

NOTES

PRETRIAL DETAINEES AND THE OBJECTIVE STANDARD AFTER *KINGSLEY V. HENDRICKSON*

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ABSTRACT

In 2015, the Supreme Court held in Kingsley v. Hendrickson that 42 U.S.C. § 1983 excessive force claims brought by pretrial detainees against state prison officials are measured by an objective reasonableness standard. Pretrial detainees bring § 1983 claims under the Fourteenth Amendment’s Due Process Clause because they are detained but are not yet convicted. Thus, constitutional violations under § 1983 are viewed as an infringement of their due process rights. Since Kingsley, circuit courts have split on whether the objective reasonableness standard extends to other kinds of pretrial detainee claims. These claims include conditions of confinement, failure-to-protect, and inadequate medical care claims. Some circuits apply the objective reasonableness standard articulated by the Court in Kingsley to these additional claims. The objective standard requires that an official should have known of a risk to the pretrial detainee and did nothing to abate the risk. Other circuits, however, apply a subjective standard, also known as deliberate indifference. The subjective standard requires that the official actually knew of the risk to the pretrial detainee and did nothing to mitigate the risk. The practical consequence of the split is that a pretrial detainee will face drastically different standards depending on where the claim is brought. This Note argues that the Supreme Court should extend the objective standard to all pretrial detainee claims, not just those of excessive force. The objective standard is more consistent with the demands of the Fourteenth Amendment and Supreme Court precedent. Circuits that continue to apply the subjective deliberate indifference standard rely on circuit precedent that is inconsistent with Kingsley and conflicts with the guarantees of due process.

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INTRODUCTION

Consider two cellmates, Tanya and Jane, who are pretrial detainees in a state prison. Tanya wakes up one morning with a piercing pain in her abdomen. Jane bangs on the door of the cell, yelling, “my cellmate, she’s sick! She’s on the floor.” But Jane has a habit of making a scene and the guard ignores her. Nevertheless, Jane relentlessly attempts to attract the guard’s attention. An hour later, the guard looks through the window of the cell door to see Tanya in the fetal position on the ground. The guard opens the door and enters the cell. Jane says that she is concerned about Tanya and moves towards her. The guard misconstrues Jane’s movement as an attack, takes his baton and strikes her several times, breaking her nose and collarbone. Turning towards Tanya, the guard notices that Tanya is clutching her right side, but Tanya does not say anything, and noticing female sanitary products in the corner, the guard assumes Tanya is suffering from menstrual cramps. Eventually, Tanya’s condition worsens; she is now vomiting and sweating. The guard calls an ambulance, but by the time it arrives, Tanya’s appendix has burst, resulting in severe damage to her health.

Jane and Tanya might consider suing prison officials under 42 U.S.C. § 1983 for excessive force and inadequate medical care, respectively. Jane's excessive force claim against the officials would be measured under an objective standard, requiring Jane to show that the use of force was objectively unreasonable in light of the facts and circumstances.¹ By contrast, the standard governing Tanya's inadequate medical care claim would depend on where she brought the claim. Some circuits would apply the objective standard both to Jane's excessive force claim and Tanya's inadequate medical care claim.² Other circuits, however, would measure Tanya's inadequate medical care claim under a *subjective* standard known as deliberate indifference. Whereas the objective standard requires that the official *should* have known of the risk to Tanya, the subjective standard requires that the official was *actually aware* that she suffered a substantial risk to her health and did nothing to abate the risk.³

The objective standard applied to Jane's claim comes from the Supreme Court's decision in *Kingsley v. Hendrickson*. In *Kingsley*, the Court held that if a pretrial detainee, like Jane, brings an excessive force claim against state prison officials, the claim will be measured under an objective reasonable person standard.⁴ The circuits are split, however, on whether the objective or subjective standard applies to pretrial detainees' primary claims of inadequate medical care, conditions of confinement, and failure-to-protect.⁵

This Note reviews the split and argues that the objective standard should be extended to these remaining pretrial detainee claims because Supreme Court precedent and the text and scope of the Fourteenth Amendment's Due Process Clause support the objective standard's universal application. Many circuits, however, still apply the subjective deliberate indifference standard to pretrial detainees' claims

1. See *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015).

2. See, e.g., *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018).

3. See, e.g., *Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018). Tanya is not likely to succeed on her claim. In this hypothetical scenario, Tanya did not tell the guard the severity of her symptoms. Although Jane alerted the guard to Tanya's illness earlier, the guard likely believed that Jane was just causing a scene and cannot be shown to have known of Tanya's condition. Even once the guard entered the cell, the presence of the sanitary products may be enough to show that the guard believed Tanya was suffering from menstrual pain. Once Tanya began exhibiting more serious symptoms—vomiting and sweating—the guard called the ambulance and therefore ameliorated the risk to Tanya. Under an objective standard, Tanya has a much stronger case; a reasonable guard would have at least checked on Tanya after Jane first alerted them and likely would have called a physician as a precaution. Compare *Miranda*, 900 F.3d at 354 (finding doctors' actions potentially unreasonable when taking a "wait and see" approach regarding a detainee who would not eat or drink), with *Johnson v. Bessemer*, 714 F. App'x 694, 697–98, 701 (11th Cir. 2018) (finding no deliberate indifference in drug overdose where defendant suspected that plaintiff had consumed drugs but believed plaintiff was sleeping deeply although the plaintiff did not respond to physical manipulation), and *Ryan v. Armstrong*, 850 F.3d 419, 426 (8th Cir. 2017) (holding officers could have been deliberately indifferent where the supervising officer notified the officers that the plaintiff requested medical help during a shift change and the officers did not check on plaintiff), and *Edwards v. Northampton*, 663 F. App'x 132, 137 (3d Cir. 2016) (finding no deliberate indifference where "defendant tailored [plaintiff's] treatment to the symptoms he was displaying at the time").

4. See 576 U.S. at 396–97.

5. See *infra* Part III (discussing how circuits have applied the two standards to each claim).

of inadequate medical care, conditions of confinement, and failure-to-protect. In doing so, these circuits rely on outdated circuit precedent, which distorts Supreme Court precedent and bypasses critical analysis of the Fourteenth Amendment's parameters.

Part I of this Note proceeds in two Sections. Section A discusses the history of Title 42, § 1983 of the U.S. Code. Section 1983 is the primary tool convicted criminals, arrestees, and pretrial detainees can use to address infringements of their constitutional rights by state officials while they are detained.⁶ Although § 1983 governs these claims for convicted criminals, arrestees, and pretrial detainees alike, each specific group of individuals brings their claims under separate constitutional provisions: arrestees bring § 1983 claims under the Fourth Amendment's Unreasonable Search and Seizure Clause; pretrial detainees bring these claims under the Fourteenth Amendment's Due Process Clause; and convicted criminals bring these claims under the Eighth Amendment's Cruel and Unusual Punishment Clause. The distinct constitutional grounds for § 1983 claims have also required different standards for analyzing the claims. Section B explains these different standards.⁷

Part II explains the Court's analysis in *Kingsley* and highlights key reasoning on which circuit courts extending the objective standard have relied. Part III demonstrates how the circuits have split as to pretrial detainee claims regarding: (1) conditions of confinement, (2) inadequate medical care, and (3) failure-to-protect. Part IV sets forth the arguments in favor of extending the objective standard to all pretrial detainees' claims and explains why circuits refusing to do so employ reasoning inconsistent with Supreme Court precedent and the Constitution. The Note concludes that extending *Kingsley*'s objective standard to all pretrial detainee claims would be most consistent with those precedents and constitutional principles.

I. THE BUILD UP TO *KINGSLEY*

Section 1983 has an important and complicated history in civil rights litigation. For many years it laid essentially dormant due to a series of decisions handed down by the Supreme Court. Today, however, it serves as a crucial cause of action against state officials for those in the criminal justice system. Section A briefly outlines this history. Section B then discusses the origins of the standards applied to

6. There is no statutory corollary cause of action for prisoners against federal officials. Prisoners seeking monetary relief from constitutional violations against federal officials must do so under a judicial doctrine known as a *Bivens* claim. However, *Bivens* is extremely limited, allowing only Eighth Amendment deliberate indifference inadequate medical care claim, Fifth Amendment gender discrimination claims, and Fourth Amendment unreasonable search and seizure claims. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (allowing Fourth Amendment claims); see also *Davis v. Passman*, 442 U.S. 228, 229–30 (1979) (allowing Fifth Amendment claims); *Carlson v. Green*, 446 U.S. 14, 16, 18 (1980) (allowing Eighth Amendment deliberate indifference claims).

7. For a full explanation of these standards, see *infra* Section I.B.

§ 1983 claims and how they coalesced in the Supreme Court's jurisprudence leading to the Court's decision in *Kingsley*.

A. *The Evolution of § 1983: Its History and How It Works Today*

Section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, establishes a federal cause of action for constitutional violations inflicted by state actors.⁸ In the prison context, § 1983 is the primary avenue a person has to receive relief for a constitutional violation committed by a state actor, including state correctional officers.⁹ Historically, § 1983 was not a useful tool for remedying constitutional wrongs. In 1882, the Supreme Court weakened § 1983 when it held that the Fourteenth Amendment applies only to “the acts of the State government itself” and not to acts of private individuals.¹⁰ Under this interpretation, § 1983 applied only to actions that were “sanctioned by the state.”¹¹ If an individual law enforcement officer violated a constitutional right, § 1983 did not provide redress because the officer acted contrary to state law, not “under color of law.”¹² Without a federal cause of action to bring against state officials for inflicting constitutional violations, the remaining option was to bring the claim in state courts, which were often hesitant to penalize their state officials.¹³

More than a century later, the Court resurrected § 1983 in *Monroe v. Pape*.¹⁴ There, the Court found that § 1983 applied to actions of state law enforcement, even if they were not sanctioned by the state.¹⁵ *Monroe* represents a watershed moment for civil rights law: “Before it, state and local law enforcement officials were not subject to federal liability; after it, such suits became possible.”¹⁶ Since *Monroe*, § 1983 has been heavily utilized, earning its reputation as the “workhorse of modern civil rights litigation.”¹⁷

8. 42 U.S.C. § 1983; see also Alan W. Clarke, *The Klu Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 152 (2005) (referring to § 1983 as “Section One of the Ku Klux Klan Act [otherwise] known as the Civil Rights Act of 1871”).

9. See § 1983 (stating that “any citizen of the United States or other person within the jurisdiction thereof” may sue a state actor who deprives the person of “any rights, privileges, or immunities secured by the Constitution and laws”); Clarke, *supra* note 8, at 152 (“[N]o other law is more central to present day police and correctional officer accountability.”).

10. See *United States v. Harris*, 106 U.S. 629, 638 (1883) (quotations and citations omitted); Clarke, *supra* note 8, at 156.

11. Michael S. DiBattista, *A Force to Be Reckoned With: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After Kingsley*, 48 COLUM. HUM. RTS. L. REV. 203, 208 (2017).

12. See Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 317, 317–18 (1995).

13. See DiBattista, *supra* note 11, at 209.

14. See Clarke, *supra* note 8, at 158 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)).

15. See *id.* at 163–67 (describing the case and its reasoning).

16. *Id.* at 164.

17. *Id.* at 152.

Though individuals now have a right to bring suit in federal court against state law enforcement officials for constitutional violations, their legal status as arrestees, pretrial detainees, or convicted criminals¹⁸ affects how a court analyzes the claim.¹⁹ This is in large part because the claims arise under different constitutional provisions. As noted, arrestees bring § 1983 claims under the Fourth Amendment's Unreasonable Search and Seizure Clause.²⁰ Pretrial detainees bring the same claims under the Fourteenth Amendment's Due Process Clause.²¹ Convicted criminals bring their § 1983 claims under the Eighth Amendment's Cruel and Unusual Punishment Clause.²²

B. Origins of the Kingsley Dispute

In *Kingsley*, the Court faced the question of whether the subjective or objective standard applied to pretrial detainees' excessive force claims.²³ Under the subjective standard, Mr. Kingsley would have to show that the state law enforcement

18. For the purposes of this Note, a convicted criminal is a person found guilty of a crime serving a sentence of imprisonment.

19. There is considerable debate as to when an individual is arrestee rather than a pretrial detainee. The distinction is significant because it changes the constitutional grounds on which the individual brings their claim. There are two primary theories in the circuit courts. The first is the "continuing seizure approach," which applies the Fourth Amendment to arrestees whilst they are in the custody of the arresting officers; the continuing seizure approach has been applied to include interactions with officials while the individual is in a holding cell. See Erica Haber, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on When Seizure and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y. L. SCH. J. HUM. RTS. 939, 948 (2003). The second approach, "the substantive due process approach," applies the Fourteenth Amendment as soon as the "initial decision to detain the accused" is made. *Id.* at 949–50 (quoting *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979)). Thus, once the arrest or stop is complete, individuals must bring § 1983 excessive force claims under the Due Process Clause of the Fourteenth Amendment.

20. *Graham v. Connor*, 490 U.S. 386, 394–95 (1989) (holding that "where the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment").

21. The Fourteenth Amendment is a more appropriate source for the claim than the Fourth Amendment because the pretrial detainee alleges a violation of their right to be treated fairly in the course of their treatment by the criminal justice system. See, e.g., Rosalie Berger Levinson, *Kingsley Breathes New Life into Substantive Due Process as a Check on Abuse of Government*, 93 NOTRE DAME L. REV. 357, 360 (2017). Prior to *Graham v. Connor*, some circuits applied the Fourth Amendment to individuals in these scenarios, but many applied the Fourteenth Amendment. The confusion arose from Judge Friendly's opinion in *Johnson v. Glick*. See *Graham*, 490 U.S. at 392 (citing *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973)). Writing for the Second Circuit, Judge Friendly applied the Fourteenth Amendment Due Process Clause to an individual detained prior to trial. In doing so, Judge Friendly invoked the Court's "shocks the conscience language" from the seminal due process case, *Rochin v. California*. *Id.* at 393 (citing *Rochin v. California*, 342 U.S. 165, 175 (1952) (overturning a criminal conviction based primarily on pills pumped from the defendant's stomach because the conduct "shock[ed] the conscience" and therefore the admission of pills as evidence violated defendant's due process)). Judge Friendly then applied a four-factor test to determine whether an official was liable for excessive force: (1) "the need for the application of force," (2) "the relationship between the need and the amount of force that was used," (3) "the extent of injury inflicted," (4) "and 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." *Glick*, 481 F.2d at 1033.

22. See *Whitley v. Albers*, 475 U.S. 312, 318–19 (1985) (noting that "[t]he Cruel and Unusual Punishments Clause 'was designed to protect those convicted of crimes'" (citation omitted)).

23. *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015).

officer “maliciously and sadistically” used force against him.²⁴ Conversely, under the objective standard, Mr. Kingsley would have to show that the state law enforcement officer used an “objectively unreasonable” degree of force.²⁵ These standards are rooted in the Eighth and Fourth Amendments, respectively.

The subjective standard has long been applied to claims brought by convicted criminals under the Eighth Amendment’s Cruel and Unusual Punishment Clause.²⁶ For such a claim to be successful, the offending official must have acted with a certain state of mind—an inquiry that is necessarily subjective.²⁷ Not all cruel and unusual punishment claims, however, require an official to have the same state of mind. Excessive force claims, for example, require officials to inflict the force maliciously and sadistically and without a good faith attempt to maintain order.²⁸ A malicious and sadistic use of force is that which is imposed “for the very purpose of causing harm.”²⁹ But inadequate medical care claims, failure-to-protect claims, and conditions of confinement claims under the Eighth Amendment require officials to have acted with deliberate indifference.³⁰ Deliberate indifference requires that the official *was actually aware* of and disregarded a substantial risk of harm to the inmate’s safety.³¹ That is, the official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”³²

Within the subjective standard, then, there are two discrete states of mind that can give rise to an Eighth Amendment claim: the malicious and sadistic state of mind that is used to analyze excessive force claims or the deliberately indifferent

24. *Id.* at 400 (citation omitted).

25. *Id.* at 396–97.

26. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (Eighth Amendment jurisprudence “mandate[s] inquiry into a prison official’s state of mind when it is claimed that the official has inflicted cruel and unusual punishment.”).

27. *Id.* at 298 (characterizing this approach as the “subjective component”); *Hudson v. McMillian*, 503 U.S. 1, 23 (1992) (Thomas, J., dissenting) (“Ascertaining prison officials’ state of mind, in other words, is the *only* relevant inquiry in” determining an Eighth Amendment claim).

28. *Kingsley*, 576 U.S. at 400; *see Wilson*, 501 U.S. at 301–02 (describing the various standards).

29. *See Wilson*, 501 U.S. at 302–03 (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

30. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *see Wilson*, 501 U.S. at 302–03 (holding that conditions of confinement claims brought by prisoners should be measured by deliberate indifference). Although the Court did not prescribe a state of mind requirement to deliberate indifference, it noted that liability cannot be imposed for mere negligence. *See Estelle*, 429 U.S. at 106. Justice Stevens in his dissent, however, warned that the Court’s contrast to deliberate indifference with negligence inadvertently applies a *subjective* state of mind requirement to deliberate indifference. *See id.* at 116 (Stevens, J., dissenting). His prediction would come to fruition later in *Farmer v. Brennan*, where the Supreme Court refined the deliberate indifference test to ascribe a subjective showing that the officer intended to punish. *See* 511 U.S. 825, 834 (1994).

31. *Farmer*, 511 U.S. at 836–37. In *Wilson*, the Court distinguished excessive force claims from conditions of confinement claims. The Court reasoned that because excessive force claims arise in situations where officials have less time to react, often having to act immediately, the state of mind requirement should be higher than deliberate indifference. *Wilson*, 501 U.S. at 302. Therefore, prisoners in excessive force claims cases must prove “malicious and sadistic” intent “with the very purpose of causing harm.” *See Whitley*, 475 U.S. at 320–21 (citations omitted).

32. *Farmer*, 511 U.S. at 837.

state of mind that is used to analyze claims of inadequate medical care, conditions of confinement, and failure-to-protect claims. Both of these states of mind impose a high burden on the convicted criminal, albeit the malicious and sadistic standard is higher than the deliberate indifference standard.³³ In the former, the convicted criminal must prove that the official imposed a force so excessive for the particular circumstances that the official was motivated by a sadistic purpose. In the latter, the convicted criminal must prove that the official had actual first-hand knowledge of a particular risk and did nothing to abate it.

The objective standard, on the other hand, originates from the Fourth Amendment's Unreasonable Search and Seizure Clause. In *Graham v. Connor*, the Supreme Court rejected the argument that the malicious and sadistic standard should apply to arrestees' excessive force claims and instead held that these claims must be analyzed by an objective reasonable person standard.³⁴ In the Court's view, because the Fourth Amendment protects arrestees from *unreasonable* searches and seizures, the Amendment lends itself to an objective reasonableness standard.³⁵

With the proper excessive force standards settled for convicted criminals and arrestees, all that remained was for the Court to determine the proper standard to apply to pretrial detainees' excessive force claims. Prior to *Kingsley*,³⁶ some circuits applied the subjective malicious and sadistic standard to pretrial detainees' excessive force claims, while others applied the objective reasonableness standard articulated in *Graham*.³⁷ In *Kingsley*, the Court held that the objective reasonableness standard applies.³⁸

33. See *id.* at 835–36 (describing deliberate indifference as a lower standard than the malicious and sadistic standard).

34. See *Graham v. Connor*, 490 U.S. 386, 397 (1989).

35. See *id.* at 397–99. The Court explicitly rejected the argument that a good-faith analysis, including whether the force was applied maliciously or sadistically, could be measured by objective factors. Instead, the Court explained that a malicious and sadistic standard injects a determination of the subjective motivations of the officer inflicting the force. *Id.* at 397–98.

36. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

37. The doctrine around excessive force claims was further confused by the Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 851–54 (1998). In *Lewis*, the Court proscribed two different standards for pretrial detainees' Fourteenth Amendment claims. The Court reasoned that in high-speed chases, or emergency situations, officials only shock the conscience, thereby offending Due Process, where there is "intent to harm." *Id.* at 854. The Court analogized the high-speed chase in *Lewis* to the prison riot in *Whitley v. Albers*. See *id.* at 851–52. In *Whitley*, the Court held that in prison security scenarios, only measures taken with a malicious and sadistic state of mind violate the Eighth Amendment. 475 U.S. 312, 320–21 (1986). The Court in *Lewis*, however, also explained that where actual deliberation is possible, such as conditions of confinement, actions that are deliberately indifferent can suffice to shock the conscience. *Lewis*, 523 U.S. at 851. After *Lewis*, several courts interpreted the "intent to harm standard" in the Fourteenth Amendment context to be identical to the malicious and sadistic standard of the Eighth Amendment, thus requiring pretrial detainees to show a subjective state of mind in excessive force claims in any emergency situation. See Levinson, *supra* note 21, at 369 & n.86 (collecting cases).

38. See *Kingsley*, 576 U.S. at 396–97.

Though *Kingsley* resolved the circuit split as to the standard required for pretrial detainees' excessive force claims, it did not decide whether pretrial detainee claims of inadequate medical care, conditions of confinement, or failure-to-protect are also measured under the objective standard.³⁹ Before *Kingsley*, many federal circuits applied the Eighth Amendment subjective standard of deliberate indifference to these claims because this standard already governed these claims when brought by convicted criminals.⁴⁰ After *Kingsley*, however, several circuits pivoted and decided to extend *Kingsley*'s objective standard—requiring that a reasonable officer *should have known* of the risk—to all pretrial detainee claims.⁴¹ Still, some circuits continue to apply the subjective deliberate indifference standard, requiring *actual* knowledge of risk to the detainee.⁴² In other words, some circuits confine *Kingsley*'s objective standard only to excessive force claims, while others apply it to all pretrial detainee claims. The practical consequence of the split is that a pretrial detainee bringing a claim in a jurisdiction that has confined *Kingsley* faces a much more difficult standard than detainees in jurisdictions that use the objective standard.⁴³

II. THE *KINGSLEY* DECISION

Part II of this Note explains the Court's decision in *Kingsley*. Section A provides background on how Michael Kingsley went from his cell in Sparta, Wisconsin, in May 2010, to the Supreme Court five years later. Section B lays out the Court's rationale for applying the objective standard to pretrial detainees' excessive force claims. This reasoning is discussed and examined further in Part IV in support of extending the objective standard all pretrial detainees' claims.

A. *Kingsley's Journey to the Supreme Court*

Mr. Kingsley was arrested and detained in Wisconsin.⁴⁴ While in his cell awaiting trial, he placed a piece of paper over the light, which was never turned off.⁴⁵

39. See Levinson, *supra* note 21, at 372 (noting that *Kingsley* did not resolve these cases and discussing how *Kingsley* could apply to them).

40. See *id.* at 373 & n.105, 378 & n.128, 381 & n.152 (collecting cases); *Wilson v. Seiter*, 501 U.S. 294, 299 (1991) (applying deliberate indifference standard to conditions of confinement claims by convicted criminals).

41. See *infra* Part III. The Ninth, Seventh, and Second Circuits have explicitly held that *Kingsley*'s objective standard applies beyond pretrial detainee excessive claims. The Eleventh, Eighth, Sixth, Third, and Fifth Circuits have declined to extend *Kingsley*. The Tenth Circuit has acknowledged that the circuits have split since *Kingsley* but has not extended the objective standard.

42. *Id.*

43. The harshness of the subjective standard under the Eighth Amendment has not gone unnoticed by the Court or scholars. In *Kingsley*, the Court acknowledged that its application of the objective standard to pretrial detainees' excessive force claims may raise doubt as to the subjective standard's application to convicted criminals. See *Kingsley*, 576 U.S. at 402–03. The Court, however, expressly reserved the question. In the scholarly community, the subjective standard has been referred to as “draconian.” *E.g.*, Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 570 (2008).

44. *Kingsley*, 576 U.S. at 392.

45. *Id.*; *Kingsley v. Hendrickson*, 744 F.3d 443, 445 n.1 (7th Cir. 2015) (explaining that trying to block the light with paper is a common practice by inmates seeking to dim the jail's light).

An officer instructed Mr. Kingsley to remove the paper several times throughout the night, but Mr. Kingsley repeatedly refused.⁴⁶ Four officers eventually moved Mr. Kingsley to another cell, so they could remove the paper themselves.⁴⁷ As the officers began to remove Mr. Kingsley's handcuffs in the other cell, one officer put his knee in Mr. Kingsley's back, allegedly slamming Mr. Kingsley's head into the concrete bunk.⁴⁸ Another officer then tasered Mr. Kingsley for five seconds and left him in the cell for fifteen minutes, still in his handcuffs.⁴⁹

Mr. Kingsley filed a § 1983 claim in federal district court alleging excessive force by the officers in violation of the Fourteenth Amendment's Due Process Clause.⁵⁰ The jury found against Mr. Kingsley.⁵¹ He appealed to the Seventh Circuit on the basis that the jury instructions improperly required the jury to find the officer had a malicious and sadistic state of mind to establish liability for excessive force rather than applying an objective reasonableness standard.⁵² A Seventh Circuit panel found the jury instructions to be accurate because the "law required a subjective inquiry into the officer's state of mind. There must be an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights."⁵³ One judge dissented, noting the circuit split on the standard applied to excessive force claims of pretrial detainees.⁵⁴ The Supreme Court granted certiorari to decide "whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard."⁵⁵

B. *The Court's Analysis: Getting to Objectivity*

The Supreme Court rejected the application of the subjective malicious and sadistic standard to pretrial detainee excessive force claims and held instead that

46. *Kingsley*, 576 U.S. at 392.

47. *Id.*

48. *Id.*

49. *Id.* at 392–93.

50. *Id.* at 393.

51. *Id.* at 394.

52. *See id.* at 402–04. The jury instructions at issue were those asking the jury to find that the officers acted "recklessly" and in "reckless[] disregard[]" for the plaintiff's safety. The instructions also asked the jury to "consider [w]hether [respondents] reasonably *believed* there was a threat to the safety of staff of prison." *Id.* (citation omitted). These instructions indicated a subjective state of mind inquiry. *Id.*

53. *Id.* at 394 (internal quotations omitted).

54. *Kingsley v. Hendrickson*, 744 F.3d 443, 457 n.1 (7th Cir. 2015) (Hamilton, J., dissenting). Judge Hamilton advocated for an objective standard applied to pretrial detainee excessive force claims on the basis that pretrial detainees are "cloaked" in the same innocence as arrestees and stopped persons and may not be punished at all. Judge Hamilton admonished the majority's upholding of the requirement of finding "recklessness" in the jury instructions because of the high burden it imposed on pretrial detainees. *Id.* at 459–60. Judge Hamilton's focus on recklessness eventually became the first prong created by the Supreme Court in *Kingsley*. Judge Hamilton explained that recklessness analysis is only required in so far that there is disagreement about whether the act of the officer was intentional. Because negligence is not sufficient to establish liability, and if intent to act is in dispute, a reckless determination may be necessary. *Id.* at 460–61.

55. *Kingsley*, 576 U.S. at 395.

these claims are measured by an objective standard.⁵⁶ The Court created a two-pronged test to determine whether a pretrial detainee can prevail on an excessive force claim under the objective standard. The first prong requires that the official acted with “a purposeful, a knowing, or possibly a reckless state of mind” “with respect to his physical acts” that caused the pretrial detainee’s injury.⁵⁷ In formulating this first prong, the Court was careful not to hold officials liable for merely negligent conduct, as negligence is not a basis for liability under § 1983.⁵⁸ By requiring the conduct that inflicted the injury on the pretrial detainee be taken purposefully or knowingly, officials will not be held liable for negligent—i.e., accidental—actions that resulted in harm.

The second prong addresses whether the force used was excessive. The Court held that this is an objective determination, deeming the internal state of mind of the officer irrelevant.⁵⁹ The Court offered a list of relevant factors in determining reasonableness of force⁶⁰ and explained that the determination is made with the knowledge of what the officer knew *at the time*, rather than with “the 20/20 vision of hindsight.”⁶¹

Under this two-pronged test, pretrial detainees can succeed on excessive force claims by first showing that the physical action was intentional or deliberate—rather than accidental—and second, that the force was objectively unreasonable given the facts and circumstances.

To support the application of the objective standard, the Court revisited its jurisprudence on the respective legal standards for claims brought under Fourth, Eighth, and Fourteenth Amendments against state prison officials. The Court first looked to its holding in *Graham*, which noted that the Fourteenth Amendment

56. *Id.* at 396–97.

57. *Id.* at 395–96. This prong preserves the understanding that negligence is not sufficient to create liability. The Court gave the example of the taser going off accidentally to illustrate a circumstance where the act as to the first prong would be negligent. *Id.* at 395. The Court addressed whether negligence suffices to establish liability in *Daniels v. Williams* because the circuits had split on the issue. 474 U.S. 327, 329, 332 (1986) (holding officials not liable for misplacing pillow causing inmate to slip and fall, suffering back and ankle injuries, because the conduct was only negligent). To ensure a clear message to lower courts, the Court also had to clarify its *County of Sacramento v. Lewis* decision. 523 U.S. 833 (1998). Although *Lewis* held that Due Process is violated where there is “intent to harm,” *id.* at 854, the *Kingsley* Court clarified that this intent only refers to the act resulting in the force and “not to whether the force intentionally used was ‘excessive.’” *Kingsley*, 576 U.S. at 401 (quoting *Lewis*, 523 U.S. at 854 & n.13). Thus, the “intent to harm” question refers to *Kingsley*’s first prong—determining that the act resulting in force was intentional. In *Kingsley*, all parties agreed that the officer intentionally tasered Mr. *Kingsley* and thus the first prong was indisputably met. *Id.* at 401.

58. *Kingsley*, 576 U.S. at 395–96. Negligent actions are those taken without an intentional state of mind. An example the Court gives is an official unintentionally falling on a pretrial detainee, causing him harm. *Id.* at 396. The first prong, however, is distinct from negligence because it requires a “deliberate” act. *Id.*

59. *Id.* at 395 (“The defendant’s state of mind is not a matter that a plaintiff is required to prove.”).

60. These factors include: (1) “the relationship between the need for the use of force and the amount of force used”; (2) “the extent of the plaintiff’s injury”; (3) “any effort made by the officer to temper or to limit the amount of force”; (4) “the severity of the security problem at issue”; (5) “the threat reasonably perceived by the officer”; and (6) “whether the plaintiff was actively resisting.” *Id.* at 397.

61. *Id.* The Court also emphasized that courts should continue to defer to officials regarding the difficulty of managing and maintaining order in jail. *Id.* at 399–400.

“protects a pretrial detainee from use of excessive force that amounts to punishment.”⁶² To clarify *Graham*’s language, which had created some confusion among the circuits,⁶³ the Court turned to its decision in *Bell v. Wolfish*.⁶⁴

According to the Court in *Kingsley*, *Bell* set forth two ways to define punishment.⁶⁵ An official can inflict punishment when he acts “with an expressed intent to punish.”⁶⁶ This analysis requires an inquiry into the state of mind of the official and is therefore a subjective standard.⁶⁷ Alternatively, an official’s act can constitute punishment if it is not “rationally related to a legitimate nonpunitive governmental purpose.”⁶⁸ This is an objective inquiry because it calls for an analysis wholly apart from the state of the mind of the official.⁶⁹ The *Kingsley* Court relied on the second definition of punishment in creating the objective standard for pretrial detainees’ excessive force claims.

The Court also clarified that prior cases involving convicted criminals’ claims under the Eighth Amendment have no bearing on pretrial detainees’ claims under the Fourteenth Amendment because the amendments are fundamentally distinct from one another.⁷⁰ Indeed, convicted criminals *can* be punished, just not *cruelly*

62. *Id.* at 397–98 (quoting *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)).

63. Several circuits found the question of what conduct “amounts to punishment” to require a subjective inquiry into the state of the official. *See, e.g., Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (explaining that pretrial detainee must show that the “purpose of the governmental action must be to punish the detainee”); *Jackson v. Buckman*, 756 F.3d 1060, 1067 (8th Cir. 2014) (explaining pretrial detainees cannot be punished at all but that punishment is force intended to “injure, punish[,] or discipline”); *Kingsley*, 576 U.S. at 405–06 (Scalia, J., dissenting) (explaining that punishment has a subjective intent element and that a state can take harmful action against pretrial detainees as long as it has a “reasonable relationship to a valid government interest”); *see also Butler v. Fletcher*, 465 F.3d 340, 344–45 (8th Cir. 2006) (explaining that under *Bell* a pretrial detainee is punished when the act is intended to berate the detainee, but applying the subjective deliberate indifference test on the grounds that the government interest at issue was not intent to punish but freedom from unsafe conditions).

64. 441 U.S. 520 (1979). *Bell v. Wolfish* was a pretrial detainee conditions of confinement case. Although, as the *Kingsley* Court argues, *Bell* set out an objective standard—requiring only that a certain condition be reasonably related to a government interest—for conditions of confinement claims, the standard was not widely implemented by lower courts. *Kingsley*, 576 U.S. at 398; *see Levinson, supra* note 21, at 373 n.105 (collecting cases). Levinson stated:

Despite the Supreme Court’s admonition in *Bell* that the Due Process Clause, not the Eighth Amendment, governs challenges to conditions of confinement brought by pretrial detainees, prior to *Kingsley* many appellate courts simply borrowed the Eighth Amendment standard of culpability, thereby requiring detainees to meet a subjective criminal recklessness standard.

Levinson, *supra* note 21, at 373.

65. *Kingsley*, 576 U.S. at 398.

66. *Id.* (quoting *Bell*, 441 U.S. at 538).

67. *See id.*

68. *Bell*, 441 U.S. at 561 (holding that the practice of double-bunking did not violate the Fourteenth Amendment because it was not intended to inflict punishment and was reasonably related to a legitimate non-penological government interest).

69. *See Kingsley*, 576 U.S. at 398.

70. *See id.* at 400–01 (noting that two of the cases that the officers cited were “excessive force claims brought by convicted prisoners under the Eighth Amendment[.]”). The Court explained that Eighth Amendment cases are only relevant “insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails.” *See id.* at 401.

and unusually.⁷¹ As noted, whether punishment is cruel and unusual requires a subjective inquiry into the state of mind of the official.⁷² Pretrial detainees, on the other hand, are presumed innocent and therefore any infliction of punishment is a violation of the Fourteenth Amendment's Due Process Clause.⁷³ As the Eighth and Fourteenth Amendments protect different rights, cases addressing claims under one cannot be legitimately analogized to cases addressing claims under the other.⁷⁴

In sum, though *Kingsley* resolved the confusion about whether to apply the subjective malicious and sadistic standard or the objective standard to pretrial detainee excessive force claims, it did not address whether the objective standard extended to all pretrial detainee claims.

III. THE POST-*KINGSLEY* CIRCUIT SPLIT

Kingsley threw some a bone and others a wrench. For pretrial detainees, *Kingsley* delivered a more generous recognition of their rights. Many circuit courts' jurisprudence, however, was delegitimized. Excessive force claims of pretrial detainees could no longer be measured by a subjective malicious and sadistic standard, and the standard applied to other pretrial detainee claims became unclear.

Beyond excessive force claims, pretrial detainee claims can be categorized into three groups: (1) Conditions of Confinement; (2) Inadequate Medical Care; and (3) Failure-to-Protect. The question lingering after *Kingsley* is whether the objective reasonableness standard or the subjective deliberate indifference standard applies to these claims.⁷⁵ This Part describes how the circuits are split as to the proper standard for each claim and whether *Kingsley*'s objective standard should be extended.⁷⁶ For each of the three claims, this Note presents two circuit court

71. Convicted criminals can be punished without offending the Fourteenth Amendment because the punishment is either in response to their crime or is an incident of incarceration. See U.S. CONST. amend VIII.

72. See *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

73. *Bell*, 441 U.S. at 535. The government can detain persons to ensure their appearance for trial or for reasons that further this interest. *Id.* at 534.

74. See *Kingsley*, 576 U.S. at 400–01; see also *Whitley v. Albers*, 475 U.S. 312, 326–37 (1986) (noting that the plaintiff's Fourteenth Amendment claim was "an alternative ground" but reaching the conclusion that the Eighth Amendment sufficiently protected plaintiff's interests).

75. With confusion over whether the subjective malicious and sadistic standard applies to pretrial detainee excessive force claims put to rest by *Kingsley*, the rest of the Note is primarily concerned with the fate of the subjective deliberate indifference standard. For simplicity's sake, the subjective deliberate indifference standard will sometimes be referred to as the "subjective standard."

76. The split can be described in two ways. Either there is one circuit split on whether to extend *Kingsley* to all pretrial detainee claims or there are three discrete circuit splits on each of the remaining three claims. However, the more accurate description is the former. The language in *Kingsley* supporting extension of the objective standard applies equally to all pretrial detainee claims, and thus is not claim-specific. Furthermore, the circuit courts discussing the split cite extensions of *Kingsley* together even if the cases address different types of claims, and so too is the case for circuits not extending *Kingsley*. See, e.g., *Darnell v. Pineiro*, 849 F.3d 17, 35–36 (2d Cir. 2017) (holding the objective standard governs pretrial detainees' conditions of confinement claims and citing *Castro v. County of Los Angeles*, 844 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (holding the objective standard governs pretrial detainees' failure-to-protect claims)). Finally, if the Supreme Court were to hear a case based on

cases falling on either side of the split—one circuit applying the objective standard and another applying the subjective standard. These cases illustrate the divergent approaches taken by the circuits to pretrial detainee claims under § 1983. Part IV addresses the circuit courts’ arguments for and against extension of the objective standard, concluding ultimately that the arguments for extension are more consistent with *Kingsley* and the Fourteenth Amendment.

A. Conditions of Confinement

Pretrial detainees can bring conditions of confinement claims if they are denied “adequate food, clothing, shelter,” or a safe environment while detained.⁷⁷ After *Kingsley*, however, the circuits split on whether these claims are measured by the objective or subjective standard.⁷⁸ The Second Circuit extended the objective standard to conditions of confinement claims.⁷⁹ Conversely, the Eleventh Circuit continues to apply the subjective standard to such claims.⁸⁰

1. The Second Circuit Applies the Objective Standard

In *Darnell v. Pineiro*, the Second Circuit rejected the subjective deliberate indifference standard as the proper measure for pretrial detainees’ Fourteenth Amendment claims and held instead that the objective standard articulated in

one of the claims and only extend *Kingsley* as to that claim, it would perpetuate the ongoing circuit split on the issue. Thus, this Note refers to the circuit split as a singular split as to whether to extend *Kingsley* to all pretrial detainee claims rather than three discrete splits based on the individual claims. Addressing each claim in turn illustrates that the circuits are split as to each claim and thus the Court can clarify *Kingsley* in a case involving any of these three claims. Concurrently, the analysis shows that the circuits consider principles encompassing all pretrial detainee claims; therefore, the disagreement is better defined as a single circuit split.

77. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); see Levinson, *supra* note 21, at 372.

78. See *Hardeman v. Curran*, 933 F.3d 816, 819, 822–24 (7th Cir. 2019) (applying the objective reasonableness standard to pretrial detainee conditions of confinement claim against prison officials after the prison shut off the water for three days and lack of water resulted in serious hygiene issues in the cells, especially regarding the toilets). The Seventh Circuit noted that it had already extended *Kingsley* to apply to inadequate medical care claims in *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018), and that the Tenth Circuit has done so to conditions of confinement. See *Hardeman*, 933 F.3d at 823 (citing *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019)). The Tenth Circuit in *Colbruno* applied *Kingsley*’s objective standard. *Colbruno*, 928 F.3d at 1164–65 (holding that any reasonable officer should know that forcing a pretrial detainee to walk around a hospital naked violates the detainee’s due process right under the Fourteenth Amendment). However, in *Goss v. Board of County Commissioners*, the circuit explained that “the protections given to pretrial detainees are the same as those given to prisoners under the Eighth Amendment.” 645 F. App’x 785, 792 (10th Cir. 2016). The circuit then held that the pretrial detainee failed on her conditions of confinement claim that the prison gave her improperly fitting clothes because there was no evidence that the officials were aware of the issue. *Id.* at 793. More recently, in *Routt v. Howard*, the Tenth Circuit applied the subjective deliberate indifference test to a pretrial detainee’s claim that the jail officials were excessively loud during count, resulting in sleep deprivation. 764 F. App’x 762, 769–70 (10th Cir. 2019). Thus, the Tenth Circuit has unevenly applied *Kingsley*’s objective to conditions of confinement, furthering the circuit split.

79. *Darnell v. Pineiro*, 849 F.3d 17, 32–35 (2d Cir. 2017).

80. *De Veloz v. Miami-Dade County*, 756 F. App’x 869, 877 (11th Cir. 2018).

Kingsley ought to apply to all pretrial detainee claims.⁸¹ Under the objective standard, a pretrial detainee must prove that an official *should* have known of the risk to the detainee.⁸² In arriving at its holding, the court explained that, until *Kingsley*, its precedent under the Fourteenth Amendment for conditions of confinement claims had tracked that of deliberate indifference in the Eighth Amendment context.⁸³ *Kingsley*, however, signaled that pretrial detainees had rights under the Fourteenth Amendment distinct from those of convicted criminals under the Eighth Amendment.⁸⁴ Moreover, the Second Circuit acknowledged that a pretrial detainee's rights are shaped by the Fourteenth Amendment, not by the particular claim the detainee brings.⁸⁵ The objective standard could not plausibly be limited to excessive force claims because the Fourteenth Amendment guarantees the protection of the objective standard, regardless of the claim pleaded.⁸⁶

The Second Circuit created a framework for applying the objective standard to conditions of confinement claims consistent with the two-pronged approach of the Court in *Kingsley*.⁸⁷ The court held that a pretrial detainee must first show that the official acted intentionally with respect to imposing the alleged condition.⁸⁸ Such intent can also be shown if the official recklessly failed to mitigate the risk imposed by the condition.⁸⁹ Second, the pretrial detainee must show that the condition "posed an excessive risk to health or safety" such that a reasonable officer should be aware of the risk.⁹⁰

2. The Eleventh Circuit Applies the Subjective Standard

In stark contrast to the Second Circuit, the Eleventh Circuit in *De Veloz v. Miami-Dade County*⁹¹ held that "the standards under the Fourteenth Amendment

81. *Darnell*, 849 F.3d at 34–35.

82. *See id.* The cells were in horrendous condition. Pretrial detainees were exposed to severe overcrowding, to the point where there was only space to stand. The toilets were unusable because they were surrounded by "feces, maggots, urine, vomit, and rotten milk." The stench from the filthy floors caused one pretrial detainee to dry-heave. The cells lacked hygiene products, including female menstrual products, causing one pretrial detainee to "bleed[] all over herself." *See id.* at 24–25 (original alterations omitted).

83. *Id.* at 32–33 (noting that its precedent relied on analysis in *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994), an Eighth Amendment case); *see also* Levinson, *supra* note 21, at 373 (explaining that despite the Court's instruction in *Bell v. Wolfish*, many circuits continued to apply the subjective deliberate indifference test to pretrial detainees' conditions of confinement claims).

84. *See Darnell*, 849 F.3d at 33.

85. *See id.* at 35 ("A pretrial detainee may not be punished at all under the Fourteenth Amendment, whether through use of excessive force, by deliberate indifference to conditions of confinement, or otherwise.")

86. *See id.*

87. *Kingsley v. Hendrickson*, 576 U.S. 389, 395–97 (2015) (outlining the two prongs).

88. *Darnell*, 849 F.3d at 35.

89. *Id.* The circuit also preserved the rule that conduct cannot be imposed for mere negligence, requiring the official to have acted "intentionally" or "recklessly." *Id.* at 36.

90. *Id.* at 35.

91. 756 F. App'x 869, 876 (11th Cir. 2018).

are identical to those under the Eighth.”⁹² In *De Veloz*, the Eleventh Circuit applied the subjective deliberate indifference standard to a pretrial detainee’s conditions of confinement claim,⁹³ which alleged that officials mistook her for a man and placed her in a male prison.⁹⁴

The Eleventh Circuit’s application of the subjective deliberate indifference standard is rooted in its pre-*Kingsley* decision, *Hamm v. DeKalb County*. There, the Eleventh Circuit held that the standards governing a pretrial detainee’s conditions of confinement claim under the Fourteenth Amendment “can equally and fairly be measured” by the same standard as the Eighth Amendment.⁹⁵ In *Hamm*, the Eleventh Circuit read *Bell v. Wolfish* as lacking guidance for the baseline of liability for conditions of confinement claims. The court reasoned that *Bell*’s test, requiring a condition or restriction be “reasonably related to a legitimate government interest,” was impractical because even egregious conditions could be reasonably related to a legitimate government interest like limiting costs.⁹⁶ To remedy this perceived problem, the court held that a pretrial detainee sufficiently alleges a conditions of confinement claim when he shows that the condition is not reasonably related to a legitimate government interest *and* officials were deliberately indifferent to the risk posed by the condition.⁹⁷

But *Kingsley* clarified that *Bell* did provide a baseline of liability. *Bell* found that punishment will be inferred if the government action is “excessive in relation” to its legitimate purpose.⁹⁸ It follows that the legitimate goal of lowering costs likely cannot justify destitute conditions because such conditions would be “excessive” in relation to the purpose.

Shortly after *Hamm*, the Eleventh Circuit decided *Edwards v. Gilbert*.⁹⁹ There, the Eleventh Circuit found that a pretrial detainee’s Fourteenth Amendment claim did not require a separate analysis from his Eighth Amendment claim because

92. *Id.* (quoting *Goebert v. Lee County*, 510 F.3d 1312, 1316 (11th Cir. 2007)).

93. The pretrial detainee’s claim is one of conditions and confinement rather than inadequate medical care because the risk she faced was associated with the jail’s environment rather than improper medical treatment. *Id.* at 877.

94. *See id.* at 872–73. De Veloz was an older woman being treated for hormone imbalances due to menopause and also suffered from high blood pressure. Originally held at a women’s facility, she went to the medical unit to have her blood pressure checked. A nurse became suspicious that De Veloz was a transgender woman (i.e., assigned male at birth) because of her hormone treatment. Despite being told by a male guard that De Veloz was almost surely female, the nurse had De Veloz examined by a doctor. The doctor asked De Veloz if she had all of her genitals, to which she responded she did. De Veloz was then categorized as male and transferred to a male correctional facility where she was released into the male general population. *Id.*

95. *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985).

96. *Id.* at 1573–74. The Eleventh Circuit also considered that creating different standards for pretrial detainees and convicted criminals regarding conditions would involve the court in the daily operations of the prison. *Id.* at 1574.

97. *Id.* (“Therefore, the level at which states provide pretrial detainees with basic necessities—in addition to being ‘reasonably related to a legitimate governmental objective’—must meet the standards applied under the eighth amendment prohibition on cruel and unusual punishment.”).

98. *See Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (citing *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)).

99. 867 F.2d 1271 (11th Cir. 1989).

Hamm had held that the standards were the same under both amendments.¹⁰⁰ In reaching this conclusion, the Eleventh Circuit also partially relied on *Whitley v. Albers*, a case involving convicted criminals' Eighth Amendment claims.¹⁰¹ Though *Edwards* and *Hamm* both pre-date *Kingsley*, the Eleventh Circuit continues to rely on them in applying the subjective standard to the categories of pretrial detainee claims that the Supreme Court has not yet addressed.¹⁰² This precedent, however, is inconsistent with the Court's reasoning in *Kingsley*.

B. Inadequate Medical Care

A common claim brought by pretrial detainees is failure to receive adequate medical care while detained.¹⁰³ The Court acknowledged this right for the first time in *Estelle v. Gamble* when it determined that deliberate indifference to a serious medical need of a convicted criminal constitutes cruel and unusual punishment under the Eighth Amendment.¹⁰⁴ The Court's decision in *Kingsley* splintered the circuit courts as to the proper standard to apply to pretrial detainees' claims of inadequate medical care, with some applying the objective standard and others applying the subjective standard.¹⁰⁵ The Seventh Circuit, for example, moved

100. *Id.* at 1274.

101. *See id.*

102. *See, e.g.,* *Greenway v. S. Health Partners, Inc.*, 827 F. App'x 952, 958 (11th Cir. 2020) (citing *Edwards v. Gilbert*, 867 F.2d at 1274–75, in a medical treatment case); *Jacob v. Georgia*, 820 F. App'x 882, 887 (11th Cir. 2020) (citing *Hamm v. DeKalb County*, 774 F.2d at 1572, in a conditions of confinement case); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1115 (11th Cir. 2005) (citing *Edwards v. Gilbert* and *Hamm v. DeKalb County* in a medical treatment case).

103. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (recognizing the "government's obligation to provide medical care" to incarcerated persons).

104. *Id.* at 104.

105. *Compare* *Miranda v. County of Lake*, 900 F.3d 335, 354 (7th Cir. 2018) (remanding to district court for new trial with instructions to use the objective, not subjective, standard to measure pretrial detainee's inadequate medical care claims), *and* *Bruno v. City of Schenectady*, 727 F. App'x 717, 720 (2d Cir. 2018) (holding that objective standard governs pretrial detainee's inadequate medical care claim), *and* *Gordon v. County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) (holding the proper standard for measuring pretrial detainee's claim of inadequate medical care to treat his opiate withdrawal is an objective, rather than subjective, one), *with* *Nam Dang ex rel. Vina Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2, 1280–83 (11th Cir. 2017) (applying subjective deliberate indifference test to pretrial detainee's inadequate medical care claim for untreated meningitis that lasted several days and resulted in multiple strokes and noting that *Kingsley* does not directly address inadequate medical care claims), *and* *Ryan v. Armstrong*, 850 F.3d 419, 425 n.3, 426 (8th Cir. 2017) (applying subjective deliberate indifference to inadequate medical care claims and noting that the court need not address *Kingsley* because district court erred in granting summary judgment to defendants under the subjective standard), *and* *Moore v. Luffey*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019) (applying subjective deliberate indifference to inadequate medical care claims for treatment of hepatitis C and noting that the circuit has not extended *Kingsley* and its application would not change the outcome of the case because the officials were not more than negligent), *and* *Powell v. Med. Dep't Cuyahoga Cnty. Corr. Ctr.*, No. 18-3783, 2019 WL 3960770, at *2 n.1 (6th Cir. Apr. 8, 2019) (applying subjective deliberate indifference to inadequate medical care claims in part because the objective standard would not lead to a different outcome but noting that the circuits are split on the issue), *and* *Johnson v. Bessemer*, 741 F. App'x 694, 699 & n.5 (11th Cir. 2018) (applying subjective deliberate indifference to inadequate medical care claims because *Kingsley* does not directly abrogate inadequate medical care claims), *and* *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 279 (5th Cir. 2015) (finding

away from applying the Eighth Amendment standard to pretrial detainees' claims of inadequate medical care and instead used *Bell's* reasoning to extend the objective standard to these claims.¹⁰⁶ The Eighth Circuit, on the other hand, fell back on pre-*Kingsley* interpretations of *Bell*, markedly glossing over any distinctions between the Eighth and Fourteenth Amendments.¹⁰⁷

1. The Seventh Circuit Applies the Objective Standard

In *Miranda v. County of Lake*, the Seventh Circuit joined the Second and Ninth Circuits in extending the objective standard to inadequate medical care claims.¹⁰⁸ The Seventh Circuit held that two medical officials¹⁰⁹ could be liable because they *should have known* that Gomes, a pretrial detainee,¹¹⁰ faced a substantial risk of harm when she refused to eat or drink for two weeks.¹¹¹ The Seventh Circuit reconsidered its precedent in light of *Kingsley*, admitting that it previously “grafted the Eighth Amendment’s deliberate indifference requirement onto the pretrial detainee situation.”¹¹² *Kingsley*, though, rejected this copy-and-pasting exercise.¹¹³

that pretrial detainee did not show a “wanton disregard” of his medical needs (citations omitted)). *See also* *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (acknowledging that *Kingsley* puts into serious doubt that a pretrial detainee need show subjective deliberate indifference to inadequate medical care but noting that no circuit has done so directly and that the parties do not raise the issue in their briefs); *Estate of Vallina v. Cnty. of Teller Sheriff’s Off.*, 757 F. App’x 643, 646–47 (10th Cir. 2018) (acknowledging that circuits are split on whether *Kingsley* applies to inadequate medical care and conditions of confinement claims but that the issue was forfeited because plaintiffs did not raise the argument in the lower court); *Duff v. Potter*, 665 F. App’x 242, 244–45 (4th Cir. 2016) (applying *Kingsley* to pretrial detainee excessive force claims but not addressing the inadequate medical care claims because pretrial detainee did not discuss the claim in his informal brief).

106. *See Miranda*, 900 F.3d at 354.

107. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018).

108. 900 F.3d at 352; *see Bruno*, 727 F. App’x at 720; *Gordon*, 888 F.3d at 1124–25.

109. *Miranda*, 900 F.3d at 354. The Seventh Circuit affirmed the district court’s ruling that the jail officials were not deliberately indifferent to Gomes’s medical needs because they reasonably relied on the judgment of medical personnel. *See id.* at 343–44. The court also noted that the medical official defendants could be liable under § 1983 despite being employees of private company because they were contracted with the county. *See id.* at 346–47.

110. Gomes was detained in county jail for failure to appear in court for a charge of resisting arrest. The arrest occurred when she failed to report for jury duty. As the court notes, this was an error because Gomes was not a citizen and therefore was disqualified from serving as a juror. *See id.* at 341.

111. *Id.* at 341–42. One of the medical officials, Dr. Elazegui, assessed Gomes daily, and in progress notes the medical provider company for the jail noted extreme symptoms of dehydration. Eventually Gomes had to make a court appearance, during which the judge called for an urgent psychiatric exam by the other medical official, Dr. Singh. Despite Dr. Singh’s diagnosis of “psychotic disorder not otherwise specified” and conclusion that Gomes could not appreciate the risks of refusing food and water, Dr. Singh did not prescribe Gomes any medication and told Dr. Elazegui to put off an involuntary blood draw. Two days later, an internist coming back from vacation was shocked that Gomes remained detained while refusing to eat or drink and immediately called an ambulance. Gomes died five days later from complications of starvation and dehydration. *Id.* at 342.

112. *Id.* at 350–51.

113. *Id.* The Seventh Circuit’s precedent applying the subjective deliberate indifference standard dates back to at least 1991. In *Salazar v. City of Chicago*, the Seventh Circuit explained that, even in the pretrial detainee context, what constitutes punishment is an inherently intent-driven inquiry. 940 F.2d 233, 239 (7th Cir. 1991). The circuit also reasoned that because negligence is not sufficient to establish liability, punishment must be done with an intent to harm. For this reason, also, the Eighth Amendment understanding of punishment is the same as

In support of its holding, the Seventh Circuit relied heavily on the Court's decision in *Bell v. Wolfish*.¹¹⁴ *Bell* "took pains" to emphasize that pretrial detainees are protected from acts expressly intended to punish, but in the absence of express intent they can succeed on their claims by showing that conditions were not "rationally related to a legitimate nonpunitive governmental purpose."¹¹⁵ The Seventh Circuit reasoned that, just as *Bell* and *Kingsley* applied an objective standard to pretrial detainee conditions of confinement claims and excessive force claims, respectively, so too should an objective standard apply to inadequate medical care claims.¹¹⁶

2. The Eighth Circuit Applies the Subjective Standard

In *Whitney v. City of St. Louis*, the Eighth Circuit applied the subjective standard to a pretrial detainee's inadequate medical care claim. In its opinion, the circuit relied on precedent that is incompatible with *Kingsley*.¹¹⁷ The Eighth Circuit's pre-*Kingsley* precedent reads *Bell* as only extending protection to pretrial detainees for acts intended to punish.¹¹⁸ The focus on *Bell*'s ban on acts *intended* to punish, however, requires proof that the official had a culpable state of mind, which is the subjective standard.¹¹⁹ The Eighth Circuit failed to mention that *Bell* also protects pretrial detainees from acts objectively deemed as punishment.¹²⁰ As discussed above, although *Bell* indeed protected pretrial detainees from acts intended to punish,¹²¹ it also allowed pretrial detainees to show conduct amounted to punishment with solely objective evidence.¹²² *Bell*'s inclusion of acts intended to punish does not exclude the option of the objective standard. The Eighth Circuit in *Whitney*, therefore, relies on pre-*Kingsley* precedent that is now outdated.

C. Failure-to-Protect

Prison officials have a duty to "protect prisoners from violence at the hands of other prisoners."¹²³ In *Farmer v. Brennan*, the Supreme Court held that convicted

under the Fourteenth Amendment; thus, the subjective deliberate indifference standard applies equally to pretrial detainees. *Id.* Until *Miranda*, the Seventh Circuit subscribed to this logic. See *Miranda*, 900 F.3d at 350–51 (citing *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003)).

114. *Miranda*, 900 F.3d at 351.

115. *Bell v. Wolfish*, 441 U.S. 520, 561 (1979).

116. *Miranda*, 900 F.3d at 351–52.

117. See *Whitney v. City of St. Louis*, 887 F.3d 857, 860 & n.4 (8th Cir. 2018) (citing *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003), and distinguishing *Kingsley* as an excessive force case).

118. See *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2001).

119. *Id.* at 905–06.

120. See *id.* at 905.

121. See *Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979).

122. *Id.* at 538–39 & n.20; see also *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (explaining that the *Bell* Court held that punishment includes actions with an express intent to punish and those lacking intent if they are not reasonably related to a "legitimate nonpunitive" government interest (citation omitted)).

123. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citation and quotations omitted).

criminals alleging failure-to-protect claims must show that the officials were deliberately indifferent to the risk posed to the convicted criminal.¹²⁴ The official must therefore be subjectively aware of the facts constituting the risk and be aware of the risk itself.¹²⁵ The Ninth Circuit declined to apply the deliberate indifference standard to failure-to-protect claims after *Kingsley* and instead extended *Kingsley*'s objective standard.¹²⁶ The Fifth Circuit, on the other hand, applies the deliberate indifference standard to failure-to-protect claims based on a unique reading of *Bell v. Wolfish* that distinguishes prison policies from independent acts of individuals.¹²⁷

1. The Ninth Circuit Applies the Objective Standard

The Ninth Circuit extended the objective standard to pretrial detainees' failure-to-protect claims in *Castro v. County of Los Angeles*.¹²⁸ The court found that an official was liable for placing Castro, a pretrial detainee, in a cell with Gonzalez, a combative inmate, because the official should have been aware that monitoring of the cell was insufficient and that Gonzalez posed a serious risk to Castro.¹²⁹ In changing the standard from subjective to objective, the Ninth Circuit acknowledged that *Kingsley* cast the legitimacy of a single deliberate indifference standard for both pretrial detainees and convicted criminals into "serious doubt."¹³⁰ Finding its relevant jurisprudence no longer reliable, the Ninth Circuit reasoned that the objective standard is consistent with *Bell* and the Fourteenth Amendment because it protects pretrial detainees from all punishment, not just that found to be punishment under the more restrictive Eighth Amendment subjective standard.¹³¹

In its analysis, the Ninth Circuit had to account for the unique difficulty of applying the objective standard to failure-to-protect claims.¹³² *Kingsley*'s first

124. See *id.* at 834.

125. *Id.* at 837.

126. See *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069–71 (9th Cir. 2016).

127. See *Leal v. Wiles*, 734 F. App'x 905, 909–10 (5th Cir. 2018); *Hyatt v. Thomas*, 843 F.3d 172, 177–79 (5th Cir. 2016) (citing *Hare v. City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996)) (applying subjective deliberate indifference standard to failure-to-protect claim for failure to prevent pretrial detainee's suicide because the standards under the Eighth and Fourteenth Amendments are the same). The Sixth Circuit has reached a similar conclusion. *Richko v. Wayne County*, 819 F.3d 910–20 (6th Cir. 2016) (holding that district court's application of the Eighth Amendment to pretrial detainee's failure-to-protect claim was harmless error because the standard is exactly the same but reversing on the grounds that the record reflected that official had subjective knowledge of risk of harm).

128. 833 F.3d 1060. Castro was a pretrial detainee placed in a sobering cell after he was arrested for public drunkenness. Not only did the cell fall below state regulation monitoring requirements, but officials also placed Gonzalez, who was described as "combative," in the cell with Castro. Gonzalez attacked Castro, putting Castro hospital for over a month. *Id.* at 1065, 1073.

129. See *id.* at 1073.

130. *Id.* at 1068.

131. *Id.* at 1069–70 (overruling its previous decision, *Clouthier v. County of Contra Costa*, 591 F.3d 1232 (9th Cir. 2010), which had applied the subjective standard). As noted, the Second Circuit later explicitly adopted this reasoning in *Darnell v. Piniero*. See discussion *supra* Section III.A.1.

132. See *Castro*, 833 F.3d at 1070.

prong asks whether the official intentionally exposed the pretrial detainee to a condition posing serious risk of harm.¹³³ Not only is it conceptually difficult to apply the objective standard to failure-to-protect claims to show that an official *intentionally failed* to protect a pretrial detainee, but doing so also poses a higher risk of improperly holding officials liable for negligence.¹³⁴ It is a thin line between a negligent or accidental act—for which liability is prohibited¹³⁵—and an improper failure to act, which constitutes a § 1983 violation.

For conceptual clarity and to aid in administrability, the Ninth Circuit rephrased *Kingsley*'s first prong to be specific to the failure-to-protect context: an official may be liable for failing to protect a pretrial detainee when he makes “an intentional decision with respect to the conditions under which the [pretrial detainee] [is] confined” and the condition “put the plaintiff at substantial risk of suffering serious harm.”¹³⁶ The Ninth Circuit emphasized that the intent element applies to the decision that exposed the pretrial detainee to the risk, such as purposefully placing Castro in a cell with Gonzalez.¹³⁷ Second, the pretrial detainee must show that the official “did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances *would have appreciated the high degree of risk involved*.”¹³⁸ Finally, “[b]y not taking such measures, the defendant caused the [pretrial detainees'] injuries.”¹³⁹

The intent requirement in the first prong serves to prevent officials from being held liable for negligence. Indeed, the official in *Castro* could only be found liable once it was established that he intentionally placed Castro in a cell with Gonzalez.¹⁴⁰ If putting Gonzalez in Castro's cell was instead a result of a clerical error unbeknownst to the guard, then the guard would have only been negligent, the first prong would then not be met, and liability would not be imposed.¹⁴¹ Thus, despite the nuances involved in failure-to-protect claims, the Ninth Circuit's test applies the objective standard without making officials liable for negligence.¹⁴²

133. *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015).

134. *See Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018) (declining to decide *Kingsley* issue because it was not raised in lower court but acknowledging that the objective standard may not apply to failure-to-protect because it edges closer to negligence than in excessive force claim cases).

135. *Kingsley*, 576 U.S. at 395–96.

136. *Castro*, 833 F.3d at 1071. The Ninth Circuit's formulation of the objective test for failure-to-protect claims is nothing more than a re-framing of the *Kingsley* two prongs. By making the questions specific to conditions of confinement claims, however, the Ninth Circuit provides clear guidance to lower courts and fleshes out any uncertainties on how to apply *Kingsley* to conditions of confinement claims.

137. *Id.* at 1072.

138. *Id.* at 1071 (emphasis added).

139. *Id.*

140. *Id.* at 1072–73.

141. *See id.* at 1072 (“[T]he individual defendants do not claim that there was any miscommunication about the placement of Gonzalez in Castro's cell or that some other unintentional act created the jail conditions at issue.”).

142. *See id.* at 1070 (explaining that an officer who suffers a sudden illness rendering him unconscious could not be found liable for monitoring practices leaving pretrial detainee at high risk of attack from another inmate because the first state-of-mind requirement would not be satisfied); *see also* Levinson, *supra* note 21, at 380

2. The Fifth Circuit Applies the Subjective Standard

The Fifth Circuit lies on the other side of the circuit split. In *Leal v. Wiles*, the Fifth Circuit found that an official was not deliberately indifferent because Leal, a pretrial detainee, could not show that the official had *actual knowledge* that Leal was the target of a gang attack.¹⁴³ The Fifth Circuit admitted that the official “should have checked the recreation roster” to look for current gang-sanctioned hits, but the record did not indicate that he did so.¹⁴⁴ Therefore, there was no showing that he knew Leal was at risk and ultimately no liability could attach.¹⁴⁵

In applying the subjective standard, the Fifth Circuit relied largely on its earlier holding in *Hare v. City of Corinth*. There, the Fifth Circuit held that the objective standard articulated in *Bell v. Wolfish*—that a condition or restriction be reasonably related to a legitimate government interest—only applies to customs or policies.¹⁴⁶ *Hare* essentially created a policy-episodic distinction, meaning that policies implemented by the prisons would be reviewed under the objective standard, but independent acts of individual officials would be reviewed under the subjective standard.¹⁴⁷ For example, in *Bell v. Wolfish*, a pretrial detainee challenged the constitutionality of the prison’s double-bunking policy.¹⁴⁸ Under the Fifth Circuit’s approach, the policy would pass constitutional muster if it was objectively reasonable. By contrast, the excessive force used in *Kingsley* would require a subjective inquiry into the official’s state of mind because excessive force is considered an independent act rather than an act permitted by policy.

The Fifth Circuit explained that the objective standard could apply to policies and customs because the state-of-mind element is presumptively met. Indeed, “[a]

(“The court conceded that the [first prong] may be more complex because in excessive force cases it is easier to determine that the officer’s physical conduct was intentional.”).

143. 734 F. App’x 905, 910–12 (5th Cir. 2018). Leal was held in administrative segregation because a prison gang sanctioned an attack on him. Without checking the recreation roster, floor cards, or computer database alerting officials to current gang-organized hits on another inmate or pretrial detainee, an official placed Leal in an elevator with two gang member-inmates on the way to the recreation yard and then loudly said Leal’s name. The gang members violently attacked Leal. *Id.* at 906.

144. *Id.* at 910.

145. *Id.* The circuit also rejected Leal’s argument that the official knew Leal was a gang target because protection from gangs is one reason a pretrial detainee is sent to administrative segregation. *Id.* at 911. Although *Farmer* prohibits officials from escaping liability for willful blindness, the circuit found that Leal’s presence in administrative segregation alone does not suffice to show that the official was aware of the risk to Leal or that the official refused to confirm the underlying fact that Leal was vulnerable to gang violence. *Id.*; see *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994) (explaining an official cannot escape liability by refusing to verify facts he “strongly suspect[s] to be true” or declining to “confirm inferences that he strongly suspect[s] to exist”).

146. 74 F.3d 633, 644–45 (5th Cir. 1996). The circuit framed *Bell*’s reasonable-relation test as such: Because policies are deliberated and consciously implemented, where a policy is not reasonably related to legitimate non-penological government interest, it is logical to infer intent to punish. However, when individual officials act independently, the same deliberation and conscious implementation cannot be assumed. Thus, individual acts require an inquiry as to “whether that official had a requisite mental state” to establish liability. *Id.*

147. See *id.* at 645.

148. See *Bell v. Wolfish*, 441 U.S. 520, 530 (1979). Double-bunking refers to housing two individuals in a 75 square foot cell. See *id.* at 541.

State's imposition of a rule or restriction during pretrial confinement manifests an avowed intent to subject a pretrial detainee to that rule or restriction."¹⁴⁹ By contrast, "[w]ith episodic acts or omissions, intentionality is no longer a given, and *Bell* offers an ill-fitting test."¹⁵⁰ In such instances, according to the Fifth Circuit, the court must inquire into whether the official had the requisite state of mind of deliberate indifference.¹⁵¹ Through this lens, the Fifth Circuit held that the subjective and objective standards are "functionally equivalent."¹⁵² Under the Fifth Circuit's approach, both the objective standard as applied to policies and the subjective standard as applied to independent acts require a specific state of mind—only, in the former, it is presumed and, in the latter, it must be proven. This interpretation of *Bell*, however, severely distorts its holding and application in *Kingsley*.

IV. THE SUPREME COURT SHOULD APPLY THE OBJECTIVE STANDARD TO ALL PRETRIAL DETAINEE CLAIMS

This Part argues that the objective standard should be extended to all pretrial detainee claims.¹⁵³ The objective standard accounts for the distinct demands of the Fourteenth Amendment, is consistent with *Kingsley*'s interpretation of *Bell v. Wolfish*, and can be applied in a way that protects officials from liability for negligence. By contrast, circuits confining *Kingsley* continue to rely on outdated circuit precedent that is at odds with *Kingsley*. This precedent glosses over distinctions between the constitutional source of the claims, misinterprets and misapplies *Bell v. Wolfish*, and erroneously asserts that the objective standard is akin to negligence. The circuits that confine *Kingsley* should revisit their precedent that *Kingsley* casts into doubt, and, in some instances, upends.

A. *The Fourteenth Amendment Requires Application of the Objective Standard*

Using separate and discrete standards for claims arising under the Fourteenth and Eighth Amendments properly accounts for their fundamental differences.¹⁵⁴ At their core, the Fourteenth and Eighth Amendments address different sets of rights. The Eighth Amendment protects convicted criminals from cruel and

149. *Hare*, 74 F.3d at 644.

150. *Id.* at 645.

151. *Id.* at 650.

152. *Id.* at 646.

153. The ideal case for the Court to take to resolve this circuit split is one where a single incident involves two pretrial detainees, with one bringing a claim of excessive force and the other bringing one of the three claims discussed in this Note. The Court could also hear a case where one pretrial detainee brings an excessive force claim and another claim governed by deliberate indifference in the particular circuit. As presented in the hypothetical scenario in the Introduction, the arbitrariness of the disparate standard is most obvious when claims arise out of the same incident but one pretrial detainee succeeds because they are entitled to the objective standard whilst the other loses under the high burden of the subjective standard.

154. See *Kingsley v. Hendrickson*, 576 U.S. 389, 400–01 (2015).

unusual punishment.¹⁵⁵ As discussed above, convicted criminals can be punished because the state has found them guilty, but the Constitution still prevents cruel and unusual punishment.¹⁵⁶ Punishment is only cruel and unusual within the meaning of the Eighth Amendment if it is undertaken with a specific state of mind—either maliciously and sadistically or with deliberate indifference.¹⁵⁷ Whether punishment is cruel and unusual thus necessitates a subjective inquiry.

The Due Process Clause of the Fourteenth Amendment, on the other hand, protects pretrial detainees from all acts intended to punish because pretrial detainees are entitled to the constitutional presumption of innocence.¹⁵⁸ In other words, pretrial detainees are protected from all punishment, not just the cruel and unusual kind. Indeed, under *Kingsley*, pretrial detainees are protected from acts that “amount to punishment”—those deemed objectively unreasonable—and acts intended to punish—those taken with a specific state of mind.¹⁵⁹ In this sense, the right to be free from punishment under the Due Process Clause is broader than the right to be free from punishment under the Eighth Amendment. By requiring a pretrial detainee to meet the subjective standard, courts narrow the right of the pretrial detainee under the Fourteenth Amendment to protection only from cruel and unusual punishment. The Eighth Amendment’s subjective standard is therefore overly restrictive when applied to pretrial detainees. Those circuits extending *Kingsley* recognize that pretrial detainee claims brought under the Fourteenth Amendment require a separate analysis from convicted criminals’ claims brought under the Eighth Amendment. By contrast, some circuits ignore these fundamental distinctions.¹⁶⁰

Further, in light of the differences between the Eighth and Fourteenth Amendments, the *Kingsley* Court explicitly rejected analogies of Eighth Amendment cases to pretrial detainee claims.¹⁶¹ Still, some circuits that use the subjective standard for pretrial detainee claims rely on circuit precedent analogizing to Eighth Amendment cases. For instance, in *De Veloz*, discussed in Section III.A.2, *supra*, the Eleventh Circuit applied the subjective deliberate indifference standard to a pretrial detainee’s conditions of confinement claim.¹⁶² The application of the subjective

155. U.S. CONST. amend. VIII.

156. See *Kingsley*, 576 U.S. at 400 (explaining that convicted criminals can be punished); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (noting convicted criminals are protected from cruel and unusual punishment inflicted by states).

157. See *Kingsley*, 576 U.S. at 400; *Wilson*, 501 U.S. at 300.

158. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

159. See *Kingsley*, 576 U.S. at 398–99; *Bell*, 441 U.S. at 535–36 (“[T]he proper inquiry is whether those conditions amount to punishment of the detainee.”); *Darnell v. Pineiro*, 849 F.3d 17, 33–35 (2d Cir. 2017) (“Unlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.”).

160. See *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018).

161. See *Kingsley*, 576 U.S. at 400–01.

162. *De Veloz v. Miami-Dade County*, 756 F. App’x 869, 877 (11th Cir. 2018).

standard is rooted in the Eleventh Circuit's decision in *Edwards v. Gilbert*.¹⁶³ There, the court interpreted an Eighth Amendment case, *Whitley v. Albers*,¹⁶⁴ to mean that the Fourteenth Amendment affords no greater protection to pretrial detainees than the Eighth Amendment does to convicted criminals and thus the same standard applies to both groups.¹⁶⁵

But the circuit's continued reliance on *Whitley* is misplaced for two reasons. First, *Whitley* did not hold that the Fourteenth Amendment provides no greater protection to pretrial detainees than the Eighth Amendment does to convicted criminals. In *Whitley*, the Court noted that because the plaintiffs were *convicted criminals*, the Fourteenth Amendment did not provide greater protection than the Eighth Amendment.¹⁶⁶ Second, even assuming *arguendo* this reading of *Whitley* is accurate, the Supreme Court in *Kingsley* explicitly noted that *Whitley* and cases involving convicted criminals have no bearing on the standard applied to pretrial detainees under the Fourteenth Amendment.¹⁶⁷

Ultimately, *Kingsley* rejected analogies to Eighth Amendment cases because the Eighth and Fourteenth Amendments are fundamentally different to the degree that cases involving one claim cannot be legitimately compared to cases involving another. Therefore, the Fourteenth Amendment requires a separate standard from the Eighth Amendment in evaluating § 1983 claims.

B. *Bell v. Wolfish Supports Application of the Objective Standard*

There is significant disagreement among the circuits on how to best interpret *Bell v. Wolfish*. In *Bell*, the Court found that a prison policy of double-bunking did not violate pretrial detainees' Fourteenth Amendment right to be free from punishment because it was not imposed "for the purpose of punishment," and it was "rationally related to a legitimate nonpunitive governmental purpose."¹⁶⁸ The Court explained that the government has a legitimate interest in ensuring a pretrial detainee's attendance at trial, and although the cells may have been uncomfortable, their use was reasonably related to this goal and was not "excessive in relation" to it.¹⁶⁹

The *Kingsley* Court interpreted *Bell*'s "rationally related" test as providing pretrial detainees an opportunity to succeed on their claims using only objective evidence.¹⁷⁰ Circuits extending *Kingsley* have relied heavily on this interpretation of

163. 867 F.2d 1271, 1274 (8th Cir. 1989).

164. 475 U.S. 312 (1986).

165. *Edwards*, 867 F.2d at 1274–75.

166. *Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("Because this case involves prison inmates rather than pretrial detainees . . . in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause."); see also *Edwards*, 867 F.2d at 1274–75.

167. *Kingsley*, 576 U.S. at 400–01 ("*Whitley* and *Hudson* are relevant here only insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails.>").

168. See *Bell v. Wolfish*, 441 U.S. 520, 538, 541, 561 (1979).

169. See *id.* at 540, 542, 561–62.

170. *Kingsley*, 576 U.S. at 398.

Bell.¹⁷¹ Circuits confining *Kingsley*, however, read *Bell* as only protecting pretrial detainees from acts intended to punish.¹⁷² In order to prove intent, a pretrial detainee would have to put forth evidence of an officer's subjective state of mind. After *Kingsley*, interpretations of *Bell* as limited only to acts intended to punish are untenable.

Further, *Kingsley* does not support the Fifth Circuit's policy-episodic distinction.¹⁷³ As mentioned above, the claim at issue in *Bell* centered around the prison's policy of double-bunking.¹⁷⁴ Conversely, *Kingsley* concerned an independent act, or episode, of a guard tasing Mr. Kingsley.¹⁷⁵ Despite this difference, the *Kingsley* Court invoked and heavily relied upon *Bell*'s "rationally related" test to support its application of the objective standard to pretrial detainees' excessive force claims.¹⁷⁶ The Court was not deterred by the fact that *Bell* involved a policy whereas *Kingsley* involved an independent or episodic act. After *Kingsley*, therefore, it is evident that *Bell*'s "rationally related" test is not confined only to policies.¹⁷⁷ The Fifth Circuit first created the policy-episodic distinction in *Hare*, predating *Kingsley*, but continues to rely on it despite its inconsistency with the Court's reasoning in *Kingsley*.¹⁷⁸

C. The Objective Standard is Separate and Distinct from Negligence

Kingsley and the circuits extending its holding create a framework for the objective standard that also shields officials from liability for negligence. Some circuits,

171. See, e.g., *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2018) (relying on the Court's emphasis in *Kingsley* that *Bell* allowed a pretrial detainee to succeed by "providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose" (emphasis in original) (quoting *Kingsley*, 576 U.S. at 398)).

172. See, e.g., *Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018) (citing *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003)).

173. As discussed previously, the policy-episodic distinction was first promulgated in *Hare v. City of Corinth*, 74 F.3d 633, 644–45 (5th Cir. 1996).

174. See *Bell v. Wolfish*, 441 U.S. 520, 541 (1979).

175. *Kingsley*, 576 U.S. at 393.

176. *Id.* at 397–98. *But see id.* at 406 (Scalia, J., dissenting) (arguing that "*Bell* makes intent to punish the focus of its due-process analysis").

177. See *id.* at 397–98 (majority opinion).

178. A Fifth Circuit judge has already echoed these concerns regarding *Hare*'s legitimacy in consideration of *Kingsley*. *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 424 (5th Cir. 2017) (Graves, J., concurring specially) (taking issue specifically with the majority's reliance on *Hare* and refusal to apply *Kingsley*). In *Alderson*, Judge Graves dissented as to the majority's decision not to apply *Kingsley* because it is bound to its precedent under *Hare* and the now-outdated reasoning that the Ninth Circuit is the only court to extend *Kingsley* to failure-to-protect claims. *Id.* Other circuits have made similar observations. See *Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. 2017) (acknowledging that *Kingsley* has "called into question" the subjective standard for inadequate medical care but that the circuit does not have to decide the correct standard because plaintiff fails even under the less demanding objective standard); *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (noting that *Kingsley* puts into question whether pretrial detainee had to show official was subjectively deliberately indifferent to the risk of another official's rape of the pretrial detainee but that neither party presents the issue in their briefs and that the law under *Kingsley* was not clearly established at the time of the alleged rape in 2013).

however, still abide by the notion that an objective standard is akin to negligence, making it improper grounds for liability under § 1983.¹⁷⁹ Other circuits find that they need not reach whether *Kingsley* requires application of the objective standard where the facts allege only negligence.¹⁸⁰ Neither of these approaches are defensible in light of *Kingsley*.

1. The Objective Standard Protects Officials from Liability for Negligence

Kingsley's use and articulation of the objective standard clarifies that objective reasonableness is not equivalent to negligence. In fact, *Kingsley* offers a practical framework to avoid conflating objective reasonableness with negligence. *Kingsley*'s first prong asks whether the official intentionally took the action or created the condition that placed the pretrial detainee at risk of harm. This action must be taken deliberately in order for liability to be imposed. For example, *Kingsley* explained that, if the official's taser *accidentally* went off, then he would not be liable for excessive force because he was only negligent with respect to the action imposing the force.¹⁸¹

Kingsley's first prong protects officials from liability for negligence even in failure-to-protect cases, where the line between a valid claim and negligence is less clear than between negligence and other categories of § 1983 claims, as discussed in Section III.C, *supra*.¹⁸² As acknowledged by the Ninth, Seventh, and

179. See *supra* Section III.C.2; *Leal v. Wiles*, 734 F. App'x 905, 910 (5th Cir. 2018); *Edwards v. Northampton County*, 663 F. App'x 132, 137 (3d Cir. 2016) (reasoning that plaintiff failed to raise an inference of deliberate indifference where he did in fact receive medical treatment but disputed the quality of that treatment); *Estate of Vallina v. Cnty. of Teller Sheriff's Off.*, 757 F. App'x 643, 647 n.2 (10th Cir. 2018) (deflecting question of whether the objective or subjective standard applies to pretrial detainees because pretrial detainees argued that negligence is sufficient under *Kingsley* and therefore neither standard was met). *But see* MARGO SCHLANGER, AM. CONST. SOC'Y, RESTORING OBJECTIVITY TO THE CONSTITUTIONAL LAW OF INCARCERATION 19 n.80 (Sept. 2018) ("To be clear, the [objective] standard is not negligence, either; the *Kingsley* Court explained that liability requires an unreasonable intentional act, and therefore the rule under *Daniels v. Williams* and *County of Sacramento v. Lewis* that mere negligence is not unconstitutional remains good law.").

180. See *Moore v. Luffey*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019) (acknowledging that plaintiff's argument for *Kingsley* standard claims would fail under the objective standard anyway because Moore did not show more than negligence); *Nam Dang ex rel. Vina Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (finding that *Kingsley* did not need to be addressed because the pretrial detainee merely alleged negligence); see also *Jacobs v. W. Feliciano Sheriff's Dep't*, 228 F.3d 388, 398 (5th Cir. 2000) (finding one official not deliberately indifferent to pretrial detainee's risk of suicide when he stopped checking the cell every fifteen minutes because the conduct was negligent and did not meet the subjective deliberate indifference standard); *Aguilar v. Gaston-Camara*, 861 F.3d 626, 631 (7th Cir. 2017) (finding officials responsible for parolee's misclassification as person released from prison on extended supervision status as only negligent and not meeting the Eighth Amendment standard); *Arenas v. Calhoun*, 922 F.3d 616, 621–22 & n.11 (5th Cir. 2019) (finding official not deliberately indifferent to prisoner's risk of suicide when he failed to enter the cell after negligence on the part of the control rooms officer).

181. *Kingsley*, 576 U.S. at 395–96.

182. See *Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018) (declining to decide *Kingsley* issue because it was not raised in lower court but acknowledging that the objective standard may not apply to failure-to-protect claims because the standard is closer to negligence than when applied to excessive force claims).

Second Circuits, an official can only be liable if he “made an intentional decision with respect to the conditions under which the [pretrial detainee] was confined.”¹⁸³ For example, in *Castro v. County of Los Angeles*, the Ninth Circuit found officials liable for failing to protect a pretrial detainee when they *intentionally* placed him in a cell with a combative cellmate.¹⁸⁴ Similarly, in *Miranda v. County of Lake*, the Seventh Circuit specified that negligence was not at issue because the medical staff *intentionally* used a “wait-and-see” treatment approach with an ill pretrial detainee.¹⁸⁵ Had the decision to place the pretrial detainee in the cell with the combative cellmate in *Castro* or the decision to not treat the ill pretrial detainee in *Miranda* been the result of an inadvertent error, the conduct would only be negligent. The circuits in these cases, however, avoided imposing liability for negligence because the courts found that the officials acted deliberately with respect to the condition that posed the risk to the pretrial detainee.¹⁸⁶ The framework for the objective standard therefore protects officials from liability for negligence even in the more difficult failure-to-protect context.

2. Facts Alleging Negligence Do Not Warrant Dodging the *Kingsley* Question

In some instances, where a circuit court still applies the subjective deliberate indifference standard to pretrial detainees’ claims even after *Kingsley*, the pretrial detainee-plaintiff will argue that *Kingsley*’s objective standard should apply instead. These courts have taken the position that they need not reach whether *Kingsley* requires application of the objective standard because the facts allege only negligence.¹⁸⁷ Even if the objective standard did apply, these courts reason, it would be of no consequence because negligent conduct cannot give rise to liability under either the objective or subjective standard.¹⁸⁸ Circuits using this approach, however, do not engage critically with whether the facts truly only plead negligence or may meet the objective standard under *Kingsley*. The courts first analyze the pretrial detainee’s claims under the subjective deliberate indifference standard and then make the negligence determination solely as a means to avoid the pretrial detainee’s argument that the objective standard should apply.¹⁸⁹ The problem that arises, however, is that distinguishing the objective standard from negligence requires closer scrutiny by the court than distinguishing the subjective standard from negligence.

183. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071–72 (9th Cir. 2018); *see also* *Darnell v. Piniero*, 849 F.3d 17, 30 (2d Cir. 2017) (“A detainee must prove that an official acted intentionally or recklessly, and not merely negligently.”).

184. 833 F.3d at 1072–73.

185. 900 F.3d 335, 354 (7th Cir. 2018).

186. *Id.*; *Castro*, 833 F.3d at 1071–73.

187. *See* *Moore v. Luffey*, 767 F. App’x 335, 340 n.2 (3d Cir. 2019); *Nam Dang ex rel. Vina Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

188. *See* *Moore*, 767 F. App’x at 340; *Nam Dang ex rel. Vina Dang*, 871 F.3d at 1279 n.2.

189. *E.g.*, *Moore*, 767 F. App’x at 340.

Negligence requires an extremely low bar of proof. Under *Kingsley*'s understanding of negligence, an official is negligent when he accidentally poses a serious risk to a pretrial detainee.¹⁹⁰ Negligent actions are categorically below the threshold for liability under the Fourteenth Amendment's Due Process Clause.¹⁹¹ Deliberate indifference requires a significantly greater showing than negligence. To be found deliberately indifferent, it must be shown the official actually knew of the risk to a pretrial detainee and nonetheless took the action imposing that risk.¹⁹²

In between negligence and deliberate indifference lies the objective standard. The objective standard requires less than a showing of the official's subjective state of mind but more than a showing of a mere accidental act. Under the objective standard, the action must be objectively unreasonable in light of what the official should have, rather than what he actually, knew, making it a lower threshold to meet than the subjective standard. But it also requires that an official deliberately, rather than accidentally, took the physical action that imposed the risk, making the objective standard a higher threshold to meet than mere negligence.¹⁹³

Differentiating between negligence and the subjective standard is not a difficult task for a court. To be negligent, the official does not even have to intend the action to take place or be aware of the risk he poses. To violate the subjective standard, the official must act with full knowledge of the risk *and* deliberately takes steps that impose that risk on the pretrial detainee. Distinguishing between a negligent act and an act that violates the objective standard is more difficult. Neither negligence nor the objective standard requires the official to be aware of the risk to the pretrial detainee.

The crucial distinction between the objective standard and negligence is whether the physical action posing the risk was done deliberately or accidentally. To distinguish objective unreasonableness from negligence in *Castro*, for example, the Ninth Circuit had to decide whether the official deliberately put the pretrial detainee in a cell with an inmate who the official knew was combative—in which case the conduct would be objectively unreasonable—or whether he did so as a result of a miscommunication between officials or some “other unintentional act,” in which case the conduct would be only negligent.¹⁹⁴

As noted, in some instances, a court will apply the subjective deliberate indifference standard to a pretrial detainee's claim, as consistent with its circuit precedent, and punt on the question of whether the objective standard applies on the grounds that the complaint at best pleads negligence. Without analyzing the claims under the objective standard, however, the court fails to apply the necessary scrutiny to properly distinguish between negligent and objectively unreasonable conduct.

190. See *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015).

191. See *id.* (citations omitted).

192. *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994).

193. See *Kingsley*, 576 U.S. at 396–97.

194. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1072 (9th Cir. 2018).

Instead, the court treats a failure to meet the subjective deliberate indifference standard as a license to find the facts allege only negligence and thus would not meet the objective standard.

Nam Dang ex. rel. Vina Dang v. Sheriff, Seminole County illustrates this analytical blunder. There, the Eleventh Circuit found that a pretrial detainee failed on his inadequate medical care claim because he did not meet the subjective deliberate indifference standard.¹⁹⁵ In a footnote, the court explained that it need not determine whether the objective standard had displaced the subjective deliberate indifference standard because, in either case, the petitioner only pleaded negligence and thus would not meet even the lower objective standard.¹⁹⁶ Based on the circuit's analysis, the negligence finding appears to be based solely on the determination that the pretrial detainee did not meet the subjective deliberate indifference standard. This is misguided. As demonstrated, conduct that is objectively unreasonable falls between negligence and the subjective standard.

For the circuit to have found that the facts allege only negligent rather than objectively unreasonable conduct, it had to much more closely parse the facts due to standards' proximity to one another. Indeed, a court cannot find that it need not reach the *Kingsley* question unless it has seriously considered whether the facts reach negligence or the objective standard. It is possible that, even if the court were to engage in an analysis of whether the conduct was negligent or objectively unreasonable, the court would still hold the act in question was negligent. It remains true, however, that a negligence finding made only after a subjective deliberate indifference analysis does not suffice to stave off whether the facts would allege a constitutional violation under the objective standard.

CONCLUSION

Kingsley freed pretrial detainees from the grip of the subjective malicious and sadistic standard in excessive force claims. After *Kingsley*, pretrial detainees could succeed on excessive force claims on an objective reasonableness standard.¹⁹⁷ The Court, however, did not reach a decision on whether the objective standard should apply to pretrial detainees' claims of conditions of confinement, inadequate medical care, and failure-to-protect. As a result, a circuit split has emerged. The circuits that confine *Kingsley*—the Eighth, Fifth, and Eleventh—rely on outdated precedent that is invalid in light of *Kingsley*. On the other hand, circuits choosing to extend *Kingsley*—the Seventh, Ninth, and Second—rely on general principles governing pretrial detainees' claims and interpretations of Supreme Court precedent introduced in *Kingsley*.

This circuit split has meaningful consequences for pretrial detainees. If a pretrial detainee is fortunate enough to have his case heard in a circuit extending *Kingsley*,

195. *Nam Dang ex rel. Vina Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1280–83 (11th Cir. 2017).

196. *Id.* at 1289 n.2.

197. 576 U.S. at 397.

he must only show that he faced an objectively unreasonable risk of harm. But less fortunate pretrial detainees face an uphill battle to justice under the subjective deliberate indifference standard. A person's access to justice should not be decided by something as arbitrary as the jurisdiction in which they happen to find themselves. The Supreme Court should resolve the confusion among the circuits by extending *Kingsley* to all pretrial detainee claims because the objective standard is most consistent with *Kingsley*'s interpretation of *Bell* and the constitutional principles governing pretrial detainees' claims.