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EXCESSIVE FORCE IN PRISON

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Any time a correctional officer (CO) physically assaults someone in prison, their conduct demands an especially compelling justification and robust ex post scrutiny. Instead, governing Eighth Amendment doctrine almost entirely defers to COs' own judgments as to the need for force. This highly deferential approach is especially ill advised given the institutional culture of the modern American prison, which systematically demonizes and dehumanizes people in custody and thus primes COs to use violence unnecessarily. Even a standard of "objective unreasonableness" would not suffice to prevent case outcomes from reflecting a callous indifference to the safety of people in prison. What is needed instead is a reasonableness standard explicitly framed in terms of the state's obligations to the incarcerated.

This Article makes the case for such a morally robust reasonableness standard and develops an account of both the normative foundations for this approach and the principles that ought to guide, not only factfinders in individual cases, but all actors in a position to shape carceral policy. What drives the inquiry—and sets it apart from the Supreme Court's own treatment of the constitutional claims of people in custody—is the attention paid to the concrete realities of the modern American prison. The current Supreme Court is unlikely to regard with sympathy the account offered here. But it

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remains open to the rest of us to insist that the Eighth Amendment's prohibition on cruel and unusual punishment has meaningful moral content beyond the narrow, often pinched reading that currently shapes the legal doctrine.

This Article is intended as part of this larger project of self-conscious moral reclamation. Its animating goals are: to expose the deep flaws in the governing law, to excavate the normative content of Eighth Amendment limits on the state's power to inflict criminal punishment, and in the process to provide a reinvigorated moral vocabulary for understanding and challenging the use of violence by state officials against the fellow human beings they are sworn to protect. In these ways, this enterprise has considerable overlap with the growing national effort to set moral limits on police violence.

INTRODUCTION

When correctional officers (COs) use force, they are exercising power, not as private parties, but as agents of the state. Force in prison may be used at the retail level, against individual prisoners.[1] Yet whether they realize it or not, when COs use force, they *are* the state. And we should not mince words. "Use of force" is a synonym for deliberate physical assault.[2] Often, the force used will be minor and the immediate harm caused will be negligible. But "use of force" also encompasses serious physical violence.[3] When COs use force, people in custody can wind up punched, kicked, body-slammed, tasered,[4] pepper sprayed,[5] hit with a baton or a flashlight,[6] and even shot.[7] Force in prison is state violence, full stop.

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[1] In this essay, I will at times refer to incarcerated people as "prisoners," a term that squarely acknowledges the "extraordinary and dehumanizing exercise of state power known as imprisonment[,]" Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021), and foregrounds the experience of being held against one's will with no power to shape one's own conditions of life. *See* Paul Wright, *Language Matters: Why We Use the Words We Do*, PRISON LEGAL NEWS (Nov. 1, 2021), https://www.prisonlegalnews.org/news/2021/nov/1/language-matters-why-we-use-words-we-do/ [https://perma.cc/6YVF-RHYJ] ("[When people are incarcerated, they] are forced into cages at gunpoint and kept there upon pain of death should they try to leave. What are they if not prisoners? They did not somehow magically appear there and they stay there based on violence and fear of violence . . . .").

[2] All aspects of state control over the lives of people in prison operate against a background threat of violence. One could therefore construe every order a correctional officer (CO) gives as a use of force in this sense. However, in this Article, "force" or "use of force" will refer specifically to deliberate physical violence.

[3] *See* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2024–36 (2018) (collecting cases); Joanna Weill & Craig Haney, *Mechanisms of Moral Disengagement and Prisoner Abuse*, 17 ANALYSIS SOC. ISSUES & PUB. POL'Y 286, 288–95 (2017) (exploring "the existence and persistence of prisoner abuse [by prison staff]").

[4] *See*, *e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 393 (2015).

[5] *See, e.g.*, *id*.

[6] *See* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 983 (2012) [hereinafter Dolovich, *Two Models*] (recounting eyewitness testimony of an incident in the L.A. County Jail in which a detainee suffered an unprovoked beating by several jail deputies, during which, according to the eyewitness, jail deputies "beat [the victim] with flashlights, they beat him with fists . . . and then they pepper sprayed him outside in the hallway [and] had that dude crying for his mother, and he was 40 years old").

[7] *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 316 (1986) and *infra* Section II.A. Force in prison also sometimes leaves the victims dead. *See, e.g.*, Michael Schwirtz & Michael Winerip, *Upstate Prosecutor Is Revisiting 2010 Death of Clinton Prison Inmate*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/nyregion/upstate-prosecutor-is-revisiting-2010-death-of-clinton-prison-inmate.html [https://perma.cc/84MP-V84Y]

Having chosen to incarcerate, the state is obliged to meet prisoners' basic needs and keep them safe.[8] This is the state's carceral burden.[9] COs, charged to act on the state's behalf, are in practice the ones who bear this burden. When a CO instead intentionally subjects prisoners to physical violence, they become "a protector who does the very thing from which he or she is supposed to be providing protection."[10] A CO who uses force against prisoners has not always done wrong. An act can be morally compromised and the actor still may not deserve blame.[11] Yet the inherent moral inversion that attends any use of force in prison means that, whenever a CO physically assaults someone in custody, their conduct demands "more thorough scrutiny and [a] more compelling justification or excuse than other [acts of violence]."[12]

As a practical matter, in the American system, the primary mechanism for effecting such scrutiny is judicial review.[13] If judicial scrutiny is to be

(describing the death of Leonard Strickland after a beating by several COs at New York's Clinton Correctional Facility); *FBI Agent Uncovers the Truth of Prison Brutality*, WASH. POST (Nov. 6, 2014), https://www.washingtonpost.com/politics/federal_government/fbi-agent-uncovers-the-truth-of-prison-brutality/2014/11/06/f65e3e58-6604-11e4-9fdc-d43b053ecb4d_story.html [https://perma.cc/ENS2-UHY2] (reporting that Rocrast Mack, then incarcerated in an Alabama prison, "died . . . of severe bruises from his head down to his legs, his front teeth knocked out and his brain swollen from blows to the head" after being beaten by four guards subsequently convicted of criminal civil rights violations and obstruction of justice).

[8] *See* Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("[H]aving stripped [incarcerated people] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."); Sharon Dolovich, *Cruelty*, *Prison Conditions*, *and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911–12 (2009) [hereinafter Dolovich, *Cruelty*] (identifying and mapping the state's carceral burden to provide for prisoners' basic needs).

[9] *See* Dolovich, *Cruelty*, *supra* note 8, at 911; *infra* Section III.A.

[10] John Gardner, *Criminals in Uniform*, *in* THE CONSTITUTION OF THE CRIMINAL LAW 97, 106 (R.A. Duff et al. eds., 2013) (discussing the related context of police violence); *see also id.* ("If one has a duty to protect someone from killing, one breaches it in an especially grave way by killing that same someone oneself. For doing so is not a mere failure in, but rather an inversion of, one's duty as protector.") I am very grateful to Eric Miller for encouraging me to read Gardner's work.

[11] As Gardner observes, "the fact that the breach is a particularly serious one does not entail that it is a particularly blameworthy one. It need not be blameworthy at all. There may be morally acceptable justifications or excuses for police law-breaking." *Id.* at 109.

[12] *Id.* at 108.

[13] In theory, in the American system, legislatures too have the authority and capacity to investigate, assess, and address systematic abuses by public officials. In practice, however, legislators have done little to address inhumane carceral conditions. *See* Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIM. 153, 158–60 (2022) [hereinafter Dolovich, *Failed Regulation*]. And even if legislators were willing to address the institutional dynamics that promote the use of excessive force against people in custody,

sufficiently meaningful and exacting in this context, we need a constitutional standard that invites robust ex post examination of COs' violence against prisoners. Instead, governing Eighth Amendment doctrine defers almost entirely to COs' own judgments as to when force is necessary.[14] The effect is to delegate the power to fix constitutional limits on state violence in prison to the very actors whose conduct most demands scrutiny and constraint.

This subjective approach is especially ill-advised given the institutional culture of the modern American prison. In this environment, which systematically demonizes and dehumanizes people in custody,[15] COs often come to approach the incarcerated with hostility, mistrust, and a callous indifference to their safety and well-being—attitudes that in turn feed a readiness to use violence even when a non-forceful response would do as well.[16] Not every CO embraces this troubling ethos, and many do their best to resist it.[17] But all face powerful normative pressure in this direction, generated and reinforced by innumerable institutional dynamics.[18] Far from enabling COs to accurately assess the need for force, the moral psychology these dynamics produce primes COs to resort to gratuitous violence.[19]

The typical doctrinal alternative to a subjective liability standard invites courts to independently assess a defendant's conduct from the perspective of a reasonable person in the defendant's situation.[20] But for our purposes, even this approach would not fully suffice. Given institutional realities, the

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legislative interventions can only be made in broad strokes. Because, as already noted, force in prison operates at the retail level, a mechanism for investigating and resolving allegations of harm by individual officers will still be necessary. In the American context, that mechanism is the judiciary.

[14] *See infra* Section II.A.

[15] *See infra* Section I.A.

[16] *See infra* Section I.B.

[17] *See*, *e.g.*, Vincent Schiraldi, *I Spent Over 40 Years Working in Corrections. I Wasn't Ready for Rikers*, THE MARSHALL PROJECT (Oct. 28, 2022, 6:00AM ET), https://www.themarshallproject.org/2022/10/28/i-spent-over-40-years-working-in-corrections-i-wasn-t-ready-for-rikers [https://perma.cc/WP9V-2P7L].

[18] *See infra* Section I.A. That COs who use excessive force may be primed to do so by environmental pressures does not wholly excuse the wrong. For further discussion on this point and its implications for constitutional liability, see *infra* Section I.D.

[19] *See infra* Section I.B.

[20] *See, e.g*, MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1985) (directing juries to determine whether a defendant's failure to perceive the risk, "considering the nature and purpose of his conduct and the circumstances known to him, involve[d] a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."); RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

"reasonable CO" will still be steeped in the prison's toxic moral culture.[21] From this perspective, save for the most extreme cases, virtually all uses of physical force against people in prison could easily be read as reasonable, however extreme or seemingly unwarranted the assault.

To enable appropriate judgments in Eighth Amendment excessive force cases, we need a richer normative account of reasonable force in prison, one that takes as its moral anchor the nature and scope of COs' constitutional obligations. When they use force, COs are not acting on their own inherent authority, but as agents of the state. Any coherent theory of constitutional force must therefore be grounded in the moral posture COs *qua* state actors are duty-bound to adopt towards those whose custody they superintend. As already noted, COs acting on behalf of the state are obliged to meet prisoners' basic needs and keep them safe. At a minimum, the reasonableness of any use of force in prison must be assessed from the perspective of a CO who acknowledges this core affirmative duty. In this Article, I argue that such a morally robust reasonableness standard ought to govern Eighth Amendment claims of excessive force.[22] I also begin the process of sketching both the normative foundation for this approach and the principles that ought to guide, not only factfinders in individual cases, but all actors in a position to shape carceral policy.

Given the powerful cultural forces that incline both prison officials and the courts to regard COs' conduct as reasonable almost regardless of the facts,[23] it will take more than a doctrinal shift to bring about tangible change.

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[21] *See* Brief for Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Wisconsin in Support of Petitioner at 15–16, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1045424, at *15–16 ("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."), *cited in* Margo Schlanger, *Issue Brief: Restoring Objectivity to the Constitutional Law of Incarceration*, AM. CONST. SOC'Y 16–17 (Sept. 2018), https://www.acslaw.org/wp-content/uploads/2018/09/Schlanger-Sept-2018-IB-Restoring-Objectivity.pdf.

[22] The same holds for Fourteenth Amendment excessive force claims brought from jail, although in this Article, I focus on Eighth Amendment excessive force claims arising from prison.

[23] *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 316–32 (2022) [hereinafter Dolovich, *Coherence*] (naming and mapping the "dispositional favoritism" with which courts often approach the arguments and evidence introduced by prison officials in prison law cases); Dolovich, *Failed Regulation*, *supra* note 13, at 164–68 (exploring the ways judicial deference to prison officials has undercut the ability of the courts to enforce prisoners' constitutional rights or to regulate prisons through constitutional review); *id.* at 160–64 (describing the process through which prison officials come to regard the

And in any case, as currently configured, the Supreme Court is unlikely to recast its Eighth Amendment excessive force doctrine in the way I advocate. This being so, some might wonder at the point of the exercise. But when constitutional law enables the abuse of vulnerable citizens, we cannot simply acquiesce. Thus far, the Court has failed utterly to articulate normatively defensible limits on the use of state violence against people under total state control. What's more, the legal standards currently in place have enabled, and ultimately helped to naturalize, a culture of violence[24] against the very people the Eighth Amendment is designed to protect.[25] This situation demands our full attention. If the Court has a practical monopoly on judicially cognizable constitutional interpretation, it remains open to the rest of us to insist that the prohibition on cruel and unusual punishment has meaningful moral content beyond the narrow, often pinched reading that currently shapes the doctrine.

This Article is intended as part of that larger project of self-conscious moral reclamation. Its animating goals are threefold: (1) to expose the deep flaws in the governing law; (2) to further excavate and make sense of the normative content of Eighth Amendment limits on the state's power to inflict criminal punishment;[26] and (3) to provide a reinvigorated moral vocabulary for understanding and challenging the use of violence by state officials against the fellow human beings they are sworn to protect. In these ways, this enterprise has considerable overlap with the growing national effort to set moral limits on police violence.

This paper takes as its primary focus individual constitutional liability for excessive force in prison. To be sure, force in prison is always deployed in an institutional context that shapes the choices and conduct of individual COs. For this reason, ensuring the safety of those we incarcerate also requires

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incarcerated with hostility and contempt and to reflexively endorse the views of fellow officers); *infra* Section I.A (describing the dynamics operating in prisons to systematically demonize and dehumanize those in custody).

[24] *See, e.g.*, Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 227–29 (2012) (explaining how the "torture memos" produced by U.S. Department of Justice lawyers post-9/11 relied on governing standards for Eighth Amendment excessive force claims to justify the use of "enhanced interrogation methods" such as isolation, hooding, forced nakedness, and waterboarding against detainees in the "war on terror").

[25] *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (stating that the Eighth Amendment prohibition on cruel and unusual punishment was "inten[ded] to limit the power of those entrusted with the criminal-law function of government" and "designed to protect those convicted of crimes.")

[26] I began this project in prior work, focusing on the normative implications of the Eighth Amendment as regards prison conditions. *See* Dolovich, *Cruelty*, *supra* note 8. Here, I extend the inquiry to encompass physical violence by state officials against those in state custody.

confronting the structural dynamics that promote excessive force.[27] But as we have already seen, force in prison is necessarily interpersonal, used against individuals at ground level. If we are to properly define the defensible scope for state violence in carceral facilities, we must attend to the nuts-and-bolts matter of when individual COs may justifiably use physical force against people in custody, as well as the question of to what extent—and why—those officers may be held to account for exceeding their lawful authority.

What drives my approach to this inquiry—and sets it apart from the Court's own treatment of Eighth Amendment excessive force—is the attention paid to the concrete realities of the modern American prison. Any defensible theory of the limits on force in custody must start with a sense of how prisons actually operate and the cultural dynamics that shape COs' attitudes towards the prisoners over whom they exercise authority. Part I of this Article zeroes in on these dynamics. Section I.A explains the process by which the institutional culture of the American prison systematically demonizes and dehumanizes people in custody and thereby predisposes COs to regard the incarcerated through this pathological lens. Section I.B unpacks the moral psychology of excessive force and maps the process by which a normative disposition shaped by dehumanization and demonization promotes the official use of unjustified violence against the incarcerated. Section I.C illustrates this dynamic in action. Taking the facts of *Kingsley v. Hendrickson*[28] as a case study, it reveals the deep connection between the normative hostility COs too often bring to their interactions with prisoners and the risk that COs will use excessive force. Finally, Section I.D argues that, notwithstanding the malign influence of environmental pressures on COs' normative attitudes, COs who subject people in custody to excessive force retain some measure of culpability, and thus some measure of constitutional liability is appropriate. The alternative would be to relieve COs of any imperative to forebear from inflicting gratuitous harm. Among other troubling effects, this arrangement would leave people in locked facilities at the mercy of officers who know themselves free to use force with impunity.

Assuming COs' continued liability for unconstitutionally excessive force, Part II turns to the governing doctrine. Section II.A provides a brief overview of the key cases of *Whitley v. Albers*[29] and *Kingsley v. Hendrickson*.[30] Section II.B draws on the institutional account presented in

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[27] *See infra* Section I.D, text accompanying notes 144–147 (discussing structural challenges to the conditions giving rise to persistent instances of excessive force).

[28] 576 U.S. 389 (2015).

[29] 475 U.S. 312 (1986).

[30] *Kinglsey*, 576 U.S. at 389.

Part I to make clear why *Whitley*'s "maliciously and sadistically" standard is so wholly inapt for this context: by conditioning liability on a showing of defendants' own subjective awareness that their force was excessive, *Whitley* effectively delegates the power to define Eighth Amendment limits to the very actors most primed to view people in custody as undeserving of official care and protection. Section II.C looks to *Kingsley* for a possible alternative and offers several reasons to think that, were *Kingsley*'s objective unreasonableness standard to supplant *Whitley*'s approach, it would represent a step in the right direction. Section II.D argues that the Eighth Amendment prohibition on "cruel and unusual punishment" could readily encompass such a shift. However, even an overt judicial importation of *Kingsley*'s standard into the Eighth Amendment context would not be enough to insulate excessive force determinations from the problematic officer perspective that *Whitley* effectively constitutionalizes. To explain the limits of *Kingsley*, Section II.E unpacks the process by which a reasonableness standard can so persistently yield verdicts favorable to defendants in cases alleging unconstitutionally excessive force. Reasonableness, it argues, is not a probability calculus. It is instead a moral judgment—specifically, a judgment as to whether the defendant's conduct was appropriate given the moral imperatives that should have guided their actions. However, as Section II.E explains, reasonableness determinations may in practice go awry in ways that undermine the moral values captured in the governing law. Section II.F draws on this account to explain why *Kingsley*'s approach would be insufficient to resolve the problem *Whitley* creates. It then proposes a more morally robust standard, on which the "reasonable CO" is one who acknowledges their affirmative duty of care and protection toward the fellow humans in their custody. Section II.G demonstrates the applicability of the analysis for the related context of Fourth Amendment excessive force claims against the police.

Part II leaves open the question of precisely how a "reasonable CO" appropriately construed would approach the use of force. Part III begins to provide an answer, sketching a theory of justified force in prison grounded in the nature of the state's obligations to the incarcerated. Section III.A argues that prison officials are entitled to use force only when doing so is reasonably likely to prevent more harm than it inflicts—a constraint tracking the basic criminal law justification of necessity.[31] Section III.B looks to

[31] The necessity defense is available in criminal cases in most jurisdictions when the defendant's conduct was intended "to prevent a harm or evil greater than that caused by violating the law." *See* Paul H. Robinson, Matthew Kussmaul, Camber Stoddard, Ilya Rudyak & Andreas Kuerste, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS

foundational principles of the necessity defense to resolve key issues concerning force in prison.[32] Drawing on this normative foundation, Section III.C identifies a further problematic aspect of *Whitley* and *Kingsley*: both cases explicitly affirm the need "to preserve internal order and discipline and to maintain institutional security" as legitimate grounds for state violence, thereby inviting and enabling the routine use of excessive force in prison.[33] As Section III.C explains, this stipulation ultimately enlists the courts in enabling repeated violations of the state's duty of care.[34] Section III.D provides a detailed proposed jury instruction which incorporates the principles of justifiable force that ought to guide factfinders in excessive force cases brought by incarcerated plaintiffs, the contents of which also provide a crisp summation of the moral limits on state violence in prison. The moral vision captured here is far richer than the stripped-down vision of the Eighth Amendment the Supreme Court has thus far been prepared to endorse. It is this richer vision that ought to guide critical analysis of carceral practice at all levels.

42–43 (2015); *see also*, *e.g.*, 720 ILL. COMP. STAT. 5/7-13 (2012) ("Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.").

[32] *See infra* Section III.B (arguing (1) that when calculating harm, COs must give equal moral weight to the safety of prisoners and of fellow COs; (2) that force in prison is justified only as a last resort, when all other nonforceful alternatives have been exhausted; and (3) that mere speculation as to possible future harm is insufficient to justify force).

[33] *Whitley*, 475 U.S. at 319; *Kingsley*, 576 U.S. at 396–97 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

[34] In this Article, I focus on the federal courts' Eighth Amendment jurisprudence, to which state courts generally look when interpretating their own states' Eighth Amendment analogues. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205–06 (2020) ("[A]lmost all states have an analogue to the Eighth Amendment. In most states, the application of such provisions has not exceeded the scope of the Eighth Amendment[.]"). For this reason, much that I say here would apply equally to state courts. *But see* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1629 (2021) (explaining that, "in a handful of cases, state courts have found that state punishments violate the state constitutional analogue to the Eighth Amendment" and collecting cases).

I. INSTITUTIONAL REALITIES

A. MECHANISMS OF MORAL DISENGAGEMENT IN THE MODERN AMERICAN PRISON[35]

We begin inside the prison, where COs are deputized to act on behalf of the state. In that role, they are charged to police the boundary between the prison and the free world. But given the practical realities of incarceration and the rarity of attempted escapes,[36] COs' primary daily responsibility involves meeting prisoners' basic needs and keeping them safe. And if they are to achieve these ends, COs must recognize two foundational points: (1) that having been imprisoned by the state, those in custody are entitled to official care and protection, and (2) that the incarcerated are human beings with the same vulnerabilities and basic needs as anybody else.

Unfortunately, in American prisons, COs are not encouraged to adopt this view. Instead, they are socialized into a culture in which the incarcerated

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[35] When this Article was substantially complete, I came upon a piece by Joanna Weill and Craig Haney that applies Albert Bandura's theory of moral disengagement to the prison context and considers what his insights suggest about the psychological mechanisms that drive prisoner abuse. Weill & Haney, *supra* note 3, at 286. In this Section, I too rely on Bandura's work, including his theory of moral disengagement, to make sense of official abuse in prison. But while Weill and Haney's discussion is more focused on the specific components of Bandura's account and their application in the prison context, I use Bandura's work as a jumping off point for a more expansive analysis of the moral psychology of correctional officers and the implications for COs' use of excessive force.

[36] In 2019, 1,527,000 people were incarcerated in state and federal prisons. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/7BJZ-A3DF]. That year, according to Statista, there were 2,231 prison escapes, which amounts to 0.14% of the total prison population. *Number of Escapes in the United States From 2000 to 2019*, STATISTA (Nov. 7, 2023), https://www.statista.com/statistics/624069/number-of-escapees-from-prisons-in-the-us/ [https://perma.cc/HJX5-UTYD]. Moreover, research "has universally and historically demonstrated" that the majority of escapes—88.5% by one estimate—are effected by people "in lower security institutions and other nonsecure settings[,]" since "less secure settings provide inmates with more opportunity to escape." Bryce Elling Peterson, Adam Fera & Jeff Mellow, *Escapes from Correctional Custody: A New Examination of an Old Phenomenon*, 96 PRISON J. 511, 516 (2016). Escapes from high security facilities, although by no means unheard of, are far more rare. One sampling analysis of escapes from prison and jail in 2009 found that 56.8% originated in jails, 10.9% in community corrections, 17.7% in minimum security, with only 6.8% originating in medium security prisons and 7.8% in maximum security prisons. *Id.* at 520 (Table 1). That year, there were 1,613,740 people in state and federal prisons. Heather C. West, William J. Sabol & Sarah J. Greenman, *Prisoners in 2009*, BUREAU JUST. STAT. 1 (2011), https://bjs.ojp.gov/content/pub/pdf/p09.pdf [https://perma.cc/9QCL-3Q5P]. According to Statista, in 2009, there were 2,845 escapes from state and federal prisons. STATISTA, *supra*. Based on this data, escapes from medium and high security prisons in 2009 thus involved roughly 0.026% of the nation's prison population.

are systematically demonized and dehumanized.[37] The effect is to prime COs to discount any potential harm their use of force might inflict, and to exaggerate both the need for force and the quantum of force a given incident demands.[38] The mechanisms that promote this moral distortion are numerous and mutually reinforcing. Perhaps most obviously, the conditions of confinement to which prisoners are routinely subjected can corrode COs' capacity to retain a sense of empathic connection. People in American prisons are routinely locked in concrete boxes and may even be held in actual cages.[39] They are regularly strip-searched.[40] Throughout their incarceration, prisoners may be required to shower and relieve themselves in full view of officers and other prisoners.[41] They must petition housing officers for their most basic needs, including soap, toilet paper, and even tampons and sanitary pads.[42] Under these conditions, it can be challenging for people in custody to

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[37] I am speaking here of the dominant perception. No doubt there will be variation among individual staff members. *See* Dick Franklin, *Culture IS . . . as Culture DOES*, *in* NAT'L INST. OF CORR., CONTEMPORARY ISSUES IN PRISON MANAGEMENT: ADDITIONAL READINGS 24, 25 (Simon Dinitz ed., 1999), https://web.archive.org/web/20100601162109/http://www.nicic.org/pubs/1999/015778.pdf ("While the individual behaviors, beliefs, and values may differ greatly, the culture of the prison communities is that expressed through the *prevailing* or *predominant* behaviors, beliefs and values of the community.").

[38] For more on this effect, see *infra* Section I.B, text accompanying notes 92–100.

[39] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 549 (2011) (including, as part of Appendix B, a photo of the "dry cages/holding cells for people waiting for mental health crisis bed" at California's Salinas Valley State Prison). In solitary confinement units across the country, people do their "yard" time in cages, the sole virtue of which as compared with their cells is some access to fresh air. *See* Johnson v. Wetzel, 209 F. Supp. 3d 766, 775 (M.D. Pa. 2016) (challenging ongoing placement in the Pennsylvania Department of Corrections' Restrictive Housing Unit, in which, among other conditions, plaintiff was "allowed one hour of outdoor 'yard' time each weekday," during which he was "placed by himself in a nine-foot by twenty-foot recreation cage.").

[40] As Justice Kennedy explained in *Florence v. Bd. of Chosen Freeholders*, "[t]he term ['strip search'] is imprecise . . . [but] may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position." 566 U.S. 318, 325 (2012). In any iteration, this experience is demeaning in the extreme.

[41] Alysia Santo, *Peeping Toms*, THE MARSHALL PROJECT (Dec. 17, 2014, 1:54PM ET), https://www.themarshallproject.org/2014/12/17/peeping-toms [https://perma.cc/3PA8-BMLH].

[42] *See, e.g.*, Mary Ellen Klas, *Florida Prisons Have Toilet Paper, But They're Not Supplying It to Some Prisoners*, MIA. HERALD (July 20, 2017, 12:01 PM), https://www.miamiherald.com/news/special-reports/florida-prisons/article162565763.html [https://perma.cc/Z64C-DHVK]; *see also* Zoe Greenberg, *In Jail*, *Pads and Tampons as Bargaining Chips*, N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/nyregion/pads-tampons-new-york-womens-prisons.html [https://perma.cc/ADU6-63ZQ]. No doubt some of the deprivations prisoners endure arise from efforts by prison administrators to run their

"maintain [their] normal physical appearance,"[43] and even to ensure adequate personal hygiene.[44] Prisoners also wear uniforms that mark them out as social pariahs.[45]

Psychologists have shown that the mere fact that people have been stripped of the markers of moral personhood can make it "easier to be callous or rude" toward them, even to the point of "perform[ing] acts of destructive cruelty against them."[46] Once people are dehumanized, "they are no longer viewed as persons with feelings, hopes[,] and concerns[,] but as sub-human objects" who as such are "easier to brutalize."[47] Here, the racial skew of the American prison population inevitably plays a role. It is well established that people of color, African-Americans in particular, are grossly overrepresented among the incarcerated. A 2021 Sentencing Project report found that "Black Americans are incarcerated in state prisons at nearly five times the rate of

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prisons as cheaply as possible. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 512 (2004) (noting the pressures that corrections administrators face to cut prison operating costs, which can lead to failures to provide for the basic needs of people in custody). But such conditions will only be tolerated to the extent that the people subjected to them are not regarded as moral equals entitled to humane treatment.

[43] JOHN IRWIN, THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY 70 (1985) [hereinafter IRWIN, THE JAIL].

[44] In crowded facilities, people may have limited access to showers, and access to personal care products will largely depend on how much money they have in their prison accounts.

[45] These basic realities of the American prison experience may seem like unavoidable requisites of any carceral system. But evidence from some northern European countries, including Germany, the Netherlands, Denmark, and Norway, makes clear that these dehumanizing aspects of the U.S. prison context are not inherent to the carceral enterprise. *See, e.g.*, Are Hoidal, *Normality Behind the Walls: Examples from Halden Prison*, 31 FED. SENT'G REP. 58 (2018) (describing the turn taken by Norway in the late 1990s towards a more humane approach to incarceration and explaining the foundational principles of that approach). For other sources on this theme, see Keramet Reiter, Lori Sexton & Jennifer Sumner, *Negotiating Imperfect Humanity in the Danish Penal System*, *in* SCANDINAVIAN PENAL HISTORY, CULTURE, AND PRISON PRACTICE 481 (P.S. Smith & T. Ugelvik eds., 2017); RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. OF JUST., SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES (2013), https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf [https://perma.cc/FW2Y-6Q49].

[46] Philip G. Zimbardo & Christina Maslach, *Depersonalization*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, PSYCHOANALYSIS, & NEUROLOGY 52, 52 (Benjamin B. Wolman ed., 1977); *see also* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 476 (2006) (noting the "countless everyday indignities that reinforce perceptions that prisoners are a lower class of people").

[47] Albert Bandura, *Selective Moral Disengagement in the Exercise of Moral Agency*, 31 J. MORAL EDUC. 101, 109 (2002).

whites."[48] Although Black Americans comprise less than 15% of the U.S. population as a whole, in seven states, the Black-White disparity in prison is greater than nine to one.[49] And in twelve states, "more than half the prison population is Black."[50] Considerable research has shown that, regardless of their own race, subjects are quicker to associate African-Americans with threat, danger, and criminality.[51] In one representative study, "[p]articipants more quickly associated the word 'bad' with Black or darker skin and 'good' with White or lighter skin."[52] The precise impact of these racialized attitudes on COs' perceptions of incarcerated people is hard to demonstrate with certainty. But it is difficult to imagine that they do not reinforce the dehumanizing dynamics just canvassed,[53] thereby deepening the readiness of COs to regard the incarcerated as less than fully human.[54]

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[48] ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/8JNU-D9LC].

[49] *Id.* at 6 n.10; *id.* at 5.

[50] *Id.* at 5; *see also* Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities [https://perma.cc/CD9V-H5S5] (reporting that, although Black Americans comprise 13% of the U.S. population, they represent 48% of people "serving sentences of life, life without parole, or 'virtual life'" and 42% of people on death row).

[51] *See, e.g.*, Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 278 (2007) (discussing studies exploring the "public association of criminality with Blackness"); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 120 (2014) (explaining that racial stereotypes that "help justify racial subordination and hyperincarceration" are "deeply embedded in [American] history and culture and are easily called to mind, even unbidden"); *see also* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 1 (2011) ("Although the statistical language of black criminality often means different things to different people, it is the glue that binds race to crime today as in the past.").

[52] Andrea Armstrong, *Race*, *Prison Discipline*, *and the Law*, 5 U.C. IRVINE L. REV. 759, 766 (2015) (citing Brian A. Nosek, Frederick L. Smyth, Jeffrey J. Hansen, Thierry Devos, Nicole M. Lindner, Kate A. Ranganath & Mahzarin R. Banaji, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 1, 17 (2007)).

[53] *See id.* at 773 (explaining that, thanks to the powerful effects of implicit bias, when prison officials are judging the danger individual prisoners pose, "non-White[s] are more likely [than Whites] to be perceived as a threat, regardless of the [person]'s actual behavior").

[54] There is a rich literature on the way blindness to others' humanity enables brutality by reducing moral resistance to inflicting harm on fellow humans. *See* Zimbardo & Maslach, *supra* note 46, at 52–53; Bandura, *supra* note 47, at 104–05, 108–09; ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE 67 (1989); Herbert C. Kelman, *Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, J. SOC. ISSUES, Fall 1973, at 48–52. But there is also a counterview, on which

There is a seeming paradox in the moral effects of exposure to others' degradation. One might imagine that proximity to people "who are living in [such] a reduced state"[55] would elicit sympathy. But pushing against a sympathetic response is the psychological distress that may be experienced by those who feel themselves implicated, if only by association, in a system that keeps people "in a state of deprivation and visibl[e] suffering."[56] Because "[i]t is difficult to mistreat humani[z]ed people without risking personal distress and self-condemnation[,]"[57] COs might experience a "threat to their moral integrity" were they to acknowledge the pain and privation endured by the very people for whom they themselves are responsible.[58] One way for

it is the very recognition of the ways victims *are* human that motivates what may be terrible acts of violence. In an article exploring this counterview, Paul Bloom considers the humiliating treatment Nazis inflicted on Jews in the early days of the Third Reich. Paul Bloom, *The Root of All Cruelty*, NEW YORKER (Nov. 27, 2017), https://www.newyorker.com/magazine/2017/11/27/the-root-of-all-cruelty [https://perma.cc/Z85F-4A6R]. Bloom recounts that, in one incident in Austria (among innumerable such incidents occurring across the Third Reich at that time), Jews were forced "to kneel and clean the streets with brushes," and quickly found themselves "performing [this] menial labor in front of jeering crowds." *Id.* (citing TIMOTHY SNYDER, BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING (2015)). It was, Bloom suggested, precisely because the Nazis understood their victims to be human beings with the full range of human emotions that they opted to inflict this degrading treatment. As Bloom put it, "if the Jews had been thought to be indifferent to their treatment, there would have been nothing to watch here; the crowd had gathered because it wanted to see them suffer." *Id.* As Bloom observed, "[t]he sadism of treating human beings like vermin lies precisely in the recognition that they are not [vermin]" but are in fact human. *Id.* This alternative view offers an important reminder that moral dispositions are complex. It seems intuitively right that those who engage in systematic abuses will have a multi-faceted view of the victims—that the targets of cruel treatment may at once be morally denigrated as subhuman and also at some level recognized as fellow human beings who are perhaps resented and begrudged for whatever advantages they are perceived to enjoy. If so, the dynamics described in this section may best be understood as undergirding a moral disposition that both encourages COs to become blind to prisoners' humanity and also helps them rationalize denying care and protection to people who are undeniably human just like themselves.

[55] JOHN IRWIN, THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS 64 (2005) [hereinafter IRWIN, THE WAREHOUSE PRISON].

[56] IRWIN, THE JAIL, *supra* note 43, at 76.

[57] Bandura, *supra* note 47, at 109.

[58] IRWIN, THE WAREHOUSE PRISON, *supra* note 55, at 64–65. Perhaps paradoxically, it is those individuals who are most inclined to be sympathetic who may end up most ardently endorsing this position, since they are the ones on whom "the plight of the needy and suffering around them will eventually take [the heaviest toll] on their peace of mind and personality organization." IRWIN, THE JAIL, *supra* note 43, at 76. As prisoner-turned-criminologist John Irwin observes, for officers "who have operated all their lives" according to beliefs consistent with the idea that "prisoners are worthless and deserve their deprivation," this cognitive shift is "relatively easy," while those who have not formally embraced such views

prison staff to resolve this distress is to "embrace the view that the prisoners are moral inferiors who deserve their state of reduced circumstances."[59]

In some cases, this shift in moral perspective may arise from a psychological need to resolve severe cognitive dissonance. In others, hostility toward those for whom one may have felt initial sympathy may reflect resentment at having been manipulated by individuals who, perceiving an impulse to kindness, sought to take advantage. Because prisoners cannot provide for themselves, they will often "beseech" COs for help when they are in need.[60] Any COs "who do not immediately and emphatically rebuff these entreaties" will be "inundated" with requests,[61] with those officers who have not yet absorbed the cultural disdain for the incarcerated being "especially vulnerable" to being taken advantage of by people who know how to work the system.[62] This experience can leave officers feeling manipulated and even foolish, their initial inclination to kindness souring to resentment, suspicion, and mistrust.[63] COs may also

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> must consciously reject more humane and tolerant conceptions of prisoners before they can accept the cynical viewpoint. In most cases, they cannot accomplish this without some strain, and this strain and their lingering ambivalence often makes them *more* expressive of hate and brutality. As in other situations, the convert is very often the extremist.

Id.

[59] IRWIN, THE WAREHOUSE PRISON, *supra* note 55, at 65 (quoting John Irwin, *The Trouble with Rehabilitation*, 1 CRIM. JUST. & BEHAV. 139, 141–42 (1974)); *see also* Leon Festinger, *Cognitive Dissonance*, 207 SCI. AM. 93, 93 (1962) ("[I]f a person knows various things that are not psychologically consistent with one another, he will, in a variety of ways, try to make them more consistent."). In his classic 1958 study of one New Jersey prison, *The Society of Captives*, Greshem Sykes noted the way "the custodians' task of maintaining order" is embittered "by the conditions of life which it is their duty to impose on their captives." GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 22 (1958). It is thus, Sykes suggests, "not surprising that [the prison officer] should overlook his part in the process," and that by way of justification for the conditions prisoners experience, should instead "tend to view the prisoner as innately vicious or depraved." *Id.*; *see also* KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC 103, 114 (2015) (describing the way hearing officers in prison disciplinary proceedings readily "impugn the character of prisoners who attempt to exercise their rights" since if prisoners are congenital liars, with "an instinctive ability to manipulate information," it becomes easier for officials to side against prisoners without compromising their sense of themselves as fair and impartial) (quoting Dave Manning, California Department of Corrections and Rehabilitation, Inmate Appeals Branch).

[60] *See* IRWIN, THE JAIL, *supra* note 43, at 76.

[61] *Id.*

[62] *Id.*

[63] In her study of correctional officers in the U.K., Elaine Crawley reported that "[p]risoners were seen by many of the officers . . . as calculating, selfish individuals who would readily take advantage of any goodwill shown by staff," and that "[o]ne of the most

develop a cynicism that shades into contempt by repeatedly watching prisoners who claim a commitment to personal transformation—a steep uphill climb in a system not designed to support people who seek meaningful self-improvement[64]—continually backsliding into antisocial behavior and even renewed criminality. By some accounts, such a repeatedly disappointed belief in prisoners' capacity to reform can lead COs to feel a deep antipathy towards the individuals in their custody.[65]

These psychological reactions can feed attitudes of hostility and contempt toward prisoners. Other dynamics reinforce this effect, including the basic fact that COs are perennially outnumbered by the people over whom they exercise control and the strong message COs receive from their first day on the job that they are "never to trust" prisoners who "[are] out to do [them] harm if they get the chance."[66] It seems plain enough that it can be hard to feel respect or sympathy towards people one is primed to regard as a threat. Compounding this impression is the corrosive effect of the fear that COs inevitably feel on the job. Such fear is hardly unfounded; virtually every CO

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common remarks made by officers about prisoners casts the prisoner as manipulator." ELAINE M. CRAWLEY, DOING PRISON WORK: THE PUBLIC AND PRIVATE LIVES OF PRISON OFFICERS 98 (2004). As one officer put it: "[i]f you give inmates an inch they'll take three miles. Kindness is taken as a weakness by this lot." *Id.* (quoting an unnamed senior officer at HM Prison Lancaster Farm).

[64] The difficulty of achieving meaningful personal growth while incarcerated was brilliantly satirized in a short piece published in *The Onion*. *See 15 Years in Environment of Constant Fear Somehow Fails to Rehabilitate Prisoner*, ONION (Mar. 4, 2014, 11:10 AM), https://www.theonion.com/15-years-in-environment-of-constant-fear-somehow-fails-1819576202 [https://perma.cc/TJ2H-GH2P].

[65] This psychological process was artfully dissected by Frank Tannenbaum, a formerly incarcerated writer, in a 1920 piece in *The Atlantic Monthly* entitled *Prison Cruelty*. As Tannenbaum explained:

> [T]he better intentioned the warden is, the more likely is he to become cruel . . . . He generally comes into prison . . . with the . . . attitude [that t]he men are bad and he is going to reform them . . . . But this is, of course, an idle dream. The prisoner cannot be changed as long as the old basis of suppression and isolation is maintained; and he finds to his dismay that the men do not reform . . . . He is outraged at the lack of gratitude . . . . He becomes convinced that there are a few men who are incorrigibles, and that these few must be made a lesson of . . . . So he falls back into the older ways . . . . [B]ecause his intentions are good . . . he has a tendency to lose his temper, to damn the fellow who would take advantage, as he puts it, of his own good-nature, and his cruelty rises with his good intentions.

Frank Tannenbaum, *Prison Cruelty*, 125 ATL. MONTHLY 433, 443–44 (1920), https://www.theatlantic.com/magazine/archive/1920/04/prison-cruelty/305502/ [https://perma.cc/CK37-R6AW].

[66] CRAWLEY, *supra* note 63, at 69 (quoting one prison official to the effect that "'at training college, you're taught never to trust the bastards!'"); *see also* Gibbons & Katzenbach, *supra* note 46, at 476 ("[Correctional officers are] trained: don't touch, don't even shake hands, don't call them by their name, call them by their number." (quoting former prison warden Jack Cowley)).

has stories of serious assaults by prisoners against other staff or even against themselves.[67] The effect is to further corrode any mutual sympathy. In the words of one officer, "[y]ou're scared five days a week. How do you deal with that fear? . . . . [B]y making him *less* than you."[68] As this officer went on to explain, the "'us' against 'them' philosophy" is "the kind of mentality you have to go in with in order to succeed or survive . . . . You have to give up that feeling that that's a human being you're dealing with and not just a piece of meat."[69]

In their turn, being only human, the incarcerated are likely to feel hostility, distrust, and resentment toward the officers who regard them in this light—feelings likely exacerbated by the fact that COs are the ones who daily enforce the innumerable restrictions of prison life that many prisoners see as gratuitous and arbitrary.[70] It would be surprising if some COs did not meet this wall of prisoners' resentment and hostility with their own increased sense of indignation, contempt, and anger,[71] and even with a determination to "put prisoners in their place" as a way to reinforce their own authority and moral superiority.[72] The ultimate effect is a vicious circle of bad feeling, producing ever-deepening mutual resentment and other obstacles to mutual sympathy.

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[67] Amy Lerman characterizes the resulting mindset among COs as a "siege mentality," and notes that such a disposition "can motivate and justify the infliction of intentional harms on others." AMY E. LERMAN, THE MODERN PRISON PARADOX: POLITICS, PUNISHMENT, AND SOCIAL COMMUNITY 66 (2013). As she observes in her study of correctional officers:

> [u]nder sustained duress, the injudicious use of violence can come to seem like an acceptable and even righteous response to perceived threat. In this context, what might reasonably appear to an onlooker to be aggressions carried out without cause may be perceived by the perpetrator as merely preemptive self-defense.

Id.

[68] KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 231 (1988).

[69] *Id.*

[70] *See* IRWIN, THE WAREHOUSE PRISON, *supra* note 55, at 161–62 (observing that "many of [the facility's] rules intrude into prisoners' ordinary practices and significantly interfere with their attempts to carry on their already excessively reduced life routines"); *see also id*. (discussing "chickenshit" rules).

[71] Ted Conover, a journalist who spent close to a year as a CO at Sing Sing, described a conversation with a fellow officer who "was fond of referring to inmates, out of their presence, as 'crooks' and 'mutts,'" which left Conover "thinking about the many reasons that an officer might come to regard inmates as savages. If a savage dissed you, what did it matter? And if a savage got hurt (particularly due to an error on your part), who cared?" TED CONOVER, NEWJACK: GUARDING SING SING 87 (2000).

[72] I thank Ken Hartman for emphasizing this motivation on the part of COs. For Hartman's powerful account of his own experience over almost four decades in prison in California, see generally KENNETH E. HARTMAN, MOTHER CALIFORNIA: A STORY OF REDEMPTION BEHIND BARS (2009).

This psychological process is experienced internally, operating on an officer's personal attitudes. But when navigating this stressful environment, COs are not in it alone. Every day, they interact with fellow COs in the very same position, who are themselves coping with the same pressures and finding psychological relief and vindication in the same normative constructions. This shared experience helps to explain the strong bonds that exist among COs. It also sheds light on the degree to which the identity of officers is "defined by its opposition to inmates" along with anyone perceived as sympathetic to them.[73] Research has shown that, to legitimize hostility toward "out-group members,"[74] group members will "exaggerate the differences" between themselves and those others, who are often "demoniz[ed] in stereotyp[ical] ways,[75] thereby "enhanc[ing] group identification and loyalty, the tightening of group boundaries, and increased out-group hate . . . ."[76] And of course, every instance of violence in a facility will only lend credence to the narrative of prisoners as "the enemy,"[77] reinforcing COs' sense of moral superiority and helping to "cognitively redefin[e]" acts of violence against prisoners as morally justified.[78] In this

[73] KAUFFMAN, *supra* note 68, at 108–11; *see also* Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL'Y 175, 176 (2006) ("[O]ne consequence of the psychological dynamics of being a [CO] is the tendency to see officers as 'us' and all others (managers, inmates and treatment staff) as 'them.'"). Prisoners too will develop a collective group identity with its own dysfunctions and pathologies. But because our concern is the way the officer subculture promotes the conditions for COs' unreasonable beliefs as to the need for force, I focus here on the attitudes of COs.

[74] Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. LEGAL F. 407, 417 (2016) (describing the findings of "[r]ealistic group conflict theory," which "investigates the dynamics of conflict between groups over resources, status, political power, or opportunity.") (citing Saera R. Khan & Viktoriya Samarina, *Realistic Group Conflict Theory*, *in* 2 ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 725, 725–26 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007)).

[75] *Id.* at 417 (explaining that "group conflict literature documents the way in which groups exaggerate the differences between group members and describe out-group members as threatening, in order to justify perpetuating the conflict."); *see also* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 28–29 (2012) ("People tend to consider their groups to be trustworthy, competent, moral, and peaceful, while out-groups are generally regarded as untrustworthy, competitive, and aggressive . . . . Group members tend to share similar worldviews, beliefs, and stereotypes about out-group members.").

[76] Roithmayr, *supra* note 74, at 418.

[77] KAUFFMAN, *supra* note 68, at 109.

[78] *See* Bandura, *supra* note 47, at 103. As Bandura explains, through "[the] process of moral justification, pernicious conduct is made personally and socially acceptable by portraying it as serving socially worthy or moral purposes." *Id.* In this way, people are able to "preserve their view of themselves as moral agents while inflicting harm on others." *Id.*

way, even COs who use grossly unreasonable force can come to perceive their actions as appropriate.[79]

To be sure, in every facility there will be individual officers who reject these dynamics, who strive to treat prisoners fairly and with respect. Yet in all but the most exceptional facilities,[80] such officers will be "swim[ming] against the tide."[81] At times—and perhaps frequently—COs' overt hostility to the incarcerated may reflect some measure of deliberate performance.[82] But given the group pressure COs face to act consistently with an "us-versus-them" attitude, their behavior may as a practical matter be indistinguishable from that of COs who wholeheartedly embrace the governing narrative.[83] And in any case, to be significant for our purposes, the normative view of prisoners as lacking humanity and possessing "demonic or bestial qualities" need not be uniformly accepted by all COs.[84] It need only be sufficiently widespread that some non-trivial number of COs subscribe to it, since, as we

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[79] *See id.*; *cf.* SIMON, *supra* note 75, at 29 (identifying the cognitive biases that allow those operating under the effects of groupthink to convince themselves that they are doing right even when they are acting in morally problematic ways).

[80] *See, e.g.*, IRWIN, THE JAIL, *supra* note 43, at 78 (describing the then-current culture of the Yolo County Jail, in which at the time of writing "the efforts of a relatively humanitarian jail supervisor . . . apparently prevented the normal deputy culture from developing," leading one detainee to report that in Yolo, "[e]veryone treats you like a human being.").

[81] CRAWLEY, *supra* note 63, at 90–91 ("The more consensual the group and the more isolate[d] the individual (i.e. the less others agree with the deviant) the greater the power of the group to define reality and induce self-doubt in the deviant. New staff are particularly unlikely to 'swim against the tide.'") (quoting an unnamed officer). Some COs who do not share the collective antipathy to prisoners report feeling compelled to "put on an act" to hide from fellow COs any sympathy they may have for those in custody. *See, e.g.*, *id.* at 91–92 (quoting one officer who recounted that, "in private, [he] talk[ed] to prisoners in a very free and easy way, but when a senior officer walked past, [he] had to start shouting and bawling . . . [to] put on an act," and that in this way, he "couldn't be [him]self"); *see also* KAUFFMAN, *supra* note 68, at 251–52 (describing the way, in the Massachusetts prison she studied, so-called "white hats," "[o]fficers who held positive attitudes towards inmates but negative ones towards officers," were less likely to remain on the job, and recounting that, of five such officers she encountered in her research, "[i]n less than a year, three had been forced out by their fellow officers and a fourth had resigned of his own accord").

[82] For example, Keramet Reiter has suggested that COs and prisoners may collaborate in the performance of their respective roles, which can then overtake them. This dynamic begets danger: in the absence of genuine fellow feeling and mutual respect, the parties in this performance might find themselves locked into positions preventing them from pulling back from the brink when the ongoing threat of violence actually manifests. Personal Communication with Keramet Reiter, Professor, Univ. Cal. Irvine. (Feb. 16, 2019).

[83] *See* SIMON, *supra* note 75, at 29 ("Group members are particularly prone to shed moral responsibility when they can attribute primary responsibility for aggressive behavior to other members of the group. Group membership also makes it easier for individuals to discount, overlook, or turn a blind eye to the misdeeds of other members of the group.").

[84] Bandura, *supra* note 47, at 109.

will shortly see, those who do may be expected to more readily employ excessive force.

In sum, innumerable dynamics in the prison environment encourage COs to regard people in custody as both less than human and congenitally dangerous, and to feel—or at least to perform—deep hostility and contempt towards them. This toxic moral brew undermines the possibility of mutual sympathy. It also enables COs to more easily justify in their own minds the mistreatment and abuse they inflict on those entrusted to their custody and care.

The foregoing indicates strong grounds for a system-wide constitutional challenge to the institutional conditions that foster attitudes likely to generate gratuitous force. I return to this point below.[85] What, however, of individual liability? Liability implies culpability, and given the picture just painted, one might wonder why officers primed by institutional dynamics to regard prisoners in the light just described should ever be subject to individual liability for unconstitutionally excessive force. In Section I.D, I explain why individual liability remains appropriate for this context.[86] But first, it is necessary to see how the normative CO disposition toward the incarcerated can incline COs to use unwarranted violence against them.

B. THE MORAL PSYCHOLOGY OF EXCESSIVE FORCE

When COs absorb the view of people in prison as less than fully human, it activates a process social psychologist Albert Bandura describes as "moral disengagement in the exercise of moral agency."[87] Such disengagement enables COs to treat prison residents inhumanely without triggering the moral self-censure people typically experience when they mistreat fellow humans.[88] In the ordinary course, people will feel concern and even distress when others around them are suffering and will be especially reluctant to

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[85] *See infra* Section I.D, paragraph surrounding notes 144–147.

[86] Section I.D, *infra*, argues that, as in the criminal context, individuals who inflict unjustifiable harm through moral error still merit condemnation even should their morally questionable perceptions have been shaped by factors over which they had no control. It further suggests that what is called for in such cases is not moral absolution but an ex post societal response that, while still holding the actor to account, acknowledges the structural or cultural forces that may have helped shape the actor's wrongful choice.

[87] Bandura, *supra* note 47, at 101; *see also* Weill & Haney, *supra* note 3, at 286 (applying Albert Bandura's theory of moral disengagement to the prison context).

[88] *See* Bandura, *supra* note 47, at 102 (identifying several "points in the process of moral control at which moral self-censure can be disengaged from inhumane conduct").

inflict harm on those others if they can possibly avoid it.[89] Recognizing shared humanity is key here, since "[i]t is difficult to mistreat humanised people without risking personal distress and self-condemnation."[90] When, however, certain others are *not* regarded as human, it becomes possible to regard their pain with indifference or even to cease to notice it altogether.[91] There is, in short, a direct link between the dehumanization of others and the capacity on the part of otherwise empathic moral agents to be unmoved by the suffering of those others—even when it is suffering that they themselves inflict.

Generally speaking, when officers use force they believe to be justified, one of two possible misjudgments will produce excessive force: COs might (1) understate the likely harmful effects of the force or (2) overstate the likely benefits in terms of harm averted.[92] COs who fail to perceive prisoners' humanity will be inclined to errors in both directions.[93] Take first the likely harm the contemplated force will cause the targets of that force. At the risk

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[89] *See id.* (explaining that, "[i]n the development of a moral self," people act in ways that "give them satisfaction and a sense of self-worth" and "refrain from behaving in ways that violate their moral standards because such conduct will bring self-condemnation").

[90] *Id.* at 109.

[91] *Id.* ("Once dehumanized, [others] are no longer viewed as persons with feelings, hopes and concerns but as sub-human objects.").

[92] I leave aside here excessive force prompted by COs' personal fear for their safety, arising not from the instant situation but from a generalized sense of vulnerability, or from a memory—whether personal or institutional—of some especially salient past event such as the death of George Jackson at California's San Quentin prison in 1971 or the riots at Camp Hill prison in Pennsylvania 1989. In such cases, it is possible for a CO to be inclined to excessive force without necessarily subscribing to a view of people in custody defined by contempt or callous indifference, although it may also be that such extreme and long-standing fear is itself produced and reinforced by a shared cultural narrative of demonization and dehumanization. On the mythology surrounding the killing of George Jackson, see KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 86–141 (2016). On the Camp Hill riots, see Michael Decourcy Hinds, *Rioters Destroy Nearly Half the Buildings in a Pennsylvania Prison*, N.Y. TIMES (Oct. 28, 1989), https://www.nytimes.com/1989/10/28/us/rioters-destroy-nearly-half-the-buildings-in-a-pennsylvania-prison.html [https://perma.cc/5XER-A3G6]. I thank Jamie Binnall and Avlana Eisenberg for pushing me on this point.

[93] Conceivably, miscalculations could also go in the other direction: officers may overstate the likely harmful effects of the force to be used or understate the likely benefits, thereby failing to prevent harms that might otherwise have been avoided had they used the appropriate measure of force. In such cases, depending on the circumstances, prisoners might have a claim for failure to protect under *Farmer v. Brennan*, 511 U.S. 825 (1994). But because our concern here is with excessive force, miscalculations that result in colorable claims of failure to protect are less relevant here—although it bears noting that, if COs could be shown to have reasonably, if wrongfully, judged their own force unwarranted under the circumstances, they should not be found liable under *Farmer* so long as they took other reasonable steps to mitigate any threats to prisoners' safety.

of stating the obvious, to accurately estimate this quantum of harm, one must recognize the vulnerability of the proposed targets to fear, pain, and injury. To do otherwise—to instead imagine that when incarcerated people suffer in these ways, it is somehow less searing, less painful, than if experienced by someone whose humanity were not in question—would necessarily produce a discounting of the anticipated harm. The result would be an exaggerated sense of the quantum of force appropriate in the moment.

A failure to fully appreciate the humanity of people in custody will also impede COs' ability to correctly read the behavior of the individual thought to pose a threat, prompting COs to overstate the degree of danger a given situation presents and thus the quantum of force warranted. In general, to make sense of another's behavior requires both a working knowledge of the general principles of human psychology and a particularized knowledge of that person's character, temperament, inclinations, patterns of conduct, and so on. We must, in other words, be attuned both to a person's humanity and to their individuality. It is no different with people in prison, who will for the most part respond to stimuli in predictable ways.[94] They get frustrated when they do not feel heard or when they are treated in ways they perceive to be unfair. They can despair when they lose hope. They rely on commitments made to them by others[95] and resent it when those commitments are abrogated. They can act irrationally, especially when under stress or when they are afraid. And like all human beings, people in prison react positively to consideration, kindness, and respect. Those who are agitated will thus

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[94] The exception here may be people with serious mental illness (SMI). But when interacting with members of this group, prison officers, charged with a duty of care, must take steps to be even more solicitous of people's vulnerabilities and even more hesitant to use force. That people with SMI are frequently subjected to force in prison is a strong indication of profound macro-level deficiencies in prison operations and the need for a major institutional redesign to ensure better, safer, engagement with people with SMI. In many cases, this should involve removing them from custodial settings and transferring them into treatment facilities. *See* Jamie Fellner, *Callous and Cruel: Use of Force against Inmates with Mental Disabilities in US Jails and Prisons*, HUM. RTS. WATCH (May 12, 2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and [https://perma.cc/M65Z-SDUD] (gathering data from various carceral systems and reporting, among other things, that, in Colorado, "3 percent of the prison population was diagnosed with mental illness but those inmates were the targets of force in 36 percent of the use of force incidents" and that in "South Carolina, inmates diagnosed with mental illness were subjected to use of force at a rate two-and-a-half times that of other inmates").

[95] *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 332 (1986) (Marshall, J., dissenting) (explaining that Albers had in a previous encounter with Whitley requested and was promised the key that would allow him to move to safety several elderly prisoners who were caught on the tier when the disturbance began, and that Albers was approaching Whitley to collect the promised key when he was shot in the leg).

often calm down once they feel heard and when they feel that others have dealt fairly with them.[96]

COs who regard prisoners as congenitally antisocial and prone to violence—who demonize prisoners as a group rather than judging each person on their own terms—will find it harder to recognize when a given situation may be resolved with minimal force or even without any force at all.[97] Granted, prisons are likely to contain a disproportionate number of people whose behavior may be more unpredictable and violent than that of the average free-world person. But COs who reject the demonization, and who therefore remain able to know residents of the prison as individuals with distinct personal qualities,[98] will make it their business well in advance of any crisis or confrontation to determine which people in a given unit are likely to respond to provocation with violence (or even to use violence when unprovoked) and which people are not.[99] Being unable to perceive the differences among people will make it difficult for COs to distinguish the person who poses a genuine threat from one who is just blowing off steam.[100]

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[96] *Cf.* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 380 (2006) ("[T]hose authorities who exercise their authority fairly are more likely to be viewed as legitimate and to have their decisions accepted.").

[97] Conversely, COs who recognize the humanity of those in their custody will be more inclined to find non-forceful ways of resolving potentially fraught situations. For example, in an incident in the LA County Jail (witnessed by the author), two officers were able, without resort to force, to defuse a situation in which one detainee had physically threatened another. Having listened carefully to each side and having personally known for many years the person who issued the threat, these officers understood that the threat was empty and simply made out of legitimate frustration at having been a victim of theft at the hands of the proposed target. Dolovich, *Two Models*, *supra* note 6, at 1040–42.

[98] *See* Kelman, *supra* note 54, at 48 ("[T]o perceive another as human we must accord him identity . . . [which requires that we perceive him] as an individual, independent and distinguishable from others, capable of making choices, and entitled to live his own life on the basis of his own goals and values.").

[99] Of course, such assessments can be off. COs should therefore approach any encounter prepared for unwelcome surprises. It is, however, one thing to approach encounters alert to signs that people who in the past have seemed reasonable and trustworthy may no longer be so (and therefore to employ standard methods of calming psychological distress while nonetheless remaining on alert for possible indications that the typical de-escalation methods will not avail in this particular case). It is quite another to decide in advance that, regardless of what one may have learned of this particular person during past encounters, he, like everyone in prison, is fundamentally violent and deceitful and sure to pose a threat unless he is physically subdued.

[100] Getting to know incarcerated people as individuals and maintaining ongoing relationships with them so as to be able to anticipate issues before they arise is a key component of what is known in the Norwegian Corrections Service as "dynamic security." *See* Sami Abdul-Salam & Hans Myhre Sunde, *Enhancing the Role of Correctional Officers in*

In short, when COs embrace the dehumanization and demonization of the people in their custody, excessive force will often follow.

C. THE PSYCHOLOGY OF EXCESSIVE FORCE IN ACTION: THE CASE OF *KINGSLEY*

To see how these dynamics can play out in practice, consider the 2015 case of *Kingsley v. Henderson*. In *Kingsley*, the Court established the appropriate standard for Fourteenth Amendment excessive force claims brought by pretrial detainees against jail officials,[101] holding that, to prevail, plaintiffs must show that the force was "objectively unreasonable."[102] We will return in Part II to *Kingsley*'s reasoning and to the potential promise (and pitfalls) its holding presents. For now, what is of interest are the facts giving rise to the case, and in particular what they reveal about how the psychology of excessive force can play out in action. Specifically, the facts of *Kingsley* illustrate the way correctional officers with pathways to defusing a fraught encounter with minimal force (or no force at all) may instead escalate the situation, leading them to act in ways unimaginable to anyone not already primed to dehumanize and demonize those involved.

The case began with a piece of paper covering the light in the cell of Michael Kingsley, a pretrial detainee in a Wisconsin jail.[103] Kingsley had been ordered several times to remove this "light cover" but he had refused,[104] so jail deputies decided to transfer Kingsley to another cell and remove it

American Prisons: Lessons Learned from Norway, 31 FED. SENT'G REP. 67, 70 (2018) (explaining the practice of "dynamic security" in Norwegian prisons).

[101] When convicted prisoners bring claims of excessive force against COs, they do so under the Eighth Amendment's Punishment Clause, which prohibits the infliction of "cruel and unusual punishment." Whitley v. Albers, 475 U.S. 312, 327 (1986). Because pretrial detainees have not yet been convicted, they may not be punished, so the Eighth Amendment Punishments Clause does not apply to them. For this reason, when detainees bring claims of excessive force against jail officials, they do so under the Due Process Clause of the Fourteenth Amendment. *See* Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

[102] *See Kingsley*, 576 U.S. at 397.

[103] *See id.* at 445 n.1 (explaining that "covering the lights with paper is a common practice by inmates in an effort to dim some of the brightness of the jail's lights").

[104] According to Kingsley, the light cover was already in place when he arrived in the cell. *Id.* at 445.

themselves.[105] For this purpose, five officers arrived at the door to Kingsley's cell, where they found him prone on his bunk.[106]

Although he refused an order to get up, Kingsley responded by putting his hands behind his back.[107] According to Kingsley, once he was physically restrained—in handcuffs that were "extremely tight"[108]—"the officers banged [his] leg against the [concrete] bunk in picking him up, causing him pain and making it difficult for him to walk."[109] The officers then "forcibly removed him from the cell [and] carried him to a receiving cell," where they "placed him face down on a bunk with his hands handcuffed behind his back."[110]

At this point, in an effort to remove the handcuffs (an effort that, the officers later testified, Kingsley "resisted"), Deputy Stan Hendrickson placed his knee on Kingsley's back.[111] Kingsley responded to this move by telling Hendrickson, "in colorful language, to get off him."[112] Immediately thereafter, according to Kingsley, "the [officers] . . . smashed his head into the concrete bunk."[113] What happened next was not in dispute: "[a]fter some further verbal exchange,"[114] Deputy Fritz Degner, on Hendrickson's order, "applied a Taser to Kingsley's back for approximately five seconds."[115] The

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[105] According to respondents, Kingsley was informed by jail officials that "jail staff would remove the paper from the light, but [that Kingsley] would first need to be moved to a separate 'receiving' cell." Brief for Respondents at 5, *Kingsley*, 576 U.S. 389 (No. 14-6368), 2015 WL 1519055, at *5.

[106] The five officers were Sergeant Stan Hendrickson, Deputy Fritz Degner, Deputy Karl Blanton, Deputy James Shisler, and Lieutenant Robert Conroy. *See* Kingsley v. Hendrickson, 744 F.3d 443, 445 (7th Cir. 2014). Both parties' merits briefs suggested that all five officers entered Kingsley's cell at this point. *See* Brief of the Petitioner at 4, *Kingsley*, 576 U.S. 389 (No. 14-6368), 2015 WL 981543, at *4 (suggesting that all five officers "entered Kingsley's cell and handcuffed him behind his back while he was lying face down on his bunk"); Brief for Respondents, *supra* note 105, at 6 ("When petitioner refused to stand up, Conroy told him to put his hand behind his back. [Rather, he] put his hands along the sides of his body, and *the officers entered the cell*.") (emphasis added). But the facts as recounted by the Seventh Circuit suggest only that the five officers "arrived" at the cell, with Officers Hendrickson and Blanton entering while the others stood outside looking on. *Kingsley*, 744 F.3d at 445.

[107] *Kingsley*, 744 F.3d at 445.

[108] Brief of the Petitioner, *supra* note 106, at 4.

[109] *Id.*

[110] *Kingsley*, 576 U.S. at 392.

[111] *Kingsley*, 744 F.3d at 446.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Kingsley*, 576 U.S. at 393.

officers then left the cell, and 15 minutes later returned and removed the cuffs.[116]

On the defendants' telling, this operation was not undertaken to torment Kingsley, but rather to enforce a rule necessary for jail security; the light cover reduced visibility, "mak[ing] it difficult to see into [the] cell," and "created a potential fire hazard."[117] Then, the officers testified, once the operation had commenced, they acted out of fear that Kingsley "could escalate the situation and begin actively fighting them."[118] And because, on arrival at the new cell, Kingsley resisted removal of the cuffs, the officers were forced to resort to the Taser so that they might "remove the handcuffs and exit the receiving cell safely."[119]

Yet even granting the necessity of removing the light cover—a goal that was of questionable importance[120]—the need for much of this transaction

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[116] *Id.*

[117] Brief for Respondents, *supra* note 105, at 4.

[118] *Id.* at 8.

[119] *Id.* at 9.

[120] Whether defendants' proffered justifications in cases like this are credible will depend on facts particular to the facility itself: how dark are the cells with the lights covered? Are there other sources of light that help COs during their rounds to see into the cells? Have there in fact been fires started by using such covers? Even if not, given the configuration of the lights and the placement of the covers, is it plausible to think that fires may result from their use? Here, it bears noting that, according to Kingsley's testimony, the cover was on the light when he arrived in the cell four weeks previously, and that he had simply left it in place. This fact may seem to deepen Kingsley's culpability, since by leaving the cover on the light, he was in violation of the rules for a full month before officers ordered him to take it down. But arguably, it does just the opposite, since it indicates that, for a solid month, visibility into the cell had been sufficiently clear that officers did not even notice the cover. And if light covers had in the past proved to create a real risk of fire, presumably jail officials would have removed the cover themselves before placing Kingsley in the cell in the first place.

If these details do not definitively establish the hollowness of the official justification for enforcing this rule, they at the very least shift the burden to jail administrators to demonstrate that the rule against light covers really does raise safety concerns sufficient to justify laying hands on people the state is affirmatively obliged to protect. And there is a further dimension to this matter worth considering; as the Seventh Circuit explained, "covering the lights with paper is a common practice by inmates in an effort to dim some of the brightness of the jail's lights." Kingsley v. Hendrickson, 744 F.3d 443, 445 n.1 (7th Cir. 2014). If light covers are a common strategy to cut the brightness, and if having light covers is against the rules, perhaps the better course for jail administrators would be to find some way to mitigate the evident discomfort the brightness of the lights causes people living in the cells which does not involve the use of violence against people who cover their lights. If the configuration of the lights in the Monroe County Jail really makes light covers a fire hazard and if more light is needed to see into the cells, jail officials might consider dimming the lights and equipping COs with high-powered flashlights that would allow them to see into the cells when conducting their rounds (while also developing guidelines to discourage COs where possible from shining the

seems doubtful. To begin with, there were five officers in the initial cell with Kingsley after his wrists were successfully cuffed. At that point, could one of the officers not just have reached up and removed the paper covering the light, thereby obviating any need to move Kingsley to another cell? Once the paper had been removed, the officers could have freed Kingsley from the handcuffs and exited the cell with no need for any further action. If, once the light cover had been safely removed, Kingsley had physically resisted the removal of the cuffs or made any sign that, once released, he might attack the officers, they could simply have left him temporarily handcuffed and returned to release him once he had calmed down.[121] And if they genuinely feared that a still-handcuffed Kingsley might "fall and be injured"—the reason respondents gave for why "officers in the Jail do their utmost to avoid leaving inmates in the receiving cells alone while handcuffed"[122]—one of the five officers might easily have remained stationed outside the cell, ready to step in if medical attention or some other intervention proved necessary.

In the litigation, the officers maintained that they had been afraid for their safety, at least during the last minutes of the encounter which ended with the Taser shot.[123] But this notion seems far-fetched. At the time they claimed to feel this fear, Kingsley was outnumbered five to one and prone on the bunk with his hands cuffed behind him. For Kingsley to pose any real threat from that position, he would have had to break free of the handcuffs and, using no weapons but his own physical power, overcome the combined strength of five officers equipped with flashlights and Tasers. To believe, despite these obstacles, that Kingsley may yet have "escalate[d] the situation and beg[u]n actively fighting" the COs, one would have had to ascribe to him both a superhuman level of strength—such as would allow him, "Incredible Hulk"-style, to burst his fetters—and a truly prodigious capacity for hand-to-hand combat.[124]

In other words, only the recasting of Kingsley as a fearsome and dangerous fighting machine bent on violence could possibly explain how,

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lights in people's eyes). Or there may be a better fix still. But whatever strategy is adopted, the goal would be to protect prisoners from the discomfort of excessive brightness in a way that addresses the jail's need for visibility into the cells and for preventing fires while also reducing or eliminating the need for force around this issue.

[121] Indeed, according to defendants' own testimony, they left Kingsley handcuffed in the new cell for 15 minutes before returning to uncuff him. *See* Brief for Respondents, *supra* note 105, at 9.

[122] *Id.* at 8.

[123] *Id.* (explaining that the "officials persisted in attempting to remove the handcuffs" in part out of concern "that [Kingsley] could escalate the situation and begin actively fighting them").

[124] I am grateful to John Goldberg for conversation on this point.

under the circumstances, anyone could have imagined him representing an imminent danger necessitating a forceful response.[125] At the same time, only a view of Kingsley as less than human, as someone whose pain and suffering did not morally signify, could ground a genuine belief that the officers' conduct was justified.[126]

Certainly, if at any point there *were* genuine safety concerns—if the light cover did in fact represent a fire hazard or an obstruction to visibility into the cell,[127] or if Kingsley's conduct really did pose a threat to officer safety[128]—the officers would presumably still have taken some mitigating action even if they regarded Kingsley as entitled to their protection and solicitude. Indeed, not to do so in the face of genuine safety concerns might well expose Kingsley, along with others, to greater harm than the use of force would cause. But to the extent that the danger was minimal or the officers' mitigating actions were likely to create a greater risk of injury than would thereby be avoided, officers who took seriously their responsibility for Kingsley's well-being would have found some other way to handle the situation. And even if some quantum of force were unavoidable—if, say, it were found necessary to cuff Kingsley in order to subdue him prior to removing the light cover—officers who recognized their duty of care towards

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[125] Assuming the truth of the officers' assertion that Kingsley was resisting their efforts to uncuff him, there remains the puzzle of why he might have done so, since according to the officers they were trying to remove his handcuffs, and Kingsley presumably would have welcomed this outcome. Here, some light is shed by the policing literature, specifically, a finding that civilians who have been victims of excessive force are in turn more likely to defy police authority. *See* Roithmayr, *supra* note 74, at 420 (citing Stephen D. Mastrofski, Jeffrey B. Snipes & Roger B. Parks, *Compliance on Demand: The Public's Response to Specific Police Requests*, 33 J. RSCH. CRIME & DELINQ. 269, 294–97 (1996)). Although one might think it would have been strongly in Kingsley's interest to be free of the handcuffs, his resistance at this point might have been an expression of defiance sparked by what he perceived as excessive force. *See id.* (reporting on research suggesting that "civilians are more likely to refuse to defer to, and even disrespect or defy authority, when they themselves . . . have recently been victims of excessive force"). Just as civilian defiance of police authority could well be contrary to their own interests, resulting, say, in arrest or escalating force, Kingsley's resistance led to a knee in his back and a tasing. Note that this interpretation appears to give credence to Kingsley's assertion that the transaction to that point had been unnecessarily rough.

[126] Under the circumstances, there is no small whiff of cynicism in the *Kingsley* defendants' assertion that a concern with promoting personal safety motivated their actions.

[127] For discussion as to the plausibility of these justifications, see *supra* note 120.

[128] *See* Brief for Respondents, *supra* note 105, at 8 (justifying the use of force (including the Taser shot) while Kingsley was handcuffed in the receiving cell on the ground that the officers were "concerned that [Kingsley] could escalate the situation and begin actively fighting them").

Kingsley would surely have sought to minimize any possible discomfort, injury, or trauma to Kingsley himself.

Kingsley is just one case. But the Federal Reporter is full of cases with facts reflecting the same dynamics, with correctional officers manifesting a degree of violence and aggression in no way demanded by the vagaries of the situation.[129] Yet in each such case, as in *Kingsley*, the defendants invariably justify their conduct ex post as having been necessary to preserve institutional security or to "maintain or restore discipline."[130] In some cases, they might sincerely believe it. But given the dynamics just canvassed and the constitutional status of the right against excessive force, it is scarcely enough for courts to take COs' word for it.

Any time a CO uses force against those they are sworn to protect, the actor has a heavy justificatory burden. Whether that burden is met demands careful scrutiny by impartial external authorities. To instead leave COs to judge for themselves the need for force entirely negates the disciplining effect of ex post review. Yet as we will shortly see,[131] deference to COs' subjective assessment is the defining feature of current Eighth Amendment excessive force doctrine. As Part II will argue, the appropriate perspective for evaluating state violence in prison should instead be that of COs who acknowledge their essential duty of care and protection towards those in custody. But first, it is necessary to address more fully the tension that may seem to exist between the account of the institutional dynamics sketched here and the suggestion that COs should be held individually liable for excessive force.

D. WHY INDIVIDUAL LIABILITY?

The foregoing may seem to cut against any individual liability for Eighth Amendment excessive force claims. Given the powerful cultural forces that shape COs' perceptions of the incarcerated, it might appear misguided and even unfair to condemn those COs who, failing to recognize the humanity and moral worth of the people over whom they wield authority, wind up using excessive force. At its core, this objection amounts to a claim

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[129] *See, e.g.*, Shapiro & Hogle, *supra* note 3, at 2024–36 (collecting cases). One can also look to *Prison Legal News*, which covers judicial decisions involving incarcerated people. Virtually every issue of *PLN* has multiple reports of CO violence against prisoners so extreme as to seem impossible to justify. *See Homepage*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/ (last visited Aug. 22, 2024).

[130] Whitley v. Albers, 475 U.S. 312, 320 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). In Section III.C, I challenge the legitimacy of justifying violence against prisoners on these grounds. *See infra* Section III.C.

[131] *See infra* Section II.B.

that COs who use excessive force should not be considered culpable because, due to powerful environmental pressures that scramble their moral perceptions, they are simply incapable of appropriately judging when force is warranted.

In doctrinal terms, this is a plea for a legal excuse.[132] Legal excuses are invoked in cases when, due to some disability, an actor may not be properly held responsible for her deed.[133] But legal excuses are granted only rarely, when defendants can make a showing of "special circumstances . . . compelling the conclusion of blamelessness."[134] And to stipulate that COs who use excessive force retain no measure of personal responsibility for the harm they cause would be a radical step indeed. In no other context does the law excuse interpersonal wrongdoing on the ground that the responsible party, due to malign moral influences, was blind to the victim's humanity.[135] An actor's recognition of others' moral worth, and of the obligations of respect and forbearance that such an understanding calls forth, may be clouded for all kinds of reasons, including circumstances over which an actor had no control (such as being raised in a virulently racist household). But apart from the rarest of cases—those involving an "observable and verifiable abnormality"[136] (for example, "the actor thinks God has ordered him to sacrifice a neighbor for the good of mankind"[137])—an actor will generally bear the burden of his mistake, especially when the mistake is one "about the equal [moral] worth of others."[138]

This is how it should be. The foundation of a free society is the promise that people may live their lives unmolested. For this reason, the law imposes

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[132] The asserted ground for a legal excuse here would presumably be that, given the moral psychology created by the institutional environment of the prison, responsible officers lacked the capacity to recognize the wrongfulness of their conduct.

[133] *See, e.g.*, 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 25(a), at 91–92 (1984) [hereinafter ROBINSON I] (explaining that "[e]xcuses admit the deed may be wrong, but excuse the actor because conditions suggest that he is not responsible for his deed" and that all excuse defenses have the same "internal structure: a *disability* causing an *excusing condition*").

[134] *See id.* § 25(b), at 97.

[135] Nor should it. A constrained choice is still a choice. Someone who commits a brutal murder has still committed a terrible wrong, however brutal their own upbringing may have been.

[136] 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 181(c), at 376 (1984) [hereinafter ROBINSON II].

[137] ROBINSON I, *supra* note 133, § 25(b), at 93.

[138] MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 14 (2003).

on all citizens a weighty duty of self-control vis-à-vis others.[139] Indeed, if any grounds exist for treating COs differently from private citizens whose violent conduct stems from moral blindness, those grounds cut *in favor* of individual liability despite institutional pressure. However tightly held defenses of legal excuse may be in the ordinary course, they should be especially so when the actors in question are sworn officers whose essential function is to safeguard and enhance citizens' safety and security. As with all public officials to whom the state has delegated legal authority, the power COs possess is not theirs by right, nor is their license to use force unlimited. To accept a CO's badge is to accept the obligations that come with it: the state will put you in a position to wield wide authority over people who, being incarcerated, have no legal right of self-defense, and you will in turn use this power judiciously and parsimoniously.[140]

Fulfilling this professional imperative requires that COs acknowledge prisoners' humanity and their entitlement to official care and protection—or at least to behave as if they do. Given the institutional dynamics to which COs are exposed, meeting this mark will not always be easy. This, however, is the nature of the CO's role, and navigating this pressure is perhaps its defining feature. To be sure, those who get it wrong will not be entirely to blame. But for individual liability to remain appropriate, it is not necessary to show wholesale personal blameworthiness unmitigated by institutional factors. It is only necessary that, when a CO uses excessive force, some measure of blame remains with the individual actor,[141] if only for failing to exhibit sufficient moral fortitude to fulfill their defining professional obligation.[142]

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[139] The exercise of such self-control might reflect an actor's recognition of the humanity of others, or it may simply indicate that she understands that she is obligated to act as if she possessed this normative perspective. For legal purposes, it makes no difference either way, just so long as the conduct remains within bounds.

[140] Given the failure across all branches of government to meaningfully regulate and oversee the treatment of people in prison, *see* Dolovich, *Failed Regulation*, *supra* note 13, at 153, COs may have good reason to believe themselves immune from any legal consequences should they abuse their power. But an undeserved expectation of legal impunity is not the same as blamelessness.

[141] *See* MORAN, *supra* note 138, at 13 ("[I]n the absence of insanity, it is just as blameworthy to fail to possess the capacity to be attentive to others as it is to fail to exercise it.").

[142] As John Gardner aptly puts it in the related context of policing:

> To uphold the rule of law often requires tremendous reserves of self-control and someone who is only ordinarily self-controlled is not fit for police work. Equally, to uphold the rule of law often requires high epistemic competence. A police officer must be particularly free from bias,

In this regard, COs are no different than police officers, who may also be exposed to an occupational culture that primes them to use excessive force. Like COs, police officers have a broad duty to protect. If it should come out that an officer being sued for excessive force was operating in a unit with an especially toxic moral culture, that institutional environment may receive critical scrutiny and some regulatory intervention. In extreme cases, the U.S. Department of Justice might even open an investigation into the responsible officer's police department.[143] But however troubling the institutional culture of that department might turn out to be, it would not exonerate the individual officer, who, by virtue of wearing the badge, had an especially great obligation to use force judiciously. Whatever the reason for the responsible actor's clouded judgment, the failure of a uniformed officer to appropriately value the life or safety of someone he is sworn to protect cannot be grounds for the finding of moral blamelessness a legal excuse requires.

Still, recognizing the toxic occupational environment in which COs operate illuminates two important points regarding liability for excessive force in prison. First, if individual COs retain some of the blame for their use of excessive force, the blame will not be theirs alone. An exclusively individualistic response to excessive force would be as wrongheaded as an exclusively institutional one. When people in prison experience excessive force, they may also have the makings of a macro-level Eighth Amendment challenge to the systemic conditions that promote gratuitous violence against prisoners. In this respect, repeated instances of excessive force are no different than repeated instances of medical neglect. When a prison operates a substandard medical care delivery system known to routinely fail to provide adequate care to those with serious medical needs, plaintiffs may bring a system-wide conditions challenge alongside individual liability claims against medical staff.[144] Likewise, to the extent that structural dynamics of the sort canvassed in Section I.A contribute to a culture that promotes the use of excessive force, a macro-level conditions claim may entitle plaintiffs to system-wide remedial relief necessary to address persistent abuses of COs'

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superstition, gullibility, and prejudice. She needs to be the sort of person who does not maintain easy assumptions or jump to conclusions.

Gardner, *supra* note 10, at 110 (footnote omitted).

[143] *See* CIVIL RIGHTS DIV., U.S. DEP'T JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT, at 5–7 (2017), https://www.justice.gov/crt/file/922421/dl [https://perma.cc/6GFQ-KFC5].

[144] *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011).

authority to use force.[145] And if the account offered in Section I.A has come anywhere near the mark, relief adequate to this end ought in many cases to entail radical institutional change.[146] In short, although this Article focuses on individual liability, it is important also to recognize the strong potential for macro-level challenges to carceral conditions giving rise to repeated instances of excessive force.[147]

Second, to maintain that COs who use excessive force bear some personal responsibility for their actions says nothing about the appropriate penalty for such violations. The question is this: is there a fair way to hold COs accountable for the harms they inflict while also appropriately acknowledging the structural factors beyond their control that may have made it more difficult for them to keep their conduct within justifiable limits? This challenge is not unique to this context, but also goes to the heart of the American criminal legal system writ large.[148] In the criminal context, the

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[145] The state's decision to create conditions giving rise to repeated constitutional violations raises a host of vexing issues, both doctrinal and moral. I explore these issues in considerable detail elsewhere. *See* Dolovich, *Cruelty*, *supra* note 8.

[146] The operative standard for such a macro-level Eighth Amendment prison conditions challenge would be, not *Whitley*'s "maliciously and sadistically," but rather the "deliberate indifference" standard established in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Under *Farmer*, it would be enough for plaintiffs to demonstrate that, due to institutional dynamics, the plaintiff class faced a substantial risk of serious harm—here, that of being subjected to gratuitous violence at the hands of COs—to which one or more prison administrators were deliberately indifferent. *See* Wilson v. Seiter, 501 U.S. 294, 303 (1991) (holding that, "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard") (second textual insertion in original) (quoting Justice Powell, sitting by designation, in *LaFaut v. Smith*, 834 F.2d 389, 391–92 (4th Cir. 1987)). To satisfy this standard, it would be enough to show that defendants were affirmatively aware of the danger posed by the challenged conditions and failed to respond reasonably to the risks those conditions created. *See Farmer*, 511 U.S. at 844 ("[P]rison officials who actually knew of a substantial risk to [prisoners'] health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted[.]"). *But see* Dolovich, *Coherence*, *supra* note 23, at 332–39 (mapping the way courts hearing Eighth Amendment prison conditions challenges during the height of the COVID pandemic subtly recast this feature of Eighth Amendment doctrine to reach outcomes favorable to the state, regardless of strong evidence rebutting the "reasonableness" of prison officials' response to the risk posed by the pandemic to people in their facilities).

[147] Elsewhere, I explore in detail the appropriate foundations, both moral and doctrinal, of such macro-level conditions claims. *See generally* Dolovich, *Cruelty*, *supra* note 8.

[148] Every day, all over the country, people grappling with the challenges created by what Richard Delgado famously termed "rotten social background" are sentenced to lengthy prison terms by a system wholly indifferent to the way lives of hardship, trauma, and neglect—all traceable to factors beyond individual control—may compromise defendants' capacity for moral judgment and self-control. Richard Delgado, *"Rotten Social Background": Should the*

injustice is not that society holds people accountable for serious wrongs against others.[149] A person who robs someone at gunpoint may have life experiences that help explain how he got to a place of being sufficiently blind to others' humanity that he would willingly subject them to such trauma and put them in fear for their lives. Still, the decision to take the step was his alone, and by doing so he has inflicted a grievous harm. No ethical society—indeed, no functional society—could let such conduct stand unanswered. Where we routinely go wrong is in our punitive response to crime.[150] What we need is a way to condemn the act and hold the responsible party accountable for the harm they caused without manifesting the same impulse to demonize and dehumanize that, when imported into the prison, helps to foster an official culture of gratuitous violence.

At a minimum, any system of accountability should at least refrain from undue punitiveness. And as it happens, in the cases that concern us here, there is no threat of such excess penality. Except in the most egregious cases,[151] a CO found to have used unconstitutionally excessive force faces no criminal

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*Criminal Law Recognize a Defense of Severe Environmental Deprivatio*n? 3 L. & INEQ. 9, 23–37 (1985); *see also* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 373 (2004) [hereinafter Dolovich, *Legitimate Punishment*] ("[I]n a partially compliant society, whether one is able to develop the moral and cognitive capacities of a mature, confident person, able to exercise judgment and self-control and to deal with others in a respectful manner, is itself a function of morally arbitrary contingencies."); Dolovich, *Legitimate Punishment*, *supra*, at 369–73 (discussing the resources necessary to resist the pressures to offend).

[149] After *Whitley*, in cases where a court finds no reason to doubt the defendant's own belief that the force was warranted, a mere assertion to this effect by the defendant automatically becomes a legally adequate ground for dismissal. If this approach were operative in the criminal context, a simple claim by the defendant that he did not realize the wrongfulness of his violent act would—so long as he convinced the court of his sincerity—be sufficient for acquittal, without any need even to put the case put before a jury. Such a position should be no more acceptable in the Eighth Amendment context than it would be in the criminal courts.

[150] To punish criminal conduct by humiliating and brutalizing the wrongdoer is not the only available response to a criminal conviction. Our penal practice is instead a political choice. *See* Dolovich, *Legitimate Punishment*, *supra* note 148, at 312 ("[A] crime no more dictates the appropriate punishment for its commission than a particular act of misbehavior by a child dictates the necessary parental response to that misbehavior."). In the vast majority of cases, moreover, this choice does more harm than good. *See* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 64–90 (2019) (systematically challenging the notion that prison time appropriately vindicates any of the penological purposes traditionally offered to justify criminal punishment).

[151] Between April 2007 and July 2023, 131 COs were convicted and incarcerated for federal civil rights violations involving extreme instances of excessive force against people incarcerated in jails and prisons nationwide. Sharon Dolovich, Cameron Leska-Kent & Jack Stephens, Correctional Officer Excessive Force Convictions (Dec. 5, 2023) (unpublished dataset) (on file with author).

punishment: no incarceration, no "collateral consequences" of the sort that weigh down those with criminal records,[152] none of the stigma carried by those found guilty in criminal proceedings.[153] There may be some monetary sanction in the form of damages, in function akin to a criminal fine. But even here, the effect is more symbolic than real, given the almost universal indemnification that protects all but the most culpable state actors from having to personally cover any money damages.[154] In practice, the only real penalty for COs found to have subjected plaintiffs to unconstitutionally excessive force is the moral censure inherent in being called out by name in judicial proceedings.[155] Given the profound abuse of authority excessive force in prison represents and the way such abuses can help to foster a climate of fear and hostility in an already traumatizing environment, this treatment hardly seems unduly punitive.[156]

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[152] *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1799–1803 (2012) (describing the array of punishing civil disabilities (so-called "collateral consequences) that accompany criminal convictions). For additional background on the practical impossibility of sealing or otherwise moving past a criminal record in the American context, see generally JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015).

[153] *See* JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING; ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) ("[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part . . . of the punishing authority.").

[154] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

[155] None of this should be taken as an affirmative argument against criminal liability in all cases of excessive force. The claim here is only that, at a minimum, the nature of the penalty that exists is not disproportionate to the quantum of personal responsibility that, notwithstanding strong environmental pressures, continues to attach when COs use unconstitutionally excessive force.

[156] Even if there *were* something to a defense of legal excuse for COs who use excessive force—which, I have argued here, there is not—efforts to apply it in specific cases would demonstrate yet further evidence that the Court got it seriously wrong in *Whitley v. Albers*. As a doctrinal matter, legal excuses "do not destroy blame"; instead, they "shift it from the actor to the excusing condition." WAYNE R. LAFAVE, CRIMINAL LAW § 9.1(a), at 473 (5th ed. 1986) (quoting ROBINSON I, *supra* note 133, § 25(d), at 97). Effectively admitting that the conduct is such that "society would in fact condemn and seek to prevent," the defendant asserts that she is not blameworthy for committing it, and that the blame should lie instead with the excusing condition. *See* ROBINSON I, *supra* note 133, § 25(a), at 91; *see also id.* § 25(b), at 92 (explaining that an "excusing condition . . . requires that the actor's disability cause a particular result; his particular exculpating mental state must relate directly to the conduct constituting the offense"). The judicial inquiry triggered by such a claim would necessarily require searching examination of the defendant's state of mind at the moment he acted, in light of the specific circumstances in which he found himself. Yet absent evidence that the force was used "in bad faith and for no legitimate purpose," *Whitley* wholly forecloses judicial review after the fact, Whitley v. Albers, 475 U.S. 312, 322 (1986), and would thus prevent

And there is a further, crucial reason why it would be ill-advised to excuse COs who use excessive force on grounds of institutional pressure: to do so would effectively grant state officials license to use force indiscriminately, whenever the whim strikes. To say that any such scheme should deeply concern those committed to constraints on state power and to the principle of limited government is to dramatically understate the point. To relieve COs of any imperative to forebear from excessive force would leave people in locked facilities at the mercy of unchecked official abuse.[157] This is the stuff of police states, not liberal democracies.[158]

In short, even a showing of powerful occupational pressures cannot wholly excuse COs who, blind to plaintiffs' humanity, wrongly believe their force to be justified. In such cases, some measure of individual liability remains appropriate. We turn now to the question of what liability standard should apply.

II. CONSTITUTIONAL STANDARDS

A. GOVERNING DOCTRINE

The Supreme Court established the standard for Eighth Amendment excessive force claims in the 1986 case of *Whitley v. Albers*.[159] *Whitley* arose from an incident at the Oregon State Penitentiary.[160] After witnessing what was perceived as unnecessary roughness by COs toward a group of prisoners, some residents of Cellblock A became agitated and refused to return to their

courts from engaging in precisely the sort of post hoc examination of the facts necessary if a court was to be able to properly assess the validity of a proffered defense of legal excuse. In this way, *Whitley* also effectively precludes courts from condemning conduct that defendants themselves would, by their proffering of an excuse, concede to be wrongful.

[157] For Judith Shklar, it is the fear of such "arbitrary, unexpected, unnecessary and unlicensed acts of force and . . . habitual and pervasive acts of cruelty and torture performed by military, paramilitary and police agents" that most corrodes the dignity and self-respect that are the requisites of moral personhood, and which most undermines the possibility of a healthy liberal democracy. Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21, 29 (Nancy L. Rosenblum ed., 1989).

[158] To a great degree, this dystopian picture reflects the day-to-day reality already experienced by many people currently incarcerated in American prisons. A good deal of the blame for this situation lies at the feet of the federal courts, which have persistently failed to hold prison officials to account for inflicting gratuitous harm on those in custody. For an examination of this judicial failure, see generally Dolovich, *Coherence*, *supra* note 23. For an account of the myriad institutional failures to ensure the meaningful regulation and oversight of prisons and prison conditions, see generally Dolovich, *Failed Regulation*, *supra* note 13.

[159] *Whitley*, 475 U.S. at 312.

[160] *Id*. at 314.

cells.[161] In the ensuing melee, one CO was assaulted and another taken hostage.[162] In response, officers led by Captain Whitley "organize[d] an assault squad" to retake control of the cellblock and free the hostage.[163] During the execution of the plan, one of the prisoners, Gerald Albers, was shot in the knee by a CO,[164] dragged down a flight of stairs by his hair, had "the barrel of a gun or gas pistol [shoved] into [his] face," and was "left lying and bleeding profusely for approximately 10 to 15 more minutes" before being taken to the prison hospital.[165]

The case became the first Eighth Amendment excessive force claim to reach the Supreme Court in the modern, post-"hands-off" era.[166] Writing for the majority, Justice O'Connor conceded that the Eighth Amendment was "intend[ed] to limit the power of those entrusted with the criminal-law function of government."[167] However, she emphasized, "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny."[168] In the prison context, "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct [that violates the Eighth Amendment]."[169] On the strength of this foundation, the Court concluded that whether force was unconstitutionally excessive "turns on 'whether [it] was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"[170]

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[161] *Id*. at 314–15.

[162] *Id*.

[163] *Id.* at 315–16.

[164] *Id.* at 316.

[165] *Id.* at 332 (Marshall, J., dissenting).

[166] In the late 1960s and 1970s, the Court decided several cases involving prisoners' constitutional rights, thereby explicitly affirming what it had effectively signaled in the 1964 case of *Cooper v. Pate*: the end of the "hands-off" era and the opening of the federal courts to prisoners' suits. 378 U.S. 546 (1964) (holding for the first time that state prisoners can sue in federal court under § 1983 for violation of their constitutional rights). On the origins of the term "hands-off" to describe the federal judicial posture towards the protection of prisoners' constitutional rights pre-*Cooper*, see Margo Schlanger, *The Constitutional Law of Incarceration*, *Reconfigured*, 103 CORNELL L. REV. 357, 368 n.53 (2018).

[167] *Whitley*, 475 U.S. at 318 (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).

[168] *Id.* at 319.

[169] *Id.* Justice O'Connor also implied that a higher standard than an "ordinary lack of due care for the prisoner's interests or safety" is required for conduct that, like force, "does not purport to be punishment at all." *Id.* I address this argument in Section II.D, text accompanying notes 237–245.

[170] *Whitley*, 475 U.S. at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

After *Whitley*, the question is not whether a reasonable person in the defendant's situation would have thought the force warranted, but whether *the defendant himself* believed it to be so.[171] This is by design a purely subjective standard. As Justice O'Connor explained, for plaintiffs to prevail under *Whitley*, the defendant must have "evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to *a knowing willingness* that it occur."[172] The defendant, that is, must use force despite affirmatively knowing it to be unwarranted. Even here, the defendant gets the benefit of the doubt; only if there is "no plausible basis for the officials' belief that this degree of force was necessary" will the plaintiff's claim succeed.[173] Constitutionally speaking, it is irrelevant that the defendant's belief in the need for force may have been wholly unreasonable.

Underscoring this point, Justice O'Connor mapped out a procedure for applying *Whitley*'s standard that forecloses liability even when the evidence casts doubt on the appropriateness of defendants' choices. Emphasizing that courts should hesitate "to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance,"[174] Justice O'Connor directed courts to determine in the first instance "whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives."[175] If not—if the court has not found "a reliable inference of wantonness" indicating force was used "in bad faith and for no legitimate purpose . . . . the case should not go to the jury."[176]

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[171] In *Whitley* and in the subsequent case of *Hudson v. McMillian*, the Court specified five factors courts should use to determine whether the *Whitley* standard is satisfied: "the extent of [the] injury, . . . the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." Hudson v. McMillian, 503 U.S. 1, 7 (1992) (internal quotation marks omitted); *see also Whitley*, 475 U.S. at 321. These factors largely sound like objective terms, but the *Whitley* Court is clear that courts are to determine on the basis of these factors whether, in light of the evidence, one might draw an inference "as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley*, 475 U.S. at 321.

[172] *Id*. (emphasis added).

[173] *Id.* at 323.

[174] *Id.* at 320.

[175] *Id.* at 322.

[176] *Id.*

Whitley justified its holding in terms of the need for judicial deference to prison officials. This theme is not unique to *Whitley*.[177] In virtually every prisoners' rights case decided by the Supreme Court between 1974—the year a Court profoundly reshaped by Nixon appointees[178] began in earnest to entertain prisoners' constitutional claims[179]—and 1986, when *Whitley* was decided, the Court admonished judges that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[180] But in *Whitley*, Justice O'Connor went beyond even this by-then-familiar caution, emphasizing that, in the face of a live prison disturbance—"[w]hen the 'ever-present potential for violent confrontation and conflagration' [has] ripen[ed] into *actual* unrest and conflict"[181]—"the admonition that 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators' carries special weight."[182] This

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[177] *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012) [hereinafter Dolovich, *Forms of Deference*] (explaining that judicial deference to prison officials "is arguably the primary driver of the [Supreme] Court's prisoners' rights jurisprudence").

[178] *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 40–41 (2014) ("After being elected president, in 1968, Richard Nixon quickly had four vacancies to fill on the Supreme Court and picked four justices—Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist—who were far more conservative than the individuals they replaced.").

[179] In 1974 alone, the Court decided *Procunier v. Martinez*, 416 U.S. 396 (1974) (First Amendment speech and Fourteenth Amendment right of access to the courts), *Pell v. Procunier*, 417 U.S. 817 (1974) (First Amendment speech), and *Wolff v. McDonnell*, 418 U.S. 539 (1974) (Fourteenth Amendment procedural due process), followed closely by *Estelle v. Gamble*, 429 U.S. 97 (1976) (Eighth Amendment medical neglect), *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119 (1977) (First Amendment right of assembly, First Amendment freedom of association), and *Bounds v. Smith*, 430 U.S. 817 (1977) (Fourteenth Amendment due process right of access to the courts).

[180] *Whitley*, 475 U.S. at 321. By 1986, when *Whitley* was decided, this precise language instructing lower courts to accord prison officials "wide-ranging deference" had already found its way into no fewer than five of the Court's opinions, with another two opinions making the same point using slightly different language. *See* Block v. Rutherford, 468 U.S. 576, 585, 593 (1984); Hewitt v. Helms, 459 U.S. 460, 472 (1983); Hughes v. Rowe, 449 U.S. 5, 20 (1980); Bell v. Wolfish, 441 U.S. 520, 521, 568 (1979); *Jones*, 433 U.S. at 126; Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981); *Pell*, 417 U.S. at 826; *see also Bounds*, 430 U.S. at 835 (Burger, C.J., dissenting); *Procunier*, 416 U.S. at 404–05 (acknowledging that "the problems of prisons in America are complex and intractable" and "not readily susceptible of resolution by [judicial] decree" but nonetheless siding with the plaintiffs in a case challenging the constitutionality of two California prison regulations).

[181] *Whitley*, 475 U.S. at 321 (citation omitted and quoting *Jones*, 433 U.S. at 132).

[182] *Id.* (citation omitted and quoting *Rhodes*, 452 U.S. at 349 n.14).

degree of deference, Justice O'Connor insisted, "does not insulate from review actions taken in bad faith and for no legitimate purpose."[183] It does, however, "requir[e] that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice."[184]

Six years after *Whitley*, in *Hudson v. McMillian*,[185] the Court again addressed an Eighth Amendment excessive force claim. Even assuming *Whitley* involved exigent circumstances[186]—those requiring COs to act "in haste, under pressure, and frequently without the luxury of a second chance"[187]—the facts of *Hudson* in no way suggested the need for an immediate response. Instead, the *Hudson* defendants seem to have engaged in entirely gratuitous violence.

Keith Hudson was incarcerated in the Louisiana State Penitentiary.[188] After a verbal altercation with CO Jack McMillian, Hudson was placed "in handcuffs and shackles" and walked over to the prison's segregation unit.[189] En route, Hudson testified, "McMillian punched Hudson in the mouth, eyes, chest, and stomach[,]" while CO Marvin Woods "held [him] in place and kicked and punched him from behind."[190] As the Court recounted, while McMillian and Woods were physically attacking a handcuffed Hudson, the "supervisor on duty," who was watching, merely exhorted the officers "not to have too much fun."[191]

Among the legal questions *Hudson* raised was the appropriate mental state requirement for Eighth Amendment excessive force claims absent exigent circumstances. In answer, the *Hudson* Court held that *Whitley*'s "maliciously and sadistically" standard applies to *all* Eighth Amendment

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183 *Id.* at 322.

184 *Id.*

185 503 U.S. 1 (1992).

186 Whether the facts of *Whitley* represented an exigency was a matter of some dispute. Writing for the *Whitley* majority, Justice O'Connor emphasized that, at the time of the shooting, a riot was in progress, "a guard was still held hostage," and "[t]he situation remained dangerous and volatile," *Whitley*, 475 U.S. at 322–23. Yet as Justice Marshall noted in dissent, Albers had presented "substantial testimony" at trial to show that, by the time the officer shot him, "the disturbance had subsided." *Id.* at 330 (Marshall, J., dissenting); *see also id.* at 331 ("Although the Court sees fit to emphasize repeatedly 'the risks to the life of the hostage and the safety of inmates . . . ,' I can only point out that respondent bitterly disputed that any such risk to guards or inmates had persisted. The Court just does not believe his story." (quoting *id.* at 323) (majority opinion)).

187 *Whitley*, 475 U.S. at 320.

188 *Hudson*, 503 U.S. at 4.

189 *Id*.

190 *Id*.

191 *Id.*

excessive force claims, regardless of exigency.[192] Over the objection of several dissenters (including, notably, Justice Thomas[193]), the Court found that "[w]hether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury" to the incarcerated.[194] "Both situations," the Court asserted, "may require prison officials to act quickly and decisively."[195] Thus, in both instances, "prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[196]

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[192] *Hudson*, 503 U.S. at 6–7. *Hudson* also addressed the objective component of an Eighth Amendment excessive force claim—specifically, whether force may be found to "constitute cruel and unusual punishment when the inmate does not suffer serious injury." *Hudson*, 503 U.S. at 4. Having found that Whitley's "maliciously and sadistically" standard applies "whenever guards use force to keep order," the Court held that no showing of serious injury is required, since "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9. So long as the force used was greater than de minimis, the objective component of an Eighth Amendment excessive force claim will be satisfied. *See id.* at 9–10. Justice Thomas dissented on this point. *See id.* at 18 (Thomas, J., dissenting) ("In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under [other constitutional provisions], but it is not cruel and unusual punishment."). It was on this ground that the New York Times editorial page labeled Justice Thomas "the youngest, cruelest Justice." The Editors, *The Youngest*, *Cruelest Justice*, N.Y. TIMES (Feb. 27, 1992), https://www.nytimes.com/1992/02/27/opinion/the-youngest-cruelest-justice.html [https://perma.cc/MUB2-HTK3] (initial caps deleted) ("Only four months after taking his oath as Justice, Clarence Thomas finds himself rebuked by a seven-member majority of the Rehnquist Court for disregarding humane standards of decency.").

[193] *Id.* at 24 (Thomas, J., dissenting); *see also infra* note 194 (quoting Justice Thomas' opinion).

[194] *Hudson*, 503 U.S. at 6 (majority opinion). In his dissent, Justice Thomas strongly rejected this view. As he put it,

> The Court today extends the heightened mental state applied in *Whitley* to *all* excessive force cases, even where no competing institutional concerns are present. The Court simply asserts that "[m]any of the concerns underlying our holding in *Whitley* arise *whenever* guards use force to keep order." (emphasis added). I do not agree. Many excessive force cases do not arise from guards' attempts to "keep order." (In this very case, the basis for petitioner's Eighth Amendment claim is that the guards hit him when there was no need for them to use any force at all.) . . . I see no justification for applying the extraordinary *Whitley* standard to *all* excessive force cases, without regard to the constraints facing prison officials.

Id. at 24 (Thomas, J., dissenting) (internal citations omitted).

[195] *Id.* at 6 (majority opinion).

[196] *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)). The Court's holding in *Hudson* may be explained by an infelicity in Justice O'Connor's *Whitley* opinion flagged by Justice Marshall in his *Whitley* dissent: whether an exigency existed at the time force was used—the

Hudson represents the Court's most recent pronouncement to date on the mental state requirement for Eighth Amendment excessive force claims.[197] But in 2015, the matter of excessive force by COs against people in custody again reached the Court—this time raised by a pretrial detainee under the Fourteenth Amendment Due Process Clause.[198] As previously noted, *Kingsley v. Hendrickson* began with jail deputies ordering Kingsley to remove the light cover in his cell and ended with him roughed up, kneed in the back, and tased.[199] During much of this experience, Kingsley was prone on the floor with his hands cuffed behind him and surrounded by five COs—facts that could not have been further from the sort of exigent circumstances the *Whitley* majority contemplated.[200]

As we have just seen, however, *Hudson* extended *Whitley*'s "maliciously and sadistically" standard to all allegations of unconstitutionally excessive force regardless of exigency.[201] And prior to *Kingsley*, the Court's constitutional decisions concerning the treatment of pretrial detainees had been governed by two basic principles: jails are functionally equivalent to prisons,[202] and jail officials are due the same (high)

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seeming basis on which, after *Whitley*, courts would need to apply *Whitley*'s higher mens rea standard—is a question of fact necessitating a jury finding. *See Whitley*, 475 U.S. at 329 (Marshall, J., dissenting) ("It is inappropriate, to say the least, to condition the choice of a legal standard, the purpose of which is to determine whether to send a constitutional claim to the jury, upon the court's resolution of factual disputes that in many cases should themselves be resolved by the jury."). Justice O'Connor, writing for the *Hudson* majority, handily resolved this problem by holding that *Whitley*'s standard applies to all excessive force claims regardless of exigency. *Hudson*, 503 U.S. at 6–7.

[197] In 2010, in *Wilkins v. Gaddy*, the Court in a per curiam opinion resolved a point regarding the objective component of Eighth Amendment excessive force claims that since *Hudson* had been causing confusion in the lower courts. It held that it is not the infliction of greater than de minimis *injury* that satisfies the objective component, but rather the use of greater than de minimis *force*. *See* 559 U.S. 34, 38 (2010) ("Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts.").

[198] Kingsley v. Hendrickson, 576 U.S. 389, 391 (2015); *see also supra* note 101 (explaining why, when excessive force claims are brought by pretrial detainees from jail, the appropriate constitutional vehicle is the Fourteenth Amendment Due Process Clause and not the Eighth Amendment Punishments Clause).

[199] *Kingsley*, 576 U.S. at 392. For a detailed recounting of the facts of *Kingsley*, see text accompanying notes 103–119.

[200] *See* Whitley v. Albers, 475 U.S. 312, 321 (1986) ("When the ever-present potential for violent confrontation and conflagration ripens into *actual* unrest and conflict, the admonition that a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators carries special weight." (citations and quotation marks omitted)).

[201] *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

[202] Prisons and jails serve different functions. Prisons, run by the state, exclusively hold people who have been convicted of crimes and sentenced to more than one year of

incarceration. Jails, run by municipalities and typically sited adjacent to courthouses, primarily house pretrial detainees, although not exclusively so. At any given time, jails will also house people who have already been convicted of minor crimes and sentenced to stints of less than one year, people who have been convicted and are awaiting sentencing, sentenced offenders awaiting transfer to prison, and people who have been brought from prison to appear in court as a witness in a case or for some other reason.

That jails and prisons are doctrinally distinct has never been in doubt; it has long been settled that conditions claims brought from jail—including excessive force claims—are governed by the Fourteenth Amendment, while prison conditions claims come in under the Eighth Amendment. *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (explaining that states do not "acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law"); Suprenant v. Rivas 424 F.3d 5, 19 (1st Cir. 2005) ("A pretrial detainee's claim that he has been subjected to unconstitutional conditions of confinement implicates Fourteenth Amendment liberty interests."); *see also supra* note 101 (explaining why, when excessive force claims are brought by pretrial detainees from jail, the appropriate constitutional vehicle is the Fourteenth Amendment Due Process Clause and not the Eighth Amendment Punishments Clause). This formal distinction, however, has made little practical difference to the constitutional law governing incarceration. Although the Supreme Court has affirmed that "the due process rights" of pretrial detainees are "at least as great" as the Eighth Amendment protections available to "a convicted prisoner," it has assiduously "avoided deciding whether 'at least as great' means 'greater than' or 'equal to.'" Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1012 (2013) (quoting *Revere*, 463 U.S. at 244).

Meanwhile, the Court has proceeded as if its jail and prison cases comprise one uniform body of law, drawing equally from each without distinguishing between them. For example, in *Turner v. Safley*, the Court established the standard of review for challenges to prison regulations that burden prisoners' constitutional rights. 482 U.S. 78, 89 (1987). In crafting this standard, the majority drew on what the Court itself labeled as "four 'prisoners' rights' cases." *Id.* at 87 (citing Pell v. Procunier, 417 U.S. 817 (1974); Jones v. N.C. Prisoners' Union, 433 U.S. 119 (1977); Bell v. Wolfish, 441 U.S. 520, 535 (1979); Block v. Rutherford, 468 U.S. 576, 585 (1984)). Although two of these cases (*Pell* and *NCPU*) arose in prisons and two (*Bell* and *Rutherford*) were brought by pretrial detainees in county jails, the Court treated the four precedential cases as equally relevant to a standard manifestly applying to people serving prison sentences. *Turner* has in turn gone on to inform the Court's assessment of jail cases. *See id.* at 87; *see also, e.g.*, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012) (explaining that a claim challenging a jail strip-search policy is "governed by the principles announced in *Turner* and *Bell*").

degree of judicial deference as prison staff.[203] On this basis—and thus not without considerable doctrinal support[204]—the *Kingsley* defendants argued throughout the litigation that the *Whitley* standard should apply.

Instead, with a 5-4 vote, *Kingsley* held that objective unreasonableness, and not *Whitley*'s "maliciously and sadistically" standard, governs Fourteenth Amendment excessive force claims arising from jail.[205] The *Kingsley* Court acknowledged *Whitley*'s point that COs facing disturbances may need "to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving."[206] However, *Kingsley* found a reasonableness standard to be more than adequate to account for the daily challenges COs face. Writing for the *Kingsley* majority, Justice Breyer emphasized that, precisely because jail officials can sometimes face pressures that require them to act in haste, "a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer."[207] An officer using force, he observed, is unlikely to be blindsided by potential liability for their own forceful conduct, since *Kingsley* "limit[s] liability for excessive force to situations in which the use of force was the result of an intentional and knowing act."[208] For these reasons, the Court concluded, a standard of objective unreasonableness was sufficient to accord appropriate deference to COs who use force against people in custody.[209]

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[203] In *Bell v. Wolfish*, the first jail conditions case of the post-"hands-off" era to come before the Court, the majority swatted away the suggestion that the "cases holding that substantial deference should be accorded prison officials are not applicable [to jail officials] . . . because those decisions concerned convicted inmates, not pretrial detainees." 441 U.S. 520, 547 n.29 (1979). Instead, it reiterated the need for deference to jail officials, asserting that, "because the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch." *Id.*; *see also id.* at 537 ("Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain.").

[204] *See supra* note 202.

[205] Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015).

[206] *Id.* at 399 (2015) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).

[207] *Id.*

[208] *Id.* at 400. Here the Court also "[left] open the possibility of including a 'reckless' act as well." *Id*.

[209] True, *Kingsley* was concerned not with prisons but with jails. But if anything, the jail is the more dangerous institution. Prisons are long-term state facilities, housing people serving sentences of more than a year. This situation gives staff an extended opportunity to get to know the people in their custody as individuals. In jails, by contrast, people are constantly coming and going. For example, in 2010, the average length of stay in Men's Central Jail in L.A. County, the largest jail system in the country, was 42–45 days. *See* Nina T. Harawa,

In *Kingsley*, the Court acknowledged that its holding—directly applicable only to Fourteenth Amendment excessive force claims brought from jail—"may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners [under the Eighth Amendment]."[210] Justice Breyer's reference to this doctrinal tension seemed to signal an openness on the part of five Justices to reconsidering *Whitley* in light of *Kingsley*.[211] However, the Court's marked rightward shift in the intervening years has largely extinguished the possibility that *Whitley* might be overruled in the near term. As a result, there remains today a striking doctrinal divide, with *Kingsley*'s objective unreasonableness standard governing Fourteenth Amendment excessive force claims brought from jail, and *Whitley*'s "maliciously and sadistically" standard applying to Eighth Amendment excessive force claims brought from prison.

In what follows, I consider these standards in turn. Of the two, *Kingsley*'s standard is both more defensible and more appropriate for the context of excessive force in custody, whether in jail or prison. Still, even *Kingsley* is not fully adequate here. Instead, I argue, Eighth Amendment reasonableness should go beyond *Kingsley*'s formulation and be given explicit moral content drawn from animating Eighth Amendment imperatives. Only in this way could courts appropriately establish how a reasonable CO would have acted in the defendant's situation. Specifically, I maintain that, when it comes to constitutional review, the only reasonable CO is one who fully acknowledges their own constitutional duty of care and protection toward the human beings in their custody. This characterization of the reasonableness standard for the prison context is in no way special pleading; to the contrary, as we will see, it is the *Kingsley* standard itself that deviates from the more defensible understanding of reasonableness in the legal sense.

That COs have an affirmative duty of care toward those in their custody is not in doubt. At least 31 state courts have explicitly acknowledged COs'

Jeffery Sweat, Sheba George & Mary Sylla, *Sex and Condom Use in a Large Jail Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenders*, 21 J. HEALTH CARE POOR & UNDERSERVED 1071, 1073 (2010). All this movement, with its changing cast of characters, makes it harder for jail officials and the detainees themselves to get to know as people those who are locked up. The consequent uncertainty about the character of the people one is dealing with creates stress and generates fear in jails that is even greater than in prisons, where populations are more stable.

[210] *Kingsley*, 576 U.S. at 402.

[211] *See id.* ("We are not confronted with such a claim, however, so we need not address that issue today."); *see also* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 133 (2016) (reading *Kingsley*'s language to signal that "the Court" may "intend[] to take up the issue in the near future").

common law duty to protect prisoners from unnecessary harm, a duty arising from the "special relationship" created when an actor is "required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection."[212]

[212] Shea v. City of Spokane, 562 P.2d 264, 267 (Wash. Ct. App. 1977) (quoting RESTATEMENT (SECOND) OF TORTS § 314A(4) (AM. L. INST. 1965)); *see also* Wilson v. City of Kotzebue, 627 P.2d 623, 628 (Alaska 1981) (agreeing "with the majority of courts which hold that a jailer owes a duty to the prisoner to exercise reasonable care for the protection of his life and health"); Maricopa Cnty. v. Cowart, 471 P.2d 265, 267 (Ariz. 1970) (holding, based on the "type of institution involved," that a juvenile detention home must exercise reasonable care and attention for the safety of those in custody); Giraldo v. Dep't of Corr. & Rehab., 168 Cal. Rptr. 3d 231, 246 (Ct. App. 2008) (holding, based on "support in numerous, if not all, pertinent authorities," that jailers have a duty to protect prisoners from foreseeable harm inflicted by a third party); Thomes v. Tuyen Duong, No. CV055001223S, 2008 WL 901442, at *8 (Conn. Super. Ct. Mar. 12, 2008) (holding, based on Section 320 of the *Restatement (Second) of Torts*, that law enforcement owes a duty of care to those in custody); Matthews v. District of Columbia, 387 A.2d 731, 734 (D.C. 1978) (refusing to adopt a "prior notice rule," instead holding that penal authorities owe prisoners a duty of reasonable care in their protection and safekeeping); Ferguson v. Perry, 593 So. 2d 273, 277 (Fla. Dist. Ct. App. 1992) ("It is clear that corrections officers have a duty to use reasonable care to insure the safety of inmates during their incarceration."); Kendrick v. Adamson, 180 S.E. 647, 648 (Ga. Ct. App. 1935) (holding that "a sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him"); Haworth v. State, 592 P.2d 820, 824 (Haw. 1979) ("It is well settled that a state, by reason of the special relationship created by its custody of a prisoner, is under a duty to the prisoner to take reasonable action to protect the prisoner against unreasonable risk of physical harm."); Porter v. Cook Cnty., 355 N.E.2d 561, 564 (Ill. App. Ct. 1976) (holding that the county's police officers and jailers must exercise reasonable and ordinary care for the life and health of prisoners); Reed v. State, 479 N.E.2d 1248, 1254 (Ind. 1985) (recognizing that the State has "a duty to take reasonable precautions to preserve the life, health, and safety of prisoners"); Smith v. Miller, 40 N.W.2d 597, 598 (Iowa 1950) ("Aside from statutory requirements [,] a sheriff owes a general duty to a prisoner to save him from harm."); L.W. *ex rel.* C.J.W. v. State, 853 P.2d 4, 12 (Kan. 1993) (relying on §§ 315, 319, and 320 of the *Restatement (Second) of Torts* to hold that juvenile hall officials had a duty to protect plaintiff from fellow prisoner); Ratliff v. Stanley, 7 S.W.2d 230, 232 (Ky. Ct. App. 1928) ("[T]he law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody."); Barlow v. City of New Orleans, 241 So. 2d 501, 504 (La. 1970) ("The duty of care owed one under arrest and in custody to keep him safe and protect him within reasonable limits from injury not attributable to his own willful act has been recognized by all courts."); Rodriguez v. State, 98 A.3d 376, 405–09 (Md. Ct. Spec. App. 2014) (citing §§ 319 and 320 of *The Restatement (Second) of Torts* to find that a special relationship between a prison sergeant and an inmate created duty of care to protect from third-party assault); Thornton v. City of Flint, 197 N.W.2d 485, 493 (Mich. Ct. App. 1972) ("The duty which defendant owed to plaintiff arose out of this special relationship in which defendant was one 'required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection.'"); Pretty On Top v. City of Hardin, 597 P.2d 58, 60 (Mont. 1979)

Moreover, as the Supreme Court has made abundantly clear, this duty also has constitutional status. As Chief Justice Rehnquist put it in *DeShaney v. Winnebago County*, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[213] This "affirmative duty to protect," Chief Justice Rehnquist noted, arises "from the limitation which [the State] has imposed on [the detained

("A jailer owes a duty to the prisoner to keep him safe and to protect him from unnecessary harm."); Daniels v. Anderson, 237 N.W.2d 397, 400 (Neb. 1975) ("It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners."); Murdock v. City of Keene, 623 A.2d 755, 756 (N.H. 1993) (citing *The Restatement (Second) of Torts* approvingly, recognizing "a special relationship between jailers and their prisoners that gives rise to a duty on the part of a jailer to aid or protect a prisoner in certain circumstances"); Harris v. State, 297 A.2d 561, 563 (N.J. 1972) (implicitly accepting the principle that prison officials owe prisoners a duty of care while in custody and that, in appropriate circumstances, prisoners would be entitled to recover for violations of this duty); City of Belen v. Harrell, 603 P.2d 711, 713 (N.M. 1979) ("When one party is in the custodial care of another, as in the case of a jailed prisoner, the custodian has the duty to exercise reasonable and ordinary care for the protection of the life and health of the person in custody."); Sebastiano v. State, 491 N.Y.S.2d 499, 501 (N.Y. App. Div. 1985) ("In its operation of the correctional system, the State has a duty to provide inmates with reasonable protection against foreseeable risks of attack by other prisoners."); King v. Durham Cnty. Mental Health Dev. Disabilities & Substance Abuse Auth., 439 S.E.2d 771, 774 (N.C. Ct. App. 1994) (acknowledging that in North Carolina, "custodian-prisoner" is a recognized "special relationship" exception to "[t]he general rule that there is no duty to protect others against harm from third persons"); Falkenstein v. City of Bismarck, 268 N.W.2d 787, 792 (N.D. 1978), *abrogated on other grounds by* Minto Grain, Ltd. Liab. Co. v. Tibert, 776 N.W.2d 549, 554 (N.C. 2009) ("If the law imposes a duty of care in respect of animals and goods which . . . (a sheriff) has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of his office?" (quoting State of Indiana v. Gobin, 94 F. 48, 50 (C.C.D. Ind. 1899)); Justice v. Rose, 144 N.E.2d 303, 305 (Ohio Ct. App. 1957) ("[T]he common law . . . imposes the duty upon the sheriff to exercise reasonable care and diligence to protect the prisoner from danger known to, or which might be reasonably apprehended by, him."); Saunders v. State, 446 A.2d 748, 750 (R.I. 1982) (holding that the State of Rhode Island, its officers, and employees have a duty to exercise reasonable care to protect prisoners in state correctional institutions from violent attack by other inmates); Blakey v. Boos, 153 N.W.2d 305, 307 (S.D. 1967) ("[W]hile the officer is not an insurer of the safety of his prisoners he has a duty to protect them from injury which he should have reasonably foreseen or anticipated."); Salazar v. Collins, 255 S.W.3d 191, 200 (Tex. App. 2008) (holding that "the requisite 'special relationship' exists between inmates and TDCJ (and its employees)," creating a duty to exercise reasonable care to protect inmates); Brownelli v. McCaughtry, 514 N.W.2d 48, 50–51 (Wis. Ct. App. 1994) (relying on § 314(A) of *The Restatement (Second) of Torts* and decisions from other jurisdictions to recognize the duty of jailers to exercise reasonable care to preserve health and life of prisoners). I am grateful to Jack Stephens for compiling this list of citations.

[213] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

individual's] freedom to act on his own behalf."[214] To put it another way, having chosen to respond to crime with incarceration, the state assumes a constitutional duty to keep people safe while they are inside.

As a practical matter, the weight of this duty is borne by the individual officers to whom the state has delegated the task of running the prisons. Yet *Kingsley* makes no mention of COs' duty of care, constitutional or otherwise. Nor does it consider in any meaningful way the nature of the affirmative obligation this duty entails. Instead, *Kingsley* remains extremely deferential to COs. In this way, as we will see, *Kingsley* invites factfinders to assess defendants' conduct through the same morally questionable lens *Whitley* ultimately endorsed.

B. THE PROBLEM WITH *WHITLEY*

As already noted, for plaintiffs to prevail under *Whitley*, defendants must be found to have "evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur."[215] Absent "a showing that there was no plausible basis for the officials' belief that th[e] degree of force was necessary," the claim will fail.[216] *Whitley* is emphatically not a reasonableness standard; indeed, to make certain that courts do not "critique in hindsight" COs' decisions to use force, "mere dispute[s] over the reasonableness of a particular use of force or the existence of arguably superior alternatives . . . . should not [even] go to the jury."[217]

With this stipulation, the *Whitley* Court confers an extraordinary degree of autonomy and authority on precisely those state actors whose conduct most requires constitutional scrutiny. Compounding the problem, as we have seen, is that the very experience of working in a prison can promote a blindness to the humanity and individuality of those who are incarcerated, thereby fostering a moral psychology likely to incline COs to use force unnecessarily.[218] In *Whitley*, the Court exhibits its own blindness—specifically, an inability to recognize these toxic dynamics and the way they can prompt the ready use of excessive force. Failing to understand the reality on the ground (or perhaps simply indifferent to it[219]), the Court strips constitutional review courts almost entirely of their authority to regulate

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214 *Id*. at 200.

215 Whitley v. Albers, 475 U.S. 312, 321 (1986).

216 *Id.* at 323.

217 *Id.* at 320, 322.

218 *See supra* Section I.A–B.

219 *See generally* Dolovich, *Coherence*, *supra* note 23 (describing the Court's dispositional hostility towards incarcerated plaintiffs).

force in prison. In doing so, *Whitley* shields COs' conduct—no matter how grossly unreasonable—from judicial scrutiny so long as they could possibly have had some security-based justification for their conduct, even when a non-forceful response would have sufficed and regardless of the degree of force used.[220]

There is no denying either the real potential for violence by some prisoners or the fact that COs will sometimes be forced to act in haste if they are to prevent serious harm. Yet neither point justifies insulating COs' decisions to use force from ex post review. They are simply two key factors that should inform a court's ultimate judgment as to the appropriateness of defendants' actions. The alternative to *Whitley*'s subjective approach—a reasonableness standard—would require courts to view the matter from the perspective of a reasonable person in the defendant's situation. It is, in other words, the circumstances in which the defendant found herself that would form the baseline against which her conduct would be assessed. As the *Kingsley* Court recognized, far from crowding out or minimizing any danger COs may have faced in an emergency or the pressure under which they may have labored when making split-second decisions, any judicial inquiry into the reasonableness of an officer's force would necessarily take these central aspects of the actor's situation into account.[221]

Instead, *Whitley* conditions liability on a finding that defendants knew their own force to be unjustified, effectively constitutionalizing COs' beliefs as to when force is necessary.[222] At the best of times, this move would be deeply inappropriate. COs are not sovereigns, possessed of their own inherent authority. They are agents of the state, holding whatever power they

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[220] *See Whitley*, 475 U.S. at 323 (finding liability foreclosed unless "there was no plausible basis for the officials' belief that th[e] degree of force [used] was necessary"); *see also id.* at 312 ("The infliction of pain in the course of a prison security measure . . . 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.").

[221] *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (explaining that, when assessing whether a defendant should have known of the risk his conduct created, a factfinder should consider "the nature and purpose of his conduct and the circumstances known to him"); RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."); *see also* Kingsley v. Hendrickson, 576 U.S. 389, 399 (2015) (explaining that "a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer").

[222] Schlanger offers a compelling critique of *Whitley*'s subjective standard on other grounds, including that it is very hard for incarcerated plaintiffs to prove what was in the heads of COs when they acted, and that COs can easily manufacture pretextual justifications for their conduct that are hard to disprove. *See* Schlanger, *supra* note 166, at 391–92.

have only because the state, not being a natural person, cannot act for itself. In a liberal democracy, any delegation of state power comes with an implicit caveat: it may be used only within constitutional limits. But such power, once conferred, cannot be easily cabined. There is always a danger it will be abused. And this danger is especially great in prisons, where high walls and a judicially protected culture of secrecy[223] make effective real-time oversight impossible[224]—and where COs are primed to exaggerate the degree of danger a given person poses and to discount any potential harm their own force will likely cause.

It is for these reasons that safeguards are needed against the possibility of such abuse, safeguards that must include both (1) constitutionally grounded standards for defining ex ante when force is appropriate and (2) effective mechanisms for ex post review. These safeguards will allow judges and juries—and any policymaker or private citizen inclined to pay attention—to identify and condemn those instances when, judged against extant standards, uses of force were unconstitutionally excessive. The alternative would leave people who lack either the possibility of exit or the right of self-defense at the mercy of state officials at once primed to regard prisoners' safety with callous indifference and knowing themselves free to act with impunity. Yet alarmingly, thanks to *Whitley*, it is precisely this troubling scenario that defines the current legal landscape.

C. *KINGSLEY V. HENDRICKSON*: A STEP IN THE RIGHT DIRECTION

In *Kingsley*, the Court declined to apply *Whitley*'s "maliciously and sadistically" standard to Fourteenth Amendment excessive force claims brought from jail.[225] Instead, it held that pretrial detainees need only show that the physical force used against them was objectively unreasonable.[226] On this alternative approach, it is irrelevant that the defendants themselves believed their conduct to have been appropriate. Under *Kingsley*, the central inquiry is instead whether a reasonable officer would have thought the force

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[223] *See* Pell v. Procunier, 417 U.S. 817, 834–45 (1974) (holding that journalists have no First Amendment right of access to state carceral institutions beyond that enjoyed by members of the general public); Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974) (same for federal prisons); Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978) (holding that corrections officials have total discretion to limit public and media access to the facilities they administer).

[224] Dolovich, *Failed Regulation*, *supra* note 13, at 157; Sharon Dolovich, *Mass Incarceration*, *Meet COVID-19*, U. CHI. L. REV. ONLINE *28–30 (Nov. 16, 2020), https://ssrn.com/abstract=3766415 [https://perma.cc/Y7L6-NHZ6] [hereinafter Dolovich, *Mass Incarceration*].

[225] *See Kingsley*, 576 U.S. at 396–97.

[226] *Id*.

excessive.[227] *Kingsley* thus shifts the focus away from defendants' subjective beliefs and toward external consideration of the propriety of defendants' conduct.

Viewed doctrinally, this is a move in the right direction, for at least four reasons.[228] First, as we have seen, COs are primed to discount the harm physical force inflicts on the individuals targeted for such treatment and to exaggerate the risks posed and thus the need for force.[229] To defer to subjective assessments shaped by these dynamics would allow this morally skewed perspective to fix the limits of constitutional protections for those in custody. In theory, an external standard would negate this troubling effect.

Second and relatedly, a reasonableness standard allows factfinders to reach their own conclusions as to whether force was warranted. In this way, *Kingsley*'s external standard opens the way for COs' conduct to be examined in light of the relevant constitutional values and thus makes possible meaningful enforcement of basic constitutional protections.

Third, *Kingsley*'s standard makes clear that, if COs intentionally use violence against those in their custody, they are obliged to ensure that their decision to do so is a reasonable one. This burden, it is hoped, would encourage reflection prior to resort to physical force. If, before acting, COs were to take care to determine whether any nonviolent alternative response would serve as well, this practice should lead to an overall decline in the number and scale of CO assaults on prisoners.

Fourth and finally, a reasonableness standard would allow incarcerated plaintiffs in excessive force cases to argue that defendants' actions were unconstitutional without having to risk provoking jury hostility.[230] In general, uniformed officers make highly sympathetic and convincing witnesses,[231] and the *Whitley* standard effectively forces plaintiffs to accuse defendants of malice and sadism in order to prevail. To be able to characterize an officer's conduct, not as malicious and sadistic, but simply as unreasonable under the circumstances should go some way toward helping plaintiffs overcome a profound structural litigation advantage that COs otherwise enjoy.

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[227] *Id.* at 395 (explaining that, as to the question of whether "the defendant's physical acts in the world" involved "force that was 'excessive,' . . . the relevant standard is objective not subjective").

[228] This list is not intended to be exhaustive.

[229] *See supra* Section I.B.

[230] I am grateful to Alan Mills for this point.

[231] Rachel Kincaid, *Mass Incarceration and Misinformation: The COVID-19 Infodemic Behind Bars*, 19 U. ST. THOMAS L.J. 323, 351 n.201 (2023) ("And just like juries want to believe law enforcement in criminal trials, and don't trust defendants, they're no more likely to believe those defendants once they've been convicted, and their bias in favor of law enforcement translates to wanting to believe prison officials.").

D. OBJECTIVELY UNREASONABLE PHYSICAL FORCE: CRUEL AND UNUSUAL PUNISHMENT?

For the reasons just canvassed, even in its current form, *Kingsley*'s reasonableness standard would represent a considerable improvement, both practically and normatively, over *Whitley*'s subjective approach. As a doctrinal matter, *Kingsley*'s holding applies only to Fourteenth Amendment claims brought by pretrial detainees from jail.[232] Yet as *Kingsley* itself seemed to recognize, the same objective unreasonableness standard could as readily be applied to Eighth Amendment claims brought from prison.[233] Indeed, writing for the majority in *Kingsley*, Justice Breyer effectively refuted *Whitley*'s central ground: that anything less than "maliciously and sadistically" would afford insufficient deference to COs, who must sometimes make decisions "in haste, under pressure, and frequently without the luxury of a second chance."[234] And if, as the Court has long assumed,

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[232] *See Kingsley*, 576 U.S. at 400 ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"). Doctrinally speaking, treating conditions claims brought by pretrial detainees differently than those brought by people convicted of crimes makes sense, since people who have yet to be convicted of anything cannot be constitutionally punished, much less punished in a way that is cruel and unusual. *See supra* note 101 (explaining why, when excessive force claims are brought by pretrial detainees from jail, the appropriate constitutional vehicle is the Fourteenth Amendment Due Process Clause and not the Eighth Amendment Punishments Clause). The practical problem, as Schlanger rightly notes, is that "of the nearly 750,000 people housed in American jails, over a third are convicted prisoners." Schlanger, *supra* note 166, at 425. For this reason (among many others), it makes sense to apply the same standards to both institutions. Schlanger argues that for both conditions challenges and excessive force claims, that standard should be objective unreasonableness. *See id*. I agree, although with the major caveat that the standard of objective reasonableness should be understood consistently with the argument I present in Sections II.D–E below.

[233] Writing for the Court in *Kingsley*, Justice Breyer strongly indicated that at least five justices were open to revisiting *Whitley* in light of *Kingsley*:

> We acknowledge that our 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.

Kingsley, 576 U.S. at 402. Since then, changes in the Court's make-up have altered the calculus entirely, making it improbable in the extreme that there will be a successful challenge to *Whitley* in light of *Kingsley* any time soon.

[234] Whitley v. Albers, 475 U.S. 312, 320 (1986); *Kingsley*, 576 U.S. at 399–402; *see also* Schlanger, *supra* note 166, at 403–04, 426 (arguing that *Kingsley*'s reliance on *Bell v. Wolfish*, which established an objective standard for assessing when jail conditions constitute punishment, also undermines *Whitley*'s conceptual foundations).

jails and prisons pose equivalent administrative challenges,[235] *Kingsley*'s reasoning in this regard should apply equally to prisons.

Some, however, may object that, for all *Kingsley*'s greater appeal, any move to replace *Whitley* with *Kingsley* for the Eighth Amendment context would be foreclosed by the constitutional text itself—perhaps most obviously by the requirement that, to come within the ambit of the Eighth Amendment, the challenged treatment must constitute "punishment."[236] In the 1991 case of *Wilson v. Seiter*, the Court maintained that "punishment is a deliberate act intended to chastise or deter"[237] and concluded that, if the treatment prisoners receive is to count as punishment, "some mental element must be attributed to the inflicting officer."[238] Three years later, in *Farmer v. Brennan*, the Court held that, to prevail on Eighth Amendment prison conditions claims, the requisite mental state showing was the equivalent of criminal recklessness.[239] *Farmer* grounded this holding in *Wilson*'s theory of Eighth Amendment punishment,[240] a theory Thomas Landry has labeled "subjectivist."[241]

On its face, the subjectivist theory of punishment seems to preclude Eighth Amendment liability in cases finding only objectively unreasonable uses of physical force.[242] On the Court's logic, if a CO subjectively believed her conduct necessary to achieve a legitimate institutional interest, she would lack any punitive purpose. As a result, any force she used would not constitute punishment, and the Eighth Amendment Punishments Clause would not apply.

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[235] *See supra* notes 202–203.

[236] U.S. CONST. amend. XIII.

[237] 501 U.S. 294, 300 (1991) (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

[238] *Id.* at 300; *see also id.* at 301–02 ("An intent requirement is either implicit in the word 'punishment' or it is not; it cannot be alternately required and ignored as policy considerations might dictate.").

[239] *See* 511 U.S. 825, 837 (1994) ("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."); *see also id*. at 839 (explaining that the Court's "subjective approach isolates those who inflict punishment").

[240] *See id*. at 838 ("It was no accident that we said in *Wilson* . . . that Eighth Amendment suits against prison officials must satisfy a 'subjective' requirement.").

[241] Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1616–20 (1996).

[242] In *Whitley*, Justice O'Connor found that force against prisoners "does not purport to be punishment at all." Whitley v. Albers, 475 U.S. 312, 319 (1986). But this notion is at odds with the more explicit theory of Eighth Amendment "punishment" the Court adopted in later cases, so I leave it to one side here.

Yet on further reflection, the subjectivist theory proves an unconvincing interpretation of punishment for Eighth Amendment purposes. For one thing, as Margo Schlanger notes, "many consequences of criminal misbehavior that are indisputably part of the punishment are not 'intended to chastise or deter.'"[243] Furthermore, as she shows, in other cases, including *Bell v. Wolfish* and *Kennedy v. Mendoza-Martinez*, the Court itself construes criminal punishment in ways at once consistent with an objective standard and wholly unconstrained by *Wilson*'s subjectivist view.[244]

But there is a still more basic problem with the Court's subjectivist theory of punishment for the Eighth Amendment context. As I have argued elsewhere,[245] criminal punishment is not inflicted by individuals, even individuals acting on behalf of the state. It is instead produced collectively by a series of state officials acting on behalf of the set of linked institutions—legislature, police, prosecutors, courts, and prisons—that together generate and carry out a stipulated criminal penalty. This characterization is indisputably true of the treatment prisoners receive while incarcerated. The terms of prisoners' confinement are fixed by the state Department of Corrections (DOC) pursuant to legislatively delegated authority to administer the prison terms imposed by the sentencing court. The sentencing itself is the moment at which the state's clear intent to punish—to "chastise or deter"—is explicitly manifested. And also at that moment, state officials collectively begin taking the steps that will together ensure that, for the length of the stipulated term, the person now to become the state's prisoner will remain locked in their assigned institution under the supervision of COs hired, trained, and assigned to their posts by the DOC.

COs are thus only able to use excessive force in the first place because a series of official decisions placed them in a position to do so. For this reason, when COs use violence against prisoners, it is irrelevant that the inflicting officers themselves might have thought the force warranted, and thus lacked the subjective intent to punish. As the Court itself recognized in *Ingraham v. Wright*, "[p]rison brutality"—which includes force inflicted for disciplinary purposes—is "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject

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[243] Schlanger, *supra* note 166, at 386–87 (discussing restitution, which "is intended to make victims whole" and further noting that, "[i]n the era of self-supporting or profit-making prisons, sentences of hard labor were intended to promote profitable use of prison labor").

[244] *See id.* at 373–77 (discussing *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)); *id.* at 387–88 (discussing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

[245] *See* Dolovich, *Cruelty*, *supra* note 8, at 895–910.

for Eighth Amendment scrutiny."[246] To somehow imagine that COs' use of physical violence against prisoners does not in all instances constitute part of the punishment intentionally imposed by the state requires a degree of sophistry inconsistent with a good faith effort to construe the Eighth Amendment's proper scope.

What, however, of "unusual"? The Eighth Amendment Punishments Clause forbids the infliction of "cruel and *unusual* punishment."[247] Given the conjunctive "and," a literal reading of "unusual"—as something out of the ordinary, "uncommon in amount or degree"—may seem to suggest that, so long as the use of gratuitous force in prison is sufficiently widespread, it will necessarily pass constitutional muster however unreasonable it may be.[248] But this notion cannot be right. Whatever his state of mind, if an officer beats a prisoner to a bloody pulp, it can be no defense to constitutional liability that the same thing routinely happens in prisons all over the country. In this sense, excessive force is like those other "barbaric punishments" the Court has long held to be per se unconstitutional under the Eighth Amendment, "such as the rack, the thumb-screw, the iron boot, the stretching of limbs and the like."[249] Even *Whitley* (rightly) presumes the irrelevance of pervasiveness as a factor in judging force unconstitutionally excessive; under *Whitley*, defendants found to have used force "malicious and sadistically for the very purpose of causing harm" would find no quarter even should they show that COs in prisons all over the country habitually do the same.[250]

To this, it might be objected that "unusual," being part of the text of the governing provision, must necessarily have some limiting effect on the scope of COs' constitutional obligations regarding the use of force. But the strongest case as to the historical meaning of "unusual" in the Eighth Amendment context appears to have little purchase as to the treatment of people incarcerated as punishment. As John Stinneford, the preeminent scholar of the Eighth Amendment's original meaning, has shown, "[a]t the time the Bill of Rights was adopted," for purposes of "the Cruel and Unusual

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[246] 430 U.S. 651, 669 (1977) (quoting Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)).

[247] U.S. CONST. amend. XIII. (italics added).

[248] *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?* 87 WASH. U. L. REV. 567 (2010).

[249] Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (quoting O'Neil v. Vermont, 144 U.S. 323, 339 (1892)).

[250] *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986). The use of force is hardly unique in this respect. As a mountain of caselaw rightly affirms, the fact that grossly inadequate medical care or systemic institutional failure to prevent sexual assault in custody may be ubiquitous in American prisons—and thus not "unusual" in the semantic sense of "rarely occurring"—cannot be taken to render these conditions constitutionally adequate.

Punishments Clause," the "word 'unusual'" was understood to mean "contrary to long usage."[251] At first blush, this understanding might seem to suggest that, were excessive force against the incarcerated shown to be a long-standing practice in custodial settings, it could not be judged unconstitutional since it is not "contrary to long usage." Yet historically, as Stinneford's discussion makes clear, the concern with the infliction of "unusual" punishment related exclusively to penalties explicitly meted out as criminal sentences.[252] The specific worry Stinneford excavates, and which his analysis suggests informs the original meaning of "unusual," was not primarily focused on the treatment of the imprisoned. Instead, the concern seems to have been with the possibility of future cruel adaptations to generally accepted forms of criminal penalties, resulting in punishments of an atypical character.[253]

When considering the meaning of "unusual" for Eighth Amendment purposes, this emphasis on criminal sentences makes sense. When judges impose criminal penalties, the substance of these penalties is out in the open, available for public analysis, criticism, and debate. If certain penalties imposed for particular offenses persist over time, they may in some sense be thought to reflect the will of the polity.

By contrast, for as long as there have been prisons and jails, what has gone on inside has been almost entirely hidden from public view, leaving

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[251] John F Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1767 (2008).

[252] According to Stinneford, punishments that were considered "unusual" within the common law meaning at the time the Bill of Rights was adopted

> fell into three main categories: (1) punishment practices that were either entirely new or were foreign to the common law system, including . . . those that were used in civil law jurisdictions; (2) punishments that were newly married to crimes with which they had not traditionally been associated . . .; and (3) traditional punishments that had fallen completely out of usage and were then revived . . . . In each case, the punishment was presumptively unjust because it attempted to replace "reasonable" punishment practices that had developed over a very long period of time with something that was either new, foreign, or previously tried and then rejected.

Id. at 1745–46.

[253] The focus on penalties imposed as punishment for criminal offenses was evident both during the ratification of the Virginia Declaration of Rights and during the debate over the Bill of Rights in the First Congress. *See id.* at 1808. As Stinneford recounts, during the debate in the First Congress over the Bill of Rights, Samuel Livermore famously expressed the view that "it is sometimes necessary to hang a man, [and] villains often deserve whipping, and perhaps having their ears cut off." *Id.* Livermore was explicitly concerned with the proposed limit, not on unusual punishments, but on cruel ones. *See id.* ("[A]re we, in [the] future, to be prevented from inflicting these punishments because they are cruel?" (quoting 1 ANNALS OF CONGRESS 439 (Joseph Gales ed., Washington, Gales & Seaton 1834))). But Livermore's emphasis on criminal sentences was consistent with the general concerns Stinneford associates with "unusual" punishments.

prison officials free to abuse their power with virtually no external check.[254] It was not until the 1970s that federal courts began to scrutinize the conditions in American prisons,[255] and what they found, as Justice Brennan succinctly put it, were "tales of horror."[256] The decades since have witnessed strenuous efforts by prison officials to keep what happens behind the walls shrouded in secrecy.[257] Whatever may be encompassed by the term "unusual" for purposes of the Eighth Amendment Punishments Clause in sentencing, it cannot possibly be read to validate the unjustified use of physical violence against prisoners on the grounds that, for decades, successful machinations by prison officials aiming to avoid external scrutiny have enabled such gratuitous violence to persist.

The normative heart of the Punishments Clause—and the real issue for constitutional review of excessive force claims brought by incarcerated plaintiffs—lies in the Eighth Amendment's prohibition on cruelty.[258] In determining the constitutional limits on force against prisoners, the question is when such treatment may be said to be cruel. At no point has the Court explicitly framed the inquiry in these terms,[259] a remarkable lacuna in cases purporting to implement Eighth Amendment imperatives.

Admittedly, at least implicitly, *Whitley*'s "maliciously and sadistically" standard acknowledges cruelty as the guiding norm for Eighth Amendment

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[254] *See* Dolovich, *Failed Regulation*, *supra* note 13, at 161 (describing the almost total freedom from external scrutiny carceral institutions enjoyed well into the 20th century).

[255] *See* Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 135–36 (Meghan J. Ryan & William W. Berry III eds., 2020) [hereinafter Dolovich, *Evading the Eighth Amendment*].

[256] Rhodes v. Chapman, 452 U.S. 337, 356 (Brennan, J., concurring); *see also* Dolovich, *Evading the Eighth Amendment*, *supra* note 255, at 157–58 (discussing living conditions in American prisons, especially in the South, when federal judges first began hearing prison conditions challenges in the 1960s and 1970s).

[257] *See* Dolovich, *Mass Incarceration*, *supra* note 224, at **29–30 (describing and condemning the "official culture of secrecy that has long kept the public from having a full and accurate picture of what goes on inside prisons and jails").

[258] *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) ("At bottom . . . the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments."); *id.* at 382 (Burger, C.J., dissenting) ("The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment."); *see also* Dolovich, *Cruelty*, *supra* note 8, at 883 ("Although the [Eighth Amendment's Punishment] Clause prohibits cruel and *unusual* punishment, its normative force derives chiefly from its use of the word *cruel*.").

[259] *See* Dolovich, *Cruelty*, *supra* note 8, at 889 ("[T]o date, the Supreme Court has avoided consideration as a constitutional matter of when prison conditions are properly judged cruel.").

analysis. And sadistic conduct being "[t]he central case of cruelty,"[260] *Whitley* may be thought to offer at least a partial account of when force against prisoners crosses the line. If so, however, *Whitley*'s standard is plainly underinclusive.[261] If sadism—taking pleasure in the suffering of others—is the most obvious form of cruelty, it is by no means the only one. For our purposes, of perhaps greater import is the cruelty that attends callous indifference to others' pain. That is, people who are not sadistic can still be cruel when they are "insensitive to the suffering they inflict, unmoved by it, as if they were unaware of it or failed to appreciate it *as suffering*."[262]

As philosopher Tom Regan observes, "[s]ome cruel people . . . seem not to feel anything. Their cruelty is manifested by a lack of what is judged appropriate feeling, as pity or mercy, for the plight of the individual whose suffering they cause."[263] Regan terms this disposition "brutal cruelty[,]" providing a label for an attitude that philosophers of cruelty almost uniformly regard as a heartland case of that morally troubling posture.[264]

To be sure, there will be sadistic COs, as there are sadists in all walks of life.[265] And because COs wield an extremely high degree of power over people in prison, sadistic COs will pose an especially great threat to prisoners' physical and psychological safety. But given the institutional dynamics of the modern American prison, it is the cruelty born of callous

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[260] Tom Regan, *Cruelty*, *Kindness*, *and Unnecessary Suffering*, 55 PHIL. 532, 533–34 (1980).

[261] *See supra* Section II.B (discussing *Whitley*'s standard and its shortcomings).

[262] Regan, *supra* note 260, at 534. John Kekes makes a similar point. As he puts it:

> [T]o be a cruel person it is not necessary to know that the relevant action will cause pain to the victim, for the agent's indifference to the victim's pain may be so extensive as to preclude awareness of the misery the action inflicts. Of course, if the agent takes delight in the pain of the victim, then the effect of the action must be known, otherwise it could not delight. Cruelty thus may be ascribed to human agents both when they know what they are doing and when they do not. The point of the condemnation involved in saying that an agent is cruel may be to assign blame for not knowing what the agent ought to know, namely, that his or her habitual actions regularly cause suffering.

John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834, 837 (1996) (emphasis added).

[263] *See* Regan, *supra* note 260, at 534. Seemingly blind to this reality, by prohibiting only force used "maliciously and sadistically," *Whitley* winds up validating as within constitutional bounds force that, although not sadistic, is cruel nonetheless. *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

[264] *See* Regan, *supra* note 260, at 534; *see also*, *e.g.*, Kekes, *supra* note 262, at 838 (defining cruelty as "the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims"); Dolovich, *Cruelty*, *supra* note 8, at 925 n.174 (canvassing the literature and finding agreement on this point among philosophers of cruelty).

[265] *But see* Shklar, *supra* note 157, at 29 (observing that "sadistic individuals may flock to occupy positions of power that permit them to indulge their urges").

indifference that is likely the more frequent driver of excessive force against prisoners. This is the cruelty that comes of regarding people as less than human, and consequently of discounting their pain and suffering or being blind to it entirely. As we have seen, in American prisons, even COs who are not sadistically inclined will often come to develop just such a studied indifference to prisoners' suffering,[266] leading them to shows of brutal cruelty and thus to unconstitutionally excessive force.[267] Failures of care reflecting callous indifference to the harm excessive force inflicts thus qualify as cruel and transgress constitutional limits whether or not responsible officers had a "plausible basis for the belief that th[e] degree of force was necessary."[268]

In short, nothing in the text of the Punishments Clause would foreclose a liability standard of objective unreasonableness for Eighth Amendment excessive force claims. This brings us back to *Kingsley*, and the potential impact of importing its reasonableness standard into the Eighth Amendment context. Section II.C offered reasons to think such a move would represent a marked improvement over *Whitley*, both practically and normatively. The question that remains is whether this shift alone would be enough to insulate excessive force determinations from the normative hostility that too often shapes officers' attitudes towards the incarcerated. And the answer, it turns out, is no. Indeed, this shift was not even enough to make a difference in *Kingsley* itself.[269] If there is to be meaningful judicial enforcement of the constitutional rights of incarcerated people against undue violence at the hands of state actors, an objective reasonableness standard is not enough—at least not without clearly specifying the appropriate normative disposition of the reasonable CO towards those in custody.

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[266] *See supra* Section I.A.

[267] In this way, it is both individual COs and carceral institutions as a whole that may be judged brutally cruel towards those in custody. *See* Dolovich, *Cruelty*, *supra* note 8, at 926 (arguing that "[i]f an institution cannot be 'indifferent' in an emotional or psychological sense, it may still arguably be so in a structural sense, when, by virtue of its design and operation, it systematically subjects some subset of the population to needless and avoidable suffering").

[268] *Whitley*, 475 U.S. at 323. Nor would the historical record suggest otherwise. Stinneford's investigation into the original meaning of "cruelty" would shift the terms of the doctrine even farther from the *Whitley* standard than the account offered here. According to Stinneford, the original understanding of "cruel" in the Eighth Amendment context was not "delighting in, or indifferent to the pain of others, but rather "unjustly harsh." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 445 (2017).

[269] *See infra* text accompanying notes 270–275.

E. REASONABLENESS AS A MORAL CONCEPT

After *Kingsley* was decided, the case went back for retrial on the newly announced standard of objective unreasonableness.[270] Again, the *Kingsley* defendants would have maintained that their conduct was necessary to preserve institutional security and that, when they acted, they had been in fear for their safety.[271] As we have seen, given the facts of the case, these claims should have been hard to swallow.[272] Yet on remand, although properly instructed on the new objective standard,[273] the jury again found for the defendants and Kingsley's claim was dismissed.[274]

Kingsley is only one case, and any trial outcome will always be a function of many variables.[275] Still, what happened on remand fits a well-worn pattern of cases in which juries, although hearing evidence of gratuitous violence by uniformed officers against the citizens they are sworn to protect, ultimately judge the force reasonable.[276] In recent years, much work has been

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[270] Kingsley v. Hendrickson, 801 F.3d 828 (7th Cir. 2015) (reversing and remanding for a new trial in light of the Supreme Court's holding in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)).

[271] Kingsley v. Conroy, No. 10-832 (W.D. Wis. filed Sept. 28, 2012) (granting plaintiff's "motion to exclude evidence of other acts, discipline, grievances, lawsuits and threats," although finding that, because "defendants' state of mind is a relevant issue," defendants were entitled to introduce evidence that their actions were "not the product of malicious intent, but [instead] based upon their legitimate considerations of state safety and institutional security and their concern that plaintiff would engage in assaultive behavior").

[272] *See supra* text accompanying notes 125–126.

[273] Specifically, the *Kingsley* jurors were directed on remand to decide whether each defendants' use of force "was unreasonable from the perspective of a reasonable officer [in the defendants' circumstances]." Kingsley v. Hendrickson, 576 U.S. 389, 394 (2015).

[274] Jury Verdict, Kingsley v. Hendrickson, No. 10-cv-832-jdp (W.D. Wis. Feb. 26, 2016), ECF 234.

[275] *See* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1543–45 (2020). To name just one variable, litigants in Kingsley's position will always face an uphill battle to convince jurors of their version of events because of juries' inclination to credit the testimony of uniformed officers over that of incarcerated plaintiffs, who, even when not on trial for their crimes, will often be met by juries with suspicion and mistrust. *See* Kincaid, *supra* note 231, at 351 n.201.

[276] That uniformed officers facing allegations of excessive force are very often found to have acted reasonably is well recognized to be a standard outcome when claims are brought. As Amna Akbar observes in the related context of police violence (where the governing standard for excessive force claims is also objective unreasonableness, see Graham v. Connor, 490 U.S. 386, 395 (1989)): "[a]s a matter of blackletter law, . . . police may not use lethal force unless necessary. In practice, however, . . . when the use of force is challenged, more typically than not, it is found to be justified." Amna Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 361 (2015); *see also id*. (noting "[t]he persistent findings of [the] justification or propriety" of police violence, "whether through internal reviews by police departments, grand jury proceedings and trials, or civil rights litigation").

done to identify and explicate the political dynamics and consequent institutional failures that enable officers—police and COs alike—to evade legal liability for conduct plainly amounting to excessive force.[277] Here, the goal is to explain one particular piece of the puzzle: how exactly the specific doctrinal standard of "objective unreasonableness" so persistently yields verdicts favorable to defendants in cases alleging unconstitutionally excessive force.[278]

As will be seen, the problem is not inherent in the reasonableness standard itself. It instead arises from the failure to make explicit—and to insist on determinations grounded in—the relevant moral foundations of any legally entailed reasonableness assessment. Others have explored the way reasonableness standards smuggle in prevailing bias.[279] In what follows, I draw on some of that work—especially that of Mayo Moran[280] and Peter Westen[281]—to describe how this process operates in the excessive force context. I also build on this work to expose the particular pathologies that arise when the conduct being judged is that of uniformed officers. The aim

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[277] *See*, *e.g.*, JOANNA C. SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023) (systematically analyzing "the phalanx of shields that have been erected to protect the police" from liability for civil rights violations arising from excessive force, among other abuses of authority); Kate Levine, *Police Suspects*, 116 COLUM. L REV. 1197, 1200, 1212–27 (2016) (describing the procedural protections police officers receive when being investigated for police brutality or other forms of criminality, which "go far beyond the Fifth and Fourteenth Amendment protections that other suspects receive"); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 749, 762–67 (2016) (exploring some ways "in which police appear to receive favorable treatment when they become criminal suspects"); Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, ATL. MONTHLY (Aug. 2, 2019), https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832/ [https://perma.cc/H3WP-2EA2].

[278] The argument presented here applies equally to criminal proceedings turning on objective reasonableness. *See, e.g.*, James C. McKinley Jr. & J. David Goodman, *Basis for Case in Brooklyn Police Shooting: No Threat Led Officer to Fire*, N.Y. TIMES (Feb. 14, 2015), https://www.nytimes.com/2015/02/14/nyregion/in-police-shooting-of-akai-gurley-lack-of-threat-led-to-charges-against-officer.html [https://perma.cc/42XX-DSE6] (describing the prosecutor's argument in the case against NYPD Officer Peter Liang in the shooting death of Akai Gurley, to the effect that, under the circumstances, the decision to shoot had created "an unjustifiable risk of death . . . that a normal person—or in [this] case, another officer—should have been aware of").

[279] *See generally* MORAN, *supra* note 138; Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137 (2008); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists*, *Intelligent Bayesians*, *and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

[280] *See* MORAN, *supra* note 138.

[281] *See* Westen, *supra* note 279.

is to identify the steps necessary to realize the constitutional values that ought to drive the inquiry.

The specific puzzle is this: why is it that even those COs who seem plainly to have used gratuitous physical violence against those in custody are so often found to have acted reasonably?[282] To answer this question, we first need to clarify what exactly a reasonableness determination entails. Is it simply a finding that the actor acted as one might have expected most people to act in the same situation? If so, reasonableness should be read as "typical,"[283] "ordinary,"[284] or "statistically *average*,"[285] and defendants' conduct should be judged reasonable if the jury finds that most people in such circumstances would likely have done the same.

But framing the matter this way misapprehends the issue. Reasonableness is not a probability calculation. It is a *moral judgment*.[286] To say that someone acted reasonably is to judge that she acted appropriately under the circumstances, with appropriateness judged in light of the moral imperatives that should have governed her conduct.[287] This does not necessarily make it wrong to say that someone who acted atypically thereby acted unreasonably. Reasonableness determinations are always moral evaluations, but they often rely on an unspoken moral consensus. In many or

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[282] *See supra* note 276.

[283] Armour, *supra* note 279, at 790.

[284] Lee, *supra* note 279, at 389.

[285] Westen, *supra* note 279, at 157 (italics in original). As Westen puts it,

> "[R]easonableness" is not an empirical or statistical measure of how average members of the public think, feel, or behave. Average is not the same as right or appropriate. Regrettably, average persons have been known to think, feel, and behave very differently from the way the polity to which they are duty-bound believes they should, and when they do, they are answerable to the polity for their failings. Rather, reasonableness is a normative measure of ways in which it is *right* for persons to think, feel or behave—or, at the very least, ways in which it is *not wrong* for them to do so.

Id. at 138.

[286] *See id.* at 157; *see also id.* ("[R]easonableness is not a statistical matter, it is a normative matter."); *id.* at 138 ("[R]easonableness is a normative measure of ways in which it is *right* for persons to think, feel, or behave—or, at the very least, ways in which it is not *wrong* for them to do so."); Lee, *supra* note 279, at 495–96 ("Reasonableness under a positivist model means typical or common. A typical or common belief, however, is not necessarily a reasonable belief. At one time, most Americans believed there was nothing wrong with slavery.").

[287] This is only one sense in which the reasonableness determination is inherently normative. To take another example, judgments about appropriate conduct may also be shaped by normative assumptions about how different types of people ought to behave. *See, e.g.*, MORAN, *supra* note 138, at 92–128 (excavating the gendered character of cases assessing the reasonableness of actions by children, in which boys are far more likely than girls to be "allowed failures of prudence").

even most cases, the governing values are so commonsensical, so taken for granted, that there is no need even to advert to them to conclude that the defendant's conduct or beliefs were aberrant and thus inappropriate.

To see how collective judgments can rest on unacknowledged shared norms, take a standard hypothetical from first-year criminal law. Two drivers are speeding, weaving in and out of traffic and treating red lights like yield signs. Each driver strikes and kills a pedestrian. But in one case, a parent had been rushing their dying child to the hospital, while in the other, a teenager was showing off for his friends.[288] The legal question here is whether either driver is guilty of involuntary manslaughter, which requires a showing that defendants' conduct constituted a gross deviation from the standard of care a reasonable person would have observed in the same situation.[289] Typically, in determining liability, there is no need to excavate and explicitly name the values at issue, since students readily grasp the difference in culpability. They instinctively understand that every citizen bears a duty of care towards others, that reasonable actors prioritize human life and safety over all else, and that the criminal prohibition is intended to vindicate these preeminent norms.[290] On this measure, the teenager is plainly liable.

What about the parent? Here it depends—but again, a moral consensus may be formed without the need to explicitly articulate shared norms. It is, for example, well understood that parents bear an especial duty of care towards their children and also typically feel an all-consuming love for them. From this understanding, it may well be thought that a reasonable parent, finding their child's life to be at risk, would feel compelled to act in ways that threaten others' lives. At the same time, notwithstanding the exigency, a reasonable parent in this situation would still be expected to remain mindful of the life and safety of others and would still be culpable for any excessive risk-creating conduct. Even a parent frantic to save their child cannot speed through red lights in a downtown core at rush hour,[291] especially if non-lethal

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[288] *See* Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 106 (1996) (posing this hypothetical).

[289] This showing is required whether the governing mens rea standard for involuntary manslaughter is criminal negligence or criminal recklessness. MODEL PENAL CODE § 2.02(2)(c)–(d) (AM. L. INST., Commentaries 1985).

[290] Samuel Pillsbury captures these moral intuitions in his discussion of this hypothetical. As he explains, the teenager demonstrates "an attitude of indifference towards others." *See* Pillsbury, *supra* note 288, at 152. This attitude is "a morally culpable state" deserving censure. *Id.* Here, Pillsbury puts into words what many observers would instinctively feel about the case.

[291] In the criminal context, the Model Penal Code directs juries to find defendants negligent when they "should have been aware" that their conduct created "a substantial and

options had existed—for example, calling an ambulance.[292] External observers called upon to render judgment in such a case, whether as students or as jurors, might find it helpful to surface the normative foundations of these intuitions. But the governing norms being widely shared, they may well cycle through these same intuitions and arrive at a deeply held conclusion as to liability without ever needing to name the values driving their analysis. In short, in the ordinary course, the relevant moral considerations may remain unspoken and yet guide reasonableness determinations in appropriate ways.

What if the defendant held different moral priorities? Should this make any difference? Our teenaged driver may, for example, place greater importance on his image with his peers than on the lives of others. Could he argue that, regardless of what others may think, "given the nature and purpose of his conduct" his behavior was reasonable to *him*?[293]

Here, the answer is plainly no. A person is generally free to follow their own path, but only so long as their actions do not put others at risk. To say so, of course, is to assume the primacy of one set of values—the priority of human life and safety—over the alternative value system this defendant espouses. But asserting this moral hierarchy is not simply a matter of personal predilection. It is instead to insist upon respect for what Peter Westen describes as "the values . . . incorporated in[to] the statute at hand regarding the rights and duties of persons."[294] The primacy of human life and limb, along with the right to be free from unjustified harm by fellow citizens, forms the moral core of the criminal law of homicide. If the teenager in our vehicular manslaughter case were to defend his actions in terms of personal idiosyncratic moral views which prioritized his own popularity over the life and safety of others, he would be evincing a clear moral misunderstanding as

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unjustifiable risk." MODEL PENAL CODE § 2.02(2)(d), at 226 (AM. L. INST., Commentaries 1985). This standard calls not for a mathematical calculation but for a normative determination: "the jury must evaluate the actor's conduct and determine whether it should be condemned," *id.* § 2.02, at 237, with the question ultimately being whether the actor's disregard of the risk, "considering the nature and purpose of his conduct and the circumstances known to him, involve[d] a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.* § 2.02(2)(d), at 226. Even here, there is no explicit reference to the priority of human life and physical safety, likely because the paramount status of these values for the criminal law is so obvious as to not require mention.

[292] Context matters, of course. The option of calling an ambulance may not have been available for a parent in a rural setting at 3:00 a.m. But in that case, it would be less risky to race to the hospital heedless of speed limits, and thus less unreasonable to do so. Things can also get complicated in other ways, as when the ambulance is called to an underserved community known to have slow response times. An appropriately framed reasonableness inquiry would take all these factors into account.

[293] MODEL PENAL CODE § 2.02(2)(d), at 226.

[294] Westen, *supra* note 279, at 151.

to his legal obligations. Jurors would instinctively understand this to be so. And the judge, if she were so moved, might even opt to make the point explicitly, directing the jury to categorically reject any suggestion that improving one's social standing among one's peers could ever justify putting others at serious risk of physical harm.

Of course, if the jury selection process went terribly wrong, a jury might wind up full of people who shared the defendant's skewed values. In that case, the jury might well judge the teenager's driving reasonable.[295] But even here, there would be no real daylight between the moral foundations of the law and what a reasonable person would have done under the defendants' circumstances. Outside observers would rightly judge the jury to have gone badly astray and would readily conclude that, in sharing the defendant's twisted moral priorities, the jury also misapprehended the moral character of our collective legal obligations to fellow citizens.

However, such cases—those involving twelve jurors who just happen to share the defendant's obviously skewed values—will be rare. In practice, reasonableness determinations that undermine the law's governing moral priorities are more likely to result from two other pathologies. The first will occur when a defendant's moral commitments and priorities conflict with the moral foundations of the governing legal regime, *and* this morally mistaken perspective is widely shared, not just by a randomly selected jury full of moral outliers, but by society as a whole. The second problematic effect will arise when, although the defendant's commitments and priorities conflict with the moral foundations of the governing legal regime, the jury declines to closely scrutinize the defendant's conduct from the appropriate moral vantage point, thereby effectively validating as reasonable the conduct shaped by the defendant's morally indefensible perspective. These two dynamics may at times work in tandem, with some latent inclination by factfinders to sympathize with defendants' morally skewed perspective, disposing them to defer more readily to defendants' judgments as to the matter at hand. Notwithstanding this potential synergy, to adequately understand these effects requires examining each separately.

Consider first the possibility that a defendant's morally mistaken view is grounded in perspectives widely shared. To return yet again to our teenaged driver, it would be as if, on the one hand, there was a criminal prohibition against putting fellow citizens at substantial and unjustifiable risk of harm, and on the other hand, a majority of society believed that impressing one's friends is more important than preserving human life and safety. In

[295] If (as these jurors might think) impressing one's friends is the highest value, then a reasonable person in the defendant's situation would indeed have driven his car just as he did.

such a situation, what would it mean to say a defendant acted reasonably? If reasonableness were just a matter of what perspective is "typical" or "statistically average," and if a majority of citizens shared the priorities of our young status-conscious driver, his actions should be judged to have been reasonable, and no liability should lie.

But what would such a regime mean for society as a whole? For one thing, it would effect a fundamental moral change in the law itself, undermining the law's moral foundations. The prohibition on conduct putting others at grossly unreasonable risk of physical harm would remain on the books. It would, however, no longer embody the collective priority of preserving human life and protecting fellow citizens from the fear of unjustified harm by thoughtless others. Instead, the values vindicated by the law would be those actually driving outcomes—which on the present example would involve the priority of personal self-image over all else.

And there is still more at stake. In a rule of law society, it is the laws themselves that shape the moral foundations of society. Were reasonableness determinations informed, not by the law's animating values, but instead by popular predilections, the legal process would no longer be the means to ensure that all society's members act in ways consistent with the highest ideals of a liberal democratic society.[296] Where reasonableness assessments governed, the legal process would instead become a vehicle for manifesting the moral priorities of the majority, however morally questionable or even reprehensible those priorities might be. The effect would again be to undermine the political morality of society as a whole.

The image-obsessed teenager is a fanciful example. To better see the force of the point, imagine instead that in a vehicular homicide case, the defendant based his reasonableness defense on the lesser value of the life he took, on the ground that his victim was a member of a popularly disfavored minority. If this pernicious moral view were allowed to infect the reasonableness assessment, it would compromise the law's fundamental commitment to affirming the equal moral worth of all society's members. But what if this discriminatory view—this moral mistake—were shared by a wide swath of citizens? Would that be enough to render it reasonable?

This brings us to the heart of the matter. On the one hand, legal systems committed to moral equality would require juries to take this paramount

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[296] *See* Dolovich, *Legitimate Punishment*, *supra* note 148, at 312 n.11, 314 (defining as liberal democracies those polities claiming a commitment to the "baseline liberal democratic values," including "individual liberty, dignity, and bodily integrity; limited government; [and] the primacy and sovereignty of the individual" and arguing that "on this definition, the United States, the political life of which is routinely punctuated with the rhetorical invocation of these very values, qualifies as an aspiring liberal democracy") (internal quotation marks omitted).

value as a nonnegotiable starting point. On the other hand, as Mayo Moran observes, "discrimination is . . . constituted by 'widely shared' . . . mistakes about the equal worth of others," and "it can be very difficult to recognize the moral quality of the mistake when it is a mistake that is commonly made."[297] It is society's perennial collective challenge to overcome the pervasiveness of such moral mistakes across social institutions, public and private alike. For present purposes, the question is narrower: which values ought to guide a reasonableness determination in a court of law? This is where it matters that, at bottom, reasonableness is a moral judgment. Any law that imposes a duty of reasonableness will rest on the moral foundation giving shape to the "rights and duties of persons"[298]—a foundation that, in a constitutional democracy, is necessarily grounded in equality and reciprocity.[299] For this reason, as Moran observes, "[t]he reasonable person, on this view, could not be a racist or a sexist"; where "a commitment to the equal moral worth of all is central to" a society's legal foundation, "no beliefs inconsistent with this baseline could be attributed to the reasonable person."[300]

Reasonableness determinations thus necessarily entail a moral judgment. If the question is what values should drive the assessment, the answer lies in the purposes of the applicable law, and the "rights and duties of persons" the law instantiates in order to achieve those purposes.[301] As Westen explains, a finding of unreasonableness is a conclusion that the actor, "rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, . . . placed insufficient value on those interests."[302] In order to reach this conclusion, the factfinder must be able—and required—to assess the actor's conduct in light of the shared values the law itself is intended to manifest.[303]

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[297] MORAN, *supra* note 138, at 14.

[298] Westen, *supra* note 279, at 151.

[299] *See* ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 172 (1999) ("[T]he reasonable person is the one who interacts with others on terms of reciprocity."); *see also id*. at 199 ("Reasonableness is a description of the world from a particular perspective—the perspective of equality.").

[300] MORAN, *supra* note 138, at 284; *see also* Armour, *supra* note 279, at 788–89 ("The reasonableness inquiry . . . extends beyond typicality to consider the social interests implicated in a given situation . . . [T]he actual moral norm implicit in the reasonable man test is that blame is reserved for persons who fail to overcome character flaws that they can fairly be expected to surmount for the sake of important social interests.").

[301] Westen, *supra* note 279, at 151.

[302] *Id.*

[303] There may be some laws whose moral foundations are contested. But in such cases, the relevant inquiry will still be which values best capture the law's purposes, in order that reasonableness assessments might realize them.

So long as jurors' reasonableness determinations are so grounded, the fact that defendants' own views may be shaped by skewed or idiosyncratic normative inputs would not affect the outcome. And where the values the law instantiates are widely shared and respected, no special instruction would be required to direct the jury's deliberations. But when a defendant's judgment as to appropriate conduct for someone in their situation rests on a widely shared moral mistake at odds with the law's guiding values, there is a real risk that reasonableness determinations will undermine rather than vindicate the law's moral purposes. When this risk exists, courts cannot leave it to juries to apply the values the law is meant to realize. Instead, they must *explicitly surface* those values, to remind factfinders of the moral perspective they are expected to bring to bear in their deliberations, and to make clear that it is this perspective they must apply in reaching their conclusions.[304]

A second problem may also arise in the context of reasonableness determinations when defendants' moral priorities deviate from the governing moral purposes of the relevant law: in some cases, even if juries' own moral inclinations are consistent with the law's governing values, they may nonetheless opt to defer to defendants' own view of the matter. When this happens, juries wind up rendering judgments that affirm defendants' conduct as reasonable even when critical scrutiny of that conduct in light of the values the jurors themselves hold would strongly suggest otherwise. In such cases, it becomes irrelevant that the values driving defendants' conduct embodied the sorts of "mistakes about the equal worth of others" that the jurors would not themselves make.[305] The effect of uncritical deference to defendants' assessments of their own conduct would be the same as if jurors equally embraced defendants' skewed moral perspective; the judicial process will have helped to undermine both the law's moral foundations (by vindicating values antithetical to the law's animating purposes) and society's moral foundations (by directly repudiating the core ideals of a liberal democratic society as manifested in the governing law).

It bears emphasizing that, when factfinders assessing the reasonableness of defendants' conduct defer uncritically to defendants' perspectives, they effectively revise the doctrinal regime that is supposed to guide their deliberations. To be precise, they transform what is intended to be an objective inquiry as to the reasonableness of defendants' conduct into a subjective determination hinging on defendants' own understanding of their actions. When factfinders defer to defendants whose values are at odds with

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[304] We return to this necessary step, and how it should operate for the Eighth Amendment excessive force context, in Section II.F and Section III.C.

[305] MORAN, *supra* note 138, at 14.

the law's governing principles, it makes no difference that the juries' own moral compass may fully align with the moral orientation of the relevant law; the defendants' skewed perspective will ultimately shape legal conclusions. When this happens, the effect is the same as if jurors shared defendants' morally mistaken perspective—an undermining of the moral foundations of both the law and society itself. Even should factfinders not fully share defendants' skewed moral perspectives, to the extent that they do so at all, they will likely be more readily disposed to credit defendants' assertions that their own conduct was reasonable.[306]

F. *KINGSLEY* AND THE LIMITS OF REASONABLENESS

This, finally, brings us back to *Kingsley* and the matter of excessive force. As we have seen,[307] the force used against Kingsley could be construed as reasonable only if we were to (1) greatly discount the harm to Kingsley himself and (2) profoundly exaggerate the danger he posed. To judge the force used in that case as reasonable would therefore require effectively endorsing several troubling views: that the safety of incarcerated individuals is relatively unimportant; that simply by virtue of their imprisonment and regardless of the facts, people in custody are to be feared, and treated, as relentlessly, uncontrollably violent; and that the incarcerated are undeserving of COs' care and protection.

These notions should be moral non-starters. The state, in opting to incarcerate, bears a duty of care towards the fellow human beings we have collectively chosen to imprison, and as a practical matter, it is COs who are charged to fulfill this duty. The defendants' conduct in *Kingsley* proves comprehensible only if we deny outright that their duty of care extends to all the people in their custody. The self-evident inadmissibility of this notion is enough to condemn their behavior as at odds with how a reasonable CO, mindful of their constitutional obligations, would have acted in their situation.

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[306] This subtle moral dynamic may help explain the phenomenon of dispositional favoritism evident across judicial decisions in cases addressing prisoners' claims. *See* Dolovich, *Coherence*, *supra* note 23, at 316–40 (mapping the phenomenon of "dispositional favoritism" in the Supreme Court's prison law cases, which among other things leads the Court to "automatically presume[] good faith and expertise on the part of defendant prison officials" and to elevate "defendants' experience, perspectives and interests" while devaluating "plaintiffs' experiences, perspectives, and interests"). For an excavation and extended discussion of this phenomenon in the prison law context, see generally *id.*

[307] *See supra* Section I.C.

Yet when *Kingsley* was remanded for retrial on the newly-announced objective unreasonableness standard, the defendants again prevailed.[308] We are now in a position to make sense of this result, in which both potential pitfalls just explored likely played a role. First, there is the likelihood of shared moral mistake. The normative disposition COs too often display towards those in their custody—the hostility, the callous indifference, the blindness to any shared humanity—unfortunately resonates with society's typical moral attitudes toward the incarcerated. Given COs' daily exposure to the moral environment of the prison, we can expect the hostility and distrust many COs display towards prisoners to be deeper and more all-consuming than the generalized animus often expressed by members of society towards people who have been convicted of crimes.[309] But it is unfortunately also the case that the callous indifference that will often drive COs' excessive use of physical force is a morally mistaken attitude more widely shared. This situation is likely to have left the factfinders on remand in *Kingsley* open to accepting the morally questionable notions that Kingsley posed a danger in the moment and was thus himself to blame for what transpired, and therefore that defendants' conduct was wholly appropriate—even when that conclusion is very hard to square with the facts.

Second, there is the real possibility that jurors were inclined to defer to the defendants' view of the matter, thereby abdicating their own obligation to conduct an independent review of the facts. Most jurors—and most judges—will know little if anything about life inside carceral facilities.[310] But they *will* know that prisons are dangerous places and that COs have a hard and risky job.[311] They may thus conclude that they are not in a position to second-guess judgments made by those COs who were actually on the spot and needed to act.[312] Viewed in this light, the *Kingsley* jurors may simply have accepted defendants' narrative and their consequent insistence that their conduct was necessary without stopping to critically assess the facts (as we

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[308] Jury Verdict, Kingsley v. Hendrickson, No. 10-cv-832-jdp (W.D. Wis. Feb. 26, 2016), ECF 234.

[309] *See* Dolovich, *Failed Regulation*, *supra* note 13, at 162 (observing that COs' "normative disposition [toward the incarcerated] is of a piece with the animus that society in general feels towards those with criminal convictions").

[310] The almost universal exclusion from jury service of people with felony convictions—i.e. of those most likely to have an accurate sense of the carceral experience—helps reduce even further the likelihood that jurors will have any accurate sense of how prisons operate. For groundbreaking research on this issue, see generally JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM (2021).

[311] I thank David Sklansky for pushing me to address this point.

[312] *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506–07 (1963).

did in Section I.C[313]). And to the extent that COs' general moral disposition towards prisoners resonated with the jurors' own latent attitudes, the jury's readiness to defer may have been all the stronger.

If the *Kingsley* jurors were indeed hesitant at retrial to second guess the judgment of defendant COs on the ground of COs' perceived greater expertise, they would have been manifesting the deferential disposition that is pervasive in this area of the law. As we have already seen,[314] the idea that "courts are ill equipped to deal with the increasingly urgent problems of prison administration"[315] has long defined the Supreme Court's approach to cases involving prisoners.[316] Its impact is plainly visible in *Whitley*, in which Justice O'Connor signals at multiple points a greater confidence in COs' on-the-ground assessments than in courts' after-the-fact judgments.[317] In *Whitley*, Justice O'Connor condemns the very idea that either judge or jury would "freely substitute their judgment for that of officials who have made a considered choice," thereby implying that COs' "considered choices" should not be questioned, at least not by courts.[318] She emphasizes "the appropriate hesitancy" courts should display "to critique in hindsight decisions . . . made" by COs in the heat of the moment.[319] And, as has been seen, she insists that courts should give prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve institutional order and discipline and to maintain institutional security"[320]—language suggesting that prison officials and not courts know best what it takes to safely run the prisons. Taken together, these comments suggest that Justice O'Connor's insistence that

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313 *See supra* paragraphs surrounding notes 117–128.

314 *See supra* text accompanying notes 177–180.

315 Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

316 *See* Dolovich, *Forms of Deference*, *supra* note 177, at 253; *see also supra* note 306 (identifying the phenomenon of dispositional favoritism in the prison law context).

317 Perhaps nothing so plainly illustrates Justice O'Connor's readiness to credit the perspective of COs over that of courts as the way she treats the facts of *Whitley* itself. *Whitley* involved an appeal from a directed verdict for the defendants. Ordinarily, this posture demands that reviewing courts take the facts in the light most favorable to the nonmoving party—in this case, Albers. Yet as Justice Marshall observed in dissent, Justice O'Connor did the opposite, instead crediting the version of the facts presented by Captain Whitley and his codefendants, even though this version directly contradicted Albers' own testimony that the hostage was already out of danger and thus that no exigency existed when Kennicott fired the shots. *See* Whitley v. Albers, 475 U.S. 312, 330–32 (1986) (Marshall, J., dissenting). For Justice O'Connor, prison officials' greater expertise appears to have warranted departing even from standard judicial presumptions as to whose version of the facts courts should credit.

318 *Id.* at 322.

319 *Id.* at 320.

320 *Id.* at 321–22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

courts should not decide "mere dispute[s] over the reasonableness of a particular use of force or the existence of arguably superior alternatives"[321] stems at least in part from the view that, if COs assert the reasonableness of their actions, judges and juries can have no valid grounds for finding otherwise.

Yet one need not deny the potential for violence in prison, or the pressure officers will sometimes face to act in haste, or courts' relative lack of expertise in prison operations as compared with that of prison officials, to persist in regarding courts as able to make reasonableness determinations in cases involving claims of excessive force. *Of course* defendants in these cases will generally know better than courts what it takes to run the prisons. Judges are not COs. But nor are they doctors[322] or law enforcement officers[323] or for that matter ski racers,[324] or any other of the non-judicial professional roles that might be filled by the defendants who enter their courtrooms facing liability for unreasonable conduct. How then can courts decide cases challenging as unreasonable the conduct of these relative adepts, who will invariably understand the context at issue far better than any judge or typical juror? The same way they always do—by hearing testimony about the facts offered by experts and witnesses and considering those facts in light of the moral obligations defendants' conduct was supposed to manifest.

Kingsley too was ensnared in such unduly deferential thinking. Rather than directing courts to engage in robust critical assessment of defendants' conduct given the core values at stake, the *Kingsley* Court instead emphasized the need for judicial deference to COs' judgments. As Justice

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[321] *Id.* at 322.

[322] *See* Cross v. Huttenlocher, 440 A.2d 952, 954 (Conn. 1981) ("A physician is under a duty to his patient to exercise that degree of care, skill and diligence which physicians in the same general line of practice ordinarily possess and exercise in similar cases. To prevail in a malpractice case the plaintiff must establish through expert testimony both the standard of care and the fact that the defendant's conduct did not measure up to that standard."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 283 (2d ed. 2023), Westlaw DOBBLOT § 283 (explaining that "medical malpractice actions are negligence actions" and as such "are governed by the general rules requiring proof of negligence, damages and factual causation").

[323] *See* Graham v. Connor, 490 U.S. 386, 397 (1989) (holding that Fourth Amendment excessive force claims brought against police officers should be decided on a standard of objective unreasonableness). For more on the reasonableness inquiry in the context of Fourth Amendment excessive force claims against law enforcement, see *infra* Section II.G.

[324] *See* People v. Hall, 999 P.2d 207, 223–24 (Colo. 2000) (reversing a finding of no probable cause for a "reckless manslaughter" charge against an expert skier and ski resort employee who, while skiing in a dangerous manner, collided with and killed a fellow skier, after assessing defendant's conduct from the perspective of a "reasonable, law-abiding, trained ski racer and resort employee").

Breyer put it, prison officials, not courts, know best how to manage the "inordinately difficult undertaking" of running a carceral facility,[325] and courts must therefore defer 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.'"[326]

But this degree of deference is inconsistent with meaningful judicial review. If there is to be any daylight between external assessments of reasonableness and defendants' own subjective views, factfinders must feel both empowered and obligated to critically assess defendants' claims that, had they not acted as they did, institutional order and security would have been seriously compromised. Yet in *Kingsley*, as in *Whitley*, these are the very points on which courts are instructed not to probe.

Despite rejecting the *Whitley* standard in favor of objective unreasonableness, *Kingsley* never even entertains the question of what sorts of security interests or threats to institutional order would reasonably justify COs' resort to force—or what moral imperatives ought to frame the inquiry. There is consequently no independent metric against which jurors might measure COs' claim that force was necessary. As a result, the mere invocation of possible danger will often be enough to trigger the caution not to second-guess the experts. On such a regime, it will matter little that jurors may personally repudiate defendants' skewed moral attitudes and instead fully endorse the values of equal moral worth and shared humanity underpinning the constitutional prohibition on excessive force. The effect would be the same as if, as a matter of moral disposition, defendant COs and jurors were as one.

It should now be clear why *Kingsley*'s objective reasonableness standard, although a step in the right direction, is not a full answer to *Whitley*: it says nothing as to either the nature or extent of COs' duty of care toward the incarcerated or the moral commitments that ought to guide the reasonable CO and thus the reasonableness determination. In his *Kingsley* majority, the only interests Justice Breyer acknowledges are administrative and operational in nature; echoing *Whitley*, he emphasizes the government's interest in "preserv[ing] internal order and discipline and . . . maintain[ing]

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[325] Kingsley v. Hendrickson, 576 U.S. 389, 399 (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987)).

[326] *Id.* at 389 (quoting Bell v. Wolfish, 441 U.S. 520, 540, 547 (1979)). As will be seen, *see infra* Section III.C, there are reasons to be troubled as to the grounds for using force that *Kingsley*, following *Whitley*, is prepared to endorse.

institutional security."[327] Yet COs disposed to regard prisoners as subhuman and inherently dangerous will frequently see an imminent threat to "internal order and discipline . . . and institutional security" almost regardless of the facts. And when judge and jurors, perhaps motivated in part by some degree of sympathy with defendants' morally mistaken views, forebear from critical scrutiny of COs' assertions or from independently assessing the need for force, it is the toxic moral disposition explored in Section I.A, and not an appropriate understanding of COs' moral obligations, that will shape the reasonableness determinations in individual cases.

How to escape this trap and instead ensure factfinders' critical scrutiny of COs' conduct? At a minimum, what is needed is a process by which courts explicitly surface the values that animate the relevant law and which therefore ought to guide juries' deliberations regardless of COs'—or jurors'—own moral disposition. Part III offers a more detailed account of what exactly, given these values, constitutes excessive force in prison. But enough has already been said to generate a reasonableness instruction that, even without more, would direct the moral orientation of the inquiry away from attitudes born of dehumanization and demonization and toward the constitutional imperatives that should guide the assessment. That is, courts should instruct jurors that, in determining whether officers' use of force was objectively unreasonable, they should "make th[e] determination from the perspective of a reasonable [CO] on the scene"[328]—with the reasonable CO defined as one who recognizes the humanity of the people in his custody and

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[327] *Kingsley*, 576 U.S. at 397 (quoting *Bell*, 441 U.S. at 540, 547 (1979)). In Section III.C, I say more about the interests named in this passage and the extent to which they should be considered to justify force in prison.

[328] *Id*. As a practical matter, there is no tension between the reasonableness perspective as I have defined it—on which the reasonable CO is one who recognizes prisoners' humanity and thus their own obligation of care and protection—and the need for juries to judge the reasonableness of an officer's use of force in light of "what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* As Stoughton, Noble, and Alpert explain in their nuanced analysis of when police use of force is justified, this admonition "does not insulate officers' decisions from meaningful, even critical, review." SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 22 (2020). The proscription against the use of "20/20 . . . hindsight" is merely "a reminder that the review of an officer's subjective observations must be conducted using only the information that was reasonably available to the officer at the time force was used." *Id.* To return yet again to Kingsley, once he had been moved to the second cell and was prone on his bunk, his hands cuffed behind him and surrounded by five officers, a reasonable CO mindful of the need to minimize the harm inflicted on him would have recognized that no further force could be justified. To condemn the force actually used in the moment is not to engage in Monday-morning quarterbacking. It is instead to judge defendants' conduct in light of what they reasonably should have known at the time, and on that ground to find the force they used to have been excessive.

acknowledges the centrality of the duty of care and protection he bears towards the incarcerated by virtue of his position.

Were this instruction adopted, its language would prompt a two-fold shift.[329] First, it would position the account offered by defendant COs and any other uniformed officers testifying for the defense as demanding independent scrutiny in light of an external moral standard—and would make clear that the content of that moral standard may be distinct from the normative assumptions driving defendants' own narrative. Second, it would appropriately focus the inquiry on the obligations that COs, as agents of the state, bear toward the people in their custody, and would require courts to directly consider the limits on the use of force those obligations impose.[330] Both these moves would destabilize the existing normative arrangements, which—even assuming a doctrinal change from subjective "maliciously and sadistically" to objective unreasonableness—would continue to allow a moral disposition of callous indifference to control the inquiry. Without such a destabilization, a rejection of *Whitley* in favor of *Kingsley* would likely have little effect on the outcomes in Eighth Amendment excessive force cases—or, for that matter, in Fourteenth Amendment excessive force cases brought from jail.[331]

Of course, this instruction alone would not be enough to ensure that judicial inquiry into the reasonableness of COs' use of force will be informed by appropriate moral commitments. Concrete change is hard, and it will not be that easy to negate the inevitable inclinations of many jurors to endorse COs' skewed moral perspective or to defer to uniformed officers. The proposal offered here—a procedural mechanism for shifting the conceptual frame—represents a necessary intermediate step on the way to achieving such change. The idea is to identify the doctrinal framework most likely to drive courts to appropriately recognize and enforce the moral obligations of those state actors licensed to use violence against citizens.

To some readers, this intervention may seem modest. But it is in fact profoundly ambitious. It would represent an explicit institutional commitment to affirming the humanity of those in custody, and to construing

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[329] Whether it is likely ever to be adopted is another matter, one to which I return below.

[330] Note that, even if—as is to be expected—defendants and their witnesses persisted in asserting the rightness of defendants' conduct, this revised instruction would force those testifying to frame their arguments in terms of Kingsley's shared humanity and COs' obligations to ensure the care and protection of all detainees, Kingsley included. This alone would mark a significant shift in the way these issues are conceptualized and assessed.

[331] *See supra* note 101 (explaining why, when excessive force claims are brought by pretrial detainees from jail, the appropriate constitutional vehicle is the Fourteenth Amendment Due Process Clause and not the Eighth Amendment Punishments Clause).

the Eighth Amendment as a shared obligation to make this moral recognition a central organizing principle of carceral practice. What I offer here is thus best understood in two ways: as a practical intervention necessary to begin moving the needle on individual cases, and as an aspirational statement mapping how we might begin collectively to manifest the appropriate moral values in carceral practice writ large. Even as to this second goal, a morally reinvigorated doctrinal standard is vital, since in our current regulatory scheme, judicial review of constitutional claims represents the primary institutional context for scrutinizing state violence in prison and for condemning official abuses.[332] That in specific cases, individual jurors may fail to transcend their own moral prejudice or their impulse to uncritically defer to uniformed defendants hardly indicates the misguided nature of the enterprise. It is instead a measure of the moral distance society as a whole must traverse before we can expect to see institutional practice appropriately manifesting constitutional imperatives.

G. REASONABLE FORCE AND THE POLICE

As things now stand, what happened on remand in *Kingsley* is likely to happen in virtually any case involving force against an incarcerated person, whether in prison or jail. The same dynamics, moreover, are often equally at play in cases of police brutality brought under the Fourth Amendment. The foregoing analysis is thus also diagnostic for the more visible and likewise urgent context of police violence. In *Graham v. Connor*,[333] the Court established objective unreasonableness as the standard for deciding Fourth Amendment excessive force claims against law enforcement.[334] And in those cases too, a readiness to defer to the judgment of uniformed officers, combined with an apparent antipathy towards anyone viewed by police with suspicion, often appears to lead jurors to judge as reasonable even conduct that seems grossly at odds with the basic law enforcement obligation to "serve and protect."[335]

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[332] *See supra* note 13.

[333] 490 U.S. 386 (1989).

[334] The *Kingsley* Court based its holding on its prior decision in *Graham*. *See* Kingsley v. Hendrickson, 576 U.S. 389, 399 (2015) (explaining that the objective unreasonableness standard is "consistent with our use of an objective 'excessive force' standard where officers apply force to a person who, like Kingsley, has been accused but not convicted of a crime, but who, unlike Kingsley, is free on bail.") (citing *Graham*, 490 U.S. at 396 (1989)).

[335] *See supra* note 276.

Graham itself offers a textbook example.[336] In that case, Dethorne Graham, a diabetic, was in the throes of an insulin shock when he and William Berry were stopped by the police on a questionable suspicion of robbery.[337] Graham, in crisis and lacking control over his movements, got out of the car, circled it twice, sat down on the curb and "started going into shock, almost like a seizure."[338] Both Berry and Graham informed the officers that Graham's seemingly erratic behavior was the effect of an insulin crash.[339] Yet the officers took no steps to get Graham the help he needed, and even actively obstructed efforts to hand Graham orange juice despite being told that it would relieve his medical distress. Then they "shoved his face [onto] the hood of the car . . . and threw him headfirst into the police car."[340] Even after the officers learned that no robbery had taken place, they kept Graham in handcuffs until they had driven him home and released him. Among other injuries, Graham sustained "a broken foot, cuts on his wrists, a bruised forehead and an injured shoulder."[341]

The case eventually reached the Supreme Court on the question of the appropriate constitutional standard for Fourth Amendment claims of excessive force. The Court held the standard to be objective unreasonableness and sent the case back for retrial[342]—at which the jury again found for defendants.[343] At first, this result may seem mystifying. Here

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[336] I thank Erin Collins for first suggesting the facts of *Graham* as an effective illustration of the theory of reasonableness I develop here.

[337] The grounds for such suspicion were extremely thin. Berry had entered a convenience store in search of orange juice to stabilize Graham's blood sugar. Seeing a long line at the cash, he exited quickly with the thought of trying some other strategy. An officer, sitting in his squad car outside, saw Berry enter and leave quickly. He suspected a robbery and gave chase. *See* Obasogie, *supra* note 277.

[338] *Mr. Graham and the Reasonable Man*, MORE PERFECT, NATIONAL PUBLIC RADIO at 00:02:35, 00:03:49 (Nov. 30, 2017) [hereinafter MORE PERFECT], https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/mr-graham-and-reasonable-man [https://perma.cc/EV2Z-4QPF]. According to the opinion,

> [o]ne of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up."

Graham, 490 U.S. at 389.

[339] Graham urged the officers to look in his wallet for his "diabetic decal." *Graham*, 490 U.S. at 389.

[340] *Id.*

[341] *Id.* at 390.

[342] *Id.* at 388, 399.

[343] *See* Eileen Sullivan, *Supreme Court Case to Shape Ferguson Investigation*, SALON (Aug. 22, 2014, 1:30 AM), http://www.salon.com/2014/08/22/supreme_court_

were police officers, whose job is to serve and protect all citizens and whose constitutional obligation is to refrain from using force unless "a reasonable officer on the scene" would judge it necessary,[344] beating a man despite strong grounds for thinking him in the throes of a medical crisis.[345]

Yet this conduct is only unaccountable if we assume a reasonable officer would have regarded Graham as someone entitled to the respect and protection of law enforcement. If police officers instead regarded Graham as someone whose pain and suffering did not matter, not as a person who might need help but instead as a threat to be contained, then what might otherwise seem a shockingly callous reaction to Graham's evident physical distress starts to look more comprehensible (if still wholly indefensible). And to the extent that jurors either shared defendants' moral disposition toward the plaintiff or, regardless of their own moral attitudes, chose to defer to the judgments of law enforcement (or some combination of these inclinations), the jury finding too makes more sense. It is hard here not to think that race—Graham was Black[346]—played a role, with racial bias both grounding a

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case_to_shape_ferguson_investigation2 [http://perma.cc/QFK9-GWYU] ("After the Supreme Court decision vacating an appeals court ruling against Graham, he had a new trial, in which the police actions were judged on new standards. Graham lost again.")

344 *Graham*, 490 U.S. at 396.

345 *Id*. That this conduct was unreasonable also seems plain when considering the three factors *Graham* identified for guiding the reasonableness judgments in Fourth Amendment excessive force, which include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*; *see also* STOUGHTON ET AL., *supra* note 329, at 24 (explaining that the *Graham* Court provided no "operational definitions of [these] factors). For one thing, even assuming the seriousness of the suspected crime, the force persisted even after officers learned that no robbery had occurred. But more to the point, given what the officers quickly learned once on the scene—that Graham's erratic behavior was due to an insulin crisis easily resolvable with orange juice—there were no grounds at all for thinking he or his companions posed any sort of threat to anyone. Nor could he be said to have been "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. To the contrary, given what the officers were told about the situation, a reasonable officer on the scheme would have prioritized helping Graham to stabilize his blood sugar.

346 It is clear from the record that Dethorne Graham was Black, as was Officer Connor. *See* Brief for the Petitioner at 3, *Graham*, 490 U.S. 386 (No. 87-6571), 1988 WL 1025786 ("Dethorne Graham, a black male employee of the North Carolina Department of Transportation, is a diabetic."); Joint Appendix at 41, *Graham*, 490 U.S. 386 (No. 87-6571) (Mr. William Berry's testimony describing the first officer on the scene as a Black man); *see id.* at 3 (stating Officer Connor initiated the stop). The remaining officers were White. *See* Brief for the Respondents at 2–3, *Graham*, 490 U.S. 386 (No. 87-6571) (introducing Mr. Berry's testimony concerning a White officer who handcuffed Graham, which may refer to Officer Rice or Officer Townes, suggesting that both Rice and Townes were White). There is no mention in the filings as to the race of William Berry. I thank Caitlin Hunter and Cecilia Bain for their help parsing the record on this question.

shared moral mistake and increasing the inclination of factfinders to defer to the officers involved.

I have been arguing that in cases involving excessive force claims brought by prisoners, reasonableness judgments must be made, and jury instructions designed, with explicit reference to the values animating the relevant law, in this case the Eighth Amendment. But the argument would apply with equal force to Fourth Amendment excessive force claims, or indeed to any legal context in which reasonableness determinations are likely to be skewed by widely shared moral mistakes or by undue deference to state actors (or both). Although each context would require its own normative excavation, it seems safe to say that, in a liberal democratic society, all laws will at some level share a basic commitment to the equal moral worth of all citizens and the right of each person to live free from fear of official violence and abuse.[347]

If in certain classes of cases—very much including those involving uniformed officers sued for excessive force—there is an appreciable risk that courts will not automatically bring these values to bear when assessing defendants' conduct, then jury instructions must explicitly define the reasonable person as one whose behavior is guided by these moral precepts. Otherwise, the channel will remain wide open for jury verdicts like those reached on remand in *Kingsley* and *Graham*, and we will continue to see outcomes in excessive force cases that leave those who take for granted the moral equality of all society's members mystified and even disgusted by what amounts in practice to a judicial endorsement of official abuse.

To avoid this outcome in cases involving excessive force in prison, jury instructions should explicitly stipulate the values that ought to inform the conduct of reasonable COs. Judges must also explicitly affirm the centrality of those values to the constitutional review process, and citizens must collectively demand the prioritization of those values in court. But even assuming such a radical transformation of current practice, important conceptual work would remain. Specifically, we would need to address the deeper question of what principled limits on the use of force in prison would flow from acknowledging CO's essential duty of care and protection to the human beings in their custody. This question is the focus of Part III.

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[347] *See* Shklar, *supra* note 157, at 29 (identifying as the highest imperative of liberal democracies the protection of citizens from fear of "public cruelty," which is "created by arbitrary, unexpected, unnecessary and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime").

III. NORMATIVE LIMITS

To this point, I have taken as given that COs have a fundamental duty of care and protection towards people in custody. Assuming collective recognition that the people at issue are human beings with ordinary human vulnerabilities, stipulating this duty of care and taking seriously its implications for officers' conduct would alone represent a considerable improvement over either *Whitley* or *Kingsley*. Perhaps such a stipulation would be all we need to make meaningful the Eighth Amendment right against excessive force. But I am not so sure. For one thing, even actors committed to conforming their conduct to that of a reasonable CO properly characterized would need principles to guide their actions. They would, in other words, need to know how exactly a reasonable CO would conduct themselves in a given situation. And if courts are to compare defendants' conduct to that of a reasonable CO who recognizes plaintiffs' humanity and acknowledges their own duty of care and protection, it will be necessary to have principled guideposts to direct the analysis.

To this end, this Part offers a theory of when force in prison is justified. This account is conceptually separate from the preceding argument, so that one might be persuaded to this point without necessarily endorsing what follows. Of course, I hope readers will find the view developed here to be convincing. But failing that, I hope at least to spark a long overdue debate on the normative limits on state violence in prison.

A. THE STATE'S CARCERAL BURDEN AND COS' DUTY TO PROTECT

We begin with a basic question: what protections does the state owe the people it imprisons? As I have argued elsewhere, when the state opts to punish with incarceration, it assumes affirmative responsibilities towards the people it confines—responsibilities that inhere regardless of the crimes committed.[348] Of these, foremost is the affirmative obligation to ensure the safety of those in custody. This obligation—a moral non-negotiable—is directly entailed by two defining features of the carceral enterprise, which together make clear both why any force in prison must be sparing and why those who would use it bear a heavy justificatory burden.

First, there is the practical effect of imprisonment. To be a prisoner means being unable to provide for one's own essential needs, to be entirely dependent on officials even for what Justice Powell termed "the minimal

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[348] *See* Dolovich, *Cruelty*, *supra* note 8, at 911 ("What the state owes its prisoners it owes not because prisoners deserve it but because of the choice the state has made to punish with incarceration. Having made this choice, the state is equally obliged to each inmate, whether he is Martin Luther King, Jr. or Jeffrey Dahmer.").

civilized measure of life's necessities."[349] These include the basic material goods one needs to survive day to day: food, water, a place to sleep, the requisites for personal hygiene,[350] medical treatment for illness or disease, and so on.[351] But it also includes a more intangible but equally urgent good, that of personal security, which is paramount for those whose living conditions put them at risk.[352]

The obligation to keep people safe from bodily harm thus emerges directly from the state's own choice to punish with incarceration.[353] It is part and parcel of what I have called *the state's carceral burden*.[354] When the state incarcerates, it forces together in closed facilities hundreds and sometimes thousands of people, at least some of whom will have "demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct."[355] This situation is entirely of the state's own making. Having exercised its power to lock people up under these conditions, the state may not simply look the other way.[356] It must instead do what is necessary to ensure the safety of prison residents while they are inside. This burden certainly entails protecting people from harm at the hands of fellow prisoners. But equally, it requires the state to ensure that the incarcerated are not subjected to gratuitous force by the officers charged with running the prisons.

The state's affirmative obligation in this regard also has a second source: the moral commitment inherent in the prison as a penal form.[357] When the state punishes with prison, it is the length of the sentence that is

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

[350] *See* sources cited *supra* note 42.

[351] Estelle v. Gamble, 429 U.S. 97, 103 (1976) ("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.").

[352] *See* Shklar, *supra* note 157, at 29 ("A minimal level of fear is implied in any system of law. . . . The fear [to be] prevent[ed] is that which is created by arbitrary, unexpected, unnecessary, and unlicensed act of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime").

[353] As Chief Justice Rehnquist put it, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

[354] For further discussion and elaboration of this notion, see Dolovich, *Cruelty*, *supra* note 8, at 911–23; *see also* Dolovich, *Evading the Eighth Amendment*, *supra* note 255, at 138–40 (describing the Eighth Amendment "roots of the state's carceral burden") (internal caps deleted).

[355] Farmer v. Brennan, 511 U.S. 825, 833 (1994) (alteration in original) (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

[356] *Id*. As Justice Souter put it, "having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.*

[357] The first half of this paragraph is drawn from Dolovich, *Cruelty*, *supra* note 8, at 920.

supposed to reflect society's collective judgment as to the seriousness of the crime and the full extent of society's penological interest. In some cases, the offense may be so grievous that a prison sentence may seem insufficiently burdensome to fully capture the offender's moral desert. There is, however, a critical difference between private judgments of moral desert and the practical manifestation of the societal condemnation embodied in the state's decision to incarcerate. In liberal democracies, the deliberate infliction of corporal harm has long since been rejected as a legitimate criminal penalty.[358] This rejection was manifest in the state's turn to incarceration, which metes out punishment in temporal increments, depriving offenders of their liberty for a fixed term.[359] The (theoretical) non-violence of this penalty is by design. As the state can no longer punish wrongdoing by the intentional application of physical pain,[360] incarceration must necessarily be understood, not as a form of corporal punishment, but as an alternative to it.

It is not that no physical hardship attends the experience of imprisonment. As Alice Ristroph rightly observes, "incarceration is, first and foremost, a physical experience."[361] Because human beings are embodied creatures, we cannot be stripped of our liberty without being bodily removed from society and perpetually forced to remain so. To be incarcerated is thus necessarily to be physically restrained.[362]

There is, however, an important difference between, on the one hand, being physically prevented from walking free and even being subjected to

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[358] *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . are forbidden by that amendment to the Constitution."); *see also* Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring) (explaining that the Eighth Amendment has been held to prohibit "[t]he barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like'" (quoting O'Neil v. Vermont, 144 U.S. 323, 339 (1892))); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (holding unconstitutional the use of the strap).

[359] *See* Dolovich, *Cruelty*, *supra* note 8, at 920 ("Although the death penalty persists, [this only means that] the decision to incarcerate rather than execute reflects an affirmative choice [by the state] not to destroy the [person being sentenced] but merely to banish him or her from society for the specified term.").

[360] Although I focus in the text on physical force, the state's affirmative duty of care to prisoners also necessarily extends to protection from gratuitous psychological trauma, since exposure to an ongoing danger of physical harm can also cause enormous suffering even if that danger never ultimately manifests.

[361] Alice Ristroph, *Sexual Punishments*, 15 COLUM. J.L. & GENDER 139, 147 (2006).

[362] *See id*. ("Prisons rely on the physical limitations of the human body to restrain their captives; prisons restrain effectively because humans cannot slip between narrowly spaced bars, or leap high walls, or survive a spray of bullets.").

pain and suffering as the practical result of a punishment that is, conceptually speaking, only a deprivation of liberty, versus, on the other hand, the state affirmatively inflicting physical pain on one's body —a.k.a. torture—as the officially sanctioned form of punishment. As incarceration is currently conceived, to the extent that a person is subjected to deliberate bodily harm by state officials while in custody[363]—raped or beaten or, as happened in a Florida prison in 2012, scalded with water so hot his skin peels off[364]—such treatment is directly at odds with the authorized penalty and is thus by definition illegitimate. Were corporal punishment taken to be within bounds, this same treatment or its cognates could be officially sanctioned, openly enforced, and backed by the force of state law.

This essential feature of the prison sentence—that it is intended as an alternative to, and not a form of, corporal punishment—is a condition we can think of as *the carceral penalty's non-corporal character*. That this condition is too often honored in the breach does not alter the essential point. Far from it, the carceral penalty's non-corporal character is one reason why unjustified physical force by correctional officers (COs) constitutes a clear abuse of state power and not a valid manifestation of it. The choice to punish with incarceration thus carries a substantial challenge for the state: it must perpetually, scrupulously enforce the line between the deprivation of liberty that incarceration represents and the corporal punishment that has been affirmatively foreclosed. But challenging though it may be, this is the state's burden to bear, since any corporal punishment deliberately inflicted on people in custody will by definition exceed the authorized penalty.[365]

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[363] *See* Shapiro & Hogle, *supra* note 3, at 2024–36 (collecting multiple examples of gratuitous physical abuse of incarcerated people by correctional officers); Schlanger, *supra* note 166, at 389–402 (same).

[364] *See* Julie K. Brown, *Florida OKs $4.5 Million Payout for Brutal Prison Shower Death of Darren Rainey*, MIA. HERALD (Jan. 26, 2018, 8:04 PM), https://www.miamiherald.com/news/special-reports/florida-prisons/article196797554.html [https://perma.cc/FL4G-T3ZH] (discussing in-depth coverage of the scalding death of Darren Rainey at the hands of officers at Dade Correctional Institution); *see also* EYAL PRESS, DIRTY WORK: ESSENTIAL JOBS AND THE HIDDEN TOLL OF INEQUALITY IN AMERICA 26–30 (2021) (discussing this brutal episode at length).

[365] There may be some measure of bodily harm suffered by people in custody that is arguably not traceable to the state and thus ought not to be categorized as corporal punishment. But the all-encompassing nature of the carceral experience means that injuries to prisoners not traceable to decisions made by the state actors running the prisons will be rare indeed. *See* Dolovich, *Cruelty*, *supra* note 8, at 897–910. Here, however, I mean to limit myself to bodily harm deliberately inflicted by state actors on people in custody. And as I have already argued, *see supra* Section II.F, text accompanying notes 245–246, all such harm should be considered part of the state-inflicted criminal punishment.

As the state actors who have direct personal interaction with prisoners, it is COs who most immediately bear the twin responsibilities of meeting the state's carceral burden and preserving the carceral penalty's non-corporal character. These duties may be satisfied only by protecting the imprisoned as much as possible from the infliction of bodily harm, both by other prisoners and by the COs themselves. Keeping those in custody safe is thus a core priority—if not the top priority[366]—of the CO's professional role.[367]

COs who use physical violence against prisoners thus bear a heavy justificatory burden. This is especially so because, in using force, they are injuring the very people they have a duty to keep safe—in other words, they are doing "the very thing from which [they are] supposed to be providing protection."[368] The use of force by COs against prisoners is thus "not a mere failure in, but rather an inversion, of [their] duty."[369] This is true even if the force used ultimately proves to have been warranted, as would be the case, for example, if a CO punched one prisoner to prevent another from being killed. As John Gardner argues in the analogous case of police shootings, a peace officer who physically harms someone he has a duty to protect still has breached his duty, and his violent act thus bears a certain kind of "moral awfulness . . . not neutralized by the mere fact that [he] had a conflicting duty to do as [he] did, nor by the mere fact that the [action] was justified."[370]

To be sure, as Gardner's comment suggests, the fact that a CO may have a duty of care to others in the prison may be the very thing that justifies his act.[371] The point, however, is not that force against people in prison may

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[366] The only plausible candidate for equal importance is the obligation of COs to police the boundaries of the prison, to make real the pledge of unbroken internal exile the sentence of incarceration represents. But because prisons are well guarded against escape and because any such attempts are relatively rare, *see supra* note 36, COs' primary responsibility as a practical matter is ensuring that prisoners' basic needs are met.

[367] In reality, COs in prisons and jails routinely fail to ensure the physical safety of people in custody, thereby violating the state's carceral burden. For discussion of some of the reasons for this failure, the measures prisoners daily take to compensate for this failure, and the practical strategies prison officials and other policymakers could undertake to increase prisoners' safety, see generally Sharon Dolovich, *Prison Conditions*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 261 (Erik Luna ed., 2017).

[368] Gardner, *supra* note 10, at 106.

[369] *Id.* ("Killing A is as far away from protecting A from being killed as one can get.").

[370] *Id.* at 108.

[371] In this discussion, I refer to COs as male for two reasons. First, the vast majority of COs are men. *Correctional Officers and Jailers*, DATA USA, https://datausa.io/profile/soc/correctional-officers-and-jailers [https://perma.cc/5EZS-ZUXA] (last visited Sept. 6, 2024). Second, judging from the overwhelming weight of the caselaw, although female COs can and do use force against prisoners, COs who use excessive force are disproportionately male.

never be justified. It is rather that, *whenever it is used, a compelling justification is required*—and the more "morally awful" the act, the stronger the justification demanded and the more carefully the force itself must be scrutinized.

The scope of COs' duty of care creates a complication for efforts to fix the moral limits on their use of force in prison. Although COs have a nonnegotiable duty to protect every person in prison from physical harm, force against prison residents will sometimes be appropriate. Inevitably, in prison, circumstances will sometimes arise in which, no matter what happens, some people will wind up hurt, perhaps even seriously. When that happens, the use of physical force—even against those not themselves most directly posing a threat[372]—may be the only thing that will prevent still greater harm. And where this is so, such force would be justified even should a CO thereby injure someone she has an affirmative duty to protect. If such an act would reflect Gardner's "moral awfulness" toward the victim of force, it would also be necessary if COs are to vindicate their obligations to others.

The key to justifiable force in prison is thus the balance of harms. Only when it would prevent more harm than it causes may COs resort to force, and even then, force must be limited only to that quantum necessary to keep overall pain and injury to a minimum. When instead force used against prisoners would cause more harm than it could plausibly be expected to prevent,[373] it would be plainly unjustified and thus excessive.

The claim, in short, is that the bounds of justifiable force in prison are analogous to those set by the basic criminal law defense of necessity. On the standard common law formulation of the necessity defense, conduct that would otherwise be a crime is justified, and thus not itself criminal, "if the harm which will result from compliance with the law is greater than that which will result from violation of it."[374] Likewise, in the prison context, so long as the harm the force would prevent is greater than the harm the force itself would cause, the use of that force may be judged appropriate and thus not excessive.[375] This is so even should the victim be someone to whom the

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[372] As when pepper spray is used in an environment where the effects may be diffuse.

[373] *See infra* text accompanying notes 424–432 (listing examples).

[374] LAFAVE, *supra* note 156, § 10.1, at 552; *see also* Robinson, et al., *supra* note 31, at 42–43 (surveying the defense in American jurisdictions).

[375] Although directing actors to minimize harm, this imperative is not itself consequentialist—at least not in the sense of consequentialism as a moral theory on which "the rightness or wrongness of an action always depends on . . . its tendency to lead to intrinsically good or bad states of affairs." BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 82, 83 (2d ed. 1993). Concern for outcomes is not the exclusive

inflicting officer owes a duty and even where the victim was entirely nonculpable, so that they could not fairly be said to have forfeited by their own conduct their right to protection.

There may, of course, be rare instances in which force against certain prisoners becomes appropriate because those individuals directly threaten harm to others and no nonviolent alternative response would safely resolve the situation. In such instances, the more apt common-law justificatory framework would be self-defense or defense of others, on which an actor is warranted in using force when honestly and reasonably believing it necessary to prevent the use of imminent, unlawful force.[376] In such cases, COs may be justified in using force even should doing so cause more harm than it prevents, as would be the case, for example, if two armed prisoners were attacking a third and credibly threatening to kill him[377]; here, depending on the circumstances,[378] COs may have license to kill the two to save the one and thus to exceed the quantum of harm a necessity framework would allow.[379]

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province of consequentialists. The moral foundation of the necessity principle endorsed here for the prison context requires a determination of whether a CO's use of violence against a given individual is consistent with a recognition of prisoners' humanity and with the CO's own affirmative obligations towards everyone in their custody—obligations that are themselves derived from foundational constitutional values. These moral imperatives require that COs only use force to the extent consistent with keeping everyone imprisoned in a given facility as safe from harm as possible, a calculation that prioritizes the minimization of overall harm. It is true that, on this view, both COs using force in the moment and courts assessing their conduct after the fact must consider and weigh the likely outcomes—the consequences—of various courses of action to establish whether the force was necessary. But this requirement does not make this approach "consequentialist" any more than the utilitarian commitment to the principle of the "greatest happiness for the greatest number" makes that moral theory deontological.

[376] *See* United States v. Peterson, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973) (recounting the doctrine).

[377] *See, e.g.*, Nathan Solis, *Corrections Officers Shoot*, *Kill Two Inmates During Fight at Northen California Prison*, L.A. TIMES, Dec. 1, 2022 (recounting how, after warning shots and the use of chemical agents did not stop Frank Nanez and Raul Cuen from attacking fellow prisoner Anthony Aguilera "with prison-made weapons," officers shot the pair, both of whom died at the scene); Jo Ellen Nott, *California Guards Kill Two Prisoners Who Attacked a Third*, PRISON LEGAL NEWS, Jan. 2023, at 36 (reporting that the assault on Aguilera was "the second time this year that a prisoner was attacked by two others" at California's High Desert State Prison).

[378] *See infra* Section III.B (exploring the principled limits on COs' use of violence against prisoners on grounds of necessity).

[379] In some narrow cases of this sort, an excuse framework may be apt—specifically, those instances in which COs themselves are so in fear for their own safety that they may be incapable of fulfilling their duty of care. *See* Peter D.W. Heberling, *Notes: Justification: The*

However, given the risk that COs will discount the likely harm to prisoners and exaggerate the danger they pose, any permission to inflict the greater harm must be tightly restricted lest it swallow the governing imperative.[380] And even in those rare cases when self-defense/defense of others is indeed the appropriate paradigm, actors remain obliged not to use force disproportionate to the threat.[381] For COs, as for any actor seeking ex post legal validation of physical violence, both these justificatory frameworks (necessity and self-defense/defense of others) are highly circumscribed. They would not negate COs' duty of care toward those in custody but would only allow the temporary suspension of the duty such as to warrant some limited measure of violence—and even this narrowly circumscribed permission would vanish as soon as exigent conditions have eased and the immediate danger has abated. Throughout, the necessity calculus must stand as the strong default.

B. NECESSITY AND GOVERNING VALUES

The foregoing section argued that, in the absence of circumstances supporting a valid claim of self-defense, COs' use of physical force is consistent with their duty of care and protection only so long as the harm the force would prevent is greater than the harm the force would itself cause. When this condition is satisfied, force may be considered appropriate and therefore justified. What, however, of reasonable mistake? In the criminal context, as elsewhere, the term "justification" suggests that the act undertaken was the right thing to do, seemingly making no allowance for reasonable mistake, which would, strictly speaking, bring this defense into the ambit of excuse.[382] The necessity principle, conventionally understood as

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Import of the Model Penal Code on Statutory Reform, 75 COLUM. L. REV. 914, 924 (1975) (advocating a "concept of excusable necessity" in cases when defendants' lawbreaking was motivated by the "urge of self-preservation" generated by sufficiently strong pressures to warrant excusing the violation).

380 *See supra* Section I.A (exploring the institutional dynamics that prime COs to regard people in prison as congenitally dangerous and thus to overestimate the danger they pose).

381 This imperative, which is baked into the doctrine of self-defense, is implicit in Justice Marshall's caustic observation in his *Whitley* dissent that "if prison officials were to drop a bomb on a cellblock in order to halt a fistfight between two [individuals] . . . I feel confident that the [Supreme] Court would have difficulty concluding, as a matter of law, that such an action was not sufficiently wanton to present a jury question, even though concededly taken in an effort to restore order in the prison." Whitley v. Albers, 475 U.S. 312, 333–34 (1986) (Marshall, J., dissenting).

382 *See* J. L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS ARISTOTELIAN SOC'Y 1, 2 (1957) (explaining that, in the case of justifications, "we accept responsibility but deny that it was bad," while in the case of excuses, "we admit that it was bad but don't accept full, or even any, responsibility").

a justification,[383] may thus seem to be at odds with the modified reasonableness standard offered in Part II, on which COs would have recourse to a reasonable mistake defense. Given, moreover, the stakes for the incarcerated, who lack any means of exit or self-defense, one might well question why COs should have any access at all to this defense. Should we not instead hold COs constitutionally liable for excessive force any time their conduct causes more harm than it prevents, however reasonable the error may have been?

For some readers, this absolutist approach may have an intuitive appeal. As it happens, however, it is not even adopted by those common-law defenses—self-defense and necessity chief among them—that are most commonly construed as pure justifications. In the self-defense context, a reasonable belief that one is in imminent danger of lethal attack is sufficient to make out a claim, even should the belief ultimately prove inaccurate. And in the necessity context, "it is the harm-reasonably-expected, rather than the harm-actually-caused, that governs."[384]

Likewise for the prison context, we ought to prioritize ex ante reasonable belief over ex post accuracy. Even COs appropriately motivated to fulfill their duty of care and protection will sometimes err, especially when acting under pressures of exigency. COs are only human, and, like the rest of us, cannot always get it right even when they are doing their best. The most that can be expected is that they act reasonably in the moment, motivated by the appropriate degree of concern for all involved.[385] Those who hit this mark

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[383] *See* LAFAVE, *supra* note 156, § 10.1, at 552 ("For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, [the defendant] is by virtue of the defense of necessity justified in violating it. Necessity, then, . . . is a defense belonging in the justification category of defenses rather than the excuse category.").

[384] *Id.* § 10.1(d)(2), at 558–59.

[385] One might well ask: if we are to accommodate the necessarily limited reach of human perceptions by validating reasonable but mistaken beliefs, should we not also make allowance for the natural human tendency to sometimes draw unreasonable judgments? There is, however, a difference between expecting the impossible (i.e. necessarily knowing in advance when one's considered, well-grounded, and thus arguably reasonable beliefs will prove unfounded) and imposing standards of judgment that, if high, are not out of reach (i.e., expecting that people charged with protecting vulnerable prisoners will only use force when doing so is reasonably believed necessary). If the imperative that COs act reasonably even in situations of high pressure imposes a burden, it is one the bearing of which is incumbent on those who have accepted positions of authority in the prisons, and on whose shoulders therefore rests the practical realization of the state's obligation to keep prisoners safe. There will inevitably be some actors who, try as they might, cannot satisfy the demands of reasonableness. But it is the state's job to exclude those individuals from the pool of possible COs. In other words, it is the responsibility of the state, acting through its senior prison

cannot fairly be judged to have abused their authority even should they get it wrong.[386] Nor would society's interests be served by concluding otherwise. If officers—again, appropriately motivated[387]—refused to use force even when reasonably believing it necessary, instead holding out for perfect certainty, their passivity would very likely facilitate instances of preventable harm. In such cases, prisoners and not COs would most likely suffer the consequences.

The question driving the excessive force inquiry is thus whether a reasonable CO, conscious of prisoners' shared humanity and of her own duty of care and protection, would have judged physical force necessary to prevent more harm than it was likely to cause. But this standard in turn raises puzzles of its own. Fortunately, centuries of common law engagement with criminal defendants asserting the rightness of conduct legally contraindicated has yielded basic principles with insights relevant for assessing the need for force in prison.

First, under what circumstances may COs use force against prisoners to protect staff? On the one hand, people in prison are there against their will,

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officials, to ensure that only those applicants capable of acting reasonably as here defined be awarded a badge and placed in positions of authority and control over the incarcerated.

[386] This defense may sound more like an excuse than a justification, with defendants being expected to argue that, even if they had erred in the moment, their mistake was reasonable. But COs in excessive force cases—as in *Kingsley*—tend not to argue for the reasonableness of their error but instead for the rightness of their conduct. In any case, so long as the question is properly framed (as whether a reasonable CO, conscious of her duty of care and protection, would have perceived the force used as necessary and therefore justified), nothing much turns on the categorization of this defense as a justification or an excuse.

[387] By "appropriately motivated," I mean a CO who recognizes both the humanity of the incarcerated and their own fundamental duty of care and protection. Prison being what it is, *see supra* Section I.A, it may be tempting to dismiss entirely the possibility that COs could ever be appropriately motivated. And given also the way reasonableness determinations may be readily made on the basis of widely shared prejudice rather than on the basis of the animating values of the relevant legal provisions appropriately framed, it may seem that any reasonableness standard, however carefully crafted, would only enable COs to continue to escape liability for excessive force. Viewing the matter in this light, some might be inclined to argue that, absent a perfect justification, COs should be found liable, reasonableness defense or no. I see the appeal of this framing but nonetheless resist it. On the one hand, if as a practical matter we cannot shift either the institutional realities mapped in Section I.A or the way reasonableness determinations are made as described in Section II.D, any legal requirement for a perfect justification of necessity would in practice likely simply devolve into an endorsement of COs' own accounts of the need for force almost regardless of the facts. It would therefore make no practical difference to require a perfect justification. If, on the other hand, the aim is to develop a morally defensible theory of justifiable force in prison and to sketch the doctrinal framework that might enable implementation of this theory, then I must try to present the arguments that seem most consistent with that project. Hence my endorsement of a modified reasonableness standard rather than some version of strict liability.

cannot leave, and have no legal right to defend themselves, whereas staff—agents of the state—are there through their own choice and have an affirmative obligation to ensure the safety of the incarcerated. From this perspective, it might seem that force would *never* be justified against prisoners to protect staff. On the other hand, if people are imprisoned, it is because they have committed crimes and have been incarcerated as punishment, whereas staff are doing a hard and even dangerous job on the public's behalf and are surely entitled to a safe working environment.[388] Viewed in this light, to put the point in its starkest form, any amount of force against prisoners, however great, might appear justified to protect staff from any amount of bodily harm, however minor. The question, in other words, is how to weigh the relative suffering of the parties.

The basic doctrine of necessity addresses this issue directly, with an insistence on the equal moral worth of all persons, whatever their character. Although one might be inclined "to assign a higher value to the life of a young person than to that of an older one, and to the life of a virtuous person than to that of an immoral one—so that *A* might be justified in killing old bad *B* to save young innocent *C*," the defense of necessity does not permit this moral hierarchy.[389] Instead, it takes as given that "one person's life [is] equal to that of another . . . , without regard to the age, character, health or good looks of the persons involved."[390] Besides being normatively appropriate for a liberal democracy, for which equality of persons is a core value, this insistence on legal equality protects judges from the unseemly need to assess the relative moral value of the parties. It also guards against allowing popular prejudice to infect the harm calculus. As we have already seen, barring some protective measures, it is all too easy for widely shared moral mistakes to subvert the law's commitment to the equal worth of all citizens.[391]

The concerns motivating this principle of universal equality seem likewise applicable to the prison context, for at least two reasons. First, as previously noted, the prison law context is one in which, absent safeguards, factfinders may well infuse their own reasonableness assessments with moral hostility to incarcerated plaintiffs. Not to insist that people in custody are as worthy of state protection as prison staff would be to write this moral hostility directly into the law itself.

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[388] *See* STOUGHTON ET AL., *supra* note 329, at 28–29 (arguing that the state "has a distinct interest in protecting officers," since "[w]ithout officers, the state's [legitimate interests] would be easily frustrated . . . . "); *see also* PRESS, *supra* note 365, at 59–69 (describing the deep physical and psychological harms experienced by individuals who work as COs).

[389] LAFAVE, *supra* note 156, § 10.1(d), at 560–61.

[390] *Id.* § 10.1(d), at 561.

[391] *See supra* Section II.E.

Second, the necessity doctrine's principled commitment to the moral equality of all parties is inherent in the recognition of prisoners as constitutional subjects. The Eighth Amendment may empower the state to inflict, as criminal punishment, treatment involving "pain or other consequences normally considered unpleasant."[392] But in prohibiting cruel and unusual punishment, it also places clear limits on the scope of any punitive response, thereby establishing constitutional protections extended explicitly and exclusively to those fellow citizens facing criminal punishment.[393] Far from stripping constitutional protections from people convicted of crimes, the Eighth Amendment firmly establishes the incarcerated as full constitutional subjects, a move that brings with it all the moral and legal recognition this status generally entails. Any practice that would discount harms inflicted on people in custody on the grounds of their criminal convictions or status as prisoners would contravene and ultimately subvert this basic constitutional commitment.

As with the norms implicitly animating the reasonableness inquiry in the criminal context writ large,[394] the legal process for resolving excessive force claims already operates on just such an equality principle. This is something all parties intuitively recognize. Had the *Kingsley* defendants justified the rough treatment they inflicted on the basis that otherwise, Kingsley may have scratched or pinched them, the jury would (rightly) have been far less sympathetic to their position. That prisons are understood to be dangerous places may work in defendants' favor by making claimed fears of violent assaults by prisoners immediately plausible. But the same assumption also grounds the expectation that some risk of harm goes along with the job. COs' awareness of this set of expectations is likely what led the *Kingsley* defendants to testify that they had been in serious danger, a characterization they sought to bolster with the frankly implausible claim that Kingsley could at any moment have "escalat[ed] the situation and beg[un] actively fighting them."[395]

In short, the insistence of the necessity doctrine on the moral equality of all parties when calculating the balance of harms applies equally to the excessive force context. What matters is minimizing the overall quantum of harm without privileging one party's safety over another's. A CO may not

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[392] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968).

[393] Indeed, at least according to the Supreme Court, it is *only* people facing criminal punishment to whom the Eighth Amendment Punishment Clause applies. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment "proscription against cruel and unusual punishment . . . was designed [only] to protect those convicted of crimes").

[394] *See supra* text accompanying notes 282–306.

[395] Brief for Respondents, *supra* note 105, at 8.

slam a prisoner into a concrete wall to protect a fellow CO from getting jostled or pushed.

Notice that this proposed standard would not oblige COs to genuinely regard a prison's residents as moral equals. To avoid excessive force, they need simply to act as if they do. There is no undue burden here. Just as any citizen contemplating breaking the law out of necessity can protect themselves by acting in ways consistent with appropriate respect for others' safety and well-being regardless of how they may personally feel, COs wishing to avoid censure for excessive force need only conduct themselves as if the safety of incarcerated individuals mattered as much as anyone else's—including that of their fellow officers.

The necessity framework also helps to resolve a second pressing issue: at what point is the official license to use violence activated? In the criminal context, the doctrine of necessity holds that breaking the law must not only prevent more harm than it causes, but must also be *the only way* to achieve this end. This principle is foundational to the criminal law necessity defense, and for good reason. In a rule of law society, there is an extremely strong presumption that the law must be obeyed. For this reason, an actor is not entitled to a necessity defense simply because breaking the law would yield a better outcome than not doing so. If there remains "a third alternative, which will cause less harm than will be caused by violating the law, [the actor] is not justified in violating the law."[396] This principle, moreover, carries an implicit obligation to continue to seek alternatives to lawbreaking until the point at which the illegal course of action remains the only way to prevent still greater harm. This is why "[i]t is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent."[397]

Does the same principle hold for the carceral context? Again, the answer must be yes, for at least two reasons. First, a legal regime that did not require COs to make every effort to resolve incidents without the use of force would signal an acceptance of force even in cases in which it could have been avoided. Such a stance could well be read as legal permission not to bother

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[396] LAFAVE, *supra* note 156, § 10.1(d), at 561. Thus a starving person may not be retroactively absolved from stealing food if he could have gotten a meal "by presenting himself at a soup kitchen," and someone who takes whiskey to church "for medicinal purposes" is not justified in violating the law prohibiting bringing alcohol into a house of worship when they could have brought a different medicine or simply stayed home. *Id.* § 10.1(d), at 562.

[397] *Id.* § 10.1(d), at 563. As LaFave observes, this may simply be "a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant[] to avoid the harm, other than the option of disobeying the literal terms of the law." *Id.*

pursuing non-forceful strategies. Especially given the skewed moral perceptions that the prison environment promotes among COs,[398] it would be fanciful to imagine that this permission would not be taken up, with gratuitous uses of force the inevitable result. Second, and perhaps still more to the point, the imperative that all alternatives must be essayed before an actor may be legally permitted to engage in the conduct to be avoided—whether lawbreaking in the criminal context or official resort to violence in the case of prisons—is logically entailed by the necessity principle itself. If there remained a nonforceful way for a CO to resolve an incident, then the use of physical force must not have been necessary to address it. And if that is the case, resort to physical force would be certain to inflict more harm than could have been avoided absent its use and thus could not possibly have been thought warranted. Until the point is reached at which there is no other way to prevent the greater harm—until the situation truly is an emergency—COs must strive to find some alternative, non-forceful way to resolve the incident[399] and avert the threatened harm.[400] Any other approach would

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[398] *See supra* Section I.A.

[399] This imperative helps make clear why, even assuming the validity of *Whitley*'s reasoning, the Court's holding in *Hudson v. McMillian*, 503 U.S. 1 (1992), was so wholly off base. In *Hudson*, the Court held that *Whitley*'s "maliciously and sadistically" standard applies not only in exigent circumstances, but "whenever guards use force to keep order." *Id.* at 6. According to Justice O'Connor, writing for the *Hudson* majority, "[w]hether the prison disturbance is a riot or a lesser disruption, [COs] must balance the need 'to maintain or restore discipline' through force against the risk of injury to [prison residents]. Both situations may require prison officials to act quickly and decisively." *Id.* But in asserting that COs must "act quickly and decisively" even in the absence of an exigency, Justice O'Connor papers over the key issue: is force immediately necessary to forestall still more harm than the force would cause, or is there time to pursue other, nonviolent strategies for resolving whatever issue is at hand? When time remains to pursue nonviolent responses, the fact that force may prevent more harm than good if no other strategies are tried does not warrant COs in taking the extreme step of inflicting bodily harm on the very people they are sworn to protect. Instead, their affirmative duty of care obliges them to try to avoid using force. In many cases, incidents may be resolved simply by engaging the person creating the disturbance with sympathetic concern and a willingness to hear them out or otherwise trying to alleviate their distress. To inflict bodily harm when sympathetic engagement might do as well is the antithesis of honoring one's duty of care. Yet just such a first-line resort to force is precisely what *Hudson* invites and even rewards. *See also infra* note 400.

[400] This principle grounds the standard emphasis among corrections professionals on COs' obligation where possible to seek to de-escalate potentially explosive situations without resorting to force, which at least implies that force should only be used as a last resort. *See, e.g.*, Rusty Ringler, *The 8 Most Effective De-Escalation Techniques in Corrections*, CORRECTIONS1 BY LEXIPOL (May 30, 2017), https://www.corrections1.com/corrections-training/articles/the-8-most-effective-de-escalation-techniques-in-corrections-jN0RMEriIsox1LuE/ [https://perma.cc/7D3W-ZWJ8]. However, as Steve Martin, former

vindicate the infliction of gratuitous harm as consistent with COs' duty of care and protection—and such a notion, with its inherent moral contradiction, is unsound on its face.

A third, related issue concerns the degree of certainty officers require before they are justified in using force. In the necessity context, "where there is a difference between the harm that [an actor's] conduct actually causes and the harm that was necessarily to be expected from his conduct . . . , it is the harm-reasonably-expected, rather than the harm-actually-caused, that governs."[401] But this principle comes with a significant caveat: the "harm-reasonably-expected" must be imminent.[402] Speculation as to possible future harm is not sufficient.[403]

General Counsel for the Texas prison system, has testified, COs often use weapons like pepper spray and tasers "as a 'first strike' response, before other tactics are considered or attempted." Gibbons & Katzenbach, *supra* note 46, at 400. In his testimony before the Commission on Safety and Abuse in America's Prisons, Martin recounted an incident

> in which a prisoner had refused to relinquish his dinner tray. The man was unarmed, locked securely in cell, and weighed only 130 pounds. Before even entering the cell, an "extraction team" of five officers and a sergeant discharged two multiple baton rounds, hitting the prisoner in the groin, dispersed two bursts of mace [a.k.a. pepper spray], and fired two TASER cartridges. The team then entered the cell and forcibly removed the prisoner.

Id. at 432. For more discussion on the appropriateness of using force to "maintain or restore discipline[,]" the primary purpose for COs' use of force emphasized in *Whitley*, see *infra* Section III.C. *See also* Schlanger, *supra* note 166, at 393–99 (explaining that "officers sometimes use excessive force to accomplish legitimate purposes, indifferent to the pain or injury the force inflicts") (capitalization deleted).

[401] LAFAVE, *supra* note 156, § 10.1(d)(2), at 558–59.

[402] *See id.* § 10.1(d)(5), at 563 ("It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent."). *But see* ROBINSON II, *supra* note 136, § 124(f)(1), at 57 ("Since the lesser evils defense already requires that the actor engage in conduct only when necessary to avoid the harm, the imminence requirement is an inappropriate and unnecessary additional limitation.") (quoted in LAFAVE, *supra* note 156, § 10.1(d)(5), at 563 n.73); *see also id.* § 10.1(d)(5), at 563 n.74 (noting a case denying the applicability of the necessity defense to a charge of trespass on a nuclear weapons plant on grounds that "purported danger of radiation hazards and nuclear war 'are long-term and speculative, and thus insufficient to demonstrate that a specific, definite, and imminent injury is about to occur'") (quoting Andrews v. People, 800 P.2d 607, 611 (Colo. 1990)).

[403] In *Evaluating Police Uses of Force*, Seth Stoughton, Jeffrey Noble, and Geoffrey Alpert make this point in the context of policing, and their account seems equally apt for the carceral context. *See* STOUGHTON ET AL, *supra* note 329, at 37. "For a use of force to be constitutionally permissible," the authors argue, an officer "must have an objectively reasonable belief that something *is happening*, not just that something *might possibly* happen." *Id.* What is required is not merely a theoretical risk but a "bona fide threat," which in turn "must be predicated on an officer's articulation of details and circumstances that would lead a reasonable officer to conclude that the individual" against whom force was used "was

In prison, COs will at times use force, not to forestall imminent harm, but to assert their authority against individuals who, in the officers' estimation, display insufficient respect for their position,[404] perhaps by speaking rudely to officers or by refusing to follow direct orders.[405] COs who use violence to assert their authority may genuinely believe that tamping down such defiant behavior is necessary to keep disorder—and greater violence—at bay. But this sort of speculation would be insufficient to justify responding with force.

Imagine a CO who body-slams a person who has refused a direct order to return to his cell. The CO may well believe that, unless he reasserts his

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physically capable of causing harm, was in a position to physically inflict that harm, and had manifested the apparent intent to do so." *Id. But see id.* (emphasizing that although "[t]he threat must be immediate, . . . it need not have fully manifested into an actual assault," and that "[t]he legal standard of 'immediate threat' allows for situations in which an officer uses force to preclude an assault by reacting to a threat before it progresses into an assault"). As Stoughton et al. observe, law enforcement officers "[s]ometimes . . . attempt to justify their actions on the basis of predictions that are . . . far-fetched." *Id.* But "vague pronouncements that the subject was threatening are insufficient, as are unreliable recitations of generic and worn indicators such as the look in a subject's eyes. Purely generalized concerns about a safety risk do not amount to an actual threat." *Id.* Just such a questionable defense was raised by L.A. Sheriff's Deputy Hector Saavedra-Soto in the investigation into the 2019 killing of Paul Rea, a diminutive 18-year-old who was shot and killed by Saavedra-Soto pursuant to a traffic stop. During his interview with the homicide investigator, Saavedra-Soto said that "in the tussle, Rea turned, reaching for his waistband," and that "'[h]e looked at me, and that look in his eyes. I could just tell . . . he was gonna fucking kill me.'" Dana Goodyear, *Above the Law*, NEW YORKER, June 6, 2022, at 50. The district attorney "decided that the shooting was justified." *Id.* This discussion suggests that the meaningful implementation of these principles might tell in favor of judicial exclusion of testimony plainly inconsistent with the morally appropriate disposition of the reasonable CO. For further discussion of this point, see *infra* note 447. The need for a bona fide threat instead of far-fetched speculation is yet another reason to reject as inadmissible the *Kingsley* defendants' claim that they were afraid that Kingsley, prone and with his hands cuffed behind him, could "begin actively fighting them." Brief for Respondents, *supra* note 105, at 8.

[404] In Section III.C, I address this issue in more detail and address the role both *Whitley* and *Kingsley* play in enabling this troubling behavior on the part of COs.

[405] Daria Roithmayr identifies one possible explanation for the observed tendency of law enforcement officers to respond to defiance with escalating force: the belief among officers that the refusal to defer to their authority indicates "that the civilian does not respect the authority of the law and may pose a danger to the officer." Roithmayr, *supra* note 74, at 422 ("[W]hen a civilian refuses to defer, affirmatively defies authority, or resists an officer, the police often interpret this action to be evidence that the civilian will not abide by ordinary moral, legal, and social rules."). *But see* STOUGHTON ET AL, *supra* note 329, at 33 (explaining that *Graham*'s requirement that law enforcement may only use force to forestall an "imminent threat" requires that "[an] officer has reason to believe that an individual has the ability, opportunity, and intent to cause . . . some particular and identified type of physical harm," and that "[i]t is not sufficient to state that an individual has the ability to cause some undefined harm").

authority with physical force, other people on the unit might be less inclined in the future to follow official directives and, as a consequence, there would be a total breakdown of order in the prison. And further, this CO may imagine, this situation might open the way for prisoners to begin calling the shots and using their newfound power to settle scores, control the prison's black market, and otherwise reduce the prison to a state of violent chaos. Yet this hypothetical chain of events is entirely speculative. Much would have to happen before the imagined parade of horribles could come about, which means that there would remain time for this CO and fellow officers to take steps to prevent it that do not involve the infliction of physical harm.

Indeed, given that people who feel themselves to have been treated unfairly may understandably respond with resentment and defiance,[406] the use of physical force in such a situation could easily *exacerbate* the likelihood of further unrest rather than quelling it[407]—the equivalent, on the doctrine of necessity, of creating the danger offered to justify the lawbreaking.[408] On the other hand, displays of anger, frustration, or distress

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[406] *See supra* Section I.B, text surrounding notes 94–96 (observing that people in prison, like people everywhere, will respond favorably to respectful treatment and will meet perceived disrespect with hostility); *see also* Tyler, *supra* note 96, at 380 ("[T]hose authorities who exercise their authority fairly are more likely to be viewed as legitimate and to have their decisions accepted.").

[407] Just such a misjudgment appears to have sparked the disturbance in the Oregon Penitentiary that left Gerald Albers shot in the knee. *See* Whitley v. Albers, 475 U.S. 312, 314 (1986). As already seen, *see supra* Section II.A, text accompanying notes 159–165, the unrest began when residents of Albers' cellblock refused to lock in after witnessing what they believed to be "unnecessary force used by the guards," who were escorting some prisoners from the cellblock "to the prison's segregation and isolation building." Albers v. Whitley, 546 F. Supp. 726, 730 (D. Or. 1982).

[408] *See* LAFAVE, *supra* note 156, § 10.1(d)(6), at 564 (explaining that in several jurisdictions, if defendants who claim necessity were "at fault in creating the situation," they "may be criminally liable," and in many instances "the level of liability" is determined "on the basis of the defendant's culpability in creating the danger"). The possibility of COs' culpable creation of the need for physical force implicates a fourth relevant issue for the context of excessive force in prison that the common law necessity defense helps to illuminate. In the criminal context, a defendant who is at fault for creating a situation in which law-breaking represented the lesser evil will find their access to the necessity defense restricted. For example, a person who intentionally sets a forest fire may not invoke necessity as a defense against criminal trespass should he have been forced by the flames to take refuge on private property. Or if "A drives recklessly and thereby creates a situation where he must either stay in the road and run down B and C or go on the sidewalk and strike D," and if A "chooses [to] . . . strike and kill[] D," A may not escape liability on the ground that he chose the lesser evil. LAFAVE, *supra* note 156, § 10.1(d)(6), at 564. This approach makes sense. An actor who culpably creates a situation in which law-breaking proves necessary has by their conduct already endangered the values the law is meant to serve. Even prior to the moment of impact,

by individual prisoners in the wake of a violent encounter with a CO could inspire empathetic, humane COs to find a nonviolent resolution, thus helping to forestall COs' worst fears. Unless and until physical harm is genuinely imminent, any prediction of future violence or disorder will remain entirely speculative, making the use of force inappropriate.

In sum, from the centuries' long development of the common law necessity defense, three basic principles emerge that are applicable to our context: (1) in the harm calculus, all people have equal value; (2) to be necessary, no non-forceful approach to averting the harm may yet remain; and (3) speculation as to possible future harm is insufficient to justify

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our reckless driver, by driving as he did, already violated his duty of care toward all citizens. He is therefore culpable for the harm he ultimately causes, even if, when forced to act, he chooses the lesser harm.

Unfortunately, in the prison context, COs will at times by their own intentional conduct create conditions in which force may eventually prove necessary. One such dynamic occurs when, feeling surly or otherwise bad-tempered, COs respond to reasonable requests from prisoners in a hostile and dismissive manner. Depending on the circumstances, this behavior can provoke an antagonistic response on the part of the person making the request, a situation that can easily escalate into full-blown conflict. Judging from interviews I have conducted with correctional officers and with people recently released from prison, this situation can occur with concerning regularity. Or COs, for reasons known only to themselves, may spread it around that a particular prisoner is a "snitch," thereby putting that person at substantial risk of violent reprisal by fellow prisoners. This situation also occurs with troubling frequency. *See, e.g.*, Jordan v. Hooks, No. 6:13-cv-2247, 2015 WL 5785504, at *4 (D.S.C. Sept. 29, 2015) (denying qualified immunity to former correctional officer who caused plaintiff to be attacked three times by repeatedly telling other prisoners he was a snitch); Quezada v. Roy, No. 14-cv-4056, 2017 WL 6887793, at *16 (S.D.N.Y. Dec. 14, 2017) (denying summary judgment for COs who incited three prisoners to assault the plaintiff by spreading rumors that he was a snitch); Warren v. Gastelo, No. 2:20-cv-3572, 2023 WL 2052184, at *1 (C.D. Cal. Jan. 11, 2023), *report and recommendation adopted*, No. 2:20-cv-3572, 2023 WL 2061932, at *1 (C.D. Cal. Feb. 16, 2023) (recommending denial of summary judgment for two COs who instigated an assault against a prisoner by publicly insinuating that he was a snitch). In each instance, depending on how things unfold, a point may ultimately be reached at which the use of force by COs might well prevent more harm than it inflicts. But COs' duty of care is not triggered only in exigent moments. It is ongoing, a defining feature of the COs' role. A CO who chooses to indulge their impulse to hostility and aggression towards those in their custody, thereby (predictably) provoking a hostile and aggressive response, has already by their own deliberate behavior put at risk the very people they are sworn to protect. The same is true of the CO who spreads information he knows will expose individual prisoners to violent reprisal. Had these actors simply acted from the get-go as their duty of care required, there would have been no greater harm to avert and no need for force. For this reason, no necessity defense should lie even if, at the moment of impact, the force used may have averted still greater harm. (Note that COs who culpably create situations putting prisoners at risk would also be open to liability for failure to protect under *Farmer v. Brennan*, 511 U.S. 825 (1994), under which prison officials who recklessly expose prisoners to a substantial risk of serious harm demonstrate the deliberate indifference requisite for Eighth Amendment liability.)

force.[409] Together, these principles help to determine when COs' use of force might reasonably be thought justified, and when instead liability is appropriate.

Although implicating two very different legal issues, these two necessity frameworks—the common law necessity defense to criminal liability, and the necessity principle adopted here for evaluating uses of force in custody—share a strong imperative: whenever possible, actors must avoid violating strong legal norms. In the criminal context, the strong legal norm is not to break the law; in the prison context, it is not to inflict physical harm on those one is sworn to protect. It is not that these norms may never be transgressed. But the reasons must be extremely compelling and the need immediate. When these conditions are not met, imposition of liability is warranted.

C.*WHITLEY*, *KINGSLEY*, AND THE (FLAWED) GROUNDS FOR FORCE

Assuming reasonableness for this context to be appropriately construed,[410] the priority for reasonable COs contemplating physical violence against prisoners will be the overall reduction of harm. This imperative arises from the need to ensure that COs do not inflict the very injury "from which [they are] supposed to be providing protection."[411] With this principle in hand, supplemented by the insights gleaned from the criminal law doctrine of necessity, we are now in a position to identify a second profound problem with the governing Eighth Amendment doctrine of excessive force. Not only does *Whitley* allow the limits of constitutional force to rest on COs' own subjective judgments, but it also explicitly authorizes force in circumstances very likely to inflict greater harm than it prevents.

At points, the *Whitley* Court appears to recognize the prevention of still greater physical harm as the central institutional interest at issue. In distinguishing cases involving use of force from those claiming medical neglect, Justice O'Connor observes that "deliberate indifference to a prisoners' serious illness or injury . . . can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other [prisoners]."[412] Moreover, she cautions that "in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials

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[409] Both the second and third principles arise from the requirement inherent in the necessity framework that the danger must be imminent.

[410] *See supra* Section II.F.

[411] Gardner, *supra* note 10, at 106.

[412] *Whitley*, 475 U.S. at 320 (citation omitted).

undoubtedly must take into account the very real threats the unrest presents to [prisoners] and prison officials alike, in addition to the possible harms to [prisoners] against whom force might be used."[413] With these comments, Justice O'Connor seems to acknowledge that COs are charged to ensure the safety of all people in a facility, and that, in contemplating the use of force, they must weigh the potential harm threatened to all parties—staff and prisoners alike—against the harm the force itself might cause.

But when the time comes to articulate the governing standard for Eighth Amendment excessive force claims, Justice O'Connor seems to forget all about the urgent need to maximize the safety of all involved. Instead, she directs courts to ask "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."[414] Elsewhere she likewise emphasizes the need to defer to prison officials' judgments as to what is required "to preserve internal order and discipline and to maintain institutional security."[415] And notably, although *Kingsley* rejects *Whitley*'s "maliciously and sadistically" standard, in this respect Justice Breyer adopts *Whitley*'s formulation wholesale. Indeed, in *Kingsley*'s discussion of its objective reasonableness standard, "internal order and discipline" and "institutional security" are the only governmental interests explicitly mentioned.[416] If the *Kingsley* majority acknowledges the need to ensure collective physical safety, it does so only glancingly, with insufficient emphasis to counter its explicit endorsement of *Whitley*'s emphasis on preserving institutional order.[417]

To this, it might be asserted that "internal order and discipline" and "institutional security" implicitly embody the priority of ensuring the physical safety of both prisoners and staff. And certainly, disorder in prison will in some cases implicate serious safety concerns. *Whitley* itself arose from just such a situation: the plaintiff, Gerald Albers, was shot in the knee by an officer who had entered the cellblock after one CO had been assaulted and another taken hostage.[418] Although the parties in *Whitley* disputed whether the exigency remained by the time the defendants' "assault squad" arrived

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413 *Id.*

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

415 *Id.* at 322 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

416 Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (quoting *Bell*, 441 U.S. at 547).

417 *See id.* at 399 ("[S]afety and order at these [carceral] institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.") (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012)); *see also id.* at 401 (referring to the "legitimate safety-related concerns of those who run jails").

418 *Whitley*, 475 U.S. at 316.

on the scene,[419] it is easy in such a scenario to imagine things spinning out of control, good faith efforts at de-escalation failing, and some forceful intervention being necessary to head off still greater physical injury and even death.[420]

However, in many other cases, breakdowns in "prison discipline"[421] will fall well short of posing a genuine threat to anyone's physical safety.[422] In such cases, authorizing physical force "to compel obedience or to subdue recalcitrant prisoners,"[423] as the Court appears to do in *Whitley*, is an invitation to excessive force. Cases abound in which a prisoner's refusal to comply with institutional rules sparks physical violence against rule breakers out of all proportion to the nature of the violation.

Kingsley is one such case, in which Kingsley's refusal to remove a light cover precipitated a violent and unnecessary cell extraction and eventually a tasing.[424] In *Treats v. Morgan*, when the plaintiff refused to take a copy of a form he had just signed, he was pepper sprayed, "slammed to the floor," and handcuffed.[425] In *Stone v. Vasquez*, when Stone left his building "in search of his pet lizards" and refused to go back inside, he was handcuffed.[426] When he tried to jerk his arm out of the grasp of a CO, he was "pushed . . . to the ground, causing [his] head to hit the asphalt," and wound up with two officers kneeling on his back and holding his arms to place him in "leg restraints."[427] And in *West v. Byers*, when the plaintiff, Christopher West, refused to remove his arm from the food slot during meal distribution in administrative segregation, he was subjected to a series of violent assaults by CO Williams, who was distributing the trays.[428] According to the complaint, Williams attempted to force West's arm and shoulder back into the cell, "slammed"

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[419] *See supra* note 186.

[420] This is an instance in which the common law framework of self-defense/defense of others would govern, although here, the balance of harms would arguably tell in favor of force.

[421] *Whitley*, 475 U.S. at 322.

[422] Moreover, as we have seen, an environment that systematically demonizes and dehumanizes the incarcerated seeds a moral blindness towards the humanity and thus the needs of people in custody, along with a readiness to exaggerate the threats they pose. *See supra* Section I.B. Under these circumstances, it seems fanciful to imagine that COs' perceptions of institutional security would prioritize prisoners' safety.

[423] West v. Byers, No. 5:13–cv–3088, 2015 WL 5603316, at *8 (D.S.C. Sept. 23, 2015) (citing Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984)).

[424] Kingsley v. Hendrickson, 576 U.S. 389, 392 (2015).

[425] 308 F.3d 868, 873–74 (8th Cir. 2002).

[426] No. 1:05-CV-1377, 2010 WL 148186, at *1 (E.D. Cal. Jan. 12, 2020). Earlier that day, CO Vasquez observed Stone trying "to obtain a cigar butt by reaching through a fence." In response, "Stone was stripped of his clothes and taken to a holding cell." *Id.*

[427] *Id.*

[428] *West*, 2015 WL 5603316, at *6.

West's arm several times with the flap in the door and, when West still did not remove his arm, pepper-sprayed him.[429]

West offers a clear case in which a nonviolent alternative was plainly available and would have better achieved the defendant's stated aims.[430] At the time of the incident, West was locked in administrative segregation, with the food slot being his only point of contact with COs. Given West's inability to touch anyone not standing immediately outside his cell, it is hard to see how West's refusal to move his hand posed any danger, much less a danger necessitating a violent response.

But the *West* court, applying *Whitley*, concluded otherwise. Citing Williams' testimony that West had become aggressive, threatened the officers distributing the trays, and failed to "comply with several directives instructing him to remove his arm from the food flap," the court concluded that West's "aggression towards Defendant Williams and his refusal to obey a direct order" made force "necessary to restore order and [thus was] not for the very purpose of causing [West] harm."[431] Moreover, the court found the amount of force reasonable under the circumstances; West "admittedly held his arm out of the door flap and did not remove it during his interaction with Defendant Williams," and—as *Whitley* makes clear—"a prison official may use reasonable force to compel obedience or to subdue recalcitrant prisoners."[432]

Whitley's standard thus explicitly constitutionalizes uses of force that will predictably inflict more harm than they prevent. Under *Whitley*, "necessary" force is any force that could plausibly be said to help maintain internal order, regardless of either the balance of harms such violence would generate or the possibility that some non-forceful alternative might resolve the situation.[433] And on this front, *Kingsley* follows *Whitley*'s lead without

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[429] *Id.* CO Williams subsequently assembled an extraction team, which forcibly removed West from his cell, during which time, CO Williams was alleged to have "scratched and clawed and squeezed [his] fingernails into [West]'s kneecap and arms." *Id.* (internal quotation marks omitted). West was then placed in a restraint chair and not permitted a shower to remove the mace. *Id.* at *2.

[430] I also discuss *West v. Byers* in Dolovich, *Coherence*, *supra* note 23, at 328–29.

[431] *West*, 2015 WL 5603316, at *6–7; *see also* Schlanger, *supra* note 166, at 394–95 (explaining that COs often use force to compel "pain compliance" with rules or orders, "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 . . . ").

[432] *West*, 2015 WL 5603316, at *8.

[433] Whitley v. Albers, 475 U.S. 312, 320–22 (1986). In his *Whitley* dissent, Justice Marshall challenges the majority's insistence that no ex-post scrutiny is appropriate when the only question is whether there existed "arguably superior alternatives." *See id*. at 333–34

remark. As a theory of state violence in prison, this framework seems hard to square with a constitutional duty of care. Yet in neither *Whitley* nor *Kingsley* does the Court notice any possible tension with constitutional imperatives. To the contrary, in both cases, the Court's framing of the relevant state interests presumes the validity even of force that inflicts more pain and suffering than it is likely to prevent.

As is to be expected, *Whitley*'s problematic authorization of state violence for reasons unrelated to the prevention of imminent physical harm has worked its way into the use of force policies of many prison systems. State agencies routinely look to applicable Supreme Court doctrine when crafting policy to help their employees remain within constitutional bounds. In this way, the Court's endorsement of physical force under circumstances where no imminent physical danger exists becomes a license for official abuse.

According to researchers Katherine Salinas and Ashtan Towles, of the twenty-six jurisdictions to have made their use of force policies publicly available,[434] fourteen authorize the use of force when it is believed necessary to "compel an inmate's compliance with orders,"[435] with a further four policies authorizing force "to overcome" a person's "physical resistance to a valid order."[436] In addition, twelve of the twenty-six policies authorize force in language consistent with *Whitley*'s endorsement of the use of force "to preserve internal order and discipline and to maintain institutional

(Marshall, J., dissenting) (predicting that, were "prison officials . . . to drop a bomb on a cellblock in order to halt a fistfight between two inmates . . . the Court would have difficulty concluding . . . that such an action was not sufficiently wanton to present a jury question").

[434] These jurisdictions include the Federal Bureau of Prisons (BOP) and 25 state Departments of Corrections (DOCs): Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, and Wisconsin. *See* Katherine Salinas & Ashtan Towles, *Permitted Circumstances in U.S. Use of Force Policies* (Aug. 2, 2022) (on file with author). I am grateful to Katherine Salinas and Ashtan Towles for generously sharing this dataset and for their analysis of the impact of *Whitley*'s language on the 26 use of force policies they collected.

[435] *Id.* (quoting Nevada policy and listing the following additional policies: BOP, California, Illinois, Massachusetts, Minnesota, Montana, Nevada, New York, North Carolina, Ohio, Pennsylvania, Texas, Utah, Vermont, Wisconsin).

[436] *Id.* (quoting Oregon policy and listing the following additional policies: Florida, Maryland, Ohio). Policies in this category do not define the sorts of physical resistance sufficient to warrant force. One wonders whether Vasquez's refusal to return to the housing unit before finding his pet lizard would qualify. *See* Stone v. Vasquez, No. 1:05-CV-1377, 2010 WL 148186, at *1 (E.D. Cal. Jan. 12, 2010).

security."[437] Of these twelve policies, six allow force to be used to "preserve" or "restore" order,[438] three to "preserve order and security,"[439] and three "to maintain order and discipline"[440] or to "enforce the observance of discipline."[441] Given the cultural dynamics that shape COs' perceptions of the need for force, it would be unsurprising if COs frequently assert the need for force even when nonforceful responses would do as well. And in cases where a DOC's policies authorize physical violence against prisoners to maintain institutional order, discipline, and security even absent an imminent risk of greater harm, COs would know themselves to be acting within policy even when they use force causing more harm than their violent response could reasonably have been expected to avert.

D. PUTTING IT ALL TOGETHER

In Part II, I suggested that juries in Eighth Amendment excessive force cases should, at a minimum, be instructed to determine the reasonableness of the force used from the perspective of a reasonable CO defined as one who recognizes both the humanity of people in custody and their own fundamental duty of care and protection.[442] If that formulation better captures appropriate constraints on the use of force in custody than *Kingsley*'s nonspecific reasonableness standard, it still lacks any definite guidance, either for courts seeking to assess ex post the reasonableness of uses of force or for COs seeking to keep their own conduct within appropriate moral limits. We are now in a position to craft a more specific instruction, one that, I argue, should guide reasonableness determinations in assessing claims of excessive force.

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[437] *Whitley*, 475 U.S. at 322 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)); Salinas & Towles, *supra* note 435. Some policies in the Salinas/Towles dataset also contain permissions to use force under other circumstances likely to cause more harm than it prevents. *See, e.g.*, *id.* (Georgia policy authorizing force to "accomplish legitimate and necessary functions of [facility] operations" or "to maintain or regain control of an [inmate]"); *id.* (Idaho policy authorizing force "to control offenders"); *id.* (Oklahoma policy authorizing force "to protect the security of the physical plant").

[438] *Id.* (quoting Texas and Montana policies and listing the following additional policies: Alaska, Maryland, Minnesota, Montana, North Dakota).

[439] *Id.* (quoting Massachusetts policy and noting the following additional policies: BOP, Vermont).

[440] *Id.* (quoting and listing the Arkansas policy).

[441] *Id.* (quoting and listing the Utah policy). It is true that several of the policies Salinas and Towles unearthed contain language directing that force be used only as a last resort. But even still, by allowing the use of physical violence to maintain institutional order and discipline, they ultimately authorize force even when doing so would cause greater harm than would non-forceful alternatives.

[442] *See supra* Section II.F, text accompanying notes 328–330.

First, as before, courts should instruct juries assessing the reasonableness of a given use of force that they should "make th[e] determination from the perspective of a reasonable [CO] on the scene,"[443] with the reasonable CO defined as one who recognizes both the humanity of people in custody and their own essential duty of care and protection. In addition, juries should be instructed as to what specifically constitutes reasonable conduct in this context. This instruction might read as follows:

> A CO who is reasonable in this sense would use physical violence against the people in their custody only when doing so is likely to prevent more harm than it inflicts, and only once all available[444] nonforceful alternatives have been tried and no nonforceful options remain. In assessing the balance of harms, the reasonable CO would act to protect staff from harm but would also give equal weight to the safety of those in custody, towards whom COs bear a particular duty of care.[445] In assessing the need for force, a reasonable CO would weigh the harm his own force would cause against the harm reasonably judged as imminent. Speculation about what might possibly happen in the future would not be sufficient. Nor may physical force qualify as reasonable when used to satisfy ends that, if left unfulfilled, would not pose an imminent threat of physical harm.
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> Prison staff will frequently act to achieve purposes that are institutionally desirable. But absent an imminent risk of physical harm, they must pursue those purposes exclusively through non-violent means. These purposes include maintaining and restoring order and discipline and preserving institutional security. Although there will be circumstances when pursuing these institutional goals will warrant the use of physical force because reasonably believed imminently necessary to prevent still greater physical harm, the mere invocation of these goals will not be sufficient to justify violent conduct. Purely generalized concerns about a safety risk do not amount to an actual threat. What is required is a particularized showing that the endangerment of these institutional purposes is reasonably believed likely to immediately cause a greater degree of physical harm than the contemplated force would inflict.[446] Anything else

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[443] Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

[444] An "available alternative" is one that may still be tried before the feared danger—that which the contemplated force is intended to avert—is reasonably expected to manifest. The more immediate the exigency, the fewer available alternatives are likely to exist. "It is sometimes said that the defense of necessity does not apply except in an emergency—when the threatened harm is immediate, the threatened disaster imminent." LAFAVE, *supra* note 156 § 10.1(d)(5), at 563. However, as LaFave observes, this may simply be "a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant[] to avoid the harm, other than the option of disobeying the literal terms of the law." *Id.*

[445] *See* Giraldo v. Dep't of Corr. & Rehab., 168 Cal. Rptr. 3d 231, 250 (Ct. App. 2008) (holding, based on "support in numerous, if not all, pertinent authorities," that jailers have a duty to protect prisoners from foreseeable harm inflicted by a third party).

[446] This formulation is only a first cut. I would welcome amendments that better capture the key points.

> would expose people in custody to gratuitous physical violence in direct violation of the duty of care and protection the state owes to everyone it chooses to incarcerate.

This instruction, I argue, captures the appropriate limits on the official use of force against people in prison and thus the principles that reasonable COs, acknowledging their constitutional obligations toward those in custody, would take as guideposts in deciding whether to use force.[447]

It might seem unrealistic to expect COs in the heat of the moment to stop and consult this list of moral constraints. But in fact, the principles I have sketched here are entirely intuitive. For those COs who recognize the shared humanity of the incarcerated and thus the moral imperative to minimize the harm prisoners suffer, these principles would already inform their behavior as a matter of course. Some correctional officers may be unwilling or unable to regard people in custody as fellow human beings or to acknowledge their own duty of care, and so may struggle to keep their resort to physical violence within bounds. But in such cases, it is their own moral blindness and not these principled limits on official use of force that is the source of the problem and which must be reckoned with.

Some readers may imagine a draft jury instruction to represent a minimal payoff, especially given the wide-ranging inquiry undertaken here. But to see the matter in this light would be to misperceive the nature of the contribution. The content of the proposed instruction is more than a guide for factfinders in individual cases (although given where things currently stand, the adoption of this instruction in actual cases would alone represent a notable contribution). It is also a crisp summation of the normative limits on state violence in carceral facilities and the precise terms of the affirmative

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[447] Notwithstanding the considerable moral pressures and practical obstacles telling against full implementation of these principles on the ground or in ex post judicial review, it would still be desirable to adopt strategies for increasing the chances that reasonableness assessments might be made consistently with the appropriate values. Among these strategies might be that of giving courts the power to exclude as inadmissible testimony that is plainly inconsistent with COs' basic obligations or plausible only if one refused to apply the foundational principles contained in the proposed instructions (for example, the *Kingsley* defendants' testimony regarding their fear of assault by a prone, handcuffed Kingsley). True, as a practical matter, courts too may endorse the toxic narratives explored in Section I.A, thereby skewing the outcomes in favor of state officials. But even still, implementing this rule would change the proceedings in a positive direction, by inviting plaintiffs to make the affirmative case for this inconsistency and thus surfacing morally questionable aspects of the case that would otherwise remain unacknowledged. In any case, the point of procedural protections is to enhance the possibility that the legal process will operate as consistently as possible with the governing ideals. To the extent that granting courts the authority to exclude plainly inconsistent testimony might increase the likelihood that reasonableness determinations will be properly motivated, the proposed judicial prerogative is worth adopting, even if it may not make a difference in every case.

duty of care and protection prison officials owe those in custody.[448] Ideally, there would be no official violence of any kind in carceral settings. But prison is far from an ideal world. And however much one might wish it, it is a world that is not going away in the foreseeable future. Given this fact, and given that, as I write this, there are close to 2 million people living behind bars in the United States, we do not have the luxury to refuse to consider the moral constraints on those who run the carceral institutions that currently exist. It is in this spirit that the content of the proposed instruction is offered.

Were the moral vision developed here to be meaningfully implemented, it would radically transform carceral practice. Prisons and jails in which COs treated those in custody as moral equals, pursued nonviolent de-escalation as a matter of course, and knew themselves obliged to support every decision to use physical violence with valid evidence of a bona fide imminent threat would look and operate profoundly differently—and far more humanely—than they do today.[449] If this prospect is unlikely to be fully realized any time

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[448] Understanding the broader purpose of this enterprise helps explain why, although it may perhaps seem otherwise, the argument offered here does not succumb to what Eric Posner and Adrian Vermeule label the "inside/outside fallacy." Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). (I thank Richard Re to calling my attention to this issue and to Posner and Vermeule's article.) On their telling, this issue can arise when legal scholars draw on a rich body of literature from other disciplines—political science, economics, or in my case social psychology—to diagnose a deep problem traceable to public actors' inappropriately motivated behavior, and then propose solutions that would rely on the presence of "public-spirited motivations" on the part of the actors called upon to implement that solution. *Id.* at 1744; *see also id.* (identifying the nature of the incoherence as that of "positing nonideal motivations for purposes of diagnosis and then positing idealized motivations for purposes of prescription"). Were I to claim my proposed instruction as a cure-all for the use of excessive force in prison, the charge of incoherence Posner and Vermeule level at accounts of this sort would be warranted. I do not, however, imagine that, were the instruction I propose suddenly to guide jury deliberations in Eighth Amendment excessive force cases, outcomes would immediately be different than they are now—although certainly, if the instruction were widely implemented, it may well make an immediate difference in some cases, and over time, that number would be likely to grow. My main purpose here has rather been to use the opportunity presented by the Court's poorly constructed and morally inappropriate doctrinal standard to try to map more precisely the moral limits on state violence in prison. In the process, I hope to seed an alternative moral understanding of the issue and the stakes, not only to displace the deracinated account currently captured in the constitutional doctrine but also to reframe broader the cultural discourse. Ultimately, it is the dominant normative perspective that determines both political possibilities and policy interventions. If we want to change the facts on the ground, we first need to shift the reigning moral view.

[449] Some readers may argue that the very enterprise of incarceration necessarily entails the dehumanization, degradation, and violence that currently define the American prison, making this enterprise quixotic and doomed to failure. But prisons in several northern European countries get far closer to the ideal than is typically the case in the United States,

soon, any amount of pressure directed to enforcing the principled limits on force excavated here would help to push carceral culture in this salutary direction. For so long as prisons persist, it is this vision, and not the Court's deracinated moral framework, that ought to guide carceral practice at every level.[450]

CONCLUSION

In choosing to punish crime with prison time, the state commits itself to ensuring the physical safety of those it incarcerates for the duration of the stipulated sentence. But the state, being a complex organization and not a natural person, can only meet its obligations through the conduct of the individuals deputized to act on its behalf. In turn, these deputized individuals become the ones responsible for ensuring that the state's obligations are fulfilled. In the prison context, it is prison officials who are thereby duty-bound. Yet rather than facilitating the fulfillment of this duty, American prisons promote a culture inclining COs to the ready use of gratuitous violence against the very people they are sworn to protect.

Under these circumstances, one might expect the courts to step in, allowing civil rights plaintiffs a meaningful opportunity to challenge as unconstitutional seeming instances of excessive force. Instead, in *Whitley*, the Court crafted an Eighth Amendment regime that in all but the most extreme cases leaves it to COs to judge for themselves whether physical force is warranted.[451] The effect of this arrangement is to transfer the power to set constitutional limits to the very actors who most need some external check, and thereby to dramatically underprotect the incarcerated from official abuse and malfeasance. Nor would a standard "objectively unreasonable" approach, such as the Court established in *Kingsley*,[452] be sufficient to ensure that judicial review will appropriately implement the values and purposes

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suggesting that substantial improvement is possible. *See supra* note 4545 (citing sources). Incarceration as punishment is not disappearing from the American criminal system for the foreseeable future. For this reason, the project of pushing the American carceral project in the direction of greater humanity must be pursued even if perfect compliance with moral imperatives will remain elusive.

[450] Some readers may prefer to forego efforts at this level and instead to reject any engagement with the carceral enterprise in its current form. I sympathize with this perspective. But as I see it, so long as prisons persist, we are morally obliged to do all we can to reduce as much as possible the harm these institutions inflict. Such efforts demand engagement with the existing regulatory system. The account developed here offers a basis for pushing that regulatory regime to manifest a greater measure of humanity, and for guiding our thinking as to the appropriate constraints on state actors in a world where a carceral response to wrongdoing is likely to endure in some form for the foreseeable future.

[451] *See* Whitley v. Albers, 475 U.S. 312, 320–22 (1986).

[452] Kingsley v. Hendrickson, 576 U.S. 389, 392 (2015).

animating COs' constitutional duty of care. Doctrinally speaking, to achieve this end, courts would need to specifically instruct juries on the appropriate moral posture of the reasonable CO,[453] who would as a matter of course affirm their own fundamental duty of care and acknowledge the humanity of the incarcerated and their consequent right to safety.

Still, if the goal is to understand the appropriate limits on state violence in prison, these findings only get us so far. To determine whether a reasonable CO appropriately characterized would have judged a particular use of force justified, we need some affirmative account of justifiable force in prison. This Article offers such an account. It argues that the state's carceral burden imposes on COs the obligation to keep people safe while they are inside, and thus that, unless COs have a valid claim of self-defense or defense of others, the use of force—which explicitly compromises prisoners' physical safety—is justified only when immediately necessary to prevent more harm than it is likely to cause. Among other things, this approach exposes a further failing of *Whitley*, one that *Kingsley* uncritically reproduces: these cases take for granted that force in prison is justified "to preserve internal order and discipline and to maintain institutional security."[454] Yet as this Article has argued, allowing these goals to justify the use of force would invite the routine infliction of physical harm by COs against the very people they are sworn to protect, without any grounds for thinking such violence necessary to maximize collective safety.

The question of how a state should run its prisons is not primarily doctrinal. In a constitutional democracy, carceral practice must be informed by a morally defensible understanding of constitutional imperatives. Yet as things stand, instead of a rich sense of what these imperatives demand, there is a moral void. This situation allows correctional officers to conduct themselves according to their own inclinations—even when those inclinations lead them to tolerate or, worse still, to valorize, the gratuitous use of physical violence. It likewise invites prison administrators, judges, and society as a whole to regard such violence with indifference.

This Article offers a moral counternarrative, a direct repudiation of the overly narrow, minimally protective, and normatively indefensible standard established in *Whitley*, and to a lesser extent in *Kingsley*. In doing so, it vindicates a central motivating premise of this project—that the Eighth Amendment's moral promise is considerably broader than the stripped-down vision the Supreme Court has thus far endorsed. An enterprise of self-

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[453] *See supra* note 447 (acknowledging that a revised jury instruction would not be enough to generate widespread change on the ground but identifying the process of getting the doctrine right as a necessary first step).

[454] *Kingsley*, 576 U.S. at 396–97 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

conscious moral reclamation invites a richer vision. This Article has used the opportunity presented by the Court's poorly constructed and morally inappropriate *Whitley* standard to map more precisely the moral limits on state violence in prison and, by doing so, to generate a reinvigorated moral vocabulary for understanding and challenging the culture of violence that currently reigns in carceral institutions. It is this normative conception, and not the currently operative constitutional standard, that should serve as the moral touchstone, not only for courts deciding individual cases, but for every public official able to influence carceral policy and every citizen motivated to challenge the prison system as it currently operates.