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Giving Due Process Its Due: Why Deliberate Indifference Should Be Confined to Claims Arising Under the Cruel and Unusual Punishment Clause

*Shad M. Brown**

Abstract

This Note discusses culpability requirements for claims brought by pretrial detainees and convicted prisoners. The initial focus is on deliberate indifference, a culpability requirement formulated under the Cruel and Unusual Punishment Clause but symmetrically applied to claims arising under the Due Process Clause of the Fourteenth Amendment. The Note then shifts to Kingsley v. Hendrickson*, a landmark Supreme Court decision that casts doubt on the application of Eighth-Amendment standards to Fourteenth-Amendment claims. Finally, this Note advocates for the application of objective unreasonableness, a different culpability requirement, to claims arising under the Due Process Clause. It does so on the basis that due process is a dynamic concept, independent of the Eighth Amendment's demands.*

* Candidate for J.D., May 2021, Washington and Lee University School of Law. I would like to thank Professor Brandon Hasbrouck, who pushed me not only to broaden my search for the right solution to the problem presented, but also to write with the depth and illustration necessary to guide the reader to it as well. I would also like to extend my gratitude to my Note Editor, Maria Liberopoulos, for leading me through this writing process with as little pain and confusion as possible. Finally, I would like to express my appreciation for my parents, Randall and Tami Brown, and my grandmother, Eileen Heard. I cannot envision where I would be without their love, support, and counsel, but I know that I would not be here, writing this Note.

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In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them.

—Justice Felix Frankfurter (1947)

I. Introduction

Pretrial detainees—those who are in government custody in connection with a crime for which they have not been convicted[1]—have suffered because of a failure to distinguish.[2] Imagine that a man named Anthony is arrested for driving under the influence. The arresting officer searches his car and discovers an empty bottle of insulin with his name on the prescription label. Anthony tells the officer that he is diabetic and in need of the full prescription at his apartment. The officer transports him straight to the local jail, where he informs a corrections officer of the statement and the empty prescription before going about his day. The corrections officer does not think that Anthony's condition is serious and processes him like any other new arrival. A few hours later he is found unconscious on the floor of his cell, suffering from a diabetic coma.

Anthony, a pretrial detainee, files a lawsuit alleging that the corrections officer deprived him of his right to adequate medical care in violation of the Fourteenth Amendment. Though the substantive law is derived from a constitutional provision,[3] the claim itself is brought into court under 42 U.S.C. § 1983, a federal statute.[4] During the litigation, the officer testifies that he did not

1. *See* Miranda v. Cnty. of Lake, 900 F.3d 335, 350 (7th Cir. 2018) (stating that pretrial detainees "are still entitled to the constitutional presumption of innocence").

2. *See infra* notes 240–260 and accompanying text (differentiating the Due Process Clause from the individual provisions contained in the Bill of Rights).

3. *See* 2 ISIDORE SILVER, POLICE CIVIL LIABILITY § 8A.09 (Matthew Bender & Co. rev. ed. 2019) (discussing various types of claims alleging unconstitutional conditions of confinement).

4. *See infra* notes 44–48 and accompanying text (discussing the

realize that the lack of insulin could have such dire consequences. Whether or not Anthony can overcome this claim is largely dependent on where the suit was filed.[5] If it is filed in Atlanta, he will have to prove that the officer was actually aware of the danger a lack of insulin can have for a person with diabetes—a consequence of the culpability requirement known as "deliberate indifference."[6]

Anthony should not be subject to the test for deliberate indifference simply because he filed a claim in Atlanta. The issue with this imposition does not stem from the fact that proof of culpability is required generally but rather that the *wrong kind* of culpability is being applied.[7] This Note argues for the uniform application of a different culpability standard: That pretrial detainees' claims alleging unconstitutional conditions of confinement should be subject to the test for objective unreasonableness instead of deliberate indifference.

As determined by the Supreme Court, deliberate indifference is the second prong of a test that governs claims under 42 U.S.C. § 1983 alleging unconstitutional prison conditions in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.[8] It requires a defendant to have subjective awareness that her conduct creates a substantial risk of harm to a prisoner.[9] Without properly alleging and proving that this "sufficiently culpable state of mind" existed at the time she was injured, a prisoner cannot successfully state a claim that the conditions of her confinement violated the Eighth Amendment.[10] The Court has justified

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jurisdictional nature of a federal statute).

5. *See infra* notes 171–261 and accompanying text (discussing a current split among federal Courts of Appeals).

6. *See infra* notes 246–256 (discussing an opinion published by the U.S. Court of Appeals for the Fifth Circuit).

7. *See Miranda*, 900 F.3d at 352–53 (discussing the requirement that something more than "mere negligence" is required for a constitutional violation).

8. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("To violate the Cruel and Unusual Punishment Clause, a prison official must have a sufficiently culpable state of mind.").

9. *See id.* at 837 ("[T]he 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 that inference.").

10. *See id.* at 834 ("It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison

deliberate indifference on the basis that it adheres to precedent interpreting the Cruel and Unusual Punishment Clause to be violated only by the "unnecessary and wanton infliction of pain."[11]

The problem lies in this connection between deliberate indifference and the Cruel and Unusual Punishment Clause.[12] That constitutional provision governs the conditions of correctional facilities as they relate to *prisoners*—people who have been convicted of a crime.[13] The substandard and harmful jail conditions affecting pretrial detainees are instead governed by the Due Process Clause of the Fourteenth Amendment.[14] The peculiarities of the two constitutional provisions are not coextensive.[15] While the Eighth Amendment allows a prisoner to be punished within certain limits, the Fourteenth Amendment prohibits punishment entirely.[16]

In its landmark 2015 decision *Kingsley v. Hendrickson*,[17] the Supreme Court considered the dichotomy between the two amendments in-depth.[18] In particular, the Court discussed the absence of permissible punishment under the Fourteenth Amendment.[19] The case ultimately resulted in two distinct

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officials responsible for the victim's safety.").

11. *See id.* (discussing the requirements for harm that rises to the level of an Eighth Amendment violation).

12. *See infra* notes 13–14 and accompanying text (discussing the relative differences between prisoners, pretrial detainees, and the constitutional provisions that protect them).

13. *See* Miranda v. Cnty. of Lake, 900 F.3d 335, 350 (7th Cir. 2018) (discussing the relative constitutional statuses of prisoners and pretrial detainees).

14. *See id.* ("Pretrial detainees stand in a different position: [T]hey have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence.").

15. *See infra* notes 267–272 and accompanying text (discussing the independent nature of the Due Process Clause).

16. *See Miranda*, 900 F.3d at 350 ("Thus, the punishment model is inappropriate for [pretrial detainees].").

17. *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015) (holding that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable in order to demonstrate that it was excessive in violation of the Fourteenth Amendment's Due Process Clause).

18. *See id.* at 400 ("The language of the two Clauses differs, and the nature of the claims often differs.").

19. *See id.* ("And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"

culpability standards for excessive-force claims, depending on whether the plaintiff is a pretrial detainee claiming protection under the Due Process Clause or a prisoner pointing to the Eighth Amendment.[20] Under this new regime, a pretrial detainee only needs to provide objective evidence to satisfy the culpability requirement.[21]

In the wake of the *Kingsley* decision, lower courts have reevaluated the application of the deliberate indifference standard to pretrial detainees' claims of unconstitutional jail conditions.[22] While some view it as a broad statement on the Due Process Clause,[23] others perceive it as too narrow to overturn established precedent.[24] The former group is correct on the basis of the language used in *Kingsley*.[25]

However, the issue is broader than that identified in *Kingsley* and its progeny.[26] Courts were mistaken in mechanically grafting the deliberate indifference standard to due-process claims in the first place.[27] *Kingsley* primarily discussed the punishment dichotomy, but that is only a single consequence of the proper interpretation of the Due Process Clause.[28] That constitutional provision is both broader than and independent of the individual guarantees contained in the Bill of Rights, including the prohibition of cruel and unusual punishments.[29] It is this concept

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(quoting Ingraham v. Wright, 430 U.S. 651, 671–72, n.40 (1977))).

20. *See id.* at 397 (discussing the appropriate culpability standard for a pretrial detainee's excessive-force claim).

21. *See id.* at 396–97 ("[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.").

22. *See infra* notes 171–250 (discussing cases dealing with the culpability issue subsequent to the decision in *Kingsley*).

23. *See infra* notes 175–225 (discussing courts that have applied objective unreasonableness to pretrial detainees' conditions-of-confinement claims).

24. *See infra* notes 232–251 (discussing courts that continue to apply deliberate indifference to pretrial detainees' conditions-of-confinement claims).

25. *See infra* notes 288–298 and accompanying text (supporting the notion that *Kingsley* requires a broader application of objective unreasonableness).

26. *See infra* notes 27–29 and accompanying text (discussing the contours of the Due Process Clause).

27. *See infra* notes 280–287 and accompanying text (discussing the independent character of the Due Process Clause).

28. *See infra* notes 267–281 and accompanying text (stating that due process "consists of collective standards that take on their own character").

29. *See infra* notes 280–287 and accompanying text (discussing the

that should give courts pause before creating parallels between individual rights and due process protections.[30] The independent character of the Due Process Clause has always demanded that distinct culpability standards at least be considered for those claiming its protections.[31] *Kingsley* merely provided the candidate.

This Note proceeds as follows. Part II discusses the fundamentals of culpability requirements and deliberate indifference. This begins with a discussion of 42 U.S.C. § 1983, the statute that provides jurisdiction to federal courts over various claims brought by both pretrial detainees and convicted prisoners. The focus there is on the statute's nature as a procedural device, effectively covering different claims that are governed by their own unique substantive law. After that, the history and purpose of the deliberate indifference standard are explored before a discussion on courts' justifications for applying it to pretrial detainees' claims.

Part III discusses *Kingsley v. Hendrickson* and the legal landscape it has created. First, there is a discussion of the case itself. The focus is directed to the part of the Supreme Court's reasoning that dealt with the differences between pretrial detainees, prisoners, and their respective constitutional rights. Next, the discussion focuses on Courts of Appeals opinions that have directly grappled with the implication that *Kingsley* necessitates the elimination of deliberate indifference as a requirement for pretrial detainees' conditions-of-confinement claims.

Part IV advocates for the application of an objective unreasonableness standard in place of deliberate indifference. The discussion is initially directed at the expansive scope and character of the Due Process Clause. In particular, it focuses on the relationship between that provision and the individual guarantees contained in the Bill of Rights. Next, the emphasis is on *Kingsley*'s reasoning and how it relates to the expansive interpretation of the Due Process Clause. The conversation then shifts to the

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peculiarities of the Due Process Clause).

30. *See infra* notes 283–288 and accompanying text (admonishing the rote application of standards derived from the Bill of Rights to the Due Process Clause).

31. *See infra* notes 280–283 and accompanying text (stating that due-process standards "stand on their own, not to be determined by the scope, character, or particularities" of the Eighth Amendment).

justifications offered for the application of deliberate indifference to pretrial detainees' claims. The majority of this conversation focuses on the inconsistencies between those justifications and the expansive interpretation of due process. The argument then concludes by demonstrating that the application of the objective standard requires only a minute change to the existing framework for conditions-of-confinement claims. The practical importance of this change are demonstrated through a hypothetical situation.

II. Fundamentals and Background

Claims alleging unconstitutional conditions of confinement are brought into court under 42 U.S.C. § 1983.[32] Although the statute applies to both prisoners and pretrial detainees, it primarily acts as a procedural device that grants a court jurisdiction.[33] This results in the application of distinct substantive law, depending on the underlying violation.[34]

When that violation is the Cruel and Unusual Punishment Clause, conditions-of-confinement claims require a plaintiff to prove the defendant's culpability under the deliberate indifference standard.[35] This is a subjective standard that has been explicitly determined by the Supreme Court to apply in those cases.[36] Similar claims brought by pretrial detainees allege violations of the Due Process Clause.[37] Lower courts have equally applied deliberate indifference to those claims in the absence of any express guidance by the Supreme Court.[38]

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32. *Cf.* 42 U.S.C. § 1983 (2018) (creating an "action at law" where there is a "deprivation of any rights, privileges, or immunities secured by the Constitution").

33. *See infra* notes 49–57 and accompanying text (examining the relationship between § 1983 and an underlying violation of federal law).

34. *See infra* notes 49–57 and accompanying text (discussing culpability requirements for § 1983 claims).

35. *See infra* notes 65–71 and accompanying text (discussing the subjective inquiry for prisoners' conditions-of-confinement claims).

36. *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:7 (4th ed. 2013) (stating the culpability standards for various claims brought under the Eighth Amendment).

37. *See infra* note 68 and accompanying text (discussing claims that are permissible under the Fourteenth Amendment).

38. *See infra* notes 95–102 (discussing lower courts' analysis of pretrial

The following subparts explore the fundamentals and background of both § 1983 and the deliberate indifference standard. In particular, they examine the procedural nature of § 1983 and the reasoning behind a subjective culpability requirement for unconstitutional punishments. This Part will conclude with a discussion of courts' justifications for applying deliberate indifference to pretrial detainees' claims.

A. Section 1983 Actions

The earliest Civil Rights Acts were passed in the post-Civil War era to provide relief for African Americans in the former Confederacy.[39] The purpose of the initial Act was to confer all of the civil rights realized by whites to freedwomen and freedmen.[40] So that its provisions could be enforced as intended, the Act granted subject matter jurisdiction to district courts over lawsuits in which citizens claimed that their civil rights had been violated.[41] The second Act was put into place with the purpose of enforcing the provisions of the Fourteenth Amendment.[42] The next year, the Civil Rights Act of 1871 amended the statute, providing federal courts with subject matter jurisdiction over claims brought under the Fourteenth Amendment against individual states and their agents.[43]

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detainees' claims).

39. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–85 (1982) (discussing the social forces that led to original enactment of the statute as Section 1 of the Civil Rights Act of 1871).

40. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 509 (1939) ("None other than citizens of the United States were within the provisions of the Act.").

41. *See id.* (discussing the practical effects of the first Civil Rights Act).

42. *See id.* at 510 (stating that the second Civil Rights Act was put in place to enforce the Fourteenth Amendment "pursuant to the authority granted Congress by the fifth section of the amendment").

43. *See* District of Columbia v. Carter, 409 U.S. 418, 428–29 (1973) *superseded by statute*, Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (including the District of Columbia under the jurisdiction of 42 U.S.C. § 1983) ("Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary.").

The current version of the 1871 Act is encoded at 42 U.S.C. § 1983.[44] This is the vehicle through which an individual pursues relief for a constitutional violation committed by a state or its officials.[45] The essential elements required by the statute ask whether the defendant, acting "under color of state law," deprived the plaintiff of some federally-guaranteed right, immunity, or privilege.[46] The phrase "under color of state law" refers to acts made possible only because the defendant—also known as a state actor—has some authority granted to him by a state or one of its subdivisions.[47] Once this authority is established, the plaintiff must prove the state actor's conduct violated an underlying federal right.[48]

Section 1983 does not impose a specific "state-of-mind" requirement.[49] Nothing in the text or legislative history conveys a congressional intent to limit claims on the basis of a state actor's motive in violating a plaintiff's rights.[50] However, the statute still requires some state of mind to be proven with respect to the

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44. *See* 42 U.S.C. § 1983 (2018) (stating that the statute is "derived from act Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.").

45. *See id.*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

46. *See* Parratt v. Taylor, 451 U.S. 527, 535 (1981) (stating the initial inquiry required for any § 1983 claim).

47. *See* United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.").

48. *See* Daniels v. Williams, 474 U.S. 327, 329–30 (1986) (discussing the different requirements between 42 U.S.C. § 1983 and its criminal counterpart, 18 U.S.C. § 242).

49. *See Parratt*, 451 U.S. at 534 (finding that the question of whether negligence is a sufficient state of mind in a § 1983 action "may well not be susceptible of a uniform answer across the entire spectrum" of constitutional violations for which the statute provides redress).

50. *See id.* at 534–35 (comparing § 1983 to a criminal counterpart that requires a defendant to act "willfully" and concluding that the differences between the two statutes suggests that a state-of-mind "gloss" should not be imposed on the former).

underlying violation.[51] Because it affords a *civil* remedy, the requisite state of mind is generally found in the realm of tort law,[52] and—most importantly—it varies with the particular right that the plaintiff claims has been violated.[53]

An example may provide clarity about how a claim under § 1983 works. Suppose that Cynthia is employed as a patrol officer for the Indianapolis Metropolitan Police Department, where George, Sr., serves as the Chief of Police. In the course of her work, Cynthia divulges information about George, Jr., a serial burglar, to a detective at the South Bend Police Department. Cynthia knows that George, Jr., is the son of the police chief.

The information given by Cynthia leads to George, Jr.'s arrest in South Bend. After pleading guilty and being sent to the Indiana State Prison, George, Jr., refuses to enter the cell to which he has been assigned. This leads to an altercation where Christian, a corrections officer, handcuffs George, Jr., and then punches him in the face, breaking his jaw. In his anger, George, Sr., transfers Cynthia to night shift duty.

Cynthia and George, Jr., both sue under § 1983. They must both prove that the respective defendants were acting "under color of state law."[54] For Cynthia, this is George Sr.'s use of power over the Department's employees entrusted to him by the city of Indianapolis. For George, Jr., this is Christian's authority over prisoners granted by the State of Indiana.

Once the "under color of state law" requirement is met, the plaintiffs' claims will differ because they must each prove an underlying violation of federal law.[55] Cynthia may pursue a claim

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51. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997) (noting that proof of § 1983's essential elements is insufficient without the presence of a requisite state of mind).

52. *See Parratt*, 451 U.S. at 535 ("Section 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961))).

53. *See* Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994) ("[T]he Supreme Court has plainly read into [the statute] a state of mind requirement specific to the particular federal right underlying a § 1983 claim.").

54. *See supra* notes 46–50 and accompanying text (describing the "under color of state law" requirement for a valid Section 1983 claim).

55. *See Williams*, 474 U.S at 329–30 (describing Section 1983's requirement that an underlying federal right has been violated).

alleging that George, Sr., violated her First Amendment right to free speech by retaliating against her for divulging information that led to his son's arrest. This would require her to prove that her speech was a matter of public concern and the act of changing her hours was substantially based on that speech.[56]

George, Jr., on the other hand, may claim that his right to be free from excessive force under the Cruel and Unusual Punishment Clause was violated. Unlike Cynthia's claim, this has nothing to do with the defendant's reaction to his speech. Instead, he would have to prove that the Christian's punch was applied "maliciously and sadistically to cause harm" and not "a good-faith effort to maintain or restore discipline."[57]

Although the plaintiffs both allege violations under § 1983, the only similarity between their claims is the requirement that the defendant acted while using authority granted by state law.[58] Other than that, their claims require completely different types of proof, as derived from the underlying violations of federal law the respective plaintiffs have alleged.[59] With respect to the state-of-mind requirements, Cynthia must show that George Sr., placed substantial weight on her protected speech when making the decision to change her hours, while George, Jr., must prove that Christian maliciously and sadistically intended to harm him.[60] Despite using the same statute to attach federal jurisdiction, the ultimate success of the plaintiffs' respective claims hinges on different kinds of evidence.

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56. *See* Gustafson v. Jones, 290 F.3d 895, 906 (7th Cir. 2002) (describing the elements required for a Section 1983 claim where the underlying federal right is the First Amendment's right to free speech and the alleged violation is a retaliation to the plaintiff's speech).

57. *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992) (describing the key inquiry for a Section 1983 claim where the underlying federal right is the Eighth Amendment's proscription of "cruel and unusual punishment" and the alleged violation is excessive force used against the plaintiff).

58. *See supra* notes 46–50 and accompanying text (describing the "under color of state law" requirement of § 1983 claims).

59. *See supra* notes 49–53 and accompanying text (describing § 1983's requirement that a plaintiff prove a violation of an underlying federal right).

60. *See supra* notes 56–58 and accompanying text (stating the state-of-mind requirements for the plaintiffs' respective claims).

B. The Deliberate Indifference Standard

Because the validity of a § 1983 claim depends on proving the deprivation of a discrete federal right,[61] the plaintiff must demonstrate that the defendant's state of mind was consistent with a violation of that right.[62] This results in different culpability requirements for claims that come into court under § 1983 that allege different underlying violations of substantive federal law.[63] The separate standards have largely been identified by judicial precedent.[64]

For a class of § 1983 claims brought by prisoners under the Eighth Amendment's guarantee against cruel and unusual punishments, the generally applicable state-of-mind standard is "deliberate indifference."[65] That is not to say *every* Eighth-Amendment claim must meet the standard.[66] However, it encompasses a broad range of conduct including inadequate jail conditions, denial of medical care, failure to protect against inmate assault, and failure to prevent suicide.[67]

Similar claims brought by pretrial detainees are subject to the Fourteenth Amendment's guarantee of due process, without

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61. *See supra* notes 48–55 and accompanying text (discussing the requirements of a valid § 1983 claim).

62. *See Fox, Rothschild, O'Brien & Frankel*, 20 F.3d at 1277 (discussing the Supreme Court's construction of § 1983).

63. *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:7 (4th ed. 2013)

> The relevance of the defendant's state of mind depends on the nature of the constitutional violation. For example, the Supreme Court held that at least 'deliberate indifference' is necessary to make out an Eighth Amendment violation. It also held that intentional interception of lawyer-client by an informer or intentional use of the conversations must occur to make out a Sixth Amendment violation.

64. *See id.* § 3:2 ("Different Fourteenth Amendment violations (and hence Bill of Rights violations) require different states of mind, apparently because of the history and the language of the applicable constitutional provisions.").

65. *See id.* § 3:28 (discussing the relevant state-of-mind standards required for convicted prisoners who bring § 1983 claims under the Eighth Amendment).

66. *See id.* ("[I]n prison security cases, including those involving the use of force by prison guards, malicious and sadistic intent is required for an Eighth Amendment violation, a more defendant-protective standard.").

67. *See* 2 SILVER, *supra* note 3, § 8A.09 (discussing various types of claims that may be brought under the Eighth Amendment).

regard to the provisions of the Eighth Amendment.[68] However, federal courts have applied the deliberate indifference standard to pretrial detainees' claims just as they have applied it to claims brought by convicted prisoners.[69] While courts have offered a number of reasons for this application,[70] they have done so without any express guidance from the Supreme Court.[71] Although this Note argues the application has been in error, it is important to comprehend the background and mechanics of the deliberate indifference standard to see why the courts have missed the mark on this issue.

1. The Formulation of Deliberate Indifference

Claims requiring deliberate indifference are premised on the idea that contemporary society will not tolerate certain conduct by corrections officials when people under their care—who are essentially at their mercy—face some threat of harm.[72] The initial formulation of the culpability requirement was made under the Eighth Amendment,[73] which states that "[e]xcessive bail shall not

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68. *See id.* § 8A.09(2) ("[T]he Eighth Amendment encompassed imposed upon persons convicted of a crime while general due-process principles under the Fourteenth Amendment protected jail arrestees awaiting trial.").

69. *See infra* notes 95–133 and accompanying text (discussing lower courts' justifications for applying standards formulated under the Eighth Amendment to claims that arise under due process).

70. *See infra* notes 95–97 and accompanying text (discussing judicial opinions in which Federal Courts of Appeals have extended the deliberate-indifference requirement to claims brought by pretrial detainees under the Due Process Clause of the Fourteenth Amendment).

71. *See* 2 SILVER, *supra* note 3, § 8A.09(4)(a) ("Although its logical soundness is questionable, in the absence of Supreme Court guidance, lower courts have often applied the exacting standards of deliberate indifference (applicable to 'punishments') to jail conditions.").

72. *See* Estelle v. Gamble, 429 U.S. 97, 103–05 (1976) ("The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . codifying the common-law view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" (quoting Spicer v. Williamson, 132, S.E. 291, 293 (N.C. 1926))).

73. *See id.* at 101 ("The gravamen of respondent's [Section] 1983 complaint is that petitioners have subjected him to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth").

be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[74] The essential effect of this is that deliberate indifference is itself considered a punishment.[75] To the author's knowledge, the Supreme Court has not explicitly analyzed deliberate indifference under any other constitutional provision.[76]

Being developed in an Eighth-Amendment vacuum,[77] the culpability requirement has been tailored to meet the prohibition on "cruel and unusual punishments."[78] In line with modern standards of decency,[79] this imposes a duty on prison officials to provide inmates with adequate necessities.[80] To state a cause of action on the basis of an official's failure in this respect, a plaintiff must provide *subjective* proof of the defendant's state of mind.[81] The standard itself is essentially tied to the criminal-law definition of "recklessness," where the defendant "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."[82]

As an example, suppose that Dwight, a corrections officer in Virginia, is tasked with finding an appropriate cell in which to place Jim, a large and violent inmate who becomes enraged whenever he hears any language spoken other than English.

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74. U.S. CONST. amend VIII.

75. *See Estelle*, 429 U.S. at 104 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." (quoting Gregg v. Georgia, 428, U.S. 153, 173 (1976))).

76. *Cf. infra* notes 111–133 and accompanying text (discussing cases that acknowledged the lack of a clear indication by the Supreme Court).

77. *See id.* (showing the Supreme Court has only analyzed deliberate indifference under the Eighth Amendment).

78. *See infra* notes 92–94 and accompanying text (discussing the relationship between the subjective standard and the Eighth Amendment's focus on "punishments").

79. *See Gamble*, 429 U.S. at 103–05 (explaining modern standards of decency).

80. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (discussing the various acts and omissions that can constitute a deprivation of a person's Eighth-Amendment right to be free from cruel and unusual punishment).

81. *See id.* at 837 ("We reject petitioner's invitation to adopt an objective test for deliberate indifference.").

82. *See id.* at 836–37 ("The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

Dwight ultimately places him in a cell with Oscar, an inmate who often speaks to himself Spanish. This leads to an altercation where Jim assaults Oscar, causing permanent injury. If Oscar wishes to file a claim under § 1983 on the basis that Dwight failed to provide him with a reasonable degree of safety, he must prove that the officer was deliberately indifferent.[83] Oscar would have to adequately demonstrate two things to meet the standard. The first is that Dwight was aware of the facts suggesting that an assault could occur if both inmates were placed in the same cell.[84] This might consist of Jim's physical capability and violent disposition toward speakers of foreign languages, along with Oscar's tendency to speak Spanish. The second requirement is that Dwight made the proper inference based on those facts—that there was a serious risk of Jim violently assaulting Oscar.[85]

When the Supreme Court initially held that subjective awareness was the proper inquiry, it was faced with the possibility of using a standard of recklessness derived from private civil law.[86] This is because the definition of recklessness varies depending on which area of the law is being discussed.[87] If a civil-law standard is used, a plaintiff would be able to prove a sufficiently culpable state of mind on a purely objective set of facts.[88]

The reason the Court used the subjective standard derived from criminal law lies in the connection between the type of claim and the federal law from which it was derived.[89] Section 1983 does not create a cause of action, but merely serves as a vehicle through which a plaintiff may claim a violation of some federally-granted

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83. *See supra* note 80 and accompanying text (identifying deliberate indifference as the appropriate state-of-mind required for a prisoner's claim that state actors failed to provide him with reasonable safety).

84. *See Brennan*, 511 U.S. at 836–37 (stating the first requirement of the deliberate indifference inquiry).

85. *See id.* (stating the second requirement of the deliberate indifference inquiry).

86. *See id*. (discussing the parties' arguments for the proper state-of-mind inquiry).

87. *See id.* (finding that the term recklessness "is not self-defining").

88. *See id.* at 836 ("The civil law generally calls a person reckless who acts or (if a person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or is so obvious that it should be known.").

89. *See id*. (contrasting different definitions of "recklessness").

right, privilege, or immunity.[90] For deliberate indifference, the underlying federal law is the Eighth Amendment's ban on cruel and unusual punishments.[91] The operative term here is "punishments," as the amendment does not outlaw cruel and unusual "conditions."[92] Under the Court's jurisprudence, a "cruel and unusual punishment" is equated with "an unnecessary and *wanton* infliction of pain."[93] This definition requires a subjective inquiry into the defendant's state of mind because it "isolates those who inflict punishment."[94]

2. The Application of Deliberate Indifference to the Claims of Pretrial Detainees

Despite a lack of discussion by the Supreme Court,[95] lower courts have applied the deliberate indifference standard to pretrial detainees' claims.[96] Unlike prisoners, pretrial detainees rely on the Fourteenth Amendment's guarantee of due process rather than on the Eighth Amendment.[97] Despite this discrepancy, lower courts

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90. *See supra* notes 39–53 and accompanying text (discussing the procedural nature of § 1983).

91. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

92. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (discussing the scope of Eighth Amendment violations).

93. *See* Wilson v. Seiter, 501 U.S. 294, 299–300 (1991) ("It is *obduracy and wantonness, not inadvertence or error in good faith*, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause. . . ." (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986))) (emphasis in original).

94. *See Farmer*, 511 U.S. at 838–40.

> [T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments."

95. *See Estelle*, 429 U.S. at 104 (holding that "prisoner's pro se complaint . . . was insufficient to state a cause of action").

96. *See infra* notes 99–133 and accompanying text (discussing lower-court opinions applying deliberate indifference to pretrial detainees' claims).

97. *See infra* note 113 and accompanying text (discussing authority acknowledging the correct constitutional provision under which pretrial detainees may bring a claim).

have frequently used Eighth-Amendment standards to govern their claims.[98] The following sections provide an overview of due process under the Fourteenth Amendment and lower courts' reasoning in applying deliberate indifference to claims that fall under it.

a. The Fourteenth Amendment as an Underlying Federal Right

As previously discussed, 42 U.S.C. § 1983 is merely a "vehicle" that a plaintiff must attach to some underlying federal right, immunity, or privilege in order to make a claim against a state actor.[99] When pretrial detainees allege conduct that would otherwise be categorized as "deliberate indifference" under the Eighth Amendment, the applicable federal law is the Due Process Clause of the Fourteenth Amendment.[100] This states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[101]

Unlike that of the Eighth Amendment, the text of the Fourteenth Amendment is not restrained to conduct that is characterized as "punishment."[102] Instead, the scope of Fourteenth-Amendment due process is broadly focused on the deprivation of rights, encompassing conduct that "is not rationally related to a legitimate nonpunitive governmental purpose" or where it "appear[s] excessive in relation to that purpose."[103]

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98. *See infra* notes 99–133 and accompanying text (discussing authority).

99. *See supra* notes 39–53 and accompanying text (discussing the statute's procedural nature).

100. *See* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1437–39 (9th Cir. 1991) (discussing the application of deliberate indifference to a due-process claim).

101. U.S. CONST. amend XIV, § 1.

102. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) (rejecting any requirement "that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated.").

103. *See id.* at 397–98 (comparing the standards of the Eighth Amendment's Cruel and Unusual Punishment Clause to that of the Fourteenth Amendment's Due Process Clause).

b. Justifications for Applying Deliberate Indifference Under Due Process

Various lower courts have applied the Eighth-Amendment standard—as formulated by the Supreme Court in the context of prisoners' claims—to pretrial detainees' claims of deprivation under the Due Process Clause.[104] Although justifications for this borrowing exercise vary between the federal circuits, they fall into two general categories.[105] The first is concerned with the similarities between the two amendments, at least with respect to the protections they provide to the two classes of plaintiffs and the types of claims that those plaintiffs bring.[106] The second focuses on the factual issues that courts would purportedly face if pretrial detainees and prisoners required conflicting treatment for similar claims.[107]

(1) Similarities Between the Eighth and Fourteenth Amendments

One general group of justifications proffered by federal courts for applying the Eighth-Amendment standard is premised on comparisons between the protections offered by the two constitutional provisions.[108] Specifically, the courts have focused on either the amendments' mutual requirement of "evolving standards,"[109] or on the basis that the Eighth Amendment's protections act as a "floor" when determining the securities offered by the Fourteenth.[110]

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104. *See infra* notes 108–153 and accompanying text (providing an overview of authority).

105. *See infra* notes 108–153 and accompanying text (introducing justifications for applying deliberate indifference).

106. *See infra* notes 108–122 and accompanying text (providing an overview of decisions basing their reasoning on the similarities between the two amendments).

107. *See infra* notes 123–153 and accompanying text (discussing a decision applying deliberate indifference due to deferential treatment for corrections officials).

108. *See infra* notes 111–159 and accompanying text (discussing a Seventh Circuit opinion).

109. *See infra* notes 111–154 and accompanying text (discussing a Ninth Circuit opinion).

110. *See infra* notes 118–159 and accompanying text (discussing an Eleventh

In 1991, the Ninth Circuit heard the appeal of a pretrial detainee who had been sexually assaulted by his cellmate while incarcerated.[111] He argued that his claim under § 1983 satisfied the requirement of an underlying constitutional violation because jail officials had violated his liberty interest in personal security, which fell under due process.[112] In evaluating his claim, the court applied the Eighth Amendment standard, while acknowledging that the claim itself fell under the Fourteenth Amendment.[113]

The court reasoned that this was appropriate because "the [F]ourteenth [A]mendment, like the [E]ighth [A]mendment, must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[114] This proposition was made in reference to language used by the Supreme Court.[115] However, in the precedential opinion, the Court was *only* referring to the acceptability of punishment under the Eighth Amendment, with no mention of the Fourteenth.[116] To eliminate this distinction, the Ninth Circuit cited similar language in another Supreme Court case, where the reference was to the Fourteenth Amendment.[117]

The Seventh Circuit's use of the Eighth-Amendment standard also involved a comparison to the Fourteenth, albeit with a slightly different focus.[118] In a case involving the attempted suicide of a

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Circuit opinion).

111. *See* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1437–39 (9th Cir. 1991) (describing the facts and procedural history of the case).

112. *See id.* at 1439 (describing the nature of the plaintiff's claim).

113. *See id.* at 1441 (discussing the proper analysis under a claim requiring deliberate indifference).

114. *See id.* (discussing the similar interests driving the analyses of the two amendments).

115. *See id.* (stating the standard under which "unnecessary and wanton infliction of pain" is tied to).

116. *See* Trop v. Dulles, 356 U.S. 86, 99–100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

117. *See* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991) ("[T]he due process clause is not violated so long as the government conduct is not repugnant to the conscience of mankind." (quoting Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471–72 (1947) (Frankfurter, J., concurring))).

118. *Compare infra* notes 119–156 and accompanying text (outlining the Eighth Circuit approach), *with Redman*, 942 F.2d at 1437–39 (describing the Ninth Circuit's approach).

pretrial detainee, the Court applied deliberate indifference because pretrial detainees' due process rights "are at least as great as the Eighth Amendment protection available to a convicted prisoner."[119] This proposition also referenced an opinion of the Supreme Court.[120] The precedent, however, was not discussing tests used to determine liability.[121] It was simply discussing the requirement that state actors obtain medical care for persons injured while being apprehended.[122]

(2) Factual Considerations

Another justification proffered by courts in applying the Eighth-Amendment standard is based on practical concerns.[123] Essentially, the application of different standards would require courts to afford different protections to plaintiffs who have been held under identical conditions.[124]

In 1985, the Eleventh Circuit heard the appeal of George Hamm, who was challenging the constitutionality of various conditions at the DeKalb County, Georgia jail.[125] His claims arose during two different time periods.[126] During the first, he was yet to

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119. *See* Hall v. Ryan, 957 F.2d 402, 405 (7th Cir. 1992) (noting that the Eighth Amendment standard should apply despite the fact that "pre-trial detainees cannot be punished because they have not yet been found guilty . . .").

120. *See id.* (citing Supreme Court precedents that hold the rights of pretrial detainees to be at least as great as those of a convicted prisoner).

121. *See* Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983) ("We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention.").

122. *See id.* ("Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury.").

123. *See infra* notes 131–168 and accompanying text (stating that courts would essentially have to split hairs, depending on the status of the plaintiff).

124. *See infra* notes 131–168 and accompanying text (discussing the reasoning of the Eleventh Circuit).

125. *See* Hamm v. DeKalb Cnty., 774 F.2d 1567, 1569 (11th Cir. 1985) ("[Hamm] alleged that the jail was overcrowded, that the conditions were unsanitary, that the food service was unsanitary, and that the medical care was inadequate.").

126. *See id.* ("The parties agree that the periods of incarceration pertinent to this appeal are February 11, 1980 to April 14, 1980 and September 23, 1980 to May 20, 1981. These periods of incarceration include periods both before and after

be convicted and thus was afforded the status of pretrial detainee.[127] During the second period, he was being held post-conviction, shifting his status to that of a prisoner.[128] Because of this context, the Court grappled with the possibility that the analyses of his claims could differ because one was under the Fourteenth Amendment, while the other was under the Eighth.[129] This was further complicated by an earlier Supreme Court decision that had made it clear that conduct that amounts to "punishment" is a violation of a detainee's due process guarantees—a clear difference from the constitutional permissibility for conduct alleged by prisoners.[130]

Ultimately, the Court decided that there should be no difference between the analyses of the two amendments.[131] The conclusion was premised on the reality that many facilities hold both pretrial detainees and convicted inmates, such as the DeKalb County Jail.[132] By requiring different standards, courts would essentially have to split hairs between claims, depending on the status of the plaintiff.[133]

Hamm's conviction.").

127. *See id.* at 1572 (discussing Hamm's status before his conviction).

128. *See id.* ("The eighth amendment, however, applies only to confinement that occurs subsequent to and as a consequence of a person's lawful conviction of a crime.").

129. *See id.* ("Since the conditions about which Hamm complains in this case were imposed on him both before and after his conviction . . . this court must determine the extent to which [Eighth Amendment] standards differ—if any—from due process standards.").

130. *See id.* at 1572–73 ("The due process clause affords pretrial detainees rights not enjoyed by convicted inmates." (quoting *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981) (en banc)).

131. *See* Hamm v. DeKalb Cnty., 774 F.2d 1567, 1574 (11th Cir. 1985) ("The court recognizes that the limitations imposed by the eighth amendment and the due process clause arise in different contexts. Nonetheless, with respect to the provision of basic necessities to individuals in the state's custody, the two provisions necessarily yield the same result.").

132. *See id.* (discussing the practical implications of using two different standards).

133. *See id.* ("That approach would result in the courts' becoming enmeshed in the minutiae of prison operations, a situation against which the Supreme Court has warned.").

III. The Effect of Kingsley v. Hendrickson

In 2015 the Supreme Court made it clear that Eighth-Amendment standards do not necessarily apply to pretrial detainees' claims.[134] The decision itself was not concerned with a conditions-of-confinement claim.[135] However, some federal courts have viewed the reasoning in that opinion as being equally applicable to those claims.[136] As a result, they have eliminated deliberate indifference as a requirement for pretrial detainees and replaced it with an objective standard.[137] Other courts have declined to extend the reasoning, creating a split among the federal circuits.[138] This Part discusses the reasoning that led to the Supreme Court's decision and the resulting disagreement among some federal Courts of Appeals.

A. Kingsley v. Hendrickson

In 2015 the Supreme Court heard the appeal of a pretrial detainee's excessive-force claim under 42 U.S.C. § 1983.[139] The question presented was whether the Fourteenth Amendment's guarantee of due process requires a plaintiff to prove that corrections officers "were *subjectively* aware that their use of force [against the plaintiff] was unreasonable, or only that the officers' use of force was *objectively* unreasonable."[140] The Court held in

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134. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015) (contrasting claims on the basis of the underlying federal rights that apply).

135. *See id.* at 395 ("Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.").

136. *See infra* notes 175–238 and accompanying text (discussing opinions that see the reasoning in *Kingsley* as generally applicable to pretrial detainees' claims).

137. *See infra* notes 175–238 and accompanying text (discussing opinions that have applied an objective unreasonableness standard to pretrial detainees' conditions-of-confinement claims).

138. *See infra* notes 232–264 and accompanying text (discussing opinions that have narrowly defined *Kingsley*'s reasoning).

139. *See* Kingsley v. Hendrickson, 576 U.S. 389, 391 (2015) (providing the procedural posture of the case and framing the question before the Court).

140. *Id.*

favor of the plaintiff, finding that "objective unreasonableness" was the appropriate standard for determining whether the force used pierced the constitutional threshold of excessiveness.[141]

An excessive force claim is not the same thing as a claim requiring a showing of deliberate indifference—the focus of this Note—even though they both apply to pretrial detainees.[142] Nevertheless, the Court's reasoning has major implications for the blind application of Eighth-Amendment doctrine to claims brought under the Fourteenth.[143]

1. Background

In April 2010, Michael Kingsley was arrested and booked into the Monroe County Jail in Sparta, Wisconsin.[144] At some point during his time in custody, Kingsley was transferred to a cell where a prior occupant had affixed a piece of paper to a light in order to dim its brightness.[145] On the evening of May 20 and in the early morning of May 21, officers at the jail ordered him to remove the paper from the light.[146] Kingsley refused to remove the paper because he had not placed it there.[147]

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141. *See id.* at 396 ("In deciding whether the force used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we must hold that courts must use an objective standard.").

142. *Compare* Graham v. Connor, 490 U.S. 386, 392 (1989) (referring to the type of violation alleged in a pretrial detainee's excessive force claim as "physically abusive government conduct"), *with* Castro v. Cnty. of L.A., 833 F.3d 1060, 1068 (9th Cir. 2016) ("[T]he 'deliberate indifference' standard applies to claims that corrections facility officials failed to address the medical needs of pretrial detainees." (quoting Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1242 (9th Cir. 2010), *overruled* by Castro v. Cnty. of L.A., 833 F.3d 1060, 1060 (9th Cir. 2016))).

143. *See infra* notes 171–174 and accompanying text (discussing a circuit split).

144. Brief for Petitioner at 3, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14–6368) ("[Kingsley] was being detained pending trial at the time of the incident that rise to his excessive force claim.").

145. *See id.* at 4 n.2 ("[T]he paper in his cell was already there when he was transferred to that cell about a month earlier. As the court below noted, inmates cover the light with paper to dim the brightness of the light.").

146. *See id.* at 4 (summarizing the events that led to litigation).

147. *See id.* (explaining the officers' reasoning for moving Mr. Kingsley from

The officers entered Kingsley's cell and placed him in handcuffs before roughly moving him to a receiving cell "so that jail staff could remove the paper."[148] Although the parties disputed the exact events that occurred in the receiving cell, it is undeniable that a senior officer directed another to use a taser on Kingsley, who was lying "face down on a cement bunk with his hands still cuffed behind his back."[149] After applying the taser for approximately five seconds, the officers left without removing the handcuffs.[150]

Kingsley filed an action in the district court under § 1983, claiming that the officers had used excessive force against him in violation of his Fourteenth-Amendment right to due process as a pretrial detainee.[151] Ultimately, a jury found in favor of the defendants.[152] Kingsley took issue with the jury instructions and appealed his case to the Seventh Circuit.[153]

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his cell).

148. *See id.*

> To accomplish [the transfer], the officers first entered Mr. Kingsley's cell and handcuffed him behind his back while he was lying face down on his bunk. Mr. Kingsley testified that the handcuffs were extremely tight. During the transfer, the officers banged Mr. Kingsley's leg against the bunk in picking him up, causing pain in his foot and making it difficult for him to walk. The officers then carried Mr. Kingsley from to original cell to the receiving cell.

149. *See id.* at 5 (stating that Sergeant Hendrickson, a named party in the ensuing litigation, "placed his knee on Mr. Kingsley's back" while he was "face down on a cement bunk with his hands still cuffed behind his back.").

150. *See* Brief for Petitioner, *supra* note 144, at 5 ("Other officers were later able to remove Mr. Kingsley's handcuffs without incident.").

151. *See* Kingsley v. Hendrickson, 576 U.S. 389, 393 (2015) (stating that the claim proceeded to trial after the district court denied the officers' motion for summary judgment because "a reasonable jury could conclude that the officers acted with malice and intended to harm Kingsley when they used excessive force against him." (quoting Kingsley v. Josvai, No. 10–cv–832–bbc, 2011 U.S. Dist. LEXIS 158769, at *18 (W.D. Wis. Nov. 16, 2011), *aff'd* 744 F.3d 443 (7th Cir. 2014), *rev'd* 135 S. Ct. 2466 (2015))).

152. *Id.* at 394.

153. *See id.* (summarizing the events that led to Kingsley's appeal); see also Joint Appendix at 278, Kingsley v. Hendrickson, 576 U.S. 389 (2015), for the jury instructions used in the district court, which state in pertinent part:

> In deciding whether one or more of the defendants used "unreasonable" force against the plaintiff, you must consider whether it was unreasonable harm from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must base the

His argument was based on the jury instructions' requirement that liability could only be found if the defendants had *actual knowledge* that their conduct created an unnecessary risk of harm to the plaintiff.[154] A majority of the court of appeals panel, however, found that liability required a "subjective inquiry into the officer's state of mind."[155] Still in disagreement with this legal standard, Kingsley petitioned for and was granted certiorari by the Supreme Court.[156]

2. The Supreme Court's Opinion

In a majority opinion authored by Stephen Breyer, the Supreme Court agreed with Kingsley's contention that a subjective standard is inappropriate for a pretrial detainee's excessive force claim.[157] Though constitutional claims for excessive force differ from those for deliberate indifference,[158] the reasons for which the Court arrived at its conclusion create implications for both.[159]

> decision based on *what the defendants knew at the time of the incident*, not based on what you know now.

(emphasis added).

154. *See id.* ("On appeal, Kingsley argued that the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness.").

155. *See id.* (stating that the majority panel found that "[t]here must be an actual intent to violate the plaintiff's rights or reckless disregard for his rights." (quoting Kingsley v. Hendrickson, 744 F.3d 443, 451 (7th Cir. 2014), *rev'd* 576 U.S. 389 (2015))).

156. *See id.* at 395 (stating that the petition for certiorari was granted "in light of disagreement among the Circuits.").

157. *See* Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015) ("We conclude with respect to that question that the appropriate standard is objective not subjective. Thus, the defendant's state of mind is not a matter that the plaintiff is required to prove.").

158. *Compare* Kingsley v. Hendrickson, 744 F.3d 443, 448 (7th Cir. 2014) ("A claim of excessive force, like the one at issue here, is, at bottom, one that seeks to impose liability for physically abusive government conduct."), *rev'd* 576 U.S. 389 (2015), *with* Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017) (per curiam) (applying the deliberate indifference standard where a pretrial detainee alleged that corrections officials "provided him inadequate security and impermissibly delayed medical care").

159. *See infra* notes 171–174 and accompanying text (discussing a circuit split).

Justice Breyer began by framing the "state of mind issue" in dispute between the parties.[160] While there was no dispute over the defendants' volition with respect to their physical acts, the proper inquiry on appeal was into their recognition of whether or not those acts were "excessive."[161] In determining the appropriate question, Justice Breyer made it clear that negligence—an impermissible standard for substantive due process claims—is inapplicable only with respect to the defendants' volitional acts, not their interpretation of the acts' consequences.[162]

After quickly concluding that objective unreasonableness is a permissible standard for judging a defendant's state of mind, Breyer noted that the application was partly due to the constitutional differences between convicted prisoners and pretrial detainees.[163] The defendants argued that precedent supported the position that some form of intent was required for § 1983 liability.[164] Breyer reminded them, however, that the authority cited concerned litigation brought by convicted prisoners.[165] Where the Eighth Amendment is placed as the substantive anchor of a

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160. *See Kingsley*, 576 U.S. at 395 ("We consider a legally requisite state of mind. In a case like this one, there are, in a sense, two separate state-of-mind questions.").

161. *See id.* at 396

> [T]he officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley. We now consider the question before us here—the defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world) that the defendant deliberately (not accidently or negligently) used. In deciding whether the force used is, constitutionally speaking, "excessive," should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind?

162. *See id.* ("Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim.").

163. *See* Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (drawing a distinction between the respective positions that pretrial detainees and convicted prisoners stand in).

164. *See id.* at 400 ("Respondents believe that the relevant legal standard should be subjective, *i.e.*, that the plaintiff must prove that the use of force . . . was applied 'maliciously and sadistically to cause harm.").

165. *See id.* ("The first of these two of these cases, however, concern excessive force claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause.").

§ 1983 claim, constitutionally impermissible punishment is a required element of the claim.[166]

Unlike prisoners, pretrial detainees' claims are not premised on whether or not they were unconstitutionally punished.[167] "The language of the two clauses differs, and the nature of the claims often differs."[168] Under the Court's jurisprudence, detainees "cannot be punished at all, much less 'maliciously and sadistically."[169] Therefore, the element of intent that is inherently required for claims under the Cruel and Unusual Punishment Clause does not apply to pretrial detainees' Due Process claims.[170]

B. The Consequences of Kingsley v. Hendrickson

Although the Supreme Court's decision was limited to pretrial detainees' excessive force claims,[171] the case has presented a substantial issue for lower courts to consider.[172] At its most basic distillation, the question seems simple enough: Should a purely objective analysis into a corrections official's state of mind be confined only to excessive force claims, or should it apply to a broader range of claims brought by pretrial detainees under the Fourteenth Amendment?[173] Courts have come down on both sides

166. *See id.* at 401 ("Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.").

167. *See id.* (explaining the inherent differences between the Fourteenth-Amendment claims of pretrial detainees and the Eight-Amendment claims of convicted prisoners).

168. Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015).

169. *See id.* ("If the offence be not bailable, or the party cannot find bail, he is committed to the county jail[,] but only for safe custody, and not for punishment." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *298, *300)).

170. *See id.* ("And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically." (quoting *Ingraham v. Wright*, 430 U.S. 651, 671–72, n.40 (1977))).

171. *See id.* at 402 ("We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment . . . .").

172. *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1068–69 (9th Cir. 2016) (discussing lower courts' treatment of the issue).

173. *See id.* ("*Kingsley* did not squarely address the objective standard applies to all kinds of claims brought by pretrial detainees, including both excessive force claims and failure-to-protect claims.").

of the issue.[174] This subpart provides an overview of the split by discussing individual cases. Those that have expanded *Kingsley*'s application will be considered first, followed by opinions that have confined *Kingsley*'s reach to excessive-force claims.

1. Expanding Kingsley *to a Broader Range of Claims*

a. The Second Circuit

In 2017, the Second Circuit Court of Appeals heard the case of twenty pretrial detainees who brought an action alleging that the City of New York, the New York Police Department, and individual officers had subjected them to "appalling conditions of confinement" at Brooklyn Central Booking.[175] The issue was whether the district court properly granted the defendants' motion for summary judgment on the basis that the plaintiffs could not establish the "subjective prong" of a deliberate indifference analysis.[176] The court noted that its own precedent had settled on applying only a subjective standard.[177] However, it also recognized that the use of a subjective requirement was no longer on steady ground in light of *Kingsley* and questioned whether a purely objective requirement is the proper standard.[178]

The court began its analysis by noting that, despite what the term itself may suggest, "deliberate indifference" is not inherently

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174. *Compare infra* notes 175–231 and accompanying text (extending the application to a broader range of pretrial detainees' due process claims), *with infra* notes 232–257 and accompanying text (declining to extend the application beyond pretrial detainees' excessive force claims).

175. *See* Darnell v. Pineiro, 849 F.3d 17, 20 (2d Cir. 2017) ("This is a case about unconstitutional conditions of confinement for pretrial detainees.").

176. *See id.* at 20–21 ("[N]or could any plaintiff establish that . . . the individual defendants were actually aware of any dangerous conditions, or that the individual defendants acted unreasonably in responding to any such conditions; nor, for similar reasons, could the plaintiffs establish that the individual defendants acted with punitive intent.").

177. *See id.* at 33 (discussing the resolution of an intra-circuit divergence with respect to the treatment of the deliberate indifference standard).

178. *See id.* at 21 ("The District Court did not analyze the implications of *Kingsley* in its opinion . . . [t]his case also requires us to consider whether *Kingsley* altered the standard for conditions of confinement claims under the Fourteenth Amendment's Due Process Clause.").

a standard that requires some subjective inquiry.[179] Because its definition is somewhat flexible, deliberate indifference requires a general state-of-mind inquiry, but there is no need for the inquiry to be subjective.[180] This interpretation was strengthened by recognizing that Supreme Court precedent demanding a subjective inquiry came under the Eighth Amendment, where "punishment connotes a subjective intent on the part of the official."[181]

The court further distanced the doctrine of the Eighth and Fourteenth Amendments by looking to the language of *Kingsley*.[182] Noting that "pretrial detainees cannot be punished at all, much less 'maliciously and sadistically," it found no basis in its prior opinions supporting the conclusion that deliberate indifference should apply equally to claims under both amendments.[183] Instead, the court found that the deliberate indifference analysis only requires the plaintiff to prove that the defendant objectively failed to appreciate the risks that led to the plaintiff's injury.[184] While the defendants argued that this would result in a dramatic increase in litigation, the court noted that its previous decision to do away with the objective standard was premised on consistency with the Supreme Court, not on considerations of judicial efficiency.[185]

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179. *See id.* at 29 ("[T]he Supreme Court has instructed that 'deliberate indifference' roughly means 'recklessness,' but 'recklessness' can be defined subjectively (what a person actually knew, or disregarded), or objectively (what a reasonable person knew, or should have known)." (citing Farmer v. Brennan, 511 U.S. 825, 836–37 (1994))).

180. *See id.* at 32 ("As such, the 'subjective prong' might better be described as the '*mens rea* prong', or 'mental element prong.").

181. *See Darnell*, 849 F.3d at 32–33 ("The Supreme Court based its holding on a close reading of the text of the Cruel and Unusual Punishments Clause, which outlaws 'cruel and unusual *punishments*,' not 'cruel and unusual conditions." (emphasis added) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)).

182. *See id.* at 33–34 (revisiting the rationale in *Kingsley*).

183. *See id.* at 34–35

> 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.

184. *See id.* at 34 ("In other words, the 'subjective prong' (or '*mens rea* prong') of a deliberate indifference claim is defined objectively.").

185. *See id.* at 36 (stating that the initial decision to use an objective standard

b. The Seventh Circuit

In 2012, Lyvita Gomes died under the care of corrections staff in Lake County, Illinois.[186] Before passing away, Gomes refused to eat or drink while "[t]he medical providers who worked at the Jail did little other than monitoring as she wasted away in her cell."[187] The personal representative of her estate brought an action against Correct Care Solutions, a contractor providing medical services to the jail's population.[188] The claim theorized that the decision to monitor Gomes in lieu of transporting her to a hospital constituted inadequate medical care with deliberate indifference.[189] Upon motion by the defendants, the district court granted judgment as a matter of law on the constitutional claims.[190]

On appeal, the Seventh Circuit discussed the proper application of deliberate indifference to claims of inadequate medical care.[191] Authority within the circuit required a showing that the defendant actually believed that the plaintiff was faced with a significant risk of harm.[192] However, the court acknowledged that this was decided without any analysis of the differences that exist between pretrial detainees and convicted prisoners.[193]

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was not "because of any concerns that an objective standard would prompt the filing of non-meritorious claims").

186. *See* Miranda v. Cnty. of Lake, 900 F.3d 335, 342 (7th Cir. 2018) ("The autopsy opined that she died of Complications of Dehydration and Starvation. The manner of death was suicide.").

187. *See id.* at 341–42 (describing the acts and omissions taken by jail staff and medical providers who oversaw the care of Ms. Gomes during her incarceration).

188. *See id.* at 341 (summarizing the litigation that led to the appeal in the Seventh Circuit).

189. *See id.* 346–47 (identifying two physicians as defendants to the estate's due process claim).

190. *See id.* at 343 ("The court also concluded that the Estate had failed to present enough evidence to reach the jury on the question of whether the medical defendants causes Gomes's death . . . .").

191. *See id.* at 350–51 (analyzing the "intent" requirement for claims of deliberate indifference).

192. *See id.* at 351 ("This subjective standard is closely linked to the language of the Eighth Amendment, which prohibits 'cruel and unusual *punishments*.'").

193. *See id.* at 350–51 ("In conducting this borrowing exercise, we have grafted the Eighth Amendment's deliberate indifference requirement onto the

The court emphasized that *Kingsley v. Hendrickson* was brought under the Fourteenth Amendment.[194] It noted that the Supreme Court's decision rested on that fact, especially with regard to the "punishment" issue.[195] While prisoners have a right to be free from "cruel and unusual punishment," detainees have a right to be free from punishment generally.[196] Acts that constitute "punishment" of pretrial detainees may include that of the "cruel and unusual" variety, which requires "an express intent to punish."[197] Although this calls for a subjective inquiry, it is only one area within a broader range of conduct considered punishment when pretrial detainees are involved.[198]

Kingsley's definition of punishment in the pretrial context led the court to "call into question" its practice of "treating the protections afforded by the Eighth and Fourteenth Amendments as 'functionally indistinguishable' in the context of a claim about inadequate medical care."[199] Noting that "the Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees" in opinions other than *Kingsley*, the court found no valid reason for confining the elimination of a subjective standard only to excessive-force claims.[200] Consequently, the court concluded that "objective

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pretrial detainee's situation.").

194. *See id.* at 351 ("*Kingsley*, it is worth emphasizing, was a Fourteenth Amendment Due Process case. Indeed, the Court took pains to reiterate the basic principles that apply to pretrial detainees . . . .").

195. *See id.* (discussing the Majority opinion in *Kingsley v. Hendrickson*).

196. *See id.* (noting that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment" (quoting Graham v. Connor, 490 U.S. 386, 395 n.10 (1989))).

197. *See id.* (discussing the Supreme Court's treatment of "punishment" by government actors in the pretrial context).

198. *See id.* ("[I]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive government purpose' or that the actions 'appear excessive in relation to that purpose." (emphasis omitted) (quoting Bell v. Wolfish, 441 U.S. 520, 561 (1979))).

199. *See id.* at 352 (discussing the grafting of Eighth Amendment principles to claims brought under the Fourteenth Amendment within the Seventh Circuit and among other federal Courts of Appeal) (quoting Smego v. Jumper, 707 F. App'x 411, 412 (7th Cir. 2017))).

200. *See id.* ("We see nothing in the logic the Supreme Court used in *Kingsley* that would support this kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause.").

unreasonableness" is the proper state-of-mind requirement for pretrial detainees' inadequate medical care claims.[201]

c. The Ninth Circuit

In 2009, Jonathan Castro was arrested for public drunkenness and transported to a police station in West Hollywood, California.[202] There, he was placed in a sobering cell designed "to allow maximum visual supervision" by corrections staff.[203] Sometime later, Jonathan Gonzalez was arrested and placed into the cell with Castro.[204] During his arrest and intake, Gonzalez was described as "combative" and his behavior characterized as "bizarre."[205] Despite a California law calling for jail staff to maintain "maximum visual supervision" of "inmates requiring more than minimum security," vision into the cell was partially blocked, and the detainees were supervised by an unpaid volunteer.[206]

Castro pounded on the cell's window shortly after Gonzalez entered, but the volunteer did not check on them for another twenty minutes.[207] Upon observing Gonzalez "inappropriately touching Castro's thigh," the volunteer did not enter to investigate.[208] Instead, he reported to the station's supervising officer, who arrived six minutes later to witness Gonzalez violently

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201. *See id.* (stating the appropriate state-of-mind requirement for inadequate medical care claims and identifying other federal courts that have used the same application).

202. *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1064–65 (9th Cir. 2016) (en banc) (describing the circumstances of Castro's arrest).

203. *See id.* at 1065 (describing a "sobering cell" as "a fully walled chamber that was stripped of objects with hard edges on which an inmate could hurt himself; the cell contained only a toilet and some mattress pads").

204. *See id.* ("[A]uthorities arrested Gonzalez on a felony charge after he shattered a glass door with his fist at a nightclub.").

205. *See id.* (describing the account of Gonzalez's arrival at the West Hollywood station as recorded on an intake form).

206. *See id.* ("The sobering cell met neither of these requirements, yet it was used routinely.").

207. *See id.* (describing the events that led to Castro's injury).

208. *See id.* (noting that "Castro appeared to be asleep" and that Gonzalez's action was "in violation of jail policy").

stomping on Castro's head.[209] After the incident, Castro was hospitalized for nearly a month and required care in a long-term facility for four years.[210] "He suffers from severe memory loss and other cognitive difficulties."[211]

Castro filed multiple claims against Los Angeles County, the Sheriff's Department, and individual defendants.[212] Among these was a failure-to-protect claim under the Fourteenth Amendment, which required a showing of deliberate indifference.[213] After a jury returned a verdict favorable to Castro, the defendants appealed to the Ninth Circuit on the basis that this conclusion was not reasonable in light of the evidence presented.[214]

The Ninth Circuit, sitting *en banc*, tackled the deliberate indifference analysis by first noting that its precedent, requiring a subjective inquiry, was premised on an interpretation of Supreme Court opinions that seemed to suggest that "punitive intent" is a requirement the plaintiff must prove.[215] The court then quickly discussed the impact of *Kingsley v. Hendrickson* before concluding that the decision directly contradicted its prior treatment of the issue.[216] However, it also recognized that the Supreme Court was

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209. *See id.* (stating that the station supervisor "found Castro lying unconscious in a pool of blood").

210. *See id.* ("When paramedics arrived, Castro was unconscious, in respiratory distress, and blue.").

211. *See id.* (describing the ongoing effects of Castro's injuries).

212. *See id.* ("Castro claimed that both the entity defendants and the individual defendants violated his constitutional rights by housing him in the sobering cell with Gonzalez and by failing to maintain appropriate supervision of the cell.").

213. *See id.* at 1067 ("[T]he Supreme Court made clear that 'prison officials have a duty to protect prisoners from violence at the hands of other prisoners' because corrections officers 'have stripped the inmates of virtually every means of self-protection and foreclosed their access to outside aid." (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994))).

214. *See id.* ("A three-judge panel affirmed the judgment of the district court as to the individual defendants but reversed as to the entity defendants. A majority of active non-recused judges voted to rehear the case en banc.").

215. *See id.* at 1068 ("[W]e held that 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot be condemned as infliction of punishment,' and so could not support liability under either the Eighth or Fourteenth Amendment." (quoting Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1242 (9th Cir. 2010), *overruled by* Castro v. Cnty. of L.A., 833 F.3d 1060 (9th Cir. 2016) (en banc))).

216. *See id.* at 1068–69 ("In sum, *Kingsley* rejected the notion that there exists

less than crystal clear as to whether the objective standard should be applied beyond excessive-force claims.[217]

The court ultimately found ample support for expansion.[218] First, it noted that the "state-of-mind" requirement is not attached to the statute that allows the court to hear the action, but rather to the underlying federal right that the plaintiff claims has been violated.[219] Whether a pretrial detainee brings an excessive-force claim or a failure-to-protect claim, the underlying federal right is due process under the Fourteenth Amendment.[220] This, of course, differs from convicted prisoners, who rely on the Cruel and Unusual Punishment Clause, which requires a subjective standard.[221]

The court also noted that *Kingsley*'s choice of language supports a broader application of the objective standard.[222] The Supreme Court could have stated that pretrial detainees can provide purely objective evidence of a defendant's state of mind with respect to the level of *force* applied.[223] Instead, it stated that such evidence can be brought with respect to a "challenged government action."[224]

After deciding that *Kingsley*'s state-of-mind requirement covers a broad range of claims, the court found that this includes

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a single 'deliberate indifference' standard applicable to all § 1983 claims, whether brought by pretrial detainees or by convicted prisoners.").

217. *See id.* at 1069 ("An excessive force claim, like the one at issue in *Kingsley*, differs in some ways from a failure-to-protect claim, like the one at issue here.").

218. *See id.* at 1069–70 ("On the other hand, there are significant reasons to hold that the objective standard applies to failure-to-protect claims as well.").

219. *See id.* at 1069 ("Section 1983 itself contains no state-of-mind requirement independent of necessary to state a violation of the underlying federal right." (quoting Bd. of Cnty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 405 (1997))).

220. *See id.* (discussing the relationship between different categories of claims that may be brought by pretrial detainees).

221. *See id.* at 1070 ("And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less maliciously and sadistically." (quoting Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015))).

222. *See id.* ("We note, too, the broad wording of *Kingsley*.").

223. *See id.* (noting that *Kingsley v. Hendrickson* rejected the interpretation of precedent on which the Ninth Circuit previously relied).

224. *See id.* ("The Court did not limit its holding to force but spoke to the challenged government action generally.").

failure-to-protect claims.[225] In applying the standard to these claims, the court proposed a concrete set of elements.[226] The first two require that the defendant created a condition that subjected the detainee to a significant risk of harm.[227] Like the decision to use force as described in *Kingsley*, this requires some measure of intent on the part of the defendant, and thus calls for a subjective inquiry.[228] The third element requires that the defendant did not take any reasonably available measures to abate the risk created.[229] Like the defendant's cognizance of whether or not the force used was "excessive" in *Kingsley*, this may be decided from the view of a reasonable person.[230] Therefore, the failure to abate the risk of harm may be demonstrated on the basis that it was objectively unreasonable.[231]

2. Confining Kingsley *to Excessive-Force Claims*

Three federal courts of appeals have decided that *Kingsley*'s application of an objective standard to excessive-force claims should not be expanded to claims requiring deliberate indifference.[232] These courts' actual consideration of *Kingsley*'s

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225. *See id.* ("Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional.").

226. *See id.* at 1071 (reciting the elements required for a pretrial detainee to prove a failure-to-protect claim).

227. *See id.* at 1070–71 (applying the principles of *Kingsley v. Hendrickson* to a failure-to-protect claim).

228. *See id.* ("In the failure-to-protect context, in which the issue is usually inaction rather than action, the equivalent is that the officer's conduct with respect to the plaintiff was intentional.").

229. *See id.* ("Was there a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take, thus causing the injury that the plaintiff suffered?").

230. *See id.* at 1071 ("Thus, the test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard.").

231. *See id.* ("The defendant did not take reasonable measures to abate that risk, even though a reasonable officer in the same circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious . . . .").

232. *See infra* notes 235–257 and accompanying text (discussing judicial

potential ramifications is perhaps best summarized by Judge Van Tatenhove of the Eastern District of Kentucky, who stated that "each of these cases contains a dearth of reasoning."[233] What little reasoning there is can be placed in two different categories, each to be considered in turn.[234]

a. Kingsley *Involved a Different Type of Conduct*

The first is not really a reason for cabining *Kingsley* to excessive-force claims so much as it is a simple assertion that it has been.[235] In 2014, Norman Whitney, Jr., was placed in the medical unit of the St. Louis City Justice Center because he suffered from a number of serious medical conditions.[236] In addition, Whitney, Jr., had pleaded with officers to kill him upon his initial arrest.[237] Shelley Sharp, a corrections officer, was tasked with monitoring him on a closed-circuit television.[238] During a fourteen-minute span where she failed to do so, Whitney, Jr., hanged himself.[239]

Whitney's father filed a § 1983 claim alleging that Sharp failed to adequately monitor his son.[240] The district court dismissed the complaint and the case was appealed to the Eighth Circuit.[241] There, the court found "that the complaint fails to allege facts establishing the subjective prong of the deliberate indifference

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opinions that have rejected the notion that an objective standard should apply to a broader range of pretrial detainees' due-process claims).

233. *See* Love v. Franklin Cnty., 376 F. Supp. 3d 740, 746 (E.D. Ky. 2019) ("Continued use of the subjective test in other circuits is similarly unpersuasive.").

234. *See infra* notes 235–257 and accompanying text (discussing the reasons given for rejecting a broader application of *Kingsley*'s objective standard).

235. *See Love*, 376 F. Supp. 3d at 746 (dismissing the Eight Circuit's opinion on *Kingsley*'s consequence to pretrial detainees deliberate-indifference claims as an "assertion without reason.").

236. Whitney v. City of St. Louis, 887 F.3d 857, 859 (8th Cir. 2018).

237. *See id.* ("He was evaluated and determined to be suicidal.").

238. *See id.* (explaining that his cell was monitored by closed-circuit television).

239. *See id.* (finding that the suicide occurred when Whitney Jr. was not being monitored).

240. *See id.* (bringing the charge in Missouri state court).

241. *See id.* at 859–60 (appealing two separate district court rulings).

claim."[242] In a footnote it acknowledged Whitney, Sr.'s assertion that *Kingsley* called for the application of an objective standard.[243] The full response to this assertion was "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." [244]

b. Circuit Precedent

The second reason offered for rejecting a broader application of *Kingsley* involves two circuits' rules for rejecting their own precedent.[245] The first case involved Nam Dang, a detainee who filed a suit for inadequate medical care after health care providers in the Seminole County, Florida jail failed to diagnose him with meningitis, despite his complaints of a headache and the presence of objectively identifiable symptoms.[246] On appeal, the Eleventh Circuit noted that the application of an objective standard would not make the individual defendants liable because their conduct was merely negligent.[247]

However, the court went even further by rejecting the application of *Kingsley*'s objective standard altogether, finding that this would be barred by its own precedent that adopted deliberate indifference.[248] This was due to the court's standard for disregarding its prior holdings upon an intermediary Supreme Court decision, which requires that the holding be "overruled."[249]

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242. *See id.* at 860 ("Our precedent establishes that whether an official was deliberately indifferent requires both an objective and a subjective analysis.").

243. *See id.* at 860 n.4 (stating the Plaintiff's argument against the use of a subjective standard).

244. *Id.*

245. *See infra* notes 246–257 and accompanying text (discussing the Fifth and Eleventh Circuits' analyses of *Kingsley*'s application to claims beyond the excessive-force context).

246. *See* Nam Dang v. Sherriff, Seminole Cnty., 871 F.3d 1272, 1276–78 (11th Cir. 2017) (establishing the circumstances that led to the appeal).

247. *See id.* at 1279 n.4 ("*Kingsley* itself notes that even when it comes to pretrial detainees, 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." (quoting Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015))).

248. *See id.* at 1279 n.2 (rejecting application of the *Kingsley* doctrine).

249. *See* United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) (discussing the applicable standard where a party argues that a prior holding of

In the Eleventh Circuit, this only occurs where the Supreme Court's decision is "squarely on point" and "actually abrogate[s] or directly conflict[s] with, as opposed to merely weaken[s]," the applicable standard.[250] Here, the court found that its precedent was not overruled because *Kingsley* was an excessive-force claim, as opposed to the claim of inadequate medical treatment before it.[251]

The Fifth Circuit applied somewhat similar reasoning in a case where Larry Alderson was placed with Louisiana Department of Corrections (DOC) inmates due to a misclassification by corrections staff, severely beaten and stabbed by some of them, and then left in the cell with other DOC inmates for an hour after a corrections officer came to document the incident with his camera phone.[252] Despite agreeing with the court's finding that Alderson had failed to properly state his claim, a concurring opinion noted that the Fifth Circuit should revisit its adherence to deliberate indifference as the applicable standard for pretrial detainees.[253]

The majority responded by pointing to the Fifth Circuit's "rule of orderliness."[254] This prevents a panel of the Court from declaring void a prior panel's interpretation of the law, even when it appears to be flawed.[255] The only way to overrule the earlier case is with a statutory amendment or a decision by either the Supreme Court or the Fifth Circuit sitting *en banc*.[256] The majority then cited Fifth

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the Eleventh Circuit is no longer good law).

250. *See id.* ("We would, of course, not only be authorized but also required to depart from our prior decision if an intervening Supreme Court decision actually overruled or conflicted with it." (quoting Chambers v. Thompson, 150 F.3d 1324, 1326 (11th Cir. 1998))).

251. *See Nam Dang,* 871 F.3d at 1279 n.4 (rejecting the Plaintiff's claim that he need not demonstrate deliberate indifference).

252. *See* Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 418–19 (5th Cir. 2017) ("When Alderson asked [corrections officer] Bryant for medications that he had been prescribed [following the incident] to prevent infection and alleviate the pain, Bryant told him '[m]an up & wait til [sic] medical staff returns from the Christmas holiday.").

253. *See id.* at 424–25 (Graves, Jr., J., concurring) ("I write separately because the Supreme Court's decision in *Kingsley v. Hendrickson* appears to call into question this court's holding in *Hare v. City of Corinth*.").

254. *See id.* at 419 n.4 (responding to the concurring opinion).

255. *See* Jacobs v. Nat'l Drug Intel. Ctr., 548 F.3d 375, 378 (5th Cir. 2008) (discussing the Fifth Circuit's rule of orderliness).

256. *See id.* (stating that the rule of orderliness applies absent an *express*

Circuit cases applying deliberate indifference to pretrial detainees' claims subsequent the *Kingsley* decision, making the rule of orderliness applicable.[257]

IV. Detainees' Claims Should Only Require Objective Unreasonableness

"Deliberate indifference" should be removed from the lexicon of terms applying to pretrial detainees' conditions-of-confinement claims. Objective unreasonableness should replace it as the appropriate standard for culpability. Put simply, a pretrial detainee should only have to prove that state actors were being *objectively* unreasonable—as opposed to *subjectively* and deliberately indifferent—when their acts or omissions contributed to her injury.

There are four general justifications for this change. The first is that substantive due process is an expansive concept, the contours of which are not limited in the same way as the provisions enumerated in the Bill of Rights.[258] The second reason follows from the first. *Kingsley*, consistent with an expansive interpretation of due process, recognized a clear difference between the rights afforded under the Cruel and Unusual Punishment Clause and those afforded under the Fourteenth Amendment.[259] This difference applies even where prisoners and pretrial detainees allege identical conduct.[260] Third, the justifications for applying deliberate indifference are unpersuasive in light of *Kingsley* and the expansive interpretation of due process.[261] Finally, the

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overruling of the court's precedent).

257. *See Alderson*, 848 F.3d at 419 n.4 ("Because the Fifth Circuit has continued to rely on *Hare* and to apply subjective standard post-*Kingsley*, this panel is bound by our rule of orderliness.").

258. *See infra* notes 263–286 and accompanying text (defining the scope of substantive due process).

259. *See infra* notes 288–303 and accompanying text (discussing *Kingsley*'s recognition of a dichotomy between the rights afforded to prisoners and those afforded to pretrial detainees).

260. *See infra* notes 305–338 and accompanying text (discussing the different state-of-mind standards applied to excessive-force claims).

261. *See infra* notes 305–338 and accompanying text (comparing the proper interpretation of due process to courts' justifications for applying deliberate indifference).

objective standard is workable and makes a genuine difference in practice.[262]

A. The Contours of Substantive Due Process Are Not Limited by the Bill of Rights

The Fourteenth Amendment forbids States from depriving "any person" of "liberty . . . without due process of law."[263] What is this "liberty" to which our Constitution refers? Justice Cardozo succinctly stated that it is "a concept of the greatest generality . . . . Its limits are not mapped and charted."[264] Nor should they be, as it is not a static concept.[265] Instead, liberty under the Fourteenth Amendment can only be defined with reference to society's attitude toward a particular government action at a given point in time.[266]

Consistent with this dynamic interpretation is the Due Process Clause's relationship with the Bill of Rights.[267] The specific guarantees enumerated in the first eight amendments do not define the scope of due process or the liberty that it protects.[268] Instead, it consists of collective standards that take on their own character, apart from and beyond the particular demands of the

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262. *See infra* notes 339–356 and accompanying text (providing hypothetical situations and applying different legal standards).

263. U.S. CONST. amend. XIV, § 1.

264. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 77 (1921) ("May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes.").

265. *See id.* at 77–78 (discussing the shift in our understanding of due process near the end of the Nineteenth Century).

266. *See* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . .").

267. *Compare supra* notes 264–266 and accompanying text (discussing the flexible interpretation of "liberty" interests contained in the Due Process Clause), *with infra* notes 266, 268, 269 and accompanying text (discussing the absence of Bill of Rights-derived restraints on the Due Process Clause).

268. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) ("The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.").

Bill of Rights provisions.[269] The Due Process Clause is expansive, protecting against "all substantial arbitrary impositions and purposeless restraints,"[270] allowing it to recognize civil liberties that are absent from the face of the Constitution.[271]

Due process rights stand on their own, even where their analysis requires some reference to an enumerated right.[272] Such is the case with a pretrial detainee's right to be free from harmful conditions of confinement.[273] Reference is often made to the Eighth Amendment, even though detainees find relief under the Due Process Clause.[274] The connection between the two constitutional provisions in this context is natural, as both detainees and convicted prisoners are being held by law enforcement in similar facilities.[275]

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269. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–72 (1947) (Frankfurter, J., concurring) ("Not until recently was it suggested that the Due Process Clause . . . was merely a compendious reference to the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the first eight amendments."); *see also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., concurring) ("[T]he fact that an identical provision is found among the first eight amendments . . . suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.").

270. *See Poe,* 367 U.S. at 543 (defining liberty under the Due Process Clause as a "rational continuum").

271. *Cf.* Roe v. Wade, 410 U.S. 113, 154 (1973) (recognizing the right to a lawful abortion as a subcategory within the broader right to privacy); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the right to marriage); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (recognizing various forms of economic freedom).

272. *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring) ("In my view, the proper constitutional inquiry is whether this Connecticut statute offends the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.").

273. *See infra* notes 274–286 and accompanying text (discussing the reference to Eighth-Amendment standards inherent in conditions-of-confinement claims).

274. *See, e.g.* Bell v. Wolfish, 441 U.S. 520, 535 n.4 (1979) ("The State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt . . . without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

275. *Cf.* Hamm v. DeKalb Cnty., 774 F.2d 1567, 1574 (11th Cir. 1985) (applying an Eighth-Amendment standard because prisoners and detainees are often harmed in similar factual contexts).

However, the provisions are not coextensive even when the contextual similarities are considered.[276] The rights afforded to prisoners originate in the Cruel and Unusual Punishment Clause.[277] This subjects them to the particular demands of that provision, as defined by its text and judicial doctrine.[278] For conditions-of-confinement claims, the doctrine imposes deliberate indifference as the appropriate standard of culpability.[279]

Due process has its own character, "apart from and beyond the particular demands" of the Cruel and Unusual Punishment Clause.[280] It is more flexible, general, and inclusive than all provisions of the Eighth Amendment.[281] Under the Due Process Clause, pretrial detainees "retain *at least* those constitutional rights" afforded to convicted prisoners.[282]

These principles demand that pretrial detainees' rights be viewed separately from those of convicted prisoners.[283] Rote application of Eighth-Amendment doctrine to an independent due process right contradicts our understanding of the Fourteenth

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276. *See infra* notes 267–271 (discussing the independent character of the Due Process Clause).

277. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.").

278. *See id.* at 103–04 (describing conduct violative of the Cruel and Unusual Punishment Clause as defined by judicial doctrine).

279. *See* 2 SILVER, *supra* note 3, § 8A.09 (Matthew Bender & Co. rev. ed. 2019) (discussing various types of claims that may be brought under the Eighth Amendment).

280. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–72 (1947) (discussing the proper scope of the due process inquiry).

281. *See* Poe v. Ullman, 367 U.S. 497, 541–42 (1961) (Harlan, J., concurring)

> However, it is not the particular enumeration of the rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights 'which are fundamental; which belong to citizens of all free governments,' for the purposes of securing which men enter into society.

282. *See* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (comparing the relative constitutional liberties retained by convicted prisoners and pretrial detainees).

283. *See supra* notes 240–246 and accompanying text (discussing due process' independent footing with respect to the Eight Amendment).

Amendment.[284] Due process is not limited in such a way.[285] The liberties afforded to detainees may be explored by reference to the Cruel and Unusual Punishment Clause, but they stand on their own, not to be defined by the text, scope, or particularities of that provision,[286] culpability requirements included.[287]

B. Kingsley *Recognized A Different Culpability Standard for Detainees' Due Process Liberty*

When the Supreme Court decided *Kingsley v. Hendrickson* in 2015, precedent required a subjective culpability standard for excessive-force claims under the Eighth Amendment.[288] The defendants argued that the same standard should apply to detainees' Fourteenth-Amendment claims.[289] The Court responded by drawing a distinction between detainees and convicted prisoners on one basis: That the two categories of plaintiffs are protected by two different constitutional interests.[290] Justice Breyer stated:

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

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284. *See supra* notes 231–235 and accompanying text (discussing the broad and flexible interpretation of the Due Process Clause).

285. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–72 (1947) (stating that due process standards as "take on their own character, apart from and beyond the particular demands of the Bill of Rights provisions").

286. *See supra* notes 278–282 and accompanying text (comparing the particularities of rights afforded under the Eighth and Fourteenth Amendments).

287. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400–02 (2015) (stating that cases discussing the Cruel and Unusual Punishment Clause do not apply to state-of-mind issue before the Court).

288. *Compare id.* at 393–97 ("Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard."), *with* Hudson v. McMillan, 503 U.S. 1, 8 (1992) ("[W]e suggested that the subjective aspect of an Eighth Amendment claim (with which the Court was concerned) can be distinguished from the objective facet of the same claim.").

289. *See Kingsley,* 576 U.S. at 400–02 (identifying cases brought by the Defendants).

290. *Id.*

> when punishment is unconstitutional. [The Eighth Amendment cases] 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.[291]

This language is consistent with the broad and independent interpretation of the Due Process Clause.[292] The particular demands of the Cruel and Unusual Punishment Clause include an awareness that harm sufficient to constitute punishment will result.[293] The Due Process Clause, on the other hand, is not beholden to the same demands.[294] Because of this, there is "no need" for a court "to determine when punishment is unconstitutional" for a pretrial detainee to succeed on her due-process claim.[295] The rights afforded to detainees under the Due Process Clause are not coextensive with the rights afforded to prisoners under the Eighth Amendment.[296]

Because due process is a discrete concept,[297] any decisions interpreting it should be either bound or persuaded by prior authority doing the same.[298] For pretrial detainees, the authority reviewed by lower courts in determining culpability standards has largely consisted of decisions interpreting the Eighth Amendment.[299] Although this practice has been inconsistent with

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291. *Id.*

292. *See infra* notes 293–295 and accompanying text (comparing *Kingsley*'s reasoning with the dynamic interpretation of the Due Process Clause).

293. *See, e.g.*, U.S. CONST. amend. VIII, cl. 3 ("[N]or cruel and unusual punishments inflicted."); Farmer v. Brennan, 511 U.S. 825, 836–37 (1994) (discussing the divergent standards of "recklessness" for civil law and criminal law before holding that the latter standard applies to Eighth-Amendment claims).

294. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–72 (1947) (discussing the independent character of the Due Process Clause).

295. *Compare id.* (stating that due process "consists of collective standards which take on their own character . . . ."), *with* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015) (rejecting the requirement of "punishment" for a pretrial detainee's due-process claim).

296. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400–02 (2015) (differentiating the rights afforded to pretrial detainees and convicted prisoners).

297. *See* JOHN M. WALKER, JR., THE ROLE OF PRECEDENT IN THE UNITED STATES: HOW DO PRECEDENTS LOSE THEIR BINDING EFFECT? 2 (Jordan Corrente Beck ed., 2016) (discussing the doctrine of *stare decisis*).

298. *See Louisiana ex rel. Francis*, 329 U.S. at 466–72 (stating that due process is an "independent guaranty of liberty and procedural fairness").

299. *See* 2 SILVER, *supra* note 3, § 8A.09 ("Although pre-trial detainees are not encompassed by the Eighth Amendment, 14th Amendment claims are generally

the concept that due process is free of the Bill of Rights' particularities,[300] it has primarily occurred in the absence of any clear doctrine by the Supreme Court.[301] Now, however, the particularities of the Due Process Clause's protection of pretrial detainees have been clarified.[302] In opposition of the subjective standards that generally apply under the Eight Amendment,[303] the *Kingsley* Court stated that "a pretrial detainee can prevail by providing only objective evidence that the challenged government action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[304]

C. Courts' Justifications for Applying Deliberate Indifference Are Unpersuasive in Light of Kingsley *and The Broad Interpretation of Due Process*

Two general arguments have been used in reasoning that deliberate indifference is the appropriate culpability standard for pretrial detainees' due-process claims.[305] The first essentially draws on interpretive comparisons between the Eighth and Fourteenth Amendments,[306] while the second considers the operational realities of managing correctional facilities.[307] For the

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analyzed by the "deliberate indifference" standard.").

300. *See supra* notes 272–287 and accompanying text (stating that due process rights "stand on their own, not determined by the text, scope, or particularities" of the Cruel and Unusual Punishment Clause).

301. *See* 2 SILVER, *supra* note 3, § 8A.09(4)(a) ("Although its logical soundness is questionable, in the absence of Supreme Court guidance, lower courts have often applied the exacting standards of deliberate indifference (applicable to 'punishments') to jail conditions.").

302. *See infra* note 303 and accompanying text (stating the Supreme Court's requirement for pretrial detainees' due-process claims).

303. *See* 2 SILVER, *supra* note 3, § 8A.09 (enumerating prisoners' claims that require a showing of deliberate indifference).

304. *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–400 (2015) ("*Bell*'s focus on punishment does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated.").

305. *See supra* notes 105–172 and accompanying text (discussing courts' justifications for the application of the deliberate-indifference standard).

306. *See supra* notes 108–187 and accompanying text (discussing considerations that factor into the meanings of both constitutional provisions).

307. *See supra* notes 123–198 and accompanying text (discussing

reasons discussed below, neither of these justifications is persuasive.[308]

1. Interpretive Comparisons

Two interpretive comparisons have been made for justifying the attachment of Eighth-Amendment standards to due-process claims.[309] The first is that both amendments "draw [their] meaning from evolving standards of decency that mark the progress of a maturing society."[310] This fails to account for the differences between the two provisions.[311] Simply because the rights provided under both are dynamic does not mean that they are equivalent.[312]

Under the Eighth Amendment, the phrase means that the State, though having the *power to punish*, is confined to only doing so "within the limits of civilized standards."[313] The meaning of the term under due process states that conduct is violative when it is "repugnant to the conscience of mankind."[314] Though both definitions are somewhat open-ended, one discernible difference between the two is clear: The state has no power to punish under the Due Process Clause.[315] Punishment requires a state actor to

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considerations for corrections staff in facilities that house both convicted prisoners and pretrial detainees).

308. *See infra* notes 309–322 and accompanying text (comparing courts' reasoning for applying deliberate indifference to due-process claims in light of judicial precedent).

309. *See supra* notes 108–122 and accompanying text (stating the positions of the Ninth and Seventh Circuit Courts of Appeals when they initially applied deliberate indifference to pretrial detainees' claims).

310. *See* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991) (comparing the Due Process and Cruel and Unusual Punishment Clauses).

311. *See supra* notes 272–282 and accompanying text (delineating the rights afforded under the two constitutional provisions).

312. *See supra* notes 276–286 and accompanying text (discussing the unique character of the Due Process Clause).

313. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("Fines, imprisonment and even execution may be imposed depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.").

314. *See* Estelle v. Gamble, 429 U.S. 97, 105–06 (1976) (discussing precedent that touches on the respective meanings of the two constitutional provisions).

315. *See Kingsley*, 576 U.S. at 400–02 (distinguishing the rights afforded under the Due Process Clause and those derived from the Cruel and Unusual

appreciate her conduct,[316] but *Kingsley* tells us that there is no such requirement when the plaintiff's rights are derived from due process.[317]

The second comparison states that pretrial detainees' due-process rights are "at least as great as" those afforded under the Cruel and Unusual Punishment Clause."[318] This at least recognizes that they are not coextensive.[319] However, the statement itself fails to explain why detainees should be subject to a requirement that is peculiar to Eighth-Amendment analysis.[320] If anything, it tends to support the independent interpretation of the Due Process Clause,[321] which rejects the idea that it is beholden to the "particular demands" of any specific Bill of Rights provision, including the Cruel and Unusual Punishment Clause.[322]

2. Operational Realities

Many correctional facilities hold both convicted prisoners and pretrial detainees.[323] Because of this reality, the deliberate indifference standard has been applied to detainees' claims as "distinguishing" due process and Eighth-Amendment standards and "would require courts to evaluate the details of slight

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Punishment Clause).

316. *See supra* note 293 and accompanying text (discussing the threshold for state-of-mind issues involving unconstitutional punishment).

317. *See Kingsley*, 576 U.S. at 400–02 ("[P]retrial detainees cannot be punished at all, much less maliciously and sadistically.").

318. *See* Hall v. Ryan, 957 F.2d 402, 405 (7th Cir. 1992) (justifying the application of deliberate indifference to due-process claims).

319. *See supra* notes 276–287 and accompanying text (contrasting the contours of the two constitutional provisions).

320. *See infra* note 324 and accompanying text (discussing application of the deliberate indifference standard to detainees' claims).

321. *Compare* Hall v. Ryan, 957 F.2d 402, 405 (7th Cir. 1992) ("[P]retrial detainees' due process rights are 'at least as great as' those afforded under the Cruel and Unusual Punishment Clause."), *with* Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("Under the Due Process Clause, pretrial detainees retain 'at least those constitutional rights' afforded to convicted prisoners.").

322. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–72 (1947) (discussing the independent character of the Due Process Clause).

323. *See* Hamm v. DeKalb Cnty., 774 F.2d 1567, 1574 (11th Cir. 1985) (justifying the application of deliberate indifference to pretrial detainees' claims).

differences in conditions."[324] This argument is premised on language by the Supreme Court that cautioned lower courts from becoming "enmeshed in the minutiae of prison operations."[325] There are two issues with this use of authority.[326]

The first starts with the Supreme Court's warning itself.[327] In context, the Court was cautioning against judicial solutions for operational issues in place of those devised by corrections officials.[328] It explicitly drew a line, however, at the point where the officials' solutions would violate "*any prohibition* of the Constitution."[329] The Due Process Clause and Eighth Amendment each contain unique constitutional prohibitions.[330] In accordance with the dynamic interpretation of the Due Process Clause, the analyses of these separate prohibitions are not parallel.[331] Therefore, a court may be required "to evaluate the details of slight differences in conditions" when faced with two plaintiffs, one

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324. *See id.* ("This court holds that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons.").

325. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("There was a time not too long ago when the federal judiciary took a completely 'hands-off' approach to the problem of prison administration. In recent years, however, these courts have largely disregarded this 'hands-off' attitude and waded into this complex arena.").

326. *See infra* notes 327–337 and accompanying text (discussing issues with courts' practical justification for applying deliberate indifference to pretrial detainees' claims).

327. *See infra* notes 328–332 and accompanying text (providing context to judicial precedent).

328. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and federal courts rightly have condemned these sordid aspects of our prison systems.").

329. *See id.* ("This does not mean that constitutional rights are not to be scrupulously observed.").

330. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., concurring) ("[D]ue process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.").

331. *See supra* notes 266–282 (discussing the individual character and scope of the Due Process Clause); *see also* Kingsley v. Hendrickson, 576 U.S. 389, 400–02 (2015) (stating that Eighth Amendment cases "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").

pointing at the Due Process Clause and the other claiming protection under the Eighth Amendment.[332]

The second issue with the justification comes from *Kingsley*.[333] There, the Court noted that its objective unreasonableness analysis must be done with "deference to the policies and practices needed to maintain order and institutional security."[334] Essentially, the objective analysis is not blind to "the legitimate interests in managing a jail."[335] This is consistent with the requirement that courts refrain from becoming "enmeshed in the minutiae of prison operations."[336] However, the Supreme Court did not see deference to corrections officials as an impediment preventing the formulation of different culpability standards for prisoners and pretrial detainees.[337] While institutional concerns must be considered in litigation arising out of correctional facilities, they are not sufficient to justify the transplantation of an Eighth-Amendment culpability standard to due-process claims.[338]

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332. *Compare* Hamm v. DeKalb Cnty., 774 F.2d 1567, 1574 (11th Cir. 1985) (justifying the parallel application of deliberate indifference on the basis that applying separate analyses to the two constitutional provisions would require it to become "enmeshed in the minutiae of prison operations"), *with supra* notes 323–331 (discussing the requirement that courts treat due process as independent of the demands of the Eighth Amendment, even where doing so would require it to become "enmeshed in the minutiae of prison operations").

333. *See infra* notes 334–336 and accompanying text (discussing the requirement that courts be deferential to the decisions of corrections officials).

334. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398–401 (2015) (discussing the workability of an objective standard in excessive-force claims).

335. *See id.* (noting that courts must take into account the State's legitimate interests in operating correctional facilities).

336. *Compare id.* (requiring "deference to the policies and practices needed to maintain order and institutional security"), *with* Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of the Government.").

337. *See id.* at 396–401 (finding that an objective standard should apply to pretrial detainees while noting that courts must be deferential to corrections officials and conceding that a subjective standard applies to convicted prisoners in a similar context).

338. *Cf. id.* (applying different standards and considering the concerns of corrections officials).

D. The Objective Standard Makes a Big Difference While Requiring a Small Change

The distinction in the tests that courts will apply under either deliberate indifference or objective unreasonableness is minute.[339] Only one element for any given conditions-of-confinement claim will require a change.[340] However, the success of a pretrial detainee's claim may hinge on the distinction.[341]

In practice, the only difference between an objective standard and deliberate indifference is how a defendant's "reckless" state of mind is defined.[342] Deliberate indifference entails two prongs.[343] The first asks whether the deprivation alleged objectively results "in the denial of the minimal civilized measure of life's necessities."[344] There have been a number of decisions defining conduct sufficient to meet this requirement in different contexts.[345] The second prong requires that the defendant is aware of a substantial risk of harm to the plaintiff, but disregards that risk in her intentional acts or omissions.[346] This second requirement essentially asks whether the defendant was *criminally* reckless with respect to her conduct.[347]

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339. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (defining the difference between objective unreasonableness and deliberate indifference).

340. *See infra* notes 348–352 (describing the different definitions of "recklessness" as applied to conditions-of-confinement claims).

341. *See infra* notes 353–356 and accompanying text (providing a hypothetical situation and applying both state-of-mind standards).

342. *See infra* notes 343–351 and accompanying text (explaining the difference between deliberate indifference and objective unreasonableness).

343. *See Farmer*, 511 U.S. at 834 (defining the requirements for a violation of the Cruel and Unusual Punishment Clause).

344. *See id.* ("[T]he deprivation alleged must be, objectively, sufficiently serious . . .").

345. *See* 2 SILVER, *supra* note 3, § 8A.09(4)(e)(iii)(A) (providing examples of deprivations that have been held to violate the Eighth Amendment).

346. *See Farmer*, 511 U.S. at 837 ("[T]he 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 that inference.").

347. *See id.* at 836–37 ("The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

The test for objective unreasonableness retains the first prong of the deliberate indifference analysis.[348] The second prong, however, would drop the requirement that the defendant was *aware* of a substantial risk of harm to the plaintiff.[349] Instead, the substantial risk of harm would have to be "so obvious that it should be known" by the defendant.[350] The conduct must be intentional, but the defendant need not be aware of the risk of harm created by that conduct.[351] Unlike deliberate indifference, this standard only requires recklessness akin to that found in tort law.[352]

Although there is only one difference between the two tests, the success of a pretrial detainee's claim may hinge on which is applied.[353] Suppose that Corey, an African-American man, is arrested on a Friday evening in Dallas for driving under the influence. Dennis and Mac, two members of the white-nationalist organization Vanguard America, were arrested the night before when police officers raided their apartment and discovered a closet packed with C-4, a plastic explosive. All three of the arrestees were transported to the Dallas County Detention Center.

Charlie, a corrections officer at the Detention Center, arrived at work on Friday morning to find fervent discussion about Dennis and Mac. He was informed that both detainees had previously been incarcerated for various violent crimes and that Dennis is wanted for questioning out of state in connection with the disappearance of a local American Civil Liberties Union officer. Charlie is even directed to the detainees' social media profiles, which primarily consist of violent threats directed at minority groups and demands for an insurrection against the Federal Government.

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348. *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1070–71 (9th Cir. 2016) (stating that "the deprivation alleged must objectively be sufficiently serious") (emphasis omitted).

349. *See id.* at 1071 ("[A] pretrial detainee need not prove those subjective elements about the officer's actual awareness of the level of risk.").

350. *See* Farmer v. Brennan, 511 U.S. 825, 836 (1994) (comparing different standards of recklessness).

351. *See Castro*, 833 F.3d at 1070–71 (explaining the different state-of-mind standards for a defendant's awareness of a risk and her physical acts or omissions).

352. *See Farmer*, 511 U.S. at 836 (stating that "the term recklessness is not self-defining").

353. *See supra* subsection IV.D (discussing the different standards applied between "deliberate indifference" and "objective unreasonableness").

After Corey is processed at the Detention Center, Charlie must assign and escort him to a holding cell. Corey is so inebriated that he can hardly stand, so Charlie has to support him during their walk. The cell Corey is assigned to contains both Dennis and Mac. Without so much of a thought, Charlie drags him into the cell and hastily walks away to go on break. After he returns to the Detention Center, Charlie learns that Corey sustained serious injuries in an attack by his cellmates.

Corey files a § 1983 claim against Charlie on the basis that he failed to protect him from the assault, in violation of the Due Process Clause. Because he filed the claim in Texas, the court will require Corey to demonstrate that Charlie was deliberately indifferent.[354] If the litigation reaches a jury, Corey must convince them that Charlie was aware of the risk that other detainees would assault him, but disregarded that risk and left him in the cell anyway.[355] If the jury finds that Charlie was not thinking about the potential risk because he was in a hurry to get to lunch, Corey's claim fails.

Suppose instead that all of this occurred in Las Vegas. A court there would apply objective unreasonableness instead of deliberate indifference.[356] Corey is not required to prove that Charlie was actually aware of the risk, but only that he *should have* been aware of it.[357] Charlie knew that Dennis and Mac were violent and racist. He also knew that they had stockpiled weapons of mass destruction. Finally, Charlie knew that Corey was a member of a group that his cellmates had violently threatened and that he was in a vulnerable state. On the basis of these facts, Corey can prevail by demonstrating that Charlie should have been aware of the risk that he would be assaulted in the cell. Unlike the proceedings in Texas, a court in Nevada will not deny him relief simply because the defendant was in a hurry.

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354. *See* Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (applying deliberate indifference to a failure-to-protect claim).

355. *See supra* notes 344–346 and accompanying text (describing the subjective component of the deliberate-indifference analysis).

356. *See* Castro v. Cnty. of L.A., 833 F.3d 1060, 1071 (9th Cir. 2016) (applying an objective unreasonableness standard for conditions-of-confinement claims brought by pretrial detainees).

357. *See supra* notes 348–351 and accompanying text (describing the state-of-mind requirement of the objective unreasonableness analysis).

V. Conclusion

The application of deliberate indifference to pretrial detainees' conditions-of-confinement claims has always been in error. The Fourteenth Amendment demanded something different from the start. Admittedly, courts were somewhat in the dark with respect to what that should be. Now, however, *Kingsley* has provided much-needed visibility. It is time for courts to abandon the subjective inquiry and instead ask whether those acting under color of state law were objectively unreasonable when they deprived detainees of their constitutional liberties afforded by the Due Process Clause.