawsuits—which can allow even the disempowered to hold government officials to account—have played a crucial oversight role,[1] although many features of the political economy of jail and prison litigation strain that role. This Issue Brief makes a doctrinal argument, aimed at shoring up prison oversight-by-lawsuit, that courts should evaluate liability for both use-of-force and conditions-of-confinement litigation using an objective standard.

Protections against excessive force and harmful conditions of confinement for convicted prisoners housed in jails and prisons are governed by the Eighth Amendment's Cruel and Unusual Punishments Clause. The Fourteenth and Fifth Amendments' Due Process Clauses afford pre-trial detainees housed in jails analogous protection. For decades, however, a flawed understanding of the Eighth Amendment has drastically undermined prison officials' constitutional accountability for tragedies behind bars. The Supreme Court's 2015 opinion in *Kingsley v. Hendrickson*,[2] which addressed liability under the Due Process Clause for official force against pre-trial detainees, calls into question that erroneous reading of the Eighth Amendment. *Kingsley* has created an opportunity to mold a more logical, consistent, and just constitutional law of incarceration through additional judicial oversight. Relying on 1970s precedent—rather than subsequent case law that placed undue emphasis on the subjective culpability

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[1] *See generally, e.g.* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) [hereinafter Schlanger, *Trends*].

[2] Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).

of officials—the *Kingsley* Court held that constitutional liability attaches when the force used against a detainee is objectively unreasonable.

For several decades, Eighth Amendment doctrine has relied on an under-supported and idiosyncratic definition of "punishment" to justify a subjective liability standard. *Kingsley* collapses that definition. The considerations that remain—earlier precedent; developed jurisprudence establishing criteria for "punishment" in other contexts; the feasibility and administrability of an objective standard as described in *Kingsley*; the safeguard of *ex ante* perspective; and normative concerns—each point to implementation of *Kingsley*'s objective standard not just in pretrial detention Due Process Clause contexts but also in Eighth Amendment cases.

Courts have not yet recognized that *Kingsley*'s logic compels application of an objective standard under the Cruel and Unusual Punishments Clause. As this Issue Brief explains, however, lawyers representing inmates can rely on *Kingsley*, and the constitutional and policy considerations it reflects, to argue for governmental liability for objectively unreasonable harm caused to prisoners, whether pretrial or post-conviction.

I. Eighth Amendment Doctrine Pre-*Kingsley*

Before the mid-1980s, the Supreme Court's Eighth Amendment doctrine largely used an objective test, consistent with *Kingsley* and *Bell v. Wolfish*, on which *Kingsley* relied. Beginning in 1986, however, a trio of cases—*Whitley v. Albers*, *Wilson v. Seiter*, and *Farmer v. Brennan*—shifted the doctrine to embrace a subjective test. This part examines both pre-1986 and post-1986 precedents.

A. Before the Mid-1980s

Prison/jail lawsuits became common only in the late 1960s and 1970s.[3] The Eighth Amendment standard of liability in these constitutional tort cases first came before the Supreme Court in 1976 in *Estelle v. Gamble*,[4] a lawsuit seeking damages for allegedly poor medical care in a Texas prison. In an opinion by Justice Marshall, the Court held, for the first time, that the Eighth Amendment requires the government to provide medical care to prisoners. The Court explained:

> 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

[3] The Supreme Court toppled numerous barriers to these lawsuits, one by one. *See* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORN. L. REV. 357, 368 (2018).
[4] *See* Estelle v. Gamble, 429 U.S. 97 (1976).

> infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . .[5]

The Court was imprecise in its discussion of the liability standard. Invoking a phrase that had only recently entered Eighth Amendment jurisprudence, in a Second Circuit case,[6] Justice Marshall wrote that what was actionable was "deliberate indifference to serious medical needs of prisoners" because it "constitutes the 'unnecessary and wanton infliction of pain.'"[7]

The *Estelle* Court relied on precedent rather than either first principles or textual/historical analysis. In 1947, the Supreme Court had held that the Eighth Amendment does not bar a "second effort to electrocute [a death-sentenced prisoner] after a mechanical malfunction had thwarted the first attempt."[8] The failure of the first attempt was inadvertent, the Court emphasized, and therefore not to be held against the second. In *Estelle*, the Court noted that,

> [s]imilarly, 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." . . . 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 "evolving standards of decency" in violation of the Eighth Amendment.[9]

The Court did not further elaborate on the meaning of "deliberate indifference," or whether the liability standard was subjective or objective in situations not similarly "inadvertent." The majority did not engage Justice Stevens's dissent, which criticized the Court's use of "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."[10]

That ambiguity seemed to be resolved in favor of an objective standard just two years later, in the 1978 case, *Hutto v. Finney*. *Hutto*, whose majority opinion Justice Stevens wrote, held that challenged conditions of confinement "constituted cruel and unusual punishment" by emphasizing the objectively horrendous conditions.[11] The district court's conclusion that imprisonment in Arkansas was "a dark and evil world completely alien to the free world" was, Justice Stevens wrote, "amply supported by the evidence."[12] There was no discussion of deliberate indifference or any other kind of scienter. Perhaps this was because the case was injunctive and forward-looking—so at least once they received the

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[5] *Id.* at 103 (internal citations omitted).
[6] *See* Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970).
[7] *Estelle*, 429 U.S. at 104.
[8] *Id.* at 105.
[9] *Id.* at 105–06.
[10] *Id.* at 108–09 (Stevens, J., dissenting).
[11] Hunto v. Finney, 437 U.S. 678, 685–87 (1978).
[12] *Id.* at 681 (quoting Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970)).

complaint, the defendants were on notice of the conditions. But the opinion does not so much as hint that the remedial posture is the reason for its objective perspective. Similarly, in the 1981 case *Rhodes v. Chapman*, the Court upheld double celling based on the objective conclusion that overcrowding did not inflict "unnecessary and wanton pain."[13]

B. The Mid-1980s to *Kingsley*

It was in 1986, in *Whitley v. Albers*, that the Court took a wrong turn and committed itself to a subjective view of the Eighth Amendment. In a (bare) majority opinion by Justice O'Connor, *Whitley* cited *Estelle*'s "unnecessary and wanton infliction of pain" standard as the essence of "cruel and unusual punishment forbidden by the Eighth Amendment," but further 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."[14]

Whitley thus required that prisoners alleging constitutional violations based on use of excessive force during a riot demonstrate officials' intent to harm. While the Court primarily relied on policy considerations relating to the difficulty and urgent need to quell prison riots to justify the requirement, Justice O'Connor also gestured towards a textual hook: a high bar to liability was appropriate because force in prison is "conduct that does not purport to be punishment at all."[15]

Because the Court has sometimes decoupled use-of-force and conditions cases, the standard of liability for the latter remained unsettled after *Whitley*. In Scalia's (again bare) majority opinion in the 1991 prison conditions case *Wilson v. Seiter*, the court clarified that *Whitley*'s subjective standard applied. More fully than in *Whitley*, the *Wilson* Court attributed its approach to the text of the Eighth Amendment: "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."[16] This was, the Court said, a straightforward implementation of the plain meaning of the word punishment—"a deliberate act intended to chastise or deter."[17]

Wilson's analysis is unpersuasive on its merits. First, the argument proves far too much: taken seriously, its definition of punishment supports an even higher bar to liability than *Wilson* (or, later, *Farmer v. Brennan*) adopted. Notwithstanding the quotation, there was not a single vote for limiting

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[13] *See* Rhodes v. Chapman, 452 U.S. 337, 348 (1981).
[14] Whitley v. Albers, 475 U.S. 312, 319, 320–21 (1986) (quoting Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir. 1973) (Friendly, J.), *cert. denied sub nom.* John v. Johnson, 414 U. S. 1033 (1973)).
[15] *Id.* at 319.
[16] *Wilson*, 501 U.S. at 300.
[17] *Id.* (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.)).

liability in prison conditions cases to "deliberate act[s] intended to chastise or deter." Indeed, no Supreme Court Justice has ever opined, even in dissent, that conditions of confinement violate the Eighth Amendment only if the relevant prison official intended to punish.[18] Moreover, there are many competing, less intent-focused dictionary definitions of punishment.[19] And of course there are normative reasons, canvassed in both *Farmer*'s concurrences[20] and in prior cases' dissents and concurrences,[21] why an intent-based standard is unsatisfying as constitutional regulation.

Justice Scalia's majority opinion in *Wilson* did not rebut these points, but rather suggested that they made no difference. The opinion described the Court's requirement of subjective culpability as linguistic and apolitical, not premised on any normative or policy claim:

> 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.[22]

The *Wilson* Court essentially read out of existence prior, conflicting precedent, offering the implausible interpretation that the Court had, without explaining itself, previously adopted *both* an objective test ("Was the deprivation sufficiently serious?") and subjective test ("Did the officials act with a sufficiently culpable state of mind?") as independent hurdles to Eighth Amendment liability.[23] The *Wilson* Court 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.[24]

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[18] Justice Thomas has taken the position that prison conditions, including uses of force, are entirely outside the scope of Eighth Amendment regulation. *See* Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) ("I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose 'punishment.'"); Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in judgment) ("Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.").

[19] *See* 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)).

[20] *Farmer*, 511 U.S. at 854-857 (Blackmun, J., concurring); *id.* at 858 (Stevens, J., concurring).

[21] *See Estelle*, 429 U.S. at 108–09 (Stevens, J., dissenting); *Bell*, 441 U.S. at 584-589 (Stevens, J., dissenting); *Wilson*, 501 U.S. at 307-311 (White, J., concurring in the judgment).

[22] Wilson v. Seiter, 501 U.S. 294, 300–02 (1991).

[23] *Id.* at 298.

[24] *Wilson*, 501 U.S. at 296–99, 301 n.2.

Finally, in *Farmer v. Brennan*, the Court more carefully defined "deliberate indifference," rejecting an objective standard for liability under a textualist reading 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 significant 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.[25]

In sum, *Estelle* was ambiguous about whether an objective or subjective standard applied in Eighth Amendment conditions-of-confinement cases, but until 1986, the Court largely focused on the nature, severity, and justification of the challenged deprivation. The subsequent Supreme Court cases—*Whitley*, *Wilson*, and *Farmer*—changed course to endorse a subjective standard, on the purportedly plain English ground that the Eighth Amendment's reference to "punishment" reaches only intentional or at least criminally reckless misconduct. Unreasonable force or conditions of confinement—even if imposed without any justification whatsoever and no matter how obviously dangerous—were deemed simply outside the reach of the Cruel and Unusual Punishments Clause. In the remainder of this Issue Brief I argue that, after *Kingsley*, this requirement of a subjectively culpable state of mind as a prerequisite to liability under the Cruel and Unusual Punishments Clause can no longer stand.

II. *Kingsley v. Hendrickson* and the Definition of Punishment

In 2010, Michael Kingsley was detained in a Wisconsin county jail awaiting trial on drug charges.[26] After Kingsley refused several times to remove some paper that covered 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 justified the Taser use by asserting that it was intended to encourage the plaintiff to stop resisting their attempts to remove his handcuffs; they denied the rest. A jury found for the officers on jury instructions endorsing a subjective recklessness standard; Kingsley's appeal challenged the instructions as legally erroneous.[27]

The Supreme Court held in *Kingsley v. Hendrickson* that when jail officials intentionally direct force against a detainee, that force is unconstitutional if it is objectively unreasonable. The opinion, by Justice Breyer (joined by Justices Ginsburg, Sotomayor, Kagan, and perhaps most crucially the "swing vote" of now-retired Justice Kennedy), explained that the use of force at issue in *Kingsley* was "deliberate—*i.e.*, purposeful or knowing."[28] The Court framed its choice as whether "a § 1983 excessive force claim

[25] *Farmer*, 511 U.S. at 837–38.
[26] Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).
[27] *Id.* at 2470–71.
[28] *Id.* at 2472.

brought by a pretrial detainee must satisfy the subjective standard or only the objective standard."[29] On that issue, the Court held, "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[30]

The Court's core justification for *Kingsley*'s holding was its understanding of the meaning of "punishment." The Court explained that the Fourteenth Amendment forbids punishment of pretrial detainees, whose incarceration is not, after all, premised on their conviction of any crime:

> *Bell*'s focus on "punishment" does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.[31]

Thus, in a detainee excessive force case, constitutional liability attaches when the force used 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.'"[32] "Challenged governmental action" that is, can amount to "punishment," the *Kingsley* Court held, *either* based on the intent of a state actor *or* based on entirely objective evidence of harm and lack of justification.[33]

Kingsley did not expressly address conditions of confinement cases—lawsuits about issues like medical care, protection from violence, nutrition, and use of restraints. But its objective approach clearly applies to conditions cases too. For starters, the *Kingsley* Court explained that its approach followed the 1979 conditions precedent *Bell v. Wolfish*. Moreover, to the extent the threshold for liability has differed for conditions and force cases, the Court requires a *higher* degree of personal culpability for liability in force cases, on the understanding that force is often used in uncertain and quickly changing circumstances.[34] If use-of-force is governed by an objective standard, rather than a more plaintiff-unfriendly subjective one, it follows *a fortiori* that conditions cases are also governed by an objective standard. Consequently, both pretrial detention use-of-force and conditions cases are properly adjudicated under an objective standard; the former was *Kingsley*'s holding and the latter its clear

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[29] *Id.*

[30] *Id.* at 2473.

[31] *Id.* at 2473-74.

[32] *Id.* (quoting *Bell*, 441 U.S. at 540, 547).

[33] *Id.* at 2473 (describing *Bell* as imposing liability based on "actions taken with an 'expressed intent to punish'" *or* "in the absence of an expressed intent to punish," on objectively unreasonable conditions.

[34] Compare *Whitley v. Albers*, 475 U.S. 312 (1986) (a use of force case) with *Wilson v. Seiter*, 501 U.S. 294 (1991) (a conditions case).

implication, as a number of courts of appeals have found.[35] It is important for lawyers to plead and argue for this approach; since *Kingsley*, it has too often been waived.

The *Kingsley* Court's understanding of punishment is eminently sensible. As I explain in the next section, it aligns with other caselaw. Moreover, it is both morally attractive and capable of accurate implementation. It is, however, entirely inconsistent with *Whitley/Wilson/Farmer*. Recall that the principal justification for a subjective standard in those cases was that the Eighth Amendment's use of the word "punishment" *requires* focus on the intent of a government official, purportedly as a matter of straightforward textualism. *Kingsley* expressly rejected this understanding of "punishment." So, after *Kingsley*, *Whitley/Wilson/Farmer* are untenable.

Kingsley itself acknowledged that its holding cast doubt on *Whitley*'s analysis:

> [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.[36]

This invitation to challenge *Whitley/Wilson/Farmer* is mildly stated but unmistakable. In his *Kingsley* dissent, Justice Scalia wrote that punishment requires more than objective unreasonableness.[37] He declared the Eighth Amendment and Fourteenth Amendment concepts of punishment one and the same and protested the Court's rejection of *Wilson*'s approach. That is, Justice Scalia—who wrote *Wilson*—thought that *Kingsley* was inconsistent with *Wilson.* He was correct; after *Kingsley*, no jurisprudential basis remains for *Whitley/Wilson/Farmer*'s insistence on a subjective test for Eighth Amendment liability.

III. *Whitley/Wilson/Farmer*'s Subjective Test Was Anomalous and Incorrect

The *Whitley/Wilson/Farmer* subjective test for what constitutes "punishment" is not only incompatible with *Kingsley*, it is also inconsistent with other precedent that defines punishment. The Court has used a multifactor test to differentiate punishment from non-punishment ("penal" from "regulatory"

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[35] 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); Gordon v. Cty. of Orange, 888 F.3d 1118, 1124 (9th Cir. 2018). There are a few courts that have not agreed with this bottom line, though generally without analysis. Whitney v. City of St. Louis, Missouri, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case."); Nam Dang v. Sheriff, Seminole Cty. Fla., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419-20 & n.4 (5th Cir. 2017). Their conclusions seem clearly wrong.

[36] *Id.* at 2476. Given that *Kingsley*'s objective approach applies *a fortiori* to pretrial detention conditions cases, as I have suggested and many courts have found, *see supra* note **Error! Bookmark not defined.**, the same questions attach to *Wilson* and *Farmer*, the Court's subjective Eighth Amendment conditions cases.

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

restrictions) over many years and "across a variety of contexts."[38] In 1963, the leading case, *Kennedy v. Mendoza-Martinez*, listed the factors:

> 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 . . . .[39]

Whitley/Wilson/Farmer are inconsistent with *Mendoza-Martinez* in two distinct ways: First, instead of insisting that punishment invariably requires the purpose to "chastise or deter," *Mendoza-Martinez* includes many other factors. This is sensible. Many consequences of criminal misbehavior that are indisputably part of punishment are not "intended to chastise or deter." Criminal restitution, for example, is intended to make victims whole. In the era of self- supporting or profit-making prisons, sentences of hard labor were intended to promote profitable use of prisoner labor. 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.

Moreover, *Mendoza-Martinez* and later cases consider intent important but again not dispositive. In *Mendoza-Martinez* itself, these factors were evaluated objectively, independent of "congressional intent as to the penal nature of a statute."[40] As the Court later developed,

> 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] intention' 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."[41]

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[38] Smith v. Doe, 538 U.S. 84, 97 (2003). *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (bill of attainder); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (due process); United States v. Ward, 448 U.S. 242, 249-55 (1980) (self-incrimination); Allen v. Illinois, 478 U.S. 364, 375 (1986) (self-incrimination); Kansas v. Hendricks, 521 U.S. 346, 362, 371 (1997) (ex post facto and double jeopardy); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365-66 (1984) (double jeopardy). *See generally* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1348 (2008).

[39] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

[40] *Id.* at 169.

[41] 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.").

Whitley/*Wilson*/*Farmer* are wrong: chastisement and deterrence are far from the only purposes of punishment, and intent to punish is important but not definitional in identifying punishment. *Kingsley*'s model of punishment as *either* subjective or objective aligns with other precedents, while *Whitley*/*Wilson*/*Farmer*'s insistence to the contrary was anomalous.

IV. What About "Cruel and Unusual"?

Even as it invited a future Eighth Amendment challenge to the *Whitley*/*Wilson*/*Farmer* doctrine, the *Kingsley* majority hinted that the challenge would face a textualist hurdle. Comparing the Cruel and Unusual Punishments Clause to the Due Process Clause, the Court noted:

> 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.[42]

In other words, a pretrial detainee can win a lawsuit based on her demonstration that she was subjected to punishment, but a convicted prisoner must show more. For convicted prisoners, only "*cruel and unusual* punishments" are unconstitutional. In this Section, I argue that a simple swap of the constitutional text under consideration from "punishment" to "cruel and unusual" cannot support a culpability-based focus.

Prior to *Kingsley*, the Supreme Court had only gestured towards the words "cruel and unusual" as a textual hook for a subjective liability standard. In a case about the Fourth Amendment, the Court noted (in dicta), "the Eighth Amendment terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind."[43] But Eighth Amendment case law in other contexts suggests that this off-handed remark was unduly confident. There is a 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."[44] In sentencing law, the mental state of state actors plays no part of the "cruel and unusual" inquiry. In *Trop v. Dulles*, for example, the Court deemed denaturalization "cruel and unusual" not because of the intent of the legislature but because of the potential indignities imposed upon an individual rendered stateless by the punishment.[45] Recent scholarship exploring the interpretation of the entire Cruel and Unusual Punishments Clause in a conditions-of-confinement context confirms that the phrase "cruel and unusual" does not support, much less compel, a subjective understanding of the Eighth Amendment.[46]

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[42] Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015) (citations omitted).
[43] Graham v. Connor, 490 U.S. 386, 398 (1989).
[44] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[45] *Id.* at 101-102.
[46] For citations to and discussions of the voluminous relevant scholarship, *see* Schlanger, *supra* note 3, at 428-430.

The Court has not yet analyzed this issue, but both Justices Kennedy (the effect of whose retirement on the future of prison litigation remains to be seen) and Sotomayor exhibited appropriate skepticism towards any other result during the *Kingsley* oral argument. Justice Kennedy began: "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 is the rationale for why they should be different?" Justice Sotomayor similarly asked, "Why are we giving a license to prison guards to use unreasonable or unnecessary force . . . against anybody?" Kingsley's counsel responded, "Convicted prisoners actually can be punished. That is one of the legitimate objectives with respect to convicted prisoners." To which Justice Sotomayor responded, "But they can't be punished corporally. . . . Do you think . . . you can knock them against the wall as punishment?"[47] 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."[48]

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 of the Eighth Circuit case *Jackson v. Bishop*, in which then-Judge Blackmun enjoined the use of disciplinary flogging in the Arkansas prison system in an opinion that has been repeatedly cited with approval by the Supreme Court.[49] If *some* corporal punishment of prisoners were allowed, there might be some reason to use an intention-focused standard to distinguish permissible from impermissible force/punishment under the Eighth Amendment. Since neither pretrial detainees nor post-conviction prisoners can lawfully be subjected to any corporal punishment, such a distinction is unjustified. There is no reason, then, that *Kingsley*'s objective standard should not apply post-conviction as well as pre-trial.

With conditions of confinement, however, there *is* a need to distinguish permissibly from impermissibly harsh prison conditions. As the Court held in *Rhodes v. Chapman*, "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

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[47] Transcript of Oral Argument at 12, 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].

[48] *Id.* at 20.

[49] Jackson v. Bishop, 404 F.2d 571, 581 (8th Cir. 1968). *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))). Other cases citing Jackson with approval include 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).

pay for their offenses against society."[50] Some might even think it is appropriate for conditions to be harsher for convicted prisoners than for pretrial detainees.[51] Granting that there is a need to separate appropriate from inappropriate conditions—and even if post-conviction conditions *are* permissibly harsher than pretrial conditions—there is nothing attractive, textually or normatively, in using a particular officer or official's state of mind to mark the separation between unconstitutional and constitutional. 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 in Part VI, I argue that an intent requirement suffers from both practical and normative flaws. *Kingsley*'s approach of testing conditions to ensure they are "reasonably related to a legitimate governmental objective"—that is, to ensure that they are objectively reasonable—is both more direct and lacks these untoward effects. Harsh post-conviction conditions that risk "serious deprivations of basic human needs,"[52] while serving no legitimate function, constitute cruel and unusual punishment.

V. Jails Treat Pretrial Detainees and Convicted Prisoners the Same

Notwithstanding its frequent reminder to lower courts that different constitutional clauses cover pretrial detainees and post-conviction prisoners,[53] the Supreme Court before *Kingsley* avoided articulating different liability standards for use-of-force and conditions cases for the two settings. Instead, the Court offered only the comment that "due process rights . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner." In response, lower federal courts blurred the standards in pre- and post-conviction cases.[54] Until courts recognize that the *Whitley*/*Wilson*/*Farmer* cannot withstand *Kingsley*'s logic, however, pre- and post-conviction standards will now be different. This divergence conflicts with operational reality: American incarcerative facilities make little distinction in practice between pretrial detainees and convicted prisoners with respect to either use of force or conditions of confinement.

Pretrial detainees are nearly always housed in the same facilities as post-conviction prisoners. On any given day, one-third of American inmates—nearly 750,000 people—are in jail. One-third of that portion are post-conviction.[55] Post-conviction prisoners may be confined in a jail while they await sentencing, if

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[50] *Rhodes*, 452 U.S. at 347.

[51] 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. *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1686–87 & sources cited.

[52] *Rhodes*, 452 U.S. at 347.

[53] *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979); Kingsley, 135 S. Ct. at 2477; 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).

[54] 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."); 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.").

[55] Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/D4JB-8QKW].

they are convicted of a misdemeanor, or when their felony sentence is less than some length chosen by the state for prison incarceration (often less than one year, but in some states far longer).[56] In addition, over 80,000 "state prisoners" are housed in county jails.[57] In many states, jails do not systematically separate pretrial detainees from convicted prisoners; 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.[58]

Once pretrial and post-conviction prisoners are housed together, they are subjected to the same treatment, as a matter of policy, training, and simple operational need. If the Constitution were to impose different liability standards for pretrial detainees and convicted prisoners, those differences could not, practically, be reflected in practice. In *Florence v. Board of Chosen Freeholders of County of Burlington*, the Court focused on operational considerations to hold that the constitutional regulation of strip searches for pretrial detainees housed in a jail's general population is no stricter than for convicted prisoners,[59] Likewise, facilities that house both cannot, practically, distinguish pretrial detainees from post-conviction prisoners in use-of-force or conditions. It therefore makes sense for the same liability standard to apply to both. The Supreme Court held, correctly, that the objective reasonableness standard is workable pretrial; it is equally workable post-conviction.

VI. Reasons to Prefer an Objective Test

Finally, there are abundant reasons to prefer an objective liability standard in both pre- and post-conviction cases. Objective standards are more administrable, more reliably subject to accurate adjudication. They are normatively more attractive. They incentivize more appropriate treatment. And, unlike a subjective test, they are doctrinally coherent.

A. Administrability

Subjective standards are dauntingly difficult to operationalize. As a group of former corrections officials argued in a *Kingsley* amicus brief, a "subjective standard would erode staff accountability" because a staff member could defend "an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice."[60]

The point holds for conditions as well as force cases. The Court held in *Farmer v. Brennan* that under a subjective standard, "a prison official cannot be found liable . . . unless the official knows of and

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[56] *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].

[57] E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 (2018), at 14 https://www.bjs.gov/content/pub/pdf/p16.pdf [https://perma.cc/3TXH-DGYA]. For discussion, see ALBERT, *supra* note 56.

[58] *See* A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-5.6 at 40–43 (3d ed. 2011), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf [https://perma.cc/4VQC-KCNV]

[59] Florence v. Bd. of Chosen Freeholders of County of Burlington, 566 U.S. 318, 335–39 (2012).

[60] 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), at *21.

disregards an excessive risk to inmate health or safety."[61] Thus a subjective "deliberative indifference" standard invites defendants to say that they didn't know, didn't appreciate, or didn't understand the danger that ripened first into harm and then into a lawsuit. For both force and conditions, it is far easier and far more even-handed for supervisors to assess reasonableness rather than any form of a what-did-you-believe-in-your-heart question.

What is true for jail or prison administrators is even truer for incarcerated persons. Even when officers engaged in the most egregious unconstitutional conduct—summary corporal punishment—inmates, who nearly always proceed pro se,[62] are unlikely to be able to prove it. 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. Even if a subjective standard was conceptually correct, one would expect many false negatives, which in turn challenges judicial competence and impartiality. Objective standards are, by contrast, announceable *ex ante* and enforceable *ex post*. As the *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."[63]

Returning to an objective focus for Eighth Amendment liability would align policy and law; the issue that matters for good practice would also matter for law, and legal institutions would actually be capable of assessing it.

B. Incentivizing Reasonable Use of Force and Conditions

If we desire reasonable use of force and reasonable conditions, it makes sense to set that as the liability standard, not merely an aspirational goal. Even if deciders-of-fact could have perfect knowledge of the true intent of government officials who applied force or made harmful decisions about conditions of confinement, the Constitution is best understood not subjectively but objectively, to ban unreasonable force and unreasonable conditions of confinement. Because jail and prison officials have constitutionally enforceable affirmative obligations to safeguard their charges, unreasonable ignorance of a risk should not be constitutionally exculpating. In addition, a subjective approach encourages a feedback loop where unreasonable force and conditions beget more unreasonable force and conditions.

1. Culpable Ignorance

Farmer v. Brennan 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

[61] Farmer v. Brennan, 511 U.S. 825, 837.
[62] Schlanger, *Trends*, *supra* note 1, at 167.
[63] Brief of Former Corrections Administrators, *supra* note 60, at *20.

disregards a risk of harm of which he is aware."[64] "Should have known" is not enough for liability—even culpable ignorance cannot support a constitutional claim.

In many settings, a rule that the Constitution does not require officials to become informed about risks works hand-in-glove with the Supreme Court's general reluctance to constitutionalize affirmative duties. But prisons and jail are different—in these custodial situations, "forethought about an inmate's welfare is not only feasible but obligatory."[65] Jails and prisons are exceptions to the general rule against constitutionalization of affirmative duties because incarceration renders 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 Court has explained, the Constitution does, indeed, impose affirmative obligations to protect inmates from serious risks of harm[66] and to provide them "the minimal civilized measure of life's necessities."[67] In this context, as in other contexts of affirmative duties, it is anomalous to immunize ignorance. 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;[68] 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. It makes no sense, either doctrinally or normatively, to immunize culpable ignorance. At the very least, liability should attach for failure to reasonably address risks the defendant *should have* known about.

2. Fragmented Responsibility

In fact, I would argue for an approach that is less individualized, focusing not on who knew what when and what they should have known, but rather on the conditions and whether they were reasonable. This better aligns with the reality that prison and jail conditions are organizational, not personal. Hierarchical bureaucracies typically fragment responsibility, separating decision making and decision implementation into different parts of the organization. That is, the person assigned to understand the facts on the ground—say 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

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[64] *Farmer*, 511 U.S. at 837.

[65] Cty. of Sacramento v. Lewis, 523 U.S. 833, 851 (1998).

[66] *See Deshaney*, 489 U.S. at 199–200.

[67] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[68] *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. 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)).

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 risk may lack authority or opportunity to alleviate that risk, while the officer who creates the risk may lack specific knowledge about it.[69] 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.

Given the way prisons and jails are organized, *Farmer*'s subjective approach frequently blocks constitutional liability even for easily preventable harm. For instance, even if a requested cell move might easily have prevented a serious assault, liability would only follow in the unlikely situation that a particular defendant both knew the individual circumstances and was authorized to approve the move. This is what Professors Luban, Strudler, and Wasserman called the "problem of fragmented knowledge."[70] *Farmer*'s response, according to them, is 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."[71] But there is neither doctrinal nor normative justification for this outcome. The problem of fragmented knowledge demands *Kingsley*'s solution—use of a standard that is objective rather than subjective and that examines the institutional processes as a whole, not one person at a time.

3. Problematic Feedback

An analytically separate reason to avoid inquiry into mental states is that those mental states are themselves affected by standards for behavior. One report, 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.[72]

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

> When objectively unreasonable uses of force pervade the jail environment, that culture shapes guards' subjective perceptions of the appropriateness of violence . . . . [T]he

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[69] 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.

[70] David Luban, Alan Strudler, & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2365 (1992).

[71] *Id.*

[72] 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].

> 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.[73]

An objective standard suitably keeps the focus on the appropriateness of state officials' conduct.

4. Unreasonable Conditions Are Unreasonable

Ultimately, if the goal is reasonable conditions and reasonable force, there is nothing to justify a liability standard that strays from that goal. The subjective intent of the official involved is simply a red herring.

Consider force applied when officers simply don't care at all about the pain they are inflicting—when rather than relishing pain, they are indifferent to it. Pain compliance techniques—efforts to induce obedience by application of pain—have become more common in jails and prisons in recent years, as standard weaponry has multiplied. A video from New Mexico's Bernalillo County jail illustrates the potential for harm. As described by the *Albuquerque Journal*:

> 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.[74]

The video continues in this vein for 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. It is extremely hard to watch. This kind of pain compliance is common. It may well not be summary punishment—the goal truly may be compliance, not retribution. But the coercive method chosen drastically undervalues the pain imposed.

Cruelty of this sort should be actionable. Acting with unconcern about the pain and harm imposed may not be "malicious or sadistic," but it violates the crucial moral imperative that the state should value every person's welfare. Yet surely this normative principle is beyond argument. It is appalling for a

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[73] 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.

[74] 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].

government official to use pain as a method to control another 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 would be true if an officer walked into a dayroom and started shooting without bothering to distinguish between rioters and non-rioters. The point is, intentional uses of force with 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 there was insufficient justification, but where the answer *is* clear, so too is the normative principle. The *Whitley* standard rejected by *Kingsley* for pretrial detainees—under which the Constitution is deemed to forbid only force used "maliciously and sadistically for the very purpose of causing harm"[75]—contradicts that principle and immunizes from liability large swathes of force that are harmful and unnecessary.

Liability for the example just given requires rejection of the *Whitley* malicious-and-sadistic standard. Admittedly, the facts presented would probably be actionable even under a subjective deliberate indifference standard, rather than *Kingsley*'s objective standard. But there is nothing attractive about this in-between liability rule. To see why, consider 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 the inmate 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"[76]—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. But why would we want our constitutional law to entirely excuse one or more of them? Both unreasonable uses of force and unreasonable conditions are, well, unreasonable, and undesirable for that reason. Aligning the standard with the desired behavior seems simple and attractive. That's why the federal government, state governments, corrections standards-setting organizations, and jails themselves have insisted in their policies[77] that the standard must be objective, and that reasonable force is proportionate force. The same is true for conditions: policies governing medical care in jail and prison, for example, focus on the objective appropriateness of the treatment provided, not the mental state of the provider.[78]

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[75] Brief for Respondents at 15, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368), 2015 WL 1519055, at *15.
[76] OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe ed., Little, Brown and Co. 1963) (1881).
[77] 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 60, at *ii.
[78] *See*, *e.g.*, NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JAILS (2018); NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (2018), AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS FOR CORRECTIONAL HEALTH CARE IN ADULT CORRECTIONAL INSTITUTIONS (2001).

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."[79] So the point here is not that government officials are required to use surgical precision when they deal with threats to prisoner safety and security, whether using force or making decisions about protection from harm, medical care, nutrition, and so on. An objective reasonableness standard directs attention where it normatively belongs: to the justification for a harmful or risky decision or its absence.[80]

C. Failure to Fund

One final doctrinal point. If the constitutionality of treatment of jail and prison inmates turns on the subjective intent and culpability of their jailers, it would seem to follow that even the most appalling conditions would pass constitutional muster if those jailers can blame someone else not reachable by a constitutional tort lawsuit. Most consequentially, if legislators decline to fund some needed prison service—food, medical care, hygiene, sufficient security staff—they have absolute legislative immunity for that decision.[81] And the ensuing starvation, preventable deaths, and other inhumane conditions wouldn't be anyone else's fault. If the subjective culpability of an individual defendant is paramount, a cost defense seems to follow, at least if budgeting is done by a legislature, as it usually is.[82] So no liability would attach to anyone.

Even as the Supreme Court made what I have argued was a wrong turn in the *Whitley v. Albers* and *Wilson v. Seiter*, it has never embraced this result.[83] It has, rather, implied—though not held—that the cost defense is unavailing. In *Whitley*, the case in which Justice O'Connor set out the malicious-and-sadistic standard by which excessive force is adjudicated under the Eighth Amendment, the Court explained that "[t]he 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."[84] If costs were permissibly weighed in the constitutional balance, this would be self-evidently false. So, it is fair to infer, costs must not count.

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

[80] To be clear, the standard is not negligence, either; the *Kingsley* Court explained that liability requires an unreasonable intentional act, and therefore the rule under *Daniels v. Williams* and *County of Sacramento v. Lewis* that mere negligence is not unconstitutional remains good law. *Id.* at 2472 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)); Daniels v. Williams, 474 U.S. 327, 331 (1986).

[81] *See* Tenney v. Brandhove, 341 U.S. 367 (1951); Bogan v. Scott-Harris, 523 U.S. 44 (1998).

[82] *See, e.g.*, Peralta v. Dillard, 744 F.3d 1076, 1084 (9th Cir. 2014) (en banc), *cert. denied* 135 S. Ct. 946 (2015).

[83] The closest the Court has come was in Block v. Rutherford, 468 U.S. 576, 588 n.9; 600 n. 10 (1984), when it listed the "substantial" "costs—financial and otherwise"—of individuated pre- and post-visit searches of pretrial detainees as something "a facility's administrators might reasonably attempt to avoid," and, in a footnote, weighed those costs against a finding of Fourteenth Amendment violation under *Bell*. The Court has not, however, ever again adverted to this footnote.

[84] Whitley v. Albers, 475 U.S. 312, 320 (1986).

The resulting doctrinal tension has not gone unremarked. Justice White's concurrence in the judgment in *Wilson*, in 1991, warned that the Court's holding "le[ft] 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."[85] Justice Scalia's majority opinion responded with unconcern, but also without any real analysis: "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."[86] An intent requirement, Justice Scalia insisted, is implicit in the text's reference to "punishment" and therefore cannot be evaded.

Of course, this understanding of the word "punishment" was rejected in *Kingsley*. And 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 a right somewhere between thin and illusory. The Court's evident disinclination to endorse a cost defense makes sense—but it suggests that subjective culpability simply cannot bear the analytic weight assigned to it by *Whitley*, *Wilson*, or *Farmer*. *Kingsley*'s focus on the conditions actually experienced, rather than either intentional or reckless misconduct by officials, suffers no such flaw.

VII. Conclusion

For convicted prisoners, the Constitution should guarantee that deliberate force and intentionally created conditions do not deliver "serious deprivation[s] of basic human needs"[87] without justification. Unreasonable force and unreasonable conditions of confinement undermine the dignity of American prisoners and of the American criminal justice system. The Court's prior, pinched understanding of deliberate indifference is ripe for aggressive challenge. Prisoners' rights lawyers should be arguing that for both detainees and prisoners, the Constitution means that deliberate force and intentionally created conditions cannot cause "serious deprivation[s] of basic human needs"[88] without justification. The Supreme Court, in turn, should reject *Whitley*, *Wilson*, and *Farmer* and adopt *Kingsley*'s objective reasonableness standard in the service of justice.

[85] Wilson v. Seiter, 501 U.S. 294, 311 (1991) (White, J., concurring in the judgment).
[86] *Id.* at 301.
[87] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

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