Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence

Anders Kaye†

The degree of civilization in a society can be judged by entering its prisons.

Attributed to Fyodor Dostoevsky¹

Prisons are dangerous places.

Judge Frank H. Easterbrook²

The political character of judicial decisions can be disguised by claims that these decisions are compelled by the logic of the law. A recent decision depriving Indiana prisoners of their right to self-defense illustrates the important role this ruse plays in current prison conditions jurisprudence.

After days of threatening sexual innuendo, Indiana Reformatory prisoner Michael Evans attempted to rape cellblock neighbor John Rowe. Rowe responded by hitting Evans with a hot-pot and calling for help.³ Prison officials found that Rowe had violated prison rules by committing battery,⁴ and imposed as a punishment one year in disciplinary segregation.⁵ Rowe was not allowed to plead self-defense.⁶ In *Rowe v DeBruyn*, the Seventh Circuit upheld the outcome of the prison hearing, concluding that prisoners may be denied the right to defend themselves against

† A.B. 1991, Harvard University; J.D. Candidate 1996, The University of Chicago.

¹ Suzy Platt, ed, *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service* 286 (Library of Congress 1989).

² *McGill v Duckworth*, 944 F2d 344, 345 (7th Cir 1991). Justice Thomas recently affirmed this description, writing that "prisons are necessarily dangerous places" *Farmer v Brennan*, 114 S Ct 1970, 1990 (1994), citing *McGill*, 944 F2d at 348.

³ *Rowe v DeBruyn*, 17 F3d 1047, 1049 (7th Cir 1994), cert denied, 115 S Ct 508 (1994).

⁴ Id at 1048-49.

⁵ In the end, the penalty was suspended. Id at 1049.

⁶ The prison officials did, however, consider self-defense a mitigating factor in sentencing Rowe. Id at 1049.

violent attacks by other prisoners.⁷ As a result, prisoners in the Indiana penal system must now submit to violence, even rape, or suffer potentially severe and recurrent punishment for their acts of self-defense.

This Comment argues that prisoners have a constitutional right to self-defense. The *Rowe* decision epitomizes the worst in prison conditions jurisprudence, ignoring important constitutional doctrines and unnecessarily imperiling prisoners. Section I illustrates the importance of the right to self-defense in the prison context, where violence is ubiquitous, and demonstrates that traditional prison conditions jurisprudence offers little promise of protection. Section II reviews the constitutional jurisprudence regarding self-defense, finding it to be both ambiguous and underdeveloped. Section III argues that there are at least two grounds for finding that prisoners have a constitutional right to self-defense. First, because self-defense has been an indispensable element of Anglo-American criminal justice, it is a fundamental right within the doctrine of due process. Second, the law governing the due process rights of the institutionalized, properly understood, mandates that when the state fails to protect prisoners, they must be allowed to protect themselves.

This Comment concludes that the decision in *Rowe* reflects not the logic of the law, but an inhumane conception of prisoners' rights. Judges often observe that "prisons are dangerous places," as though this were positive fact. *Rowe* reveals the fallacy in such an analysis. Judges often determine the conditions of prison life. If prisons are dangerous places, it is, at least in part, because judges make them so.

I. THE IMPORTANCE OF SELF-DEFENSE IN THE PRISON CONTEXT

It has long been recognized that the rule of law cannot be absolute: there are times when lawbreaking is justified or excusable.⁸ Of all the justifications and excuses present in the law,

⁷ 17 F3d 1047, 1052 (7th Cir 1994), cert denied, 115 S Ct 508 (1994). Specifically, the court stated: "[W]e . . . consider if the right to self-defense is a fundamental constitutional right within the Due Process Clause itself. We conclude that it is not." *Id.*

⁸ The doctrines of justification and excuse are the two most important limitations on the reach of the criminal law. Justified conduct is conduct that under ordinary circumstances is criminal but which under the special circumstances that constitute the justification defense is not wrongful, such as when choosing the lesser of two evils, defending another, or defending oneself. Joshua Dressler, *Understanding Criminal Law* § 16.03 at 182-83 (Matthew Bender 1987). Excused conduct is wrongful and unjustified conduct that causes social harm but for which the actor is not held personally to blame, such as when

none has been more fundamental than the right to self-defense.⁹ Although Anglo-American law has always deplored violence, for nearly as long it has recognized that victims of unjustified attacks must be allowed to fend off their attackers, even if doing so requires violence.¹⁰ It has been said that the self-defense instinct is so irresistible that legal prohibition would be futile, resulting only in punishment detached from culpability,¹¹ and that prohibiting self-defense under the law would undermine notions of security that undergird civil society itself.¹² For these reasons, the law declares that violence is wrong, but that violence as a defense against violence is justified.

The modern American prisoner is exposed to tremendous violence. Assault, rape, and murder occur with extraordinary frequency in prison.¹³ Yet modern prison conditions jurisprudence fails to provide prisoners meaningful protection from each other. This Section describes the pervasive violence encountered by prisoners in the modern American prison and the inadequate protection offered by current law. In this context, the right to self-defense takes on profound importance: nowhere is the need to defend against violence more pressing than amidst the pervasive violence and sparse protections of the modern American prison.

A. Prisons Are Dangerous Places: The Ubiquity of Violence in the Modern American Prison

Academic literature has documented an epidemic of prison

the actor is insane or under duress. Id.

⁹ This Comment will not attempt to provide a precise definition of the right to self-defense. There has been extensive debate about the scope and contours of self-defense, but commentators agree on the core elements. Professor Robinson summarizes them neatly: "Conduct constituting an offense is justified if (1) an aggressor unjustifiably threatens harm to any legally-protected interest; and (2) the actor engages in conduct harmful to the aggressor, (a) when and to the extent necessary to protect that interest, (b) that is reasonable in relation to the harm or evil threatened." Paul H. Robinson, *2 Criminal Law Defenses* § 131(a) at 73 (West 1984). See also Dressler, *Understanding Criminal Law* § 17.04 at 199 (cited in note 8) ("[D]eadly force is [justified if] the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor."); Model Penal Code and Commentaries, § 3.04 at 478 (ALI 1985) ("MPC") ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

¹⁰ See note 120 and accompanying text.

¹¹ See text accompanying notes 134-36.

¹² See text accompanying notes 137-40.

¹³ See notes 14-18 and accompanying text.

violence. James E. Robertson calculates that the murder rate in prison is eight times that outside of prison and that the assault rate is at least twenty times that beyond the prison walls.¹⁴ Michael Mushlin speculates that the incidence of homosexual rape and sexual assault is even more disproportionate.¹⁵ Thus, while "no one knows for certain how much violence takes place in American prisons since so much of it is not reported,"¹⁶ the available evidence depicts prison as a place where violence is ubiquitous:

[T]here are violent persons housed in our nation's prisons. These persons, left unchecked, can make prey of weaker inmates. The explosive mixture of personalities inherent in any prison setting is made even more incendiary by the overcrowding prevalent in numerous prisons, the lack of supervision and control in others, and the rising presence of . . . AIDS, which makes the prospect of sexual assault even more frightening than it already is. The result is that, in all too many prisons, the risk of serious violence is pervasive.¹⁷

Thus, writes Robertson, "a reign of inmate terror has descended upon many prisons."¹⁸

The ubiquity of prison violence demonstrates its crucial role in prison social and institutional dynamics. One author observes that there are several powerful incentives for violence in the prison context:

[V]iolence . . . (1) provides a reputation for violence that in itself becomes a deterrent against victimization; (2) improves the self-image of the user; (3) gives sexual relief; (4) serves as a means of extortion; (5) enhances the prospect for parole because the staff wishes to be rid of the troublemaker.¹⁹

Violence is also used to establish prison hierarchy: sexual assault becomes "an act whereby one male (or a group of males) seeks testimony to what he considers is an outward validation of

¹⁴ James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U Cin L Rev 91, 93-94 (1987).

¹⁵ Michael B. Mushlin, 1 *Rights of Prisoners* § 2.06 at 66 (Shephard's/McGraw Hill 2d ed 1993).

¹⁶ *Id.*

¹⁷ *Id.* (citations omitted).

¹⁸ Robertson, 56 U Cin L Rev at 93 (cited in note 14).

¹⁹ *Id.* at 92 n 9, citing Lee H. Bowker, *Prison Victimization* 31-33 (Elsevier 1981).

his masculinity,"²⁰ and "new inmates are usually tested by predators to determine if they will resist exploitation."²¹ Likewise, violence is an outlet for racial tension; indeed, "racial conflict, including extreme violence and riots, is the reality of institutional life in prisons around the country."²² Finally, some speculate that the extraordinary rate of prison violence reflects its utility in maintaining prison order:

[A]ctions of prison officials make homosexual rape easier to commit. They do not discourage it because rape "facilitates greater control over the inmates[,] . . . divides the prisoners . . . [and] gives them real cause to suspect, fear, fight, and hate each other."²³

Commentators have paid special attention to the gruesome form of violence threatened in *Rowe*: prison rape. It is now well established that prisoner-on-prisoner rape is a widespread form of prison violence.²⁴ One observer has written that "[s]exual assault appears to be as common in American prisons as iron bars."²⁵ Another estimates that "of the forty-six million Americans . . . who will be arrested at some time in their lives, ten million will be raped while in prison."²⁶ And Justice Blackmun has observed that:

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.²⁷

²⁰ Michael Graubart Levin, *Fight, Flee, Submit, Sue: Alternatives for Sexually Assaulted Prisoners*, 18 Colum J L & Soc Probs 505, 508-09 (1985), quoting Anthony M. Scacco, *Rape in Prison* 3 (C.C. Thomas 1975).

²¹ Robertson, 56 U Cin L Rev at 92 (cited in note 14).

²² Id at 92 n 11, quoting James B. Jacobs, *New Perspectives on Prisons and Imprisonment* 81 (Cornell 1983).

²³ David M. Siegal, Note, *Rape In Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 Stan L Rev 1541, 1546 (1992), quoting Carl Weiss and David James Friar, *Terror in the Prisons* 27 (Bobbs-Merrill 1974).

²⁴ Carl Weiss and David James Friar, *Terror in the Prisons* (Bobbs-Merrill 1974); Robertson, 56 U Cin L Rev at 93-94 (cited in note 14).

²⁵ Levin, 18 Colum J L & Soc Probs at 506 (cited in note 20).

²⁶ Weiss and Friar, *Terror in the Prisons* at 61 (cited in note 24).

²⁷ *United States v Bailey*, 444 US 394, 421 (1980) (Blackmun dissenting) (citations omitted).

Victims of prison rape typically experience severe physical and psychological injury.²⁸ Some are killed during the assault, and others may subsequently commit suicide. Survivors experience the "feelings of shame suffered by anyone who is raped [as well as] . . . a 'loss of manhood,' and a shattering of their self-esteem."²⁹ At least one judge found the psychological harm resulting from prison rape so terrible that he released the victim before the victim's sentence had expired.³⁰

One of the most disturbing problems posed by rape in the prison context is the unique danger of AIDS transmission associated with this form of violence. As David M. Siegal has written:

The virus that causes this disease is transmitted rapidly through anal intercourse, especially forceful, violent intercourse. . . . The combination of AIDS and rape within our prisons thus poses a dilemma: any man sent to prison confronts, from the first moment he is incarcerated, the Kafkaesque prospect of brutal attack by another inmate and infection with one of the world's most deadly diseases.³¹

Another commentator has suggested that AIDS transmission in prisons is evolving into a new form of the death penalty.³² These descriptions starkly illustrate what was at stake in *Rowe*. Had Rowe complied with the prison policy against self-defense, he would have risked not just the immediate physical and psychological injury associated with rape, but infection with a gruesome and fatal disease. Yet in spite of the frightening frequency with which this scenario arises in the prison context, the *Rowe* court denied a victimized prisoner the right to resist.

The ubiquity of violence, the pervasive threat of rape, and the potential for infection with the AIDS virus illustrate the importance of protection from violence in the prison context, and thus the importance of the right to self-defense. Moreover, the

²⁸ Levin, 18 Colum J L & Soc Probs at 510 (cited in note 20).

²⁹ Siegal, Note, 44 Stan L Rev at 1545 (cited in note 23). A newsletter prepared for current and former prisoners by the Fortune Society, a group made up of ex-offenders, refers to prison rape as "the ultimate shame." Levin, 18 Colum J L & Soc Probs at 506-07 & n 12 (cited in note 20), quoting *How to Understand Sexual Assaults in Prisons and Jails*, Crim Just Newsletter 2 (Apr 28, 1980).

³⁰ *People v Insignares*, 121 Misc 2d 921, 470 NYS2d 513, 515 (Sup Ct 1983), rev'd, 109 AD2d 221, 491 NYS2d 166 (App Div 1985) (reversed on ground that trial judge abused his discretion in dismissing the sentence).

³¹ Siegal, Note, 44 Stan L Rev at 1542 (cited in note 23) (citations omitted).

³² Ann F. Hammond, Note, *AIDS in Correctional Facilities: A New Form of the Death Penalty?*, 36 J Urban & Contemp L 167 (1989).

prevalence of such conditions illustrates the utter failure of the modern American prison system to provide this protection. The next Section shows that this failure follows in large part from the abdication of prisoner protection by modern prison conditions jurisprudence.

B. Prison Conditions Jurisprudence and Prison Violence

The law governing prison conditions substantially relieves prison officials of responsibility for prisoner-on-prisoner violence. As one court recently observed: “[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do.”³³ Thus, “no matter how deplorable, prison conditions that are undesired [by prison officials] are not ‘punishment’” and, therefore, are not subject to Eighth Amendment challenge.³⁴ Such analysis is typical of modern prison conditions jurisprudence, which erects daunting hurdles for plaintiffs in prison conditions cases. As a result, prison systems have few legal incentives to protect prisoners from violence.

Modern prison conditions jurisprudence is grounded in the Eighth Amendment’s prohibition of cruel and unusual punishment.³⁵ As early as 1890, the Supreme Court applied the Eighth Amendment to prohibit punishments involving “torture or a lingering death.”³⁶ Still, it was not until the 1970s that the Court recognized that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”³⁷ Although it may seem obvious that egregious prison conditions, such as rampant prison violence, should be evaluated as potentially cruel or unusual punishment, the Supreme Court did not explicitly affirm this connection until 1976, when it decided *Estelle v Gamble*.³⁸ That case has given rise to a doctrine that in theory requires “civilized” prisons, but in practice rarely punishes even the most egregious failures to meet this standard.³⁹

³³ *McGill v Duckworth*, 944 F2d 344, 348 (7th Cir 1991).

³⁴ *Id.* at 349.

³⁵ See Mushlin, 1 *Rights of Prisoners* § 2.00 at 21-22 (cited in note 15). The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” US Const, Amend VIII. The Eighth Amendment is the only provision of the Bill of Rights applicable by its own terms to prisoners.

³⁶ *In re Kemmler*, 136 US 436, 447 (1890).

³⁷ *Wolff v McDonnell*, 418 US 539, 555-56 (1974).

³⁸ 429 US 97 (1976).

³⁹ See Mushlin, 1 *Rights of Prisoners* § 2.01 at 21-40 (cited in note 15). For an excellent analysis of the emergence of this tension and its applicability to problems of rape and AIDS in the prison context, see generally Siegal, Note, 44 Stan L Rev 1541 (cited in

In *Estelle*, a Texas prison inmate alleged that he had been denied proper medical treatment for a back injury, and that this denial amounted to cruel and unusual punishment in violation of the Eighth Amendment.⁴⁰ The Supreme Court concluded that prisons have an obligation to provide medical care for inmates.⁴¹ In the Court's view, "deliberate indifference to serious medical needs constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."⁴² From this analysis were born the two basic and sometimes incompatible principles of modern prison conditions jurisprudence. First, prison conditions that unnecessarily and wantonly inflict pain violate the Eighth Amendment.⁴³ Second, such an Eighth Amendment violation may be found only in limited circumstances—namely, when prison officials have acted with an egregiously culpable state of mind, which the courts have defined as "deliberate indifference."⁴⁴

In *Wilson v Seiter*, the Supreme Court extended these principles to cover a wide range of "inadequate 'conditions of confinement'"⁴⁵ understood to fall short of "minimal civilized measure[s]."⁴⁶ Examples of treatment courts have held violative of the Eighth Amendment include insufficient nourishment,⁴⁷ failure to allow exercise,⁴⁸ inadequate shelter,⁴⁹ poor sanitation,⁵⁰ environmental hazards,⁵¹ overcrowding,⁵² and excessive use of force by guards.⁵³

Consistent with this doctrine, courts have recognized that prisoners have an Eighth Amendment right to be free from excessive risk of prison violence.⁵⁴ The basic right had been recog-

note 23). See also Candace Ada Mueller, Note, *The Evolving Standards in Prison Condition Cases: An Analysis of Wilson v. Seiter and the Cruel and Unusual Punishment Clause*, 13 BC Third World L J 155 (1993).

⁴⁰ 429 US at 101.

⁴¹ Id at 103.

⁴² Id at 104, quoting *Gregg v Georgia*, 428 US 153, 173 (1976).

⁴³ *Estelle*, 429 US at 104. See also text accompanying notes 158-60.

⁴⁴ *Wilson v Seiter*, 501 US 294, 297 (1991), quoting *Estelle*, 429 US at 104.

⁴⁵ 501 US 294, 303 (1991).

⁴⁶ Id at 298, quoting *Rhodes v Chapman*, 452 US 337, 347 (1981).

⁴⁷ *Adams v Mathis*, 458 F Supp 302, 308 (M D Ala 1978).

⁴⁸ *French v Owens*, 777 F2d 1250, 1255 (7th Cir 1985).

⁴⁹ *Henderson v DeRobertis*, 940 F2d 1055, 1059 (7th Cir 1991).

⁵⁰ *Young v Quinlan*, 960 F2d 351, 363 (3d Cir 1992).

⁵¹ *Helling v McKinney*, 509 US 25, 35 (1993) (exposure to second-hand smoke may violate the Eighth Amendment).

⁵² *Moore v Morgan*, 922 F2d 1553, 1556 (11th Cir 1991). See also *Rhodes*, 452 US at 349 (holding that overcrowding must cause serious hardship before Eighth Amendment violation arises).

⁵³ *Whitley v Albers*, 475 US 312, 320-21 (1986).

⁵⁴ See, for example, *Farmer v Brennan*, 114 S Ct 1970, 1976 (1994); *Rhodes*, 452 US

nized by some lower courts even prior to *Estelle*.⁵⁵ One judge, surveying particularly horrific prison conditions, wrote that "penitentiary inmates . . . ought at least to be able to fall asleep at night without fear of having their throats cut before morning, and . . . the state has failed to discharge a constitutional duty in failing to take steps to enable them to do so."⁵⁶

The Supreme Court also has recognized that the Eighth Amendment provides at least some protection against prisoner violence. As a subsequent court observed, the Court assumed in *Davidson v Cannon*⁵⁷ that "the prison system may not ignore prisoners' risk of harm at the hands of other inmates."⁵⁸ Similarly, in *Farmer v Brennan*, the Court asserted that "[b]eing violently assaulted in prison is simply not 'part of the penalty criminal offenders pay for their offenses against society.'"⁵⁹

Nevertheless, it is exceedingly difficult for prisoners to win either prison conditions or prison violence cases. The Supreme Court has read *Estelle*'s deliberate indifference requirement narrowly, thereby limiting Eighth Amendment protection for prisoners. In *Whitley v Albers*, for example, prison guards panicked during a riot and shot an innocent prisoner, but the Court refused to find a violation of the Eighth Amendment on the ground that the requisite culpability had not been established: panic could not be equated with deliberate indifference.⁶⁰ Subsequently, in *Wilson*, the Court affirmed this understanding of deliberate indifference, reasoning that since "punishment" implied a deliberately administered purpose, the Eighth Amendment is not triggered unless prison officials act with "some mental element" akin to intent.⁶¹ In keeping with this emphasis on intent, the Court

at 347; *Cortes-Quinones v Jimenez-Nettleship*, 842 F2d 556, 558 (1st Cir 1988); *Villante v Department of Corrections*, 786 F2d 516, 519 (2d Cir 1986).

⁵⁵ See, for example, *Woodhouse v Commonwealth*, 487 F2d 889, 890 (4th Cir 1973) ("A prisoner has a[n Eighth Amendment] right . . . to be reasonably free from the constant threat of violence and sexual assault by his fellow inmates . . ."); *Holt v Sarver*, 442 F2d 304, 308 (8th Cir 1971) (holding that system of armed "trustee" inmates with supervisory authority over other inmates, combined with "open barracks" and other dangerous conditions, violated Eighth Amendment); *Roberts v Williams*, 302 F Supp 972, 989 (N D Miss 1969) (holding that unprovoked shooting of inmate by "trustee" violated Eighth Amendment).

⁵⁶ *Holt v Sarver*, 300 F Supp 825, 831 (E D Ark 1969), aff'd, 442 F2d 304 (8th Cir 1971).

⁵⁷ 474 US 344 (1986).

⁵⁸ *McGill*, 944 F2d at 347, citing *Davidson*, 474 US at 350.

⁵⁹ 114 S Ct 1970, 1977 (1994), quoting *Rhodes*, 452 US at 347.

⁶⁰ 475 US 312, 320-21 (1986).

⁶¹ 501 US at 299-302. See also *Mushlin*, 1 *Rights of Prisoners* § 2.01 at 27-28 (cited in note 15).

recently stressed that it is not enough that prison officials *should* have known about horrific conditions—rather, they must *actually* have known about them.⁶²

Beyond the common observation that prisons are not meant to be comfortable places, two justifications have been offered for the use of the deliberate indifference standard. First, courts in general have been reluctant to burden “the legitimate efforts of the states to deal with difficult social problems.”⁶³ In the Eighth Amendment context, judicial review has been limited by the concern that “courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system”⁶⁴ Second, courts have increasingly emphasized that the text of the Eighth Amendment itself limits the Amendment’s reach: the Eighth Amendment regulates punishment, and punishment is by definition intentional. Thus, the Eighth Amendment, by its terms, can only apply where government officials act with a state of mind akin to intent—that is, where the officials’ indifference may be said to be deliberate.⁶⁵

This deliberate indifference standard poses a daunting obstacle for prisoners making prison conditions claims. Severe injuries and deprivations are often caused by official behavior that does not fit within the deliberate indifference paradigm. For example, one commentator has noted that, under the *Wilson* test, budget-constrained prison officials would not violate the Eighth Amendment even where they had full knowledge of horrible prison conditions because courts are unlikely to find that the officials deliberately imposed the conditions to magnify the inmates’ punishment.⁶⁶ By this reasoning, disinterested ignorance, negligence,

⁶² *Farmer*, 114 S Ct at 1979. See also *McGill*, 944 F2d at 351 (observing that in the Eighth Amendment context, deliberate indifference is governed by a subjective standard under which a prison official must actually know of or suspect a dangerous situation before he can be deliberately indifferent to it).

⁶³ *Parham v J.R.*, 442 US 584, 608 n 16 (1979).

⁶⁴ *Rhodes*, 452 US at 352.

⁶⁵ *Wilson*, 501 US at 299-302.

⁶⁶ David J. Gottlieb, *Wilson v Seiter: Less than Meets the Eye*, in Ira P. Robbins, ed, 1 *Prisoners and the Law* 2-33, 2-37 (Clark Boardman Callaghan 1992). The Supreme Court acknowledged this possibility without distress in *Wilson*:

[A] state-of-mind inquiry might allow officials to interpose the defense that . . . fiscal constraints . . . prevent the elimination of inhumane conditions. Even if that were so, it is hard to understand how it could control the meaning of ‘cruel and unusual punishment’ in the Eighth Amendment.

and incompetence would be similarly valid defenses to Eighth Amendment liability.⁶⁷

The deliberate indifference standard stands as an especially daunting barrier to prison violence claims. When injury is caused by a systematic failure to provide a basic necessity, as when prisons fail to provide heat or adequate nutrition, the resulting injuries will be widespread and traceable to policy decisions made by prison officials. As identical injuries with identical causes mount, prison officials' claims to ignorance of either injury or cause become less credible and allegations of deliberate indifference become more plausible. But when injury is caused by prisoner violence, the causal connection between policy and injury becomes more obscure—an autonomous, aggressive prisoner has interceded. Prison officials may argue that the acts of the aggressive prisoner, rather than their policy, caused the injury. Or they may argue that they had no capacity to foresee the acts of specific, autonomous prisoners, and thus did not know about the risk of violence. By this line of argument, prison officials are absolved of any general duty to try to separate more dangerous inmates from less dangerous ones.⁶⁸ Indeed, such defenses are particularly viable where courts embrace the assumption that some prison violence is inevitable. The more courts see prison violence as inevitable, the less they will attribute causation to prison officials. Thus, the deliberate indifference standard offers prison officials numerous defenses to claims based on prisoner violence.⁶⁹

As a result, prison conditions doctrine allows prisons to leave prisoners perilously vulnerable to the violence of their peers. Yet the *Rowe* court concluded that a prison may lawfully punish a prisoner for defending himself. This holding is cruel. Given the epidemic of prison violence and the inadequacy of Eighth Amendment protections against such violence, thousands of prisoners

501 US at 301. See also *McGill*, 944 F2d at 349 (suggesting that prison officials should not be found liable for prison conditions for which legislators, architects, judges, and taxpayers are all at least partly responsible).

⁶⁷ "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . ." *Wilson*, 501 US at 299, quoting *Whitley*, 475 US at 319.

⁶⁸ This was the argument approved of in *McGill*. 944 F2d at 350-53.

⁶⁹ Not surprisingly, the practical result of these cases has been to shift the burden of protection from prison officials to inmates. "As the opportunities for violence have expanded, and the risks of detection and punishment diminished, more responsibility has had to be taken by the inmate to secure his own safety." Richard C. McCorkle, *Personal Precautions to Violence in Prison*, 19 Crim Just & Behav 160, 171 (1992).

inevitably will be faced with a terrible choice: submit to assault, rape, and perhaps infection with the AIDS virus, or suffer serious punishment by the prison system. It is, as one judge has written, "a Hobson's choice."⁷⁰ The *Rowe* court concluded that this tragic outcome is compelled by the Constitution. The remainder of this Comment argues the contrary.

II. SELF-DEFENSE: A NEW CONSTITUTIONAL QUESTION

The *Rowe* court viewed the law governing Rowe's claim to a right of self-defense as clear and, therefore, disposed of his claim in one short paragraph. The court explained that it could "find no precedent establishing a constitutional right of self-defense in the criminal law context,"⁷¹ and that it had found one earlier case denying the existence of such a right.⁷²

In fact, the law before the court was far from clear. The Supreme Court has never directly considered the constitutional status of self-defense. In addition, only a handful of lower courts have considered the issue, and those courts have reached inadequately reasoned and unsatisfactory conclusions. Thus, as dissenting Judge Ripple observed in *Rowe*, "it is [not] hyperbole to characterize the position of the majority as a novel one."⁷³ No well established law required the Hobson's choice the *Rowe* court imposed on prisoners.

A. Supreme Court Analysis of the Right to Self-Defense

The Supreme Court has never directly considered whether self-defense is a constitutionally protected right. Early Supreme Court self-defense cases were preoccupied with determining the contours of the common law right,⁷⁴ an effort the Court appears

⁷⁰ *Griffin v Martin*, 785 F2d 1172, 1187 n 37 (4th Cir), withdrawn, 795 F2d 22 (4th Cir 1986) (en banc).

⁷¹ 17 F3d at 1052. The court devoted subsequent analysis to whether a right of self-defense, if it existed, would apply in the context of a prison disciplinary hearing, and whether the right would outweigh legitimate penal interests. *Id* at 1052-53.

⁷² *Id* at 1052, citing *White v Arn*, 788 F2d 338 (6th Cir 1986) (holding that in criminal cases there is no constitutional right to self-defense and that a state may allocate the burden of proof on the issue of self-defense to the defendant).

⁷³ *Rowe*, 17 F3d at 1054 (Ripple dissenting).

⁷⁴ In *Beard v United States*, for example, the Court decided that at common law a man on his own land need not retreat from an attacker before acting in self-defense, so long as his fears are reasonable. 158 US 550, 560 (1895). Later, in *Brown v United States*, Justice Holmes broadened the reasonableness standard with the famous admonition that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." 256 US 335, 343 (1921).

to have abandoned.

Some constitutional self-defense questions have reached the Court. Recently, these have involved the allocation of the burden of proof when a defendant claims that he acted in self-defense. In *Martin v Ohio*, the Court concluded that a state may place the burden of proving self-defense on the defendant.⁷⁵ But while *Martin* addressed an important constitutional question about the place of self-defense in a criminal trial, it did not resolve the issue of whether self-defense is a constitutionally protected right. Requiring defendants to prove that they acted in self-defense (rather than forcing the state to prove that they did not) is different from withholding the defense altogether.

Indeed, the Court has long recognized that while states have broad discretion in the allocation of burdens of proof in criminal trials, there are limits to this discretion. In *Speiser v Randall*, for example, the Court warned that:

It is of course within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence . . . "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷⁶

While the Court has never had occasion to apply the *Speiser* principle to a self-defense case, the principle has often been noted in other cases considering the allocation of burdens in criminal trials.⁷⁷ Section III of this Comment explores whether taking away the right to self-defense would violate the *Speiser* principle.

B. Lower Court Constitutional Analysis of the Right to Self-Defense

A handful of lower courts have considered whether there is a constitutional right to self-defense. Unfortunately, their decisions compose an anemic body of constitutional jurisprudence. Two cases prior to *Rowe* held that there is no constitutional right to

⁷⁵ 480 US 228, 232 (1987) (holding no violation of Due Process Clause when state requires defendant to prove affirmative defenses).

⁷⁶ 357 US 513, 523 (1958), quoting *Snyder v Massachusetts*, 291 US 97, 105 (1934).

⁷⁷ See, for example, *Patterson v New York*, 432 US 197, 210 (1977) (noting that Due Process Clause permits states to require criminal defendants to prove affirmative defenses, but that "[t]here are obviously constitutional limits beyond which the states may not go" in relabeling the elements of its crimes).

self-defense.⁷⁸ However, these decisions exhibit both a cursory consideration of the issue and a failure to invoke significant supporting authority. In contrast, two judges have speculated—one in dictum and one in dissent—that the right to self-defense must necessarily be guaranteed in the Constitution.⁷⁹ Here too, the arguments are cursory and unsupported.

1. Cases denying that there is a constitutional right to self-defense.

The first case to deny that the Constitution guarantees a right to self-defense was *Fields v Harris*.⁸⁰ Following her termination for assaulting a coworker, Fields brought a wrongful discharge claim to a federal employment review board.⁸¹ After her claim was rejected by the review board, Fields appealed to federal court, where she argued that she had acted in self-defense and that the dismissal therefore violated her constitutional rights.⁸² Rejecting her claim, the *Fields* court concluded that self-defense is "not a substantive right conferred directly by the federal Constitution."⁸³

The discussion of the constitutional question in *Fields* is thin: two short sentences. The court cited no authority—statutory, common law, academic, or otherwise—in support of its holding. Rather, the court suggested that the constitutional argument was not a serious one, but merely "an effort to circumvent [a] statutory time bar and establish jurisdiction."⁸⁴ Hence, while the *Fields* court rejected the constitutional claim in this procedural posture, the opinion does not purport to dispose of the issue of whether there is a constitutional right to self-defense.

⁷⁸ See *Fields v Harris*, 675 F2d 219 (8th Cir 1982); *White v Arn*, 788 F2d 338 (6th Cir 1986).

⁷⁹ See *Griffin v Martin*, 785 F2d 1172 (4th Cir 1986); *Isaac v Engle*, 646 F2d 1129 (6th Cir 1980) (Merritt dissenting on other grounds).

⁸⁰ 675 F2d 219, 220 (8th Cir 1982).

⁸¹ Id at 219-20.

⁸² Id at 220.

⁸³ Id. Fields had attempted to ground this right in the Second, Fifth, and Eighth Amendments. Id.

⁸⁴ Fields was appealing an adverse ruling by the United States Civil Service Commission, review of which must be filed with the Court of Claims or a Court of Appeals within thirty days. Her constitutional claim was apparently an effort to get into court after the thirty-day period had lapsed. (The court did not comment on whether this ruse would have worked had her constitutional claim been valid.) Id, citing Civil Service Reform Act of 1978, 5 USC § 7703(b)(1) (Supp 1978).

The other case cited for the proposition that self-defense is not a constitutional right is *White v Arn*.⁸⁵ There, the state placed the burden of proving self-defense on a criminal defendant. Anticipating the ruling in *Martin*, the *White* court rejected the claim that this burden allocation was unconstitutional.⁸⁶ Unlike the plaintiff in *Martin*, however, *White* also argued that "there is a constitutional right of self-defense, founded in the Eighth, Ninth, and Fourteenth Amendments, which an accused cannot be required to prove."⁸⁷ The *White* court responded that this argument was foreclosed by the burden allocation analysis of earlier Supreme Court cases: "[T]o hold that self-defense is a constitutional right which a defendant cannot constitutionally be required to prove, would be to reject the Supreme Court's established analysis"⁸⁸

White, like *Fields*, is weak authority for the proposition that there is no constitutional right to self-defense. Like the *Fields* court, the *White* court did not cite a single authority regarding the constitutional status of self-defense. More significantly, although *Rowe* suggests that *White* held there is no constitutional right to self-defense,⁸⁹ this is a mischaracterization of *White*. In fact, the *White* court rejected *only* the proposition that the right to self-defense was constitutionally protected in a way that had bearing on the allocation of the burden of proof.⁹⁰ Indeed, *White* expressly reserved the broader question whether the right to self-defense exists at all: "This holding does not reject the notion that a defendant has a limited right to act in self-defense under certain circumstances."⁹¹ Therefore, neither *White* nor *Fields* is reliable authority regarding the constitutional status of the right to self-defense.

⁸⁵ 788 F2d 338 (6th Cir 1986).

⁸⁶ Id at 343-47.

⁸⁷ Id at 347.

⁸⁸ Id, citing *Patterson v New York*, 432 US 197 (1977). *Patterson* had held that the prosecution in a criminal case is not constitutionally required to prove the nonexistence of all affirmative defenses, and that states may therefore allocate the burden of proving affirmative defenses to the defendant. 432 US at 208-09.

⁸⁹ *Rowe*, 17 F3d at 1052.

⁹⁰ *White*, 788 F2d at 347.

⁹¹ Id at 347 n 15. The court specifically limited its holding to the burden of proof issue: "Our holding simply embodies a determination that Ohio's allocation of the burden of proving self-defense does not violate the Due Process Clause." Id.

2. Judges arguing that there is a constitutional right to self-defense.

While no court has held that there is a constitutional right to self-defense, at least two judges prior to *Rowe* argued that the Constitution must incorporate such a right. Judge Merritt first advanced this position in a brief dissent in *Isaac v Engle*.⁹² Like *White*, *Isaac* was one of numerous pre-*Martin* cases considering the burden-of-proof issue; the *Isaac* majority concluded that because Ohio had, by statute, effectively made the absence of affirmative defenses an element of the crimes in question, the burden of proving self-defense could not be placed on the defendant.⁹³ Dissenting on procedural grounds, Judge Merritt nevertheless took special care to argue that self-defense is a constitutional right:

I believe the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists.⁹⁴

In *Griffin v Martin*,⁹⁵ Judge Murnaghan reached a similar conclusion in dicta. The issue in *Griffin* was whether trial instructions on the burden of proof issue were so contradictory and misleading as to be unconstitutional. The appellate court held that the instructions were unconstitutional and found for the defendant.⁹⁶ Murnaghan's opinion, however, went beyond the scope of the case to discuss the constitutional status of the right to self-defense. In a footnote, he reasoned that, because self-defense is a complete exoneration, its absence must be regarded as an element of a crime; accordingly, defendants should not bear the burden of proof on this issue.⁹⁷ Judge Murnaghan also stated that:

⁹² 646 F2d 1129, 1140 (6th Cir 1980) (Merritt dissenting on other grounds).

⁹³ Id at 1134-35. The majority contended that placing the burden of proof on the defendant would be inconsistent with *In re Winship*, 397 US 358, 364 (1970) (holding that due process requires prosecution to prove "every fact necessary to constitute the crime").

⁹⁴ *Isaac*, 646 F2d at 1140 (Merritt dissenting on other grounds).

⁹⁵ 785 F2d 1172 (4th Cir 1986), withdrawn upon rehearing en banc, 795 F2d 22 (1986).

⁹⁶ Id at 1173.

⁹⁷ Id at 1187 n 37. The dissent rejected Judge Murnaghan's reasoning. See id at 1194 (Sneed dissenting).

It is difficult to the point of impossibility to imagine a right in any state to abolish self-defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later.⁹⁸

Given this sparse and inconsistent body of law, it is not surprising that one federal court recently observed in dicta (without referring to *Rowe*, *Fields*, *White*, *Isaac*, or *Griffin*) that the constitutionality of the right to self-defense would "present an important question."⁹⁹ Neither the Supreme Court cases nor the decisions and dicta in the lower courts employ satisfactory analysis of, or invoke significant authority regarding, the constitutional status of the right to self-defense. Rather, current law comprises a disconnected array of unsupported decisions and musings—a sad basis for a decision with the ramifications of *Rowe*. The next Section demonstrates that the Constitution offers fertile ground for a more compassionate approach.

III. THE PRISONER'S RIGHT TO SELF-DEFENSE AND JUDICIAL RESPONSIBILITY IN THE PRISON CONDITIONS CONTEXT

A manual for jailhouse lawyers informs prisoners: "It is virtually certain that you retain your right of self-defense if attacked by a fellow inmate . . ."¹⁰⁰ Contrary to the arguments in *Rowe*, the logic of the law does not compel the conclusion that prisoners must submit to violence. Rather, as this Section demonstrates, the Due Process Clause supports a right to self-defense.¹⁰¹ First, it has long been held that due process protects

⁹⁸ *Griffin*, 785 F2d at 1187 n 37.

⁹⁹ *Jackson v Senkowski*, 817 F Supp 6, 7 (S D NY 1993). The *Jackson* court indicated it would ground the right to self-defense in due process:

One might well be deprived of liberty without due process if incarcerated for attempting to defend one's life . . . All states appear to recognize a defense of self-defense [and] security of the person is an obvious component of the domestic Tranquility [sic] which was one of the original objectives of the Constitution.

¹⁰⁰ Barret L. Brick, *The Right to be Free from Assault*, 16 Colum Hum Rts L Rev 347, 381 (1985), citing *United States v Stahls*, 194 F Supp 849 (S D Ind 1961), and *State v Boyd*, 498 SW2d 532 (Mo 1973) (no mention of whether the right has a constitutional dimension).

¹⁰¹ The Fifth Amendment, which is binding on the federal government, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." US Const, Amend V. Nearly identical language in the Fourteenth Amendment imposes the same restriction on the states: "[N]or shall any State deprive any person of life,

those rights essential to the Anglo-American conception of criminal justice, and self-defense is such a right.¹⁰² Second, even if there is not a general right to self-defense, an emerging strand of due process doctrine supports the argument that the state must either protect institutionalized individuals, or allow them to protect themselves.¹⁰³ This Comment concludes that failure to recognize the right of self-defense is not only unconstitutional, but also a disturbing abdication of judicial responsibility.

A. Self-Defense as a Fundamental Right in Anglo-American Criminal Justice

In *Speiser*, the Supreme Court warned that while states may place heavy burdens of proof on criminal defendants, they may not do so if in so doing they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."¹⁰⁴ Courts have long recognized that certain rights are so essential to the Anglo-American system of criminal justice that, although they are nowhere explicitly enumerated, they are nevertheless guaranteed by the Due Process Clause. Whether entrenched in the common law or recognized as part of our history, these rights have been called "fundamental"¹⁰⁵ and necessary to "ordered liberty."¹⁰⁶ No right recognized within this doctrine, however, has been more entrenched in the common law, nor more universally recognized, than the right to self-defense.

1. The doctrine of fundamental rights.

In *Palko v Connecticut*, the Supreme Court described the class of rights protected by constitutional due process as those rights without which "neither liberty nor justice would exist"; of which "a pervasive recognition . . . can be traced in our history,

liberty, or property, without due process of law" US Const, Amend XIV. The requirements of these two provisions have apparently converged in the criminal context. "[The Supreme] Court has 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.'" *Benton v Maryland*, 395 US 784, 794 (1969) (citation omitted).

¹⁰² See text accompanying notes 104-09.

¹⁰³ See text accompanying notes 164-69.

¹⁰⁴ 357 US at 523, quoting *Snyder v Massachusetts*, 291 US 97, 105 (1934).

¹⁰⁵ *Palko v Connecticut*, 302 US 319, 328 (1937), overruled on other grounds, *Benton v Maryland*, 395 US 784, 794 (1969); *Speiser*, 357 US at 523, quoting *Snyder*, 291 US at 105.

¹⁰⁶ *Palko*, 302 US at 325.

political and legal"; and the violation of which would be "so acute and shocking that our polity will not endure it."¹⁰⁷ In short, constitutional due process protects "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"¹⁰⁸ In *Moore v City of East Cleveland*, the Court described such rights as those that are "deeply rooted in this Nation's history and tradition."¹⁰⁹

These standards remain controversial. Their vague terms offer courts little guidance when confronted with specific rights. Thus, the Supreme Court has been reluctant to guarantee rights under *Palko*, *Moore*, and their progeny: "the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."¹¹⁰ Yet time and again, the Supreme Court has determined that certain rights, not elaborated in the text of the Constitution, are nevertheless inherent in the constitutional conception of due process.¹¹¹

¹⁰⁷ 302 US 319, 326-28 (1937).

¹⁰⁸ Id at 328, quoting *Hebert v Louisiana*, 272 US 312, 316 (1926). The discussion in *Palko* was confined to rights enumerated in the Bill of Rights. The Court stated that some, like free speech, are fundamental (and therefore binding on the states through the Fourteenth Amendment), and held that double jeopardy is among those that are not. Id at 328. The holding as to double jeopardy was later overruled by *Benton v Maryland*, 395 US 784, 794 (1969). The idea of fundamental rights implicit in the concept of ordered liberty was, consistent with the quoted language from *Palko*, later applied to other, nonenumerated rights. See, for example, *Moore v City of East Cleveland*, 431 US 494, 498 (1977) (right to count grandsons as part of a "single family" for zoning purposes); *Griswold v Connecticut*, 381 US 479, 496 (1965) (right to marital privacy); *Shapiro v Thompson*, 394 US 618, 627 (1969) (right to interstate travel).

Other courts have used language different from *Palko* to convey the notion of fundamental rights. For example, in *Rochin v California*, the Court stated that substantive due process is violated by state actions which "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not formulated anywhere as though they were specifics." 342 US 165, 169 (1952) (citation omitted).

¹⁰⁹ 431 US 494, 503 (1977).

¹¹⁰ *Collins v Harker Heights*, 503 US 115, 125 (1992). Justice Black expressed the core concern in dissent in *In re Winship*: "When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to 'the law of the land' and instead becomes one governed by the 'law of the judges.'" 397 US 358, 384 (1970) (Black dissenting).

¹¹¹ See, for example, *Mooney v Holohan*, 294 US 103, 110-12 (1935) (Knowing use of perjury by a prosecutor inconsistent with constitutional due process.); *Napue v Illinois*, 360 US 264, 269 (1959) (Failure of the prosecution to correct known, false testimony violates due process.); *Brady v Maryland*, 373 US 83, 87 (1963) (Prosecutorial suppression of favorable, material evidence requested by defendant violates due process.); *Giglio v United States*, 405 US 150, 152-54 (1972) (Failure of the prosecutor to disclose agreements with witnesses violates due process.).

The most famous inherent rights case, *In re Winship*,¹¹² provides some guidance in identifying what constitutes an inherent right. There, the Court held that the reasonable-doubt standard in criminal trials is protected by constitutional due process.¹¹³ According to the *Winship* Court, such a right is indispensable in "a society that values the good name and freedom of every individual"¹¹⁴ and is a "historically grounded right[] of our system, developed to safeguard men from dubious and unjust convictions."¹¹⁵ To this end, the Court focused on two factors. First, the Court emphasized that the reasonable-doubt standard had long been recognized in Anglo-American criminal justice: "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion . . . was recurrently expressed from ancient times . . .'"¹¹⁶ Second, the Court stressed that the reasonable doubt standard was recognized in nearly every contemporary common-law jurisdiction. According to the Court: "Although virtually unanimous adherence to the reasonable-doubt standard in common law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'"¹¹⁷ Thus, the decision in *Winship* turned on the historical entrenchment and universal acceptance of the reasonable-doubt standard.¹¹⁸

While the doctrine of inherent rights is notoriously vague, the more concrete standards of historical entrenchment and universal recognition provide a reliable foundation for identifying fundamental rights. Moreover, legal analysis that derives the meaning of due process from consensus that cuts across time and place has the salutary effect of minimizing the potential for abuse of judicial discretion.¹¹⁹ Under the above standards, courts should consider the right to self-defense to be inherent in due process, for it has been affirmed by a consensus that spans

¹¹² 397 US 358 (1970).

¹¹³ Id at 364.

¹¹⁴ Id at 363-64.

¹¹⁵ Id at 362-64, quoting *Davis v United States*, 160 US 469, 488 (1895).

¹¹⁶ Id at 361, quoting Charles T. McCormick, *Handbook of the Law of Evidence* § 321 at 681-82 (West 1954).

¹¹⁷ Id at 361-62, quoting *Duncan v Louisiana*, 391 US 145, 155 (1968).

¹¹⁸ See also *Albright v Oliver*, 114 S Ct 807, 825 (1994) (Stevens dissenting) ("In *In re Winship*, [the Court's holding] relied on history and certain societal interests . . .").

¹¹⁹ See note 110.

several hundred years of common law and every modern common law jurisdiction.

2. Self-defense as essential to the Anglo-American system of criminal justice.

Some conception of the right to self-defense is as fundamental to the Anglo-American conception of criminal justice as any of the rights affirmed in the line of cases stretching from *Palko* to *Winship* to the present. As a brief survey of its history shows, the lineage of self-defense rivals that of the reasonable-doubt standard. Likewise, the right is almost universally recognized today.

The right to self-defense has been entrenched in the English system of criminal justice since the decline of the Saxons.¹²⁰ As early as the thirteenth century, prototypical conceptions of justification and excuse were emerging in criminal law, and the right to self-defense began to take form.¹²¹ At first, the right was recognized in only limited circumstances. Killings committed to prevent crimes or to fulfill a lawfully mandated punishment became lawful, but only because they were considered an implementation of the state's interest in a safe and secure society.¹²² As one commentator explains, "[a]t early common law, justification defenses [including self-defense] had a strong public-benefit cast. Conduct was . . . justified [when] it was performed in the public's interest."¹²³

¹²⁰ In Anglo-Saxon law prior to the nineteenth century, self-defense was viewed as a mitigating factor—and often the basis for a pardon—rather than a complete justification for homicide. Dolores A. Donovan and Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 Loyola LA L Rev 435, 442 (1981). As one commentator suggests, the provisions of Saxon law were geared to maximize the power of the ruling class: "Prohibition of any form of self-help allowed early English rulers to control violence and establish obedience to the rule of law." Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on the Behalf of Battered Women Who Kill*, 36 Am U L Rev 11, 25 (1986). The Anglo-Saxon reluctance to allow self-help gave way between the twelfth and sixteenth centuries to the concept of justifiable homicide, which was rooted in the theory that such killings were done on behalf of the state and benefitted society. *Id.* at 25.

¹²¹ Garrett Epps, *Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule"*, 55 L & Contemp Probs 303, 307-08 (1992).

¹²² Rosen, 36 Am U L Rev at 25-26 (cited in note 120). See also Dressler, *Understanding Criminal Law* § 16.03 at 182-83 (cited in note 8).

¹²³ Dressler, *Understanding Criminal Law* § 17.02 at 187 (cited in note 8). See also *Mullaney v Wilbur*, 421 US 684, 692 (1975) ("At early common law only those homicides committed in the enforcement of justice were considered justifiable . . .").

An alternative understanding of self-defense began to take form in the medieval common law courts. Some came to recognize the right to self-defense as essential to a fair system of criminal justice. Courts observed that acts of self-defense often arose irresistibly from human instinct, and that punishment of such acts would distort the calibration of punishment to culpability. "A medieval English defendant who acted in self-defense was probably presumed to have had no real choice whether to act because of the natural human instinct for self-preservation—an instinct inconsistent with the need for social control."¹²⁴

By the seventeenth century, the concept of self-defense had matured and was well established.¹²⁵ The original social-control account of self-defense had given rise to a more general understanding that acts of self-defense were "justified" because they contributed to the social order.¹²⁶ Kant, for example, believed that "[s]elf-defense [had] to be understood exclusively as an institution designed to secure the Right, the framework securing the maximum freedom of all."¹²⁷

The early conception of self-defense as an irresistible instinct had also taken hold. By the eighteenth century, it was widely recognized that, because the self-defense reaction was irresistible, it was not blameworthy; in legal terms, it became an "excuse" from punishment.¹²⁸ On this basis, Blackstone declared self-defense a fundamental individual right. In his view, the common law "respect[ed] the passions of the human mind."¹²⁹ Killing in self-defense was "excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another."¹³⁰ Indeed, Blackstone maintained that society could not take away the right: "Self-defense . . . is justly called the primary law of nature, [and therefore] it is not, neither can it be . . . taken away by the law of society."¹³¹

¹²⁴ Rosen, 36 Am U L Rev at 26 (cited in note 120).

¹²⁵ *Mullaney*, 421 US at 692.

¹²⁶ For a discussion of self-defense as a justification, see George P. Fletcher, *Rethinking Criminal Law* § 10.5 at 857-64 (Little, Brown 1978).

¹²⁷ George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 Colum L Rev 533, 551 (1987), citing Immanuel Kant, *The Metaphysical Elements of Justice* 331-37 (Bobbs-Merrill 1965) (J. Ladd, trans).

¹²⁸ For a discussion of self-defense as an excuse, see Fletcher, *Rethinking Criminal Law* § 10.5 at 856 (cited in note 126).

¹²⁹ Dressler, *Understanding Criminal Law* § 18.05 at 208 (cited in note 8), quoting William M. Blackstone, 3 *Commentaries* *3.

¹³⁰ Dressler, *Understanding Criminal Law* § 18.05 at 208 (cited in note 8), quoting William M. Blackstone, 4 *Commentaries* *186.

¹³¹ Blackstone, 3 *Commentaries* *4 (cited in note 129).

From these early principles, several modern justifications for the right to self-defense have emerged. Some contemporary theories are rooted in the early understanding of the relationship between self-defense and a stable social order. One utilitarian justification, for example, holds that when choosing between aggressors and victims, the law should favor victims as a class because they are and will be less destructive to society than aggressors.¹³² Another common argument is that giving victims the right to act violently against aggressors will reduce the overall level of violence in society: aggressors will be deterred by the threat of defensive violence, and the violence deterred will more than counterbalance the violence resulting from self-defense.¹³³

Most modern scholars, however, follow Blackstone's argument that the self-defense reaction is irresistible and therefore not blameworthy. They echo Blackstone's assertion that no fair system of criminal law can remove so natural an impulse as self-defense.¹³⁴ For example, according to Professor Fletcher, self-defense "has its origins in the common-sense view that a person sometimes has 'no choice' but to kill his adversary . . . [T]he human response is to kill rather than be killed."¹³⁵ The excuse of self-defense is therefore necessary to the proper calibration of punishment to culpability: it is "our way of making the moral claim that [the defender] is not to be blamed for the kind of choice that other people would make under the same circumstances."¹³⁶

¹³² Dressler, *Understanding Criminal Law* § 18.05 at 208 (cited in note 8). See also Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 Cal L Rev 871, 882 (1976). A similar conclusion is sometimes reached in "principled" or deontological moral argument, where it is said that the victim's claim to safety and life is "superior" to that of the aggressor. Dressler, *Understanding Criminal Law* § 18.05 at 210 (cited in note 8). Another common argument from moral principle is that the high value of personal autonomy authorizes victims to protect that autonomy even by violence against encroachers. Here again the arguments echo the early "social good" justifications. Fletcher, *Rethinking Criminal Law* § 10.5.3 at 860-61 (cited in note 126). See also Robinson, 2 *Criminal Law Defenses* § 131(a) at 70 (cited in note 9).

¹³³ Kadish, 64 Cal L Rev at 882-83 (cited in note 132); Dressler, *Understanding Criminal Law* § 18.05 at 209 (cited in note 8).

¹³⁴ The crudest version of this account asserts that unlawful attackers forfeit their right to legal protection, at least while engaged in the unlawful attack, because their interests are "discounted . . . by the degree of [their] culpability." Fletcher, *Rethinking Criminal Law* § 10.5.2 at 858 (cited in note 126). See also Kadish, 64 Cal L Rev at 882 (cited in note 132) (observing that "on the balance of utilities it is better . . . that it be the attacker [who dies] rather than his victim").

¹³⁵ Fletcher, *Rethinking Criminal Law* § 10.5.1 at 856 (cited in note 126).

¹³⁶ Id. See also Rosen, 36 Am U L Rev at 27 (cited in note 120) (The "intentional infliction of physical harm upon another is not culpable when it is inflicted in self-defense.").

Similarly, many modern scholars echo Blackstone's assertion that the right to self-defense is so essential to justice that it cannot be denied by the state. According to Professor Kadish, "[t]he individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority [It is a] moral right against the state"¹³⁷ Kadish concludes that "[t]he answer is unambiguous in every legal system: the victim may kill to save his own life."¹³⁸ Dressler makes a similar argument:

[T]he innocent person may have a right against the government to kill the aggressor. The thesis is that people band together to create a legal system in order to protect themselves against various forms of aggression. Every person has a right, therefore, to the law's protection against aggression; when the law fails to provide protection, the threatened person has a right to resist the aggression.¹³⁹

Finally, Fletcher observes that "there are few legal ideas as basic as the principle of legitimate self-defense. . . . Th[is] principle is so deeply ingrained in our legal thinking that it is difficult to imagine a legal system that did not acknowledge it."¹⁴⁰

Every modern American jurisdiction recognizes, in some form, the right to self-defense.¹⁴¹ All states now have statutory provisions establishing a form of the right to self-defense in the general population.¹⁴² Similarly, state courts have consistently recognized some form of the common law right to self-de-

¹³⁷ Kadish, 64 Cal L Rev at 885 (cited in note 132). See also Fletcher, *Rethinking Criminal Law* § 10.5.4 at 867 (cited in note 126) ("According to this view of necessary defense, the private use of force is tolerated . . . because the state fails in its task of providing protection against aggression.").

¹³⁸ Kadish, 64 Cal L Rev at 881 (cited in note 132).

¹³⁹ Dressler, *Understanding Criminal Law* § 18.04 at 201 (cited in note 8).

¹⁴⁰ George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 Cardozo L Rev 859, 859 (1991). Fletcher notes that even in legal systems that do not embrace our conception of rights, such as the system elaborated in the Talmud, "self-defense and defense of others emerge . . . as central and unquestioned aspects of legal life." *Id.* For an interesting counter to these traditional arguments, see Epps, 55 L & Contemp Probs 303, 304 (cited in note 121) (positing that "pure" self-defense is rare—and therefore not a useful concept—because most homicides occur following ambiguous confrontations between persons who know each other and have conflicted before).

¹⁴¹ Robinson, 2 *Criminal Law Defenses* § 132 at 96 n 1 (cited in note 9) (citing statutory and/or case law recognition of the right to self-defense in "every American jurisdiction").

¹⁴² *Id.* (listing self-defense statutes in every state).

fense.¹⁴³ So too have federal courts, including the Supreme Court.¹⁴⁴

Thus, while it may seem striking that only a few courts have ever considered the constitutional nature of the right to self-defense, the dearth of case law actually attests to the universal acceptance of the right. Because states and courts have always permitted claims of self-defense, the constitutional foundation of this prerogative has rarely ever been at issue. In *Winship*, the Court paid special note to similar circumstances. As Justice Harlan explained:

It is only because of the nearly complete and long-standing acceptance of the reasonable doubt standard by the states in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires [the reasonable doubt standard]¹⁴⁵

Consideration of the constitutionality of the right to self-defense has been foreclosed in much the same way.¹⁴⁶

In sum, the right to self-defense clearly meets the standards established in *Speiser*, *Palko*, and *Winship*. Like the right to proof beyond a reasonable doubt, the right to self-defense has been entrenched in the Anglo-American system of criminal justice for several centuries. Similarly, and again like the right to proof beyond a reasonable doubt, the right to self-defense is now accorded near universal recognition in common law jurisdictions. Indeed, the theories underlying the right suggest that it is indispensable to the calibration of punishment and culpability and that a legal system without a right to self-defense could not achieve justice.

¹⁴³ Id.

¹⁴⁴ See, for example, *Brown v United States*, 256 US 335, 343 (1921) (recognizing right to use deadly force against an attacker if grievous harm reasonably believed imminent); *Smith v Lauritzen*, 356 F2d 171, 176 (3d Cir 1966) (same).

¹⁴⁵ 397 US at 372 (Harlan concurring) (citation omitted).

¹⁴⁶ Indeed, courts have occasionally recognized that the question of the constitutionality of the right to self-defense might never arise. The majority in *Griffin* recognized that "[t]he question is not presented in Griffin's case, and is unlikely to arise." 785 F2d at 1186.

B. Self-Defense as a Due Process Right of the Institutionalized

While the doctrine of inherent rights provides a basis for finding that prisoners have a right to self-defense, it is not the only basis. The prisoner's right to self-defense may also be grounded on a narrower rationale, one that emerges at the intersection of the law governing the due process rights of the institutionalized in general and the law of necessity in the prison context.

The Due Process Clause places substantive limits on the conditions to which the institutionalized may be exposed. Specifically, their "basic human needs" must be met.¹⁴⁷ But there is a problem with this doctrine. In deference to the difficulties faced by state-run institutions, courts have injected a culpability requirement into the due process analysis, transforming seemingly absolute limits on the conditions of institutionalization into frail and contingent protections.¹⁴⁸ This Section demonstrates that recognizing a necessity defense within the due process doctrine governing the rights of the institutionalized mitigates this problem by reinforcing certain basic rights without unduly burdening state institutions. From this necessity defense arises a prisoner's right to self-defense.

1. Due process rights of the institutionalized.

The Constitution provides special protection to those the state institutionalizes against their will. According to a line of cases culminating in *DeShaney v Winnebago County Department of Social Services*,¹⁴⁹ due process requires that institutions provide food, clothing, shelter, medical care, and reasonable safety to the institutionalized.¹⁵⁰ While the Court in *DeShaney* recognized that "nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens,"¹⁵¹ it also held that due process requirements

¹⁴⁷ See *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 200 (1989).

¹⁴⁸ See text accompanying notes 158-59.

¹⁴⁹ 489 US 189 (1989).

¹⁵⁰ *Id.* at 200. *DeShaney* traced this principle to *Youngberg v Romeo*, 457 US 307, 315-16 (1982). *Youngberg* involved inmates in a state-run mental hospital. The Court there held that substantive due process requires the state to assure the reasonable safety of involuntarily committed mental patients. *Id.* See also *Revere v Massachusetts General Hospital*, 463 US 239, 244 (1983) (holding that due process requires provision of medical care to injured suspects in police custody).

¹⁵¹ 489 US at 195.

change dramatically when the state institutionalizes an individual.¹⁵² The Due Process Clause is phrased as a limitation on the state's power to act, and incarceration is state action. Thus, "it is the state's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause"¹⁵³

As the Court has repeatedly recognized, these due process protections require the state to assure that the basic human needs of those it incarcerates are met. As the Court held in *DeShaney*:

[If] the state . . . so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause.¹⁵⁴

In *Youngberg v Romeo*, a case involving patients committed to a state-run mental hospital, the Court identified "adequate food, shelter, clothing, and medical care" as the "essentials of the care that the State must provide."¹⁵⁵ The Court also declared that the state "has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution."¹⁵⁶

The principle that institutionalized individuals must be assured such basic necessities as food, shelter, and protection from violence serves an important purpose. The absence of such assurance would allow states to render the institutionalized helpless, then forswear responsibility for injuries, even death, suffered by these individuals. Furthermore, this understanding of due process resolves some of the most disturbing hypotheticals posed by critics of Eighth Amendment jurisprudence.¹⁵⁷ For example, the Eighth Amendment allows petty thieves to starve, freeze, or be raped when prison officials are handcuffed by budgetary constraints, so long as such conditions do not result from deliberate indifference or intentional punishment. Fortunately, starving

¹⁵² Id at 199-200.

¹⁵³ Id at 200.

¹⁵⁴ Id.

¹⁵⁵ 457 US 307, 324 (1982).

¹⁵⁶ Id.

¹⁵⁷ See text accompanying note 66.

thieves have other constitutional recourse—the Due Process Clause.

While the due process principles articulated in *DeShaney* and *Youngberg* seem to establish firm limits on the conditions to which the institutionalized may be exposed, these limits are undermined by the injection of a culpability element into the due process analysis. Specifically, under *Youngberg*, courts must defer to the decisions of institutional officials regarding conditions of confinement in all cases where the decisions are made in good faith.¹⁵⁸ Indeed, the Supreme Court has suggested that the particularly daunting deliberate indifference standard applied to the Eighth Amendment should be applied to due process analysis in the prison context.¹⁵⁹ However, as in the Eighth Amendment context, the injection of the culpability requirement into due process analysis undermines constitutional safeguards, and transforms the substantive limits of due process into unreliable, contingent protections.

Courts justify the culpability requirement in due process analysis by concerns that are similar to, but crucially distinct from, those invoked in the Eighth Amendment context. As in the Eighth Amendment context, courts are reluctant to impose onerous constitutional burdens on state institutions.¹⁶⁰ Courts recognize that such institutions face challenging social problems on limited budgets. The requirement of deference to decisions made in good faith serves to shield institutions from liability for their honest mistakes as they struggle to allocate their limited resources appropriately. Often, however, this means that state institutions escape liability for even the most deplorable conditions unless they act with a culpable mental state.

Although the text of the Eighth Amendment has been interpreted as *necessarily* including an intent requirement (since

¹⁵⁸ 457 US at 324.

¹⁵⁹ "[W]e suggested that [deliberate indifference] is required to make out a substantive due process claim in the prison setting." *DeShaney*, 489 US at 199 n 5, citing *Whitley*, 475 US at 326-27 (holding that Due Process Clause affords inmate no greater protection than the Cruel and Unusual Punishments Clause).

¹⁶⁰ See, for example, *Parham v J.R.*, 442 US 584, 608 n 16 (1979) (procedures for commitment to state mental hospitals); *Youngberg*, 457 US at 324 (care and safety of committed mental patients); *Wolff v McDonnell*, 418 US 539, 556 (1974) (prison disciplinary proceedings). See also text accompanying notes 60-65. Indeed, this may have been what the *Rowe* court was really getting at. Having held that there is no constitutional right to self-defense, the *Rowe* court held in the alternative that even if there were such a right, it could be overridden: "The policy purportedly advances prison security by discouraging all physical violence among inmates . . . [P]rison security and the reduction of violence are certainly legitimate penological interests." *Rowe*, 17 F3d at 1053.

"punishment" requires purposeful state action),¹⁶¹ no such element is textually required by the Due Process Clause.¹⁶² Thus, unlike the culpability requirement in the Eighth Amendment context, the culpability element of the due process analysis is merely a vehicle for deference to institutional decision making.

In some circumstances, however, such deference is not warranted. The following Section demonstrates that a limited defense of necessity can and should be recognized as a central component of the due process rights of the institutionalized. Recognition of such a defense would revitalize *DeShaney's* substantive limitations without unduly burdening state institutions. From this limited necessity defense arises a prisoner's right to self-defense.

2. Institutionalization, necessity, and self-defense.

The law governing the due process rights of the institutionalized typically addresses institutional conditions by placing obligations on the state. The institutionalized must be fed, sheltered, and protected, for example. Because these obligations can be so costly, good-faith institutional decisions regarding their fulfillment are protected by the culpability element of the due process analysis. What some courts fail to recognize, however, is that the institutionalized also have rights that do not place corresponding obligations on the state; institutional actions and decisions affecting these rights should not be shielded in the same way. The right to necessary acts of survival is such a right. This right provides a basis for a constitutional right to self-defense in the prison context.

Necessity is a longstanding defense to criminal liability. It is properly invoked by one who has broken a law, but did so because lawbreaking was necessary to avoid a greater evil. Most commonly, necessity is claimed where the lawbreaker's life depended on the lawbreaking. While there is no universally accepted definition of necessity, its basic elements are widely agreed upon: "[c]onduct that the actor believes to be necessary to avoid a harm or evil . . . is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law [broken]."¹⁶³

¹⁶¹ See text accompanying notes 61-62.

¹⁶² For the texts of the Fifth and Fourteenth Amendment Due Process Clauses, see note 101.

¹⁶³ MPC § 3.02(1). See also Dressler, *Understanding Criminal Law* § 17.02 at 183

Recognizing a limited due process right to perform necessary acts in the institutional context solves some of the problems created by the tension between the basic human needs of the institutionalized and the practical difficulties confronted by state institutions. First, recognizing a right to perform necessary acts places no significant corresponding obligations on state institutions. The right to claim necessity as a defense to a charge of wrongdoing cannot be translated into a right to a given resource that the state must provide. Necessity authorizes an individual to act, but it imposes no concomitant, affirmative performance obligation on the state. Unlike the familiar, concrete rights to food, shelter, and safety—typical of the due process cases—the prisoner's right to perform necessary acts of survival does not unduly burden the institution.

Second, recognizing the necessity defense in the prison context preserves to the institutionalized at least a baseline right to survival. When the individual's survival is jeopardized, he is allowed to act regardless of the institution's culpability or lack thereof. Despite his institutionalization, he is not required to submit to his own destruction. Thus, recognizing a limited necessity defense in the institutional context revitalizes at least the core ideals articulated in *DeShaney*.¹⁶⁴

Indeed, necessity has a long history in the institutional context, and in the prison context in particular. As early as 1736, English courts had determined that prisoners escaping from burning prisons could claim necessity as a defense: "[I]f a prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony."¹⁶⁵ In 1868, the Supreme Court affirmed this principle in dictum, observing that "he is not to be hanged because he would not stay to be burnt."¹⁶⁶ Courts have since struggled to determine just what conditions really make escape from state institutions and prisons necessary,¹⁶⁷

(cited in note 8); Kadish, 64 Cal L Rev at 888-89 (cite in note 132) (discussing the lesser-evil theory of justification).

¹⁶⁴ See *DeShaney*, 489 US at 199 ("[T]he state [must] . . . ensure [institutionalized persons'] 'reasonable safety' from themselves and others."), citing *Youngberg*, 457 US at 314-25.

¹⁶⁵ Levin, 18 Colum J L & Soc Probs at 515 (cited in note 20), quoting *People v Whipple*, 100 Cal App 261, 279 P 1008, 1009 (1929), quoting Sir Matthew Hale, 1 *History of the Pleas of the Crown* 611 (1736).

¹⁶⁶ *United States v Kirby*, 74 US 482, 487 (1868).

¹⁶⁷ See, for example, *People v Lovercamp*, 43 Cal App 3d 823, 118 Cal Rptr 110, 111-16 (1974); *People v Noble*, 18 Mich App 300, 170 NW2d 916, 918 (1969); *Whipple*, 279 P at 1010; *State v Cahill*, 196 Iowa 486, 194 NW 190, 192 (1923); *State v Davis*, 14 Nev 439,

but in the last twenty-five years, the basic right to necessary escape has been widely accepted. As the court wrote in *People v Lovercamp*, the seminal prison escape case:

[W]e may assume that a prisoner with his back to the wall, facing a gang of fellow-inmates approaching him with drawn knives, who are making it very clear that they intend to kill him, might be expected to go over the wall rather than remain and be a martyr to the principle of prison discipline¹⁶⁸

Since *Lovercamp*, the majority of courts that have considered the issue have agreed that recognizing some form of necessity in the prison context is appropriate.¹⁶⁹

As suggested by its historical pedigree, necessity strikes a workable balance between the needs of state institutions and the rights of institutionalized individuals. Claims of necessity do not burden state institutions by requiring them to reallocate precious and scarce resources. Yet the right to claim necessity as a defense to a charge of wrongdoing vindicates the institutionalized individual's right to act when the state fails to meet his basic human needs. Thus, necessity solves the most problematic aspect of the due process doctrine governing the rights of the institutionalized: it assures the survival of the institutionalized in the face of good-faith institutional incapacity.

From this right to claim necessity in the institutional context arises a prisoner's right to self-defense. Self-defense is, at bottom, a variation on necessity. It can only be invoked when danger is imminent, when no other alternative is available, and when the state has failed to intervene.¹⁷⁰ When self-defense is invoked, it is because violence is necessary to prevent worse or less-justified violence. Self-defense claims will almost always satisfy the requirements of necessity claims.¹⁷¹

444 (1880). See also Levin, 18 Colum J L & Soc Probs at 514-22 (cited in note 20) (reviewing cases struggling with necessity in prison context).

¹⁶⁸ 43 Cal App 3d 823, 118 Cal Rptr 110, 116 (1974). Significantly, the court noted that it was not creating any new judicial doctrine: "We do not conceive that we have created a new defense to an escape charge. We merely recognize, as did an English Court 238 years ago, that some conditions 'excuseth the felony.'" Id at 116.

¹⁶⁹ See, for example, *People v Unger*, 66 Ill 2d 333, 362 NE2d 319, 320 (1977); *People v Trujillo*, 41 Colo App 223, 586 P2d 235, 236 (1978). See also Levin, 18 Colum J L & Soc Probs at 520-22 (cited in note 20) (collecting cases).

¹⁷⁰ See the definitions of the self-defense right in note 9.

¹⁷¹ Indeed, in the context of *Lovercamp*, recognizing a necessity-based right to self-defense seems to avoid perverse results. If the state cannot require the prisoner to submit

Thus, a prisoner's right to self-defense may be found at the intersection of the due process rights of the institutionalized and the law of necessity as it has developed in the institutional context. Courts reluctant to embrace the general right to self-defense suggested by the *Palko* analysis¹⁷² might still recognize this more limited version, and thereby do justice to important due process principles without unduly burdening state institutions. In so doing, they would also avoid the disturbing outcome embraced by *Rowe*.

IV. CONCLUSION

If Dostoevsky is right that a society's prisons reflect that society's degree of civilization, then the unrelenting violence that makes the modern American prison such a dangerous place should be cause for concern. And while economic and political realities surely limit the resources available to the prison system, and thus determine in large part the conditions that prevail therein, the decision in *Rowe* illustrates that courts can and do play a vital role in determining just how dangerous modern American prisons are.

Rowe also illustrates the extent to which legal rhetoric disguises the role of the courts in shaping prison conditions. Despite the availability of a spectrum of legal arguments supporting a constitutional right to self-defense, the *Rowe* court embraced pallid precedent and made not even passing reference to the rich constitutional doctrines supporting more compassionate outcomes. As a result, a decision with cruel ramifications for prisoners was made to seem inevitable.

In fact, courts are entrusted with unusual responsibility in shaping prison conditions doctrine. To a unique degree, prisoners are excluded from the lawmaking process. They are pariahs,¹⁷³ often disenfranchised,¹⁷⁴ and generally despised by much of the

to life-threatening violence, which version of prisoner self-help would it prefer—escape or self-defense? To allow escape, but not self-defense, would appear to indicate a preference for escape over self-defense within the confines of the prison walls. Clearly, escape seems to pose more of a threat to prison security and the general welfare of society than does allowing the prisoner to act in self-defense.

¹⁷² See text accompanying notes 107-08.

¹⁷³ For a general discussion of the significance of minority and/or pariah status in constitutional theory, see John Hart Ely, *Democracy and Distrust* chs 4-6 (Harvard 1980). See also *United States v Carolene Products Co.*, 304 US 144, 153 n 4 (1938).

¹⁷⁴ Prisoners are permanently disenfranchised in fourteen states. Most other states disenfranchise prisoners for the duration of their stay in prison. See Andrew L. Shapiro, Note, *Challenging Criminal Disfranchisement Under the Voting Rights Act: A New Strate-*

public. Politicians distance themselves from prisoner interests and concerns, and often legislate by appealing to the fear, anger, and hatred that broad constituencies feel toward imprisoned criminals.¹⁷⁵ Prisoners disproportionately comprise racial and socioeconomic minorities whose access to political representation can already be tenuous. Thus, legislators and policymakers often pay little heed to prisoners' needs.

As a result, the task of safeguarding prisoners' rights falls uniquely to judges. As John Hart Ely has observed, judges have heightened responsibilities where there is reason to fear that "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility"¹⁷⁶ The Supreme Court has long recognized that cases involving the rights of discrete and insular minorities warrant special scrutiny.¹⁷⁷ Prisoners epitomize such a minority. Thus, as Justice Brennan observed, courts have a unique role in protecting the rights of prisoners: "Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices"¹⁷⁸ For prisoners, then, courts are a crucial check against potential abuse in the democratic process. The responsibility for assuring that prisoners are treated in a civilized manner lies primarily with judges.

Courts should recognize the prisoner's constitutional right to self-defense. Self-defense has been an indispensable element of Anglo-American criminal justice, and it is therefore a fundamental right within the doctrine of due process. Furthermore, the ideals of the law governing the due process rights of the institutionalized can best be realized by recognizing a necessity defense in the institutional context—and this necessity defense likewise provides a sound basis for a prisoner's right to self-defense.

The analysis in *Rowe* ignored both compassion and the Constitution. Prisoners in modern American prison are exposed to

gy, 103 Yale L J 537, 538-39 (1993); Alice E. Harvey, Note, *Ex-Felon Disfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U Pa L Rev 1145, 1146 (1994).

¹⁷⁵ But see Ely, *Democracy and Distrust* at 152-54 (cited in note 173) (positing that there may be "perfectly respectable reasons"—relating to differences among voters and their interests—for the isolation of particular political groups).

¹⁷⁶ Id at 103 (cited in note 173).

¹⁷⁷ See, for example, *Carolene Products*, 304 US at 153 n 4.

¹⁷⁸ *McCleskey v Kemp*, 481 US 279, 343 (1987) (Brennan dissenting).

tremendous violence, and Eighth Amendment doctrine offers them little hope of protection. Even so, the *Rowe* court deprived prisoners of their last line of defense on the basis of a shallow legal analysis, ignoring or failing to recognize constitutional doctrines supporting far more compassionate results. It may be true that prisons are dangerous places, but, as *Rowe* illustrates, for the modern American prisoner, courts can be dangerous places too.